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IN THE SUPREME COURT OF THE STATE OF DELAWARE

IN RE ALEXION PHARMACEUTICALS, INC. INSURANCE APPEALS	)	No. 154, 2024
	)	No. 157, 2024
	)	
	)	Case Below – Superior Court of the State of Delaware
	)	C.A. No. N22-C10-340-PRW (CCLD)
	)	
	)	

APPELLEE ALEXION PHARMACEUTICALS, INC.'S ANSWERING BRIEF

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NATURE OF PROCEEDINGS

This appeal arises out of an effort by three excess insurers ("Insurers") to evade coverage under directors and officers ("D&O") liability policies for the settlement of a federal securities class action brought against Appellee Alexion Pharmaceuticals, Inc. ("Alexion") that falls squarely within the coverage of their policies. Citing a prior notice exclusion and interrelated wrongful acts provision, Insurers seek to link that lawsuit to an unrelated SEC investigation and Alexion's notice thereof, and thereby foist coverage onto the insurers of a prior policy period. However, applying this Court's framework in *First Solar*,[1] the securities class action does not arise out of and is not related to the Wrongful Acts,[2] facts and circumstances at issue in the SEC's investigation or Alexion's notice thereof. Op. at 27.[3] Therefore, this Court should affirm the Superior Court's holding that the securities class action is covered by Insurers' policies.

Alexion is a biopharmaceutical company that sold a single product during the relevant time period, Soliris, which treats rare genetic diseases. Alexion is insured

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[1] *First Solar Inc. v. National Union Fire Ins. Co. of Pittsburgh, PA*, 274 A.3d 1006, 1014 (Del. 2022) *as modified* (Mar. 22, 2022).

[2] Capitalized terms used herein, unless specifically defined in this brief, denote defined terms as used in Alexion's insurance programs.

[3] Memorandum Opinion and Order of the Superior Court ("Op.").

under claims-made D&O liability policies covering two policy periods: June 27, 2014 to June 27, 2015 ("Tower 1") and June 27, 2015 to June 27, 2017 ("Tower 2").

In 2015, during the Tower 1 policy period, Alexion learned that the SEC was investigating third-party payments Alexion's foreign subsidiaries made in Japan, Turkey, Russia, and Brazil, and Alexion's internal accounting and recordkeeping of those payments under the Foreign Corrupt Practices Act ("FCPA"). Alexion notified Tower 1 of the SEC's subpoena (the "SEC Subpoena"), which demarcated the initial scope of the investigation, and informed those insurers that if the SEC made findings of wrongdoing, it could result in future civil lawsuits seeking monetary damages as a "consequence." Ultimately, the parties settled the investigation, the SEC issued findings of fact and a cease-and-desist order (the "Cease-and Desist-Order") which focused on specific, alleged wrongdoing under the FCPA (primarily in Russia and Turkey), and Alexion made disgorgement payments to the SEC in connection with those findings.[4]

On December 29, 2016, during the Tower 2 policy period, Alexion and certain of its D&Os were sued in a securities class action styled *Boston Retirement System v. Alexion Pharmaceuticals, Inc. et al.*, No. 3:16-cv-02127 (D. Conn.) (the

[4] The SEC Subpoena, Cease-and-Desist Order, and the SEC's initial order of investigation (the "Order of Investigation") are referred to collectively herein as the "SEC Investigation."

"Securities Action"), which alleged violations of Sections 10(b) and 20(a) of the Securities and Exchange Act of 1934 ("Exchange Act"). Unlike the SEC Investigation, the Securities Action alleged that Alexion and its U.S. management inflated Alexion's stock price through a series of misrepresentations relating primarily to Alexion's domestic sales practices. The Securities Action never once mentions the FCPA (which focuses on foreign payments – not domestic practices) and only makes sparing references to Alexion's international operations in Brazil. Alexion provided notice of the Securities Action to the Tower 2 insurers.

Finger-pointing ensued, with the unique insurers of each tower pointing at the other tower for coverage of the Securities Action. Insurers, three excess insurers in Tower 2 who were not part of Tower 1,[5] argued that the Securities Action was related to the SEC Investigation, such that the Securities Action constituted a Claim made during the Tower 1 policy period under an interrelated wrongful acts provision in the Tower 2 policies. Insurers also argued that the Securities Action arose out of the SEC Investigation and Alexion's notice thereof, such that coverage was barred by a prior notice exclusion.

[5] These insurers are Appellants Swiss Re Corporate Solutions America Insurance Corporation ("Swiss Re"), Endurance Assurance Corporation ("Endurance"), and Navigators Insurance Company ("Navigators").

Both Alexion and certain insurers in Tower 1 disagreed, resulting in a gap in coverage. Therefore, Alexion filed suit against certain Tower 1 and Tower 2 insurers, asserting that the Securities Action was properly covered under Tower 2 because it was not meaningfully linked to and did not arise out of the SEC Investigation. After permitting limited discovery, the Superior Court resolved the parties' cross-motions for summary judgment in favor of Alexion.

Applying the plain language of the policies and applicable precedent, the Superior Court carefully analyzed and compared the Securities Action to the SEC Investigation (the subject of Alexion's "Notice of Circumstances" (A0530)) and concluded that these matters were not sufficiently related to trigger the Tower 2 policies' interrelated wrongful acts provision and prior notice exclusion. That is because these two matters involved different parties, different time periods, different evidence, different theories of liability, different alleged wrongdoing, and different relief. This appeal ensued.

SUMMARY OF ARGUMENTS

Denied. This dispute is about Insurers' efforts to shirk their coverage obligations for Alexion's settlement of the Securities Action, a Claim falling squarely within the coverage of their policies. Insurers distill their argument as follows: Tower 2 does not cover the Securities Action because "Alexion previously specified that future Claims arising from Alexion's improper Soliris sales tactics would be deemed first made" during the Tower 1 policy period. Br. at 3.[6] But this premise is false. Alexion only provided notice to Tower 1 of the SEC Subpoena and investigation, which focused on specific alleged wrongdoing regarding third-party payments in foreign countries, and future Claims that might arise as a "consequence" of the SEC's findings *in that investigation*. The Securities Action, however, did not arise from or share a meaningful link with the SEC Investigation, or the wrongful acts, facts and circumstances identified in Alexion's notice thereof. On the contrary, the Securities Action involved different alleged wrongdoing, different parties, different time periods, different evidence, different theories of liability, and different relief. As the Superior Court correctly observed, Insurers' reliance on "abstract notions" in describing these matters is "not helpful in a relatedness analysis." Op. at 27.

[6] Insurers' Opening Brief ("Br.").

1. Denied. Insurers' assertion that Alexion's notice of the SEC's investigation and any Claim resulting from the SEC's findings under Tower 1 assigns the Securities Action to Tower 1 is wrong. The prior acts exclusion is only triggered if the Claim for which coverage is sought is a Claim "alleging, based upon, arising out of, or attributable to any Wrongful Act, fact, or circumstance which has been the subject" of a written notice under a prior policy period. A0079. Similarly, the interrelated wrongful acts provision only applies if the Securities Action and a prior Claim arise out of "Wrongful Acts" that "have as a common nexus any fact, circumstance, situation, event, transaction [or] causes . . . ." Here, however, the Securities Action did *not* arise from the Wrongful Acts, facts and circumstances at issue in the SEC Investigation or Alexion's notice thereof, or Wrongful Acts with a common nexus of fact. Even the district court presiding over the Securities Action recognized that "the plaintiffs do not claim that the FCPA allegations are the basis for the securities fraud claim." A0810–811. Therefore, the Superior Court correctly concluded that the Securities Action was covered under Tower 2.

1.A. Denied. Insurers are wrong that the Superior Court "misapprehended" the relevant policy provisions by comparing the Securities Action solely to the SEC Subpoena, rather than more broadly comparing the Securities Action to Alexion's notice. Although the Superior Court framed its analysis as a comparison of the SEC

Subpoena to the Securities Action, the *substance* of its analysis was broader: it considered the SEC's investigation holistically, including specifically the Cease-and-Desist Order. This is significant because Alexion's Notice of Circumstances only advised Tower 1 of potential Claims arising as a consequence of the SEC's findings, which were documented in that order.

Insurers' criticism of the Superior Court is also puzzling given that they repeatedly invited the Superior Court to engage in the very analysis they now criticize, asserting that the Securities Action was related to the SEC Investigation, which is the precise analysis the Superior Court performed. But even beyond the particulars of the Superior Court's analysis, this Court should affirm based on its *de novo* review because the Securities Action plainly does not arise from or relate to the Wrongful Acts, facts and circumstances described in Alexion's Notice of Circumstances.

1.B. Denied. A comparison of the SEC Subpoena to the Securities Action reveals that these matters were not sufficiently related to deem the Securities Action a Claim made under Tower 1. These matters involved different parties, time periods, alleged wrongdoing, facts, circumstances, theories of liability, and claims for relief. As the Superior Court recognized, the *only* potential overlap between these matters

were tangential allegations relating to Alexion's activities in Brazil that were insufficient to create the required meaningful link under the policies.

2. Denied. The Superior Court did not abuse its discretion by granting in part and denying in part Swiss Re and Navigators' motion to compel discovery. Notably, Appellant Endurance did not join that motion because it agreed that additional discovery was unnecessary. Further, Insurers did not identify the Superior Court's discovery order in their Notice of Appeal. In any case, the Superior Court recognized that, ordinarily, relatedness is assessed by comparing the relevant pleadings, but nevertheless granted Swiss Re and Navigators' discovery request, in part, because the Superior Court believed certain additional documents would provide important context for its analysis. It correctly denied the remainder of Swiss Re and Navigators' fishing expedition because the other discovery they sought was not necessary for the court to resolve the dispute.

STATEMENT OF FACTS

A. The Insurance Policies

1. Alexion's Tower 2

Tower 2 provides $105 million in coverage comprised of a primary policy issued by nonparty Chubb, which provides $10 million in total limits in excess of a $5 million retention for indemnifiable loss, plus 14 layers of excess policies. A0051 (the "2015-2017 Primary Policy").

Insurers Swiss Re, Endurance, and Navigators are three of these excess insurers that participate in Tower 2, but they do not participate in Alexion's D&O program for prior policy years. Swiss Re, the second-layer excess insurer, covers $10 million excess of $20 million (A0104); Endurance, the third-layer excess insurer, covers $10 million excess of $30 million (A0121); and Navigators, the ninth-layer excess insurer, covers $10 million excess of $85 million (A0141). Insurers' policies follow form to the 2015-2017 Primary Policy in all relevant respects.

The 2015-2017 Primary Policy provides that "[a]ll **Claims** arising out of the same **Wrongful Act** and all **Interrelated Wrongful Acts** of the **Insureds** shall be deemed to be one **Claim**, and such **Claim** shall be deemed to be first made on the date the earliest of such **Claims** is first made . . . " (the "Interrelated Wrongful Acts Provision"). A0061.

"**Wrongful Acts**" is defined as "any error, misstatement, misleading statement, act, omission, neglect, or breach of duty, . . . actually or allegedly committed or attempted by: 1) . . . any **Insured Person** in his or her status as such, . . ; 2) . . . the **Company**, but solely with respect to a **Securities Claim**." A0091.

"**Interrelated Wrongful Act**" is defined 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." A0055.

The "**Prior Notice Exclusion**" in the 2015-2017 Program provides that "The **Insurer** shall not be liable for **Loss** on account of any **Claim** . . . alleging, based upon, arising out of, or attributable to any **Wrongful Act**, fact, or circumstance which has been the subject of any written notice given and accepted under any other directors & officers policy of which this **Policy** is a renewal or replacement." A0058, A0079.

2. Alexion's Tower 1

Tower 1 provides $85 million in coverage comprised of a primary policy also issued by Chubb, which provides $10 million in coverage excess of a $5 million retention for indemnifiable loss, plus additional excess policies. A0156 (the "2014-2015 Primary Policy"). The 2014-2015 Primary Policy provides coverage on identical terms to the 2015-2017 Primary Policy. A0159.

The 2014-2015 Primary Policy contains the following notice provision:

> . . . The **Insureds** shall, as a condition precedent to their rights under this **Policy**, give to the **Insurer** written notice of any **Claim** made against the **Insureds** as soon as practicable . . .
>
> If, during the **Policy Period** . . . the **Insureds** first become aware of facts or circumstances which may reasonable give rise to a future **Claim** covered under this **Policy**, and if the **Insureds** give written notice to the **Insurer** during the **Policy Period** . . . of the identity of the potential claimants; a description of the anticipated **Wrongful Act** allegations; the identity of the **Insureds** allegedly involved; the circumstances by which the **Insureds** first became aware of the facts or circumstances; the consequences which may have resulted or may result; and the nature of the potential monetary damages and non-monetary relief; 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**.

A0165 (emphasis added).

Although Insurers contend (Br. at 10) that this provision "grants Alexion the unilateral option to lock in coverage under a single policy period for future Claims that may be made after the policy period expires," the provision is far narrower, and only requires that Alexion provide notice as a condition precedent to obtaining coverage, and that subsequent Claims that "arise out of" "anticipated Wrongful Act[s]" described in the notice shall be deemed to have been first made at the time of notice of circumstances. *Id*.

B. The SEC's Investigation

[redacted]

[redacted]

The SEC's investigation culminated in a settlement and Cease-and-Desist Order dated July 2, 2020, in which the SEC once again confirmed the narrow focus

of its investigation on third-party payments in certain foreign countries. A0571. In its "Findings," the Cease-and-Desist Order asserts that from 2010 to 2015, Alexion's subsidiaries in Turkey and Russia made improper payments to government officials to obtain beneficial treatment of Soliris. A0572–575.

The SEC further found that those Alexion subsidiaries kept false records in connection with those payments and that Alexion's internal accounting controls were not sufficient to catch its subsidiaries' wrongdoing. *Id.* The SEC also found that Alexion's deficient internal accounting controls led to Alexion's subsidiaries in Brazil and Colombia failing "to maintain adequate books and records of certain of its financial transactions involving payments to third parties" under the FCPA. A0575. Alexion agreed to pay $21,476,531, consisting of disgorgement of profits, prejudgment interest, and penalties. A0577.

C. Alexion's Notice of Circumstances of the SEC Investigation

Alexion timely reported the SEC Investigation to Tower 1 via the Notice of Circumstances. Insurers assert that the Notice of Circumstances broadly provided notice of "facts and circumstances concerning potential liability for [Alexion's] improper Soliris sales practices" and contend, without any supporting evidence, that this shows Alexion's intent to "assign all future Claims arising from those Wrongful Acts, facts and circumstances to Tower 1." Br. at 29. But the "Wrongful Acts, facts, and circumstances" reported in the Notice of Circumstances were limited to the SEC

Investigation which, as stated, was focused on third-party payments in foreign countries under the FCPA and recalls of certain lots of Solaris, which could "give rise" to a future Claim:

> Alexion . . . hereby provide[s] ACE with notice . . . of facts or circumstances which may reasonably give rise to a future claim that is covered under the Policy. **On May 8, 2015, Alexion received a subpoena in connection with an investigation by the Enforcement Division of the Securities and Exchange Commission ("SEC") requesting information relating to Alexion's grant-making activities and compliance with the Foreign Corrupt Practices Act** . . . While the subpoena seeks information related to Alexion's activities and policies and procedures worldwide, it notes in particular Japan, Brazil, Turkey and Russia. **The subpoena also seeks information related to Alexion's recalls of specific lots of Soliris and related securities disclosures**.
>
> **On May 8, 2015, Alexion received a notice from the SEC requiring Alexion to reasonably preserve and retain evidence in connection with the SEC investigation**. That notice states that the SEC considers documents potentially relevant to the investigation to include, among others, those that "were provided, created, modified, or accessed to or by" 37 individuals (listed by name on the notice) on or after January 1, 2009. Potential claimants or insureds allegedly involved in connection with the **facts or circumstances relating to the investigation** include Alexion and may potentially include other insureds under the Policy and/or some or all of these listed individuals.

A0530.

With respect to potential future claims, as relevant here, the Notice of Circumstances informed the Tower 1 insurers that a determination by the SEC that

Alexion's "operations or activities" were not "in compliance with existing United States or foreign laws or regulations, including by the SEC pursuant to its investigation of Alexion's compliance with the FCPA" could result in "consequences," including "lawsuits brought by private litigants," as well as "[m]onetary damages and non-monetary relief." A0530–531.

Thus, rather than "lock in coverage" for all future Claims relating to Alexion's Soliris "sales practices" under Tower 1, as Insurers suggest (Br. at 10), the Notice of Circumstances only locked in Tower 1 coverage for a Claim that arises out of the specific Wrongful Acts, facts, and circumstances at issue in the SEC Investigation, including civil lawsuits that "may . . . follow *as a consequence*" of the SEC's "determination[s]." *Id*.

D. The Securities Action

On December 29, 2016, a purported class of Alexion stockholders who purchased or otherwise acquired Alexion securities between January 30, 2014 and May 26, 2017 commenced the Securities Action against Alexion and its officers and directors. Unlike the SEC Investigation, the operative complaint in the Securities Action alleged that Alexion and its D&Os violated Sections 10(b) and 20(a) of the Exchange Act and SEC Rule 10b-5 by "falsely attributing the source of the Company's meteoric success to its ability to identify new patients for the Company's only money-making drug, Soliris." A0257 at ¶ 1. The complaint further asserted

that, in reality, Alexion's success was the result of three factors: (1) improperly obtaining patient information from labs in the United States to target potential Soliris customers; (2) improperly using company-paid nurses to urge doctors and patients to continue prescribing Soliris; and (3) illegally funding kickbacks to patient advocacy groups, primarily two patient assistant programs in the U.S. A0260–261 at ¶¶ 11-12.

None of these asserted bases for Alexion's liability were at issue in the SEC Investigation as reflected in the SEC Subpoena and the SEC's ultimate fact-finding (as reflected in the Cease-and-Desist Order) and were referenced nowhere in the Notice of Circumstances as Wrongful Acts, facts or circumstances which could give rise to a potential Claim. Indeed, the *only* potential overlap between the SEC Investigation and the Securities Action is limited to 9 paragraphs in the Securities Action complaint out of 378 (Op. at 26), which reference Alexion's relationship with patient advocacy group "AFAG" in Brazil. But the complaint includes no allegations regarding Alexion's internal accounting and bookkeeping of such grants, or its conduct in Turkey and Russia, which were the focus of the SEC's investigation as identified in the Notice of Circumstances.

Moreover, although Insurers note that a *Bloomberg News* article cited in the Securities Action complaint referenced the SEC Investigation and the alleged

wrongdoing uncovered by that investigation in foreign countries, the operative complaint itself does not. It also does not reference the FCPA or any of the internal accounting and recordkeeping provisions of the FCPA. Nor does it reference the Soliris recall referenced in the SEC Subpoena or any of Alexion's grant-making practices in Turkey, Japan or Russia beyond the basic observation that Soliris is sold in those locations. The Securities Action sought compensatory damages measured by the plaintiffs' stock losses and attorneys' fees. A0366, Prayer for Relief.

E. Alexion's Insurers Play Hot-Potato With the Securities Action

Alexion timely noticed the Securities Action to Tower 2 because it was filed during that policy period. A0541. On February 20, 2017, the primary insurer in both programs, nonparty Chubb, issued its first coverage position letter. *Id*. At that time, even though Chubb had the Notice of Circumstances, it did not conclude that the Securities Action was related to the SEC Investigation and Notice of Circumstances. Instead, it initially accepted the Securities Action as a Claim first made during Tower 2 and treated it as such for nearly a year in multiple letters. A0541, A0544, A0548. On May 22, 2018, Appellant Swiss Re adopted Chubb's initial position accepting coverage for the Securities Action as a Claim first made during the Tower 2 policy period. B0051.

On October 8, 2018, after Chubb executed an updated confidentiality agreement and Alexion provided Chubb with a copy of the SEC Subpoena, Chubb

changed its position. A0555. Chubb informed Alexion that, having reviewed the SEC Subpoena, it now considered the Securities Action a Claim first made in Tower 1. A0564. Insurers subsequently adopted this revised coverage position, as it meant they would not have to cover the Securities Action. B0051; B0054; B0107.

Although Alexion believed the Securities Action should be covered under Tower 2, it provided notice of that Claim to Tower 1 in an abundance of caution given Chubb's change in coverage position. A0405. In response, Hudson, which participates only in Tower 1, issued a coverage letter disagreeing with Chubb. Hudson concluded that "the Boston Securities Action [does] not sufficiently overlap with the information provided in the Alexion SEC Subpoena Letter to deem them **Claims** first made" in Tower 1. A0419.

Notably, it was not just Hudson that disagreed with Chubb's new coverage position. Old Republic Insurance Company ("Old Republic"), which participates in *both* insurance programs, likewise disagreed with Chubb's new coverage position and reiterated that it accepted the Securities Action as a Claim first made under Tower 2. A0402.

These conflicting coverage positions came to a head in advance of a September 16, 2022 mediation in the Securities Action. Given the insurers' divergent positions, Alexion asked all insurers in both towers to attend the mediation

and asked Insurers to reconsider their denial of coverage under Tower 2. B0118–128. In response, Insurers informed Alexion that they would not even attend the mediation. B0107; B0111; B0115.

F. Alexion Commences this Coverage Action and the Superior Court Allows Limited Discovery

Alexion settled its coverage dispute with Chubb and the other insurers who appear in both Towers. Alexion commenced this coverage litigation on October 13, 2022, asserting breach of contract against Insurers, and asserting an alternative claim for declaratory relief against Hudson, the insurer that appears only in Tower 2. A0015.

Alexion moved for summary judgment that the Securities Action was a Claim first made during the Tower 2 policy period. B0001. Endurance cross moved for summary judgment that the Securities Action related back to the SEC Subpoena and thus fell within Tower 1. A0738. Insurers Swiss Re and Navigators opposed Alexion's motion for summary judgment on Rule 56(f) grounds (A0425) and moved to compel discovery on whether the SEC Subpoena and Securities Action were related. A0815. Specifically, Swiss Re and Navigators sought (1) Alexion's correspondence with the SEC regarding the scope of the SEC investigation and all of Alexion's productions to the SEC; (2) discovery relating to a December 13, 2016 subpoena from the U.S. Attorney's Office for the District of Massachusetts (the

"DOJ Subpoena"), which is a different matter noticed to Tower 2; and (3) Alexion's settlement communications with the nonparty insurers. A0821–825. Alexion opposed Swiss Re and Navigators' motion to compel. B0056; B0129.

On May 25, 2023, the Superior Court granted in part and denied in part Swiss Re and Navigators' motion to compel. A0929–935. The Superior Court ordered Alexion to produce: (1) the SEC's March 9, 2015 Order of Investigation, which commenced the SEC's investigation into Alexion; (2) the SEC's document preservation notice referenced in the Notice of Circumstances; and (3) Alexion's communications with the SEC on the front end of the investigation regarding the scope of the investigation. A0932–934. The Superior Court recognized that, ordinarily, relatedness issues are decided based on a side-by-side comparison of the pleadings, but it believed these additional materials could provide helpful "context" for its analysis. *Id*.

On July 6, 2023, after Alexion produced these materials, Alexion proposed that the parties prepare a joint submission to the Superior Court with a briefing schedule for supplemental summary judgment briefs and a hearing date. B0146. After not hearing from Swiss Re and Navigators for almost a month, on August 1, 2023, Alexion asked the Superior Court to schedule a hearing on the pending cross motions for summary judgment. *Id*.

The day after Alexion filed its letter with the Superior Court, Swiss Re and Navigators demanded Alexion produce a laundry list of additional discovery, to which Alexion objected. B0131. On August 28, 2023, the Superior Court denied Swiss Re and Navigators' request for additional discovery. B0248. Further, at the court's request, Alexion confirmed that the SEC never issued a Wells Notice or its equivalent. B0251–252. Thereafter, the parties filed supplemental summary judgment briefs. A0934, A0947, A0994.

G. The Superior Court Grants Alexion's Motion for Summary Judgement

On February 15, 2024, the Superior Court granted Alexion's motion for summary judgment and denied Insurers' cross-motions for summary judgment. Based on the plain language of the Prior Notice Exclusion and Interrelated Wrongful Acts Provision, and Delaware case law interpreting such language, the Superior Court identified the relevant question as whether there was a "meaningful link" between the prior noticed "incident" and the Securities Action based on various factors. Op. at 23 (quoting *ACE Am. Ins. Co. v. Guaranteed Rate, Inc.*, 305 A.3d 339 (Del. 2023)). After a careful analysis and comparison of the SEC Investigation and the Securities Action, the Superior Court concluded there was no such link. Op. at 25.

The Superior Court found that "when looking for a meaningful link, it is 'not enough for two claims to mention some of the same facts.'" *Id.* at 24 (quoting *Options Clearing Corp. v. U.S. Specialty Ins. Co.*, 2021 WL 5577251, at *14 (Del. Super. Nov. 30, 2021)). Rather, Delaware courts consider various factors such as "(1) the parties; (2) the relevant time period; (3) the overall theory of liability; (4) a sampling of relevant evidence; and (5) the claimed damages." *Id.* at 25 (citing *First Solar*, 274 A.3d at 1014).

Applying these factors, the Superior Court concluded that the "incident" at issue in the Notice of Circumstances, i.e., the SEC Subpoena (and, more broadly, the SEC Investigation) and Securities Action were not meaningfully linked because "the SEC Subpoena and Securities Action are only loosely connected by Alexion's activities in Brazil. And that tangential link is not enough to make the two related for purposes of the 2015-2017 Policy." Op. at 25. Specifically, the Superior Court found that the SEC Subpoena was concerned with Alexion's compliance with the FCPA. And, while Brazil was referenced in the SEC Subpoena, so too were Japan, Turkey and Russia. *Id.*

In reaching this conclusion, the Superior Court did not limit itself to the SEC Subpoena. Rather, it examined the additional evidence submitted by the parties in their supplemental briefs, including the Cease-and-Desist Order, which identified

the SEC's ultimate findings. Those findings, the Superior Court recognized, focused on conduct related to Turkey and Russia, and only briefly mentioned Alexion's conduct in Brazil. Op. at 25-26. This alleged conduct, the Superior Court found, was different from the conduct alleged in the Securities Action. Op. at 26.

The Superior Court also rejected Insurers' argument that accusations of "general wrongdoing" regarding "illegal and unethical conduct in the sales and marketing of Soliris" were sufficient to create a meaningful link. Op. at 26-27. The Superior Court found that "such abstract notions are not helpful to a relatedness analysis" and can lead to illusory coverage. Op. at 27.

ARGUMENT

I. THE SECURITIES ACTION IS NOT MEANINGFULLY LINKED TO THE SEC INVESTIGATION OR ALEXION'S NOTICE OF CIRCUMSTANCES

A. Question Presented

Did the Superior Court correctly find that the Securities Action was covered under Tower 2 where the Securities Action did not result from or share a meaningful link with the Wrongful Acts, facts and circumstances at issue in the SEC Investigation and Alexion's Notice of Circumstances? B0001; B0056; A1002.

B. Scope of Review

The Court reviews the grant of a motion for summary judgment de novo. *ACE Am. Ins. Co.*, 305 A.3d at 344.

C. Merits of the Argument

The Superior Court properly held that the Securities Action was a Claim first made under Tower 2 and that the 2015-2017 Primary Policy's Prior Notice Exclusion and Interrelated Wrongful Acts Provision did not bar coverage. The reason for this is straightforward: a comparison of the SEC Investigation and Alexion's Notice of Circumstances, on the one hand, with the Securities Action on the other, reveals that these matters involved different parties, time periods, theories of liability, alleged wrongdoing, and relief. These fundamental differences are evident in even a cursory comparison of the operative complaint in the Securities Action and the Wrongful

Acts, facts and circumstances at issue in the SEC Investigation and identified in Alexion's Notice of Circumstances. To evade this inexorable conclusion, Insurers mischaracterize the Securities Action and SEC Investigation, overstate the Notice of Circumstances, misstate the applicable legal standards, and distort the Superior Court's analysis.

1. The Securities Action Did Not Result From or Share a Meaningful Link With the Wrongful Acts, Facts and Circumstances Described in the Notice of Circumstances and the SEC Investigation

Following this Court's guidance in *First Solar*, the Superior Court correctly concluded that the Securities Action did not trigger the plain language of the Prior Notice Exclusion and Interrelated Wrongful Acts Provision, such that the Securities Action was a Claim first made under Tower 2. In *First Solar*, this Court held that the plain language of the policy controls in a relatedness analysis. 274 A.3d at 1009. There, this Court analyzed whether a Claim was "alleging, arising out of, based upon or attributable to any facts or Wrongful Acts that are the same as or related to those that were . . . alleged in a Claim made against an Insured," such that the Claim would be deemed made during a prior policy period. *Id.* In applying that language—which uses the same key terms at issue here—this Court considered various factors, including a comparison of the parties, time periods, theories of liability, relevant evidence, and the damages sought in each matter. *Id.*

In the years since, numerous Delaware courts have applied this framework to relatedness analyses, invoking the phrase "meaningful linkage" to capture this type of policy language, including specifically the key term "arising out of," and looking to the factors this Court relied on in *First Solar*.[7] This Court recently endorsed this approach in *ACE Am. Ins. Co.*, 305 A.3d at 347, finding that the phrase "arising out of' 'requires' some meaningful linkage between the two conditions imposed in the contract." Applying this framework to the indisputable facts at issue here, the Securities Action does not fall within the Prior Notice Exclusion or Interrelated Wrongful Acts Provision.

Like in *First Solar*, the policy language here dictates an analysis of whether (1) the Securities Action and some other Claim are "Claims arising out of the same Wrongful Acts and all Interrelated Wrongful Acts" (for purposes of the Interrelated Wrongful Acts Provision), or (2) the Securities Action "arises out of" a "Wrongful, Act, fact, or circumstance" that was the "subject" of the Notice of Circumstances (for purpose of the Prior Notice Exclusion). Op. at 19-20; A0059; A0079. However, in stark contrast to the facts of *First Solar*, there is no meaningful linkage between

[7] *See e.g.*, *Options Clearing Corp.*, 2021 WL 5577251, at *8-9; *Sycamore Partners Mgmt., L.P. v. Endurance Am. Ins. Co.*, 2021 WL 4130631, at *11 (Del. Super. Sept. 10, 2021); *Nat'l Amusements, Inc. v. Endurance Am. Specialty Ins. Co.*, 2023 WL 3145914, at *9 (Del. Super. Apr. 28, 2023).

the Securities Action and the SEC Investigation/Notice of Circumstances, such that this policy language is not triggered.

The Notice of Circumstances gave specific notice of the SEC Subpoena, which was issued in "connection with an investigation by the [SEC]," and sought "information related to Alexion's grant-making activities and compliance with the [FCPA]." A0530. The Notice of Circumstances made clear that the focus of this investigation was on activities in Turkey, Russia, Japan, and Brazil and Alexion's recalls of certain lots of Solaris under the FCPA. A0530.

The SEC ultimately focused primarily on Alexion's third-party payments in two countries, Russia and Turkey, in its Cease-and-Desist Order. A0570–0575. That Order made no mention of Japan, or any alleged wrongdoing in the United States. Regarding Brazil, the Cease-and-Desist Order describes (in only 4 out of 35 paragraphs) "inadequate accounting controls" that led to a "failure" to "maintain accurate books and records regarding third-party payments" under the FPCA. *Id.* The Cease-and-Desist Order provides only three examples of this alleged wrongdoing: (1) the submission of fictitious invoices to mask the use of funds to cover personal expenses, (2) falsely describing funds as being used for "legal support" when those funds were used for other purposes, and (3) the failure to maintain (and the destruction of) adequate books and records regarding payments to

third parties. A0575. The Notice of Circumstances advised that future Claims seeking damages might follow as a "consequence" of the SEC's "determination." A0530.

The Securities Action was not such a Claim. Unlike the SEC Investigation, the Securities Action was brought by shareholders who alleged that Alexion and its D&Os violated federal securities laws by misleading investors in specific ways as to the source of Alexion's success with respect to its sales of Soliris. A0257 ¶ 1-3. Specifically, the shareholders alleged that Alexion's success was based on three overarching categories of wrongdoing: (1) improperly obtaining patient information from labs in the United States to target potential Soliris customers; (2) using company-paid nurses to urge doctors and patients to continue prescribing Soliris; and (3) illegally funding kickbacks to patient advocacy groups, primarily in the U.S. A0260–61 ¶¶ 11-12. Based on these theories – none of which were the subject of the SEC Investigation – shareholders sought compensatory damages for the lost value of their shares. A0366, Prayer for Relief. The Securities Action nowhere references the SEC Investigation and was not a "consequence" of the SEC's "determination" in the Cease-and-Desist Order.

The *only* potential overlap between the SEC Investigation/Notice of Circumstances and the Securities Action was a tangential reference in 9 out of 378

paragraphs of the Securities Action complaint to Alexion's grants in Brazil. A0304–305. But even then, the focus of the SEC Investigation and the Securities Action, and the alleged wrongdoing at issue in each matter, were different. Unlike the SEC Investigation, which focused on the above-referenced examples of book-keeping violations under the FCPA in Brazil, the Securities Action alleged that Alexion's third-party payments to a patient advocacy group in Brazil unethically funded fraudulent lawsuits, and that Alexion failed to disclose this practice. A0304–305. As the Superior Court recognized, that both the SEC Investigation and Securities Action mention Brazil is a "tangential link" insufficient to lasso the entire Securities Action back into Tower 1:

> [T]he SEC's eventual findings focused on conduct related to Turkey and Russia, and only briefly mentioned Alexion's conduct in Brazil. The SEC's findings only charged Alexion with failing to keep adequate books and records and not maintaining "sufficient internal accounting controls over the payments to foreign officials and third parties." That is wholly different from the conduct alleged in the Securities Action.

Op. at 25-26.

Indeed, the differences between the Securities Action and the Wrongful Acts, facts and circumstances at issue in the SEC Investigation and identified in the Notice of Circumstances are stark and dispositive, as reflected in the below chart:

	SEC Investigation	**Securities Action**

Parties	The SEC versus foreign affiliates of Alexion	A class of Alexion shareholders versus Alexion, Leonard Bell, David Hallal, Vikas Sinha, David Brennan, David Anderson, Ludwig Hantson, and Carsten Thiel
Type of Action	SEC Investigation	Civil Complaint by Shareholders
Statutory Basis for Liability	The Foreign Corrupt Practices Act	Sections 10(b) and 20(a) of the Securities Exchange Act of 1934
Alleged Wrongful Acts	(1) Foreign grant-making practices in Turkey, Russia, Japan, and Brazil (with focus on Turkey and Russia) (2) Improper bookkeeping and internal controls in Turkey, Russia, Japan, and Brazil (with focus on Turkey and Russia) (3) Recalls of Soliris and financial disclosures relating to the recalls	(1) Misrepresentations to the investing public regarding Alexion's ability to generate revenue and identify new patients for Soliris (2) Misrepresentations to the investing public regarding the use of company-paid healthcare personnel to drive sales (3) Misrepresentations to the investing public regarding the use of partner labs to identify customers (4) Misrepresentations to the investing public regarding the funding of patient advocacy groups, primarily in the United States

Time Period	2007 - 2015	January 30, 2014 - May 26, 2017
Relief Sought	Documents; Injunctive Relief, Disgorgement, and Penalties	Compensatory damages and attorneys' fees

This dispute bears no resemblance to the facts of *First Solar*, where both matters alleged "violations of the same federal laws" based on the overarching allegation that "First Solar made material misrepresentations regarding its solar power capabilities as part of a fraudulent scheme to increase stock prices." *First Solar*, 274 A.3d at 1015. The policyholder in *First Solar* even admitted that the two matters were "nearly identical." *Id.* at 1017. The opposite is true here in every respect.

Unable to rebut these dispositive differences, Insurers mischaracterize (1) the facts of the SEC Investigation and Securities Action, (2) the scope of the Notice of Circumstances, (3) the applicable legal standard, and (4) the Superior Court's analysis. These arguments should be rejected.

a. Insurers' Efforts to Link the Notice of Circumstances and the Securities Action Fail

Insurers do not dispute that the *First Solar* factors properly guide the relatedness analysis here. But their application of those factors is fatally flawed.

First, Insurers assert that the Notice of Circumstances gave broad notice of any Claim arising from or related to "improper sales practices relating to Soliris,"

and argue that the Securities Action is such a Claim. Br. at 29, 38; *see also id.* at 4, 31. However, as the Superior Court recognized, "such abstract notions are not helpful to a relatedness analysis." Op. at 27. By the same measure, both matters broadly involved the drug Soliris (just as the SEC Subpoena and Securities Action complaint were both written on paper), but that does not make them related within the meaning of the Interrelated Wrongful Acts Provision or Prior Notice Exclusion. As the Superior Court observed, Alexion was a one-drug company during the Tower 2 period, whose primary business at that time was the sale of Soliris. If the Notice of Circumstances is interpreted to deem any future claim involving Soliris sales practices a Claim made during Tower 1, as Insurers suggest, it would render coverage under Tower 2 illusory.

Insurers' argument is not simply an abstraction, it is also false. The Notice of Circumstances did not broadly provide notice of future Claims involving all allegedly "improper sales practices relating to Soliris." Rather, the Notice of Circumstances gave specific notice of the SEC Investigation, explaining that the SEC requested information regarding: (1) "Alexion's grant-making activities in compliance with the Foreign Corrupt Practices Act," with a particular focus on "Japan, Brazil, Turkey and Russia"; and (2) "information related to Alexion's recalls of specific lots of Soliris and related securities disclosures." A0530. And it advised

Tower 1 only of future Claims that might arise as a "consequence" of the SEC's "determination." As stated, the Securities Action was not such a Claim.

[redacted]

[redacted]

Likewise, the Subpoena and Cease-and-Desist Order confirmed that the SEC's theories of liability were solely predicated on the FCPA and alleged wrongdoing, facts and circumstances different than those at issue in the Securities Action. That Order stated that "[t]hese proceedings arise out of Alexion's violations of the internal accounting controls and recordkeeping provisions of the Foreign Corrupt Practices Act of 1977." A0571 (emphasis added). This alleged statutory violation was never even mentioned in the Securities Action.

Third, Insurers claim that because the Notice of Circumstances stated that "'lawsuits brought by private litigants may also follow as a consequence' of the SEC investigation," the Securities Action was necessarily one of those lawsuits. Br. at 31. Insurers likewise contend that because the Notice of Circumstances advised that as a consequence of the SEC's findings, a future claim "might seek monetary damages," this means the Securities Action was contemplated by the Notice of Circumstances. Br. at 37. But Alexion's notice merely informed the Tower 1 insurers that a determination by the SEC that Alexion's operations or activities were not in "compliance with existing laws or regulations" could result in additional "consequences," including "lawsuits brought by private litigants" seeking

"[m]onetary damages and non-monetary relief." *Id.* Thus, for example, if Alexion's shareholders had brought a securities action or derivative claim against Alexion and its directors as a result of or based on the SEC Investigation or findings of FCPA-related misconduct, that could be a Claim falling within the Notice of Circumstances.

Here, however, the Securities Action was *not* a "consequence" of the SEC's findings, as its allegations of wrongdoing and asserted bases of liability were not predicated on and did not arise out of the SEC's findings. Contrary to Insurers' assertion (Br. at 32), the operative complaint in the Securities Action did not even mention the SEC Investigation or the SEC's findings under the FCPA – it does not even identify the SEC at all. The Securities Action plaintiffs also did not allege that Alexion failed to disclose the SEC's investigation to shareholders. Nor could they: the Securities Action plaintiffs expressly recognized that Alexion properly disclosed the SEC's investigation and that they were not pursuing a disclosure violation based on that investigation. A0719. Perhaps that is why, in their briefing below, Insurers Swiss Re and Navigators coyly asserted that the Securities action "did, indeed, follow the SEC Investigation," glaringly omitting the key phrase "as a consequence," a critical limitation on the scope of the future Claims identified in the Notice of Circumstances. B0292.

Insurers' inability to meaningfully and causally link the SEC Investigation to the Securities Action is further evidenced by their resort to extrinsic evidence, including specifically their heavy reliance on the *Bloomberg Article* and the parties' discovery disputes in the Securities Action. Br. at 17, 32-33, 36. Because courts routinely decide issues of relatedness based on a "side-by-side comparison of the two complaints," Insurers resort to this evidence simply reveals the weakness of their position. *First Solar*, 274 A.3d at 1013; *see also Options Clearing*, 2021 WL 5577251, at *2.

Insurers' reliance on these materials is also self-defeating. The *Bloomberg Article* is an extensive, 13-page exposé, detailing varied alleged wrongdoing by Alexion, only certain of which was the wrongdoing that supported the Securities Action. Within that document, *a single sentence* notes that "[f]or the past two years the [SEC] has been investigating grants made by Alexion in Brazil, Columbia, Japan, Russia, and Turkey, with a focus on potential violations of the Foreign Corrupt Practices Act." A0527. But the *Bloomberg Article* did not "expose" the SEC's investigation, and the Securities Action was not a consequence of the SEC's findings, investigation, or allegations. Nor was this sentence quoted or expressly referenced in the Securities Action as a basis for its allegations or causes of action.

And the operative complaint does not assert any allegations of wrongdoing in Columbia, Japan, Russia, and Turkey.

Only 9 isolated paragraphs in the 378 paragraph Securities Action complaint even arguably related to this single sentence in the *Bloomberg Article*. And even then, the complaint only referenced Brazil – and only insofar as it impacted shareholders' stock value in connection with an allegedly unethical scheme to fund fraudulent lawsuits. The SEC Investigation, in contrast, ultimately focused primarily on alleged wrongdoing in Russia and Turkey under the FCPA, none of which is even mentioned in the Securities Action. Regarding Brazil, the SEC asserted wrongdoing not at issue in the Securities Action. Put simply, the notion that the relatedness provisions of the policies are triggered by the transitive property based on a fleeting reference to Brazil in a news article should be rejected.

Insurers' reliance on the discovery sought by the plaintiffs in the Securities Action is similarly misplaced. As the Superior Court aptly observed:

> The Court recognizes that the Securities Action plaintiffs considered the SEC's findings that resulted from the SEC Subpoena to be useful evidence in their case. But that's of little moment. First, it is unremarkable that ably represented litigants would portray any available evidence as favorable to them. More importantly, the Securities Action plaintiffs did not argue that the SEC's findings directly proved any of their allegations.

Op. at 26-27.

Indeed, in permitting this discovery under the liberal discovery standards mandated by the Federal Rules of Civil Procedure, the court made clear that "the plaintiffs do not claim that the FCPA allegations are the basis for the securities fraud claim." A0810–811.

Finally, Insurers' self-serving accusation (Br. at 34) that Alexion is improperly trying to "steer the Securities Action into a policy period with $20,000,000 in additional limits" should be rejected. Insurers theorize that if the only available coverage were Tower 1, Alexion would "undoubtedly" be "urging Tower 1 coverage." Br. at 34. But there is nothing nefarious about a policyholder trying to secure coverage under a claims-made insurance program for a claim that is brought during the policy period of that program. One could just as easily speculate that if only Tower 2 existed, Insurers would be arguing that the SEC Subpoena constituted a Claim made prior to their policy period, and that the Securities Action was not covered because it related back to that Claim.

In sum, the Superior Court correctly concluded that the Securities Action was not subject to the Prior Notice Exclusion or Interrelated Wrongful Acts provision.

b. The Superior Court Applied the Correct Legal Framework

Although Insurers do not directly attack the meaningful linkage standard, they try to broaden that standard, suggesting that all that is required is "a loose conception

of causation," or a "broad causal nexus" between the Securities Action and the Notice of Circumstances. Br. at 30. But Insurers did not challenge the meaningful linkage standard below, such that this argument is not preserved and the Court should not consider it on appeal. *Protech Mins., Inc. v. Dugout Team, LLC*, 284 A.3d 369, 378 (Del. 2022).

However, even if this argument had been preserved, it fails. The two main cases Insurers cite for their broader standard did not interpret insurance policies, let alone insurance policy *exclusions*, such as the Prior Notice Exclusion, which must be construed strictly and narrowly in favor of coverage.[8] And even the insurance cases Insurers cite, including *First Solar*, did not apply this broad, amorphous test. Instead, these cases – like the Superior Court here – applied the plain language of the policies to determine whether two matters were causally and meaningfully linked based on their facts, including specifically the nature of the misconduct alleged, the relevant time periods, the claimed damages, the identity of the parties, and the theories of liability. *First Solar*, 274 A.3d at 1015.

Insurers' suggestion that their "more lenient" standard is consistent with the "common nexus" language of the Interrelated Wrongful Acts Provision is wrong.

[8] *See* Br. at 30-31 (citing *City of Newark v. Donald M. Durkin Contracting, Inc.*, 305 A.3d 674, 680 (Del. 2023); *Torrent Pharma, Inc. v. Priority Healthcare Distrib., Inc.*, 2022 WL 3272421, at *10 (Del. Super. Aug. 11, 2022)).

Br. at 43-44. The Superior Court recognized that, in context, the "common nexus" language had a similar meaning to terms such as "arising out of." Op. at 21. That is because, "stitching together the definition of 'Interrelated Wrongful Act' and the limitation in Section VII.A, the key phrase there is 'arising out of' '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.'" Op. at 19-20 (emphasis in original).

The Superior Court supported its conclusion by comparing the Interrelated Wrongful Acts Provision here with the similar provision in *Sycamore Partners*. 2021 WL 4130631 at *11. Although Insurers do not challenge *Sycamore Partners'* analysis, they argue the case is distinguishable based on the language of the interrelated acts provision at issue there. But there is no material difference between the language at issue in *Sycamore* and the language here, which requires not just a causal nexus, but specifically that two Claims "aris[e]" from a common nexus of any "fact, circumstance, situation, event, transaction, cause or series of related facts, circumstances, situations, events, transactions or causes." A0055, A0159.[9]

[9] Insurers' efforts to distinguish *Pfizer Inc. v. Arch Insurance Company*, 2019 WL 3306043, at *5 (Del. Super. July 23, 2019), also fail. The Superior Court recognized that *Pfizer* was abrogated by *First Solar* to the extent it relied on the "fundamentally identical" standard. The Superior Court cited to *Pfizer* solely for the proposition that

Moreover, Insurers omit that the Interrelated Wrongful Acts Provision requires two "*Claims*" that arise out of the same Wrongful Acts or Interrelated Wrongful Acts, such that both Claims are "deemed to be first made on the date the earliest of such Claims is first made . . . ." A0061. Insurers, however, emphatically argue that the "SEC investigation did not constitute a 'Claim.'" Br. at 39. Thus, Insurers' suggestion that, based on the Interrelated Wrongful Acts Provision, the Superior Court should have employed a broader "common nexus" standard in comparing the Notice of Circumstances, a document that was not itself a Claim and did not provide notice of a Claim, to the Securities Action, makes no sense. This tactic by Insurers also improperly borrows language from the Interrelated Wrongful Acts Provision to expand the scope of the Prior Notice Exclusion in violation of bedrock principles of insurance policy interpretation. In any case, as noted, the Securities Action and SEC Investigation/Notice of Circumstances do not even share a common nexus of fact.

Equally baseless is Insurers' effort to use the "Notice" provision of the 2014-2015 Primary Policy to expand the scope of the Prior Notice Exclusion in the 2015-2017 Primary Policy. Insurers are not parties to or third-party beneficiaries of the

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the type of relatedness language employed here should not be interpreted to mean "shar[ing] 'any' commonality." Op. at 21.

2014-2015 insurance contracts and, thus, have no rights under those policies. Therefore, the operative question is not whether the Securities Action is a Claim within the "Notice" provision of the 2014-2015 Primary Policy but, rather, whether it is a Claim that falls within the 2015-2017 Primary Policy's Prior Acts Exclusion and Interrelated Wrongful Acts Provision.

In any case, Insurers mischaracterize the Notice provision, claiming that it is triggered by a policyholder's "awareness of" 'facts or circumstances which *may* reasonably give rise to a future Claim.'" Br. at 29. But that provision, by its plain terms, only applies to a "Claim which arises out of such Wrongful Act," i.e., an "anticipated Wrongful Act" of which the policyholder provides specific, written notice. A0165. Alexion's "awareness" is not enough. Indeed, Hudson, an insurer that is a party to the 2014-2015 policies, disagrees with Insurers' interpretation, and contends that the Securities Action properly falls within Tower 2.

Finally, Insurers' "loose conception of causation" test would "effectively extend[] coverage of the [Prior Notice Exclusion] to just about anything remotely connected to the" Notice of Circumstances. *ACE Am. Ins. Co.*, 305 A.3d at 348 (rejecting interpretation of the phrase "arising out of" that "effectively extends coverage of the exclusion to just about anything remotely related to the professional service"). This is contrary to the plain language of the Prior Notice Exclusion, which

is only triggered if the Claim at issue specifically arises out of the "Wrongful Act, fact, or circumstance" identified in the Notice of Circumstances. A0159. Insurers' broad test would lead to particularly absurd results here, where Alexion sold a single product during their policy period. However, even if Insurers' broader test applied, their arguments would still fail because the Securities Action and SEC Investigation do not even share a "loose causal connection."

c. Insurers Mischaracterize the Superior Court's Analysis So They Can Attack a Strawman

Insurers' accusation that the Superior Court improperly compared the Securities Action to the SEC Subpoena, when it should have more broadly compared the Securities Action to the Notice of Circumstances is baffling, incorrect and a distraction. Br. at 5, 22, 35, 41. Insurers Swiss Re and Navigators repeatedly asked the Superior Court to assess whether the Securities Action fell within the Prior Notice Exclusion and Interrelated Wrongful Acts Provision by comparing the Securities Action to the "SEC Materials," which they defined to include the Order of Investigation, SEC Subpoena, and Cease-and-Desist Order. B0292. Likewise, Appellant Endurance asked the Superior Court to compare the Securities Action to the "SEC's investigation" and, specifically, the SEC Subpoena, in its analysis of the Prior Notice Exclusion. B0265.

Insurers' focus makes sense – the SEC Investigation, and the SEC Subpoena in particular – was the matter noticed in the Notice of Circumstances. A0530–531. This focus was also consistent with Insurers' pre-litigation coverage correspondence, in which they asserted that the Prior Notice Exclusion applied because of the Securities Action's "interrelatedness with a May 7, 2015 subpoena from the [SEC]." B0052 (emphasis added); *see also* B0054; B0107. Indeed, Insurers did not change positions and assert that the Securities Action arose out of the Notice of Circumstances until they actually reviewed the SEC Subpoena itself, further confirming that this was the pivotal document for purposes of their relatedness analysis. A0542; B0051; B0054; B0107.

Here, the Superior Court performed the exact analysis Insurers requested. Although the Superior Court framed its discussion as a comparison of the Securities Action with the SEC Subpoena – because that was the document actually identified in the Notice of Circumstances – its analysis was broader, and encompassed the very documents Insurers asked the Superior Court to assess, including specifically the Cease-and-Desist Order, which set forth the SEC's findings. Op. at 24-25.

Indeed, in granting Insurers' motion to compel discovery relating to the SEC Investigation, in part, the Superior Court declined to limit its analysis to the SEC Subpoena on the ground that the Subpoena was not a "complaint." A0932–35.

Instead, it concluded that it needed additional documents to provide "context" for its relatedness analysis. Op. at 25-27. This was reflected in the Superior Court's decision which, contrary to Insurers' assertion, recognizes that the SEC Subpoena is not itself a "Claim," describes the very "SEC Materials" Insurers' focused on in their briefing, and looked beyond the SEC Subpoena to those "SEC Materials" in reaching its conclusion. *Id.* It is also reflected in the Superior Court's analysis of the broader "incident" identified in the Notice of Circumstances, as opposed to evaluating a particular Claim or just the SEC Subpoena. Thus, the scope of the Superior Court's analysis was commensurate with the scope of the Notice of Circumstances, which focused on the SEC Investigation and future Claims that might arise as a consequence of the SEC's findings.

At bottom, Insurers' conjecture that if the Superior Court had applied the correct analysis, it would have agreed with their conclusion is demonstrably false. The Superior Court performed the very analysis Insurers asked for, and resoundingly (and correctly) disagreed with them. In any case, Insurers' nit-picking of the Superior Court's decision is a transparent effort to distract from the fact that the Superior Court reached the correct *conclusion*, which this Court should affirm based on its *de novo* review.

II. THE SUPERIOR COURT DID NOT ABUSE ITS DISCRETION IN DENYING SWISS RE AND NAVIGATORS' REQUEST FOR ADDITIONAL DISCOVERY

A. Question Presented

Whether the Superior Court abused its discretion in denying Swiss Re and Navigators request for additional discovery? A0933-35.[10]

B. Scope of Review

"This Court reviews a trial court's application of discovery rules for abuse of discretion." *ABB Flakt, Inc. v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa.*, 731 A.2d 811, 815 (Del. 1999).

C. Merits of the Argument

Taking guidance from *First Solar*, *National Amusements*, and *Options Clearing*, the Superior Court recognized that Delaware courts typically assess whether matters are related for insurance purposes by comparing the pleadings in each matter.[11] A0932–934. The Superior Court, however, believed that in addition to the SEC Subpoena, its relatedness analysis could be aided by its review of the

[10] Endurance does not join in this request for additional discovery on appeal because Endurance agreed that additional discovery was not necessary. *See* Endurance Notice of Appeal.

[11] *See Nat'l Amusement*, 2023 WL 3145914, at *9; *see also First Solar*, 274 A.3d at 1013 (performing a "side-by-side comparison of the two complaints"); *Options Clearing*, 2021 WL 5577251, at *2 (denying Rule 56(f) request for discovery because courts determine relatedness based on the pleadings or related formal documents).

Order of Investigation, the SEC's document retention letter, and "communications between Alexion and [the] SEC regarding the scope of the SEC's investigation" and, thus, granted Insurers' motion to compel production of these documents. A0932–933. At the same time, the Superior Court recognized that certain other materials requested by Insurers, including the "documents Alexion produced in connection with the SEC investigation," would not aid its analysis, and therefore denied Insurers' motion to compel production of these materials. *Id.* This thoughtful and balanced approach to discovery was not an abuse of discretion. Appellant Endurance agrees, having never asserted that additional discovery was needed.

Insurers Swiss Re and Navigators, however, argue that because Alexion provided notice of "the entire SEC investigation as part of the Notice of Circumstances, not merely the SEC Subpoena," they were entitled to expansive discovery into the entirety of the multi-year investigation conducted by the SEC, including *all* materials Alexion produced to the SEC, identification of all persons at Alexion involved in the investigation, and depositions relating to Alexion's communications with the SEC. Br. at 47; A0477–499. According to Insurers, this discovery could reveal Alexion's and its counsel's undisclosed "belief[s]" and "knowledge" about the SEC Investigation. Br. at 47-48. The Superior Court did not abuse its discretion in denying this discovery.

The Notice provision Insurers heavily rely on is only triggered if there is actual, written notice of anticipated Wrongful Acts that give rise to a Claim. The same is true of the Interrelated Wrongful Acts Provision and Prior Notice Exclusion, which focus on whether there is a meaningful link between the Claim for which coverage is sought, and the facts, circumstances, and Wrongful Acts at issue in a prior Notice, or another Claim. Here, the key documents informing this analysis are the Notice of Circumstances, Order of Investigation, SEC Subpoena, Cease-and-Desist Order (which is effectively a complaint replete with factual allegations and conclusions), and the Securities Action operative complaint, all of which were part of the summary judgment record and considered by the Superior Court.

None of the additional materials and depositions Insurers sought would have altered the import of these documents. And what Alexion may have subjectively believed about the SEC's investigation is irrelevant to the relatedness analysis under the plain policy language.

CONCLUSION

For the foregoing reasons, this Court should affirm the orders under review.

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