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Related Or Not Related? Delaware Supreme Court Weighs In On What Constitutes A "Related" Claim

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Highlights

- The Delaware Supreme Court took a broad view of relatedness, holding that an SEC investigation and later class action were "related claims" despite that they involved different claimants, asserted different legal theories, and sought different relief
- The decision reaffirmed the "meaningful linkage" test, stating that claims are "related" if they involve "common underlying wrongful acts"
- The content and level of detail in the insured's notice of claim or circumstances can be an important factor in determining whether claims are related

The Delaware Supreme Court recently handed down an insurance coverage decision addressing a question that has significant practical importance for both insurers and policyholders: What makes a wrongful act "related to" a prior wrongful act? The answer to this question can dictate under which policy period a claim is covered—or even whether it is covered at all.

The insured in *In Re Alexion Pharmaceuticals, Inc.* had two D&O

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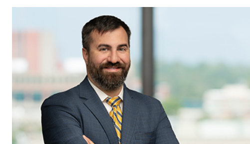

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coverage towers with substantially similar insurers: Tower 1, providing $85 million in coverage from June 2014 to June 2015, and Tower 2, providing $105 million in coverage from June 2015 to June 2017.

In March 2015, the Securities and Exchange Commission (SEC) issued a formal investigation order against Alexion regarding several potential violations of federal securities law, including inaccurate annual reports, failure to maintain adequate books and records, failure to maintain an adequate system of internal accounting controls, and bribing foreign officials and political parties. In May 2015, as part of that investigation, the SEC served Alexion with a subpoena and document preservation demand. Alexion tendered notice of the subpoena to its Tower 1 insurers, describing the focus of the document requests and observing that the subpoena could lead to other government investigations or "private litigations."

Importantly, the primary insurer acknowledged Alexion's notice as a "notice of circumstances" rather than a "notice of claim" and explicitly stated that no claim had yet been made against Alexion.

That observation lasted until December 2016, when Alexion stockholders filed a class action securities suit alleging that the company's sales, marketing, and lobbying tactics violated Sections 10(b) and 20(a) of the Exchange Act and SEC Rule 10b-5. Alexion noticed the class action to Tower 2, and the primary insurer initially accepted coverage. But the primary insurer later reassigned the claim to Tower 1 because the class action "arose from the circumstances and anticipated Wrongful Acts reported during the 2014-2015 Policy Period, as well as many of the same Wrongful Acts and Interrelated Wrongful Acts."

After Alexion settled with the SEC (for $21.5 million) and the class action plaintiffs (for $125 million), it demanded that the Tower 2 insurers cover the class action settlement up to the $105 million total policy limits. When they refused, Alexion sued for breach of contract. The trial court granted partial summary judgment for Alexion, agreeing that the SEC subpoena and the class action were insufficiently connected and that the class action should be covered under Tower 2.

The insurers appealed, arguing that the trial court applied the wrong standard; instead of evaluating the two matters for "meaningful linkage," it should have asked whether the Securities Class Action arose from "any Wrongful Act, fact, or circumstance" covered in Alexion's 2015 Notice. The insurers further argued that the 2015 Notice was a "notice of circumstances" rather than a claim, and pointed out that it expressly noted the potential for future civil claims arising out of the same issues.

The Delaware Supreme Court agreed with the insurers and reversed.

It first looked to the policies' notice provision, which states that if the insureds "first become aware of facts or circumstances which may reasonably give rise to a future Claim covered under this Policy, and if the Insureds give written notice to the Insurer" during the policy period, then any "Claim which arises out of such Wrongful Act shall be deemed to have been first made at the time such written notice was received by the Insurer." The Court found that this provision was not ambiguous and benefits insureds by allowing them to "lock in existing insurance for later related claims even though the facts and circumstances have yet to occur or might be somewhat different."

Likewise, the limit of liability provision states that "[a]ll Claims arising out of the same Wrongful Act and all Interrelated Wrongful Acts . . . shall be deemed to be one Claim . . . first made on the date the earliest such Claims is first made," which the Court read to mean that "all Claims arising out of a properly noticed Wrongful Act or Interrelated Wrongful Act are treated as a single Claim made on the earliest date the insurer received the insured's written notice."

The policies did not define the "arises/arising out of" phrases in these and other policy provisions, so the Court interpreted them "as requiring some 'meaningful linkage between the two conditions imposed in the contract.'" In other words, "if the Securities Class Action is meaningfully linked to any Wrongful Act, including any Interrelated Wrongful Act, disclosed by Alexion in the 2015 Notice, the Securities Class Action is covered by Tower 1."

The Court concluded there was such a "meaningful link": both the 2015 Notice and the Securities Class Action "involve the same underlying wrongful act – Alexion's improper sales tactics worldwide, including its grantmaking efforts in Brazil and elsewhere." The lower court's first mistake, the Court stated, had been its treatment of the 2015 Notice as a notice of claim, rather than a notice of circumstances. That error had led to another: the trial court narrowly focused on the wrongful acts alleged in the SEC subpoena, rather than considering all of the wrongful acts disclosed in the notice of circumstances.

The 2015 Notice disclosed the SEC's investigation as well as the subpoena and described the potential consequences of that investigation, including possible "private litigations." Because both the SEC investigation and the class action arose from Alexion's grantmaking activity and foreign business practices—the same underlying acts—it did not matter that they involved different claimants, asserted different legal theories, and sought different relief: "It is the common underlying wrongful acts that control."

Takeaways

Insurers use "arises/arising out of" language in many policies and contexts, so the Alexion decision will likely have implications beyond the D&O space in matters involving other types of claims-made policies such as environmental liability, professional liability, malpractice, and employment practices liability. It will be particularly relevant in industries that tend to attract both governmental enforcement actions and civil litigation—banking and investment, manufacturing, and transportation.

And although the decision may not have been favorable for Alexion itself, it may prove to be helpful to policyholders in the long run in certain instances. In many circumstances, as the Alexion Court observed, a policyholder may choose to give notice of circumstances before an issue has risen to the level of a claim in order to "lock in" favorable coverage. Insureds may find, notably, that the content of that notice could be critical: this might include questions of whether the notice includes enough information to satisfy the notice requirement, without providing so much detail that it invites the insurer to try to escape coverage by carving off the resulting claim off as "unrelated."

On the flip side, an overly broad notice of circumstances could give the

insurer an opening to shoehorn unrelated claims in with the noticed circumstances to take advantage of a lower or exhausted policy limit.

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