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The D&O Diary

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Del. Court Narrows Godiva's Insurers' Defenses in Dispute Over Coverage for Consumer Protection Claims

By Kevin LaCroix on September 12, 2022

Yet another Delaware court has issued a noteworthy management liability insurance coverage opinion. In a detailed September 12, 2022 opinion in a dispute between Godiva Chocolatier and its management liability insurers over coverage for underlying consumer protection claims against the company, Delaware Superior Court Judge Mary M. Johnston rejected many – but not all — of the insurers' coverage defenses. A copy of Judge Johnston's opinion can be found **here**.

Background

G-New, Inc. d/b/a Godiva Chocolatier originated at a Brussels storefront. Because of this connection to Belgium Godiva's product exhibit the phrase "Belgium 1926." In 2019, two plaintiffs filed a class action against the company alleging that the phrase "Belgium 1926" misled consumers. The plaintiffs alleged violations of New York and California consumer protection

statutes and common law. The class action ultimately settled for Godiva's agreement to pay a maximum of $15 million in monetary relief and a maximum of $5 million in attorneys' fees.

At the relevant time, Godiva maintained a program of private company management liability insurance, which consisted of a primary layer of $10 million and a single excess layer of $10 million. Godiva submitted the class action lawsuit and the settlement to its insurers. The insurers denied coverage and Godiva initiated coverage litigation against the insurers. The insurers contend coverage is precluded in whole or in part on a number of grounds: that the settlement represents uninsurable restitution or disgorgement; that the amounts to be paid in the settlement do not represent covered "Loss"; that coverage for the settlement is precluded by the policy's exclusion for Loss arising from "unfair trade practices"; that the settlement amounts represent "fines and penalties imposed by law" for which the policy precludes coverage.

The defendant insurers filed motions to dismiss Godiva's action. Godiva in turn filed a motion for partial summary judgment.

September 12, 2022 Order

On September 12, 2022, Judge Johnston entered an opinion granting in part and denying in part the defendants' motions to dismiss and granting in part and denying in part Godiva's motion for summary judgment.

Judge Johnston opened her opinion with a lengthy review of the choice of law issues. The insurers contended that New York law governed. Godiva argued that Delaware law applied. The parties contended that the choice of law matters because of differences in the laws of the two jurisdictions, particularly with respect to the availability of coverage for restitution or disgorgement and with respect to the availability of a claim for bad faith. After a thorough review of the applicable choice of law principles, Judge Johnston ultimately concluded that she did not need to decide which jurisdiction's law applied. She reached this conclusion because she determined that even if New York law applied, the settlement amounts did not constitute restitution or disgorgement and Godiva had not made out a claim for bad faith.

Judge Johnston then turned to the insurers' argument that the settlement amounts did not represent covered "Loss" under the Policy. The insurers contended that Godiva's alleged wrongful acts involved "knowing" or "willful" violation of the false advertising laws. Judge Johnston found that the insurers had failed to present evidence that there had been a determination or admission that the alleged violations were knowing or willful. She went on to say that the primary policy's language "provides broad coverage," adding that it covers "settlement and many types of damages," concluding that the settlement agreement is "a covered loss" within the meaning of the term "Loss" in the policy.

Judge Johnston then reviewed the defendant's argument that the coverage was precluded by the antitrust exclusion, which among other things, precludes coverage for Loss based upon or arising from actual or alleged "unfair trade practices." Johnston noted that the term "unfair trade practices" is not defined. Judge Johnston questioned whether unfair trade practices are the equivalent of consumer fraud, adding that the insurers had presented no authority demonstrating that the terms are interchangeable or legally equivalent. She noted that the settlement agreement does not state that the agreed "monetary relief" is for unfair trade practices. To the extent that some of the underlying statutory and regulatory allegations reasonably can be interpreted as relating to or governing unfair trade practices, "it is possible that some [of] the Settlement Amounts could be allocated to amounts subject to the exclusion."

Finally, Judge Johnston turned to the insurers' argument that the settlement is not covered because it represents "fines or penalties imposed by law." The primary insurer's counsel has conceded that a genuine issue of material fact exists about whether the entire settlement constitutes "penalties." After reviewing the parties' position, Johnston concluded that the settlement agreement is not for "fines or penalties" imposed by law; however, she also concluded that some portion of the settlement may amount to "civil money penalties," which are explicitly precluded from coverage. **UPDATE:** *After a communication with a member of this blog's community, I realize that I did not accurately describe Judge Johnstone's position. She did not say that civil money penalties are expressly excluded. To the contrary, she said that "civil money penalties" are omitted from the exclusion and therefore are within covered loss (the exclusion provides that Loss shall not include "fines or penalties imposed by law, other than civil money penalties expressly referenced in the definition of Loss above." The definition of Loss specifically includes civil money penalties as long as the violations*

were not knowing or willful.) She found that "To avoid coverage with regard to civil money penalties, there needs to be some evidence or admission that the violation of law was knowing or willful. Defendants have failed to present such evidence."

Discussion

It is important to note at the outset that the insurance policy at issue here is a private company management liability insurance policy, not a public company D&O insurance policy. Were a public company policy involved, the coverage issues would have been far different, and there likely would not have been coverage for the underlying claim. Public company policies provide liability coverage for the insured entity solely with respect to securities claims. The underlying claims here, which were asserted against Godiva (that is, against the entity), did not involve securities claims. However, because entity coverage under a private company management liability insurance policy is not limited just to securities claims, there was at least the potential for the underlying claims here to be covered, subject of course to all of the policy's terms and conditions.

Judge Johnston's analysis of the choice of law issues is interesting. Practitioners may find it instructive to review her analysis. In the end, she concluded that he did not have to determine which jurisdiction's law governed; but her conclusion that she did not need to decide did not depend on a conclusion that there were no pertinent differences between New York and Delaware law; to the contrary, she expressly noted key differences between the two jurisdictions law. What she did conclude was that even if New York law applied, it would not change the outcome because the underlying settlement did not involve disgorgement or restitution and because Godiva had not stated a claim for bad faith. In the end, Judge Johnston made a decision on the merits on these two issues, without making a choice of law determination, in order to complete her analysis and reach the conclusion that the choice of law issue didn't matter. This seems to me to be a little bit of a reversal of the usual order of things, as analytically the choice of law issue typically precedes a determination of the merits.

Many readers of this blog are aware of the concern I have expressed elsewhere on this site that the Delaware courts (and in particular the Delaware Superior Court) is a policyholder-friendly forum for the determination of insurance disputes. While in this case Judge Johnston did in fact conclude that some portions of the settlement amounts may be precluded from coverage either

as representing loss due to a claim for "unfair trade practices" or as "civil money penalties," she otherwise gave the insurers' arguments fairly short shrift. I have not read the briefs so I can't really say, but reading between the lines I suspect that there may be more to the insurers' arguments relating to the nature of the underlying statutory claims than appears in Judge Johnston's opinion.

That said, I have to say I was heartened by at least some of Judge Johnston's analysis of the insurers' argument that coverage for the settlement was precluded by the policy's antitrust exclusion. It has been my observation that insurers often try to leverage this exclusion to try to preclude coverage for claims having nothing to do with alleged violations of the antitrust laws. Here they were trying to argue that the exclusion precluded coverage for the underlying consumer protection and false advertising claims. I was glad to see Judge Johnston take a very narrow view of this argument. In the end, she said only that the exclusion could preclude coverage, if at all, only to the extent that some of the underlying statutory allegations can be interpreted as relating to or governing unfair trade practices, which narrowed the preclusive effect that the insurers sought considerably.

Many thanks to a loyal reader for providing me with a copy of Judge Johnston's opinion.
