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Article

RELATED ACTS PROVISIONS: PATTERNS AMIDST THE CHAOS

John Zulkey*

“Relatedness” is not self-defining. It is, in fact, a concept that recedes away from you the harder you try to think about it. At a certain level of generalization, everything in the universe is related, all joined together in the all-powerful and all-knowing mind of almighty God. Yet from another perspective, nothing is related, as all of creation consists of nothing more than chaotic, swirling bits of matter randomly spinning away within the cosmic void.

—Kevin LaCroix, THE D&O DIARY¹

I. INTRODUCTION

A “Related Acts Provision” refers to any provision in an insurance policy which groups together otherwise distinct claims which have been deemed to be “related” or “interrelated.” These provisions often can be crucially important because they may alter the number of claims deemed made (thereby changing the number of per-claim limits or deductibles/SIRs triggered), the date on which the claim is deemed first made (thereby moving the claim outside of or within the policy period), or lead to other, unexpected results. Courts and commenters both have remarked on the perceived lack of consistency between decisions on Related Acts Provisions.² This Article’s purpose is to apprise the reader

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¹ Kevin LaCroix, *D&O Insurance: Mediations on the Meaning of “Relatedness”*, THE D&O DIARY (Feb. 20, 2012), <http://www.dandodiary.com/2012/02/articles/d-o-insurance/do-insurance-meditations-on-the-meaning-of-relatedness/> [perma.cc/K4P5-8HZZ].

² See, e.g., Robert D. Chesler & Syriion Anthony Jack, *Interrelated Acts, Unrelated Case Law*, 19 COVERAGE 1, 3–4 (Mar./Apr. 2009), <https://www.lowenstein.com/files/Publication/52cdc96f-f125-45a6-ac30-7ebbb088d075/Presentation/PublicationAttachment/92bd8746-897a-400a-bf36-8f442eced623/Interrelated%20Acts%20Unrelated%20Case%20Law%20Chesler%20and%20Jack%20Coverage%2003.09.pdf> [https://perma.cc/A6WM-PEH8] (“[I]t is likely impossible to reconcile all of the results . . . in the . . . cases [dealing with related acts provisions] . . . such that each is consistent with a single set of principles.”) (quoting

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of trends that exist amongst similar fact patterns and to guide the reader to relevant case law that will aid in making the argument for or against relatedness.

Related Acts Provisions can contain markedly different language and are not restricted to any one section of a policy. For example, a Related Acts Provision may appear in a definition:

“Occurrence” means an act or threatened act of abuse or molestation A series of related acts of abuse or molestation will be treated as a single “occurrence” [;]³

in an exclusion:

This Policy shall not apply to and the Insurer shall pay neither Damages nor Defense Expenses for any Claim . . . arising out of, based upon or in consequence of, directly or indirectly resulting from or in any way involving . . . any Wrongful Act occurring on or after the Retroactive Date, which, together with a Wrongful Act occurring on or prior to such Retroactive Date, would constitute Interrelated Wrongful Acts[;]⁴

as a condition:

A CLAIM or CLAIMS by one or more claimants made against one or more INSUREDS which arise out of the same WRONGFUL ACT or interrelated WRONGFUL ACTS shall be deemed to be a single CLAIM and shall be deemed to have been made when the first of such CLAIMS is made. Any interrelated WRONGFUL ACTS shall be deemed to have been committed when the first of any such WRONGFUL ACTS was committed[;]⁵

or in the Limits of Liability section:

The limits of liability shown in the Declarations and subject to the provisions of this Policy is the amount the

Southridge Capital Mgmt., LLC v. Twin City Fire Ins. Co., No. X04CV20103527S, 2006 WL 2730312 (Conn. Super. Ct. Sept. 8, 2006)).

³ Knowledge Learning Corp. v. Nat’l Union Fire Ins. Co. of Pittsburgh, 475 F. App’x 137, 138 (9th Cir. 2012).

⁴ Templeton v. Fehn, No. 12-CV-00859-RPM, 2014 WL 2861832, at *7 (D. Colo. June 24, 2014).

⁵ Reeves Cty. v. Houston Cas. Co., 356 S.W.3d 664, 672 (Tex. App. 2011).

Company will pay as damages and claim expenses regardless of the number of Insureds, claims made or persons or entities making claims. If related claims are subsequently made against the Insured and reported to the Company, all such related claims, whenever made, shall be considered a single claim first made and reported to the Company within the policy period in which the earliest of the related claims was first made and reported to the Company[;]⁶

Although a minority of courts have deemed “interrelated” to be distinct from “related,”⁷ most treat the terms as interchangeable, and this Article will use only the terms “related” or “relatedness” for ease of reading. Similarly, “occurrences” and “claims” both can be related, but because Related Acts Provisions occur most frequently in claims-made policies, this Article will refer only to related “claims.” While the difference between a “claim” and an “occurrence” can be crucial in other contexts, courts typically employ the same analysis regardless whether examining the relatedness between claims or between occurrences.⁸

Relatedness is an easy concept to argue but a difficult one to prove. Any attorney with even a modicum of creativity can look at multiple claims and point to any number of factors that they have in common. Perhaps certain parties are involved in both, perhaps the claims allege common actions by the insured or similar damages to the claimants, perhaps they occurred within the same timeframe—driven to absurd extremes, an attorney could point to the fact that each claim arose from actions that occurred on the planet Earth between human beings. Conversely, an attorney arguing against relatedness should almost always be able to find some points of distinction. Perhaps certain parties or allegations were unique to one claim or another, perhaps the underlying

⁶ Cont’l Cas. Co. v. Howard Hoffman & Assoc., 955 N.E.2d 151, 156 (Ill. App. Ct. 2011) (emphasis in original).

⁷ See, e.g., Sigma Fin. v. Am. Int’l Specialty Lines Ins. Co., 200 F. Supp. 2d 697, 704–05 (E.D. Mich. 2001) (concluding “related” matters are plentiful, but that “interrelated” involves a mutual relationship); Am. Home Assurance Co. v. Allen, 814 N.E.2d 662, 669 (Ind. Ct. App. 2004) (construing “interrelated” as requiring a mutual connection or relationship); Home Ins. Co. of Ill. v. Spectrum Info. Tech., Inc., 930 F. Supp. 825, 848 (E.D.N.Y. 1996) (finding “interrelated” ambiguous).

⁸ Worthington Fed. Bank v. Everest Nat’l Ins. Co., 110 F. Supp. 3d 1211, 1230 n.6 (N.D. Ala. 2015) (citing to John E. Zulkey, *Related and Interrelated Acts Provisions: Determining Whether Your Claims Are Apples and Oranges, or Pears in a Pod*, 50 TORT TRIAL & INS. PRAC. L.J. 83, 87 (2014), <http://www.americanbar.org/content/dam/aba/administrative/tips/webinars/RelatedandInterrelatedClaims/Zulkey.authcheckdam.pdf> [<http://perma.cc/B7U6-MXLN>]).

actions took place at different times – driven to the opposite extreme, an attorney could point to the fact that one claimant was a Gemini whereas another was a Taurus. The point is that an imaginative attorney can scour up any number of factors that unite or divide the claims at issue, but the challenge is finding binding or persuasive decisions stating that those factors are decisive.

Previous articles on this subject outline several general principles that courts have applied to determine whether claims are related.⁹ While it is hoped that these general principles prove useful, any litigator worth his or her salt knows that there is no substitute for finding a factually analogous decision on all-fours. In that spirit, the primary purpose of this Article is to assist the reader in finding decisions dealing with scenarios that are factually similar to what the reader may be grappling with. This goal will be accomplished by subdividing decisions on relatedness according to types of claims at issue, which should help the reader narrow the search to cases factually similar to the one at issue.

II. GENERAL PRINCIPLES

Before breaking the case law on relatedness into categories, it may be helpful to address general principles common to all categories. First, it is essential to understand that any analysis of relatedness is of limited value unless the policy at issue actually contains a Related Acts Provision. Next, an attorney must grasp the effects of Related Acts Provisions and the general factors courts rely upon across all types of claims in determining relatedness. Following an explanation of those issues, this Article will address unsettled issues regarding the burden of proving relatedness and whether the issue is a question of law or fact. Finally, this section will address nuances in the well-recognized doctrine that relatedness is based on a relationship between underlying facts, rather than upon a procedural grouping.

A. Necessity of Terms “Related” or “Interrelated”

As stated above, attorneys researching relatedness must understand that the defining feature of Related Acts Provisions is that they always will contain either the word “related” or “interrelated,” and that where the

⁹ See John Zulkey, *Related Acts Provisions: Complicated by Inconsistency and Subjectivity*, FOR THE DEFENSE 64, 65 (May 2015), <http://www.hww-law.com/161E02/assets/files/Documents/FTD-1505-Zulkey.pdf> [<http://perma.cc/GT85-HZ37>]; John E. Zulkey, *Related and Interrelated Acts Provisions: Determining Whether Your Claims Are Apples and Oranges, or Peas in a Pod*, 50 TORT TRIAL & INS. PRAC. L.J. 83, 87 (2014), [http://www.americanbar.org/content/dam/aba/administrative/tips/webinars/RelatedandInterrelatedClaims\[Zulkey.athcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/tips/webinars/RelatedandInterrelatedClaims[Zulkey.athcheckdam.pdf) [<http://perma.cc/B7U6-MXLN>] [hereinafter Zulkey, *Apples and Oranges*].

policy in dispute does not contain either term, then decisions on relatedness will be distinguishable (at best). This issue arises when a party seeks to combine two or more similar claims as one and cites to decisions on relatedness despite the absence of a Related Acts Provision in the policy.¹⁰ Such practice is akin to citing to decisions which turned on the enforcement of a particular exclusion which is not contained in the policy in dispute, and the Illinois Court of Appeals properly disposed of such an argument in the context of relatedness by stating that the appellant “want[ed] the instant policies to say that related wrongful acts constitute a single claim, but they simply do not.”¹¹ In the absence of a Related Acts Provision, otherwise-separate claims may still be deemed to be the same based on some other type of deemer provision (e.g., a provision stating that all claims arising from the same wrongful act will be deemed to be the same),¹² but decisions on whether claims are “related” or “interrelated” will be of minimal relevance where neither term is given any effect by the policy at issue. In sum, if the policy does not contain either the word “related” or “interrelated,” analysis as to whether the subject claims are related is likely to be irrelevant.

B. Effects of Related Acts Provisions

The purpose of Related Acts Provisions is to require that otherwise-distinct claims be treated as a single claim where they are related. As more thoroughly discussed in previous articles, the two most common effects of a Related Acts Provision are to alter the number of claims and/or the timing of claims. With regard to the number of claims, this can mean that multiple claims trigger only a single per-claim limit or per-claim deductible/SIR if they are deemed related.¹³ With regard to the timing, a claim first made during the policy period of a claims-made (or claims-made-and-reported) policy may be deemed to have been made beforehand (and therefore outside of the policy period) if related to a claim that was made beforehand.¹⁴ Conversely, a claim made after the

¹⁰ See, e.g., *Viacom Int'l Inc. v. Axis, Ins. Co.*, No. CV 14-5721 PSG, 2014 WL 7404124, at *4 (C.D. Cal. Dec. 19, 2014); *Uhlich Children's Advantage Network v. Nat'l Union Fire Ins. Co. of Pittsburgh*, 929 N.E.2d 531, 538-39 (Ill. App. Ct. 2010) (distinguishing cases on relatedness where the policy at issue did not contain a Related Acts Provision).

¹¹ See *Uhlich*, 929 N.E.2d at 539.

¹² For more on deemer provisions outside of the context of relatedness, see SCOTT C. TURNER, *INSURANCE COVERAGE OF CONSTRUCTION DISPUTES* §§ 6:49-6:51 (2d ed. Nov. 2015).

¹³ See Zulkey, *Apples and Oranges*, *supra* note 9, at 88 n.12 (collecting cases in which the number of claims/occurrences were at issue).

¹⁴ A small handful of cases could be read to suggest that a Related Acts Provision can never affect when a claim was deemed made, but these cases typically involved special circumstances or language, or arguably error by the court. See, e.g., *Homestead Ins. Co. v.*

expiration of such a policy may be deemed made within the policy period if related to a claim that was made within the policy period.¹⁵ As with prior knowledge provisions, insureds sometimes attempt to raise as a defense their belief that previous claim(s) had been settled, but courts have held that such a belief is irrelevant.¹⁶ With respect to the timing-of-claims, parties must be certain to read the language of each implicated policy—including the policy covering the period in which the claim was actually made and the policy covering the period in which it may be deemed made—as complications may arise where a later policy deems claims to be first-made during prior periods, but the prior policy does not contain reciprocal language.

The most commonly seen effects of a Related Acts Provision alter the number-of-claims and/or the timing-of-claims, but those are not the only possible effects. For example, in *MBIA, Inc. v. Certain Underwriters at Lloyd's London*, a district court held that where the insurer had no obligation to reimburse the insured until the claim was fully resolved, the

Am. Empire Surplus Lines Ins. Co., 44 Cal. App. 4th 1297 (Cal. Ct. App. 1996) (holding that a Related Acts Provision would not make it possible for claims submitted during later policy periods to be deemed made in earlier policy periods because the purpose of claims-made coverage is to limit the length of the policy period). *But see* Am. Auto Ins. Co. v. Marlow, 666 F. Supp. 2d 1209 (D. Colo. 2009) (citing *Homestead* for the premise that Related Acts Provisions are not intended to deem claims in different policy periods); James River Ins. Co. v. Rinella & Rinella, Ltd., No. 07 C 4233, 2008 WL 4211150 (N.D. Ill. Sept. 10, 2008), *rev'd on other grounds* 585 F.3d 382 (7th Cir. 2009) (Related Acts Provision appeared in the limits of liability section, so the fact that claims were related to a claim made before the retroactive date did not limit the duty to defend); Lehigh Valley Health Network v. Exec. Risk Indem., Inc., No. CIV. A. 1999-CV-5916, 2001 WL 21505 (E.D. Pa. Jan. 10, 2001); Nat'l Union Fire Ins. Co. of Pittsburgh, Pa. v. Cont'l Ill. Corp., 673 F. Supp. 300 (N.D. Ill. 1987) (Related Acts Provision as worded operated only to effect the number of retentions owed and did not effect when claims would be deemed made); Attorneys Ins. Mut. of Ala., Inc. v. Smith, Blocker & Lowther, P.C., 703 So.2d 866 (Ala. 1996) (declining to apply Related Acts Provisions as deeming when a claim is first made); Friedman Prof'l Mgmt. Co. v. Norcal Mut. Ins. Co., 120 Cal. App. 4th 17, 34 (Cal. Ct. App. 2004). The overwhelming number of decisions have held that a properly-worded Related Acts Provision will deem a claim first-made at the time that the first of any related claims was first made. *See* Zulkey, *supra* note 9, at 91–93 n.20–21 (collecting cases).

¹⁵ *Worthington Fed. Bank v. Everest Nat'l Ins. Co.*, 110 F. Supp. 3d 1211, 1230 n.6 (N.D. Ala. 2015) (citing Zulkey, *supra* note 9, at 87) (Related Acts Provisions can bring a claim within a prior policy period); *Burks v. XL Specialty Ins. Co.*, No. 14-14-740, 2015 WL 6949610 (Tex. App. Nov. 10, 2015) (same).

¹⁶ *See, e.g., Presidio Wealth Mgmt, LLC v. Columbia Cas. Co.*, No. 13-CV-04604-WHO, 2014 WL 1341696, at *9 (N.D. Cal. Apr. 3, 2014) (finding civil action and arbitration related to emails first raising claims despite the fact that attorney believed that claimant had been satisfied in the interim); *United Westlabs, Inc. v. Greenwich Ins. Co.*, No. 09C-12-048-MMJ, 2011 WL 2623932, at *11 (Del. Super. Ct. June 13, 2011) (concluding suit related to earlier arbitration despite addition of new parties to later suits where all arose out of threats to cut off computer service for failure to pay fees; irrelevant whether insured believed prior acts to be settled).

insurer had no duty to reimburse the costs of one resolved claim until a still-pending related claim was settled.¹⁷ Other cases have applied or declined to apply Related Acts Provisions in other uncommon ways.¹⁸

C. Factors That Determine Relatedness

Even where “relatedness” is not defined in the policy, claims typically will be deemed related where they share either a “logical connection” or a “causal connection.”¹⁹ A causal connection has been defined as “where

¹⁷ 33 F. Supp. 3d 344, 355–56 (S.D.N.Y. 2014).

¹⁸ See, e.g., *TIG Specialty Ins. Co. v. PinkMonkey.com Inc.*, 375 F.3d 365, 371–73 (5th Cir. 2004) (finding the personal profit exclusion barred coverage not only for stock fraud claims against CEO, but also for securities fraud claims against the corporation because they were considered the same claim under the Related Acts Provision); *Attorneys Ins. Mut. of Ala., Inc. v. Smith, Blocker & Lowther, P.C.*, 703 So.2d 866, 868–70 (Ala. 1996) (arguing that insured’s failure to notify the insurer of one claim barred coverage for a subsequent related claim); *Am. Auto. Ins. Co. v. Marlow*, 666 F. Supp. 2d 1209, 1215–16 (D. Colo. 2009) (insured unsuccessfully attempted to argue that an untimely later claim was covered because it was related to a timely reported earlier claim); *Nat’l Union Fire Ins. Co. of Pittsburgh v. Holmes & Graven*, 23 F. Supp. 2d 1057, 1069 (D. Minn. 1998) (arguing that the unreported claim was related to the reported claim and thus coverage should be afforded for both); *Sirius XM Radio Inc. v. XL Specialty Ins. Co.*, No. 650831/2013, 2013 WL 5958390, at *2–3 (N.Y. Sup. Ct. Nov. 7, 2013) (arguing on motion to dismiss that a timely tender of related claims excused its late tender of the claims regarding merger); *Cont’l Cas. Co. v. Jones, C/A No. 3:09-CV-1004-JFA*, 2011 WL 3880963, at *5 (D.S.C. Sept. 2, 2011) (holding coverage for one claim against a law firm was barred because an attorney had prior knowledge of it, therefore, coverage for related claims by different claimants was also barred).

¹⁹ E.g., *Gregory v. Home Ins. Co.*, 876 F.2d 602, 605–06 (7th Cir. 1989); *Berry & Murphy, P.C. v. Carolina Cas. Ins. Co.*, 586 F.3d 803, 813 (10th Cir. 2009); *N. Am. Specialty Ins. Co. v. Royal Surplus Lines Ins. Co.*, 541 F.3d 552, 557 (5th Cir. 2008); *Highwoods Props., Inc. v. Exec. Risk Indem., Inc.*, 407 F.3d 917, 923–24 (8th Cir. 2005); *Cont’l Cas. Co. v. Wendt*, 205 F.3d 1258, 1262–63 (11th Cir. 2000); *Fed. Deposit Ins. Corp. v. Mmahat*, 907 F.2d 546, 553 (5th Cir. 1990); **CA**: *Bay Cities Paving & Grading, Inc. v. Lawyers’ Mut. Ins. Co.*, 855 P.2d 1263, 1274 (Cal. 1993); **DE**: *In re DBSI, Inc.*, No. 08-12687 (PJW), 2011 WL 3022177, at *4 (Bankr. D. Del. July 22, 2011); **IL**: *Cont’l Cas. Co. v. Howard Hoffman & Assocs.*, 955 N.E.2d 151, 167–69 (Ill. App. Ct. 2011); **MA**: *Gateway Grp. Advantage, Inc. v. McCarthy*, 300 F. Supp. 2d 236, 244–46 (D. Mass. 2003); **MI**: *URS Corp. v. Travelers Indem. Co.*, 501 F. Supp. 2d 968, 976–77 (E.D. Mich. 2007); **MN**: *Nat’l Union Fire Ins. Co. of Pittsburgh v. Holmes & Graven*, 23 F. Supp. 2d 1057, 1069–71 (D. Minn. 1998); *Am. Commerce Ins. Brokers, Inc. v. Minn. Mut. Fire & Cas. Co.*, 551 N.W.2d 224, 228 (Minn. 1996); **MO**: *Bar Plan Mut. Ins. Co. v. Chesterfield Mgmt. Assocs.*, 407 S.W.3d 621, 629 (Mo. Ct. App. 2013); **NE**: *Cont’l Cas. Co. v. Orr*, No. 8:07-CV-292, 2008 WL 2704236, at *5 (D. Neb. July 3, 2008); **OK**: *Axis Surplus Ins. Co. v. Johnson*, No. 06-CV500-GKF-PJC, 2008 WL 4525409, at *8 (N.D. Okla. Oct. 3, 2008); **PA**: *Aetna, Inc. v. Lexington Ins. Co.*, No. 03076, 2006 WL 1462926, at *3 (Phila. Cty. Ct. Common Pleas May 2, 2006); **TX**: *Columbia Cas. Co. v. CP Nat’l Inc.*, 175 S.W.3d 339, 347–48 (Tex. Ct. App. 2004); *Comm. Underwriters Ins. Co. v. Royal Surplus Lines Ins. Co.*, 345 F. Supp. 2d 652, 666–67 (S.D. Tex. 2004); **WA**: *St. Paul Fire & Marine Ins. Co. v. RWR Mgmt., Inc.*, No. CV-05-0294-EFS, 2006 WL 3289772, at *3–4 (E.D. Wash. Nov. 13, 2006); **WI**: *Am. Med. Sec., Ins. v. Exec. Risk Specialty Ins. Co.*, 393 F. Supp. 2d 693, 706–07 (E.D. Wis. 2005); **WV**: *Liberty Ins. Underwriters, Inc. v. Camden Clark Mem’l Hosp. Corp.*, No. 6:08-CV-01219, 2009 WL

one person or thing brings about the other,” and a logical connection as “connected by an inevitable or predictable interrelation or sequence of events.”²⁰ A small minority of decisions have held that claims can only be related if they share a causal connection, rather than merely a logical one.²¹ Several courts, particularly those applying New York law, have found that relatedness requires the claims to share a “sufficient factual nexus.”²²

While most current policies define the term “related,” those definitions rarely are any less subjective than the above definitions. Moreover, courts very rarely distinguish decisions on relatedness based upon differing definitions of “related.” Instead courts typically have been influenced by the following general factors, none of which are themselves determinative: (1) whether the claims are made by the same or different parties; (2) whether the claims arise from the same or different acts or omissions; (3) whether the acts are part of a pattern of similar activity; (4) whether there is a significant lapse of time between the causes giving rise to the claims; and (5) whether the claims arise from the same or a different injury.²³

4825199, at *4 (S.D. W. Va. Dec. 8, 2009).

²⁰ See *Berry & Murphy, P.C. v. Carolina Cas. Ins. Co.*, 586 F.3d 803, 811–12 (10th Cir. 2009) (quoting *Prof'l Solutions Ins. Co. v. Mohrlang*, No. 07-CV-02481-PAB-KLM, 2009 WL 321706 (D. Colo. Feb. 10, 2009)) (applying Colorado law).

²¹ E.g., *Ariz. Prop. & Cas. Ins. Guar. Fund v. Helme*, 735 P.2d 451 (Ariz. 1987); *Vill. of Camp Point v. Cont'l Co.*, 578 N.E.2d 1363 (Ill. Ct. App. 1991) (adopting *Helme* but called into question by *Continental Casualty Co. v. Howard Hoffman & Associates*, 955 N.E.2d 151 (Ill. App. Ct. 2011)).

²² See, e.g., *Breck & Young Advisors, Inc. v. Lloyds of London Syndicate* 2003, 715 F.3d 1231, 1238–39 (10th Cir. 2013); **FL**: *Capital Growth Fin. LLC v. Quanta Specialty Lines Ins. Co.*, No. 07-80908-CIV, 2008 WL 2949492, at *4 (S.D. Fla. July 30, 2008); **MD**: *Ace Am. Ins. Co. v. Ascend One Corp.*, 570 F. Supp. 2d 789, 798, 800–01 (D. Md. 2008); **NY**: *Glascoff v. OneBeacon Midwest Ins. Co.*, No. 13 Civ. 1013 (DAB), 2014 WL 1876984, at *5–7 (S.D.N.Y. May 8, 2014); *Seneca Ins. Co. v. Kemper Ins. Co.*, No. 02 Civ. 10088 (PKL), 2004 WL 1145830, at *4 (S.D.N.Y. May 21, 2004); *Zahler v. Twin City Fire Ins. Co.*, No. 04 Civ. 10099 (LAP), 2006 WL 846252, at *7 (S.D.N.Y. Mar. 31, 2006); *Zunenshine v. Exec. Risk Indem., Inc.*, No. 97 Civ. 5525 (MBM), 1998 WL 483475, at *4–5 (S.D.N.Y. Aug. 17, 1998). *But see* *Nomura Holding Am., Inc. v. Fed. Ins. Co.*, No. 14-3789, 2015 WL 6161487 (2d Cir. Oct. 21, 2015) (explaining that the court need not employ the “sufficient factual nexus” test where the policy defines “related”).

²³ *Worthington Fed. Bank v. Everest Nat'l Ins. Co.*, 110 F. Supp. 3d 1211, 1230 n.6 (N.D. Ala. 2015) (citing *Zulkey, Apples and Oranges*, *supra* note 9, at 87).

Identity of Claimants: Where the claims are made by the same party(ies), that fact weighs in favor of relatedness,²⁴ whereas if the claims are made by separate claimants, that fact weighs against relatedness.²⁵

²⁴ Bay Cities Paving & Grading, Inc. v. Lawyers' Mut. Ins. Co., 855 P.2d 1263 (Cal. 1993); Eagle Am. Ins. Co. v. Nichols, 814 So.2d 1083 (Fla. Dist. Ct. App. 2002); Estate of Logan v. Ne. Nat'l Cas. Co., 424 N.W.2d 179, 188–89 (Wis. 1988); Conn. Ins. Co. v. Schindler, 35 A.D.3d 784 (N.Y. App. Div. 2006); Columbia Cas. Co. v. CP Nat'l, Inc., 175 S.W.3d 339 (Tex. App. 2004); Reeves Cty. v. Houston Cas. Co., 356 S.W.3d 664 (Tex. App. 2011); Bar Plan Mut. Ins. Co. v. Chesterfield Mgmt. Assocs., 407 S.W.3d 621 (Mo. Ct. App. 2013); Westrec Marina Mgmt., Inc. v. Arrowood Indem. Co., 163 Cal. App. 4th 1387 (Cal. Ct. App. 2008); Regal-Pinnacle Integrations Indus., Inc. v. Philadelphia Indem. Ins. Co., No. A. 12-5465, 2013 WL 1737236 (D.N.J. Apr. 22, 2013); Idaho Trust Bank v. BancInsure, Inc., No. 1:12-cv-00032-REB, 2014 WL 1117027 (D. Idaho Mar. 20, 2014); Gidney v. Axis Surplus Ins. Co., 140 So.3d 609 (Fla. Ct. App. 2014); TIG Ins. Co. v. Smart School, 401 F. Supp. 2d 1334 (S.D. Fla. 2005); Comm. Health Ctr. of Buffalo, Inc. v. RSUI Indem. Co., No. 10-CV-813S, 2012 WL 713305 (W.D.N.Y. Mar. 5, 2012). *But see* GWR Investments, Inc. v. Exec. Risk Specialty Ins. Co., No. 8:04CV441, 2005 WL 3143186 (D. Neb. Nov. 23, 2005) (claims made by the same plaintiff regarding advice on different investments were not related); Med. Malpractice Joint Underwriting Ass'n v. Lyons, No. PC 00-5583, 2004 WL 3190049, at *6 (R.I. Super. Ct. Dec. 17, 2004) (claim against physician for failure to treat one condition was unrelated to a claim by the same patient to treat a separate condition; court found "related" to be ambiguous); Methodist Healthcare v. Am. Int'l Specialty Line Ins. Co., 310 F. Supp. 2d 976 (W.D. Tenn. 2004) (claims against hospital for malpractice were not related to claims by the same plaintiffs for negligence in credentialing the doctor who committed the malpractice); Admiral Ins. Co. v. Marsh, No. 3:12cv601-JAG, 2013 WL 3270555 (E.D. Va. June 26, 2013) (representation of a client in one matter was not related to representation of the same client in prior matters where "no common facts connect[ed]" the prior matters to the one at issue). *Cf.* Flowers v. Camico Mut. Ins. Co., No. A134890, 2013 WL 2571271 (Cal. Ct. App. June 12, 2013) (finding claims related where multiple corporate entity plaintiffs shared a single owner); Novapro Risk Solutions, L.P. v. TIG Ins. Co., No. D059066, 2012 WL 913243 (Cal. Ct. App. Mar. 16, 2012) (policies were not related where common plaintiff was the only factor in favor of relatedness and actionable conduct was "distinct in time, character, and impact").

²⁵ Lexington Ins. Co. v. Lexington Healthcare Grp., Inc., 84 A.3d 1167 (Conn. 2014); Fin. Mgmt. Advisors, LLC v. Am. Int'l Specialty Lines Ins. Co., 506 F.3d 922 (9th Cir. 2007); Sigma Fin. Corp. v. Am. Int'l Specialty Lines Ins. Co., 200 F. Supp. 2d 697, 706–07 (E.D. Mich. 2001); Auto Lenders Acceptance Corp. v. Gentilini Ford, Inc., 854 A.2d 378, 397–98 (N.J. 2004); Beaufort Cty. Sch. Dist. v. United Nat'l Ins. Co., 709 S.E.2d 85, 91 (S.C. Ct. App. 2011); Argent Fin. Grp., Inc. v. Fid. & Dep. Co. of Md., No. Civ.A.04-2323, 2005 WL 2304515, at *9 (W.D. La. Sept. 21, 2005); Am. Guar. & Liab. Ins. Co. v. Chicago Ins. Co., 963 N.Y.S.2d 642 (App. Div. 2013); Lehigh Valley Health Network v. Exec. Risk Indem., Inc., No. CIV.A.1999-CV-5916, 2001 WL 21505 (E.D. Pa. Jan. 10, 2001). *But see* Gateway Group Advantage, Inc. v. McCarthy, 300 F. Supp. 2d 236, 243 (D. Mass. 2003) ("The fact that the same [allegedly wrongful acts] may give rise to claims by different claimants, and may give rise to different causes of action based on the laws of different states does not prevent the claims from being 'related' under the clear terms of the policy."); Am. Med. Sec., Inc. v. Exec. Risk Specialty Ins. Co., 393 F. Supp. 2d 693, 705–07 (E.D. Wis. 2005) (thirty-nine separate lawsuits against insured were related because each alleged the insured was illegally basing premiums for group health insurance on individual group participant's health risks and claims history); Prof'l Consultants Ins. Co. v. Emp'rs Reinsurance Co., No. 1:03-CV-216, 2006 WL 751244, at *8 (D. Vt. Mar. 8, 2006) (claims brought by two different plaintiffs were related where both were tendered at the same time and both were based upon the same failure to properly calculate

Identity of Causes: Where all claims arise from the same act or acts, that fact weighs in favor of relatedness,²⁶ whereas if they arise from separate acts, that fact weighs against relatedness.²⁷ But a minority of decisions have held that a claim for continuation of activity that was the subject of a prior claim does not result in relatedness.²⁸

retirement benefits under the tax code); *Knowledge Learning Corp. v. Nat'l Union Fire Ins. Co.*, 475 F. App'x 137 (9th Cir. 2012) (sexual abuses of different victims were related); *Bryan Bros. Inc. v. Cont'l Cas. Corp.*, 704 F. Supp. 2d 537, 543 (E.D. Va. 2010), *aff'd sub nom.* 419 F. App'x 422 (4th Cir. 2011) and *aff'd sub nom.* 660 F.3d 827 (4th Cir. 2011) (embezzlements by insured employee of accounting firm which occurred before policy inception were related to embezzlements against different clients which occurred after, as they were part of the same scheme to defraud); *ProCentury Ins. Co. v. Ezor*, No. 10-7293 (C.D. Cal., July 25, 2011), *aff'd* 554 F. App'x 576 (9th Cir. Jan. 30, 2014) (rejecting insureds' arguments that claims cannot be related unless made by the same claimant and seeking the same remedy).

²⁶ *Southridge Capital Mgmt., LLC v. TwinCity Fire Ins. Co.*, No. X04CV020103527S, 2006 WL 2730312 (Conn. Super. Ct. Sept. 8, 2006) (unpublished), *dec. clarified by* 2006 WL 3491382 (Conn. Super. Ct. Nov. 13, 2006); *Highwoods Props. v. Exec. Risk Indem. Co.*, 407 F.3d 917, 924 (8th Cir. 2005); *Med. Mut. Liab. Ins. Soc. of Md. v. Goldstein*, 879 A.2d 1025 (Md. Ct. App. 2005); *Maritz Holdings, Inc. v. Fed. Ins. Co.*, 298 S.W.3d 92 (Mo. Ct. App. 2009); *Westrec Marina Mgmt., Inc. v. Arrowood Indem. Co.*, 163 Cal. App. 4th 1387 (Cal. Ct. App. 2008); *Comm. Health Ctr. of Buffalo, Inc. v. RSUI Indem. Co.*, No. 10-CV-8135, 2012 WL 713305 (W.D.N.Y. Mar. 5, 2012); *United States v. A.C. Strip*, 868 F.2d 181 (6th Cir. 1989); *TIG Specialty Ins. Co. v. PinkMonkey.com Inc.*, 375 F.3d 365 (5th Cir. 2004); *Regal-Pinnacle Integrations Indus., Inc. v. Philadelphia Indem. Ins. Co.*, No. A.12-5465, 2013 WL 1737236 (D.N.J. Apr. 22, 2013); *Lexington Ins. Co. v. St. Bernard Parish Gov't*, 548 F. App'x 176 (5th Cir. 2013); *Westport Ins. Corp. v. Coffman*, No. C2-05-1152, 2009 WL 243096 (S.D. Ohio Jan. 29, 2009). *But see* *Beale v. Am. Nat'l Lawyers Ins. Reciprocal*, 843 A.2d 78 (Md. Ct. App. 2004) (claims by five clients for a single mistake made in the same case for the same mistake were not related due to individual duty owed to each); *Am. Cas. Co. of Reading, Pa. v. Gelb*, No. 653280/2011, 2014 WL 2828859 (N.Y. Sup. Ct. June 19, 2014) (two claims which both arose out of the same merger were not interrelated where one was an adversarial claim involving a bankruptcy and another was a claim for breach of duty to get the best available price).

²⁷ *Lexington Ins. Co. v. Lexington Healthcare Grp., Inc.*, 84 A.3d 1167 (Conn. 2014); *Cont'l Cas. Co. v. Grossman*, 648 N.E.2d 175, 177-80 (Ill. App. Ct. 1995); *Lexington Ins. Co. v. Integrity Land Title Co.*, 852 F. Supp. 2d 1119 (E.D. Mo. 2012).

²⁸ *See, e.g., ACE Am. Ins. Co. v. Ascend One Corp.*, 570 F. Supp. 2d 789, 801 (D. Md. 2008) (claim and Senate report regarding insured's violations of various consumer protection statutes were not interrelated to a later multi-state claim that pled the continuation of the same activity that gave rise to the first claim); *Crescent City Baptist Church v. Church Mut. Ins. Co.*, No. Civ.A.05-2200, 2006 WL 508060, at *5-6 (E.D. La. Feb. 22, 2006) (after a church received a demand letter insisting that it rectify corporate misbehavior, failure to rectify those acts and continuation of the same behavior constituted new unrelated wrongful acts). *But see* *Borough of Moosic v. Darwin Prof'l Underwriters, Inc.*, No. 3:11-CV-1689, 2012 WL 2527279, at *6-7 (M.D. Pa. June 29, 2012) (action against public officials was related to prior action where both were rooted in same zoning dispute over same real estate, concerned same principal parties, and alleged failure to address zoning regulations); *Reeves Cty. v. Houston Cas. Co.*, 356 S.W.3d 664, 674-75 (Tex. App. 2011) (claim against county for sheriff's retaliatory interference with claimant's ability to act as a bail bondsman related to later-filed suit by same claimant for sheriff's continued retaliatory interference following settlement of the first claim).

Pattern of Activity: Where claims arise from separate acts, they are more likely to be deemed related if they arose from a pattern of similar activity²⁹ or from a common omission.³⁰

Timing of the Acts: A significant lapse in time between the causes giving rise to claims weighs against them being deemed a pattern of

²⁹ Cont'l Cas. Co. v. Wendt, 205 F.3d 1258, 1264 (11th Cir. 2000) (applying Florida law); Westport Ins. Corp. v. Key West Ins., Inc., 259 F. App'x 298, 299 (11th Cir. 2007); Gateway Grp. Advantage, Inc. v. McCarthy, 300 F. Supp. 2d 236 (D. Mass. 2003); Am. Med. Sec., Inc. v. Exec. Risk Specialty Ins. Co., 393 F. Supp. 2d 693, 705-07 (E.D. Wis. 2005); Capital Growth Fin. LLC v. Quanta Specialty Lines Ins. Co., No. 07-80908, 2008 WL 2949492 (S.D. Fla. July 30, 2008); URS Corp. v. Travelers Indem. Co., 501 F. Supp. 2d 968, 976 (E.D. Mich. 2007); Reeves Cty. v. Houston Cas. Co., 356 S.W.3d 664 (Tex. App. 2011); Prof'l Consultants Ins. Co. v. Emp'rs Reinsurance Co., No. 1:03-CV-216, 2006 WL 751244, at *8 (D. Vt. Mar. 8, 2006); Seneca Ins. Co. v. Kemper Ins. Co., No. 02 Civ. 10088(PKL), 2004 WL 1145830 (S.D.N.Y. May 21, 2004); N. Am. Specialty Ins. Co. v. Royal Surplus Lines Ins. Co., 541 F.3d 552, 554 (5th Cir. 2008) (applying Texas law); Cont'l Cas. Co. v. Orr, No. 8:07CV292, 2008 WL 2704236 (D. Neb. July 3, 2008); Knowledge Learning Corp. v. Nat'l Union Fire Ins. Co., 475 F. App'x 137 (9th Cir. 2012); N. Fullerton Surgery Ctr. v. Franklin Mut. Ins. Co., No. L-45-11, 2013 WL 5762560 (N.J. App. Oct. 25, 2013); Gidney v. Axis Surplus Ins. Co., 140 So.3d 609 (Fla. Dist. Ct. App. 2014); Templeton v. Fehn, No. 12-cv-00859, 2014 WL 2861832 (D. Colo. June 23, 2014), *aff'd* 612 F. App'x 940 (10th Cir. 2015). *But see* Lexington Ins. Co. v. Lexington Healthcare Grp., Inc., 84 A.3d 1167 (Conn. 2014) (where a single fire in a nursing home gave way to multiple claims by different claimants alleging injuries for different acts of negligence related to the same fire, claims were not related); ACE Am. Ins. Co. v. Ascend One Corp., 570 F. Supp. 2d 789 (D. Md. 2008) (claim was not related to a later claim that pled the continuation of the same activity that gave rise to the first claim); City of Idaho Falls v. Home Indem. Co., 888 P.2d 383, 387-88 (Idaho 1985) ("simply because the same types or categories of wrongful acts are alleged over an interval" does not mean that the acts are related); Beaufort Cty. Sch. Dist. v. United Nat'l Ins. Co., 709 S.E.2d 85, 91 (S.C. Ct. App. 2011) (claims for sexual abuses of the same student were all related, but a claim for a series of sexual abuses of one student were unrelated to a series of claims for sexual abuse of a different student).

³⁰ Cont'l Cas. Co. v. Howard Hoffman & Associates, 955 N.E.2d 151, 154 (Ill. App. Ct. 2011); Quanta Lines Ins. Co. v. Investment Capital Corp., No. 06 Civ. 4624, 2009 WL 4884096 (S.D.N.Y. Dec. 17, 2009); Cont'l Cas. Co. v. Law Offices of Melvin James Kaplan, No. 01 CH 4483, 2005 WL 583733 (Cir. Ct. Cook County, Ill. Feb. 3, 2005); Camico Mut. Ins. Co. v. Rooney, Ida, Nolt & Ahern Accountancy Co., No. A109589, 2006 WL 866321 (Cal. Ct. App. Apr. 5, 2006); Bryan Bros. Inc. v. Cont'l Cas. Corp., 704 F. Supp. 2d 537, 543 (E.D. Va. 2010), *aff'd sub nom.* 419 F. App'x 422 (4th Cir. 2011) and *aff'd sub nom.* 660 F.3d 827 (4th Cir. 2011); Conn. Ins. Co. v. Schindler, 828 N.Y.S.2d 146 (N.Y. App. Div. 2006); Flowers v. Camico Mut. Ins. Co., No. A134890, 2013 WL 2571271 (Cal. Ct. App. June 12, 2013); KB Home v. St. Paul Mercury Ins. Co., 621 F. Supp. 2d 1271 (S.D. Fla. 2009); Columbia Cas. Co. v. CP Nat'l, Inc., 175 S.W.3d 339 (Tex. App. 2004). *But see* Med. Malpractice Joint Underwriting Ass'n v. Lyons, No. PC 00-5583, 2004 WL 3190049, at *6 (R.I. Super. Ct. Dec. 17, 2004) (claim against physician for failure to treat one condition was unrelated to a claim by the same patient to treat a separate condition; court found related to be ambiguous); Glascoff v. OneBeacon Midwest Ins. Co., No. 13 Civ. 1013, 2014 WL 1876984 (S.D.N.Y. May 8, 2014) (rejecting contention that two claims were related by insured's failure to oversee agent and prevent his actions).

activity, thereby making it less likely that the resultant claims will be deemed related.³¹

Identity of Underlying Results: Where claims arise from the same result, e.g., separate wrongful acts that each contribute to the same ultimate harm, that fact weighs in favor of relatedness;³² whereas if they lead to different harms, that fact weighs against relatedness.³³

³¹ See *Novapro Risk Sols., L.P. v. TIG Ins. Co.*, D059066, 2012 WL 913243, at *13–14 (Cal. Ct. App. Mar. 16, 2012); *Southridge Capital Mgmt., LLC v. Twin City Fire Ins. Co.*, No. X04CV0201035275, 2006 WL 2730312, at *12–14 (Conn. Super. Ct. Sept. 8, 2006); *Argent Fin. Grp., Inc. v. Fid. & Deposit Co. of Maryland*, No. Civ.A.04-2323, 2005 WL 2304515, at *7–8 (W.D. La. Sept. 21, 2005); *Allmerica Fin. Corp. v. Certain Underwriters at Lloyd’s London*, 871 N.E.2d 418, 429–30 (Mass. 2007); *ACE Am. Ins. Co. v. Ascend One Corp.*, 570 F. Supp. 2d 789, 801 (D. Md. 2008); *Hrobuchak v. Fed. Ins. Co.*, No. 3:10-CV-481, 2010 WL 4237435, at *3–4 (M.D. Pa. Oct. 21, 2010); *Fed. Savings & Loan Ins. Corp. v. Burdette*, 718 F. Supp. 649, 654 (E.D. Tenn. 1989). *But see* *Lexington Ins. Co. v. St. Bernard Parish Gov’t*, 548 F. App’x 176, 179–80 (5th Cir. 2013) (demolitions taking place at different times were related because they occurred as a result of the same ordinance); *Reeves Cty. v. Houston Cas. Co.*, 356 S.W.3d 664, 674–75 (Tex. App. 2011) (2001 claim for discrimination was related to a 2005 claim by the same plaintiff for continuation of the same conduct at a later time); *Bryan Bros. Inc. v. Cont’l Cas. Corp.*, 704 F. Supp. 2d 537, 543 (E.D. Va. 2010) (employee embezzled from various accounts consistently between 2002 and 2009; latest embezzlements were related to earlier embezzlements); *Prof’l Consultants Ins. Co. v. Emp’rs Reinsurance Co.*, No. 1:03-CV-216, 2006 WL 751244, at *19 (D. Vt. Mar. 8, 2006) (court rejected argument that two claims were unrelated because they arose from events “different in time,” where both were tendered at the same time and both were based upon the same failure to properly calculate retirement benefits under the tax code).

³² *Berry & Murphy, P.C. v. Carolina Cas. Ins. Co.*, 586 F.3d 803, 811–12 (10th Cir. 2009); *Bay Cities Paving & Grading, Inc. v. Lawyers’ Mut. Ins. Co.*, 855 P.2d 1263 (Cal. 1993); *Lipton v. Superior Court*, 48 Cal. App. 4th 1599 (Cal. Ct. App. 1996); *Eagle Am. Ins. Co. v. Nichols*, 814 So.2d 1083 (Fla. Dist. Ct. App. 2002); *Columbia Cas. Co. v. CP Nat’l, Inc.*, 175 S.W.3d 339 (Tex. App. 2004); *Cont’l Cas. Co. v. Brooks*, 698 So.2d 763, 764–65 (Ala. 1997); *Paradigm Ins. Co. v. P&C Ins. Sys.*, 747 So.2d 1040, 1042–43 (Fla. Dist. Ct. App. 2000); *Flowers v. Camico Mut. Ins. Co.*, No. A134890, 2013 WL 2571271 (Cal. Ct. App. June 12, 2013); *Oregon State Bar Prof’l Liab. Fund v. Benfit*, 201 P.3d 936 (Or. App. Ct. 2009); *Estate of Logan v. Ne. Nat’l Cas. Co.*, 424 N.W.2d 179, 188–89 (Wis. 1988). *But see* *Methodist Healthcare v. Am. Int’l Specialty Line Ins. Co.*, 310 F. Supp. 2d 976 (W.D. Tenn. 2004) (claims against hospital for malpractice were not related to claims by the same plaintiffs for negligence in credentialing the doctor who committed the malpractice); *Ariz. Prop. & Cas. Ins. Guar. Fund v. Helme*, 735 P.2d 451, 457 (Ariz. 1987) (rejecting logical causation and finding that “the number of causative acts, and not the number of injuries produced, determines the number of ‘occurrences’”).

³³ *Fed. Dep. Ins. Corp. v. Mmahat*, 907 F.2d 546 (5th Cir. 1990); *Novapro Risk Solutions, L.P. v. TIG Ins. Co.*, No. D059066, 2012 WL 913243 (Cal. Ct. App. Mar. 16, 2012). *But see* *Knowledge Learning Corp. v. Nat’l Union Fire Ins. Co.*, 475 F. App’x 137 (9th Cir. 2012) (sexual abuses of different victims were related); *Lexington Ins. Co. v. St. Bernard Parish Gov’t*, 548 F. App’x 176 (5th Cir. 2013) (Louisiana law) (demolition of different properties were related because they occurred as a result of the same ordinance); *Scott v. Am. Nat’l Fire Ins. Co.*, 216 F. Supp. 2d 689 (N.D. Ohio 2002) (malpractice action brought by corporation was not related to the malpractice action brought by investors concerning same actions because insured owed different duties to corporations and to investors, and the breaches of the respective duties resulted in discrete harms).

Similar to the pattern of activity factor, courts have differed regarding the importance of *modus operandi* in proving relatedness. The prototypical example of this would be where an insured is accused of defrauding separate claimants in separate instances using the same basic scheme. Some courts have found that the use of a common *modus operandi* is a strong factor in finding relatedness,³⁴ while others have found that it is insufficient to overcome the differences in claimants and instances of alleged wrongdoing.³⁵ In arguing that claims are related due to a common *modus operandi*, parties should be careful to characterize the *modus operandi* narrowly rather than in a way which is overly-broad. For example, one should avoid alleging that an insured's *modus operandi* was to fail to provide the services that constitute the insured's core

³⁴ Cont'l Cas. Co. v. Howard Hoffman & Assocs., 955 N.E.2d 151, 154 (Ill. App. Ct. 2011) (embezzlement by non-attorney employee of law firm from accounts of different clients all related by common *modus operandi*); Bryan Bros. Inc. v. Cont'l Cas. Corp., 704 F. Supp. 2d 537, 543 (E.D. Va. 2010), *aff'd sub nom.* 419 F. App'x 422 (4th Cir. 2011) and *aff'd sub nom.* 660 F.3d 827 (4th Cir. 2011) (multiple claims for thefts by employee were related because same employee used same scheme and *modus operandi* to conceal thefts by drafting checks on clients' accounts and manipulating the employer's records); Am. Commerce Ins. Brokers, Inc. v. Minn. Mut. Fire & Cas. Co., 551 N.W.2d 224 (Minn. 1996) (each act of employee of issuing checks to herself formed one series of acts related by common *modus operandi*; each act by same employee of taking funds received from customers as insurance premiums formed part of a separate series of acts related by different *modus operandi*); N. Fullerton Surgery Ctr. v. Franklin Mut. Ins. Co., No. L-45-11, 2013 WL 5762560 (N.J. Super. Ct. App. Div. Oct. 25, 2013) (persistent and repetitive thefts by nurse administrator at surgery center all were related); **MI**: Park West Galleries, Inc. v. Ill. Nat'l Ins. Co., No. 11-15047, 2013 WL 6095482 (E.D. Mich. Nov. 20, 2013) (multiple claims and class actions against art gallery connected to the sale and appraisal of artwork were related).

³⁵ See Liberty Ins. Underwriters, Inc. v. Davies Lemmis Raphaely Law Corp., No. CV 15-859, 2016 WL 741847 (C.D. Cal. Feb. 23, 2016) ("In this case, while the Underlying Actions have been brought by different plaintiffs, they all arise from a single course of conduct, a unified policy of making alleged affirmative misrepresentations to investors in order to induce them to invest in commercial real estate acquisitions facilitated by [insured law firms' client]."); Auto Lenders Acceptance Corp. v. Gentilini Ford, Inc., 854 A.2d 378 (N.J. 2004) (where car dealer's finance manager submitted fraudulent applications to lender to induce it to finance car sales to seventeen different high risk customers, the transactions were not a series of related acts but were distinct sales to separate purchasers notwithstanding the common *modus operandi*); see also **LA**: Argent Fin. Grp., Inc. v. Fid. & Dep. Co. of Md., No. Civ.A.04-2323, 2005 WL 2304515, at *9 (W.D. La. Sept. 21, 2005) ("a common scheme to defraud or harm is irrelevant"); **NY**: Am. Guar. & Liab. Ins. Co. v. Chicago Ins. Co., 963 N.Y.S.2d 642 (App. Div. 2013) (claims made by different clients against lawyer for referral to fraudulent financial services representatives are unrelated where the clients claimed different amounts and the financial services professional who committed fraud were not the same); **TX**: Am. Auto. Ins. Co. v. Grimes, No. Civ.A.5:02-CV-066-C, 2004 WL 246989 (N.D. Tex. Feb. 10, 2004) (claims by multiple clients that life and health insurance agent wrongfully convinced them to make early withdrawals to invest in customer-owned, coin-operated telephones not related because agent rendered separate services to each client in distinct meetings, owed each a separate duty, and insured had a duty to consider each claimant's unique circumstances in determining how to advise them regarding their investments).

business model because under such a theory, virtually any suit against the insured would be related, and a court may be unlikely to adopt such an expansive interpretation.³⁶ A helpful discussion of *modus operandi* was contained in *W.C. and A.N. Miller Development Co. v. Continental Casualty Co.*, in which the U.S. District Court for the District of Maryland separated out the applicable decisions on the issue to distinguish between claims that were related due to a “common scheme” versus claims which were unrelated by a mere “common motive.”³⁷

The definitions of relatedness contained in policies are rarely intuitive, and it can be difficult to determine which of the above factors will be deemed to predominate. Accordingly, a rough method employed by the author to gauge relatedness is the “reasonable storyteller test.” This test has not been employed by any court, but is purely an invention of the author. The test takes the form of a hypothetical question: if a completely unbiased party (e.g., a judge’s clerk) were to summarize the facts of one of the claims at issue, is it likely that in telling the facts underlying one claim, that he or she would relay the facts that underlay the other(s)? If so, the claims likely are related.

Two examples may help demonstrate the application of this test. In *Great American Insurance Co. v. Sea Shepherd Conservations Society*, the insured was sued by the Institute of Cetacean Research (“ICR”), which obtained an injunction to keep the insureds away from their vessels.³⁸ After the insured allegedly violated the injunction, the insurer argued that the subsequent contempt proceedings for alleged violation of the injunction were related to the proceedings which originally sought the injunction.³⁹ In this situation, it would be extremely unlikely that any unbiased storyteller would relay the facts of the second claim without also relaying the facts that underlay the first claim, and so it would be

³⁶ See, e.g., *Hrobuchak v. Fed. Ins. Co.*, No. 3:10-CV-481, 2010 WL 4237435, at *3-4 (M.D. Pa. Oct. 21, 2010) (two suits against debt collection agency for unlawful debt collection practices were not related where suits involved different time frames, different states, different state penal laws, different plaintiffs, and different arrangements with district attorneys; the fact that both suits arose out of insured’s core business model was not enough to make them related because nearly all suits against the insured would then be related); see also *Dormitory Auth. of New York v. Cont’l Cas. Co.*, No. 12 Civ. 281(KBF), 2013 WL 840633, at *8-10 (S.D.N.Y. Mar. 5, 2013) (finding “related to” unambiguous).

³⁷ *W.C. and A.N. Miller Dev. Co. v. Cont’l Cas. Co.*, No. GJH-14-00425, 2014 WL 5812316, at *5-7 (D. Md. Nov. 7, 2014), *aff’d* -- F. App’x --, 2015 WL 9487938 (4th Cir. 2015); *Connect Am. Holdings, Inc. v. Arch Ins. Co.*, No. 14-4784, 2016 WL 1254073 (E.D. Pa. Mar. 31, 2016) (claims not related because “[a]lthough the goal was the same, the means used in each scheme were different”).

³⁸ *Great Am. Ins. Co. v. Sea Shepherd Conservation Soc’y*, No. C13-1017, 2014 WL 2170297, at *2 (W.D. Wash. May 23, 2014).

³⁹ See *id.* at *2-3.

reasonable to infer that a court would find the second claim related to the first, which is what happened.

As a counterexample, in *Axis Surplus Insurance Co. v. Johnson*, the insured directors and officers argued that two claims against them by separate claimants were interrelated—one claim alleging that a specific loan approved by the insureds had been improper, and the other alleging that the insureds undercapitalized the company, mishandled efforts to obtain financing, and generally mishandled the company’s eventual bankruptcy.⁴⁰ While a storyteller in this circumstance might choose to include the facts of one claim in the summary of the other, it would not be unreasonable to omit them because the facts of the specific loan were not crucial to the claim regarding general mismanagement, and vice versa. Because a reasonable storyteller could recount the underlying facts of either claim without mentioning the facts of the other, it would be reasonable to predict that a court would find that these claims were not related, and indeed that is what happened.

Once again, it must be stressed that the Reasonable Storyteller Test is an invention of the author that has not been adopted by any court. Certainly, there will be cases in which it will be inapplicable, but it is intended as a rough, more-intuitive guide than the technical definitions in the policy or general factors described above.

D. Burden of Proof

Burden of proof should rarely be a decisive factor, as it most frequently becomes determinative in disputes where there is no evidence. As described in the introduction, a creative attorney should be able to draw from the pleadings ample support for an argument for or against relatedness, and a court should be able to make a determination based upon the evidence found in the underlying claims and/or complaints rather than resorting to who has the burden of proof.⁴¹ But where the burden of proof does become an issue (perhaps to determine which side will proceed first at trial),⁴² the issue properly should depend on the policy

⁴⁰ *Axis Surplus Ins. Co. v. Johnson*, No. 06-CV500-GKF-PJC, 2008 WL 4525409, at *8–10 (N.D. Okla. Oct. 3, 2008).

⁴¹ An unusual exception to this general rule can be found in *Millennium Labs, Inc. v. Allied World Ins. Co.*, No. 12-cv-2280, 2015 WL 5772653 (S.D. Cal. Sept. 30, 2015), in which an insured drug testing lab attempted to argue that an ongoing Department of Justice investigation was related to previous lawsuits. The court found that because the investigation was “shrouded in secrecy” that there was no way to determine whether there existed sufficient overlap between the two to deem them related.

⁴² See, e.g., W.D. WASH. LOCAL R. 43(h) (stating that the first opening statement will be made by the party with the affirmative of the issue, i.e., the burden of proof).

in dispute, as recognized by Chief Justice Chew of the El Paso Texas Court of Appeals:

Houston Casualty argues the “interrelated acts” provision was not an exclusion, but constituted “other conditions and agreements,” and as such, Reeves County and Sheriff Gomez bore the initial burden to establish that a claim was first made during the policy period, and not at an earlier time under the “interrelated acts” provision. We agree with Houston Casualty. This provision was listed apart from the fourteen exclusions as set forth under Section V of the Policy; instead, it was listed under Section VII, entitled “Other Conditions and Agreements.” Therefore, it was not an exclusion, and so Reeves County and Sheriff Gomez bore the initial burden to show their claim falls within the scope of coverage provided by the Policy.⁴³

Justice Chew correctly reasoned that a Related Acts Provision should not be treated as an exclusion where it is not written as one, but rather should be treated as a term or condition.

In contrast to Justice Chew’s analysis, several courts have jumped to the conclusion that Related Acts Provisions are exclusions, particularly where a finding of relatedness would deem a claim to be outside of the policy period. For example, in *Gladstone v. Westport Insurance Corp.*, the court stated that the insurer had the burden of proving that a Related Acts Provision applied because it acted as an exclusion.⁴⁴ The Related Acts Provision at issue stated that all related claims would be deemed a single claim made at the time of the first-made claim, and the court stated that this Related Acts Provision was exclusionary and thus had to be interpreted against the insurer.⁴⁵ Because the court ultimately found in favor of the insurer, this statement was not critical to the holding, but it raises the question as to why the court would assume that the provision was exclusionary. Although a finding of relatedness in *Gladstone* would have resulted in no coverage, that by itself, should not be enough to deem

⁴³ *Reeves Cty. v. Houston Cas. Co.*, 356 S.W.3d 664, 670 (Tex. App. 2011).

⁴⁴ See *Gladstone v. Westport Ins. Corp.*, No. 10-652 (PGS), 2011 WL 5825985, at *6 (D.N.J. Nov. 16, 2011) (“If the insured carries his/her burden then the insurer has the burden of proving that an exclusion applies.”); see also *G-I Holdings v. Hartford Fire Ins. Co.*, Civil Action No. 00-6189 (DMC), 2007 WL 842009, at *8 (D.N.J. Mar. 16, 2007) (interrelated is exclusionary and should be strictly construed against insurer).

⁴⁵ See *Gladstone*, 2011 WL 5825985, at *4, 9 (finding that the “[p]olicy’s interrelated wrongful act provision is clear and should be enforced as written”).

a provision exclusionary. If that were enough, all provisions and definitions in a coverage grant would also have to be interpreted as exclusions where a finding contrary to the insured would result in a finding of no coverage. But that is not the case. Instead, it is universally recognized that the insured bears the burden of proof with regard to the coverage grant.⁴⁶ Moreover, the flaw in treating Related Acts Provisions as inherently exclusionary should be evident from the number of insureds who have relied on similar provisions to *create* coverage where none would otherwise exist.⁴⁷ Accordingly, Chief Justice Chew's analysis would seem the most logical approach because it treats Related Acts Provisions as exclusions only where they are written as such,⁴⁸ and otherwise treats them either as neutral conditions or as terms of the coverage grant.

A similar issue is whether an insurer is obligated to raise relatedness in its initial reservation of rights letter to avoid waiving the issue. The answer may depend on the applicable state law, but at least one decision has held that an insurer did not waive the right to rely on a Related Acts Provision by failing to include it in a reservation of rights letter, even where the Related Acts Provision was unambiguously written as an exclusion.⁴⁹ That being said, raising all potential defenses known to the

⁴⁶ See EDWARD J. ZULKEY, *LITIGATING INSURANCE DISPUTES* 12-15 (2014) ("Generally, insureds have the burden of demonstrating that coverage exists, while the insurer has the burden of proving a policy defense or exclusion to coverage.").

⁴⁷ See, e.g., *Worthington Fed. Bank v. Everest Nat'l Ins. Co.*, 110 F. Supp. 3d 1211, 1226 (N.D. Ala. 2015) (citing Zulkey, *Apples and Oranges*, *supra* note 9, at 1); *Burks v. XL Specialty Ins. Co.*, NO. 14-14-00740-CV, 2015 WL 6949610 (Tex. App. Nov. 10, 2015); *Blackburn v. Fid. & Dep't Co. of Md.*, 667 So.2d 661, 672 (Ala. 1995) (finding that a claim made after the policy period related back to the policy period); *Gidney v. Axis Surplus Ins. Co.*, 140 So.3d 609, 616 (Fla. Dist. Ct. App. 2014); *Capital Growth Fin. LLC v. Quanta Specialty Lines Ins. Co.*, No. 07-80908-CIV, 2008 WL 2949492, at *6 (S.D. Fla. July 30, 2008); *Idaho Trust Bank v. BancInsure, Inc.*, No. 1:12-CV-00032-REB, 2014 WL 1117027, at *10 (D. Idaho, Mar. 20, 2014); *St. Paul Fire & Marine Ins. Co. v. RWR Mgmt., Inc.*, No. CV-05-0294-EFS, 2006 WL 3289772, at *7 (E.D. Wash. Nov. 13, 2006); *Glascoff v. OneBeacon Midwest Ins. Co.*, No. 13 Civ. 1013 (DAB), 2014 WL 1876984, at *7 (S.D.N.Y. May 8, 2014); *Axis Surplus Ins. Co. v. Johnson*, No. 06-CV-500-GKF-PJC, 2008 WL 4525409, at *10 (N.D. Okla. Oct. 3, 2008).

⁴⁸ See, e.g., *HR Acquisition I Corp. v. Twin City Fire Ins. Co.*, 547 F.3d 1309, 1312 (11th Cir. 2008) (considering a Related Acts Exclusion that stated: "[Insurer] 'shall not be liable to make any payment for Loss in connection with any Claim' made against [Insured] that was based upon, arising from, or in any way related to any demand, suit, or other proceeding against any Insured which was pending on or existed prior to the applicable Prior Litigation Date specified by endorsement to this Policy, or the same or substantially the same facts, circumstances or allegations which are the subject of or the basis for such demand, suit, or other proceeding").

⁴⁹ *Templeton v. Fehn*, No. 12-CV-00859, 2014 WL 2861832, at *8 (D. Colo. June 23, 2014) ("[Insurer's] failure to explicitly raise the Policy's interrelated-wrongful-acts exclusion in its reservation of rights does not constitute a waiver of its right to invoke the exclusion here."). Cf. *Columbia Cas. Co. v. SMI Liquidating, Inc.*, 909 F. Supp. 2d 1303, 1317 (D. Utah 2012)

insurer at the time in the reservation of rights letter, including relatedness, is the safer path.

E. *Question of Fact of Law?*

The overwhelming majority of decisions on relatedness have been made on summary judgment, thereby implying that relatedness is solely an issue of law.⁵⁰ But at least one decision has explicitly stated that relatedness is a mixed question of law and fact: “it is a legal question insofar as the word ‘related’ is open to legal construction; it is factual to the extent that the Court must determine whether the . . . [claims] are *as a matter of fact* related.”⁵¹

Closely tied to the issue of law or fact is when the proper stage is to move for a ruling on relatedness. Basic civil procedure tells us that to the extent that relatedness is a pure issue of law, it should be judged at the summary judgment stage, or even at the motion to dismiss stage if the issue is dispositive of the claim. But despite the number of decisions stating that relatedness is a question of law, few decisions have been found in which the issue was decided at the motion to dismiss stage, with some courts suggesting that relatedness should never be determined so early in the proceedings.⁵² Other decisions have determined that the summary judgment stage also is premature, and that determinations on relatedness turned on findings of fact.⁵³ Furthermore, one decision has even held that where relatedness informs the determination of limits for indemnification,

(declining to find claims regarding the same product were related where insurer did not inform insured of decision on relatedness until after insured purchased a new policy).

⁵⁰ See, e.g., *Weaver v. Axis Surplus Ins. Co.*, No. 13-CV-7374, 2014 WL 5500667, at *14 (E.D.N.Y. Oct. 30, 2014) (holding “as a matter of law” that the two claims were interrelated).

⁵¹ *Dormitory Auth. of New York v. Cont’l Cas. Co.*, No. 12 Civ. 281(KBF), 2013 WL 840633, at *8 (S.D.N.Y. Mar. 5, 2013), *aff’d in relevant part* 756 F.3d 166 (2d Cir. 2014).

⁵² See *Rancho Tehama Ass’n v. Fed. Ins. Co.*, No. 2:15-CV-00291, 2015 WL 3454610, at *3 (E.D. Cal. May 29, 2015) (stating relatedness is a factual inquiry) (citing *RQ Constr., Inc. v. Exec. Risk Indem. Inc.*, No. 13-CV-1360-LAB-KSC, 2014 WL 654619 (S.D. Cal. Feb. 18, 2014)). *But see* *Cove Partners, LLC v. SL Specialty Ins. Co.*, No. CV 15-07635, 2016 WL 461918 (C.D. Cal. Feb. 2, 2016) (granting a motion to dismiss and denying leave to amend, determining that underlying claims were related and that re-pleading would not change the fact).

⁵³ *Biochemics, Inc. v. Axis Reinsurance Co.*, 963 F. Supp. 2d 64, 70 (D. Mass. 2013) (denying summary judgment because relatedness turned on issue of fact requiring discovery: whether earlier subpoena sought information about wrongful acts that shared a “common nexus” with later-made misrepresentations regarding ibuprofen); *Brown v. Nat’l Union Fire Ins. Co. of Pittsburgh, Pa.*, No. Civ. 02-4724DWFSRN, 2004 WL 292158, at *3 (D. Minn. Feb. 11, 2004) (holding that genuine issue of material fact existed as to whether stock broker’s four different methods of defrauding clients were interrelated). *But see* *Direct Gen. Ins. Co. v. Houston Cas.*, – F. Supp. 3d – (S.D. Fla. Sept. 30, 2015) (specifically rejecting argument that summary judgment stage was premature to determine relatedness because issues of fact existed).

determination of relatedness must await resolution of the underlying claim.⁵⁴

F. Focus on Facts Rather Than Procedural Grouping

In determining relatedness, the focus is on the relationship between the facts that give rise to the claim rather than on any procedural grouping that occurs during litigation.⁵⁵ In other words, claims should not be deemed related merely because they are brought in the same action or because those actions are later joined or consolidated in some manner. For example, in *Home Insurance Company of Illinois v. Spectrum Information Technologies, Inc.*, the Eastern District of New York rejected arguments for relatedness of claims based upon their inclusion in the same suit, stating that:

[T]he concept of “claim” is distinct from that of “suit,” and neither the initial amalgamation of claims in one suit nor the variety of procedural metamorphoses which a suit often undergoes, whether via consolidation or amendment, alters the distinctive nature of individual claims or the consequent loss potentially incurred therefrom.⁵⁶

Accordingly, it is of little consequence whether the claims at issue are brought within the same underlying action. Similarly, it makes little

⁵⁴ Am. Cas. Co. of Reading, Pa. v. Allen, No. 2:12-cv-2414, 2015 WL 5693598, at *8 (N.D. Ala. Sept. 29, 2015).

⁵⁵ Policies may be drafted which contradict the general rule that relatedness is determined solely by the relation of the facts and not by procedural grouping. For example, Zurich Policy STF-DFI-100-A CW (12/99) contains in the definition of “Interrelated Wrongful Act” a statement that “All **Wrongful Acts** or **Wrongful Employment Acts** that are alleged in the same **Claim** shall be considered **Interrelated Wrongful Acts.**” However, such a provision appears to be uncommon.

⁵⁶ 930 F. Supp. 825 (E.D.N.Y. 1996); see also *Seneca Ins. Co. v. Kemper Ins. Co.*, No. 02 Civ. 10088(PKL), 2004 WL 1145830 (S.D.N.Y. May 21, 2004); *Breck & Young Advisors, Inc. v. Lloyds of London Syndicate* 2003, No. 09-2516, 2011 WL 1060955 (D. Kan. Mar. 21, 2011). *But see* *Royal Indem. Co. v. C.H. Robinson Worldwide, Inc.*, No. A08-0996, 2009 WL 2149637 (Minn. Ct. App. July 21, 2009) (finding that various claims that had been rejected from a class action for lack of commonality and which were subsequently filed individually had been related to the class action partly because they had been raised in the class action and would not have been filed individually if they had not been rejected from the class); *John M. O’Quinn P.C. v. Nat’l Union Fire Ins. Co. of Pittsburgh, Pa.*, No. 4:00-cv-2616, 2014 WL 3543709 (S.D. Tex. July 17, 2014) (fact that plaintiffs in one suit non-suited their claims and joined subsequent class action was indication that later class action was related to earlier suit).

difference whether the claims are pled under different causes of action,⁵⁷ in different jurisdictions,⁵⁸ or even if they differ by an order of magnitude in the number of claimants or amount of damages sought.⁵⁹ Moreover, the fact that a party was not named as a defendant in a previous claim does not necessarily defeat relatedness. This issue arises most frequently where one claim is made against a corporate entity and a later claim is made against the entity and adds as defendants various officers and agents.⁶⁰ The focus remains on the relationship between the underlying facts. Specifically, relatedness turns on the facts as they are *alleged*, and it makes no difference whether the allegations are true.⁶¹ Moreover, at least

⁵⁷ *E.g.*, *Feldman v. Ill. Union Ins. Co.*, 198 Cal. App. 4th 1495 (Cal. Ct. App. 2011) (the insured company had originally been sued for breach of contract in failing to produce devices in accordance with a contract, and when amended complaint later added the president of the insured company and added claims for breach of fiduciary duty and fraudulent transfer of funds to hide them from creditors, the newly-styled causes of action, which named the president as a new defendant, arose from the same facts and thus were related to claims in the original complaint).

⁵⁸ *Gateway Grp. Advantage, Inc. v. McCarthy*, 300 F. Supp. 2d 236, 243 (D. Mass. 2003) (“The fact that the same [allegedly wrongful acts] may give rise to claims by different claimants, and may give rise to different causes of action based on the laws of different states does not prevent the claims from being ‘related’ under the clear terms of the policy.”); *St. Paul Fire & Marine Ins. Co. v. RWR Mgmt., Inc.*, No. CV-05-0294-EFS, 2006 WL 3289772 (E.D. Wash. Nov. 13, 2006) (causes of action in differing lawsuits did not have to be the same or even similar to be related so long as they were caused by the same act or series of related acts); *Ettinger & Assoc., LLC v. Hartford/Twin City Fire Ins. Co.*, 22 F. Supp. 3d 447 (E.D. Pa. 2014) (“When determining whether claims relate back to or arise from the same facts, courts review the complaint filed in the prior action to determine whether the acts at issue in it not the legal theories or claims that it propounds are the same as, or related to, the acts alleged in the present dispute.”); *Universal Teleservices Ariz., LLC v. Zurich Am. Ins. Co.*, No. 001670, 2004 WL 550761 (Phila. Cty. Ct. Common Pleas Mar. 4, 2004) (“exclusion looks to the underlying facts rather than the legal theories pled”); *Aetna, Inc. v. Lexington Ins. Co.*, No. 03076, 2006 WL 1462926 (Phila. Cty. Ct. Common Pleas May 2, 2006), *rev’d in part, vacated in part*, 953 A.2d 820 (Pa. Super. Ct. 2008) (unpublished table disposition), *appeal granted in part, dec. vacated in part*, 600 Pa. 508, 968 A.2d 229 (2009).

⁵⁹ *Gidney v. Axis Surplus Ins. Co.*, 140 So.3d 609, 616 (Fla. Dist. Ct. App. 2014) (“The number of claimants or amount of alleged damages involved in each claim is not dispositive in this analysis under a [Related Acts] provision like the one at issue. Acts can be ‘related’ under the policy’s definition of ‘Wrongful act’ even if the resulting claims differ in magnitude, such as the amount of damages or number of claimants, so long as the basis of those claims are ‘common facts, circumstances, transactions, events and/or decisions.’”).

⁶⁰ *See, e.g.*, *Worthington Fed. Bank v. Everest Nat’l Ins. Co.*, 110 F. Supp. 3d 1211 (N.D. Ala. 2015); *Feldman*, 198 Cal. App. 4th at 1497.

⁶¹ *Hale v. Travelers Cas. & Sur. Co. of Am.*, No. 3-14-1987, 2015 WL 6737904, at *4 (M.D. Tenn. Nov. 4, 2015). *But see* *UnitedHealth Grp. Inc. v. Columbia Cas. Co.*, No. 05-CV-1289 PJSRRN, 2010 WL 317521, at *10 (D. Minn. Jan. 19, 2010) (discussing an unusually-worded Related Act Provision in which relatedness was defined with respect to “a series of **Wrongful Acts** that have as a common nexus, any *true* facts, circumstance, situation, event, transaction, cause or series of causally connected facts, circumstances, situations, events, transactions or causes”) (emphasis added).

one court has held that the related acts need not even be key to the underlying finding of liability.⁶²

Although procedural grouping should not be determinative, it is not surprising that courts have paid attention to whether claims were deemed similar enough to be joined for the purposes of a class action, Multidistrict Litigation Panel, or other procedural groupings that require similarity between claims.⁶³ It is important to understand that the claims were not deemed to be related *because* they were grouped together procedurally, but rather that the court looked at the decision to group them together procedurally as evidence that the claims were related factually.⁶⁴ In other words, procedural grouping does not make something related, but suggests that another court already agreed that they were factually related and grouped them together procedurally based upon the factual relatedness.⁶⁵

Occasionally, a claim will arise from the parties' conduct in litigation, and it is unsurprising that courts have found the new claims to be related to the original claim on which the litigation was based. For example, in *Great American Insurance Company v. Sea Shepherd Conservations Society* (discussed above), the insured was sued by the Institute of Cetacean Research, which obtained an injunction to keep the insureds away from

⁶² See *Foster v. Summit Med. Sys. Inc.*, 610 N.W.2d 350, 354 (Minn. Ct. App. 2000) (“[T]he policies do not require that the ‘Wrongful Acts’ or ‘Interrelated Wrongful Acts’ be key to finding liability.”).

⁶³ See *Park West Galleries, Inc. v. Ill. Nat’l Ins. Co.*, No. 11-15047, 2013 WL 6095482, at *5 (E.D. Mich. Nov. 20, 2013) (“It is clear from the consolidation of these cases that the claims present similar issues of fact and law, as required by the Multidistrict Panel.”). See also *Farmington Cas. Co. v. United Educators Ins. Risk Retention Grp.*, 117 F. Supp. 2d 1022, 1026 (D. Colo. 1999) (finding that claims arose from the same facts which were supported by the fact that magistrate judge consolidated the first and second lawsuits filed by the same plaintiff over her termination and that the plaintiff probably should have just amended her complaint in her first lawsuit rather than filing a second one); *Venture, LLC v. Hiscox, Inc.*, No. FSTCV136019949S, 2015 WL 6405812 (Conn. Super. Ct. Sept. 18, 2015) (in finding cases related, noting that the wrongful acts were identical and that the only reason cases in an MDL were initiated separately was that jurisdictional issues prevented them from being filed as the same action). *But see Royal Indem. Co. v. C.H. Robinson Worldwide Inc.*, No. A08-0996, 2009 WL 2149637, at *5 (Minn. Ct. App. July 21, 2009) (rejecting the argument that claims excluded from a class action could not be related to claims included in class action, but noting that “class certification is separate and distinct from the policy language governing whether claims are ‘related’ for coverage purposes”).

⁶⁴ See *Farmington Cas. Co.*, 117 F. Supp. 2d at 1026 (noting the fact that the magistrate judge consolidated the two lawsuits filed by the same plaintiff supported the finding that the claims arose from the same facts).

⁶⁵ Following this reasoning, it also should make little difference how the claims adjuster initially grouped the claims. In other words, a claims-handler’s decision to assign two claims to the same file should not preclude a later finding that the claims were unrelated and vice versa.

their vessels.⁶⁶ The insured allegedly violated the injunction, and a court found that the subsequent contempt proceedings for alleged violation of the injunction were related to the proceeding which originally sought the injunction.⁶⁷

Lastly, while claimants should not be able to “manufacture” relatedness simply by alleging that claims are related, courts nonetheless have taken notice where a claimant’s complaint explicitly alleges that its claims are related to prior claims.⁶⁸ The opinion of non-parties should not prove dispositive, however, and one court has held where one insurer treats the claims as related (even to its detriment), such a decision was not dispositive as to whether the claims were related in a suit involving another insurer.⁶⁹

III. CLASSES OF RELATEDNESS CLAIMS

Before dividing the case law on relatedness by category, it must be stated that the categories below have been drawn by the author solely for the purpose of helping the reader find cases on relatedness which are factually analogous to what the reader may be facing. These categories

⁶⁶ No. C13-1017RSM, 2014 WL 2170297, at *1 (W.D. Wash. May 23, 2014).

⁶⁷ See *id.* at *8. The case states:

A reasonable Insured reading the Policy at issue in this case would have little trouble finding contempt proceedings to be casually connected to the ICR Litigation, where the contemnors are alleged to have violated the very injunction that the ICR Litigation put in place, and the contempt proceedings could not have taken place but for the underlying ICR Litigation.

Id. But see Nat’l Title Ag., LLC v. United Nat’l Ins. Co., No. 2:15-CV-160, 2016 WL 1092485 (D. Utah Mar. 21, 2016) (garnishment action not related to action where underlying judgment gave rise to garnishment action).

⁶⁸ See Liberty Ins. Underwriters, Inc. v. Davies Lemmis Raphaely Law Corp., No. CV 15-859, 2016 WL 741847 (C.D. Cal. Feb. 23, 2016) (noting that “Defendants’ own court filings indicate that they themselves consider the claims in these cases to be ‘virtually identical’ . . . and to ‘contain identical claims involving similar properties’”); W.C. & A.N. Miller Dev. Co. v. Cont’l Cas. Co., No. GJH-14-00425, 2014 WL 5812316, at *2 (D. Md. Nov. 7, 2014), *aff’d* – F. App’x –, 2015 WL 9487938 (4th Cir. 2015) (considering a complaint that characterized a subsequent claim as an ancillary proceeding to a prior related claim); Borough of Moosic v. Darwin Prof’l Underwriters, Inc., No. 3:11-CV-1689, 2012 WL 2527279, at *6 (M.D. Pa. June 29, 2012) (“complaint in the Underlying Action specifically alleges that the matters are related”); Quinn P.C. v. Nat’l Union Fire Ins. Co. of Pittsburgh, 33 F. Supp. 3d 756, 760 (S.D. Tex. 2014) (evaluating the complaint where one claim specifically stated that it involved the same identical legal and factual issues and party defendants and that the interrelationship between cases was identical).

⁶⁹ See Methodist Healthcare v. Am. Int’l Specialty Lines Ins. Co., 310 F. Supp. 2d 976, 980-81 (W.D. Tenn. 2004) (concluding that the prior argument that the claims were related by the insurer were not dispositive in an action against a later insurer who argued that they were not related).

have not been recognized by any court, nor has any court refused to apply the holdings or analysis found in one category of claim to a case that might be classified in another. Furthermore, where courts have differed in their treatment of the importance of a particular factor, it could be argued that the differences can be explained through differences in jurisdiction, or in some cases through a desire by the court to find in favor of the insured (which could result in differences of what factors to deem important, depending on the circumstances).⁷⁰ Lastly, there are some discrete cases that do not fit neatly into any of the categories below but may be of interest to readers researching the relatedness of claims for pollution,⁷¹ antitrust,⁷²

⁷⁰ See LaCroix, *supra* note 1 (“My perception is that courts generally approach the analysis of these issues with an unconscious bias in favor of whatever outcome will maximize the amount of insurance available.”).

⁷¹ **TX**: Pennzoil-Quaker State Co. v. Am. Int’l Specialty Lines Ins. Co., 653 F. Supp. 2d 690 (S.D. Tex. 2009) (release of pollution from 2000 fire was not related to November 2001 release, thereby requiring separate deductibles to be paid for each).

⁷² **MI**: Realcomp II, Ltd. v. ACE Am. Ins. Co., 46 F. Supp. 3d 736 (E.D. Mich. 2014) (two claims related where both alleged that insured’s website excluded certain types of brokers); **NY**: Seneca Ins. Co. v. Kemper Ins. Co., No. 02 Civ. 10088(PKL), 2004 WL 1145830 (S.D.N.Y. May 21, 2004), *aff’d* by 133 F. App’x 770, 771–72 (2d Cir. 2005) (despite lack of business connection between two claimants, their two antitrust claims against equestrian organization were related where both drafted by the same attorney and shared numerous factual allegations).

TCPA claims,⁷³ real estate,⁷⁴ debt collection,⁷⁵ personal injury protection,⁷⁶ trademark infringement,⁷⁷ or refusal to hire.⁷⁸

⁷³ **DE:** RSUI Indem. Co. v. Sempris, LLC, No. N13C-10-096, 2014 WL 4407717 (Del. Super. Ct. Sept. 3, 2014) (class action arising out of TCPA not related to claim arising out of online order).

⁷⁴ **AL:** HR Acquisition I Corp. v. Twin City Fire Ins. Co., 547 F.3d 1309 (11th Cir. 2008) (two suits related where both alleged that insured entity had purchased real estate and leased it back to the seller at artificially high prices); **GA:** Am. Guar. & Liab. v. Abram Law Grp., No. 13-13134, 2014 WL 563618 (11th Cir. Feb. 14, 2014) (claims arising from two separate real estate loan closings were interrelated where negligence in one was a necessary predicate to fraud in other); **MO:** Lexington Ins. Co. v. Integrity Land Title Co., 852 F. Supp. 2d 1119 (E.D. Mo. 2012) (insured title abstractor's failure to discover condemnation judgment on two separate occasions were not related); **MI:** Sigma Fin. Corp. v. Am. Int'l Specialty Lines Ins. Co., 200 F. Supp. 2d 697 (E.D. Mich. 2001) (legal claims arising from sales of products from single fraudulent mortgage company were unrelated where each sale involved different representatives of the insured, different products of the fraudulent company, and different purchasers); **NY:** Darwin Nat'l Assur. Co. v. Westport Ins. Corp., No. 13-CV-02076, 2015 WL 1475887 (E.D.N.Y. Mar. 31, 2015) (claims were related where both arose from zoning dispute concerning cemetery); **PA:** Borough of Moosic v. Darwin Prof'l Underwriters, Inc., No. 3:11-cv-1689, 2012 WL 2527279 (M.D. Pa. June 29, 2012), *rev'd* 2014 WL 407477 (3d Cir. Feb. 4, 2014) (action against public officials was related to prior action where both were rooted in same zoning dispute over same real estate, concerned same principal parties and alleged failure to address zoning regulations; later claim was a direct consequence of insureds' alleged failure to remedy issues raised in first suit); Pizzini v. Am. Int'l Specialty Lines Ins. Co., 210 F. Supp. 2d 658, 671 (E.D. Pa. 2002) ("solicitation and sale of the same oil well leases at the same time was either 'a single act, error, or omission' or a 'series of related acts, errors or omissions'"); **WA:** St. Paul Fire & Marine Ins. Co. v. RWR Mgmt., Inc., No. CV-05-0294-EFS, 2006 WL 3289772 (E.D. Wash. Nov. 13, 2006) (claims by city against real estate broker were related because both arose out of broker's failure to disclose relationship and alleged encouragement to the city to sell over-inflated municipal bonds); RC Invs., Inc. v. St. Paul Fire & Marine Ins. Co., No. 04-CV-5030-AAM, 2005 WL 1123751 (E.D. Wash. May 11, 2005) (new claim for negligent supervision of real estate agent in amended complaint related to claims in original complaint because it arose from the same original facts).

⁷⁵ **PA:** Hrobuchak v. Fed. Ins. Co., No. 3:10-CV-481, 2010 WL 4237435, at *1 (M.D. Pa. Oct. 21, 2010) (two suits against debt collection agency for unlawful debt collection practices were not related where suits involved different time frame, different states, different state penal laws, different plaintiffs, and different arrangements with district attorneys; fact that both suits arose out of insured's core business model was not enough to make them related because nearly all suits against insured would then be related); **VA:** Lessard v. Cont'l Cas. Co., No. 1:14-cv-64, 2014 WL 4162006 (E.D. Va. Aug. 19, 2014) (undisputed relation between all claims arising out of failure to resolve collections dispute regarding confessed judgments); *Cf. DE:* United Westlabs, Inc. v. Greenwich Ins. Co., C.A. No. 09C-12-048 MMJ, 2011 WL 2623932 (Del. Super. Ct. June 13, 2011) (suit related to earlier arbitration despite addition of new parties to later suits where all arose out of threats to cut off computer service for failure to pay fees; irrelevant whether insured believed prior acts to be settled), *aff'd*, No. 337, 2011, 2012 WL 628006 (Del. Feb. 28, 2012).

⁷⁶ Direct Gen. Ins. Co. v. Houston Cas., -- F. Supp.3d --, 2015 WL 6160361 (S.D. Fla. Sept. 30, 2015) (personal injury protection claims were related).

⁷⁷ Connect Am. Holdings, LLC v. Arch Ins. Co., No. 14-4784, 2016 WL 1254073 (E.D. Pa. Mar. 31, 2016) (finding the term "common nexus" ambiguous and interpreting it against the

A. *Financial/Business*

The plurality (if not majority) of decisions on relatedness concern the arena of finance and commercial transactions. In an attempt to create some semblance of order, this Article has broken these decisions into subcategories according to the type of commercial claims in dispute, specifically: disputes over loans, securities violations, and mismanagement. Accordingly, the reader should not consider these subcategories to be stark dividers between discrete sets, but rather as general guides to finding decisions with analogous facts.

1. Loans

Courts generally have been reluctant to find relatedness between multiple claims against businesses or boards for giving out bad loans. For example, in *Federal Savings & Loan Insurance Corp. v. Burdette*, the U.S. District Court for the Eastern District of Tennessee found that despite a common plan between them, twenty-five loans were unrelated because they involved separate collateral, took place at different times and for different purposes, and the respective deficiencies in the loans were caused by different omissions which constituted distinct and dissimilar business decisions.⁷⁹ In contrast to this general trend, the Ninth Circuit

insurer, finding two suits for trademark infringement were unrelated where scheme was different despite common goal).

⁷⁸ *Lehigh Valley Health Network v. Exec. Risk Indem., Inc.*, No. CIV.A.1999-CV-5916, 2001 WL 21505 (E.D. Pa. Jan. 10, 2001) (claim by candidate for employment not related to previous claim by candidate's sponsor to recommend the candidate because claims were brought by different plaintiffs and parties were not in privity).

⁷⁹ 718 F. Supp. 649, 660 (E.D. Tenn. 1989). *See also* *Eureka Fed. Sav. & Loan Assoc. v. Am. Cas. Co. of Reading, Pa.*, 873 F.2d 229, 235 (9th Cir. 1989) (determining that the existence of an aggressive loan policy was insufficient to make loans to 200 different borrowers related where they were the result of disparate acts and omissions of five different directors); *Okada v. MGIC Indem. Corp.*, 608 F. Supp. 383, 388 (D. Haw. 1985) (concluding that losses arising from a change in terms related to condominium loan were unrelated to losses arising out of the spot lending policy of making loans to individual home buyers and to losses arising out of expenditure of funds on renovation and move out of corporate headquarters); *N. River Ins. Co. v. Huff*, 628 F. Supp. 1129, 1133 (D. Kan. 1985) (noting that several different loan swap transactions were unrelated as they occurred at separate times, involved different borrowers, were for different purposes, and had separate collateral); *W Holding Co. v. AIG Ins. Co.*, Civil No. 11-2271(GAG), 2014 WL 3378671, at *5 (D.P.R. July 9, 2014) (holding that two claims arising out of loans approved with gross negligence were not related because while the general course of conduct was similar, the loans themselves were separate). *Cf. McCuen v. Am. Cas. Co. of Reading, Pa.*, 946 F.2d 1401, 1408 (8th Cir. 1991) (finding the term "interrelated" to be ambiguous and holding that seventeen loans to three borrowers were distinct and not three sets of related loans); *Axis Surplus Ins. Co. v. Johnson*, No. 06-CV500-GKF-PJC, 2008 WL 4525409, at *9 (N.D. Okla. Oct. 3, 2008) (stating that two claims against directors for breach of fiduciary duty and gross negligence were not related where one claim

Court of Appeals held in *WFS Financial, Inc. v. Progressive Casualty Insurance Company* that suits filed by two different sets of plaintiffs in two different forums under two different legal theories were related by a common business practice of permitting independent dealers to markup loans, thus finding that the harms alleged in two class actions suits were causally related.⁸⁰

2. Securities

Proving relatedness in the context of securities can be particularly challenging because the respective claims often are brought by different claimants, may involve different agents of the insured, and may involve different misrepresentations or financial instruments/transactions taking place at different times. Accordingly, many courts have focused on such differences to reject relatedness. For example, the Ninth Circuit Court of Appeals found that claims by separate plaintiffs against financial advisors were unrelated where the investors had unique investment objectives, were advised in separate meetings on separate dates, and different investment packages were recommended.⁸¹ Similarly, the Connecticut Superior Court held that five suits alleging that insured and allied entities engaged in investment practices which allowed insured to control companies invested in were not related where parties differed as did financing and other features germane to the transactions.⁸²

arose from allegations concerning a specific loan and the other was based on sweeping allegations of mismanagement of the corporation throughout its lifetime).

⁸⁰ 232 F. App'x 624, 625 (9th Cir. 2007); *see also* Idaho Trust Bank v. BancInsure, Inc., No. 1:12-CV-00032-REB, 2014 WL 1117027, at *8, 10 (D. Idaho Mar. 20, 2014) (commenting that statements by 30(b)(6) witness supported argument against relatedness, but ultimately finding that two claims were related where they involved the same parties to a lending relationship, both arose from the purchase of steel, and the later claim would not have existed but for the attempts to settle the earlier claim). *Cf.* Barr v. Colo. Ins. Guar. Assoc. & W. Guar. Fund Serv., 926 P.2d 102, 105 (Colo. App. 1996) (explaining the failure of the board of directors to check the background of borrower or value of collateral was a single loss rather than a separate claim for each board member); W.C. & A.N. Miller Dev. Co. v. Cont'l Cas. Co., No. GJH-14-00425, 2014 WL 5812316, at *6 (D. Md. Nov. 7, 2014), *aff'd* -- F. App'x --, 2015 WL 9487938 (4th Cir. 2015) (asserting that adversary proceeding by bankruptcy estate of group hired to secure commercial lenders was related to prior complaint where both arose out of alleged scheme by customer not to pay full finder's fee).

⁸¹ Fin. Mgmt. Advisors, LLC v. Am. Int'l Specialty Lines Ins. Co., 506 F.3d 922 (9th Cir. 2007).

⁸² Southridge Capital Mgmt., LLC v. TwinCity Fire Ins. Co., No. X04CV020103527S, 2006 WL 2730312 (Conn. Super. Ct. Sept. 8, 2006) (unpublished), *dec. clarified by* 2006 WL 3491382 (Conn. Super. Ct. Nov. 13, 2006); *see also* ID: City of Idaho Falls v. Home Indem. Co., 888 P.2d 383 (Idaho 1995) (multiple claims against insured by bondholders who provided financing for power plants where complaints alleged distinct misrepresentations and omissions); LA: Argent Fin. Grp., Inc. v. Fid. & Dep. Co. of Maryland, No. Civ.A.04-2323,

On the other hand, some courts have looked past such differences to find relatedness where common facts predominated. For example, in *Worthington Federal Bank v. Everest National Insurance Co.*, the U.S. District Court for the Northern District of Alabama was faced with two claims

2005 WL 2304515, at *9 (W.D. La. Sept. 21, 2005) (securities claims by different clients for fraudulent activity unrelated where only common fact was that they were perpetrated by same employee); **MI**: *Sigma Fin. Corp. v. Am. Int'l Specialty Lines Ins. Co.*, 200 F. Supp. 2d 697 (E.D. Mich. 2001) (legal claims arising from sales of products from single fraudulent mortgage company were unrelated where each sale involved different representatives of the insured, different products of the fraudulent company, and different purchasers); **NE**: *GWR Invs., Inc. v. Exec. Risk Specialty Ins. Co.*, No. 8:04CV441, 2005 WL 3143186 (D. Neb. Nov. 23, 2005) (claims that financial advisor improperly took control of account of deceased husband of client unrelated to claims that it fraudulently induced her to purchase notes or to claim by another client that insured switched investments in her retirement account; arbitrations claims were related which all involved securities of the same bankrupt entity); **OK**: *Stauth v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa.*, 185 F.3d 875 (10th Cir. 1999) (unpublished) (declining to find that class actions for securities fraud were related to prior settled claim where insurer offered insufficient specificity of settled claim to prove interrelation); **TX**: *Admiral Ins. Co. v. Briggs*, 264 F. Supp. 2d 460 (N.D. Tex. 2003) (three suits against insured corporation regarding misrepresentations about stock were not related because the suits alleged different misstatements, omissions, and promises that occurred on different days to different individuals). *Cf.* **MA**: *Biochemics, Inc. v. Axis Reinsurance Co.*, 963 F. Supp. 2d 64 (D. Mass. 2013) (summary judgment denied because relatedness turned on issue of fact requiring discovery: whether earlier subpoena sought information about wrongful acts that shared a "common nexus" with later-made misrepresentations regarding ibuprofen); **MN**: *Brown v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa.*, No. Civ. 02-4724DWFSRN, 2004 WL 292158 (D. Minn. Feb. 11, 2004) (genuine issue of material fact existed as to whether stock broker's four different methods of defrauding clients were interrelated); **NY**: *Home Ins. Co. v. Spectrum Info. Tech., Inc.*, 930 F. Supp. 825, 850 (E.D.N.Y. 1996) (finding interrelated wrongful acts provision ambiguous and thus finding no relation between numerous claims for violations of federal securities laws); *David v. Am. Home Assurance Co.*, No. 95Civ. 10290 (LAP), 1997 WL 160367 (S.D.N.Y. Apr. 3, 1997) (motion to dismiss denied due to ambiguity of "related"); *Am. Cas. Co. of Reading, Pa. v. Gelb*, No. 653280/2011, 2014 WL 2828859 (N.Y. Sup. Ct. June 19, 2014) (class action for alleged failure by directors to obtain best possible offer in merger was unrelated to subsequent adversary proceeding in bankruptcy alleging that financing obtained to finance merger overleveraged company forcing bankruptcy; fact that both claims were concerned with merger was insufficient to create interrelation); *Sirius XM Radio Inc. v. XL Specialty Ins. Co.*, No. 650831/2013, 2013 WL 5958390 (N.Y. Sup. Ct. Nov. 7, 2013), *aff'd* 117 A.D.3d 652 (N.Y. App. Div. 2014) (insured survived a motion to dismiss in arguing that its timely tender of related claims excused its late tender of the claim at issue); **TX**: *Gastar Exploration Ltd. v. U.S. Specialty Ins. Co.*, 412 S.W.3d 577 (Tex. App. 2013) (insurer could not rely on related acts exclusion because court deemed it to conflict with exclusion in endorsement precluding coverage for claims arising out of litigation pending before a specific date or arising out of the same facts as the earlier litigation; court determined that because any claims excluded under exclusion would have already been excluded under related acts provision, exclusion in endorsement conflicted with related acts exclusion); **UT**: *Morden v. XL Specialty Ins.*, No. 2:14-cv-00224, 2016 WL 13377252 (D. Utah Apr. 5, 2016) (although securities claim pled by family of private investors shared facts and causes of action with prior claim brought by SEC, the two were unrelated where they alleged very different breaches by the insured).

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against the insured bank by shareholders raising derivative claims based on the same wrongful acts, and the court determined that the claims were related despite differences in legal theories pled and the fact that two new defendants were included in one claim which had not been named in the other.⁸³ Similarly, the U.S. District Court for the District of Massachusetts held that two claims were related where both arose from the insured engaging in the same course of conduct designed to promote investment in a franchise program, and the fact that the sales pitch was made to different people over time and that franchises were located in different states did not render wrongful acts unrelated.⁸⁴

⁸³ **AL:** *Worthington Fed. Bank v. Everest Nat'l Ins. Co.*, 110 F. Supp. 3d 1211 (N.D. Ala. 2015) (citing *Zulkey, Apples and Oranges*, *supra* note 9, at 1).

⁸⁴ **MA:** *Gateway Grp. Advantage, Inc. v. McCarthy*, 300 F. Supp. 2d 236 (D. Mass. 2003); *see also AZ:* *SP Syntax LLC v. Federal Ins. Co.*, No. 1 CA-CV 14-0638, 2016 WL 831532 (Ariz. Ct. App. Mar. 3, 2016) (securities actions related where both alleged that insured's officers and directors misrepresented price protection rebates and "tooling deposits" paid to supplier); **CA:** *Liberty Ins. Underwriters, Inc. v. Davies Lemmis Raphaely Law Corp.*, No. CV 15-859, 2016 WL 741847 (C.D. Cal. Feb. 23, 2016) ("In this case, while the Underlying Actions have been brought by different plaintiffs, they all arise from a single course of conduct, a unified policy of making alleged affirmative misrepresentations to investors in order to induce them to invest in commercial real estate acquisitions facilitated by [insured law firms' client]"); **DE:** *In re DBSI, Inc., Bankruptcy No. 08-12687(PJW), Adversary No. 09-52031(PJW)*, 2011 WL 3022177 (Bankr. D. Del. July 22, 2011) (avoidance actions in bankruptcy related to covered actions where all alleged misuse of accounting reserves, misrepresentations about insured's financial condition, use of alter egos, misrepresentations in private placement memoranda, use of a master lease agreement, and exercise of a Ponzi scheme); **FL:** *Cont'l Cas. Co. v. Wendt*, 205 F.3d 1258 (11th Cir. 2000) (suit against attorney for engaging in actions to encourage investment in company were all related despite leading to different consequences to different individuals, some of whom were clients of the insured); **MN:** *Foster v. Summit Med. Sys., Inc.*, 610 N.W.2d 350 (Minn. Ct. App. 2000) (multiple lawsuits arising from registration statement and prospects containing accounting errors were related because all were related to improper revenue recognition; court noted that interrelated acts did not have to be key to the underlying finding of liability); *Kilcher v. Cont'l Cas. Co.*, 747 F.3d 983 (8th Cir. 2014) (investment advisor's selling of whole life insurance policies for themselves was related to acts of selling whole life insurance policies to those customers for their children and spouses; acts of offering unsuitable investments to customer was related to churning as well); **NC:** *Highwoods Props., Inc. v. Exec. Risk Indem., Inc.*, 407 F.3d 917 (8th Cir. 2005) (two claims arising from merger were related where they included many of the same factual allegations but a later-filed complaint added a number of facts that had occurred subsequent to the filing of first); **NJ:** *G-I Holdings v. Hartford Fire Ins. Co.*, No. 00-6189 DMC, 2007 WL 842009 (D.N.J. Mar. 16, 2007) (multiple lawsuits all interrelated because all arose from transfer of stock to allegedly shield money from asbestos claimants), *aff'd G-I Holdings, Inc. v. Reliance Ins. Co.*, 586 F.3d 247 (3d Cir. 2009); **NY:** *Breck & Young Advisors, Inc. v. Lloyds of London Syndicate* 2003, 715 F.3d 1231 (10th Cir. 2013) (multiple arbitrations for mismanaging and unlawfully churning investment accounts of clients were related); *Nomura Holding Am., Inc. v. Fed. Ins. Co.*, 45 F. Supp. 3d 354 (S.D.N.Y. 2014) (two claims brought under federal securities laws were related where they relied on overlapping and frequently identical factual allegations and alleged similar claims for relief); *Capital Growth Fin. LLC v. Quanta Specialty Lines Ins. Co.*, No. 07-80908-CIV, 2008 WL

3. Mismanagement

It is rarely sufficient to prove that claims are related merely because both allege that the insured officers mismanaged their business. For example, the U.S. District Court for the Eastern District of New York found that although four claims against insured directors all alleged allegations of wrongdoing concerning the demise of insured directors' company, they were unrelated where one alleged violations for failing to disclose information, another alleged negligent mismanagement and breach of fiduciary duties through misstatements in annual statements, another alleged inducement based on reliance on false financial statements, and the last alleged mismanagement of a subsidiary company.⁸⁵ Similarly, the U.S. District Court for the Northern District of Oklahoma held that two claims against directors for breach of fiduciary duty and gross negligence were not related where one claim arose from allegations concerning a specific loan and the other was based on sweeping allegations of mismanagement of the corporation throughout its lifetime.⁸⁶

2949492 (S.D. Fla. July 30, 2008) (applying New York law; despite variations in the types of misrepresentations made or the unique financial positions of the claimants, arbitrations accusing insured of churning related to prior arbitration for the same where all unauthorized trading occurred in the same four year span and the respective traders at issue in each worked together out of the same office of the insured, and all claims involved allegations of "unsuitable aggressive investments"); *Zahler v. Twin City Fire Ins. Co.*, No. 04 Civ. 10099(LAP), 2006 WL 846352 (S.D.N.Y. Mar. 31, 2006) (claims raised in class action securities litigation against insured satellite communications company related to later-filed class action complaint alleging fiduciary breaches under ERISA where both complaints alleged class periods beginning with publication of same article containing misleading statements and both alleged other common misleading statements); *Templeton v. Fehn*, No. 12-cv-00859, 2014 WL 2861832 (D. Colo. June 23, 2014), *aff'd* 612 Fed. App'x 940 (10th Cir. 2015) (two claims against securities broker for sales to the same clients at different times were related despite broker working for different employers at the respective times because the acts involved the same clients and his conduct was similar in that he knew that they were unsuitable investors but encouraged them and failed to disclose material facts); **TX**: *Exec. Risk Indem., Inc. v. Integral Equity, L.P.*, No. Civ. A. 3:03-CV-0269, 2004 WL 438936 (N.D. Tex. Mar. 10, 2004) (multiple claims were related where all alleged inducement to invest in certain funds, alleged mishandling of those funds by the defendants, alleged continuing misrepresentations by the defendants about the performance of the funds, and the common loss to the same entity to enrich the defendants); **VT**: *Prof'l Consultants Ins. Co. v. Emp'rs Reinsurance Co.*, No. 1:03-CV0216, 2006 WL 751244 (D. Vt. Mar. 8, 2006) (two claims against pension consultants involving different times, personnel, damages, and claims related because both arose out of the same faulty evaluations of pensions); *Weaver v. Axis Surplus Ins. Co.*, No. 13-CV-7374(SJF)(ARL), 2014 WL 5500667 (E.D.N.Y. Oct. 30, 2014) (criminal action related to letter from Maryland Attorney General where both alleged that insured vending machine company defrauded investor by making misrepresentations about earnings).

⁸⁵ *Nat'l Union Fire Ins. Co. of Pittsburgh v. Ambassador Grp., Inc.*, 691 F. Supp. 618, 623-24 (E.D.N.Y. 1988).

⁸⁶ *See Axis Surplus Ins. Co. v. Johnson*, No. 06-CV500-GKF-PJC, 2008 WL 4525409, at *9 (N.D. Okla. Oct. 3, 2008); *see also LA*: *Crescent City Baptist Church v. Church Mut. Ins. Co.*,

In arguing that claims for mismanagement are related, it may help if it can be argued that one was a claim for the continuation of the same specific activity alleged in a previous claim. For example, the Florida Court of Appeals held that a class action against a mortgage broker was related to previously-filed individual suit where the class action was based upon the same course of conduct, specifically that the insured's failure to conduct due diligence, maintain proper accounting, and detect and report prior encumbrances on properties, which provided collateral for loans.⁸⁷ Alternatively, the Missouri Court of Appeals held that while two suits brought by same claimants sought different forms of relief, they were interrelated because both alleged same breaches of duty by majority shareholders and arose from decisions made in the same meeting in which majority shareholders eliminated cumulative voting, reduced the size of the board of directors, and removed the claimants.⁸⁸

No. Civ.A.05-2200, 2006 WL 508060, at *6 (E.D. La. Feb. 22, 2006) (stating that after the church received a demand letter insisting that it rectify corporate misbehavior, failure to rectify those acts and continuation of the same behavior constituted new unrelated wrongful acts); *Glascoff v. OneBeacon Midwest Ins. Co.*, No. 13 Civ. 1013(DAB), 2014 WL 1876984, at *6-7 (S.D.N.Y. May 8, 2014) (holding that the claims were not related merely because they arose out of the same failure to catch misdeeds of insured's president and CEO where different plaintiffs alleged different misconduct and only one alleged that the insured failed to act on reports of his misconduct.). *Cf. Anglo-Am. Ins. Co. v. Molin*, 691 A.2d 929, 933-34 (Pa. 1997) (concluding the trial court improperly granted injunction for insurer to pay defense costs of directors of insolvent life insurance company where the record was insufficient to show that the claims regarding self-dealing, falsifying assets, and improper investing were related to prior claim).

⁸⁷ *Gidney v. Axis Surplus Ins. Co.*, 140 So.3d 609 (Fla. Dist. Ct. App. 2014); *see also AL: Sharp Realty & Mgmt., LLC v. Capitol Specialty Ins. Corp.*, 503 F. App'x 704 (11th Cir. 2013) (all claims by same claimant against insured for failure to collect rent and maintenance fees at same location were related regardless of the fact that they occurred at different times); *IN: Bainbridge Mgmt., LP v. Travelers Cas. & Sur. Co. of Am.*, No. 2:03 CV 459 JM, 2006 WL 978880 (N.D. Ind. Apr. 10, 2006) (civil suit related to wrongful act that began prior to retroactive date where criminal charging documents and plea agreement stated that scheme to defraud Medicare began prior to that date); *WA: RC Invs., Inc. v. St. Paul Fire & Marine Ins. Co.*, No. 04-CV-5030-AAM, 2005 WL 1123751 (E.D. Wash. May 11, 2005) (new claim for negligent supervision in amended complaint related to claims in original complaint because it arose from the same original facts). *But see LA: Crescent City Baptist Church v. Church Mut. Ins. Co.*, No. Civ.A. 05-2200, 2006 WL 508060 (E.D. La. Feb. 22, 2006) (after church received demand letter insisting that it rectify corporate misbehavior, failure to rectify those acts and continuation of the same behavior constituted new unrelated wrongful acts); *MD: ACE Am. Ins. Co. v. Ascend One Corp.*, 570 F. Supp. 2d 789 (D. Md. 2008) (claim and Senate report regarding insured's violations of various consumer protection statutes were not interrelated to a later multi-state claim that pled the continuation of the same activity that gave rise to the first claim).

⁸⁸ *Maritz Holdings, Inc. v. Fed. Ins. Co.*, 298 S.W.3d 92 (Mo. Ct. App. 2009).

B. Legal Malpractice

The three most important factors in determining relatedness in the context of legal malpractice are: (1) the underlying litigation or transactions at issue; (2) the identity and relationship between the parties; and (3) the common modus operandi. With regard to the first issue, in most circumstances, claims will be deemed related where they arise from the same underlying litigation or transaction (or where one suit or transaction arises from the previous one). For example, in *Lipton v. Superior Court*, the California Court of Appeals held that multiple professional errors all arising out of the same claim were related.⁸⁹

⁸⁹ 48 Cal. App. 4th 1599, 1606–07 (Cal. Ct. App. 1996); *see also* ProCentury Ins. Co. v. Ezor, 554 F. App'x 576, 577 (9th Cir. 2014) (finding claim by beneficiary of trust against attorney-trustee for failure to remove incompetent co-beneficiary as co-trustee related to later claim made by conservator for incompetent beneficiary/trustee for same); Am. Guar. & Liab. v. Abram Law Grp., 555 F. App'x 919, 921 (11th Cir. 2014) (reflecting that claims arising from two separate real estate loan closings were interrelated where negligence in one was a necessary predicate to fraud in the other); Berry & Murphy, P.C. v. Carolina Cas. Ins. Co., 586 F.3d 803, 812 (10th Cir. 2009) (concluding the alleged failure to comply with rules for disclosure of a witness related to alleged failure to opt out of same rules in same case); Gregory v. Home Ins. Co., 876 F.2d 602, 605 (7th Cir. 1989) (discussing claims from attorney's error in opinion letter concerning tax consequences of buying video tapes was related to error concerning the video tape promotion's status as a security); United States v. A.C. Strip, 868 F.2d 181, 188–90 (6th Cir. 1989) (stating the second amended complaint naming law firm as jointly and severally liable with one of its lawyers was related to first amended complaint which named only that lawyer); Blackburn v. Fid. & Dep. Co. of Md., 667 So.2d 661, 670 (Ala. 1995) (providing claim against law firm for legal malpractice and breach of fiduciary duty under ERISA law related to prior claim for breach of ERISA duties which had mentioned but did not name the insured); Bay Cities Paving & Grading, Inc. v. Lawyers' Mut. Ins. Co., 855 P.2d 1263, 1275 (Cal. 1993) (recognizing attorney's failure to file complaint to foreclose mechanic's lien was related to his failure to serve stop notice on construction project's construction lenders because the errors arose out of the same transaction with regard to the same client and resulting in the same injury: the loss of a debt); Eagle Am. Ins. Co. v. Nichols, 814 So.2d 1083, 1086–87 (Fla. Dist. Ct. App. 2002) (holding attorney's failure to name medical center was related to his failure to name individual medical center physicians in the same suit where the failures led to a single injury: an award that did not represent the full extent of the client's damages); Synergy Law Grp., v. Ironshore Specialty Ins. Co., No. 1-14-2070, 2015 WL 1391614, at *7 (Ill. App. Ct. March 24, 2015) (mistakes in failing to rectify an error in drafting the shareholder agreement all related to original error in drafting it); James River Ins. Co. v. Rinella & Rinella, Ltd., No. 07 C 4233, 2008 WL 4211150, at *5 (N.D. Ill. Sept. 10, 2008) (holding initial failure prior to retroactive date to properly transfer stock in divorce proceeding was related to subsequent failures to remedy the problem, but because related language affected only the number of limits at issue, it did not limit the duty to defend); Bar Plan Mut. Ins. Co. v. Chesterfield Mgmt. Assocs., 407 S.W.3d 621, 630–31 (Mo. Ct. App. 2013) (several errors made in the same land deal and cause of action for failure to maintain adequate insurance all were related, regardless of the fact that they were made during different policy periods); Cont'l Cas. Co. v. Orr, No. 8:07CV292, 2008 WL 2704236, at *5 (D. Neb. July 3, 2008) (determining malpractice actions brought by multiple investors in the same coffee shop franchise were related); Gladstone v. Westport Ins. Corp., Civil Action No.

However in *Beale v. American National Lawyers Insurance Reciprocal*, an attorney represented five clients in the same matter, each of whom brought a malpractice claim arising from the same mistake in their common suit, and the Maryland Court of Appeals found that the malpractice claims were unrelated due to the separate duty the attorney owed to each client.⁹⁰

Likewise, claims are more likely to be related where the claims are brought by the same client. For example, in *Simpson & Creasy, P.C. v. Continental Casualty Co.*, the U.S. District Court for the Southern District of Georgia held that all claims for malpractice by the same client were related, whether they arose from the sale of the client's home, sale of stock shares, management of stock shares, sale of a company, acquisition of a company, review of contracts, acquisition of a note, creditor status, or as a

10-652 (PGS), 2011 WL 5825985, at *9 (D.N.J. Nov. 16, 2011) (two claims by different claimants were related because each alleged that the insured committed legal malpractice with respect to work on the same zoning matter); *Westport Ins. Corp. v. Coffman*, No. C2-05-1152, 2009 WL 243096, at *9 (S.D. Ohio Jan. 29, 2009) (finding a malpractice claim was related to a class action claim where both were premised on the legal malpractice of failing to register transfer of ownership of client collection agency); *Oregon State Bar Prof'l Liab. Fund v. Benefit*, 201 P.3d 936, 939 (Or. Ct. App. 2009) (malpractice claim against attorney hired to fix mistakes made by previous attorney was related to malpractice claim against the previous attorney); *Estate of Logan v. Ne. Nat'l Cas. Co.*, 424 N.W.2d 179, 188 (Wis. 1988) (holding claim against attorney for loss of tax returns was related to prior claim for failure to file same tax returns previously). *Cf. Attorneys Ins. Mut. of Ala., Inc. v. Smith, Blocker & Lowther, P.C.*, 703 So.2d 866, 870 (Ala. 1996) (stating insurer argued that previous demand for money related to a subsequent demand from the same client arising out of the same failure by insured to timely file form with IRS, but court effectively declined to apply the Related Acts Provision); *Ettinger & Assocs. v. Hartford/Twin City Fire Ins. Co.*, 22 F. Supp. 3d 447, 457-58 (E.D. Pa. 2014) (claims by client and opposing party for wrongfully encouraging the suit were related, but the client's claim for wrongfully engaging dual representation arose from a distinct wrongful act).

⁹⁰ 843 A.2d 78, 92-93 (Md. 2004); *see also Kopelowitz v. Home Ins. Co.*, 977 F. Supp. 1179, 1188 (S.D. Fla. 1997) (failure to inform client of settlement offer was unrelated to negligence in handling of loans despite occurring in a common bankruptcy action); *St. Paul Fire & Marine Ins. Co. v. Chong*, 787 F. Supp. 183, 187-88 (D. Kan. 1992) (finding the term "series of related wrongful acts" was ambiguous, holding that the attorney's numerous errors and omissions in the representation of three defendants arrested together were unrelated); *Nat'l Union Ins. Co. of Pittsburgh, v. Holmes & Graven*, 23 F. Supp. 2d 1057, 1070-71 (D. Minn. 1998) (concluding insured unsuccessfully argued that claim involving the drafting of a trust indenture was related to the claim by trustee regarding legal arguments made at trial); *Scott v. Am. Nat'l Fire Ins. Co.*, 216 F. Supp. 2d 689, 695 (N.D. Ohio 2002) (malpractice action brought by corporation was not related to the malpractice action brought by investors because insured owed different duties to corporations and to investors, and the breaches of the respective duties resulted in discrete harms). *But see Informix Corp. v. Lloyd's of London*, No. C-91-1506-FMS, 1992 WL 469802 (N.D. Cal. Oct. 15, 1992) (finding that amended complaint, even if it could constitute a new "claim" would nonetheless be deemed to arise out of interrelated wrongful acts).

“quasi-legal advisor.”⁹¹ In contrast, in *Admiral Insurance Co. v. Marsh*, a law firm agreed to provide free legal services to a client for one year in exchange for settling a malpractice claim, and the U.S. District Court for the Eastern District of Virginia ultimately found that the malpractice claims arising from the year of free legal services was unrelated to the original malpractice claim.⁹²

Lastly, where claims are brought by separate clients, courts have differed as to the importance of a common *modus operandi* or common mistake in multiple representations. For example, in *Continental Casualty Co. v. Wendt*, the Eleventh Circuit Court of Appeals held that claims against an attorney for engaging in actions to encourage investment in a company were all related despite leading to different consequences to different individuals, some of whom were clients of the insured.⁹³ But in *Continental Casualty Co. v. Grossman*, multiple clients sued an insured lawyer for malpractice, and the Illinois Court of Appeals held that although all clients had alleged that the attorney participated in a scheme regarding investments in or by the same company, each also could theoretically recover based on alternative allegations that his conduct constituted discrete acts of negligence, rather than parts of a unified

⁹¹ No CV409-202, 2012 WL 5389818, at *4-5 (S.D. Ga. Oct. 31, 2012); *see also* Cont'l Cas. Co. v. Brooks, 698 So.2d 763, 765 (Ala. 1997) (determining that various acts of malpractice in the preparation of deeds, wills and power of attorney were related because they led to the singular loss of property that formed the basis of the plaintiff's claim); *Liberty Ins. Underwriters, Inc. v. Camden Clark Mem'l Hosp. Corp.*, Civil Action No. 6:08-CV-01219, 2009 WL 4825199, at *4 (S.D. W.Va. Dec. 8, 2009) (reviewing two claims of misconduct for frivolous prosecution against lawyer in prosecution of claim on behalf of same client against same defendant were related).

⁹² *See* Civil Action No. 3:12CV601-JAG, 2013 WL 3270555, at *4 (E.D. Va. June 26, 2013). *Cf. Prof'l Sols. Ins. Co. v. Mohrlang*, Civil Action No. 07-CV-02481-PAB-KLM, 2009 WL 321706, at *13 (D. Colo. Feb. 10, 2009) (malpractice claims dealing with attorney's structuring of a sale of a family business were not related to his actions regarding a family member's promissory note in the business, where the promissory note was not affected by the sale).

⁹³ 205 F.3d 1258, 1263-64 (11th Cir. 2000); *see also* Cont'l Cas. Co. v. Howard Hoffman & Assoc., 955 N.E.2d 151, 167 (Ill. App. Ct. 2011) (finding that embezzlement by a non-attorney employee of a law firm from accounts of different clients were all related by common *modus operandi*); *Cont'l Cas. Co. v. Law Offices of Melvin James Kaplan*, No. 01 CH 4483, 2005 WL 583733, at *4 (Ill. Cir. Ct. Feb. 3, 2005) (all claims by members of a class action were related where each alleged injuries resulting from firm's common and consistent policy of failing to obtain a discharge of their bankruptcy clients' pre-petition obligations); *O'Quinn P.C. v. Nat'l Union Fire Ins. Co. of Pittsburgh*, 33 F. Supp. 3d 756, 774 (S.D. Tex. 2014) (holding that claims were related where both alleged that the insured law firm had improperly billed clients by the same deduction taken from each client's settlement disbursement).

scheme.⁹⁴ Accordingly, the court found that the claims were not related despite the common modus operandi alleged.⁹⁵

C. Medical Malpractice

The most frequently litigated issue in the context of medical malpractice is whether multiple acts of malpractice upon the same patient are necessarily related. For example, in *Connecticut Indemnity Co. v. Schindler*, the New York Appeals Division found that a dentist's various failures to diagnose a patient's cyst on multiple occasions were all related.⁹⁶ On the other hand, in *Doe v. Illinois State Medical Inter-Insurance Exchange*, the Illinois Court of Appeals found that multiple acts of negligence in the treatment of the same patient spread across policy periods were unrelated.⁹⁷ In the context of nursing homes, at least one

⁹⁴ 648 N.E.2d 175, 179 (Ill. App. Ct. 1995).

⁹⁵ *Id.* at 177; *see also* Fed. Ins. Corp. v. Mmahat, 907 F.2d 546, 554 (5th Cir. 1990) (attorney's failure to advise of the existence of loans-to-one-borrower regulations were unrelated to advice regarding the amount of the limit or aggregate limits and common interest in generating fees did not make them related); *Vill. of Camp Point v. Cont'l Cas. Co.*, 578 N.E.2d 1363, 1374 (Ill. App. Ct. 1991) (each instance of an attorney drafting documents, pleading revenue sharing and sales tax funds to retirement bond while knowing that such a pledge was not statutorily approved, was an unrelated incident); *Chi. Ins. Co. v. Lappin*, 792 N.E.2d 1018, 1028 (Mass. App. Ct. 2003) (attorney's negligence in allowing secretary to perform legal services and steal from clients consisted of "multiple, with discrete, unrelated breaches occurring over many years resulting in discrete, unrelated losses to numerous individuals"); *Am. Guar. & Liab. Ins. Co. v. Chi. Ins. Co.*, 105 A.D.3d 655, 657 (N.Y. App. Div. 2013) (claims made by different clients against lawyer for referral to fraudulent financial services representatives were unrelated where the clients claimed different amounts and the financial services professional who committed fraud were not the same). *Cf. Duckson v. Cont'l Cas. Co.*, Civil No. 14-1465 MJD/JJK, 2015 WL 75262, at *8 (D. Minn. Jan. 6, 2015) (lawyer's alleged misconduct in drafting fraudulent private placement memorandum in the sale of interests in a real estate investment fund were not related to covered work for other entities which also required the drafting of such memoranda).

⁹⁶ 35 A.D.3d 784, 785-86 (N.Y. App. Div. 2006); *see also* N. Am. Specialty Ins. Co. v. Royal Surplus Lines Ins. Co., 541 F.3d 552, 558 (5th Cir. 2008) (concluding "poor nutritional care, followed by shoulder injury, which led to mobility problems, which led to sores, skin ulcers and similar conditions" all were related by pattern of neglect and incompetence); *Friedman Prof'l Mgmt. Co. v. Norcal Mut. Ins. Co.*, 120 Cal. App. 4th 17, 32 (Cal. Ct. App. 2004) (plaintiff's suit for medical malpractice was related to later suit by same plaintiff arising out of same incident for sexual battery and invasion of privacy); *Med. Mut. Liab. Ins. Soc. of Md. v. Goldstein*, 879 A.2d 1025, 1035 (Md. 2005) (finding that contribution action against doctor arose from same incident, "defined . . . as a single act or omission or a series of related acts or omissions[,] as the underlying medical malpractice claim) (internal quotations omitted); *Columbia Cas. Co. v. CP Nat'l, Inc.*, 175 S.W.3d 339, 348 (Tex. App. 2004) (failures of two different doctors at the same facility to diagnose lymphoma, which subsequently led to the patient's death, were related).

⁹⁷ *See* 599 N.E.2d 983, 991 (Ill. App. Ct. 1992) (multiple acts of negligence in treatment of the same patient spread across policy periods were unrelated); *see also* *Ariz. Prop. & Cas. Ins. Guar. Fund v. Helme*, 735 P.2d 451, 458 (Ariz. 1987) (rejecting logical connection, finding that

court has been reluctant to deem related claims made by multiple residents as the result of a single fire.⁹⁸

D. Accountants

Courts generally have found that claims against accountants for negligent failure to detect fraud on multiple occasions have been related. For example, in *Flowers v. Camico Mutual Insurance Co.*, the California Court of Appeals held that in multiple engagements for the plaintiffs, the insured accounting firm allegedly failed to detect and guard against an embezzlement scheme, and all such instances were related because they caused the same loss of funds to the client.⁹⁹ Courts have made similar findings with regard to deliberate fraud. For example in *Tri Core, Inc. v. Northland Insurance Co.*, the U.S. District Court for the Northern District of Texas held that two claims against a tax and investment consulting firm for making false representations to induce the purchase of group life insurance policies and retirement plans were related to an earlier-filed claim because all claims arose from the same retirement plans and the plaintiffs in the later claims were named in the earlier claim.¹⁰⁰

the separate failures by two physicians to look at X-rays in connection with surgery were not related); *Med. Malpractice Joint Underwriting Ass'n v. Lyons*, No. PC 00-5583, 2004 WL 3190049, at *7 (R.I. Super. Ct. Dec. 17, 2004) (finding "related" ambiguous, holding that the doctor's failure to treat patient's diabetes was not related to malpractice claim for amputation of the leg due to the disease the patient became susceptible as a result of untreated diabetes); *Methodist Healthcare v. Am. Int'l Specialty Lines Ins. Co.*, 310 F. Supp. 2d 976, 980 (W.D. Tenn. 2004) (suit against a doctor for medical malpractice was not related to the later-filed suit by same patient for credentialing the doctor sued in the previous action).

⁹⁸ See *Lexington Ins. Co. v. Lexington Healthcare Grp., Inc.*, 84 A.3d 1167, 1179 (Conn. 2014) (holding individual claims arising from the same fire at a nursing home were not related medical incidents because each loss was caused by a unique set of negligent acts, errors, or omissions by insured). Cf. *N. Am. Specialty Ins. Co. v. Royal Surplus Lines Ins. Co.*, 541 F.3d 552, 558 (5th Cir. 2008) (concluding poor nutritional care of resident of nursing home followed by shoulder injury, mobility problems, sores, skin ulcers, and similar conditions all were related by pattern of neglect and incompetence).

⁹⁹ A134890, 2013 WL 2571271, at *2 (Cal. Ct. App. June 12, 2013); see also *Camico Mut. Ins. Co. v. Rooney, Ida, Nolt & Ahern Accountancy Co.*, No. A109589, 2006 WL 866321, at *3 (Cal. Ct. App. Apr. 5, 2006) (finding that three claims for negligent preparation of financial statements and failure to detect Ponzi scheme were related because each claim resulted in the same injury to investors).

¹⁰⁰ No. 3:01-CV-1431-BD, 2002 WL 31548754, at *5 (N.D. Tex. Nov. 12, 2002); see also *Bryan Bros. Inc. v. Cont'l Cas. Corp.*, 704 F. Supp. 2d 537, 543 (E.D. Va. 2010) (rendering multiple claims for thefts by employee were related because same employee used the same scheme and modus operandi to conceal thefts by drafting checks on clients' accounts and manipulating the employers' records). Cf. *Pope v. Chi. Ins. Co.*, No. D040139, 2003 WL 21640888, at *6 (Cal. Ct. App. July 14, 2003) (ruling accountants' recommendations of two individuals were not related because separate types of injuries were suffered at different times as a result of the hiring each and were the result of different types of conflicts of interest); *Cont'l Cas. Co. v. Jones*, No. 3:09-CV-1004-JFA, 2011 WL 3880963, at *6-7 (D.S.C.

E. Insurance Producers

One of the most important factors in determining relatedness in claims against insurance producers is whether the claims were made by the same customer. For example, in *Westport Insurance Corp. v. Key West Insurance, Inc.*, the Eleventh Circuit Court of Appeals held that where the agent of an insurance broker copied and pasted the wrong language into two different policies for the same insured, that the resulting claims were related.¹⁰¹ In contrast, claims by separate customers generally have been deemed not to be related, even where the modus operandi otherwise appeared similar. For example, in *American Automobile Insurance Co. v. Grimes*, the U.S. District Court for the Northern District of Texas held that claims by multiple clients that their life and health insurance agent wrongfully convinced them to make early withdrawals to invest in customer-owned, coin-operated telephones were not related because the agent rendered separate services to each client in distinct meetings, owed each a separate duty, and the insured had duty to consider each claimant's

Sept. 2, 2011) (establishing coverage for one claim against firm was barred because insured had prior knowledge of his own misconduct, therefore coverage for related claims by different claimants was also barred).

¹⁰¹ 259 F. App'x 298, 300 (11th Cir. 2007); see also *Paradigm Ins. Co. v. P & C Ins. Sys., Inc.*, 747 So.2d 1040, 1042 (Fla. Dist. Ct. App. 2000) (claim against insurance agency for failure to procure primary insurance related to claim by same customer for failure to notify excess carrier); *Phila. Indem. Ins. Co. v. AGCO Corp.*, No. 1:10-CV-4148-TWT, 2012 WL 1005030, at *4 (N.D. Ga. Mar. 23, 2012) (the underwriter and funder of warranty claims directed administrator to stop paying the warranty claims on behalf of the customer; all claims against the customer for failure to pay warranty claims were related); *MBIA, Inc. v. Certain Underwriters at Lloyd's, London*, 33 F. Supp. 3d 344, 355 (S.D.N.Y. 2014) (claims against writer of financial guarantee policies were similar enough for insured to submit them as a single claim, and thus could not later argue that they did not constitute a single claim for other purposes under the policy); *Tri Core, Inc. v. Northland Ins. Co.*, No. 3-01-CV-1431-BD, 2002 WL 31548754, at *5 (N.D. Tex. Nov. 12, 2002) (finding two claims against tax and investment consulting firm for making false representation to induce the purchase of group life insurance policies and retirement plans were related to earlier-filed claim where all claims arose from the same retirement plans and the plaintiffs in the later claims were named in the earlier claim). But see *Novapro Risk Sols., L.P. v. TIG Ins. Co.*, D059066, 2012 WL 913243, at *12-13 (Cal. Ct. App. Mar. 16, 2012) (fact that plaintiff in his own claim also was the claimant in litigation involving over 900 other claims was insufficient to create relation between the two, "where the actionable conduct by the insured is distinct in time, character and impact, and is only related to the same insurance program"). Cf. *Anglo-Am. Ins. Co. v. Molin*, 691 A.2d 929, 934 (Pa. 1997) (the trial court had improperly granted an injunction for insurer to pay defense costs of directors of insolvent life insurance company where the record was insufficient to show claims regarding self-dealing, falsifying assets, and improper investing were related to prior claim).

“unique circumstances in determining how to advise them regarding their investments.”¹⁰²

F. Employee Dishonesty

The most important factor in the context of employee dishonesty is the weight that the court gives to the *modus operandi*. Some courts have concluded that all dishonest acts by an employee are related if they share a common *modus operandi*. For example in *Continental Casualty Co. v. Howard Hoffman & Associates*, the Illinois Court of Appeals found that all embezzlements by a non-attorney employee of the insured law firm from accounts of different clients were related by a common *modus operandi*.¹⁰³ In contrast, in *Chicago Insurance Co. v. Lappin*, the Massachusetts Court of Appeals held that an attorney’s negligence in allowing a secretary to perform legal services and steal from clients consisted of “multiple, with discrete, unrelated breaches occurring over many years resulting in discrete, unrelated losses to numerous individuals.”¹⁰⁴

¹⁰² No. Civ.A.5:02-CV-066-C, 2004 WL 246989, at *7 (N.D. Tex. Feb. 10, 2004); *see also* Am. Home Assurance Co. v. Allen, 814 N.E.2d 662, 669 (Ind. Ct. App. 2004) (finding the term “interrelated” ambiguous, and holding that multiple misrepresentations by the same life insurance agent to different plaintiffs over a span of seven years were not interrelated); Allmerica Fin. Corp. v. Certain Underwriters at Lloyd’s, London, 871 N.E.2d 418, 430 (Mass. 2007) (concluding that the claim was not related to class action despite both alleging misrepresentations about future cash values of policies; also alleged wrongdoing took place at different times and locations and involved different policyholders, different sales agents, and separate transactions). *But see* Am. Med. Sec., Inc. v. Exec. Risk Specialty Ins. Co., 393 F. Supp. 2d 693, 707 (E.D. Wis. 2005) (holding thirty-eight claims against health insurer were all related because they all arose from the business decision to market and sell as group health insurance policies the premiums for which it increased on an individual basis according to its assessment of the health and claim history of the individual participant or beneficiary).

¹⁰³ 955 N.E.2d 151, 168 (Ill. App. Ct. 2011); *see also* Aldridge Elec., Inc. v. Fid. & Dep. Co. of Md., No. 04 C 4021, 2008 WL 4287639, at *6 (N.D. Ill. Sept. 10, 2008) (concluding that although the employee used two separate tactics to embezzle money, they had the single aim of diverting money from the profit-sharing plan to herself, thus thefts constituted a series of related acts); N. Fullerton Surgery Ctr. v. Franklin Mut. Ins. Co., No. L-45-11, 2013 WL 5762560, at *6 (N.J. Sup. Ct. Oct. 25, 2013) (issuing persistent and repetitive thefts by nurse administrator at surgery center were all related); Bryan Bros. Inc. v. Cont’l Cas. Corp., 704 F. Supp. 2d 537, 543 (E.D. Va. 2010) (discussing multiple claims for thefts by employee were related because the same employee used the same scheme and *modus operandi* to conceal thefts by drafting checks on clients’ accounts and manipulating the employers’ records).

¹⁰⁴ 792 N.E.2d 1018, 1028 (Mass. Ct. App. 2003); *see also* Allmerica Fin. Corp. v. Certain Underwriters at Lloyd’s, London, 871 N.E.2d 418, 430 (Mass. 2007) (finding that the insurer failed to prove on summary judgment that the claim was related to the class action despite both alleging misrepresentations about future cash values of policies sold and the class action alleged scheme of misrepresentations perpetrated through agents; also alleged wrongdoing took place at different times and locations and involved different policyholders, different sales agents, and separate transactions); Auto. Lenders Acceptance Corp. v. Gentilini Ford,

Courts also have differed as to the importance of a change in *modus operandi* in the dishonest acts committed by an employee. For example, in *APMC Hotel Management, LLC v. Fiduciary & Deposit Co. of Maryland*, the U.S. District Court for the District of Nevada held that all thefts by the hotel's CFO were related despite using three different general methods to commit the thefts.¹⁰⁵ In contrast, the Minnesota Supreme Court held in *American Commerce Insurance Brokers, Inc. v. Minnesota Mutual Fire & Casualty Co.* that each act by an employee of issuing checks to herself formed one series of acts related by a common *modus operandi*, but that each act by the same employee of taking funds received from customers as insurance premiums formed part of a separate series of acts related by a different *modus operandi*.¹⁰⁶

G. *Design Contractor*

Due to the small number of decisions on whether claims against design contractors are related, it is difficult to discern a pattern beyond the general principles described above.¹⁰⁷ For example, in *URS Corp. v. Travelers Indemnity Co.*, the U.S. District Court for the Eastern District of Michigan found that structural steel flaws and mechanical design drawing flaws in two schools designed by the insured were related because all arose from the insured's common failure to properly perform duties required in their agreement with the school system.¹⁰⁸ But the U.S. District Court for the Southern District of New York reached a seemingly incongruous result in *Dormitory Authority of New York v. Continental Casualty Co.*, which held that a claim against an insured architect and engineering firm for problems with ice control on the exterior of a building was not related to a previous claim for steel grit tolerance with the same building where two different design teams worked on the respective issues, the two issues involved different architectural considerations,

Inc., 854 A.2d 378, 397 (N.J. 2004) (where the car dealer's finance management submitted fraudulent applications to lender to induce it to finance car sales to twenty-seven different high risk customers, the transactions were not a series of related acts but were distinct sales to separate purchasers notwithstanding the common *modus operandi*). Cf. *Pope v. Chi. Ins. Co.*, No. D040139, 2003 WL 21640888, at *4 (Cal. Ct. App. July 14, 2003) (accountants' recommendations of two individuals, an investment advisor and a surgeon, were not related because separate types of injuries were suffered at different times as a result of hiring each, and were the result of different types of conflicts of interest).

¹⁰⁵ No. 2:09-CV-2100-LDG-VCF, 2011 WL 5525966, at *5 (D. Nev. Nov. 10, 2011).

¹⁰⁶ 551 N.W.2d 224, 231 (Minn. 1996).

¹⁰⁷ *Supra* Part II.C.

¹⁰⁸ 501 F. Supp. 2d 968, 977 (E.D. Mich. 2007).

resulted in different harms at different times, and the later issue could not occur until the prior issue had been resolved.¹⁰⁹

H. *Employment Discrimination/Misconduct*

Similar to *modus operandi*, courts in this context have found that claims which allege the same type of discrimination typically are related. For example, in *KB Home v. St. Paul Mercury Insurance Co.*, the U.S. District Court for the Southern District of Florida found that multiple claims for sexual harassment were related because they all arose from the same work outing to a strip club, but a racial discrimination claim was unrelated.¹¹⁰ Similarly, in *Vozzcom, Inc. v. Beazley Insurance Co.*, two employees sued over the insured employer's failure to pay overtime for wages worked in excess of forty hours a week during the same time period, and their claims were deemed related because their employer had wronged them in the same fashion.¹¹¹

I. *Sexual Molestation*

No decision has been found in which claims were deemed to be related solely because each generally alleged that sexual abuse had occurred, or that the insured's negligent hiring or failure to supervise allowed the abuse to occur. Instead, the issue more frequently turns on whether the claims are related by a common victim and/or perpetrator. Specifically, courts have found that all claims by a single victim are

¹⁰⁹ No. 12 Civ. 281(KBF), 2013 WL 840633, at *9 (S.D.N.Y. Mar. 5, 2013).

¹¹⁰ 621 F. Supp. 2d 1271, 1277 (S.D. Fla. 2008); *see also* Regal-Pinnacle Integrations Indus., Inc. v. Phila. Indem. Ins. Co., Civ. No. A. 12-5465 (NLH/JS), 2013 WL 1737236, at *7 (D.N.J. Apr. 22, 2013) (holding later filed lawsuit for sexual harassment and discrimination based upon gender related to previously-filed administrative action alleging only discrimination where pleadings in administrative action served as the "foundation and logical basis" for the civil action).

¹¹¹ 666 F. Supp. 2d 1321, 1329 (S.D. Fla. 2009); *see also* Westrec Marina Mgmt., Inc. v. Arrowood Indem. Co., 163 Cal. App. 4th 1387, 1394 (Cal. Ct. App. 2008) (lawsuit alleging employment discrimination related to claim letter sent by plaintiff's attorney before initiation of lawsuit); Farmington Cas. Co. v. United Educators Ins. Risk Retention Grp., Inc., 117 F. Supp. 2d 1022, 1026 (D. Colo. 1999) (first and second lawsuit filed by the same plaintiff regarding her termination from a university were related); Cmty. Health Ctr. of Buffalo, Inc. v. RSUI Indem. Co., No. 10-CV-813S, 2012 WL 713305, at *3-4 (W.D.N.Y. Mar. 5, 2012) (former employer brought suit for discrimination, and later brought complaint under FCA which included retaliation claim; retaliation claim in FCA complaint was related to prior lawsuit, but claims on behalf of the government were not). *Cf.* Royal Indem. Co. v. C.H. Robinson Worldwide, Inc., No. A08-0996, 2009 WL 2149637, at *6 (Minn. Ct. App. July 21, 2009) (EEOC claims which were denied certification with class action lawsuit against the insured were related to the class action because "but for these plaintiffs being dismissed from the class-action suit, no individual claims would have been filed").

related, even if the victim was subjected to abuse on multiple occasions.¹¹² At least one court has held that all acts of abuse by a single perpetrator against multiple students were related, however that decision turned on a definition of “sexual abuse occurrence,” which stated that all such acts would be deemed to be related “regardless of the number of persons involved.”¹¹³ Outside of the context of relatedness, courts have varied regarding the number of occurrences deemed to have occurred where a perpetrator abuses multiple victims and/or the acts of abuse stretched across multiple policy periods.¹¹⁴

J. *Public Entities*

Courts have not articulated any factors or principles unique to determinations of whether claims against public entities are related.¹¹⁵ Nonetheless, courts may be more receptive to arguments made by those public entities, particularly where an adverse judgment would come at the expense of the taxpayers.

¹¹² See *TIG Ins. Co. v. Smart Sch.*, 401 F. Supp. 2d 1334, 1346 (S.D. Fla. 2005) (teacher’s lewd touching of student during one policy period related to rape of the same student during the second policy period); *Beaufort Cty. Sch. Dist. v. United Nat’l Ins. Co.*, 709 S.E.2d 85, 91 (S.C. Ct. App. 2011) (multiple sexual abuses of a single victim were related while abuses of multiple victims were unrelated).

¹¹³ See *TIG Ins. Co. v. Merryland Childcare and Dev. Ctr., Inc.*, No. 04-2666 B, 2007 WL 316571, at *4 (W.D. Tenn. Jan. 31, 2007) (that all abuses by same perpetrator against multiple students were related).

¹¹⁴ See GREGORY L. ARMOUR, *COVERAGE AND LIABILITY ISSUES IN SEXUAL MISCONDUCT CLAIMS* 4-5 (5th. ed. 2010) (analyzing a fifty state survey of law related to coverage for sexual abuse); see also Rebecca R. Haller, *Sexual Abuse Claims Against Nonparticipants*, *FOR THE DEFENSE* 70, 70 (May 2013) (discussing the differing views of courts concerning allegations of sexual abuse made against persons and organizations were not engaged directly in the claim).

¹¹⁵ See, e.g., *Lexington Ins. Co. v. St. Bernard Parish Gov’t*, 548 F. App’x 176, 180 (5th Cir. 2013) (finding parish demolition of multiple properties at different times were all related because all resulted from the same ordinance condemning properties); *Borough of Moosic v. Darwin Prof’l Underwriters, Inc.*, No. 3:11-CV-1689, 2012 WL 2527279, at *6 (M.D. Pa. June 29, 2012) (providing action against public officials was related to prior action where both were “rooted in same zoning dispute, concerned the same real estate (the Jack Williams and Zaloga properties), concerned same principal parties (the Zalogas, Borough, and James Durkin), and involved Plaintiffs’ alleged refusal to address Zalogas’ complaints regarding particular zoning violations”; later the claim was a direct consequence of insureds’ alleged failure to remedy issues raised in first suit); *Upper Allen Twp. v. Scottsdale Ins. Co.*, Civ. A. No. 1: CV-92-01557, 1994 WL 772759, at *11 (M.D. Pa. Apr. 29, 1994) (related acts provision contained in provision addressing insured’s responsibility to pay deductibles could not affect when claims against the township regarding building code enforcement were deemed made); *Reeves Cty. v. Houston Cas. Co.*, 356 S.W.3d 664, 675 (Tex. App. 2011) (claim against county for sheriff’s retaliatory interference with claimant’s ability to act as a bail bondsman related to a later-filed suit by same claimant for sheriff’s continued retaliatory interference following settlement of the first claim).

IV. CONCLUSION

As noted in the introduction, courts and commenters both have remarked on the perceived lack of consistency between decisions on Related Acts Provisions.¹¹⁶ However, it does the courts a disservice to dismiss the precedent on this subject as arbitrary or entirely outcome oriented. As this Article has attempted to demonstrate, trends can be found between similar fact patterns, which in turn will develop into consistent principles in applying these provisions. It is my hope that this Article has helped the reader gain a greater understanding of this developing area of insurance coverage law, and – more importantly – to aid the reader in finding the decisions which will prove their case for or against relatedness.

For more of John Zulkey’s work on Related Acts Provisions, please see *Related and Interrelated Acts Provisions: Determining Whether Your Claims Are Apples and Oranges, or Peas in a Pod*,¹¹⁷ *Related Acts Provisions*,¹¹⁸ and the Defense Research Institute’s Compendium of Professional Liability (John Zulkey authored the Illinois and Missouri chapters of this state-by-state survey of professional liability law, which includes the respective states’ decisions on Related Acts Provisions). Also recommended is Mark E. Cohen’s *How Many Degrees of Separation? Determining the Degree of “Relatedness” Required for Multiple Claims to be Deemed “Related” Under Related or Interrelated Acts Provisions in Claims-Made Policies*, in the August 28, 2012 issue of *DRI Today*. An excellent source for updates on future decisions discussing Related Acts Provisions is Kevin M. LaCroix’ *The D&O Diary*, available at <http://www.dandodiary.com/>.

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¹¹⁶ See, e.g., Chesler & Jack, *supra* note 2, at 1 (“[I]t is likely impossible to reconcile all of the results . . . in the . . . cases [dealing with related acts provisions] . . . such that each is consistent with a single set of principles.”); Matthew L. Jacobs & Brian S. Scarbrough, *The “Same, Related, or Interrelated” Acts or Claims Provision: Insurers’ Efforts to Expand the Reasonable Application of Such Provisions to Deny or Otherwise Limit Coverage Under Claims-Made Policies*, 23 ENV’T L CLAIMS J. 126 (2011) (describing the case law on related acts provisions as “discordant and often confusing”).

¹¹⁷ John Zulkey, *Related and Interrelated Acts Provisions: Determining Whether Your Claims Are Apples and Oranges, or Peas in a Pod*, 50 TORT TRIAL & INS. PRAC. L.J. 1 (Fall 2014).

¹¹⁸ John Zulkey, *Related Acts Provisions*, FOR THE DEFENSE (May 2015).

