

ERISA Claim Based on Same Facts As Securities Class Action Lawsuit Deemed an Interrelated Claim

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In an unreported decision, the United States District Court for the Southern District of New York, applying New York law, has held that an ERISA class action is an interrelated claim relating back to a claim made during a prior policy period and not a new claim covered by the subsequent policy in force when the class action was filed. *Zahler v. Twin City Fire Ins. Co.*, 2006 WL 846352 (S.D.N.Y. Mar. 31, 2006).

The case concerned two policies. The first was a directors, officers and company liability policy that covered claims made and reported within its policy period, July 1, 2000 to April 23, 2003. The second policy was a management liability and company reimbursement insurance policy that covered claims first made and reported within the policy period, April 23, 2003 to April 23, 2004. Both policies had "Interrelated Claim" and "Interrelated Wrongful Act" clauses, which stated that all claims based on the same or similar facts would constitute an Interrelated Wrongful Act, and that all claims based on such Interrelated Wrongful Acts were deemed Interrelated Claims. Interrelated Claims were deemed one claim made at the earliest time any of the Interrelated Claims was made.

A securities class action lawsuit was filed on May 22, 2001, and reported during the first policy's term. A subsequent ERISA class action was filed on December 8, 2003, and reported during the second policy's term. Both class actions were based on "alleged misstatements regarding the financial health of Loral's investment in Globalstar." Additionally, both class actions had identical class periods and made many identical factual allegations.

Both insurers denied coverage for the ERISA suit and refused to provide a defense. The first argued that the ERISA suit was a claim made subsequent to its policy and thus there could not be coverage. The second argued that the ERISA suit constituted an Interrelated Claim under the first insurer's policy, and therefore coverage, if any, existed under the first insurer's policy.

The court first considered coverage under the second insurer's policy, during which the ERISA class action was filed. In addition to the Interrelated Claims language, the second policy contained an exclusion for wrongful acts "based upon, arising out of, directly or indirectly resulting from, in consequence of, or in any way

involving any fact circumstance, situations, transactions, event or Fiduciary Wrongful Act which, before the effective date of this endorsement, was the subject of any notice given under any other . . . policy." Additionally, it contained a prior notice exclusion for claims "based upon, arising out of, directly or indirectly resulting from, in consequence of, or in any way involving any fact, circumstance, situation, transaction, event or Wrongful Act . . . which, before April 23, 2003, was the subject of any notice given under any other . . . policy." The court noted that the language in the exclusions and the Interrelated Wrongful Act definition was clear and sweeping in its attempt to avoid coverage for a claim based on factual circumstances similar to any prior claim. The court then noted that the ERISA suit contained nearly identical facts and was based, generally, on the same acts by the insured. Therefore, the court held that it was an Interrelated Claim not covered under the second insurer's policy.

The court then considered the first insurer's policy. The court noted that the securities class action was covered by the first insurer and that the ERISA class action was based on the same wrongful acts. Thus, the court ruled that under the Interrelated Claims definition, the suits constituted one claim under the first policy.