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Delaware court rejects insurers' argument that insureds breached D&O policies by settling merger-related lawsuits without consent

By Sergio F. Oehninger, Esq., and Yaniel Abreu, Esq., ***Hunton Andrews Kurth LLP****

JUNE 17, 2019

The Delaware Superior Court ruled that insurers could not rely on Written Consent and Cooperation clauses in directors and officers liability insurance policies to avoid coverage for settlements by Dole Food Company, Inc. ("Dole") in shareholder disputes involving fraud in a go-private transaction. Arch Ins. Co. v. Murdock, No. 16-01-104, 2019 WL 2005750 (Del. Super. Ct. May 7, 2019).

In the first underlying dispute, In re Dole Food Co., Inc. Stockholder Litig., 2015 WL 5052214 (Del. Ch. 2015), shareholders sued Dole, its former CEO, Michael Carter, DFC Holdings, LLC ("DFC"), and David Murdock, who owned 40% of Dole's stock and was a director and officer of Dole.

The shareholders alleged that Murdock used DFC to acquire the remaining shares of Dole at an artificially low price in order to take the company private. The court found that Murdock, Carter, and DFC breached their duty of loyalty.

The plaintiffs in San Antonio Fire & Police Pension Fund v. Dole Food Co., Inc., 177 F. Supp. 3d 838 (D. Del.), brought similar claims against Dole and Murdock.

> The court explained that consent-to-settle provisions do not grant an insurer an absolute right to veto a reasonable settlement.

Both cases settled. The combined settlements reportedly totaled $222 million.

According to Dole, DFC, and Murdock (the "policyholder"), they notified the D&O insurers of their intent to settle the shareholder disputes, shared information relevant to the ongoing settlement negotiations, and formally asked the insurers to contribute funds toward resolution.

Despite those efforts, the insurers, which had reserved their rights to accept coverage, refused to fund the settlement amount. Instead, the insurers sued their policyholders seeking a declaration of no coverage under the policies.

In their motions for summary judgment, the insurers argued, among other things, that the policyholders breached the policies' Written Consent provision by finalizing the underlying settlements without their prior consent.

They also contended that the policyholders breached the Cooperation clause and that there is no coverage because the settlements are not a "Loss" as that term is defined in the policies.

The court rejected these arguments.

At the outset, the court explained that consent-to-settle provisions do not grant an insurer an absolute right to veto a reasonable settlement. Rather, the main purpose of the provision is to protect the insurer from prejudice or a collusive settlement.

The court determined that, based on the record, there is a question of fact as to whether the insurers unreasonably withheld their consent to the settlements. The court similarly concluded that there was a genuine issue of material fact as to whether the insurers had a reasonable opportunity to participate before the settlements were finalized.

Because of these factual disputes, the court concluded that it could not, as a matter of law, rule that the policyholders breached the Written Consent provision.

Indeed, the court explained that whether the insurers placed the policyholders in an untenable position, by making them decide between (a) settling without consent and potentially losing coverage or (b) continuing with the litigation and then potentially not being able to recover, is a question of fact for the jury.

The court also ruled that there was a genuine issue of material fact as to whether the policyholders breached the policies' Cooperation clause.

The court explained that the purpose of cooperation clauses is to prevent collusion between the insured and the claimant and to allow the insurer an opportunity to conduct a reasonable investigation of the claim.

The policyholders maintained that the insurers did not associate with the defense of the shareholder lawsuits, did not accept coverage, never reserved their rights to deny coverage in certain instances, and even failed to respond to the policyholders' notice of one of the lawsuits.

The policyholders maintained that, because the insurers failed to take timely action, the policyholders were permitted to make reasonable decisions to defend themselves.

The insurers, on the other hand, admitted that the policyholders had notified them of settlement discussions, but ultimately negotiated the settlement without insurer participation.

Based on these factual contentions, the court rejected the insurers' argument that the cooperation clause was breached as a matter of law.

Because these issues will often result in a fact-finding inquiry, it is important to have interactions with insurers well-documented.

The court also ruled that the settlements were a "Loss," which the policies defined, in relevant part, as "all monetary amounts which the insureds become legally obligated to pay on account of a Claim, including damages, settlement amounts and judgments[.]"

In reaching its conclusions, the court relied on the following established rules concerning the interpretation of insurance policies:

- Insurance policies are construed as a whole, to give effect to the parties' intentions and to avoid reading single passages in isolation.
- Courts must give effect to all terms and avoid a conclusion that renders terms uselessly repetitive, illusory, or meaningless.
- Where the language of an insurance policy is clear and unambiguous, the parties' intent is ascertained by giving the language its ordinary and usual meaning.
- Ambiguous insurance policy language is construed in the insured's favor — i.e., under the doctrine of contra proferentem, the language of an insurance policy (i.e., a contract of adhesion) must be construed most strongly against the insurance company that drafted the policy.
- An insurance policy is ambiguous when the provisions at issue are reasonably or fairly susceptible to different interpretations or may have more than one meaning.
- Coverage language is interpreted broadly to protect the insured's objectively reasonable expectations.
- Exclusionary clauses, on the other hand, are accorded a strict and narrow construction.

Finally, the court emphasized that courts apply the reasonable expectation doctrine to fulfill an insured's expectations even where those expectations contravene the unambiguous, plain meaning of exclusionary clauses.

The court's ruling shows that whether an insurer can rely on an alleged breach of the policyholder's duties to cooperate or seek consent to settlement in an effort to deny coverage under a liability policy often involves fact-intensive issues that courts will, generally, avoid solving as a matter of law.

Accordingly, it is imperative that insureds document their communications with insurers, including but not limited to notification of claims, requests for attendance at mediation, demands to settle, and ongoing cooperation efforts.

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This article first appeared on the Practitioner Insights Commentaries web page on June 17, 2019.

ABOUT THE AUTHOR


Sergio F. Oehninger serves as counsel in the Washington office of **Hunton Andrews Kurth LLP**, representing multinational corporations in complex insurance coverage disputes affecting various industries, including financial services, energy and technology. **Yaniel Abreu**, an associate in the firm's Miami office, specializes in coverage disputes involving directors and officers, errors and omissions, and cyber and commercial liability policies. They can be reached at soehninger@HuntonAK.com and yabreu@HuntonAK.com, respectively. This article was first published May 13, 2019, under a different title on the firm's Insurance Recovery blog. Republished with permission.