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The D&O Diary

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Does the No Action Clause Bar a Policyholder's Suit for Current Defense Costs?

By Kevin LaCroix on July 24, 2025

D&O insurance claims can sometimes lead to intricate coverage disputes, often involving disagreements over the meaning of technical policy terms and provisions. A recent Delaware Supreme Court opinion illustrates the kinds of disputes that can arise. Among other things, the coverage issues the court considered involved disagreements over the meaning and application of the No Action Clause. The result of the court's opinion is that there will be further proceedings in the court below on the No Action Clause issue. Among other things, the Court's consideration of the extent to which a policyholder may bring an action against the insurer before the resolution of the underlying claim raises interesting and important issues. A copy of the Delaware Supreme Court's July 23, 2025, opinion can be found **here**.

Background

Certain investors in the former parent company of Origis USA sued Origis USA and one of its executives in the Southern District of New York. This underlying claim is still proceeding. Origis

USA tendered the claim to its D&O insurers. For purposes of consideration of the coverage dispute by the Delaware Supreme Court, the Court divided the insurers into two groups, the 2021 insurers and the 2023 insurers. The insureds seek coverage for the underlying lawsuit, including reimbursement of costs of defense incurred in the underlying matter.

The policy provides for advancement of defense costs, subject to an allocation provision stating that if the parties cannot agree to an allocation of covered and noncovered costs, the insurer must advance the costs it believes to be covered. The primary insurer in the 2021 tower apparently is advancing defense expense at a 10% allocation, the amount the insurer determined to be covered.

Origis USA filed a coverage action against the insurers in Delaware Superior Court. The 2021 insurers filed a motion to dismiss arguing that because the underlying matter is still pending, the coverage lawsuit violates the policy's No Action clause. The 2023 insurers moved to dismiss, arguing that the Prior Acts Exlusions preclude coverage because all of the allegedly wrongful acts occurred prior to the past acts date. The insureds opposed these motions, arguing first that the No Action clause precludes suits against the insurer while the underlying action is pending *only* for suits brought by third party claimants, but *not* for claims for coverage brought by insured persons. The insureds also argued that three paragraphs in the underlying complaint constituted a separate claim involving alleged wrongful acts occurring after the past acts date.

The Superior Court granted the insurers' motions to dismiss, holding, first, that the No Action Clause barred the insureds' action against the insurers while the underlying claim remained pending; and, second, that the three paragraphs in the underlying complaint on which the insureds sought to rely did not represent a separate claim, and even if they did, the acts alleged arose out of and were directly connected to wrongful acts that took place prior to the past acts date. The insureds appealed.

Relevant Policy Language

The No Action Provision provides as follows:

> With respect to any Liability Coverage Part, no action shall be taken against the Insurer unless, as a condition precedent thereto, there has been full compliance with all the terms of this Policy, and until the Insured's obligation to pay has been fully determined by an adjudication against the Insured or by written agreement of the Insured, claimant and the Insurer.

The July 23, 2025, Opinion

In a unanimous July 23, 2025, opinion written by Justice **Karen Valihura**, the Delaware Supreme Court affirmed the Superior Court's ruling with respect to the separate claim/past acts date issue, but with respect to the No Action Clause issue, the Supreme Court remanded the issue to the Superior Court for further proceedings.

Concerning the No Action clause issue, the Court found that there were a variety of policy provisions, particularly with respect to the advancement and allocation of defense expenses, that potentially could be relevant to the determination of the meaning and application of the No Action clause. Essentially, the insureds had argued that because the insurers defense cost obligations are present obligations, and because the advancement and allocations required the insurer to make present payment of allocated expense amounts, the policy taken as a whole operates to except issues concerning the payment of defense expenses from the lawsuit bar in the No Action clause.

The Superior Court had rejected these arguments, holding that advancement of defense cost issues were not excepted from the lawsuit bar in the No Action clause, adding that "Plaintiffs and Defendants are sophisticated parties who could have negotiated for different language" if a different result was intended.

The Supreme Court said that the lower court's "reasoning logically flows as far as it goes; however, it is not clear to us the extent to which the court focused on the competing constructions of the disputed provisions," adding that the parties' arguments had shifted and evolved and that they had presented "several additional arguments to this Court regarding the proper construction of the primary policy that were not the focus of the proceeding below."

What is needed, the Supreme Court said, "is a more in-depth analysis that considers the combination of these provisions and how they function together." The Supreme Court remanded the issue to the lower court for it to "more fully consider the question of the relationship of the No Action Clauses, Advancement and Allocation provisions, and how they were intended to function given the absence of a duty by the Insurers to defend."

Discussion

The No Action Clause is a standard liability insurance policy provision. It is generally understood to mean, first and foremost, that the third-party claimant in the underlying claim can't sue the insurer until liability has been established in the underlying proceeding. It is also generally understood to mean that lawsuits for indemnification, even if brought by the insured, are generally precluded until liability has been established, on the theory that litigating the issues before liability has even been established would be premature. However, it is also generally understood that the No Action clause is not a bar when the insurer has refused or failed to defend.

The complicated wrinkle here is that the policy involved here is not a duty to defend policy, rather it is a duty to indemnify policy. That is, under the policy the insurers are indemnifying the insureds for their costs of defense. Moreover, at least as I understand the situation, the insurers are not denying the defense costs altogether, but rather are advancing allocated defense costs according to the insurers' determined allocation. I think the Delaware court got it right that the way that the various relevant policy provisions interact is important to understanding how the No Action clause should operate under these circumstances.

While the final outcome of this dispute over the No Action clause is yet to be determined, I do think it is critically important that policyholders in these kinds of circumstances need to have their defense cost rights determined, while the issue is relevant. The underlying case here is a complex securities lawsuit, undoubtedly involving millions of dollars of defense. It is no answer that the defense costs issues can be disputed later, after liability in the underlying action is established, because by then it could be too late for the insureds – they need to defend themselves now. More importantly, the outcome of these defense cost issues do not depend on the liability determinations in the underlying case. The defense expenses will have to be paid regardless of the outcome of the underlying case, and so it is not premature for the defense cost issues to be sorted out now.

I will freely concede that others who have undertaken comprehensive legal research on these issues may well disagree with my analysis. There is no doubt that legal authority may well have much to say on these issues. My point here is that the No Action clause is there to prevent premature litigation of issues that may not need to be litigated depending on the outcome of the underlying claim. The defense cost issues here are relevant now, and will apply regardless of the outcome of the underlying dispute, and so should be litigated now.

One final note. The Superior Court said that these sophisticated parties could have negotiated different language, had they wanted to do so. Maybe this is a valid point, but I note that even sophisticated parties must assume that standard provisions will be interpreted and applied in certain ways, and it could well be argued that even if the No Action Clause bar precludes lawsuits by third-party claimants, it does not bar claims between the policyholder and the insurer on issues that are not premature but that are ripe for decision now.

Special thanks to a loyal reader for providing me with a copy of the Delaware Supreme Court's opinion.

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