RECENT DEVELOPMENTS IN INSURANCE COVERAGE

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This article covers recent developments in insurance coverage, focusing on directors' and officers' liability insurance coverage, as well as the tolling of applicable statutes of limitation during the COVID-19 pandemic.

I. DIRECTORS' AND OFFICERS' LIABILITY INSURANCE COVERAGE

During the period under review, state supreme courts and federal appellate courts issued a number of significant rulings with respect to directors' and officers' (D&O) liability insurance.[1] These decisions addressed questions involving conflict-of-law rules, claims based on fraudulent conduct, settlements of "mixed" claims (*i.e.*, claims including both covered and uncovered matters), consent-to-settle provisions, and potentially ambiguous exclusions.

The Delaware Supreme Court issued a pair of rulings during the survey period addressing a number of issues that are critical to D&O insurance law.

1. This review focuses on published appellate decisions. There were, of course, dozens of trial-court decisions that were noteworthy in one respect or another.

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In *RSUI Indemnity Co. v. Murdock*,[2] the court issued a blockbuster ruling addressing a number of important questions: conflicts of law, whether fraudulent acts are insurable, and the appropriate framework for deciding an insurer's obligations with respect to settlements of "mixed" claims. In the underlying litigation, former shareholders of Dole Food Company sued two of the company's directors and officers for breaching their fiduciary duties after one of them acquired control of the company.[3] The Court of Chancery found that the defendants had engaged in fraud and held them liable for nearly $150 million.[4] Around the same time, a different group of former shareholders filed a federal securities class action against the company and the two individuals who were defendants in the state-court case.[5] The defendants settled both cases.[6]

The court resolved the parties' conflict-of-law dispute by applying the law of the insured corporation's state of incorporation (Delaware) rather than the law where it was headquartered (California). Applying the framework outlined in the *Restatement (Second) of Conflict of Laws*, the court concluded that Delaware law applied because "it has the most significant relationship to the Policy and the parties."[7] The court emphasized "Delaware's interest in protecting the ability of its considerable corporate citizenry to secure D&O insurance and thereby attract talented directors and officers . . . ."[8] The corporation purchased the policy pursuant to its statutory authority "to purchase D&O policies to protect" its directors and officers when they suffer losses that cannot be indemnified by the corporation.[9] Moreover, "in the vast majority of cases," Delaware law governs (or at least informs) the insured directors' and officers' duties that are at issue in the underlying shareholder and securities disputes for which coverage is sought.[10] In light of these various considerations, the court applied Delaware law.[11] Though the court's analysis was based in part on case-specific facts, the court indicated in a footnote that "a choice-of-law analysis for a D&O policy will most often reveal that the insured's state of incorporation has the most significant relationship to the D&O policy."[12]

The court's conflict-of-law decision had a significant impact on its conclusions regarding the insurability of the losses at issue. While California

2. 248 A.3d 887 (Del. 2021).
3. *Id.* at 892.
4. *Id.*
5. *Id.* at 893.
6. *Id.* at 892–93.
7. *Id.* at 901.
8. *Id.*
9. *Id.* at 900 (citing Del. Code Ann. tit. 8, § 145).
10. *Id.*
11. *Id.* at 901.
12. *Id.* at 897 n.43.

law prohibits insurance coverage for "wilful acts," the court concluded that Delaware law does not.[13] The court emphasized Delaware's strong policy in favor of enforcing parties' contractual agreements.[14] In addition, the legislature specifically authorized corporations to purchase insurance "'against *any* liability'" incurred by their directors and officers.[15] Because the policy at issue barred coverage for fraudulent acts *only* when those acts are "'established by a final and non-appealable adjudication,'" the court saw no reason to "defeat the parties' contractual expectations" by "void[ing the insurer's] contractual obligations on public-policy grounds."[16] Because the insureds were seeking coverage for the settlement of a securities class action in which no factual findings had been made about any fraudulent acts, the court refused to bar coverage on account of fraud.[17]

Finally, the court addressed the parties' dispute over the allocation of the settlement between covered and non-covered matters. The court concluded that in the absence of a clear allocation provision to the contrary, settlements of "mixed" claims must be examined under the "larger settlement rule" rather than the "relative exposure" test.[18] Under the larger settlement rule, "a loss is fully recoverable unless the insurer can show that the liability for non-covered conduct increased the insurer's liability."[19] The court concluded that this approach is more consistent with the policy's provision requiring the insurer to "'cover *all* Loss that the Insured(s) become legally obligated to pay.'"[20] While the policy included an allocation provision that resembled the relative exposure test (in which the court allocates the settlement according to "the relative legal and financial exposures of the Insureds"), the court determined that the provision required only negotiations between the parties and did "not establish an allocation methodology to be applied in the absence of an agreement between the parties."[21]

The Delaware Supreme Court issued another significant D&O insurance decision in *In re Solera Insurance Coverage Appeals*, where it concluded

13. *Id.* at 895, 905 (citing Cal. Ins. Code § 533).
14. *Id.* at 902–03.
15. *Id.* at 903 (emphasis in original) (citing Del. Code tit. 8, § 145(g).)
16. *Id.* at 902, 903, 905 (quoting policy).
17. *Id.* at 907. By focusing on the underlying securities lawsuit rather than the breach of fiduciary duty lawsuit, the court avoided addressing the question of whether the trial court's ruling in the fiduciary duty lawsuit was a "'final and non-appealable adjudication'" where the parties reached a settlement before the trial court's adverse findings were memorialized in a judgment. *Id.* at 906 (quoting policy).
18. *Id.* at 909.
19. *Id.* at 908.
20. *Id.* at 908–09 (quoting Superior Court decision) (emphasis added).
21. *Id.* at 908 (internal quotation marks omitted). In the concluding section of the opinion, the court applied existing Delaware law to reject the insured's bad faith claim, concluding that the parties had a "bona fide dispute" and the insurer's position was not "lacking color." *Id.* at 910–11.

that an appraisal action was not a "securities" claim because it did not involve any actual or alleged *violation* of laws relating to securities.[22] After the insured corporation was acquired by another company, some of its shareholders filed an appraisal action to recover the fair value of their shares.[23] The corporation then sought coverage under its D&O policy for the attorneys' fees and prejudgment interest it paid in connection with the appraisal proceeding.[24] The court rejected the claim. The court focused its analysis on the specific language used in the policy's coverage provisions, emphasizing that the corporation was covered only if it was sued for a "'Securities Claim,'" which was defined as a claim "'for any actual or alleged *violation*'" of any law regulating securities.[25] Looking to dictionary definitions of "violation" and related terms, the court held that a claim is based on a "violation" of law only if it involves "contravention of a statute's prohibition" or other "wrongdoing" (though strict liability claims may be covered, as "[s]cienter may not be required").[26] The court then discussed the nature of appraisal actions and concluded that they are "neutral" proceedings where the parties seek to determine the fair value of the company's stock, not to adjudicate or remedy wrongdoing.[27] Accordingly, the court concluded that the appraisal action did not involve a "violation" of any laws and thus was not a covered "Securities Claim" under the policy.[28]

The Arizona Supreme Court outlined the framework for determining whether a settlement is "reasonable" under a consent-to-settlement provision, holding that settlements must be considered from the *insurer's* perspective rather than the *insured's*.[29] The case originated in federal court and the Ninth Circuit certified the question of Arizona law to the state Supreme Court.[30] The state court held that the language and context of the policy supported the conclusion that a settlement must be examined from the insurer's perspective rather than the insured's. The court emphasized that the policy required the insured to obtain the insurer's consent to a proposed settlement and it provided specifically that "'[t]he Insurer's consent shall not be unreasonably withheld'"—language that focused on the *insurer's* perspective.[31] The court distinguished its prior decisions involving duty-to-defend policies, where the governing rule is that the insurer must

22. 240 A.3d 1121 (Del. 2020).
23. *Id.* at 1126.
24. *Id.* at 1127.
25. *Id.* at 1125 (quoting policy) (emphasis added).
26. *Id.* at 1133.
27. *Id.* at 1135–36.
28. *Id.* at 1138.
29. Apollo Educ. Grp., Inc. v. Nat'l Union Fire Ins. Co. of Pittsburgh, PA, 480 P.3d 1225, 1230 (Ariz. 2021).
30. *Id.* at 1227.
31. *Id.* at 1228 (quoting policy).

"consider 'the insured's interests equally with its own interests.'"[32] The court limited that approach to the duty-to-defend context because there, the insurer, rather than the insured, controls the defense of the third-party claim. In contrast, in typical D&O policies like the one at issue before the court, the insurer does not have a duty to defend and the insured controls the defense.[33]

The court then drew on its bad faith failure-to-settle case law to outline the standard for determining whether an insurer has reasonably exercised its discretion to approve or disapprove a settlement:

> To act reasonably, the insurer is obligated to conduct a full investigation into the claim. The Court has described the insurer's role as "an almost adjudicatory responsibility." To carry out this responsibility, the insurer "evaluates the claim, determines whether it falls within the coverage provided, assesses its monetary value, decides on its validity and passes on payment." The company may not refuse to pay the settlement simply because the settlement amount is at or near the policy limits. Rather, the insurer must fairly value the claim. The insurer may, however, discount considerations that matter only or mainly to the insured—for example, the insured's financial status, public image, and policy limits—in entering into settlement negotiations. The insurer may also choose not to consent to the settlement if it exceeds the insurer's reasonable determination of the value of the claim, including the merits of plaintiff's theory of liability, defenses to the claim, and any comparative fault. In turn, the court should sustain the insurer's determination if, under the totality of the circumstances, it protects the insured's benefit of the bargain, so that the insurer is not refusing, without justification, to pay a valid claim.[34]

Two of the court's seven justices dissented, arguing that the implied covenant requires the insurer to give equal consideration to the insured's interests as to its own.[35] The dissenting justices faulted the majority for suggesting that the equal-consideration rule applies only where the policy imposes a duty to defend on the insurer.[36]

In *HM International, LLC v. Twin City Fire Insurance Co.*,[37] the Fifth Circuit addressed a different question about whether a settlement is insured. The insured reached a pre-litigation settlement with third-party claimants who asserted that the insured had negligently wired their money to a fraudulent account.[38] The insurer argued that it had no obligation to pay the settlement because the insured had settled the claim *after* the underlying statute

32. *Id.* at 1231 (quoting Clearwater v. State Farm Mut. Auto. Ins. Co., 792 P.2d 719, 723 (Ariz. 1990)).
33. *Id.*
34. *Id.* at 1231–32 (citations omitted).
35. *Id.* at 1234 (Gould, J., dissenting).
36. *Id.* at 1235–36.
37. 13 F.4th 356 (5th Cir. 2021).
38. *Id.* at 358.

of limitations had expired, so the insured was not "'legally liable to pay'" the claim, as required by the policy.[39] The court, applying Texas law, rejected the insurer's argument.[40] The policy did not "require that the insured meet a threshold likelihood of losing the threatened lawsuit before a settlement can be covered."[41] The court explained that settlement contracts are a legal liability for the insured and the insurance policy specifically listed "settlement amounts" as a type of covered loss.[42] Moreover, because the insurer had refused to defend the claim, it could not challenge the reasonableness of the settlement amount.[43] In the final section of the opinion, the court also rejected the insurer's reliance on the professional services exclusion, concluding that there were triable issues of fact regarding whether the insured had performed money-wiring services for the underlying claimant "for a fee," as required to trigger the exclusion.[44]

In an intriguing pair of decisions that were issued a few months apart and authored by the same judge (United States Circuit Judge David Stras), the Eighth Circuit analyzed potentially ambiguous exclusionary provisions. In the first decision, *Tile Shop Holdings, Inc. v. Allied World National Assurance Co.*, the court applied Minnesota law and examined the relationship between the prior acts exclusion in a primary policy and the prior acts exclusion in a follow-form excess policy.[45] The primary policy's prior acts exclusion included a "relation-back clause" that deemed related wrongful acts to have occurred during the first applicable policy period.[46] The excess policy, in contrast, simply excluded coverage for wrongful acts that occurred prior to the policy period, without suggesting that subsequent related acts would relate back to earlier policy periods.[47] The court concluded that the excess policy's prior acts exclusion was "supplemental" to the primary policy's exclusion and did not "displace" it.[48] The court explained that the excess policy specifically "incorporate[d] 'all terms . . . and limitations'" of the primary policy, subject only to the limitations explicitly stated in the excess policy.[49] While another provision in the excess policy expressly "'delete[d]' a clause" in the primary policy "'and replace[d]'" it with new language, no equivalent language about deletion or replacement appeared in the excess policy's prior acts exclusion.[50] The court accordingly held that

39. *Id.* at 359 (quoting policy).
40. *Id.*
41. *Id.* at 361.
42. *Id.* at 360.
43. *Id.* at 361.
44. *Id.* at 362.
45. 981 F.3d 655 (8th Cir. 2020).
46. *Id.* at 658.
47. *Id.*
48. *Id.* at 659.
49. *Id.* (quoting excess policy).
50. *Id.* (quoting excess policy).

the primary policy's relation-back clause applied under the excess policy as well.[51] The court then determined that the primary policy's prior acts exclusion barred coverage because the underlying securities lawsuits challenged alleged omissions and misstatements that were first made before the policy period and continued to be made during the policy period.[52]

In the other Eighth Circuit decision, the court applied Missouri law to analyze the impact of multiple endorsements that provided conflicting instructions about the policy's contractual liability exclusion.[53] The form policy had a contractual liability exclusion labelled exclusion "D."[54] Endorsement 11 deleted exclusion D and replaced it with a modified version of the contractual liability exclusion, which was also labelled as exclusion "D."[55] Endorsement 13 then provided that "'Exclusions A., B., C. and D.'" were "'deleted in their entirety and replaced'" by new exclusions labelled A, B, and C, but the endorsement said nothing further about exclusion D.[56] The court concluded that Endorsement 13 resulted in ambiguity: it was unclear whether Endorsement 13 was meant to delete Exclusion D entirely from the policy, or whether it was meant to delete the original Exclusion D in the form policy, which would then be replaced by Endorsement 11's modified version of the exclusion.[57] Because Endorsements 11 and 13 became effective on the same date, the court was unable to give priority to one endorsement over the other.[58] Since the policy was ambiguous, the court applied Missouri law requiring ambiguities to be construed against the drafter "even if extrinsic evidence of the parties' intent is available."[59] The court accordingly held that the contractual liabilities exclusion did not bar coverage and remanded the case for further proceedings to address other disputed policy provisions.[60]

The Eleventh Circuit ruled on another potentially ambiguous exclusion, the invasion-of-privacy exclusion, in *Horn v. Liberty Insurance Underwriters, Inc.*[61] The underlying complaint asserted causes of action under the Telephone Consumer Protection Act based on allegations that the insured sent unsolicited text messages in violation of the act.[62] Applying Florida law, the court held that the invasion of privacy exclusion barred coverage

51. *Id.*
52. *Id.* at 659–60.
53. Verto Med. Sols., L.L.C. v. Allied World Specialty Ins. Co., 996 F.3d 912 (8th Cir. 2021).
54. *Id.* at 913–14.
55. *Id.* at 914.
56. *Id.* (quoting policy).
57. *Id.*
58. *Id.* at 914 n.1.
59. *Id.* at 915 (citing Burns v. Smith, 303 S.W.3d 505, 511–12 (Mo. 2010)).
60. *Id.*
61. 998 F.3d 1289 (11th Cir. 2021).
62. *Id.* at 1294–95.

because the underlying claims "ar[ose] out of" an "invasion of privacy" within the meaning of the exclusion.[63] The court declined to conclude that TCPA claims involve an invasion of privacy *per se*, but it held that the exclusion applied because the underlying plaintiffs specifically alleged that the insured's conduct had invaded their privacy.[64] A dissenting judge argued that the exclusion for "invasion of privacy" should be read narrowly to apply only to common law tort causes of action for invasion of privacy.[65] The majority responded by emphasizing the breadth of the policy's exclusionary language—any claims *arising out of* invasions of privacy—as well as the underlying plaintiffs' specific references to invasions of privacy in their complaint.[66]

II. TOLLING STATUTES OF LIMITATION DURING THE COVID-19 PANDEMIC

Virtually all states issued various emergency orders to address safety concerns related to the COVID-19 pandemic throughout the first half of 2020, whether executive, legislative, or judicial in nature. In many states, these orders included court operations in an effort to protect the health and safety of the public. Some states' orders tolled statutes of limitations for a certain period because courts in many states were essentially shut down and attorneys were suddenly working remotely.

In a recent decision, the Massachusetts Supreme Judicial Court interpreted the application of its own COVID-19 tolling order. In *Shaw's Supermarkets, Inc. v. Melendez*, the plaintiff filed suit in Massachusetts District Court against a grocery store chain alleging that on September 3, 2017, she was injured in a collision with a grocery cart caused by one of the store employees.[67] Suit was filed on September 24, 2020, which would have been after the Massachusetts three-year tort statute of limitations expired on September 3, 2020, pursuant to G.L. c. 260, § 2A.[68] The plaintiff argued, however, that pursuant to Massachusetts's COVID-19 tolling orders, her suit was timely even though the tort at issue occurred more than two years before the beginning of the pandemic and the issuance of the COVID-19 tolling orders.

The Massachusetts Supreme Judicial Court had issued a series of orders stating that all civil statutes of limitations were tolled from March 17, 2020 through June 30, 2020 due to the COVID-19 pandemic.[69] The Third

63. *Id.* at 1295.
64. *Id.*
65. *Id.* at 1301 (Newsom, J., dissenting).
66. *Id.* at 1295 n.9, 1297 (majority op.).
67. 173 N.E.3d 356, 357–58 (Mass. 2021).
68. *Id.*
69. *Id.* at 359.

Updated Order Regarding Court Operations Under the Exigent Circumstances Created by the COVID-19 (Coronavirus) Pandemic, entered on June 24, 2020, stated: "The new date for the expiration of a statute of limitation is calculated as follows: determine how many days remained as of March 17, 2020, until the statute of limitation would have expired, and that same number of days will remain as of July 1, 2020 in civil cases."[70] In *Melendez*, the defendant argued that this tolling order applied only to statutes of limitations that would have expired between March 17, 2020, and June 30, 2020.[71] The Supreme Judicial Court disagreed, however, holding that the order applied to "all causes of action for which the relevant limitations period ran for some period between, or through," March 17, 2020, and June 30, 2020.[72] As a result, the statute of limitations was extended by 106 days for any cause of action for which any portion of the limitations period was running during the period from March 17, 2020, to June 30, 2020.

The Massachusetts Supreme Judicial Court noted that in other areas of its COVID-19 orders, it specified when it intended to only extend deadlines that expired within a specified period, such as extending all deadlines set forth in statutes or court rules, standing orders, tracking orders, or guidelines that expired at any time from March 17, 2020, through June 30, 2020.[73] The Court also noted that the investigation required by attorneys prior to filing suit, including client interviews and gathering medical records and other evidence, has been impaired by ongoing COVID-19 restrictions, as an apparent justification for its determination.[74]

It appears that this decision is the first to interpret a state's COVID-19-related tolling orders. The Court in *Melendez* noted that states followed essentially two approaches with regard to COVID-19 tolling orders.[75] Some states, including Delaware, New Hampshire, North Carolina, Ohio, Tennessee, Texas, Vermont, and West Virginia, explicitly tolled only those statutes of limitations set to expire within a particular period.[76] Other states' orders, like the order in Massachusetts, were drafted to apply more broadly to any pending statute of limitations. The states in this latter group include California, Connecticut, Georgia, Indiana, Iowa, Kansas, Louisiana, Maryland, Michigan, Minnesota, Nevada, New Jersey, New York, Oklahoma, Oregon, and Virginia.[77]

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70. *Id*. (quoting Third Updated Order Regarding Court Operations Under the Exigent Circumstances Created by the COVID-19 (Coronavirus) Pandemic).
71. *Id*. at 359–60.
72. *Id*. at 362–63.
73. *Id*. at 361.
74. *Id*. at 360 n.3.
75. *Id*. at 361 nn.4, 5.
76. *Id*. at 361 n.4.
77. *Id*. at 361 n.5.

In *Melendez*, the Court noted that it was aware of no court in another jurisdiction that had yet been presented with the issue in *Melendez*, that is whether a statute of limitations that had begun well prior to the pandemic, but did not expire during the time period noted in the order, was extended based on a COVID-19-related tolling order.[78] In the states following the second approach where the COVID-19 tolling orders did not explicitly toll only the statutes of limitations that would expire during a particular time period, there may be future cases like *Melendez* where defendants argue that the tolling order should only apply to statutes of limitation that actually expired during the tolling period. If the states with broadly drafted tolling orders follow the Massachusetts Supreme Judicial Court's approach, however, this argument is unlikely to be successful and courts will likely find that the tolling orders apply to extend all statutes of limitations.

These COVID-19 tolling orders will be an important consideration in the handling of both first-party and third-party insurance claims for the foreseeable future. First, with respect to third-party claims, i.e. claims made by third parties against insureds who seek coverage under liability policies, insurers and defense counsel will need to account for the impact of broadly applicable COVID-19 tolling orders, the impacts of which will continue for years to come. For instance, in a state with a three-year tort statute of limitations, if a claim relates to an incident that occurred on March 10, 2020, just before the pandemic began, the statute of limitations would expire on March 20, 2023, under normal circumstances. That period will be extended based on the particular state's tolling order. In Massachusetts, where the order tolled statutes from March 17, 2020, through June 30, 2020, the expiration of the statute of limitations would be extended for an additional 106 days—from March 10, 2023, to June 24, 2023. Each state's order may have a different COVID-19 tolling period and, therefore, the statutes of limitations in different states may be extended for different lengths of time.

Additionally, as noted in *Melendez*, these tolling orders take different forms in different states. Although many, like Massachusetts, are orders from the state's highest court, other states tolled statutes of limitations by executive or legislative actions. The application of these orders could involve different legal standards for determining the meaning and application of the executive order or legislation. Further, a court may be more cautious when interpreting the intent of the Governor or state legislature in issuing a COVID-19 tolling order as opposed to the court's own intent where the COVID-19 tolling order was issued by the court itself.

78. *Id.* at 362.

With regard to first-party insurance claims, the impact of COVID-19 tolling orders is less clear. Most first-party insurance policies include a suit limitation provision as part of the policy, outlining the time that an insured has to bring suit against the insurer with respect to a particular claim. For instance, in the context of first-party property insurance, such as homeowners insurance policies, the suit limitation provision of the policy often states that any suit against the insurer under the policy must be brought within two years from the date the loss at issue occurred. Insurers may argue that these suit limitation periods are contractual in nature and, therefore, are not subject to any COVID-19 orders tolling statutes of limitations. In many states, however, these contractual suit limitation periods are also incorporated in state statutes, such as statutes outlining the standard fire insurance policy provisions for a particular state. For instance, in Massachusetts, General Laws c. 175, § 99 outlines the Massachusetts Standard Form of Fire Policy and includes, in part, that "[n]o suit or action against this company for the recovery of any claim by virtue of this policy shall be sustained in any court of law or equity in this commonwealth unless commenced within two years from the time the loss occurred."[79] Outside of the context of these COVID-19 orders, the contractual suit limitation provisions are generally enforced by courts. To date, no court appears to have issued a decision in any jurisdiction analyzing whether such a provision constitutes a "statute of limitations" for purposes of any state COVID-19 tolling orders. Further, a decision to do so could be a slippery slope suggesting that all contractual suit limitation periods are subject to COVID-19 tolling orders, an impact broader than only insurance contracts. Additionally, other issues could arise in the context of timeframes outlined in first-party insurance policies and how they are impacted by the COVID-19 pandemic, such as the timeframe for an insured to make a claim for replacement cost under a property insurance policy where payment is initially made on an actual cash value basis.

For both first-party and third-party claims, attorneys and insurance professionals handling claims across multiple states will need to note that the applicable rules regarding determining the correct statute of limitations period or the application of a policy's suit limitation period may vary and could potentially extend significantly beyond the length of time provided in the applicable statute or policy. Further, with regard to accidents reported by insureds to insurers, where no formal third-party claim or suit has yet been made, the wait for closure has now been extended. These are issues that will not be going away any time soon and are important for anyone in the legal and insurance industries to know.

79. Mass. Gen. Laws c. 175, § 99.