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Delaware Courts Issue Series of Pro-Policyholder D&O Insurance Decisions

Dole Litigation Results in Important Decisions Favoring Policyholders in D&O Coverage Litigation, Including Delaware Supreme Court Decision on Choice of Law, Insurability and Allocation

SUMMARY

On March 3, 2021, the Delaware Supreme Court (the Court) in *RSUI Indemnity Co.* v. *Murdock*[1] issued an important decision concerning various coverage issues under directors and officers liability (D&O) policies. The decision ends years of litigation (the *Dole* litigation) concerning insurer obligations for settlements of (i) litigation in which two executives of Dole Food Co. (Dole) were found to have fraudulently induced Dole to permit one of them to take the company private at an unfairly low price, and (ii) a follow-on securities fraud suit based on the same wrongful conduct. As discussed in more detail below, the Court held that:

1. the D&O policy was governed by Delaware law because Dole was incorporated in Delaware—even though its principal place of business was in California and the policies were issued in California;
2. breaches of fiduciary duty, including fraud, by a company's officers and directors are not uninsurable as a matter of Delaware public policy; and
3. an allocation provision in the policy requiring the parties to use their best efforts to agree on allocation as between insured and uninsured parties and matters, taking into account relative financial and legal exposures, did not apply because (a) the parties neither made an effort to agree, nor agreed, on allocation, and (b) the provision is inconsistent with the overall coverage of the policy.

This decision followed a series of lower court decisions containing other important rulings which the Delaware Supreme Court did not review. These included holdings concerning (i) the ability of an insured to obtain coverage for a settlement in the full amount of the underlying claim after having been found guilty after trial of fraud, (ii) the effect upon coverage of entering into a settlement without the insurer's consent;

and (iii) the ability of an insured to refuse to cooperate with insurer requests that call for privileged information.

In light of the large number of corporations that are incorporated in Delaware and the numerous lawsuits that allege securities and common law fraud against such corporations and their officers and directors, the Delaware Supreme Court decision, as well as the lower court rulings left undisturbed by that decision, have significant implications both for insureds and insurers, including:

1. The Delaware Supreme Court's analysis suggests that Delaware public policy imposes no restraint at all on the scope of D&O insurance coverage. D&O insurers thus must rely on the language of their policies, and not public policy, to exclude coverage for fraudulent conduct in Delaware.
2. In certain other states, claims arising from fraud are uninsurable as a matter of public policy. Likewise, certain other types of claims (such as for punitive damages or disgorgement) are insurable in Delaware but uninsurable in certain other states. In light of the Delaware Supreme Court's choice-of-law analysis, insurers may race to bring coverage actions in states other than Delaware in an attempt to avoid the application of Delaware law.
3. Under the Delaware Superior Court's analysis, coverage may be available for a settlement in which the insureds agree to pay the full amount of liability after having been found guilty of fraud at trial. As a corollary, it may be considered unreasonable for an insurer to refuse to consent to such a settlement. This provides an incentive for insureds to try to delay final judgment and negotiate a settlement even after being found guilty of fraud at trial. Other courts, such as the U.S. Court of Appeals for the Seventh Circuit, have held that coverage is unavailable in similar circumstances.
4. Under the Delaware Superior Court's analysis, provisions in D&O policies requiring "reasonable" cooperation do not necessarily require insureds to provide privileged information to insurers.
5. To combat the Delaware courts' pro-insured decisions, insurers may seek to amend their D&O policies, including by strengthening their fraud exclusions, clarifying how loss is to be allocated as between insured and uninsured matters and actors, and including express choice-of-law provisions for a law other than that of Delaware.

BACKGROUND

A. DAVID MURDOCK'S ACQUISITION OF ALL OF DOLE'S STOCK

Dole is one of the largest producers of fruits and vegetables in the world. In November 2013, it went private through a single-step merger transaction in which David H. Murdock, Dole's then-Chairman and Chief Executive Officer, acquired all of Dole's common stock that he did not already own at a price of $13.50 per share,[2] totaling approximately $1.2 billion. Before the transaction, Murdock had owned approximately 40% of Dole's common stock.[3] The transaction was negotiated with a Special Committee of Dole and approved by a narrow majority—50.9%—of disinterested stockholders. The transaction closed November 1, 2013.[4]

B. STOCKHOLDER LITIGATION CHALLENGING THE FAIRNESS OF THE TRANSACTION

Before the transaction closed, a group of Dole stockholders who owned shares at the time of the going private transaction brought a class action in the Delaware Court of Chancery alleging that Murdock and C. Michael Carter (Dole's President, Chief Operating Officer, and General Counsel) had breached their fiduciary duties, including their duty of loyalty, by making intentionally false statements to the Dole Special Committee[5] negotiating the proposed transaction and taking other improper actions to fraudulently induce Dole to agree to the transaction at an unfairly low price.[6] This case was subsequently consolidated with a separate action by another group of stockholders in the Chancery Court disputing the adequacy of the merger's share price and requesting the court to appraise the fair value of the stock at the time of the merger.[7] These two consolidated actions are collectively referred to here as the "Stockholder Litigation."

C. POST-TRIAL RULING BY CHANCERY COURT THAT MURDOCK AND CARTER COMMITTED FRAUD

In a lengthy August 27, 2015 memorandum opinion, issued after a nine-day bench trial, the Chancery Court (Laster, V.C.) held that Murdock and Carter had breached their fiduciary duties "through a series of intentional, unfair, and fraudulent actions that, among other things, drove down Dole's pre-merger stock price, undermining it as a measure of value and hampering the Special Committee's negotiating position."[8] The court identified a number of fraudulent statements that Murdock and Carter made to the market and to the Special Committee.[9] The court found that Murdock and Carter's conduct had "reduced the ultimate deal price by 16.9%,"[10] and held Murdock and Carter jointly liable for approximately $148 million in damages, representing $2.74 per share.[11] In addition to holding Murdock and Carter liable, the court also found DFC Holdings, LLC (a special purpose vehicle used by Murdock to acquire the shares of Dole) jointly and severally liable with Murdock and Carter.[12]

D. SETTLEMENT OF THE STOCKHOLDER LITIGATION FOR FULL AMOUNT OF THE CLAIM

After the Chancery Court issued its memorandum opinion, but before judgment was entered in the case, Murdock and Carter negotiated a settlement with plaintiffs pursuant to which Murdock agreed to pay the full $148 million amount awarded by the Chancery Court, plus interest.[13] The insurers were asked to provide consent to the settlement, but, instead of doing so, they requested certain information, pursuant to the cooperation requirements of the policies, in connection with the insureds' requests for consent.[14] The insureds then executed the settlement without obtaining insurer consent.[15] The Chancery Court approved the settlement in February 2016.[16]

E. THE SAN ANTONIO ACTION

In December 2015, the San Antonio Fire & Police Pension Fund, which had disposed of its Dole shares prior to the effective date of the going private transaction and, therefore, was not a party to the initial Stockholder Litigation, instituted a securities fraud class action in the U.S. District Court for the District of Delaware against Dole, Murdock, Carter, and DFC on behalf of a putative class of individuals who sold their

stock in Dole between January 2 and October 31, 2013 (the "San Antonio Action").[17] Citing the trial court's findings in the Stockholder Litigation, plaintiffs alleged that they suffered financial losses by selling Dole stock at artificially reduced prices as a result of Murdock and Carter's false and misleading statements in violation of the Securities Exchange Act.[18] The San Antonio Action was settled in January 2017 for $74 million.[19] Again, the defendants informed the insurers of their intent to settle, and the terms of the settlement, but the insurers did not provide their consent.[20]

F. DOLE'S D&O POLICIES

During the relevant period, Dole's D&O insurers included a primary insurer (AXIS Insurance Company) and eight "excess" insurers (including RSUI Indemnity Company) providing a total of $85 million in policy limits. The excess policies each followed the terms and conditions of the AXIS policy but were available for use only after all underlying insurance has been exhausted.[21] DFC was not an insured, and Murdock and Carter were insured only for acts taken in their capacity as a Dole officer or director.[22]

The policies contained generally customary terms, including, among other things, (i) a conduct exclusion for fraud in the event such fraud was established by "a final and non-appealable adjudication adverse to such Insured in the underlying action" (the Profit/Fraud Exclusion), (ii) a requirement that insurer consent be obtained prior to entering into any settlement, (iii) a clause requiring the insureds to cooperate with the insurers, including with respect to requests for information, and (iv) and an allocation provision, providing that in the event of both insured and uninsured matters, the parties would use their best efforts to agree upon allocation, taking into account "the relative legal and financial exposures of the Insureds in connection with the defense and/or settlement of the Claim."[23]

G. THE COVERAGE LITIGATION

Several of these excess insurers filed an action in the Delaware Superior Court seeking a declaratory judgment that they had no obligation to fund either the Stockholder Litigation settlement or the San Antonio Action settlement.[24] This coverage litigation led to a number of decisions over the years.

1. Arch I

On December 23, 2016, the Delaware Superior Court rejected the insurers' contention that the Chancery Court's detailed post-trial memorandum, holding that Murdock and Carter had committed fraud, constituted a final adjudication that relieved the insurers of any obligation to pay for the Stockholder Litigation settlement.[25] The court found that although the Chancery Court made findings of fraud after trial in the Stockholder Litigation, that court's memorandum opinion was nevertheless not a "final and non-appealable adjudication."[26] The only "final" adjudication in the Stockholder Litigation was the final judgment entered after the court had approved the settlement, and that judgment did not contain any findings of fraud.[27] Nor did the fact that the insureds settled for 100% of the amount of their alleged liability, plus interest, render the Profit/Fraud Exclusion applicable in light of the absence of a final judgment finding fraud.[28]

This decision pre-dated the San Antonio Action settlement and thus did not analyze whether the Profit/Fraud Exclusion applied to that matter.

2. Arch II

On March 1, 2018, the Delaware Superior Court granted in part and denied in part the insurers' motion for summary judgment, ruling on several issues. In relevant part, the court held that Murdock and Carter were collaterally estopped from contesting the findings of fraud at trial in the Stockholder Litigation.[29] It found that the memorandum opinion in the Stockholder Litigation was a "final adjudicat[ion]" (even though it was not a "final and non-appealable adjudication" for purposes of the Profit/Fraud Exclusion), and that, as a result, the court's findings in that case could be used to the extent that they were relevant to issues in the coverage suit.[30] The court also ruled that Delaware law, not California law, applied to the D&O policy.[31] Finally, the court found that the settlements were not uninsurable as a matter of Delaware public policy despite the fact that they were based on fraudulent conduct.[32]

3. Arch III

On May 1, 2019, the Delaware Superior Court granted the insurers' motion for summary judgment dismissing the insureds' claim that the insurers engaged in bad faith in denying coverage.[33] The court found that the insurers acted based on well-reasoned arguments as to the interpretation of the D&O policy's provisions, even if the court ultimately did not agree with those interpretations.[34] The court also held that it was reasonable, albeit incorrect, for the insurer to have applied California law to the policy (instead of Delaware law) and to have concluded that the claims were uninsurable as a matter of California public policy. Accordingly, the insurer's denial was not in bad faith.[35]

4. Arch IV

On May 7, 2019, the Delaware Superior Court denied the parties' cross-motions for summary judgment on the issues of consent and cooperation. Although the insureds had notified the insurers of the terms of the Stockholder Litigation and San Antonio Action settlements, the insurers did not provide their consent, and the insureds settled nonetheless.[36] The insureds claimed that the insurers unreasonably withheld their consent. The insurers, though, claimed that they were not given enough time to thoroughly examine the terms, the insureds had failed to provide the information requested by the insurers, and the settlements were unreasonable.[37]

The court held that the consent provision did not give the insurer an unfettered right to veto a reasonable settlement, and that there was an issue of fact as to whether consent was unreasonably withheld and whether the insureds' refusal to provide requested information because of alleged privilege constituted a breach of the insureds' cooperation obligations.[38]

5. Arch V

On January 17, 2020, the Delaware Superior Court issued a memorandum opinion on the issue of allocation. The insurers argued that some of the loss should be allocated to the uninsured DFC, because DFC was found jointly and severally liable with Murdock and Carter for the damages assessed in the memorandum opinion in the Stockholder Litigation.[39] Second, the insurers argued that Murdock and Carter, when committing the fraud in connection with the going-private transaction, were acting in both insured and uninsured capacities.[40] Specifically, Murdock was acting in his uninsured capacity as a controlling shareholder of Dole.[41] Moreover, Carter, in his capacity as general counsel, was also uninsured under the policy.[42] Accordingly, the insurers argued that at least a portion of the losses must be allocated to the fraudulent actions taken by the uninsured DFC, and by Murdock and Carter in their uninsured capacities.

The court held that the allocation provision in the policies was inapplicable, because it required the parties to use their best efforts to agree on allocation, which none of the parties did, and therefore had no application when there was neither an effort to agree nor any agreement on allocation.[43] As the allocation provision did not apply, the court needed to decide what allocation formula it should use instead. It decided that the Larger Settlement Rule—which asks whether the settlement was made larger by the actions of uninsureds—should be used, at least for purposes of the San Antonio Action settlement.[44] The court believed that the Larger Settlement Rule could be applied to the San Antonio Action without further fact-finding because the complaint there expressly asserted joint and several liability of Murdock and Carter. The Stockholder Litigation Complaint, however, did not allege joint and several liability as to all counts, and thus—despite the Chancery Court's memorandum opinion finding all defendants jointly and severally liable—further fact-finding was necessary before the Larger Settlement Rule could be applied to that settlement in a manner that required the insurers to pay, up to their policy limits, for the full amount of the settlement on the basis that the settlement amount was unaffected by any uninsured matters.[45]

According to the court, its "decision to apply the Larger Settlement Rule is to protect the economic expectations of the insured—*i.e.,* prevent the deprivation of insurance coverage that was sought and bought. The Larger Settlement Rule applies in those situations where: (i) the settlement resolves, at least in part, insured claims; (ii) the parties cannot agree as to the allocation of covered and uncovered claims; and (iii) the allocation provision does not provide for a specific allocation method (*e.g., pro rata* or alike)."[46] The court also found that the Larger Settlement Rule was most consistent with the "complete indemnity" promise provided by the policies:

> The Policies cover all Loss that the Insured(s) become legally obligated to pay. Such language implies . . . a complete indemnity for Loss regardless of who else might be at fault for similar actions. The Policies do not limit coverage because of the activities of others that might overlap the claims against the Insureds. Any type *of pro rata* or relative exposure analysis seems contrary to the language of the Policies.[47]

Despite rejecting the insurers' allocation argument, the court ruled that the insurers nevertheless were not without rights for uninsured portions of the settlements, since they have a right of subrogation under the policies.[48]

H. COVERAGE SETTLEMENTS BY ALL INSURERS EXCEPT RSUI

All excess insurers except RSUI eventually paid their policy limit or settled with Dole.[49] RSUI's policy was the eighth layer of coverage, with a limit of $10 million that was available only after the underlying $75 million in coverage, plus a $500,000 retention, was exhausted.[50] After exhausting underlying insurance, Dole paid $66 million of the $74 million San Antonio Action settlement itself and sought reimbursement from RSUI up to the limit of RSUI's excess coverage.[51] Although RSUI did not settle, it did forego its right to pursue its defenses of lack of consent and breach of the duty of cooperation, as to which the Superior Court had found a question of fact requiring trial. The withdrawal of these defenses rendered the other coverage decisions of the Superior Court ripe for appeal to the Delaware Supreme Court.

THE DELAWARE SUPREME COURT DECISION

On March 3, 2021, the Delaware Supreme Court ruled in favor of the insureds, holding that: (1) Delaware, not California, law governed the D&O policy; (2) the claims at issue were insurable as a matter of Delaware public policy; (3) the San Antonio Action settlement was not subject to the exclusion in the D&O policy for fraudulent conduct; (4) the insurer could not allocate the San Antonio Action settlement between insured and uninsured matters; and (5) RSUI had not acted in bad faith in denying coverage.

Choice of Law

Because the insurance contract did not include a choice-of-law provision, the Court applied the "most significant relationship" test to determine which state's law governs the contract.[52] The Court looked to the following factors:

- the place of contracting;
- the place of negotiation of the contract;
- the place of performance;
- the location of the subject matter of the contract; and
- the domicile, residence, nationality, place of incorporation and place of business of the parties.[53]

Although Dole was headquartered in California, its directors and officers lived in California, and the insurance policies were negotiated and issued to Dole in California through a California-based broker, the Delaware Supreme Court found that Delaware, as the state of incorporation, has the greatest interest in application of its law given its specific policies affecting D&O insurance, such as laws governing the duties of D&Os and laws empowering Delaware corporations to obtain D&O insurance.[54] Thus, Delaware law applied.

Delaware Public Policy

Next, the Court held that the claims at issue were not uninsurable as a matter of Delaware public policy. The Court emphasized the freedom of sophisticated parties to contract.[55] It based its analysis principally on section 145(g) of the Delaware General Corporation Law, which authorizes corporations to purchase D&O insurance "against any liability" asserted against directors and officers "whether or not the corporation would have the power to indemnify such person against such liability under this section."[56] The Court reasoned that because section 145(a) permits corporations to indemnify directors and officers for liabilities arising from good-faith, reasonable conduct, section 145(g) implies that corporations are able to insure their directors and officers for liabilities arising from bad-faith conduct.[57]

The Profit/Fraud Exclusion

The Court then held that the Profit/Fraud Exclusion did not apply. Again, the exclusion in the D&O policy applied to "any willful violation of any statute or regulation or any deliberately criminal or fraudulent act, error or omission by the Insured; if established by a final and non-appealable adjudication adverse to such Insured in the underlying action."[58] With respect to the San Antonio Action settlement, because the exclusion required the finding to be made "in the underlying action," and there was no finding of fraud in the San Antonio Action (even though it was based entirely on the fraud findings made at trial in the Stockholder Litigation), the exclusion had no bearing on coverage for that settlement.[59] Because the policy limit of RSUI—the sole remaining insurer in the litigation—would be exhausted by that settlement, the court did not address whether the Profit/Fraud Exclusion applied to the Stockholder Litigation, and thus did not reach the question whether the court below was correct that the post-trial, pre-judgment memorandum opinion in the Stockholder Litigation finding Murdock and Carter had committed fraud was not a "final and non-appealable adjudication."

Allocation

The Court refused to apply the allocation provision of the policy to either the Stockholder Litigation or the San Antonio Action. The Court agreed with the Superior Court that the Larger Settlement Rule should apply because the allocation provision "does not establish an allocation methodology to be applied in the absence of an agreement between the parties" and "limiting RSUI's responsibility for the Insureds' losses in the manner favored by RSUI ignores other, more substantive, policy language" which, as the Superior Court noted, "implies … a complete indemnity for Loss regardless of who else might be at fault for similar actions."[60] The Delaware Supreme Court further noted that: (i) "RSUI has not argued that the acts of DFC or the actions of Murdock and Carter in their uninsured capacities increased the amount of the Stockholder Litigation settlement"; (ii) DFC was found liable in the Stockholder Litigation "to the same extent as" Murdock, and thus "could not have increased the Stockholder Litigation settlement"; (iii) RSUI pleaded "no facts that suggest the San Antonio Action settlement represented an admixture of covered and non-covered losses"; and (iv) RSUI had provided no explanation of how the "relative exposure" allocation theory "would lead to a reduction in the coverage available to the Insureds."[61]

The Insureds' Bad Faith Claim

Although it rejected RSUI's arguments and interpretation of the policy, the Delaware Supreme Court found that RSUI had not denied the claim in bad faith because there was a "bona fide dispute" as to whether the claim was insurable as a matter of public policy, and RSUI asserted a colorable, if ultimately unsuccessful, argument that the findings at trial in the Stockholder Litigation triggered the Profit/Fraud Exclusion.[62]

IMPLICATIONS

The decisions in the *Dole* litigation have significant implications for both insureds and insurers.

No Delaware Public Policy Restriction on Insurance for D&Os

Securities lawsuits and derivative actions are often framed in terms of fraud or intentional misconduct and can be financially devastating for companies and their directors and officers. Large M&A transactions are routinely challenged in the courts, often with allegations of fraud or intentional misconduct. The Delaware Supreme Court's pronouncement in *RSUI* removes all doubt as to whether fraud is insurable under Delaware law. This is significant especially in light of the fact that Delaware law expressly prohibits Delaware corporations from contractually indemnifying their own directors and officers for fraud.[63]

Moreover, although this case involved only fraud and breaches of the duty of loyalty, the Court's analysis was based on a Delaware statute providing that corporations can purchase D&O coverage against "**any** liability." (Emphasis added.) The Delaware Supreme Court's reliance on this language as a statement of the public policy of Delaware likely means that Delaware public policy imposes no restraint at all on the scope of D&O insurance coverage. Accordingly, the liability of D&O insurers will rise or fall based upon the language of their policies.

Probability of No Delaware Public Policy Restriction on Indemnification Provided by Limited Liability Corporations and Limited Partnerships

The same public policy analysis would presumably apply to indemnification obligations of other organizational forms, such as Delaware limited liability companies and limited liability partnerships, which are permitted to provide indemnification without restriction for "any and all claims and demands whatsoever" under their respective Delaware statutes.[64]

Ability of Insureds, Facing Certain Liability for Fraud, to Settle Even for the Full Amount of the Claim and Yet Hold the Insurers Liable for the Settlement

In drawing a clear distinction between a final adjudication and a settlement with respect to coverage for fraud, the Delaware courts were faithful to the provisions of the insurance policy, but departed from the holdings of a number of other courts. In *Level 3 Commc'ns, Inc.* v. *Fed. Ins. Co.*,[65] for example, in a decision by Judge Posner, the Seventh Circuit rejected the insured's argument that its settlement of a claim for fraud resulting in unjust enrichment should be covered by insurance because "the line runs between judgments and settlements. As long as the case is settled before entry of judgment, the insured is covered regardless

of the nature of the claim against it."[66] According to the Seventh Circuit, "That can't be right."[67] In fact, the Seventh Circuit described a hypothetical remarkably like the situation faced by the Delaware courts in the *Dole* litigation:

> [Level 3's argument would mean] that if Level 3, seeing the handwriting on the wall, had agreed to pay the plaintiffs in the fraud suit all they were asking for (a very large amount—almost $70 million), which they surely would not have done had there been no evidence of fraud (no rational defendant settles a nuisance suit for the full amount demanded in the complaint, unless the amount is trivial), Federal would still be obligated to reimburse Level 3 for that amount. And that would enable Level 3 to retain the profit it had made from a fraud.[68]

Under the Delaware Superior Court decision, even a post-trial finding of fraud, resulting in a settlement prior to judgment for the full amount of the claim, plus interest, would be covered by a D&O policy with the language of the Dole policies. Moreover, again under the Delaware Superior Court decision, an insurer's refusal to consent to such a settlement could be viewed as unreasonable. Although the Delaware Supreme Court did not review these rulings, insureds are apt to rely on them. In addition, it is possible that insureds can successfully argue, even post-judgment, that a motion for reconsideration tolling the time for appeal, or even a settlement during the pendency of an appeal, permits them to settle a fraud claim, even for the full amount of the claim, plus interest, and have that settlement covered by the D&O policy.

Inapplicability of the Fraud Exclusion to Settlements of Follow-On Litigation

The Delaware Supreme Court's interpretation of "in the underlying action" was devastating to the insurer's attempt to avoid coverage for the San Antonio Action settlement based on the prior finding of fraud in the Stockholder Litigation. As discussed above, the Court interpreted this language to mean that regardless of whether the Profit/Fraud Exclusion applied to the Stockholder Litigation, it did not exclude coverage for the later San Antonio Action because the "adjudication" of fraud occurred only in the Stockholder Litigation, not the San Antonio Action (even though the San Antonio Action was based entirely on the facts established at trial in the earlier Stockholder Litigation). This is a significant ruling given the prevalence of follow-on litigation in the U.S. court system. Any time a company faces a derivative action based on fraud or breaches of fiduciary duty, it is not uncommon for investors to file a separate securities fraud action. Likewise, investors routinely file securities class actions in the wake of significant corporate criminal proceedings and regulatory enforcement actions (which can often involve findings or admissions of fraud). Thus, the Profit/Fraud Exclusion could operate to exclude coverage for an initial derivative action or criminal case resulting in a final, non-appealable adjudication of fraud, but not a separate, follow-on action based on the exact same conduct that is settled before judgment.

Ability of Insureds to Refuse to Provide Privileged Documents Requested by Insurers

Insurers often insist that the cooperation requirement in their policies requires insureds to provide requested information, even if the information is privileged and the insurers have not agreed to provide coverage. The

Delaware Superior Court rejected this proposition, at least as a matter of law, and instead found a question of fact as to whether the insureds' refusal to provide the documents constituted a material breach of the cooperation clause. Although the insurers ended up forgoing this defense, the Superior Court's decision can be used by insureds as another authority in favor of refusing to provide privileged information, particularly when the insurer has not accepted coverage.

Ability of Insureds to Recoup Full Settlement Amount for Claims Based Largely on Wrongful Acts Taken in Uninsured Capacities

In the *Dole* litigation, Murdock was a large shareholder of Dole and his actions in taking the company private were undoubtedly at least in large part motivated by his interests as shareholder rather than simply as a director of Dole. Yet none of the settlements involving his and Carter's fraud were required to be allocated in a manner reducing coverage. These decisions, rejecting any such allocation, will enable insureds to contest efforts by D&O insurers to refuse or limit coverage for claims involving actions taken by D&Os in both insured and uninsured capacities.

Possible Insurer Amendments to their D&O Policies

In light of the Delaware Supreme Court's decision, insurers may, depending on market conditions, seek to amend their D&O policies in order to avoid the pro-insured rulings in the *Dole* litigation. These efforts could include:

1. removing or altering the "final and non-appealable adjudication in the underlying action" requirement for application of the fraud exclusion;
2. changing the "relative exposure" allocation provision to state expressly that the Larger Settlement Rule is inapplicable, to provide greater clarity on how uninsured matters are to be treated, and to render the allocation provision applicable regardless of whether the parties agree on allocation and notwithstanding anything else in the policy; and/or
3. inserting an express choice-of-law provision in the policy providing for a law other than that of Delaware to apply.

Likelihood of Forum Battles

While the Delaware Supreme Court believed that Delaware, as the place of incorporation, has the greatest interest in application of its law to construction of D&O policies issued to corporations incorporated in Delaware, it is quite possible—and perhaps even likely—that California courts, as California was the principle place of business of Dole and the state where the insurance policies were negotiated and issued, would have had a different view and applied its own law to the issues. Similarly, corporations headquartered in New York with similar types of contacts there could have difficulty persuading a New York court that Delaware public policy, rather than New York's own, should apply because the place of incorporation is in Delaware.

It is, therefore, likely that when there is a coverage dispute concerning claims against insureds that allege fraud or other matters, such as disgorgement, that are uninsurable as a matter of public policy in certain

states but not in Delaware, insurers may attempt bring a coverage action in a state other than Delaware that is apt to apply its own, pro-insurer law concerning insurability. Such an action may well be brought pre-emptively in the insurer's preferred jurisdiction, in the hope that the "first-filed" rule will give its pre-emptive suit priority and withstand a motion to dismiss or stay in favor of a later-filed action by insureds in Delaware.

* * *

ENDNOTES

1 No. 154, 2020, 2021 WL 803867 (Del. March 3, 2021).

2 *Id.* at *2.

3 *Id.*

4 *Id.*

5 Sullivan & Cromwell LLP represented the Special Committee in the transaction and underlying litigation. The Chancery Court praised the Special Committee and its counsel for their work in the face of fraud, and S&C obtained the dismissal of all claims against the Special Committee's members before the Stockholder Litigation went to trial.

6 *Id.*

7 *Id.*

8 *Id*.

9 *See generally In re Dole*, 2015 WL 5052214 (Del. Ch. Aug. 27, 2015).

10 *RSUI Indemnity Co.*, 2021 WL 803867, at *2.

11 *Id.*

12 *Id.*

13 *Id.* at *3.

14 *Arch Ins. Co.* v. *Murdock (Arch IV)*, 2019 WL 2005750, at *4 (Del. Super. Ct. May 7, 2019).

15 *Id.*

16 *RSUI Indemnity Co.*, 2021 WL 803867, at *3.

17 *Id.*

18 *Id.*

19 *Id.*

20 *Arch IV*, 2019 WL 2005750, at *5.

21 *RSUI Indemnity Co.*, 2021 WL 803867, at *1.

22 *Id.* at *1.

23 *Id.* at *2, *17.

24 *Id.* at *3.

25 *Arch Ins. Co.* v. *Murdock (Arch I)*, 2016 WL 7414218, *7 (Del. Super. Dec. 21, 2016)

26 *Id.* at *7-8.

27 *Id.*

28 *Id.*

29 *Arch Ins. Co.* v. *Murdock (Arch II)*, 2018 WL 1129110, at *5-8 (Del. Super. Mar. 1, 2018).

30 *Id.*

31 *Id.* at *8-11.

32 *Id.* at *11.

33 *Arch Ins. Co.* v. *Murdock (Arch III)*, 2019 WL 1932536, at *6 (Del. Super. Ct. May 1, 2019).

ENDNOTES (CONTINUED)

34 *Id.*

35 *Id.*

36 *Id.* at *10-11.

37 *Id.*

38 *Id.*

39 Def. David H. Murdock's Opening Br. in Supp. of his Mot. for Summ. Judgment at 30 & n.8, *Arch Ins. Co.* v. *Murdock*, C.A. No. N16C-01-104 (Del. Super Ct.), filed Sep. 24, 2018; Pltf. Insurers' Br. in Opp. to Defs.' Mots. for Summ. Judgment at 58, *Arch Ins. Co.* v. *Murdock*, C.A. No. N16C-01-104 (Del. Super Ct.), filed Oct. 19, 2018.

40 *Id.*

41 *Id.*

42 *Id.*

43 *Arch Ins. Co.* v. *Murdock (Arch V)*, 2020 WL 1865752, at *6-7 (Del. Super. Ct. Jan. 17, 2020).

44 *Id.* at *7.

45 *Id.*

46 *Id.*

47 *Id.*

48 *Id.* at *8.

49 *RSUI Indemnity Co.*, 2021 WL 803867, at *15.

50 *Id.* at *1.

51 *Id.* at *3.

52 *Id.* at *5.

53 *Id.* at *6. The Court noted that these factors are to be considered in light of overarching choice-of-law principles, including: "(a) the needs of the interstate and international systems, (b) the relevant policies of the forum, (c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue, (d) the protection of justified expectations, (e) the basic policies underlying the particular field of law, (f) certainty, predictability and uniformity of result, and (g) ease in the determination and application of the law to be applied." *Id.*

54 *Id.* at *9.

55 *Id.* at *10.

56 Delaware General Corporation Law § 145(g).

57 *RSUI Indemnity Co.*, 2021 WL 803867, at *11.

58 *Id.* at *13.

59 *Id.* at *14.

60 *Id.* at *16.

61 *Id.*

62 *Id.* at *17.

63 Delaware General Corporation Law § 145(a).

ENDNOTES (CONTINUED)

64 Delaware Limited Liability Company Act § 18-108; Delaware Revised Uniform Partnership Act § 15-110.

65 272 F.3d 908, 911–12 (7th Cir. 2001).

66 *Id.*

67 *Id.*

68 *Id.*; *see also Reliance Grp. Holdings, Inc.* v. *Nat'l Union Fire Ins. Co. of Pittsburgh, Pa.*, 188 A.D.2d 47, 54, 594 N.Y.S.2d 20, 24 (1993) (criticizing the "untenability" of an insured's construction of its D&O policy that would cover any settlement even for restitution of property wrongfully acquired).

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