

Delaware Supreme Court Affirms D&O Coverage For Fiduciary And Securities Settlements, Rejecting Uninsurability Defense

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The Delaware Supreme Court ruled that an excess D&O insurer was obligated to fund the two underlying settlements, rejecting arguments that coverage was barred by public policy or contractual language. *RSUI Indem. Co. v. Murdock*, 2021 WL 803867 (Del. Mar. 3, 2021).

Following a merger, shareholders of Dole Food Company filed suit, challenging the fairness of the transaction and alleging breach of fiduciary duty. After a nine-day trial, the court issued a Memorandum Opinion finding that Dole executives breached their duty of loyalty through intentional and fraudulent conduct. Dole ultimately settled the suit. Before the settlement was approved by the court, a second set of shareholders brought a federal securities action against Dole. Dole settled that action as well. In turn, several insurers sought a declaration that they had no duty to fund the settlements. A Delaware trial court entered judgment in favor of Dole. RSUI, a high-level excess insurer, appealed. The Delaware Supreme Court affirmed the trial court, rejecting each of RSUI's assertions.

First, the Delaware Supreme Court ruled that the trial court correctly applied Delaware law. RSUI argued that California law, which bars insurance coverage for willful acts, governed the dispute under the “most significant relationships” analysis because the negotiation and procurement of the policies occurred at Dole’s headquarters in California, and the directors and officers lived and worked in California. RSUI further argued that Dole’s incorporation in Delaware was “largely irrelevant.” The court disagreed, observing that “in the vast majority of cases, Delaware law governs the duties of the directors and officers of [a] Delaware corporation to the corporation, its stockholders, and its investors.” The court explained that Delaware statutory law permits Delaware corporations to provide broad indemnification to their executives and to purchase D&O policies to protect them where such indemnification is unavailable. Thus, “applying Delaware law to the D&O policies that actually cover those costs advances the relevant policies of the forum.” However, the court noted the fact-specific nature of its ruling, acknowledging that the California contacts presented here “might be dispositive . . . [for] an insurance policy covering a different subject matter and insureds with a more tenuous connection to Delaware.”

Second, the court ruled that Delaware public policy does not preclude coverage for fraudulent conduct. RSUI argued that because both underlying settlements were predicated on a judicial finding of fraud by Dole executives, Delaware public policy should bar their insurability. Rejecting “this invitation to void the Insureds’ otherwise valid coverage,” the court held that the policy’s “expansive definition of covered losses, which on its face does not exclude losses occasioned by fraud,” governs coverage. The court stated: “in the absence of clear guidance

from the General Assembly to the contrary, we must reject RSUI’s invitation to void its contractual obligations on public-policy grounds.”

Third, the court concluded that a “Fraud/Profit Exclusion” did not bar coverage for the settlements. The exclusion applied to fraud or willful violation of law “if established by a final and non-appealable adjudication adverse to such Insured in the underlying action.” The court ruled that the exclusion did not apply to the settlement of the second shareholder suit because there was no “adjudication of fraud.” The court rejected RSUI’s contention that the exclusion should apply because the settlement was based upon and attributable to the findings of fraud in the first stockholder action. The court noted that it need not address whether the settlement of the first shareholder action was subject to the exclusion because the settlement of the second action alone exhausted the underlying coverage limits.

Fourth, the Delaware Supreme Court ruled that the “larger settlement rule” (under which a loss is fully recoverable unless the insurer can show that the liability for non-covered conduct increased the insurer’s liability), rather than a “relative exposure” rule (which weighs the relative exposure between covered and non-covered losses) governed the allocation of covered losses. The policy stated that:

If in any Claim, the Insureds who are afforded coverage for such Claim incur Loss jointly with others . . . or incur an amount consisting of both Loss covered by this Policy and loss not covered by this Policy because such Claim includes both covered and uncovered matters, then the Insureds and the Insurer agree to use their best efforts to determine a fair and proper allocation of covered Loss. . . . In making such determination, the parties shall take into account the relative legal and financial exposures of the Insureds in connection with the defense and/or settlement of the Claim.

The trial court held that this provision governs only situations in which the parties work together to arrive at a “fair and proper allocation,” and does not address the situation presented here, where the parties have failed to agree on allocation and seek judicial resolution. *See* [February 2020 Alert](#). The Delaware Supreme Court agreed, and noted that RSUI failed to allege that the settlement represented a mixture of covered and non-covered losses or that a relative exposure theory would lead to a reduction in available coverage.

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