

## Pharma Co. Can Get D&O Coverage For Securities Suit

By Jennifer Mandato

*Law360 (February 20, 2024, 7:02 PM EST)* -- A pharmaceutical company that developed a drug for rare genetic blood disorders is covered under a recent directors and officers policy for a securities class action, a Delaware state court ruled, rejecting its insurers' contention that the action was related to an SEC subpoena and thus fell under an older policy.

Judge Paul R. Wallace granted Alexion Pharmaceuticals Inc. partial summary judgment Thursday, ruling that excess insurers Swiss Re Corporate Solutions America Insurance Co., Endurance Assurance Corp. and Navigators Insurance Co. owed coverage for the underlying action under a D&O insurance tower spanning from 2015 to 2017.

A "meaningful linkage" between the U.S. Securities and Exchange Commission subpoena and the underlying securities action was required for the insurers to bar coverage under the 2015-2017 policy, but there was only a "loose connection" between the two, Judge Wallace said.

Swiss Re, Endurance and Navigators were the second-, third- and ninth-level excess insurers, respectively, in Alexion's 2015-2017 insurance program, according to court records. Alexion had previously purchased a D&O tower running from 2014 to 2015, in which Hudson Insurance Co. was the third-level excess insurer. Hudson is also a defendant in Alexion's suit.

On March 9, 2015, the SEC ordered an investigation into Alexion over the company's potentially inaccurate annual and quarterly reports and lack of internal accounting system, the order said. The SEC subsequently issued a subpoena May 7, 2015, seeking documents related to Alexion's foreign and domestic grant-making activities and any documents related to recalls of Alexion's blood disorder product, Soliris.

Soliris is considered an "orphan drug," a type of medicine used to treat the world's least common diseases. According to court records, Soliris is used to treat two different rare blood diseases and only had about 11,000 customers in 2017.

With an annual cost per patient ranging between \$500,000 and \$700,000, Alexion was accused of relying upon extreme sales tactics, including improperly obtaining patient data to locate potential customers and tell them they were going to die "to encourage them to demand Soliris from their doctor," according to the order. Alexion also allegedly funded foreign patient advocacy groups to obtain government funding for Soliris prescriptions, the order said.

Alexion settled with the SEC in July 2020, agreeing to pay over \$21 million in penalties. According to the SEC's findings, the company's subsidiaries in Russia and Turkey made improper payments to government officials in connection with Solaris, and its subsidiaries in Brazil and Colombia did not maintain accurate third-party payment records, the order said.

In December 2016, a class of Alexion stockholders brought a federal securities lawsuit in Connecticut against the company that was later amended to a consolidated class action. The shareholders accused Alexion and its directors and officers of misleading investors about the source of the company's financial success and argued that they overpaid for stock propped up by illegal activity, filings show.

Alexion sued its insurers in October 2022, seeking coverage for the securities action under either the 2014-2015 policy or the 2015-2017 policy.

While both towers of coverage are largely the same, the answer of which policy is applicable rests on whether the securities action was related to the SEC subpoena, Judge Wallace said, as both filings notably raised issues with Alexion's business activities in Brazil.

The 2015-2017 insurers relied on language in the policy stating that claims arising out of the same wrongful act would be deemed to be one claim. In this instance, such a finding would potentially bring the securities action under the 2014-2015 policy should the court determine that the claim was first made when the SEC issued its subpoena.

Alexion had argued that the securities action was covered under the 2015-2017 program, as the suit and the SEC subpoena were not "so related" that the two should be considered as one claim, and that should the court adopt the insurers' interpretation, it would render the 2015-2017 policy illusory. Judge Wallace sided with the company Thursday.

"The SEC subpoena and securities action are only loosely connected by Alexion's activities in Brazil," Judge Wallace said. "And that tangential link is not enough to make the two related for the purposes of the 2015-2017 policy."

According to the order, the SEC subpoena was "broadly concerned" with Alexion's compliance with the Foreign Corrupt Practices Act, and while Brazil was mentioned in the subpoena, the SEC's eventual findings were more focused on conduct related to Turkey and Russia.

The securities action, on the other hand, accused Alexion and its directors of "artificially inflating" the company's value through a number of wrongful actions, of which Alexion's activity in Brazil is only a small part.

"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,'" Judge Wallace said. "That is wholly different from the conduct alleged in the securities action."

While the securities action class said that the SEC's findings helped show a sustained pattern of illegal and unethical conduct, the class didn't argue that the investigation directly proved their allegations, the judge said.

"Unlike the SEC subpoena — which was focused on the propriety of the contributions and the reporting

thereof — the securities action is only concerned with the use to which the contributions were put," the judge ruled.

Counsel for Alexion declined to comment. Representatives of the insurers did not immediately respond to requests for comment Tuesday.

Alexion is represented by Robin L. Cohen, Cynthia M. Jordano and David J. Matulewicz-Crowley of Cohen Ziffer Frenchman & McKenna LLP and Daniel M. Silver and Benjamin A. Smyth of McCarter & English LLP.

Endurance is represented by Marc S. Casarino of Kennedys CMK and Jeanette L. Dixon of Manning & Kass Ellrod Ramirez Trester LLP.

Swiss Re is represented by John C. Phillips Jr. and David A. Bilson of Phillips McLaughlin & Hall and James Sandnes and Sarah F. Voutyras of Skarzynski Marick & Black LLP.

Navigators is represented by Bruce W. McCullough of Bodell Bove LLC and Ronald P. Schiller, Thomas N. Brown and Daniel J. Layden of Hanglely Aronchick Segal Pudlin & Schiller.

Hudson is represented by R. Grant Dick IV of Cooch & Taylor PA and Courtney E. Scott of Tressler LLP.

The case is Alexion Pharmaceuticals Inc. v. Endurance Assurance Corp. et al., case number N22C-10-340, in the Superior Court of the State of Delaware.

--Editing by Abbie Sarfo.