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First Circuit Holds That Subpoena and Subsequent SEC Investigation Are Interrelated Wrongful Acts Under D&O Claims-Made Policy

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The United States Court of Appeals for the First Circuit recently held that an insurer did not have a duty to defend an SEC investigation against its insured under a D&O claims-made policy, finding that the policy's "interrelated wrongful acts" provision related the investigation back to a 2011 subpoena that predated the policy period.

In *Biochemics, Inc. v. AXIS Reinsurance Company*, 2019 WL 2223125 (1st Cir. 2019), the SEC issued a subpoena to Biochemics on May 5, 2011, requesting that Biochemics produce certain documentation in connection with the SEC's investigation into whether Biochemics and its President and CEO, John Masiz, had committed securities violations in connection with alleged fraudulent misrepresentations made to investors. In October 2011, Biochemics and Masiz applied for a D&O claims made policy from AXIS, which AXIS issued with an effective policy period of November 2011 to November 2012. In January and March 2012, the SEC issued deposition and document subpoenas and thereafter commenced an enforcement action against Biochemics and Masiz in December 2012. Biochemics sought coverage from AXIS for the January and March 2012 subpoenas and the enforcement action.

AXIS denied coverage for the investigation on the basis that Biochemics and Masiz were seeking coverage for a single "claim" that was first made in May 2011 when the SEC issued document subpoenas. In the ensuing declaratory action, Biochemics moved for partial summary judgment on the basis that the 2012 subpoenas and the 2012 enforcement action were separate and distinct claims which had been "first made" during the policy period. AXIS, in turn, filed a cross-motion for summary judgment on the basis that the SEC filings were properly treated as a single "claim" that had been "first made" when the SEC issued the May 2011 documents subpoena. The District Court agreed with AXIS and granted its motion, finding that the SEC investigation constituted a single claim that had been first made in May 2011, prior to the inception of the policy.

The AXIS policy included an interrelated wrongful acts provision, which defined "interrelated wrongful acts" as "any and all Wrongful Acts that have as a common nexus any fact, circumstances, situation, event, transaction, cause or series of casually or logically connected facts, circumstances, situations, events, transactions or causes." The policy defined "wrongful act" as "any actual or alleged error, misstatement, misleading statement, act, omission, neglect, or breach of duty." The policy also defined "claim," in pertinent part, as a "written demand … for … non-monetary relief" or a "civil … administrative or regulatory proceeding against any Insured commenced by… the filing of a[n]… investigative order or like document; or written notice or subpoena from an authority identifying such Insured as an entity or person whom a formal proceeding may be commenced."

On appeal, Biochemics contended that each of the SEC subpoenas constituted a separate claim as a "written demand… for… non-monetary relief." The First Circuit, disagreed, finding that the subpoenas did not request non-monetary relief, relying on Black's Law Dictionary's definition of "relief" as "[t]he redress or benefit… that a party asks of a court." The First Circuit reasoned that the subpoenas were merely requests for information, rather than requests made of a court for equitable redress or benefit. The First Circuit found that the issuance of a subpoena was a component of the "claim" that constituted "a civil proceeding" against the insured and found the SEC investigation constituted a single claim under the policy.

The First Circuit also rejected Biochemics' position that the interrelated wrongful acts provision was ambiguous because it was included within the section of the policy entitled "Limits of Liability" and thus required the Court to construe it to address only the amount of coverage available rather than the availability of coverage. The First Circuit held that the text of the provision stating that coverage only applied to claims first made during the policy could only serve to indicate the availability of coverage, and thus found that the clause was unambiguous.

The Court also noted that Biochemics could not argue that the 2012 subpoenas, which Biochemics conceded did not contain any references to misconduct, nonetheless alleged "wrongful acts" for purposes of triggering the duty to defend, while simultaneously contending that the 2011 subpoenas did not trigger a duty to defend. The Court rejected Biochemics' argument the 2012 subpoena alleged a wrongful act not alleged in the 2011 subpoena, finding that under the "substantial overlap" test enunciated in *Federal Ins. Co. v. Raytheon Co.*, 426 F.3d 491 (1st Cir. 2005), the existence of a single non-overlapping act could not suffice to preclude the aggregation of distinct "claims" that the policy's interrelated wrongful acts provision would otherwise require."

Finally, Biochemics argued that even if AXIS did not have a duty to defend Biochemics, it had a duty to defend Masiz, relying on the language of the policy covering claims "first made against such Insureds…during the policy period." Biochemics argued that since no allegations of wrongdoing were alleged against Masiz in the 2011 subpoena the "claim" was not first made against him until 2012. The First Circuit also rejected this argument, finding that, although not directed against Masiz specifically, the 2011 subpoena described Masiz's past securities violations and the terms of his probation and identified him as the "sole officer and director of Biochemics." The Court held that the 2011 Order, in announcing an investigation of Biochemics' officers and expressly naming Masiz as the only one, was properly deemed a "claim" against not only Biochemics but Masiz as well. The Court therefore affirmed the District Court's grant of AXIS' partial motion for summary judgment.