LAW360 Insurance Authority

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The Biggest D&O Insurance Rulings Of 2022

By **Josh Liberatore**

Law360 (January 2, 2023, 12:03 PM EST) -- A pair of insurer wins in corporate-friendly Delaware and a favorable ruling on the so-called bump-up exclusion have carriers feeling good about the past year of directors and officers disputes, although Verizon obtaining coverage for a $95 million fraudulent transfer settlement gave policyholders something to cheer about.

Here, Law360 breaks down the most significant D&O decisions and trends of 2022.

Carriers Gain Ground in Bump-Up Exclusion Fight

While previous years saw policyholders pick up key wins in the debate over how to interpret the hotly contested bump-up exclusion in D&O policies, insurers had the upper hand in 2022.

Liberty Mutual prevailed in a California federal court when a judge found that a bump-up exclusion in Ceradyne's D&O policy protected the insurer from having to cover an $11.3 million settlement of shareholder lawsuits. (Photo Illustration by Rafael Henrique/SOPA Images/LightRocket via Getty Images)

In November, a California federal court held that Liberty Mutual **doesn't have to cover** Ceradyne for an $11.3 million settlement the company struck to end shareholder lawsuits stemming from its acquisition by 3M. U.S. District Judge James V. Selna found that coverage was precluded by a bump-up exclusion in Ceradyne's D&O policy, despite the company's argument that its deal with 3M didn't meet key characteristics required for the clause to apply.

The Ceradyne ruling curbed some momentum policyholders gained through recent wins in cases that successfully challenged the applicability of bump-up exclusions, which seek to limit the coverage companies can get for shareholder lawsuits that challenge an acquisition.

"It's worrisome because the insurance industry is clearly going to use it to try and expand the bump-up exclusion beyond its intent and its plain language, Raymond Mascia Jr., a shareholder in Anderson Kill's insurance recovery practice, said of the Ceradyne decision.

Bump-up exclusions have slightly different language in different D&O policies, but they generally state that for claims alleging the price paid for the acquisition of a company is inadequate, the amount of any judgment or settlement that increases that price is not a covered loss.

Ceradyne argued its deal with 3M couldn't trigger the exclusion because it was the company being acquired, and the clause should only apply in instances where it acted as the buyer. Judge Selna rejected that argument, among others, finding that the bump-up exclusion applied regardless of Ceradyne's role in the transaction.

Policyholder attorneys lamented the Ceradyne case as an example of the insurance industry stretching the bump-up exclusion beyond the clause's originally intended function, which, they say, was to apply only to shareholder suits lodged against acquiring companies.

The policy Liberty Mutual issued to Ceradyne used a common bump-up exclusion created by AIG. It applied to "a claim alleging that the price or consideration paid or proposed to be paid for the acquisition … of all or substantially all the ownership interest in or assets of an entity is inadequate," according to language taken from the exclusion.

"That exclusion does not apply to a claim against the seller," Mascia said. "It can't, because the seller doesn't pay for its own acquisition."

Keith McKenna, a partner at Cohen Ziffer Frenchman & McKenna, said he disagreed with the Ceradyne court's analysis, noting that exclusions in insurance policies should be read narrowly and that, when in doubt, judges should give the benefit of the doubt to the policyholder's interpretation of unclear language.

"It reasonably could be read the way the policyholder said, that the intent of the exclusion is to apply only when the company being sued is the company that acquired the stock," said McKenna, who represents policyholders.

Insurer-side attorneys praised Judge Selna's ruling for holding Ceradyne to what they believe is the actual language of the exclusion.

"The wording of the bump-up clause is sufficiently broad to apply to either situation, whether you acquired or are the acquirer." said Thomas Breen, a partner at Mound Cotton Wollan & Greengrass LLP who represents insurers. "Ceradyne wanted to insert language into the bump-up clause that simply wasn't there."

Delaware Policyholders Get Bankruptcy Boost

In a decision that was unsealed in October, the Delaware Superior Court held that a bankruptcy trustee's fraudulent transfer suit against Verizon counted as a covered securities claim under the company's D&O policy, a ruling that should help policyholders facing similar claims in the First State.

A Delaware judge said insurers for Verizon Communications **must cover the company's $95 million settlement** with a bankruptcy trustee for the then-insolvent FairPoint Communications, which accused the communications giant of luring FairPoint into a "disastrous" acquisition of Verizon's old telephone equipment and infrastructure.

The court found that the trustee's suit was "brought derivatively" on behalf of Northern New England Spinco Inc, a Verizon-created entity that was a covered organization under the D&O policy at issue. The court also held that the trustee counted as a security holder for Spinco, which meant the FairPoint suit was a covered securities claim, leading to coverage for the settlement.

"The decision was a complete victory for Verizon and great news for policyholders seeking coverage for securities claims or contemplating coverage litigation in Delaware on similar issues," said Geoffrey

Fehling, a partner at Hunton Andrews Kurth who represents policyholders.

Brian Scarbrough, a partner at Jenner & Block LLP who represents policyholders, said the Verizon decision should encourage public companies to seek coverage for different types of claims under their D&O policies.

"For public companies, securities claims are not just shareholder class actions or shareholder derivative actions," Scarbrough said. "It's important for policyholders to think more broadly about what a securities claim is."

Breen of Mound Cotton warned that the ruling could create "tremendous exposure" for insurers in Delaware whose policyholders are hit with fraudulent transfer claims. However, he said there's reason to believe the ruling may be limited in its application, since not all D&O policies have the same definition of "securities claims."

Under Verizon's policy, a securities claim was defined as a claim "brought derivatively on the behalf of an organization by a security holder of such organization," with "organization" including any for-profit entity Verizon controlled on or before the effective date of the policy.

"There's no requirement that the claim itself alleged a breach of securities regulations," Breen noted of the Verizon policy language.

Under D&O policies that require a breach of securities regulations in order for a securities claim to be triggered, it may be more difficult for policyholders to get coverage using the Delaware Court's rationale in the Verizon ruling, Breen hypothesized.

Fehling agreed with Breen that policy language may make all the difference for policyholders in obtaining a favorable coverage ruling.

"Because D&O policies define 'securities claims' differently, public companies should not overlook minor variations when placing or renewing policies that could have an outsized impact on coverage," he said.

Delaware High Court Sides With Insurers in Key Cases

In early 2022, the Delaware Supreme Court bucked its usual pro-policyholder trend and issued a pair of important D&O wins for insurers.

In First Solar Inc. v. National Union Fire Insurance Co. of Pittsburgh, the Delaware high court in March **upheld a lower court's ruling** that a solar panel company can't get coverage for a shareholder suit accusing it of concealing production defects. The underlying shareholder suit was too similar to an earlier class action that insurers already covered, triggering the policy's related claims provision, the high court found.

Notably, despite affirming the Delaware Superior Court's ruling, the state's high court rejected the trial court's adoption of First Solar's argument that the "fundamentally identical standard" should apply to determine whether two underlying claims are related. Under that standard, the Delaware trial court has previously ruled that related claims must share "common facts, circumstances, transactions, events and decisions."

Carrier-side attorneys lauded the Supreme Court's decision to do away with the fundamentally identical standard as a win in and of itself, since the standard contemplates a very high bar for insurers to prove interrelatedness.

"It's a big win because the court acknowledged the policy wording," said Mike Manire, a partner at Manire Galla Curley LLP who represents insurers. "Clearly what was going around as the 'standard' for a couple years for related claims in Delaware was not really a standard, it was, as the First Solar court put it, 'an observation.'"

Policyholder attorneys said they aren't overly worried about the First Solar ruling.

Justin Lavella, an insurance recovery partner at Blank Rome LLP, said the fundamentally identical standard wasn't being used by the Delaware Supreme Court to prove interrelatedness before the First Solar decision, so the high court's refusal to adopt it should be of limited precedential impact.

"The opinion is very clear that it is not upsetting, changing, modifying or altering in any way the existing Delaware law on interrelatedness," Lavella said.

Also in March, the Delaware Supreme Court issued another pro-insurer ruling in Jarden LLC v. Ace American Insurance Co. The court held that **Jarden can't get coverag**e for its $38 million interest bill and legal fees stemming from an appraisal action challenging its 2016 merger with Newell Rubbermaid Inc.

The Delaware high court adopted a trial court ruling that found that shareholders in the Jarden appraisal proceeding didn't seek relief "for" a wrongful act, which was required for coverage under the company's D&O policy. It marked the second time that the Delaware Supreme Court was asked to weigh in on coverage for an appraisal action under D&O insurance — in 2020, the high court ruled that **Solera Holdings Inc. couldn't pursue such coverage** under its policies with several excess insurers.

"The argument that an appraisal action is covered under a D&O policy is a really hard one to make now," Manire said of the combined impact of Jarden and Solera.

For policyholder attorneys, the Jarden decision isn't the be-all and end-all when it comes to appraisal suit coverage.

Fehling of Hunton Andrews Kurth noted that Delaware Superior Court Judge Abigail M. LeGrow didn't make an affirmative finding about whether the Jarden appraisal action was "for" a wrongful act in her ruling, which was adopted in full by the state's high court. The trial court judge went with ACE's definition of the word simply because it wasn't contested by Jarden during the case's oral argument, Fehling said.

"In a future case where the parties do not ascribe the same meaning to the word 'for,' I think there's a very good argument that there should be coverage for an appraisal action," said Mascia of Anderson Kill.

Insurers Keep Winning in Related Claims Fights

In addition to First Solar, insurers continued to enjoy success in related claims fights in other jurisdictions in 2022.

In October, the Seventh Circuit found that a family-owned construction business, R.W. Dunteman Co., didn't have coverage under its claims-made D&O policy for an amended complaint filed against it in July 2018, since it didn't provide Hanover Insurance Co. with timely notice of the original suit, which was filed in August 2017.

The appellate judge said the claims in the amended complaint related back to the original suit, rejecting the family's arguments that the two pleadings weren't sufficiently connected since only the latter suit named the company's individual directors and officers as defendants.

The appellate court's decision presents important lessons for policyholders about providing notice to insurers not just early and often, but for all types of claims, attorneys told Law360.

Scarbrough of Jenner & Block said policyholders should be sure to provide notice even for claims that may seem harmless at first, because they could blossom into something bigger down the road.

"You should report things even if you think they're minor," Scarbrough said. "Because as it turned out here, you had a lawsuit that was later amended to add new defendants and new theories, and then, at that point, the policyholder thought it was a big deal."

In a more contentious related-claims ruling, a North Carolina federal court said in October that an insurer didn't have to cover a doormaker for a securities lawsuit lodged against it in 2020, finding that that suit related back to an earlier antitrust claim filed against the company in 2018.

U.S. District Judge Max O. Cogburn Jr. found that the securities and antitrust suits **alleged interrelated wrongful acts on the part of Jeld-Wen Holding Inc.**, since the actions both stemmed from the company's initial alleged anti-competitive conduct.

Manire said the court made the right decision, since the securities claims against Jeld-Wen couldn't have happened without the earlier antitrust action.

"The decision is proper in that it focuses on the allegations in the two sets of claims rather than who brought them or when they were brought," Manire said.

He added that the ruling is helpful for insurers given the lack of consistency among courts across the country in deciding on related claims disputes.

"It's such a difficult issue, relatedness, that this sort of stands out for the clarity and confidence with which the court makes its finding," Manire said.

Policyholder attorneys disagreed, pointing to courts' lack of consistency as evidence of the ambiguity in related claims provisions.

Mascia of Anderson Kill noted that Travelers was a fifth-layer excess insurer in Jeld-Wen's coverage tower that ran between 2019 and 2020, and the four underlying carriers all agreed to cover the company.

"The fact that multiple insurance companies in the same tower with the same policy terms could take entirely divergent positions shows that these related claims provisions are inherently ambiguous," Mascia said. "And it is black letter insurance coverage law that when a provision is ambiguous, it should be read in favor of the policyholder."

McKenna of Cohen Ziffer said the Jeld-Wen ruling is another instance of a court taking an overly broad view of a related claims provision, and focusing on surface-level similarities instead of taking a holistic view of what each underlying claim is asserting.

"Disclosing to the market is totally different from anti-competitive behavior, but the court took a very broad view and I think that could be problematic for policyholders down the road," he said.

But attorneys on both sides were quick to note that in some cases, it could be beneficial for policyholders to have courts find that two claims are related.

"Sometimes carriers are trying to un-relate," Manire noted. "So context can make a difference."

--Additional reporting by Daniel Tay and Emily Enfinger. Editing by Bruce Goldman.