

## Applying Delaware Law Pursuant To Policy's "Law Most Favorable" Clause, Delaware Court Rules That Settlement Funds Are Not Uninsurable Losses

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A Delaware court rejected insurers' "uninsurability defense," ruling that Delaware law applied to the insurance dispute and that insurance for disgorgement or restitution is not prohibited as a matter of public policy. *Sycamore Partners Management, L.P. v. Endurance American Ins. Co.*, 2021 WL 761639 (Del. Super. Ct. Feb. 26, 2021).

The coverage dispute arose after a corporate transaction led to a bankruptcy filing by the acquired company. The bankruptcy estate sued the acquiring investment funds for fraudulent conveyance and breach of fiduciary duty, among other claims. The investment funds settled the claims for \$120 million and then sought insurance coverage. The insurers denied the claim, arguing that the settlement was uninsurable as a matter of public policy because it represented disgorgement of or restitution for ill-gotten gains. The investment funds moved for judgment on the pleadings as to the insurability issue and the court granted the motion.

The coverage question turned primarily on whether a "law most favorable" policy clause constituted a choice of law provision. The provision excluded loss for "amounts which are uninsurable under the law most favorable to . . . insurability." The court ruled that this clause constitutes a choice of law provision that allows the policyholder to select "any reasonable forum" for determining whether a loss is uninsurable. In addition, the court ruled that the provision was enforceable, rejecting the contention that it conflicts with the public policy of New York, which has a materially greater interest in the conflict than Delaware. The court explained that even absent the choice of law clause, New York would not be the "default" state because Delaware "takes a superseding interest in the merits of disputes involving insurance coverage for fiduciary mismanagement of Delaware organizations."

Having determined that Delaware law governs the dispute, the court addressed whether the state has a public policy prohibiting insurance coverage for disgorgement or restitution payments. It held that it does not, noting the absence of clear legislation on this point.

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