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New Decision Confirms D&O Coverage for Appraisal Actions

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On July 31, 2019, the Superior Court of the State of Delaware issued a decision addressing coverage under directors and officers liability insurance for an appraisal action. In Solera Holdings, Inc. v. XL Specialty Insurance Co., 2019 WL 3453232 (Del. Super. Ct. July 31, 2019), the court addressed the specific question of whether a D&O policy "covers attorneys' fees and pre-judgment interest the insured company incurred defending an appraisal action.

The appraisal action was filed under 8 Del. C. § 262 by several shareholders seeking the fair value of their shares. The Court of Chancery ordered the insured to pay the petitioners the fair value of their shares, plus pre-judgment interest of more than $30 million. The insured also incurred more than $13 million in attorneys' fees and costs defending the appraisal action.

The insurers denied coverage, arguing that an appraisal action is not a "Securities Claim" as defined in the policy because it was not an action for the "violation" of any statute, rule, or law regulating securities. The insurers pointed out that allegations of wrongdoing are not required in an appraisal action. They also argued that there was no coverage for the pre-judgment interest award because the underlying fair value award was not covered and that there was no coverage for any defense expenses incurred before they were notified because they were incurred without their consent.

The court determined that the policy language is unambiguous. It noted, "Nothing in the Policy's use of the word 'violation' purports to limit coverage only to claims containing allegations of wrongdoing because the common meaning of the word

'violation' in this context is not limited to wrongdoing. 'Violation' simply means, among other things, a breach of the law and the contravention of a right or duty."

The court noted that although the insurers "could have used limiting language," "[t]heir choice to use a broader word, like violation, must be given effect by this Court." Therefore, it held that "the Appraisal Action is a Securities Claim under the Policy because the appraisal petition necessarily alleges a violation of law or rule."

The court also addressed one other important issue—the "consent" provision in the policies. The insured sought to have the insurers pay for the fees it had incurred in the defense of the action from its commencement until after trial, even though it did not tell the insurers about the action or obtain their consent to incur those defense payments. Therefore, the insurers argued that they were not obligated to pay because their policies contained a consent provision saying that the insured could not "incur any Defense Expenses . . . or admit liability for, making a settlement with respect to, or settle any [c]laim without [the insurer's] consent, such consent not to be unreasonably delayed or withheld . . . ."

The insured argued that the insurers could not rely upon the consent condition unless they were materially prejudiced by the delay in notice. The court accepted this argument, stating that it could not "find any reason why the implied prejudice requirement that Delaware courts apply to consent-to-settle clauses would not also apply to the Consent Clause in this case." It noted that a "strict interpretation" of the clause "would lead to a forfeiture of coverage." Therefore, it concluded, "Implying the prejudice requirement . . . protects an insured who has breached a consent provision from the harsh result of forfeiture, but only if the insured can prove by competent evidence a lack of prejudice to the insurer." Id. In so holding, the court followed the decision earlier this year in Arch Insurance Co. v. Murdock, 2019 WL 2005750, at *10-11 (Del. Super. May 7, 2019) (insurers could not rely on consent clause to avoid coverage for settlement if insured established that insurers were not materially prejudiced).

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