

## Insurers Must Pay Pharma Co. Defense Costs In SEC Probe

By **Ruben Castaneda**

*Law360 (February 13, 2024, 8:38 PM EST)* -- A drug development company formed by a merger is entitled to insurance payments for expenses it paid two of its former officers in connection with federal subpoenas because the insurer failed to show that an exclusion applied, a California federal judge ruled Monday.

The insurer, AmTrust International Underwriters DAC, failed to show conclusively that a change-in-control exclusion eliminating directors and officers' insurance coverage for the expenses paid by 180 Life Sciences Corp. is applicable, U.S. District Judge Beth Labson Freeman found.

Therefore, AmTrust and excess insurer Freedom Specialty Insurance Co. are obligated under their policies to pay 180 Life all defense costs they have advanced and will pay to the former company officers in connection with U.S. Securities and Exchange Commission subpoenas, U.S. District Judge Labson Freeman said in granting 180 Life's second motion for partial summary judgment.

Additionally, citing a 2017 decision in the same district in *Braden Partners v. Twin City Fire Insurance*, the judge said the advancement clause "requires the insurers to advance defense costs for potentially covered claims."

In *Braden*, Judge Freeman said, the policy at issue required the insurer to advance expenses in connection with claims made against the policyholder "prior to the disposition of such claims."

He said language in a separate advancement clause "distinguishes the policies in this case from typical D&O policies that require payment of defense costs only after they have been shown to be a component of indemnified loss."

Judge Freeman said that even if he were to find other constructions of the policy to be a component of indemnified loss — which he did not — "the policies must be interpreted broadly to give the greatest protection to 180 Life."



A drug development company must cover payments it made to two former officers related to federal subpoenas. (AI Drago/Bloomberg via Getty Images)

The dispute follows the 2020 merger that combined KBL Merger Corp. IV, Katexco Pharmaceuticals Corp., CannBioRx and 180 Life Sciences Corp. The merged company kept the name 180 Life Sciences with a Palo Alto headquarters.

The SEC subpoenaed former KBL directors and officers Marlene Krauss and George Hornig. Both left KBL at the time of the merger.

According to court filings, 180 Life has advanced \$3.6 million to Krauss and \$100,000 to Hornig in connection with the subpoenas.

In court filings, AmTrust and Freedom Specialty argued that their policies, issued to KBL, do not cover 180 Life because that company is not named as an insured party on the policies.

The insurers said courts applying California law that have considered policies with provisions similar to the AmTrust policy have refused to apply the "potential for coverage" standard and have instead only required advancement of defense costs by an insurer when they were actually covered by the policy.

Even if the "potentially covered" standard applied, there is no potential coverage for SEC subpoenas under the AmTrust policy or the Freedom excess policy, the insurers argued.

Andrew N. Bourne of Cohen Ziffer Frenchman & McKenna LLP, who represents 180 Life Sciences, told Law360 the court "came to the right decision, based on the policy language and the purpose behind these policies."

AmTrust and Freedom Specialty did not immediately respond to a request for comment.

Freedom Specialty is represented by Valerie D. Rojas of Cozen O'Connor.

AmTrust is represented by Adrian T. Rohrer and David L. Koury of BatesCarey LLP and Samuel J. Galvin and Neil M. Kliebenstein of Bowman and Brooke LLP.

180 Life Sciences Corp. is represented by Jeffrey W. Shields and Rich A. Varner of Shields Law Offices and Andrew N. Bourne and Andrea B. Jung of Cohen Ziffer Frenchman & McKenna LLP.

The case is Amtrust International Underwriters DAC v. 180 Life Sciences Corp., case number 5:22-cv-03844, in the U.S. District Court for the Northern District of California.

--Additional reporting by Emily Enfinger and Elizabeth Daley. Editing by Brian Baresch.