

ALERT

Qui Tam Claim and Anti-Retaliation Claim Based on Alleged False Reporting by Company Are Single Claim

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The United States District Court for the Western District of Washington has held that coverage exists for a *qui tam* claim that was first made and reported after the policy period because it arose out of related wrongful acts to an anti-retaliation claim that previously was made and reported during the policy period. *Carolina Cas. Ins. Co. v. Omeros Corp.*, No. C12-287RAJ (W.D. Wash. Mar. 11, 2013). The court also held that, even though the claims were treated as a single claim made at the time of the anti-retaliation claim, the insurer could not rely on the policy's employment-related exclusion to deny coverage for the *qui tam* claim.

The insured biopharmaceutical company's former CFO sued the company, alleging that he was wrongfully terminated, in violation of the anti-retaliation provisions of the False Claims Act, for internally reporting the company's alleged false reports to the National Institutes of Health. The company's insurer agreed to defend the company, subject to a reservation of rights, under the management liability insurance policy's employment practices liability coverage. Following discovery in the anti-retaliation suit, the former CFO amended his complaint to include a *qui tam* action on behalf of the U.S., asserting that the company violated the False Claims Act. The insurer then brought a declaratory judgment action to determine its coverage obligations for the *qui tam* suit.

The insurer argued that the policy's D&O coverage did not apply to the *qui tam* action because the claim was made and reported after the policy period. The court looked to the policy's related claim provision, which treated all claims based upon or arising out of the

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same wrongful act or related wrongful acts as a single claim deemed made when the first claim was made. The policy defined “related wrongful acts” as those which are “logically or causally connected by reason of any common fact, circumstance, situation, transaction, casualty, event, or decision.” The insurer argued that the anti-retaliation claim sought recovery for wrongs done to the former CFO himself and did not require him to prove that the company actually made false claims, whereas the *qui tam* claim sought recovery for wrongs done to the U.S. and required proof that the company actually made false claims. The court found these differences irrelevant because the alleged false reporting was a common event logically connecting both of the claims sufficient to make the two wrongful acts “related” under the policy.

The insurer also argued that, if the claims were to be treated as a single claim, the D&O coverage exclusion for claims “in any way involving any past, present or future actual or potential employment relationship” should bar coverage. The court rejected this argument as well, finding that “related wrongful acts” are deemed a single claim only for purposes of determining the timing of the claim, not for purposes of applying policy exclusions unrelated to the claims-made nature of the policy. The court noted that the insurer’s interpretation of the related claim provision would permit it to decline coverage even for related claims made simultaneously if they consisted of both an employment and non-employment claim. The court held that a more reasonable interpretation was to construe exclusions having nothing to do with the claims-made nature of the policy to apply separately to individual claims, even if they were considered a single claim for purposes of determining when they were first made.