MA Court Issues Ruling Favorable to Insurers on Extrinsic Evidence, Interrelatedness

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A recent Federal Court decision held that in Massachusetts, an insurer may use extrinsic evidence to deny the duty to defend, so long as the insurer is not trying to use that evidence to challenge the merits of the underlying litigation.


Biochemics sought summary judgment that Axis owed it a defense against the 2012 SEC subpoenas and enforcement action because the claims were made during Axis’s policy period. Axis opposed the motion by arguing that the 2012 subpoenas and enforcement action were part of a single ongoing claim first made before its policy period began — i.e. when the 2011 subpoenas were served — and it was entitled to take discovery to prove it.

Biochemics argued that discovery was not needed because in determining the insurer’s duty to defend, the insurer cannot rely on extrinsic evidence but instead the insurer’s duty must be decided solely by reference to the underlying complaint and the policy.

Judge Zobel denied Biochemics’ motion, stating that although an insurer cannot use extrinsic evidence to avoid its duty to defend by challenging the allegations in the complaint, it “may use extrinsic evidence to deny a duty to defend based on facts irrelevant to the merits of the underlying litigation, such as whether the claim was first made during the policy period, whether the insured party reported the claim to the insurer as required by the policy, or whether the underlying wrongful acts were related to prior wrongful acts.” (Citations omitted.) Biochemics, Inc. at p. 8.

Judge Zobel also rejected Biochemics’ argument that because the SEC enforcement action alleged wrongful acts that took place after the 2011 subpoenas were served, the enforcement action could not be related to the wrongful acts underlying the 2011 subpoenas. She held that based on the definition of “Interrelated Wrongful Acts” in the D&O policy, the question is not whether the 2011 subpoenas sought information about the later alleged wrongful acts, but whether there is a “common nexus” between the 2011 subpoenas and the SEC enforcement action.

Judge Zobel also found that Massachusetts law does not require an insurer to defend while coverage issues are pending – if the insurer fails to defend, “the insurer simply risks liability for the defense costs that the insured party incurs (which may be higher than if the insurer had provided a defense).” Id. at 12.
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