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Delaware Supreme Court: SEC Investigation of Drug Company Was Related to Securities Action, Superior Court Misapplied "Meaningful Linkage" Standard

Alexion Pharmaceuticals develops therapies for people living with rare disorders. It allegedly engaged in extreme business practices to retain its uncommon but highly lucrative patients.

In March 2015, the Securities and Exchange Commission issued a formal investigation order against Alexion for possible violations of federal securities laws. This included inaccurate reporting in its annual and quarterly reports, failure to maintain adequate books and records, failure to maintain adequate accounting controls, and bribery.

Two months later, the SEC served Alexion with a subpoena seeking all documents related to its grantmaking worldwide, recalls of certain lots of its drug Soliris, lobbying efforts, and gifts to public health institutions and government agents.

Alexion was insured for wrongful acts under successive claims-made director and officer liability policies. Its first tower of coverage was effective from June 27, 2014, to June 27, 2015 (Tower 1). Its second tower was effective from June 27, 2015, to June 27, 2017 (Tower 2).

Alexion notified its Tower 1 insurers of the SEC's subpoena on June 18, 2015 (2015 Notice). It told its insurers that other regulatory proceedings and private lawsuits could follow.

On December 29, 2016, during the Tower 2 coverage period, Alexion's stockholders filed a federal securities class action lawsuit in Connecticut federal court. They cited a series of unethical and illegal sales and lobbying practices, including obtaining data from partner labs to identify potential customers, deploying extreme fear tactics to garner patients, and funding foreign organizations. Alexion notified its Tower 2 insurers of the securities class action on January 5, 2017.

Alexion settled with the SEC in July 2020. It later settled the securities class action in September 2023.

Chubb, the primary insurer in both towers, assigned the securities class action to Tower 1 because it arose from interrelated wrongful acts reported under the 2014-2015 policy period. The Tower 2 insurers also asserted the prior notice exclusion. Because Tower 2 had more coverage than Tower 1, Alexion demanded that the securities class action settlement be handled under Tower 2.

A dispute arose over which tower applied. Unhappy with the insurers' position, Alexion filed a coverage action in Delaware Superior Court. It argued that the securities class action was unrelated to the SEC's subpoena.

In assessing the issue, the Superior Court applied the "meaningful linkage" standard. Under that standard, the linkage between the two claims must be meaningful, not tangential. The Superior Court determined that the SEC subpoena and the securities class action were only loosely connected. Even though the securities class action plaintiffs considered the SEC's findings to be useful evidence, the Superior Court did not see a meaningful link because the class action plaintiffs did not use the SEC's findings to prove their allegations. The court placed the Securities Class Action in Tower 2.

The insurers appealed. They argued that the Superior Court erred in treating the 2015 Notice of the subpoena as a "claim," instead of a disclosure of facts or circumstances that may give rise to a future claim. The insurers contended that the Superior Court improperly framed the inquiry as whether the SEC Subpoena was meaningfully linked to the Securities Class Action. The insurers argued that the proper inquiry was whether the Securities Class Action arose from "any Wrongful Act, fact, or circumstance" that was the subject of Alexion's 2015 Notice. Indeed, the insurers argued, Alexion foreshadowed in its 2015 Notice the potential for future claims related to the SEC subpoena.

Looking to the language of the policies, the Delaware Supreme Court found that the policies required all Claims arising out of a properly noticed Wrongful Act or Interrelated Wrongful Act were to be treated as a single Claim made on the earliest date the insurer received the insured's written notice. The

court interpreted "arising out of" as requiring some meaningful, and not tangential, linkage. So the Delaware Supreme Court agreed with the Superior Court that the "meaningful linkage" standard applied. But it found that the Superior Court misapplied it.

The Delaware Supreme Court found that the securities class action was meaningfully linked to the wrongful acts disclosed in the 2015 Notice because both involved the same underlying wrongdoing – Alexion's improper sales tactics worldwide, including its grantmaking efforts in Brazil and elsewhere. Because both the SEC investigation and the Securities Class Action involved the same conduct, it did not matter, the court said, 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.

The Delaware Supreme Court said that the Superior Court erred in identifying the objects of comparison. In focusing its inquiry on the link between the SEC subpoena and the securities class action, the lower court found that the securities class action was unrelated to a "previous claim."

But the Delaware high court said the 2015 Notice of the subpoena was a "notice of circumstances," not a notice of "claim." By treating the 2015 Notice as a "claim," the Superior Court improperly narrowed the scope of the inquiry to the wrongful acts alleged in the SEC subpoena. The court instead should have focused on Alexion's disclosure of the SEC investigation and should have asked whether the securities class action is meaningfully linked to any of the alleged wrongful acts disclosed in the 2015 Notice.

Thus, the Delaware Supreme Court found that a meaningful linkage existed between the securities class action and the SEC investigation as disclosed by Alexion in its 2015 Notice. As the Securities Class Action claim was deemed to have been first made at the time of the 2015 Notice, these matters fell under the Tower 1 coverage. The prior notice exclusions in the Tower 2 policies applied.

The case is *In re Alexion Pharms., Inc. Ins. Appeals*, Nos. 154, 2024 and 157, 2024 (Del. Feb. 4, 2025).

California Appellate Court Finds No Direct Physical Loss from 2019 Wildfire Debris

After a wildfire near their Los Angeles home in 2019, the insureds submitted a claim to their property insurer, Wawanesa General Insurance Co. The fire resulted in debris but not burn damage to the property. A dispute arose over whether there was "direct physical loss to property." The trial court granted summary judgment for the insurer. The insureds appealed.

The appellate court affirmed. The court held that there was no evidence of any direct physical loss to the insureds' property. As the court observed, "direct physical loss" requires an alteration of the property itself that is physical in nature and none happened here. The wildfire debris did not alter the property and was easily cleaned or removed. The court equated this case with Covid-19 cases in which there was no demonstration of direct physical loss to property.

The insureds' expert witness stated that ash could create physical damage. But the court found that the insureds ignored the witness's qualification – that ash only caused physical damage when it becomes wet – and no such damage existed on the insureds' property.

Wawanesa had paid the insureds $20K for professional cleaning services (which they did not use because they cleaned the property themselves). That the insurer made certain payments to the insureds, the court noted, was irrelevant to the "direct physical loss" issue, as insurers often adjust claims for reasons entirely unrelated to their merits.

For these reasons, the appellate court affirmed the lower court holding.

The case is *Gharibian v. Wawanesa General Ins. Co.*, B325859 (Cal. Ct. App. Feb. 7, 2025).

Third Circuit Finds No Accident for Emotional Distress Claim Involving Intentional Concealment of Murder Victim and Weapon

After their adult son shot and killed his twenty-two-year-old former classmate at their house, two homeowners allegedly slowed discovery of the murder weapon and the victim's body. Based on that delay, the victim's mother sued the homeowners in state court for the intentional infliction of emotional distress.

The homeowners sought a defense under a homeowners policy with Chubb and an umbrella policy with Hudson Insurance Company. Both policies imposed a duty on the insurers to defend the insureds against claims related to "accidents." Neither policy defined "accident."

The insurers denied coverage on the basis that there was no "accident." The homeowners sued for coverage, and the federal district court ruled for the insurers. The homeowners appealed.

The Third Circuit affirmed. Applying Pennsylvania law, the court observed that the term "accident" has been interpreted to mean "the culmination of forces working without design, coordination or plan." The allegations against the homeowners did not involve chance. Rather, the homeowners allegedly acted intentionally by concealing the handgun that would have implicated their son and led to the earlier discovery of the deceased's body.

Thus, the Third Circuit found that the district court did not err in rejecting the claims for coverage under the Chubb and Hudson policies. The court added that any duty to defend would be unenforceable under Pennsylvania law, which prohibits insuring criminal acts as contrary to public policy.

The case is *Rosenberg v. Hudson Ins. Co*., No. 22-3275 (3d Cir. Jan 13, 2025).

Case Note: The case is unpublished and should not be cited as precedent under Third Circuit Internal Operating Procedure Rule 5.7. Federal Rule of Appellate Procedure 32.1 governs the citation to unpublished opinions.

Florida Federal District Court Finds No Coverage For Road Rage Gunshot Wound

George Hurley drove his Suzuki Samurai in a manner that his neighbor, David Ruttinger, found unacceptable. Bryan Sieben was a passenger in the Samurai. Ruttinger fired a shotgun towards the car. Hearing a gunshot, Hurley stopped the car, and Sieben got out. Ruttinger fired again, this time hitting Sieben and injuring him.

Sieben sued Hurley for negligently causing the confrontation by driving recklessly, and Ruttinger for negligence.

The insurance question was whether Hurley's auto insurer, State Farm, had a duty to defend Hurley in Sieben's suit.

The case was brought in Florida federal court, where the incident occurred. But the court applied South Carolina law because that's where Hurley bought the policy. The court found no coverage under South Carolina Supreme Court precedent.

In 2022, the South Carolina Supreme Court clarified that gunshot injuries do not arise out of the ownership, maintenance, or use of an automobile. First, gunshots are not foreseeably identifiable with the normal use of an automobile. Second, the act of firing a weapon into another vehicle constitutes an act of independent significance, breaking the chain of causation and thus precluding coverage.

For these reasons, the court held that State Farm had no duty to defend or indemnify the insured for the underlying claims.

The case is *State Farm Mut. Auto. Ins. Co. v. Hurley*, 24-cv-138 (N.D. Fla. Feb. 24, 2025).

Hawaii Federal Court Finds That Insurer Has a Duty to Defend Climate Change Suit Under Two Policies without Pollution Exclusions

The counties of Honolulu and Maui sued the major oil companies over the effects of climate change. Aloha Petroleum (a Sunoco subsidiary) was named in each suit. Aloha filed its own suit in Hawaii federal court seeking to have its insurers cover its defense costs.

Last October, the Hawaii Supreme Court on certified question ruled that greenhouse gases are pollutants and exemplify traditional pollution that pollution exclusions are meant to exclude. *(See our November 2024 update **here**, pages 1-4).* After that decision, the federal district court ruled that Aloha's insurers had no duty to defend Aloha in Honolulu's and Maui's climate change suits under ten policies that had pollution exclusions.

But Aloha had two policies in 1986 and 1987 without pollution exclusions. The district court now had to decide whether Honolulu's and Maui's claims triggered those two policies.

The underlying suits alleged that the industry concealed their knowledge of the harmful effects of fossil fuel use, promoted climate science denial, and increased fossil fuel production, which caused the planet to warm, the climate to change, and the counties to suffer infrastructure and other harm. The counties asserted claims for public and private nuisance, strict liability failure to warn, negligent failure to warn, and trespass.

In assessing the duty to defend, the court's focus was on whether Honolulu and Maui asserted claims against Aloha that were potentially covered. The court emphasized that Aloha's burden was very light under Hawaii law.

In its October decision, the Hawaii Supreme Court found that recklessness can be an "accident" and thus an "occurrence." The Hawaii Supreme Court explained that when an insured acts with knowledge of a probable risk, that could be an accident. But it is no longer an accident when the risk crosses the line into practical certainty. Applying this standard, the district court determined that some allegations in the counties' suit suggest that Aloha acted with less than practical certainty of harm. Thus, the complaints potentially alleged an "occurrence."

The court next considered whether the complaints potentially alleged property damage when the 1986 and 1987 policies were in effect.

Aloha first argued that there was property damage during this time because the Hawaii Supreme Court recognized that greenhouse gases cause harm to the atmosphere upon emission. The court was skeptical of this argument because the Hawaii Supreme Court never address when greenhouse gas emissions cause harm to *tangible* property as is required by the "property damage" definition. But the court ultimately declined to decide this issue because it was not necessary to resolve the motions.

The court instead found that other allegations in the complaints asserted the possibility of damage to tangible property in the 1980s. For example, Honolulu alleged that high tide flooding has substantially increased since the 1960s and that it lost 25% of its beaches to the erosive force of rising seas. The court acknowledged that Honolulu's complaint did not allege exactly when the flooding took place or precisely

how it damaged property. But it found that the complaint did contend that ocean water has been inundating property with increased regularity since the 1960s. The court conceded that this presented only a remote possibility of coverage but said that was enough under Hawaii's "stout" duty to defend. The court rejected the insurer's argument that mere flooding does not necessarily cause property damage. The court reasoned that even if a flood is not technically inherently damaging, it at least suggests damage like corrosion.

Maui's complaint did not include allegations about high tide flooding since the 1960s. But it alleged saltwater flooding, which the court viewed as suggesting harm to tangible property such as via corrosion. And because Maui said it suffered historical harm from climatic changes, the court determined the complaint raised the possibility Maui suffered harm to physical property during the effective dates of the policies.

The insurer argued that these allegations had to be considered in context. It pointed to allegations that defendants and their scientists were aware that the effects of climate change would become noticeable around the year 2000. The court rejected this argument, finding that such allegations merely described predictions made by scientists in the 1960s and did not prove that the climate effects only began after 1987. Allegations of predictions from the 1960s did not foreclose the possibility of damage from effects arising earlier than the estimates.

In short, the court held that Aloha met its burden to prove the possibility of coverage. Thus, the insurer must defend Aloha under the 1986 and 1987 policies.

The case is *Aloha Petroleum, Ltd. v. National Union Fire Ins. Co. of Pittsburgh, Pa.*, No. 22-00372 JAO-WRP (D. Haw. Feb. 27, 2025).