

Delaware Court Rules That Appraisal Action Is Covered “Securities Claim” And That Policy Covers Pre-Judgment Interest For Non-Covered Losses

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A Delaware court ruled that an appraisal action against an insured company qualifies as a covered “Securities Claim” under a D&O policy and that “Loss” encompasses pre-judgment interest for non-covered losses. *Solera Holdings, Inc. v. XL Specialty Ins. Co.*, 2019 WL 3453232 (Del. Super. Ct. July 31, 2019).

After Solera, a publicly-traded company, was acquired by another entity, a group of shareholders filed an appraisal action seeking determination of the fair value for their shares. That action culminated in a finding that the value of the petitioners’ shares at the time of merger was actually lower than the merger price. Following the ruling, Solera was ordered to pay the petitioners the fair value of their shares plus pre-judgment interest. Solera paid more than \$13 million in attorneys’ fees and other costs defending the appraisal action.

Solera’s D&O insurers denied coverage, arguing that the appraisal action was not a “Securities Claim,” which the policy defined as a claim “made against [Solera] for any actual or alleged violation of any federal, state or local statute, regulation, or rule or common law regulating securities.” The insurers contended that the appraisal action did not allege any “violation” of law or any wrongdoing that satisfied the “Securities Claim” definition. The court disagreed, noting that allegations of wrongdoing are not required by the policy language. The court explained that the undefined term “violation” includes any breach of the law or contravention of a right or duty. Allegations of unfair share valuation in an appraisal action meet this standard, the court concluded, because “[b]y its very nature, a demand for appraisal is an allegation that the company contravened that right by not paying shareholders the fair value to which they are entitled.”

Additionally, the court ruled that even though Solera’s payment of the fair market value of the shares was not a covered loss, the pre-judgment interest on that payment is covered. The policy defines “Loss” as “damages, judgments, settlement, pre-judgment and post-judgment interest or other amounts . . . that [Solera] is legally obligated to pay.” The court stated: “Defendants’ argument that ‘Loss’ includes pre-judgment interest only on a covered judgment is untethered to the language in the Policy.” However, the court declined to grant summary judgment on this issue, finding issues of fact as to whether other provisions precluded coverage and whether Solera actually paid the interest award, among other things.

Finally, the court addressed the insurers’ argument that they had no duty to cover Solera’s pre-notice defense costs because Solera violated

the policy’s consent clause by failing to give notice before incurring those costs. The court concluded that a coverage denial based on a violation of a consent clause requires a showing of material prejudice under Delaware law. The court held that the issue of prejudice could not be decided on summary judgment, explaining that there is a presumption that the insurers were prejudiced by the breach, but that Solera could rebut that presumption with specific evidence.

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