

RECENT DECISION ADDS ADDITIONAL RISK FOR PA-BASED BUSINESSES; PA'S CONSUMER PROTECTION LAW WIDENS

PUBLICATION, *RCCB INSURANCE COVERAGE ALERT* - MARC SKAPOF, MAY 2021

In a recent decision, the Delaware Supreme Court ruled that insuring against fraud does not per se violate Delaware public policy and held that the insured's D&O policy covered claims alleging securities fraud. *RSUI Indemnity Company v. Murdock*, No. 154, 2020, 2021 WL 803867 (Del. Mar. 3, 2021). In so doing, the Court diverged from other states with general public policy exceptions to fraud and reinforced the proposition that contracts should be enforced as written. In other words, if an insurer intends its policy to exclude certain types of claims, the policy should expressly say so as opposed to after-the-fact appeals to "public policy" as grounds for denying coverage.

BRIEF CASE SYNOPSIS

The Murdock case involved a directors and officers ("D&O") excess policy insuring Dole Food Company, Inc. ("Dole"), which was triggered, along with another eight layers of D&O insurance, when CEO and Director David Murdock took Dole private through a merger transaction. That merger resulted in several lawsuits asserting claims for securities fraud against him and COO and General Counsel C. Michael Carter. The allegations contained claims 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 of Chancery found that both Murdock and Dole had engaged in fraud and found them liable for \$148,190,590.18 in damages, which settled for the full amount with the stockholders, while a new federal securities class action was initiated, citing fraud and breach of loyalty, and settled for \$74,000,000. After all the D&O policies had paid their limits, RSUI Indemnity Company ("RSUI") pushed back, claiming that it would not insure Dole for the fraud allegations because doing so violated Delaware public policy. RSUI also cited a fraud exclusion in the policy. The Court found that coverage for intentional wrongdoing or fraud did not violate public policy under Delaware law and that the D&O policy's fraud exclusion did not apply to the federal securities fraud class action. The Supreme Court noted that it rejected the insurer's "invitation to void its contractual obligations."

In holding that Delaware did not have a public policy against the insurability of losses occasioned by fraud strong enough to vitiate the parties' freedom of contract, the Supreme Court noted that, to the contrary, "when the Delaware General Assembly enacted Section 145 authorizing corporations to afford their directors and officers broad indemnification and advancement rights and to purchase D&O insurance 'against any liability' asserted against their directors and officers 'whether or not the corporation would have the power to indemnify such person against such liability under this section,' it expressed the opposite of the policy RSUI [was] ask[ing] [the Court] to adopt."

FUTURE IMPLICATIONS

This has several implications in how Delaware courts will rule on an insurer's resistance in providing coverage where there otherwise is coverage—that is, once the parties enter into an insurance contract for, among other things, protecting the insured against fraud allegations and coverage is triggered with no exclusions to preclude the same, an insurer must simply pay. It is important that business owners and insurers alike review application policies to better inform coverage positions and decisions moving forward. Based on the Supreme Court's decision, it appears as though Delaware courts are ready to protect the parties' contracting interests and are willing to enforce those contracts resolving ambiguities against the insurer. At the same time, insurance companies will also have to take stock of the many policies they have similar to the one in *Murdock*, as arguments against coverage for fraud very well may be turned down as they were in that case.

PROFESSIONALS

Marc Skapof

CAPABILITIES

Litigation