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In Reversal, Del. Sup. Ct. Holds Subpoena and Securities Suit Interrelated

By Kevin LaCroix on February 11, 2025

In a closely watched case, the Delaware Supreme Court has reversed a lower court holding that a prior SEC subpoena and a later securities class action lawsuit were not interrelated. The Supreme Court held, contrary to the lower court, that the allegations in the subsequent securities suit were "meaningfully linked" to the alleged wrongful acts referenced in the insured's prior notice of the subpoena. While the Supreme Court's opinion provides clarification on important recurring "interrelatedness" issues, its ultimate holding may in the end provide relatively little guidance for other future wrestling with "interrelatedness" disputes. A copy of the Delaware Supreme Court's February 4, 2025, opinion can be found **here**.

Background

Alexion is a pharmaceutical company. In May 2015, the company was served with an SEC subpoena seeking documents related to the company's FCPA compliance. The subpoena also requested documents pertaining to recalls of one of the company's products, Soliris. In July 2020,

Alexion entered into a settlement with the SEC, which Alexion agreed to pay about $21.5 million. In its summary of findings, the agency noted that its investigation arose out of the company's violations of the books and records provisions of the FCPA. The SEC found that the company had made improper payments to government officials in Turkey and Russia to obtain beneficial treatment of Soliris. The SEC also found that the company had internal control deficiencies that had led to books and records violations concerning certain payments in Brazil and Colombia.

In December 2016, Alexion was sued in a securities class action lawsuit alleging that the company had misled investors about the company's sales practices concerning Soliris, and that contrary to the company's disclosures, the company had employed illegal and unethical sales practices to promote the use of Soliris. The securities complaint specially referenced, among many other allegations, the company's sales practices in Brazil, in which the company allegedly used a patient advocacy group to manipulate Brazil's pharmaceutical reimbursement policies and to maximize the company's reimbursement recoveries from the Brazilian government. The securities suit ultimately settled for $125 million.

The Insurance Issues

The insurance dispute involved two programs of D&O insurance: the 2014-2015 program (the one in force at the time the SEC served its subpoena) and the 2015-2017 program (the one in force when the securities class action lawsuit was filed). Each of these programs consisted of a layer of primary D&O insurance and several layers of excess D&O insurance. Because of the differences in the two towers, the limits of liability available under the 2015-2017 program provided $20 million more coverage than the 2014-2015 program.

In June 2015, Alexion sent the insurers in the 2014-2015 tower notice of its receipt of the subpoena. The 2015 notice specifically described the various categories of documents the subpoena sought, specifically noting that it related to the company's activities in a number of countries, and also specifically noted that the subpoena foreshadowed future possible governmental investigations or other proceedings, including lawsuits brought by private litigants.

The lineup of insurers on the two programs was largely identical; however, several of the excess insurers were on the 2015-2017 program, but not on the 2014-2015 program. These excess insurers contended that the subsequent securities lawsuit was related to the prior SEC subpoena and therefore that the later securities should be deemed first at the time of the subpoena – that is, during the policy period of the 2014-2015 program, not during the policy period of the 2015-2017 program. Coverage litigation ensued. The parties filed cross-motion for summary judgment on the question of whether or not the earlier subpoena and the later securities suit are or are not related.

The relevant policy language defines the term Interrelated Wrongful Acts as "all Wrongful Acts that have as a common nexus any fact, circumstance, situation, event, transaction, cause or series of related facts, circumstances, situations, events, transactions or causes."

The Superior Court's Ruling

As discussed **here**, in a detailed February 15, 2024, Opinion, Delaware Superior Court Judge Paul R. Wallace granted Alexion's motion for summary judgment, holding that, because the subpoena and the securities lawsuit are not "materially linked," the subpoena and the securities suit are not related; the securities suit does not relate back to the subpoena; and therefore the 2015-2017 program is the one that applies to the securities suit. The insurer defendants appealed.

The Delaware Supreme Court's Ruling

In a February 4, 2025 opinion written by **Chief Justice Collins J. Seitz, Jr.** for a unanimous five-judge panel, the Delaware Supreme Court reversed the Superior Court's ruling, based on its finding that the securities class action lawsuit was "meaningfully linked to the wrongful acts disclosed in the 2015 Notice."

In reaching this conclusion, the Supreme Court held that the relevant policy provisions are "unambiguous." The Court also agreed that the appropriate standard in determining whether or not facts are interrelated is whether there is a "meaningful linkage," and noted further that in order for sets of facts to be sufficiently "linked," the linkage between the facts "must be meaningful and not tangential."

The Supreme Court said further that the Superior Court erred in treating the 2015 notice as a *Claim*, rather than as a *notice of circumstances that may give rise to a claim*. By treating the 2015 notice as a claim, rather than as a notice of circumstances, the Supreme Court said, the Superior Court "narrowed the scope of inquiry to the wrongful acts alleged in the SEC subpoena." Instead, the Supreme Court said, the Superior Court "should have focused on Alexion's disclosure of the SEC investigation in the 2015 Notice." The Superior should have, the Supreme Court said, asked whether "the Securities Class Action is meaningfully linked to any of the alleged wrongful acts disclosed in the 2015 Notice," rather than to the subpoena itself.

Based on its own analysis and comparison, the Supreme Court found that the securities class action "is meaningfully linked to the wrongful acts disclosed in the 2015 Notice." Both, the Court said, "involve the same alleged wrongdoing – Alexion's grantmaking activities worldwide." The 2015 Notice "also disclosed that the SEC subpoena sought information on Alexion's activities, policies, and procedures worldwide, especially in Brazil, Japan, Russia and Turkey." The securities

lawsuit, the Court said, "alleged the same wrongdoing investigated by the SEC and disclosed by Alexion in the 2015 Notice." The complaint explicitly referred to the SEC subpoena and the SEC's foreign corrupt practices investigation, including with reference to Alexion's grantmaking activities in Brazil, Columbia, Japan, Russia, and Turkey."

Alexion had tried to argue that the SEC subpoena differed from the securities class action lawsuit, focusing on specifics of the securities suit complaint, which Alexion argued rendered the supposed linkage between the two to be "tangential." The Supreme Court said it was unpersuaded:

> Both the SEC investigation 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. Because both the SEC investigation and the Securities Class Action involve the same conduct, it does not matter whether the SEC and the stockholder plaintiffs are different parties, asserted different theories of liabilities, or sought different relief. It is the common underlying wrongful acts that control. … It is true that the SEC investigation and the Securities Class Action alleged non-identical time periods. But while not perfectly identical, they do meaningfully overlap.

Because the Supreme Court found that a meaningful linkage exists between the Securities Class Action and the SEC investigation disclosed by Alexion in the 2015 Notice, the securities suit is "deemed to have been first made at the time [of] the 2015 Notice" – that is, during the policy period of the 2014-2015 program.

Discussion

This is the rare Delaware court decision that went in favor of the insurers and against the policyholder. But while the Delaware courts have a well-earned reputation for being policyholder friendly (as arguable evidenced by the Superior Court's opinion in this case), there is also a notable pattern of the Delaware Supreme Court reversing at least some policyholder-friendly rulings of the Superior Court.

There are some aspects of the Supreme Court's opinion that will be helpful to all litigants in future relatedness disputes in the Delaware courts. For example, the Supreme Court did clear up that the Superior Court should not have treated the SEC subpoena as a claim, but rather should have treated the 2015 Notice as a notice of circumstances that could give rise to a claim. The Supreme Court did also clarify that there can be difference between two sets of circumstances, even important differences, yet the two circumstances can nevertheless be found to be "meaningfully linked."

But in the end, what we have here is that one Court (the Superior Court) found that the two sets of circumstances were *not* "meaningfully linked," while the another Court (the Supreme Court) found that the two sets of circumstances *are* "meaningfully linked." I am sure the excess carriers here, at least, believe the Supreme Court got it right. The problem for everyone is that the "meaningful linkage" standard still leaves significant areas for dispute; in a sense the "meaningful linkage" standard changes the question of what makes something related into a question of whether a link is "meaningful." These kinds of questions not only are inherently factual, they also can be very much in the eye of the beholder.

The inherent, imbedded problem in "interrelatedness" issues is that it is not always clear which side of the issue is going to be policyholder favorable and which side is going to be insurer favorable.

Sometimes, as here, the policyholder wants two sets of circumstances to be found not be interrelated, while the insurer will want them to be interrelated. In other circumstances, it may be the policyholder arguing for interrelatedness – for example, to avoid having multiple unrelated claims triggering multiple self-insured retentions.

That is one reason why the many court decision on interrelatedness are all over the map; parties find it expedient to make different or even conflicting arguments in different sets of circumstances. There undoubtedly will be many future disputes in Delaware courts about whether two sets of circumstances are or are not "meaningfully linked." I suspect both sides will try to cite this Supreme Court decision to try to support their arguments.

As I have said before in my **meditations** on relatedness issues, relatedness is an issue that recedes away from you the more you try to think about it. It is very hard to generalize about the court decisions in this area, as they are so often a reflection of the specific policy language at issue and the specific fact pattern involved. Parties and courts will continue to struggle as they try to decide what connection between two matters is sufficient to make them related.

Special thanks to the several loyal readers who sent me a copy of the Delaware Supreme Court's opinion in this case.

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