

Lawyer Insights

8th Circ. Insurance Ruling Spotlights Related-Claims Defenses

By Geoffrey Fehling and Jae Lynn Huckaba
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Insurers frequently raise related acts provisions to limit coverage or disclaim any duty to defend.

But the U.S. Court of Appeals for the Eighth Circuit's recent decision in *Dexon Computer Inc. v. Travelers Property Casualty Co. of America* — the latest example of coverage disputes arising from related acts and claims — highlights the breadth of an insurer's duty to defend, and provides some guidance for how policyholders can overcome related-acts defenses.

Background

Dexon Computer, a reseller of computer networking products, sources brand name products from different suppliers, including Cisco Systems Inc.

In 2020, Cisco sued Dexon in the U.S. District Court for the Northern District of California for federal trademark infringement and counterfeiting in violation of the Lanham Act.

To bolster its allegations, Cisco referenced allegations of infringements between 2006 and 2010, which had formed the basis of a prior suit against Dexon that was dismissed with prejudice in 2011. Cisco also alleged 35 separate acts of infringement between 2015 and 2020.

Through nearly 15 years' worth of alleged infringements, Cisco sought to prove that Dexon engaged in a trademark infringement scheme, entitling Cisco to enhanced Lanham Act remedies.

Dexon sought a defense of the Cisco lawsuit from its insurer, Travelers, under a claims-made liability policy that provided communications and media liability coverage.

The policy covered losses caused by a "communications and media wrongful act." It defined "wrongful act" to include acts of trademark infringement, subject to the condition that the wrongful act must have been committed on or after the policy's retroactive date of May 28, 2019, and before the end of the policy period.

Travelers denied coverage and declined to defend Dexon based on its interpretation of the policy's related acts provision. That provision provided that each wrongful act in a series of related wrongful acts would be deemed to have been committed on the date the first wrongful act in the series was committed.

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The policy defined "related" to broadly mean "connected, tied, or linked by any fact, circumstance, situation, event, transaction, cause or series of related facts, circumstances, situations, events, transactions or causes."

Cisco's complaint, Travelers asserted, alleged a series of infringements dating as far back as 2006, all of which were related and deemed to have been committed as early as 2006 — over a decade prior to the retroactive date.

In response, Dexon provided Travelers with additional information about the suppliers from whom Dexon sourced the allegedly counterfeit products and noted that no two acts of alleged infringement involved the same or related suppliers. But Travelers maintained its coverage denial.

The Trial Court Holds That the Insurer Must Defend

Dexon filed an action against Travelers in the U.S. District Court for the District of Minnesota, seeking a declaratory judgment that Travelers had a duty to defend and indemnify the Cisco lawsuit.

Relying on Minnesota law, the court held that Travelers was required to defend because the duty to defend extends to every claim that "arguably" falls within the scope of coverage.

The court explained that relatedness is a nebulous concept, and noted that the parties' agreement that the policy's definition of "related" could not be applied literally, as "every claim that any litigant has ever made against Dexon is 'linked' by the 'fact' that the claims were made against Dexon."

It stated that the relevant issue was whether each of the alleged infringement acts were related enough to the infringed acts occurring prior to the retroactive date.

In considering whether the alleged acts of infringement were sufficiently related, the court noted that Dexon had informed the insurer that the allegedly counterfeit products referenced in the complaint were different in several respects.

For example, Dexon told Travelers that the allegations involved different products, purchased at different times, from different sources by different employees and sold to different customers. Thus, the court concluded that it could not hold that every alleged act of trademark infringement was related to a prior act of trademark infringement that occurred prior to the retroactive date.

The district court stated that "if even one of the post-Retroactive Date acts of infringement is even arguably unrelated to any pre-retroactive date act of infringement, Travelers owes Dexon a defense."

The Eighth Circuit

Travelers appealed the district court's decision to the Eighth Circuit.

On appeal, Travelers argued that the district court erred in:

- Considering information outside of the complaint to determine the insurer's duty to defend;

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- Ruling that the insurer owed Dexon a defense "if even one of the post-Retroactive Date acts of infringement [was] even arguably unrelated to any pre-Retroactive Date acts of infringement"; and
- Finding that the policy's broad definition of "related acts" did not encompass Cisco's allegations of a "unified, continuous counterfeit trafficking scheme spanning more than 15 years."

The Eighth Circuit rejected each of the insurer's arguments and affirmed the district court's holding that Travelers must defend.

In addressing the insurer's argument that the district court erred in considering information outside the complaint in determining the insurer's duty to defend, the court pointed to precedent from the Minnesota Supreme Court and the Eighth Circuit holding that an insurer must accept tender of a defense or further investigate a potential claim where the insurer is aware of facts indicating there may be coverage.

Dexon had provided Travelers with additional information indicating that the allegations in Cisco's complaint may be covered, including the information that each of the counterfeit products were different, sold at different times and purchased from different suppliers.

The Eighth Circuit pointed out that once Travelers knew all of these facts, the insurer had the obligation to either accept the defense or further investigate the potential claim.

The Eighth Circuit also rejected the argument that the district court erred in ruling that Travelers had to defend if even one of the post-retroactive date acts of infringement is even arguably unrelated to any pre-retroactive date act of infringement.

The appellate court noted that the insurer did not include this argument in its briefs, but stated "even if preserved, this argument is completely without merit" because both the Supreme Court of Minnesota and the Eighth Circuit had previously held that an insurer must defend where "any part of the cause of action is arguably within the scope of coverage."

Finally, to address the insurer's related acts argument, the Eighth Circuit explained that Cisco pleaded 35 distinct infringing transactions and that the insurer improperly focused on some of the conduct asserted by Cisco to prove the claim instead of the specific allegations of infringement.

The court stated that under Minnesota law, "the duty to defend turns on whether any part of the cause of action inferentially alleged a species of covered injury that is arguably within the scope of coverage."

It agreed with the district court that the complaint, combined with the additional information Dexon provided, undermined Traveler's argument that the 35 transactions were a series of related acts. Therefore, the Eighth Circuit affirmed.

Takeaways

Insurers often try to use the related acts provisions to deny coverage, especially where the pleadings highlight acts committed arguably outside the scope of the policy's coverage.

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That defense could be based on wrongful acts allegedly committed before the policy's retroactive date or because earlier related claims were first made outside the relevant policy period, making all claims fall outside the covered policy period.

While all related-claims disputes are highly fact-specific and heavily dependent on the particular policy wording, there are several recurring themes that policyholders should keep in mind when navigating these kinds of claims.

Defining "Relatedness"

The specific policy language and definitions of "related" is crucial in determining whether a related actions provision applies to negate coverage.

In *Dexon*, the definition of "related" was so nebulous that both parties agreed that it could not be applied literally because doing so would mean that every claim any litigant has ever made against the company would be linked by that fact and could be treated as related under the policy.

Choice of Law

Depending on the governing law, policyholders may be able to rely on facts outside the operative pleadings to support the insurer's defense obligations.

State law may also be determinative on the issue of whether a particular claim or set of facts meets the policy's relatedness requirement, since courts often have been forced to create common law standards to create guardrails on how related-claims provisions are applied in practice.

Policyholders should understand the state law likely to govern any coverage dispute, including whether the policy includes choice-of-law, choice-of-venue or dispute resolution provisions that may affect governing law.

Duty to Advance Versus Duty to Defend

The *Dexon* dispute was different because, unlike many claims-made policies that give rise to relatedness disputes, the Travelers policy at issue imposed a duty to defend, rather than a duty to advance defense costs.

While courts often find that to be a distinction without a difference in assessing the insurer's defense obligations based on the potential for coverage, case law is clear that an insurer with a duty to defend one claim may create a duty to defend all claims.

Understanding the scope of the insurer's defense obligations — especially in mixed claims involving covered and potentially uncovered parties, causes of action, or wrongful acts — is important to navigating a potential related claim dispute.

Timing Is Everything

As with many coverage disputes, the best time to think about the availability and scope of coverage, as well as potential defenses or limitations to coverage, is before a claim arises.

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Evaluating policy language at the time of placement and in connection with ongoing renewals can identify potential gaps, overbroad exclusionary language and other problematic language that may be able to be modified or removed.

But if those ambiguities or roadblocks are first discovered through the insurer's denial letter, options are much more limited.

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