Six Cases in 45 Minutes

2021 Annual Meeting

September 22-24, 2021

Chicago, IL

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AMERICAN COLLEGE OF COVERAGE COUNSEL

SPEAKER:

Robert D. Chesler, Esq.
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Robert D. Chesler is a shareholder in Anderson Kill's Newark office. Bob represents policyholders in a broad variety of coverage claims against their insurers and advises companies with respect to their insurance programs. Bob is also a member of Anderson Kill's Cyber Insurance Recovery group.

A leading participant in the birth of modern insurance law in the early 1980s, Bob has earned the reputation as "The Insurance Guru" for exceptional insurance coverage knowledge, and has emerged as a leader in such new areas of insurance coverage as cyber-insurance, D&O, IP, and privacy insurance.

Bob has served as the attorney of record in more than 30 reported insurance decisions, representing clients including General Electric, Ingersoll-Rand, Westinghouse, Schering, Chrysler, and Unilever, as well as many small businesses including gas stations and dry cleaners. He has received numerous professional accolades, including a top-tier ranking for Insurance Litigation: New Jersey in Chambers USA: American's Leading Lawyers for Business, which dubs him a "dominant force in coverage disputes" and cites a client who calls him "a dean of the insurance Bar; one of the brightest in writing about and analyzing insurance coverage.“

He is also listed in The Legal 500, The Best Lawyers in America, Super Lawyers and Who's Who Legal in the Insurance and Reinsurance section of the publication.

Bob is a relentless advocate for his clients in their efforts to obtain coverage from their insurance companies. He has strength in creatively analyzing complex insurance coverage disputes and rapidly driving towards resolution. He has spent his entire career obtaining settlements from insurance companies. He can speak "insurancese" as well as the insurers, and knows how to approach insurance companies, when to talk to them and when to litigate. His depth of experience enables him to distinguish a bad insurance claim from a good one, and understand and implement best strategies for obtaining money for his clients quickly and cost-effectively.

Bob taught history at the State University of New York at Purchase and Legal Methods at Harvard University. He currently teaches insurance law at Rutgers Law School. He holds a Ph.D. in history from Princeton University and maintains a scholarly interest in insurance. He is co-author of the seminal article Patterns of Judicial Interpretation of Insurance Coverage for Hazardous Waste Site Liability, 18 Rutgers L.J. 9 (1986), which has been cited by numerous courts, including seven state supreme courts and the Second Circuit, along with dozens of other articles on insurance issues. He is co-author of Insurance Coverage for Intellectual Property and Cyber Insurance Claims, published by Thomas West, and is former co-editor in chief of the Environmental Claims Journal. Bob is also co-editor of Coverage, the ABA Insurance Journal. He has chaired seminars on the new cyber-policies and food insurance issues for the ABA and NJSBA, and is currently Chair of the Insurance Sub-Committee of the American Intellectual Property Law Association.

G&G Oil Co. of Indiana v. Continental Western Insurance Co., (Ind. Sup. Ct. 2021)

- Ransomware attack shut down computers – company paid $35,000 in bitcoins to unfreeze.

Commercial Crime Coverage Part – Computer Fraud Provision

- "resulting directly from the use of any computer to fraudulently cause a transfer of money'"
  1. G&G had declined to purchase computer coverage under its Agribusiness Business Property coverage.
- Court – doesn't matter – each coverage part should be read individually.
  2. Was the loss fraudulent? – unambiguous - by 'trick'
- Both parties denied SJ.
- If no safeguards in place, attack may not have been by trick or fraudulent.
  3. Directly from use of computer.

Immediately or Proximately

- Transfer of bitcoin nearly immediate result from use of computer.
- Payment both voluntary – under duress.
- ‘Voluntary’ payment was not so remote that it broke the causal chain.

Landry's, Inc. v. Insurance Company of State of Pennsylvania, (5th Cir. 2021)

- Duty to defend case.
- Texas law – eight corner rule.
- Data Breach from Malware.

Landry's, Inc. v. Insurance Company of State of Pennsylvania, (5th Cir. 2021) (Cont'd)

- Personal info from millions of credit cards – unauthorized charges.
- Paymentech, credit card authorization company, sued Landry's for over $20,000,000 in breach of contract action.
- General liability policy – personal and advertising injury coverage.

> "oral or written publication in any manner…of material that violates a person's right of privacy"

District Court – No Publication

1) Is there publication; (2) was it ‘arising out of’ the ‘violation of a person’s right of privacy’?

   Court – ‘publication’ not defined by policy. Three reasons to interpret it broadly.

   1. Use of ‘in any manner’.
   2. Use of ‘publication’ in defamation coverage, where it is applied broadly.
   3. Ambiguities construed in favor of coverage.

- Two publications – Landry exposed credit card info to view; hacker exposed info by using it to make purchases.

‘Arising Out of’ Connotes ‘Breadth’

- Coverage not just for violations, but for damages ‘arising’ out of’ violations.
- Court rejected insurance company’s argument that coverage was limited to tort –
- “Of course, the policy contains none of these salami slicing distinctions.”

See also, *West Bend Mutual Insurance Co. v. Krishna Schaumburg Tan, Inc.*, (Ill. Sup. Ct. 2021) – in biometric violation case, court held that publication can be disclosure to a single party.

SPEAKER:

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Tony Leuin is the founder of the Insurance Coverage Practice at Shartsis Friese LLP in San Francisco, California. Although Tony has a broad background in civil disputes of all types, he has for over two decades focused on representing policyholders against their insurers. Tony evaluates and litigates coverage under the widest range of policies, including CGL, D&O, E&O, Environmental, Employment, Crime, Cyber, and Reps and Warranties insurance. Tony has also represented numerous insureds, including prominent Northern California wineries, on property losses, most often from fire.

Tony has co-chaired the Construction Sub-Committee of the ABA Litigation Section's Insurance Coverage Litigation Committee; has been a Contributing Editor to California Practice Guide: Insurance Litigation (The Rutter Group); has been named to "Super Lawyers" and Best Lawyers in America for his expertise in insurance coverage; has served on ACCC's Membership Committee; and frequently writes and speaks on coverage matters. Tony also chairs a Risk Purchasing Group through which over 2,000 lawyers at over 40 mid-size law firms around the country acquire professional liability coverage.

VERTO MED. SOLS., LLC v. ALLIED WORLD SPECIALTY INS., 996 F. 3d 912 (8th Cir. 2021) – AMBIGUITY

- Verto enters into agreement to sell assets to Harman Int'l.
- To obtain approval, Verto agrees to reallocate portion of proceeds to investors.
- Deal sours, but dispute settled for Harman's payment of $3.5 million.
- Verto's Founder keeps large portion of settlement.
- Verto investors sue Founder for breach of reallocation agreement, breach of fiduciary duty and more.
- Verto's D&O carrier denies defense or indemnity; insureds sue.
- District court dismisses coverage suit based on contractual liability exclusion.

VERTO MED. SOLS., LLC v. ALLIED WORLD SPECIALTY INS., 996 F. 3d 912 (8th Cir. 2021) – AMBIGUITY

- Exclusion D [No coverage for]:

  "any **Loss** in connection with any **Claim** . . . based upon, arising from, or in consequence of any actual or alleged liability of any **Insured** under any express contract or agreement."

- Endorsement 11 deletes original Exclusion D and replaces it with new Exclusion D to same effect.

- Endorsement 13 deletes Exclusions A, B, C and D and replaces them with new exclusions A, B and C.

- Insurer: Endorsements 11 and 13, read together, replaced "Original D" with "New D," which excludes coverage.

- Insureds: Endorsements 11 and 13 each purport to replace an Exclusion D without specifying which.

VERTO MED. SOLS., LLC v. ALLIED WORLD SPECIALTY INS., 996 F. 3d 912 (8th Cir. 2021) – AMBIGUITY

- Eighth Circuit reverses:

  "Like many insurance policies, this one is complicated."

  "If the insurance policy seems unclear, it is."

- Terms subject to two reasonable interpretations:
  - Endorsements 11 and 13 together replaced Old D with highly similar New D; or
  - Endorsement 11 replaced Old D with new D, and then Endorsement 13 replaced New D with nothing.

- Policy is ambiguous: one reasonable construction covers contractual liability claims, and one doesn't.

- *Contra proferentem* applies. Policyholder must prevail.

CERTAIN UNDERWRITERS AT LLOYD'S v. NL INDUSTRIES, INC. (N.Y. Sup. Court, December 29, 2020) – EXPECTED OR INTENDED

- Coverage for California public nuisance action against lead paint manufacturers
- Tortuous 20 year history.
  - 2000: Santa Clara County initiates class litigation against NL (Dutch Boy), ConAgra (Fuller), Sherwyn-Williams and others.
  - Initial theories.
    - strict liability, negligence, unfair business practices, fraud and concealment
    - civil conspiracy and nuisance
    - public and private nuisance
  - 2001: Public Nuisance claim dismissed on pleadings (demurrer sustained without leave to amend).
  - 2003: Lead Paint Defendants granted summary judgment on remaining claims.

CERTAIN UNDERWRITERS AT LLOYD'S v. NL INDUSTRIES, INC. (N.Y. Sup. Court, December 29, 2020) – EXPECTED OR INTENDED

- "Nuisance"

  "*Anything*… injurious to health…so as to interfere with the comfortable enjoyment of life or property…" Cal. Civil Code §3479.

  "Public Nuisance" is a nuisance which "affects at the same time an entire community or neighborhood, or any considerable number of persons…" Cal. Civil Code §3480.

- Remedies for public nuisance are criminal prosecution, civil action, or abatement.
- "Class" public nuisance claim rejected as at core an action for product liability damage to property.

CERTAIN UNDERWRITERS AT LLOYD'S v. NL INDUSTRIES, INC. (N.Y. Sup. Court, December 29, 2020) – EXPECTED OR INTENDED

- 2013: Trial
- 2014: Decision for Plaintiff
- Finding: Defendants promoted lead paint for home use with "actual knowledge" that high level exposure was fatal, and lower levels of exposure harmed children.
- Remedy: $1.15 billion abatement fund.
- 2017: Court of Appeal affirms, but remands for recalculation of damages.
- 2019: Superior Court enters Judgment approving settlement of $305 million ($101.66 million from each of the three defendants).

CERTAIN UNDERWRITERS AT LLOYD'S v. NL INDUSTRIES, INC. (N.Y. Sup. Court, December 29, 2020) – EXPECTED OR INTENDED

- Insurers bring coverage litigation in state court in New York.
- Insurers advance exclusion for "expected and intended" and "fortuity doctrine," N.Y Ins. Law §1101(a) (coverage not available for expected or intended harm).
- Court applies New York law.
- NL bound by California Court of Appeal ruling affirming trial court:

  "substantial evidence…supported the Superior Court's finding that NL had *actual knowledge* that lead exposure harmed children, that lead paint used in residences would deteriorate, and that the dust resulting from the deterioration would poison children causing serious injury."

CERTAIN UNDERWRITERS AT LLOYD'S v. NL INDUSTRIES, INC. (N.Y. Sup. Court, December 29, 2020) – EXPECTED OR INTENDED

- California courts did not address whether NL intended to cause *the damage* as a result of its actions.
- N.Y. courts distinguish knowledge of risk of hazardous consequences, and intention to cause harm.
- Whether assessed under definition of "accident" or coverage for harm "neither expected nor intended" or codification of "fortuity" doctrine, Insurers failed to show intention to cause injury to meet their burden on MSJ.

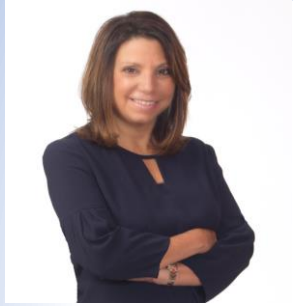
CERTAIN UNDERWRITERS AT LLOYD'S v. NL INDUSTRIES, INC. (N.Y. Sup. Court, December 29, 2020) – EXPECTED OR INTENDED

- *But see Certain Underwriters at Lloyd's, London v. ConAgra Grocery Products Co.,* California Superior Court No. CGC-14-536731; California Court of Appeal No. A160548.
- ConAgra (like NL) responsible for $101.66 million toward settlement.
- Insurers sue ConAgra and its coverage litigation proceeds in California.
- ConAgra's insurers deny coverage on various grounds, including California Insurance Code § 533 ("insurer is not liable for a loss caused by the willful act of an insured").

CERTAIN UNDERWRITERS AT LLOYD'S v. NL INDUSTRIES, INC. (N.Y. Sup. Court, December 29, 2020) – EXPECTED OR INTENDED

- Trial court grants summary judgment for insurers.
- ConAgra's predecessor intentionally promoted lead paint with knowledge that damage to children was at least highly probable.
- ConAgra knew harmful consequences were "substantially certain to result."
- California Insurance Code § 533 precludes coverage for such conduct.
- Appeal Pending: stay tuned!

SPEAKER:



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Suzanne Cocco Midlige is the Managing Partner and a founding member of Coughlin Midlige & Garland LLP. She is also a member of the Firm's Insurance and Reinsurance Services Group.

Suzanne's practice focuses on the representation of domestic and international insurers and reinsurers in litigated and non-litigated matters. She has extensive experience representing multi-national companies involved in transnational disputes. Suzanne has years of experience representing the interests of insurers and reinsurers in disputes relating to financial institutions, director and officers, asbestos, pollution and health hazards, including opioid litigation, PFOA and Paraquat. Suzanne has acted for multinational reinsurers in a series of corporate malfeasance claims and failed tax strategy claims, as well as coordinating counsel for a multinational reinsurer in relation to subprime and credit exposures. She has significant experience with asbestos coverage disputes, including the area of asbestos bankruptcy litigation. Significant cases include acting as counsel to 50 multinational insurers in a complex insurance and antitrust dispute involving US and Australian asbestos claims, as well as counsel to European insurers in asbestos coverage litigation filed in the US and London. Suzanne works closely with insurers in relation to the development and implementation of models to allocate losses across complex insurance programs, and in evaluating future loss projections and developing burn rate analyses.

TARGET CORP. V. ACE. AM. INS. CO., 2021 U.S. DIST. LEXIS 23490 (D. MINN. FEB. 8, 2021) WHETHER "LOSS OF USE" OF PAYMENT CARDS ARE COVERED UNDER CGL POLICIES

- In 2013, Target Corporation ("Target") discovered a massive data breach involving stolen payment card information
  - Malware was installed at point of sale ("POS") systems
  - The breach caused stolen payment card data and personal contact information belonging to customers
- Banks cancelled the compromised payment cards and reissued new cards to customers
- The banks then sued Target to recover the costs to replace the payment cards, which resulted in confidential settlements

TARGET CORP. V. ACE. AM. INS. CO., 2021 U.S. DIST. LEXIS 23490 (D. MINN. FEB. 8, 2021) WHETHER "LOSS OF USE" OF PAYMENT CARDS ARE COVERED UNDER CGL POLICIES

- Target sued its CGL insurers, ACE American Insurance Company and ACE Property & Casualty Ins. Co. (collectively, "ACE"), to recover part or all of the settlement liability (the duty to defend was not at issue)
- Target argued the settlements were damages because of "loss of use" as encompassed within the definition of "property damage" (Coverage A)
- In doing so, Target's theory appeared to advocate a "but-for theory" for loss of use damages *(i.e.*, because the payment cards allegedly lost their use and Target had to resolve the claims through settlements, the liability for the settlements constituted damages for "loss of use").

TARGET CORP. V. ACE. AM. INS. CO., 2021 U.S. DIST. LEXIS 23490 (D. MINN. FEB. 8, 2021) WHETHER "LOSS OF USE" OF PAYMENT CARDS ARE COVERED UNDER CGL POLICIES

- The district court, however, flatly rejected Target's "but-for theory" and pointed out that other courts have concluded there must be some nexus between:
  - the value of the consumer or company's ability to use the product or service that has been lost; and
  - the damages associated with that loss of use. *Id.* at *13 (citations omitted).
- The district court further held that under Minnesota law, this "requires loss-of-use damages to have some connection to the value of the use of the now-damaged property when it previously was unimpaired." *Id.*
  - An example the district court used was the reasonable rental value of a replacement vehicle.
  - But in the *Target* case, the "record was devoid of any allegation or evidence as to what the value of the use of the payment cards is, either to Target's customers or to the payment card companies." *Id.* at *14.

TARGET CORP. V. ACE. AM. INS. CO., 2021 U.S. DIST. LEXIS 23490 (D. MINN. FEB. 8, 2021) WHETHER "LOSS OF USE" OF PAYMENT CARDS ARE COVERED UNDER CGL POLICIES

- The district court concluded that the connection between the damages claim and loss of use of the payment cards was "insufficiently direct" and therefore not covered. *Id.* at *15.
- The district court also agreed with ACE's position that diminution of value is not a recoverable damage under loss of use claims. *Id.* at *9 (*citing Federated Mut. Ins. Co. v. Concrete Units, Inc.*, 363 N.W.2d 751 (Minn. 1985)).
- However, the district court disagreed with ACE's position that loss-of-use damages was exclusively measured by time. *Id.* at *10-11. Rather, it adopted the requirement that there must be some connection between the value and loss-of-use of the property, as discussed above.

STATUS OF TARGET DECISION AND OTHER CASES

- The *Target* decision (based upon Minnesota law) is one of the few reported decisions on this issue
  - Target has filed a motion to alter, amend and/or correct judgment, which is still pending

- *Camp's Grocery, Inc. v. State Farm Fire & Cas. Co.*, 2016 U.S. Dist. LEXIS 147361 (N.D.A.L. Oct. 25, 2016) (applying Alabama law):
  - District court rejected the credit unions' argument that alleged losses for the replacement of the payment cards constituted "property damage"
  - Attributed the damages as purely economic losses that flowed from the grocery store's poor network security system, which allowed intangible electronic data to be hacked
  - Also enforced the Electronic Data Exclusion to bar coverage

- *The Home Depot, et al. v. Steadfast Ins. Co., et al.*, Case No. 1:21-cv-00242 (S.D. Ohio) (pending case)
  - Home Depot is similarly seeking coverage from CGL insurers for "loss of use" of payment cards due to settlements made to banks and credit unions for 2014 data breach incident

ARCH INSURANCE COMPANY V. MURDOCK
ALLOCATION IN D&O POLICIES

Case Citation:

Arch Ins. Co. v. Murdock, C.A. No. N16C-01-104 EMD CCLD, 2020 Del. Super. LEXIS 156 (Del. Super. Ct. Jan. 17, 2020), *aff'd*, *RSUI Indem. Co. v. Murdock*, No. 154, 2020, 248 A.3d 887, 2021 Del. LEXIS 90, 2021 WL 803867 (Del. March 3, 2021)

Allocation issues arise with…

- covered and uncovered persons/entities
- covered and uncovered claims
- covered and uncovered damages

THE MURDOCK (DOLE) CASE

Facts:

- Dole Director and CEO Murdock took the company private through a merger transaction in which he acquired all stock not already owned by him by way of a holding company that he controlled – DFC. The merger was approved by a 50.9% vote of disinterested stockholders, and the stockholders received $13.50 per share. After the merger closed, Dole stockholders filed suit challenging the fairness of the transaction and alleging breach of fiduciary duty against Murdock and Dole's President, COO and General Counsel Carter (the "Stockholder Action") claiming that the two manipulated the value of the company's stock which enabled Murdock to acquire the stock at an artificially low price. The suit was consolidated with a separate stockholder Appraisal Action.
- After a trial, the Court of Chancery determined that Murdock and Carter breached their duty of loyalty through a series of intentional, unfair and fraudulent actions that, among other things, drove down Dole's pre-merger stock price. The Court found the two jointly and severally liable for approximately $148 million in damages. After the ruling, the Court directed the parties to confer regarding whether any issues remained to be addressed in connection with the Appraisal Action, during which time the parties commenced settlement discussions culminating in the settlement of both actions. Murdock paid the settlement in full plus interest.

THE MURDOCK (DOLE) CASE

Facts, Cont'd:

- Before the Court of Chancery approved the settlement, a federal securities class action (the "San Antonio Action") was filed by Dole stockholders who had sold their stock in Dole between January and October 2013 and were therefore not parties to the Stockholder Action. Citing the Court of Chancery's findings of fraud and breach of loyalty, the stockholders claimed that they were entitled to damages against Murdock, Carter and Dole for violations of the Securities Exchange Act. Several months after the San Antonio Action was filed, the parties pursued mediation and the case was ultimately settled with Dole agreeing to pay (or cause to be paid) $74 million plus interest.
- After the Stockholder Action settled but before the Court of Chancery approved the settlement and the San Antonio Action was settled, several of Dole's excess policy insurers filed suit for declaratory judgment as Murdock had sought reimbursement for the amount of the two settlements. The 7th and 8th excess layer insurers refused payment based on the primary policy's (Axis') Allocation Provision and their entitlement to subrogation to any rights Murdock had against other underlying defendants who did not contribute to the settlements.

THE AXIS PRIMARY POLICY'S ALLOCATION PROVISION

If in any Claim, the Insureds who are afforded coverage for such Claim incur Loss jointly with others (including other Insureds) who are not afforded coverage for such Claim, or incur an amount consisting of both Loss covered by this Policy and loss not covered by this Policy because such Claim includes both covered and uncovered matters, then the Insureds and the Insurer agree to use their best efforts to determine a fair and proper allocation of covered Loss. The Insurer's obligation shall relate only to those sums allocated to matters and Insureds which are afforded coverage. In making such determination, the parties shall take into account the relative legal and financial exposures of the Insureds in connection with the defense and/or settlement of the Claim.

THE PARTIES' POSITIONS

The Insured's Argument:

- The "Larger Settlement Rule" should be adopted when determining whether any indemnifiable Loss suffered in a settlement should be allocated between covered and uncovered loss.
- Applying the Rule to the case at hand, the entire amounts of the two settlements at issue are recoverable ***unless*** the insurers can establish that some uncovered liability increased the amount of the settlements.

The Insurers' Argument:

- Burden to prove allocation between covered and uncovered Loss rests on the insured.

1. The allocation provision at issue explicitly requires allocation between covered Loss and uncovered loss.

2. Circumstances surrounding settlements require insured to carry burden of proof.

JUDGE DAVIS' RULING

- The Allocation Provision is ***not*** ambiguous.
- However, the provision does not set out a specific formula to be applied in the event parties fail to agree on allocation issues and thus, is "mostly unhelpful" under the facts presented.
- Where parties fail to agree to an allocation and the manner in which an allocation provision is to be interpreted, the "Larger Settlement Rule" applies: "allocation is appropriate only if, and only to the extent that, the defense or settlement costs of the litigation were, by virtue of the wrongful acts of the uninsured parties, higher than they would have been had only the insured parties been defended or settled."

RATIONALE BEHIND THE RULING

- Protecting the “economic expectations of the insured” by preventing the deprivation of coverage sought and bought
- Reading the policy as a whole (the policy did not limit coverage due to the activities of others that might overlap the claims against the insureds, thus *pro rata* or “relative exposure analysis” would be contrary to policy language)
- Insurers’ subrogation rights protected (insurers are not deprived of the economic deal they bargained for – under the policy’s subrogation provision, the insurers still have a right to exercise subrogation rights of the insureds)

DELAWARE SUPREME COURT AFFIRMS

- On appeal, RSUI (Dole's 8th layer excess insurer) argued that the lower court erred by applying the "Larger Settlement Rule" and should have conducted a "relative exposure analysis," weighing the relative exposures between covered and non-covered losses. Under the latter theory, RSUI argued its excess layer would not have been reached because "significant liability" was placed on non-insured DFC and liability was incurred for actions taken in uninsured capacities (Murdock as a controlling shareholder and Carter as General Counsel).
- The Delaware Supreme Court agreed with Judge Davis's observations regarding the "unhelpful" language of the Allocation Provision and incompatibility with other policy language.
- The Court further agreed with Judge Davis' conclusion that the "Larger Settlement Rule" should apply: "responsibility for any portion of a settlement should be allocated away from the insured *only if the acts of the uninsured party are determined to have increased the settlement*") (citing *Nordstrom, Inc. v. Chubb & Son, Inc.,* 54 F.3d 1424, 1432 (9th Cir. 1995)) (further citations omitted).
- The Court affirmed the allocation decision as: (1) RSUI did not argue that the acts of DFC or the actions of Murdock and Carter in their uninsured capacities *increased* the amount of the Stockholder Action settlement (indeed, the facts appeared to show that DFC's actions could not have increased the settlement); and (2) aside from "conclusory assertions," RSUI pleaded no facts suggesting that the San Antonio Action settlement represented an admixture of covered and non-covered losses nor ventured an explanation of how the application of a "relative exposure" allocation theory would lead to a reduction in the coverage available to the insureds.

POST MURDOCK:
THE POWER OF A "DISAGREEMENT CLAUSE" AND THE BURDENS OF PROOF

Verizon Commc'ns Inc. v. Ill. Nat'l Ins. Co.,
C.A. No. N14C-06,048 WCC CCLD, 2020 Del. Super. LEXIS 3090, 2020 WL 8509725
(Del. Super. Ct. Dec. 11, 2020)

- Insured sued its insurer seeking to recover defense costs for a covered officer after the officer and an uninsured entity were named defendants in the underlying transaction litigation.
- *Murdock* distinguished on the basis that the *Murdock* policy "failed to explicitly require that [a particular] allocation method be applied upon disagreement," whereas the *Verizon* policy "require[d] that upon a disagreement on allocation, [the insurer] will pay what it believes is fair and equitable until a different amount is agreed upon or determined in accordance with the Policy and law."
- While the allocation method in the event of disagreement would be "difficult at best" to employ, it nevertheless sufficiently provided a governing allocation method rendering the "Larger Settlement Rule" inapplicable.

POST MURDOCK
THE POWER OF A "DISAGREEMENT CLAUSE" AND THE BURDENS OF PROOF

Calamos Asset Mgmt. v. Travelers Cas. & Sur. Co. of Am.,
C.A. No. 18-1510 (MN), 2021 U.S. Dist. LEXIS 83132, 2021 WL 1721661
(Dist. Del. April 30, 2021)

- Insured sued excess insurer for breach of contract and declaratory judgment that it was obligated to pay for losses incurred as a result of two actions – an Appraisal Action and a Stockholder Action. The Stockholder Action alleged claims against Mr. Calamos in both his insured capacity (as a director and officer) and uninsured capacity (as a stockholder) and the parties thus disputed how the settlement amount from the Stockholder Action should be allocated and who has the burden of proving such allocation.

- District Court ruled that Travelers' Allocation Provision was more comparable to that at issue in *Verizon*, supporting application of the "relative exposure rule" and not the "Larger Settlement Rule."

POST MURDOCK
THE POWER OF A "DISAGREEMENT CLAUSE" AND THE BURDENS OF PROOF

Calamos Asset Mgmt. v. Travelers Cas. & Sur. Co. of Am.

(Cont'd)

- Acknowledges that under Delaware law, the insured bears the burden of proving that a claim falls within the scope of coverage, and if satisfied, the insurer bears the burden of proving application of a policy exclusion but that "coverage questions" "are distinct from allocation questions" and Delaware has not definitively stated who has the burden by default on allocation.

- Finds that the better-reasoned cases support the conclusion that the initial burden for proving allocation should be on the insured.

CONCLUSIONS

- The "Larger Settlement Rule" *may* be applied and prevail over a D&O policy's allocation provision if the provision is silent as to a specific allocation method in the event an insurer and its insured do not agree on methodology
- "Disagreement Clauses" are key
- Allocation discussions/negotiations are crucial
- Policy subrogation provisions may impact allocation
- Choice of law may impact the burden of proof

QUESTIONS?