

# The Impact of Delaware's Sudden Dominance in D&O Coverage Disputes

2020 Annual Meeting

September 9-11, 2020

Chicago, IL

Leslie Ahari - Seth Lamden – Mike Manire



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# *Introduction*

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- Pro-policyholder rulings in D&O insurance disputes by Delaware Superior Court
- Surge in D&O coverage suits filed in Delaware as policyholders seek to take advantage

# *Choice of Law*

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State of incorporation as determinative factor in most significant relationship test

- *Mills Ltd. P'ship v. Liberty Mut. Ins. Co.*, C.A. No. 09C-11-174, 2010 WL 8250837 (Del. Super. Ct. Nov. 5, 2010)
- *Arch Ins. Co. v. Murdock*, No. N16C-01-104, 2019 Del. Super. LEXIS 96, 2018 WL 1129110 (Del. Super. Ct. March 1, 2018)

# *Forum Fight*

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- Delaware limits first filed rule
- Forum non conveniens – “overwhelming hardship” standard
- Personal jurisdiction
- Comity

# *Forum Fight*

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*AR Capital, LLC v. XL Specialty Ins. Co.*, C.A. No. N19C-01-024 MMJ (Del. Super. Ct.)

- April 25, 2019, 2019 WL 1932061
- August 3, 2020, 2020 WL 4907990

*XL Specialty Ins. Co. v. AR Capital, LLC*, 181 A.D.3d 546 (N.Y. 1st Dep't 2020)

# *Settlement After Finding of Fraud*

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D&O policy's fraud exclusion does not bar coverage for settlement after trial court found conduct to be fraudulent

- *Arch Ins. Co. v. Murdock*, No. N16C-01-104, 2016 Del. Super. LEXIS 645, 2016 WL 7414218 (Del. Super. Ct. Dec. 21, 2016)

# *Public Policy*

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Does Delaware public policy permit insurance coverage for fraud and disgorgement?

- Yes: *Arch Ins. Co. v. Murdock*, No. N16C-01-104, 2019 Del. Super. LEXIS 96, 2018 WL 1129110 (Del. Super. Ct. March 1, 2018) (fraud)
- Yes: *Gallup, Inc. v. Greenwich Ins. Co.*, Case No. N14C-02-136, 2015 WL 1201518 (Del. Super. Ct. Feb. 25, 2015) (disgorgement)

# *Definition of “Securities Claim”*

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Requires “actual or alleged violation of any ... statute, regulation or rule regulating securities”



# *Definition of “Securities Claim”*

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Does a statutory appraisal action under 8 Del. C. § 262 allege a violation of a law regulating securities?

- Yes: *Solera Holdings, Inc. v. XL Specialty Ins. Co.*, 213 A.3d 1249 (Del. Super. Ct. 2019) (interlocutory appeal pending)
- No: *Zale Corp. v. Berkley Ins. Co.*, Case No. 05-19-730, 2020 WL 4361942 (Tex. Ct. App. July 30, 2020)

# *Definition of “Securities Claim”*

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Do breach of fiduciary duty, fraudulent transfer and unlawful distribution of dividends counts allege violations of a law regulating securities?

- Yes: *In Re Verizon Ins. Coverage Appeals*, 2017 WL 1149118 (Del. Super. Ct. March 2, 2017) and 2018 WL 2317821 (Del. Super. Ct. May 16, 2018)
- No: Delaware Supreme Court reversed, 222 A.3d 566 (Del. 2019)

# ***Related Wrongful Acts/Claims***

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Interrelated Wrongful Acts – “common nexus” of any fact, circumstance, situation

Logical or causal connection

Same or related Wrongful Acts

Based on, arising out, in any way involving any facts, circumstances, situations in prior matters

# ***Related Wrongful Acts/Claims***

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Delaware: “Fundamentally Identical” Standard

- *United Westlabs, Inc. v. Greenwich Ins. Co.*, Case No. 09C-12-048, 2011 WL 2623932 (Del. Super. Ct. July 1, 2011)

# ***Related Wrongful Acts/Claims***

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- RSUI Indem. Co. v. Sempris, LLC, Case No. N13C-10-096, 2014 WL 4407717 (Del. Super. Ct. Sept. 3, 2014)
- *Medical Depot, Inc. v. RSUI Indem. Co.*, Case No. N15C-04-133, 2016 WL 5539879 (Del. Super. Ct. Sept. 29, 2016)
- *Pfizer Inc. v. Arch Ins. Co.*, No. N18C-01-310, 2019 WL 3306043 (Del. Super. Ct. July 23, 2019) and 2020 WL 5088075 (Del. Super Ct. Aug. 3, 2020)

# *Related Wrongful Acts/Claims*

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Compare “Fundamentally Identical” to

- Substantial Overlap (“same or substantially the same” facts)
- Lesser Connections
  - *UBS Financial Servs. v. XL Specialty Ins. Co.*, 929 F.3d 11 (1st Cir. 2019) (“in any way involving” does not require substantial overlap)
  - *Voxxcom, Inc. v. Great American Ins. Co.*, 666 F. Supp. 2d 1332 (S.D. Fla. 2009) (“in any way involving” requires only a “tenuous connection”), *aff’d* 374 F. App’x 906 (11<sup>th</sup> Cir. 2010)

# *Allocation*

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“Larger settlement rule” applied notwithstanding “relative legal and financial exposures” language

- *Arch Ins. Co. v. Murdock*, No. N16C-01-104, 2020 Del. Super. LEXIS 156 (Del. Super Ct. Jan. 17, 2020).

# *Take Away*

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- More coverage litigation
- Delaware Supreme Court to address critical issues
- Impact on pricing and terms



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