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Alerts

Part Seven: Reviewing Key U.S. Insurance Decisions, Trends, & Developments

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Insights for Insurers

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This is the seventh and final installment of our series of articles reviewing some of the key trends and developments currently impacting the U.S. insurance industry.

Some key decisions impacting the D&O and securities law landscape were rendered in 2021, with several cases worth following in 2022.

Last year's important case decisions included an important U.S. Supreme Court decision. On June 21, 2021, the U.S. Supreme Court issued its decision in *Goldman Sachs* holding that, at the class action certification stage, a court may consider whether a company's alleged misstatements were too generic to have impacted its stock price. The decision is expected to make it more difficult to certify a class action in suits alleging securities fraud based on generic company statements. The U.S. Supreme Court's decision in *Goldman Sachs* allows courts to consider the generic quality of a statement before certifying a class. The court's recognitions that generic statements "often will be important evidence of price impact" at the class certification stage may have favorable implications for companies defending against various claims, including ESG-related securities litigation, by placing companies in a better position to defend misrepresentation claims at the class certification phase.

Next, we stop at the Big Apple and note a decision by the New York Court of Appeals. New York's highest court reversed an intermediate appellate court ruling, holding that a $140 million settlement payment by J.P. Morgan Securities Inc.'s predecessor to the SEC was not an uninsurable penalty. The court concluded that the insurers failed to prove the disgorgement payment—"a component of the SEC settlement that serves compensatory purposes and was measured by the profits wrongfully obtained and losses caused by the alleged wrongdoing"—fell under the exclusion for "penalties imposed by law."

In 2022, the Seventh Circuit is set to review an Illinois district court ruling that an insurer must pay the $10 million policy limit toward the $100 million settlement that drug manufacturer, Astellas, reached with the U.S. Department of Justice over a Medicare fraud probe. The trial court rejected the insurer's position that the payment is uncovered restitution under Illinois law. According to the district court, the focus of the DOJ's investigation into Astellas violations under the False Claims Act is compensatory and should be considered a covered loss.

Delaware is the domicile to more U.S. companies than any other state. In 2021, Delaware courts expressed a strong desire to retain the large reach of Delaware corporate law and the primacy of Delaware courts in adjudicating disputes involving Delaware corporations. In *RSUI Indemnity Co. v. Murdock*, the Delaware Supreme Court ruled Delaware law governed the excess D&O policy even though most contacts were in California. The court ruled that the profit/fraud exclusion did not apply on the narrow ground that one of the two underlying matters was resolved by settlement and, therefore, did not satisfy the requirement of the exclusion that the underlying matter be resolved by adjudication. It also affirmed the trial court's application of the "larger loss" rule as opposed to the "relative exposure" rule to defence costs and costs of settling one of the two underlying matters.

An August 2021 decision by the Delaware Superior Court upheld a policyholder's preferred forum in Delaware even after its insurers had filed suit preemptively three days earlier in Texas. In that case, the court applied Delaware law and subsequently granted partial summary judgment in favor of five companies and their directors seeking D&O coverage for lawsuits challenging a stock buyback. In February 2021, a Delaware court rejected insurers' arguments that they could invoke an "uninsurability" defense to avoid the settlement payment. The insurers argued that the court should apply New York law, where the policies were written and where there was no provision for insuring "ill-gotten gains." The court applied Delaware law, where there is no policy against insuring for coverage for restitution or disgorgement.

Additionally, there are some cases before the Delaware Supreme Court that are worth watching. In one such case, the Delaware high court heard arguments in First Solar Inc.'s (First Solar) appeal of a state judge's June 2021 decision, which held that First Solar was not entitled to coverage with respect to a shareholder suit accusing it of concealing production defects. The trial court ruled that, under the "related claims" provisions in the company's D&O policy, there is no coverage because the underlying plaintiffs were opt-outs of an earlier class action that brought the same allegation against First Solar. First Solar argues that the two suits involve different aspects of its business: the first class action focused on the manufacturing of individual panels, while the second focused on the company's promise on its solar farm's ability to compete with fossil fuels.

In February 2022, the Delaware Supreme Court will hear arguments in Jarden LLC's (Jarden) appeal of a July 2021 decision by Delaware Superior Court holding that the company's insurers have no obligation to cover a $177 million appraisal award arising from a dissenting stockholders' action challenging Jarden's 2016 merger with Newell Rubbermaid Inc. First, the lower court ruled the underlying appraisal action was not covered because it did not seek a remedy for a wrongful act. Second, the court ruled that the appraisal demands did not constitute "claims" under the policies.

Although most special purpose acquisition company (SPAC) securities class action lawsuits are filed after the de-SPAC transaction has been completed, more suits are being filed before the merger becomes effective. In addition to merger objection lawsuits, more full-blown 10b-5 class actions are being filed. The trend of SPAC-related state court actions being asserted as state law causes of action rather than federal securities law violations will likely continue, with attorney's fees being a major consideration. Approximately twenty-eight SPAC-related securities suits were filed in 2021 compared to approximately four suits filed in 2020. SPAC-related suits are expected to increase, as over 590 SPACs have completed initial public offerings in 2021 compared to 248 in 2020. The SEC is signaling greater regulation of SPACs, due to the perception that investors may not be getting the same protections in comparison with traditional initial public offerings. This may take the form of increased disclosure requirements, greater focus on marketing practices, and liability for sponsors and others.

Many commentators posit that disputes between and among insurers and policies will emerge concerning which insurers must respond to claims among the insurers issuing policies to the target entity, the SPAC Company, and to the new company if the transaction is finalized.

The scope and application of "bump-up" exclusions has also been subject to litigation. The exclusion bars coverage for amounts paid to shareholders of an acquired company who allegedly received lower compensation for their shares. Policyholders have been arguing the exclusion only applies to company acquisitions and takeovers instead of mergers. Court decisions have gone both ways on the issue.

One interesting recent decision considered pandemic-related losses under a D&O policy. In *Federal Insurance Co. v. Healthcare Information and Management Systems Society, Inc*., the Northern District of Illinois ruled that Federal Insurance Co. (Federal) cannot avoid coverage for a health consulting company's underlying settlement over a pandemic

trade show cancellation. Federal denied coverage, asserting that the policy's contract exclusion barred coverage and the exhibitors sought uninsurable restitution damages. However, the court rejected the dismissal bid, saying the underlying plaintiffs did not just seek the return of fees and alleged other damages on top of the breach of contract claims. The court also rejected the insurer's argument that the professional services exclusion bars coverage because reimbursement was sought for money paid to sublease the exhibition floor space, which does not involve the policyholders' professional services.

In another ruling, the Arizona Supreme Court, in responding to a question certified by the Ninth Circuit, ruled that in evaluating whether a D&O insurer was unreasonable in withholding consent to the policyholder's settlement should be determined from the perspective of the insurer, not the policyholder—at least where the policy does not contain a duty to defend.

On February 25, 2022, a split panel of the Court of Appeals for the Seventh Circuit issued a decision on D&O coverage for the Nassar USAG sexual assault claims that was mostly favorable to the policyholder on defense issues. The court held that claims were not made prior to the policy's inception, the wrongful conduct exclusion only barred coverage for the 10 counts on which Nassar plead guilty, the personal injury exclusion did not apply, and costs associated with congressional and USOPC investigations were covered as these constituted "formal investigations." *USA Gymnastics v. Liberty Insurance Underwriters, Inc.*, No. 20-1245, 2022 U.S. App. LEXIS 5185 (7th Cir. Feb. 25, 2022). See our more detailed summary of this decision at https://www.jdsupra.com/legalnews/seventh-circuit-rules-largely-in-favor-1072182/.

Cyber-attacks, data loss, regulatory risks, health and safety, COVID-19, EGS, climate, and employment claims likely will remain among the leading D&O emerging risk areas.

- Part One: Environmental, Social, and Governance (ESG)
- Part Two: Social Inflation
- Part Three: COVID-19 Business Interruption Coverage Litigation
- Part Four: Civil Unrest, Riots, And Strikes
- Part Five: Cyber Security and Privacy Insurance Claims
- Part Six: Lead Paint, Opioids, Sexual Abuse, and Long-Tail Claims

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[1] *Goldman Sachs Grp., Inc. v. Ark. Teacher Ret. Sys.,* 141 S. Ct. 1951, 1960 (2021).

Goldman Sachs Group Inc. v. Arkansas Teacher Retirement System, 141 S. Ct. 1951, 1963 (2021).

Id. at 1961.

J.P. Morgan Securities Inc. v. Vigilant Insurance Co., 2021 NY Slip Op 06528 at *3.

Id. at *2.

Astellas US Holding, Inc. v. Starr Indem. & Liab. Co., No. 17 CV 8220, 2018 U.S. Dist. LEXIS 89725, at *20 (N.D. Ill. May 30, 2018).

RSUI Indemnity Co. v. Murdock, 248 A.3d 887, 898 (Del. 2021).

[8] *Id*. at 907.

[9] *Id.* at 909.

CVR Ref. LP v. XL Specialty Ins. Co., No. N21C-01-260 EMD CCLD, 2021 Del. Super. LEXIS 542, at *17 (Super Ct. Aug. 11, 2021).

See CVR Ref., LP v. XL Specialty Ins. Co., No. N21C-01-260 EMD CCLD, 2021 Del. Super. LEXIS 667, at *29 (Super. Ct. Nov. 23, 2021).

Sycamore Partners Mgmt., L.P. v. Endurance Am. Ins. Co., No. N18C-09-211 AML CCLD, 2021 Del. Super. LEXIS 182, at *5 (Super. Ct. Feb. 26, 2021).

Id. at *3.

Id. at *4.

First Solar, Inc. v. Nat'l Union Fire Ins. Co., No. N20C-10-156 MMJ CCLD, 2021 Del. Super. LEXIS 489, at *3 (Super. Ct. June 23, 2021).

Id. at *15-16.

Jarden, LLC v. ACE Am. Ins. Co., No. N20C-03-112 AML CCLD, 2021 Del. Super. LEXIS 534, at *20 (Super. Ct. July 30, 2021).

Id. at *17-18.

Id. at *19-20.

Compare *Towers Watson & Co. v. Nat'l Union Fire Ins. Co. of Pittsburgh, PA, N*o. 1:20-cv-810 (AJT/JFA), 2021 U.S. Dist. LEXIS 192480, at *33 (E.D. Va. Oct. 5, 2021) and *Northrop Grumman Innovation Sys. v. Zurich Am. Ins. Co*., No. N18C-09-210, 2021 Del. Super. LEXIS 92, at *43 (Super. Ct. Feb. 2, 2021) with *Joy Glob. Inc. v. Columbia Cas. Co*., No. 2:18-CV-02034, 2021 U.S. Dist. LEXIS 155494, at *12-13 (E.D. Wis. Aug. 18, 2021).

Fed. Ins. Co. v. Healthcare Info. & Mgmt. Sys. Soc'y, No. 20 C 6797, 2021 U.S. Dist. LEXIS 201161, at *13. (N.D. Ill. Oct. 19, 2021).

Id. at *7.

Id. at *11.

Id. at *10.

Apollo Educ. Grp., Inc. v. Nat'l Union Fire Ins. Co., 480 P.3d 1225, 1232 (Ariz. 2021).