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Survey of Key Management Liability and Professional Liability Insurance Coverage Decisions

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Agenda

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- **What Constitutes a Claim?**
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Disgorgement Update

SXSW, L.L.C. v. Fed. Ins. Co., 2024 U.S. App. LEXIS 6771 (5th Cir. Mar. 21, 2024)

- The underlying plaintiffs sought actual damages and/or restitution, interest, and attorneys' fees and costs.
- Fifth Circuit rejected the D&O insurer's argument that restitution is uninsurable under Texas law.
- Fifth Circuit found that "Texas state courts have never held that restitution is *per se* uninsurable. Restitution *might* be uninsurable when the receipt of funds was unlawful…but there is no suggestion that SXSW acquired the plaintiffs' money unlawfully."

Disgorgement Update

Huntington Nat'l Bank v. AIG Specialty Ins. Co., 2024 U.S. App. LEXIS 2369 (6th Cir. 2024)

- 6th Circuit reversed a district court's grant of summary judgment to the insurer regarding the insurability of a settlement for a fraudulent transfer claim under a banker's professional liability policy.
- Ohio law demonstrates that for insurance coverage to be uninsurable under the law, the damages claimed must be based on an intent to injure, malice, ill will, or other similar culpability
- Liability under the fraudulent conveyance statutes is not tantamount to the type of culpable conduct that Ohio courts have held precludes insurance recovery. The fraudulent conveyance statutes create a strict liability scheme for transferees.
- The intent of the transferee—Huntington, here—is irrelevant to liability.
- "Fraudulent transfer laws are intended to promote payment to creditors; that is, the statutes are remedial, rather than punitive."
- Ohio courts thus would not hold that the liability of a transferee for a fraudulent transfer is uninsurable under the law.

Disgorgement Update

Jasper v. Chubb Nat'l Ins. Co., 2024 Cal. App. Unpub. LEXIS 7136 (Nov. 12, 2024)

- Jasper was formerly the Named Insured's CFO. The parties had an indemnification agreement that required the Named Insured to cover and advance defense costs for any lawsuit brought against him in his capacity as a corporate officer. Jasper was required by the agreement to repay Named Insured if it was determined that he was not entitled to coverage.
- In 2007, the SEC filed a civil enforcement action against Jasper regarding stock option backdating and inaccurate regulatory filings. A jury found Jasper liable for fraudulent conduct, securities fraud and making knowingly false statements to the agency. The 9th Circuit sustained the jury's verdict.
- The Named Insured's shareholders then filed derivative lawsuits against the company and Jasper that were settled and covered by Arch and Federal. A securities class action was also filed. The securities class action settled for $173 million.
- After Jasper exhausted his appeal from the SEC fraud judgment, he sued the Named Insured alleging it owed him millions of dollars for stock options granted to him before he resigned. The Named Insured counterclaimed to seek a declaration that indemnification was prohibited as a matter of law because Jasper had been found liable for fraud. The Named Insured also counterclaimed for breach of the indemnification agreement because Jasper had not repaid the amounts it advanced for legal defense costs and the amounts it spent to fund the civil settlements. Jasper tendered the Named Insured's counterclaims to its D&O insurer, which denied coverage.

Disgorgement Update

Jasper v. Chubb Nat'l Ins. Co., No. H050804, 2024 Cal. App. Unpub. LEXIS 7136 (Nov. 12, 2024)

- Jasper settled with the Named Insured by assigning his policy rights to it and dismissing his causes of action. The Named Insured and Jasper agreed that a referee would decide the Named Insured's counterclaims. The referee issued a Statement of Decision finding the conduct alleged in the backdating litigation not indemnifiable under Delaware law, and finding Jasper liable for defense costs in the SEC action (including all appeals) and the class action, as well as for repayment of the class action settlement and pre-judgment interest.
- The Insureds commenced coverage litigation alleging that the insurer breached the policy in bad faith by disclaiming coverage of Jasper's defense costs in the underlying backdating litigation, refusing to advance Jasper's defense costs to litigate the Named Insured's counterclaims and refusing the Named Insured's offer to settle within the policy's limits of liability. Among other things, plaintiffs seek to recover the legal defense costs the Named Insured advanced on Jasper's behalf in the backdating litigation, as well as the insureds' costs to obtain the policy benefits and damages arising from the insurer's failure to provide a defense and indemnification under the policy.
- The parties disputed whether the policy covers Jasper's obligation to repay the Named Insured the amounts it advanced for his legal defense. Plaintiffs asserted the Named Insured's advances met the policy's definition of "Defense Costs" and the policy covered Jasper's reimbursement obligation as a "Non-Indemnifiable Loss" because the Named Insured refused to indemnify Jasper.
- The insurers argued that Jasper's obligation to repay the Named Insured is equivalent to "restitutionary damages," which are excluded from the policy's definition of "Loss," on the theory that Jasper wrongfully obtained and was unjustly enriched by the Named Insured's payments.

Disgorgement Update

Jasper v. Chubb Nat'l Ins. Co., No. H050804, 2024 Cal. App. Unpub. LEXIS 7136 (Nov. 12, 2024)

- The insureds argued that restitutionary damages should be confined to "traditional claims in equity to retrieve monies wrongfully obtained" and therefore does not apply to Jasper's claim because he did not "wrongfully obtain" anything from the Named Insured.
- The insurers responded that the term does not distinguish between legal and equitable relief, and its plain meaning encompasses anything—including Jasper's contractual obligation to pay the Named Insured—"that is inherently restitutionary in nature.“
- The court rejected the insurers’ broad interpretation of "restitutionary damages" because it is inconsistent both with the term's industry-specific usage, and with the language and purpose of the policy. Policy language should be interpreted as an ordinary person would read it and not as it might be analyzed by an attorney or an insurance expert. This interpretation also comports with the purpose and intent of directors and officers insurance policies that cover an insured's defense costs as part of "damages" and "loss.”
- The court also rejected the insurers’ argument that Section 533 applied.

What Constitutes a Claim?

Fed. Home Loan Mortg. Corp. v. Twin City Fire Ins. Co., 2024 U.S. Dist. LEXIS 203703, (D.D.C. Nov. 8, 2024)

- Primary D&O Policy defined a Claim to include:

a civil, criminal, administrative, or regulatory investigation of an Insured Person:

(i) once such Insured Person is identified in writing by such investigating authority as a person against whom a proceeding described…[elsewhere] may be commenced; or

(ii) in the case of an investigation by the SEC or a similar state or foreign government authority, after service of a subpoena upon such Insured Person.

What Constitutes a Claim?

- Policy did provide entity coverage for regulatory investigations “if and only if during the time that such proceeding is also commenced and simultaneously maintained against an Insured Person.”
- Court held that the subpoenas alone, were insufficient to trigger coverage.
- Discovery will determine whether the SEC was investigating Freddie employees for their wrongful acts as necessary to establish coverage for Freddie's indemnification of the employees' costs.
- Treating a subpoena to an insured person as a Claim, in and of itself, would negate the distinction in the policy between investigations solely of the insured entity and investigations of the company and insured individuals.

What Constitutes a Claim?

Match Grp., LLC v. Beazley Underwriting Ltd., 2024 U.S. App. LEXIS 20317 (2d Cir. Aug. 13, 2024)

- Pre-suit letter sent to Match Group's subsidiary, Tinder, alleged that Tinder stole claimant's idea for a "Super Like" feature.
- The letter alleged Tinder stole claimant's idea without compensating him and threatened suit against Tinder if it did not contact him to resolve his claims.
- The policy defined a "claim" as a "demand . . . for money or services, including the service of a suit or institution of arbitration proceedings" or "a threat . . . of a suit seeking injunctive relief."
- The policyholder argued that while the letter was explicitly a "threat of a suit," it did not seek injunctive relief. Additionally, the letter was not a demand for money, service of a suit, or institution of arbitration, but rather simply an invitation to negotiate toward an amicable resolution of the dispute. The policyholder noted that the claimant's grievance might be resolved with the payment of money, his grievance might also be resolved another way – such as by providing him with recognition for his idea, or employment with Tinder, or by providing him with some other benefit (other than a financial one).
- The 2nd Circuit held that the pre-suit letter was a "claim" under the policy even though the claimant did not specifically demand a sum certain. Instead, by stating that he had legal claims against Tinder, that he believed he was entitled to compensation and that he would sue if Tinder did not contact him to resolve his claims, claimant was clearly seeking monetary compensation.

What Constitutes a Claim?

Pine Mgmt. v. Colony Ins. Co., 2024 U.S. App. LEXIS 7110 (2d Cir. Mar. 26, 2024)

- Pre-suit demand letter outlined potential claims by claimant against limited liability companies managed by Pine Management (“Pine”).
- The letter alleged allegations of wrongdoing, including claims of fiduciary duty breaches, nondisclosure of material facts, and violations of operating agreements. It also explicitly demanded document production and alleged unauthorized payments by Pine.
- E&O Policy defined a "Claim," as a "written demand received by [Pine] for monetary, nonmonetary, or injunctive relief" and arising from a "Wrongful Act."
- The 2nd Circuit found that the letter makes it clear that it is demanding certain forms of relief. For example, it contains an explicit demand letter and specified documents, including certain documents regarding Pine's capital expenditures. And it alleges that Pine made unauthorized payments to itself, indicating that the letter was demanding repayment of such funds.
- The final paragraph of the letter "suggest[ed] that a meeting be scheduled to resolve" the concerns outlined in the letter and stated "that a mutually satisfactory resolution of the issues is preferable to a costly and unnecessary litigation.“
- The policyholder argued that this language indicates that claimant was not making a Claim but simply wanted to discuss its concerns.
- The 2nd Circuit disagreed. “On the contrary, this final line—explicitly referencing future litigation—underscored the legal consequences that would likely result from noncompliance with the Schneider Group's demands and reinforced the earlier assertion that "there are many serious issues arising from Pine's management . . . “

What Constitutes a Claim?

Schulman v. Axis Surplus Ins. Co., 90 F.4th 236 (4th Cir. 2024)

- Lawyer's liability policy provided that the insurers will "pay on behalf of the Insureds all Loss . . . resulting from Claims for Wrongful Acts committed before the expiration of the Policy Period that are first made against any Insured during the Policy Period."
- The Policy defines a Claim as:

1. any of the following:

    a.) a written demand against any Insured for monetary or non-monetary relief;

    b.) a civil proceeding against any Insured commenced by the service of a complaint or similar pleading;

    c.) a written demand for arbitration or mediation;

    d.) a formal civil administrative or civil regulatory proceeding against any Insured, including, but not limited to, a Disciplinary Proceeding, commenced by the filing of a notice or charges or similar document or by the entry of a formal order of investigation or similar document;

2. a written request received by an Insured to toll or waive a statute of limitations relating to a matter described in subparagraph 1. above.

What Constitutes a Claim?

- A grand jury in the District of Maryland returned an indictment charging one of the law firm’s partners with mail fraud, wire fraud, bank fraud, money laundering, conspiracy to commit mail, wire, and bank fraud, and conspiracy to commit money laundering (the “Indictment").
- The Indictment alleged that the partner had conspired with various Somali entities and individuals to recover millions of dollars in frozen Somali assets. The partner allegedly executed the fraud by representing to financial institutions, through various forged documents, that he was authorized to take control of the Somali assets on behalf of the law firm’s clients. The Indictment further alleged that the partner and the law firm retained a portion of the fraudulently obtained assets. The Indictment warned that the government would "seek forfeiture as part of any sentence . . . in the event of [the partner’s] conviction of any of the offenses" contained in the Indictment (the "forfeiture allegation").

What Constitutes a Claim?

- The insurers disclaimed coverage for the Indictment on the basis that it did not constitute a "Claim as defined by the Policy, which is limited in pertinent part to civil rather than criminal proceedings."
- The Indictment indicated that the government would "seek forfeiture as part of any sentence . . . .". The parties disputed whether that forfeiture allegation qualified as a "written *demand* against any Insured for monetary or non-monetary relief" under the Policy's definition of a Claim, such that the Policy covers the partner's legal fees related to the forfeiture allegation.
- The forfeiture allegation in the Indictment states that "notice is hereby given to the defendant that the United States *will seek* forfeiture as part of any sentence . . . *in the event of the defendant's conviction of any of the offenses*."
- The forfeiture allegation did not require the partner to turn over any money or property to the government. It merely informed him that, *if he was convicted* in the future, the government would seek forfeiture of various money and property. At most, therefore, the forfeiture allegation is a notice that there will be a demand in the future. The ordinary meaning of "demand" does not encompass a notice that, on the condition a triggering event occurs, something will be demanded in the future.

What Constitutes a Claim?

Las Vegas Sands, Inc. v. Nat'l Union Fire Ins. Co. of Pittsburgh, PA., 2024 U.S. Dist. LEXIS 171950 (D. Nev. Sep. 23, 2024)

- In the underlying action, the underlying plaintiffs alleged that they entered into an agreement with Las Vegas Sands, Inc. (“LVS”) to help them obtain a gaming license in Macau in exchange for $5 million and a success fee of 2% of net profits from the resort.
- The policy defines a claim as "a civil, criminal, administrative, regulatory or arbitration proceeding for monetary or non-monetary relief.“
- The policyholder argued that a claim means each individual cause of action and not the entirety of the underlying complaint. They argue that because the underlying plaintiff also alleged non-contractual causes of action, the insurer had a duty to defend the entire Suen action.
- The court found that the term claim as defined in the policy is unambiguous. A reasonable person would interpret a claim to mean the entirety of the Suen action—a civil proceeding for monetary relief.
- The policyholder failed to provide the court with any support that the term claim means each individual cause of action, and that defendant had a duty to defend the entirety of the underlying action.
- As such, the court granted summary judgment in the insurer’s favor because coverage for the underlying action was properly denied under exclusion (h). This exclusion states that defendant is not liable for losses in connection with "a claim ... alleging, arising out of, based upon or attributable to any actual or alleged contractual liability of the company under any express contract or agreement."

Questions of Interrelatedness

Ferrellgas Partners L.P. v. Zurich Am. Ins. Co., 319 A.3d 849 (Del. 2024)

- Supreme Court of Delaware affirmed trial court decision sustaining insurer's declination of coverage based on a "run-off exclusion," which precluded coverage for "any Claim made against any Insured based upon, arising out of, or attributable to any Wrongful Acts including any Interrelated Wrongful Acts, taking place in whole or in part subsequent to 06/24/2015 [the run-off date]."
- The insurer denied coverage on the basis that some, but not all, of the wrongful acts giving rise to the claim occurred after the run-off date. The insured argued that the lawsuit alleged fraudulent inducement years prior to breach of the contract, which was separate from the wrongful acts occurring during the run-off period, thereby triggering coverage.
- The Supreme Court held that the Run-Off Exclusion's meaning is clear. If a claim arises from Wrongful Acts that take place either partially or completely after June 24, 2015, then the claim is excluded from coverage. The Run-Off Exclusion incorporates any Interrelated Wrongful Acts.

Questions of Interrelatedness

Alexion Pharms., Inc. v. Endurance Assur. Corp., 2024 Del. Super. LEXIS 103 (Del. Super. 2024)

- A pharmaceutical company insured was issued an SEC subpoena.
- The SEC Subpoena was broad in scope, but primarily sought documents related to the insured's foreign and domestic grantmaking activities, with an emphasis on the insured's compliance with the Foreign Corrupt Practices Act (the "FCPA") The SEC Subpoena also requested any documents related to recalls of the insured's drug, Soliris.
- An earlier SEC document—which ordered the investigation into Alexion—outlined the SEC's early theories. That preliminary document raised the possibility of the insured including inaccurate information on its annual and quarterly reports, failing to keep adequate books and records, and "failing to implement a system of internal accounting controls." Like the subpoena it spurred, the most specific allegations in the order of investigation related to the insured's "payment of bribes to foreign officials . . . and the level of recall required for the insured's drug, Soliris, the impacts on the insured's revenue streams, and the risk to investors.
- In July 2020, Alexion settled with the SEC.
- In its summary of findings, the SEC said, "[t]hese proceedings arise out of Alexion's violations of the internal accounting controls and recordkeeping provisions of the Foreign Corrupt Practices Act of 1977."
- The SEC found that from 2011 to 2015, the named insured's subsidiaries in Turkey and Russia made improper payments to government officials to obtain beneficial treatment of Soliris. The SEC further found that those subsidiaries kept false records in connection with those payments and that the insured's internal accounting controls weren't sufficient to catch its subsidiaries' wrongdoing. Similarly, the SEC found that the insured's deficient internal accounting controls led to Alexion's subsidiaries in Brazil and Colombia failing "to maintain accurate books and records regarding third-party payments." The insured agreed to remedy its noncompliance and pay over $21 million in penalties.

Questions of Interrelatedness

- A securities class action was later filed against the insured and its D&Os.
- The Securities Action Amended Complaint's allegations had three general themes: (1) the named insured and its officers and directors misled investors about the source of the named insured's financial success; (2) the named insured's sales practices violated applicable industry ethical standards and federal law; and (3) the "truth" about the named insured's illegal and unethical sales practices was slowly revealed through a series of "partial disclosures."
- The plaintiffs asserted causes of action under Sections 10(b) and 20(a) of the Securities and Exchange Act of 1934 (the "Exchange Act"), and SEC Rule 10b-5.
- In sum, the Securities Action plaintiffs complained that they overpaid for stock that was propped up by illegal activity.
- The Securities Action plaintiffs used the named insured's activities in Brazil as one example of its undisclosed wrongdoing.
- Applying the "meaningfully linked" standard, the court determined that the SEC Subpoena and the Securities Action were not meaningfully linked. In so finding, the court explained that the two matters were "only loosely connected by [the company's] activities in Brazil." Of the fraudulent scheme alleged in the Securities Action Amended Complaint, only nine of more than sixty paragraphs mention foreign contributions.
- The court concluded that "at bottom, the factual connection between the SEC Subpoena and the Securities Action is insufficient to make them related. They have different parties; focus on overlapping, but not identical time periods; raise entirely different theories of liability; rely on different evidence; and seek different relief."

Contract Exclusion Update

- MRFranchise, Inc. v. Stratford Ins. Co., 2024 U.S. Dist. LEXIS 213500 (D.N.H. Nov. 1, 2024) (California law).
- Broadly worded contract exclusion did not apply to preclude coverage for statutory claim alleging a violation of the California Franchise Investment Law (CFIL) because the insured's liability under the CFIL exists independently of the franchise agreement (the contract).
- The CFIL violation bears no causal connection to a breach of contract. The franchisees' CFIL claim alleged that Plaintiffs failed to disclose certain information in the MRF Disclosure regarding Rafipoor's civil litigation history in violation of statutory law. The CFIL requires these disclosures in connection with the sale or offer of a franchise, regardless of whether a contract is ultimately executed. Indeed, the conduct upon which the Franchisees sought to hold Plaintiffs liable under the CFIL was entirely different conduct for which they sought to hold Plaintiffs liable for breach of contract—and the Franchisees' breach-of-contract claims were ultimately unsuccessful.
- S. Afr. Enter. Dev. Fund v. Ironshore Specialty Ins. Co., 2024 U.S. Dist. LEXIS 164071 (D. Del. Sep. 11, 2024)
- Applying contractual liability exclusion based on “meaningful linkage” test
- Paraco Gas Corp. v. Ironshore Indem., Inc., 2024 U.S. App. LEXIS 14628 (2d Cir. June 17, 2024)
- Applying broadly worded contractual liability exclusion to dispute arising under shareholders’ agreement
- Domus BWW Funding, LLC v. Arch Ins. Co., 2024 U.S. Dist. LEXIS 162245 (E.D. Pa. Sep. 10, 2024)
- Contract exclusion did not bar defense cost coverage for a lawsuit against a private equity firm alleging, among other causes of action, enforcement of guaranty and breach of contract, because the exclusion’s carveout for loss resulting from the insured’s provision of “Asset Management Services” applied.

Contract Exclusion Update

- AIG Specialty Ins. Co. v. Agee, 2024 U.S. Dist. LEXIS 13995 (E.D. La. Jan. 26, 2024)
- Breach of contract exclusion in policy's EPL and D&O coverage parts precluded coverage for amounts owed under employment agreement
- SXSW, L.L.C. v. Fed. Ins. Co., 2024 U.S. App. LEXIS 6771 (5th Cir. Mar. 21, 2024)
- Contract exclusion not applicable because the class-action plaintiffs' claims were not limited to SXSW's purchase agreement. Court also found that the professional services exclusion was inapplicable because the festival host's refunding of tickets is not a professional service.

Scope of the Property Damage/Bodily Injury Exclusion

Gardens of Forest Lakes Condo. Ass'n v. Aspen Specialty Ins. Co., 2024 U.S. Dist. LEXIS 219220 (M.D. Fla. Dec. 4, 2024)

- This policy does not provide coverage for any claims arising directly or indirectly from any: (1) bodily injury, sickness, mental anguish, humiliation, emotional distress, disease or death of any person, false arrest or imprisonment, invasion of privacy, assault, or battery, except that this exclusion shall not apply to allegations of emotional distress or mental anguish arising out of a claim for wrongful employment practices; or, (2) damage to or destruction of any tangible property, including the loss of its use, whether or not it is damaged or destroyed.
- A fire destroyed a building of the Gardens of Forest Lakes Condominiums, leaving the units inside it uninhabitable.. The owners of those units subsequently filed lawsuits against the condominium association and the members of its board of directors under Florida Statutes § 718.111, alleging that they failed in their duty to repair and reconstruct the building after the fire.
- D&O condo insurer denied coverage. In the ensuing coverage litigation, the parties disputed the underlying lawsuits "arise directly or indirectly from...damage to or destruction of any tangible property, including the loss of its use.
- Disclaimer of coverage sustained. Court found that he underlying lawsuits stem from and are dependent on the existence of the property damage caused by the fire; they would not exist but for the fire.
- The underlying lawsuits plainly "grow[] out of, flow[] from...or hav[e] a connection with" property damage. Under Florida law, they fall squarely within the exclusion of claims arising directly or indirectly from property damage.

Qui Tam Issues

Henrich v. XL Specialty Ins. Co. (In re Insys Therapeutics, Inc., 2024 Bankr. LEXIS 1261 (Bankr. D. Del. May 29, 2024)

- Two separate actions filed against Insys. The first is a *qui tam* suit ("*Qui Tam* Action") filed in 2012 under the Federal Claims Act (FCA), and the second is a shareholder derivative suit filed against the directors and officers of Insys in the Delaware Court of Chancery in 2016 ("D&O Action").

- Both actions challenge the same allegedly fraudulent schemes employed by the directors and officers of Insys to market addictive opioid products.

- The parties specifically dispute whether the Policy's Pending and Prior Litigation ("PPL") exclusion precludes coverage for the D&O Action.

- The PPL exclusion provides:

> In consideration of the premium charged, no coverage will be available under this Policy for claims based upon, arising out of, directly or indirectly resulting from, in consequence of, or in any way involving any fact, circumstance, situation, transaction, event or wrongful act, underlying or alleged in any prior and/or pending litigation or administrative or regulatory proceeding or arbitration which was brought prior to May 02, 2013.

Qui Tam Issues

- Insurer argued that the *Qui Tam* Action—which was filed before May 2, 2013—prevents coverage because it arises out of the same facts as the D&O Action.
- The Trustee argued that (1) the unique procedural characteristics of *qui tam* suits call for different treatment under the PPL exclusion, and (2) the word "brought" is ambiguous as used in the PPL exclusion.
- Court held that under the PPL exclusion, litigation is "brought" at the point in time when the complaint is filed with the court.
- Like many *qui tam* suits, the *Qui Tam* Action was filed under seal and was dismissed before it was served on the directors and officers of Insys. At the time that Insys purchased the D&O Policy, it was unaware that the *Qui Tam* Action had been filed.
- Court found that “it is reasonable to believe that a similar person of ordinary intelligence would consider the *Qui Tam* Action to be ‘brought’ when it was properly filed.”
- The parties do not dispute that the *Qui Tam* Action was filed before the PPL exclusion's May 2, 2013, cutoff date, that the two cases share a significant factual overlap, that the D&O Action qualifies as a "claim," or that the *Qui Tam* Action qualifies as "prior litigation." Nothing in the XL Policy indicates that the defendant's notice is required to trigger the exclusion, and so it must be enforced according to its terms.

Scope of Antitrust Exclusion

Beazley Ins. Co. v. Foster Poultry Farms, 2024 U.S. Dist. LEXIS 151122 (E.D. Cal. Aug. 22, 2024)

- In 2016, several actions were filed against Foster Farms and other major chicken producers in the United States District Court for the Northern District of Illinois.
- The actions were consolidated into *In re Broiler Chicken Antitrust Litigation*, ("*In re Broiler Chicken*").
- The underlying plaintiffs comprise four distinct groups: (1) a class of direct purchasers of broiler chickens; (2) a class of indirect purchasers who sold broiler chickens; (3) a class of individuals who purchased broiler chickens; and (4) over eight dozen direct-action plaintiffs who filed their own complaints.
- The plaintiffs all allege that Foster Farms and other chicken producers conspired to "fix and raise prices of broiler chickens"; that the price-fixing conspiracy has had the "principal purpose and effect" of "reduc[ing] the supply of Broilers, eliminat[ing] competition, and increas[ing] the price of Broilers purchased by consumers at retail,"; and that the chicken producers made "numerous misleading public statements" to conceal their conspiracy.

Scope of Antitrust Exclusion

The primary D&O policy contained the following antitrust exclusion:

The Insurer shall not be liable to make any payment for Loss in connection with any Claim made against an Insured:
...
for any actual or alleged violation of any law, whether statutory, regulatory or common law, respecting any of the following activities: antitrust, business competition, unfair trade practices or tortious interference in another's business or contractual relationships[.]

- Excess D&O insurer denied coverage for the *In re Broiler Chicken* based on the primary policy's antitrust exclusion.

Scope of Antitrust Exclusion

- In the ensuing coverage litigation, the insurer argued that it owed Foster Farms no duty to pay defense costs because *In re Broiler Chicken* falls within the antitrust exclusion for "any actual or alleged violation of any law, whether statutory, regulatory or common law, respecting any of the following activities: antitrust, business competition, unfair trade practices or tortious interference in another's business or contractual relationships.“

- Foster Farms argued that the antitrust exclusion does not bar coverage because many of the cases consolidated in *In re Broiler Chicken* assert causes of action for unjust enrichment and violations of state consumer protection laws and include allegations of fraud and false advertising. Foster Farms argues that these claims are not "respecting" "antitrust, business competition, unfair trade practices, or tortious interference.“

- Foster Farms did not dispute that the antitrust exclusion applies to the Sherman Act claim and to claims under state antitrust statutes.

Scope of Antitrust Exclusion

- Court held that the unjust enrichment claims asserted by the indirect purchaser plaintiffs are derivative of, and entirely dependent upon, the antitrust claims and underlying price-fixing allegations.

- The unjust enrichment allegations are as follows: "As a result of their unlawful conduct described above, Defendants have and will continued [*sic*] to be unjustly enriched by the receipt of unlawfully inflated prices and unlawful profits of Broilers. Under common law principles of unjust enrichment, Defendants should not be permitted to retain the benefits conferred on them by overpayments by Plaintiffs and members of the Classes[.]").

- Apart from the allegations that Foster Farms conspired with other chicken producers to fix the prices of broiler chickens, causing the plaintiffs to pay inflated prices, there is no basis for an unjust enrichment claim. The plaintiffs cannot prevail on their unjust enrichment claims if they do not prevail on their antitrust claims.

Scope of Antitrust Exclusion

- Additionally, the court found that the claims for violations of state consumer protection laws are, in this respect, no different from the unjust enrichment claims. The indirect purchaser plaintiffs assert violations of a variety of state consumer protection statutes. A representative sample of those allegations is that: "Defendants entered into a contract, combination, or conspiracy between two or more persons in restraint of, or to monopolize, trade or commerce in the Broiler market," and "established, maintained, or used a monopoly, or attempted to establish a monopoly, of trade or commerce in the Relevant Markets[.]"

- These are the same as the allegations underlying the claims for violations of the Sherman Act and state antitrust statutes. Accordingly, the court held that the consumer protection claims fall within the antitrust exclusion.

- Lastly, Foster Farms argued that the *In re Broiler Chicken* complaints "assert allegations relating to alleged misrepresentations, fraudulent conduct, and false advertising or marketing." Foster Farms contends that these allegations are distinct from the antitrust claims and not subject to the antitrust exclusion.

Scope of Antitrust Exclusion

- The court disagreed. The court found that the fraud allegations are exclusively allegations that the defendants omitted, concealed, and misrepresented material facts with the intent of hiding from the public their alleged conspiracy to fix the price of broiler chickens.

- Most of the fraud allegations do not support the elements of a substantive offense, but rather negate an anticipated statute of limitations defense based on the discovery rule. The plaintiffs allege that they "could not have discovered the alleged conspiracy at an earlier date by the exercise of reasonable diligence because of the deceptive practices and techniques of secrecy employed by Defendants and all of their co-conspirators to conceal their combination.“

- Apart from the fraud allegations in support of the discovery rule, the indirect purchaser plaintiffs allege, in support of claims for violations of various state deceptive trade practices statutes, that the "[d]efendants' conduct misled consumers, withheld material facts, and resulted in material misrepresentations to Plaintiffs and members of the Classes." The only fraud allegation specific to Foster Farms is that it "blamed the ethanol mandate" and rising corn prices for a "delayed [] expansion[,]" when the alleged cause was a conspiracy to artificially constrain the supply of broiler chickens. The alleged injury underlying these deceptive trade practices claims is indistinct from the antitrust injury on which the entire action is based—increased prices due to fixing the price of broiler chickens. Once again, without liability on the antitrust claims, there could be no liability on the deceptive trade practices claims.

Insured Capacity

Mist Pharm., LLC v. Berkley Ins. Co., 479 N.J. Super. 126, 318 A.3d 744 (Super. Ct. App. Div. 2024)

- Mist was named as a party to an action brought by CelestialRX Investments, LLC in Delaware Chancery Court (the "Delaware Action").

- Other named parties in the Delaware Action included Joseph Krivulka, Akrimax Pharmaceuticals, LLC (Akrimax) and various other Krivulka Family Entities (KFEs). Celestial alleged in its twelve-count complaint that Krivulka, one of three Akrimax directors, engaged in a scheme of self-dealing which defrauded Celestial.

- The Delaware court summarized the allegations this way:

> Krivulka improperly inserted various entities that he controlled or was invested in . . . as middlemen between Akrimax and other drug companies from whom Akrimax sought to receive drug rights. The [m]iddlemen [e]ntities received a cut of the sales or marketing performed by Akrimax. The favorability of the terms under which the [m]iddlemen [e]ntities were interposed between the company and third parties is heavily disputed.

Insured Capacity

Under its D&O policy, Mist was insured for loss arising from claims that were both made and reported during the policy period, for any actual or alleged wrongful act. The policy defined a wrongful act as follows:

1. [W]ith respect to Insured Persons[,] any actual or alleged breach of duty, neglect, error, misstatement, misleading statement, omission or act by the Insured Persons in their respective capacities as such, or any matter claimed against them by reason of their status as Insured Persons, or any matter claimed against them arising out of their serving as a director, officer, trustee or governor of an Outside Entity in such capacities, but only if such service is at the specific request or direction of the Insured Entity, or

2. [W]ith respect to an Insured Entity[,] any actual or alleged breach of duty, neglect, misstatement, misleading statement, omission or act by the Insured Entity.

Insured Capacity

The D&O Policy also contained a "capacity exclusion," which stated:

[T]he Insurer shall not be liable to make any payment for Loss in connection with a claim made against any Insured:

. . . .

G. based upon, arising out of, directly or indirectly resulting from or in consequence of, or in any way involving any Wrongful Act of an Insured Person serving in their capacity as director, officer, trustee, employee, member or governor *of any other entity other than an Insured Entity* or an Outside Entity, or by reason of their status as director, officer, trustee, employee, member or governor of such other entity.

[(Emphasis added).]

Insured Capacity

- Court held that the capacity exclusion precluded coverage for the settlement because the chairman of the insured entity was acting in a “dual capacity” based on his role with the non-insured entity.
- Court reasoned that the claim would not exist “but for” the insured person’s status with a non-insured entity, the exclusion applies.

Bump Up Redux

Towers Watson & Co. v. Nat'l Union Fire Ins. Co. of Pittsburgh, PA, 2024 U.S. Dist. LEXIS 40653, (E.D. Va. Mar. 6, 2024)

- Eastern District of Virginia district court, applying Virginia law, held that the bump-up exclusion in Towers Watson's D&O insurance policy precludes coverage for the $90 million paid in settlement of claims relating to the firm's January 2016 merger with Willis Group Holdings.

- On May 9, 2023, the Fourth Circuit concluded that the merger was unambiguously within the scope of the bump-up exclusion, and remanded the case for further proceedings to consider whether for the purposes of the exclusion Towers Watson is "an entity" under the Policies and whether the Settlements "represent[ ] the amount by which ... consideration is effectively increased

Bump-Up Redux

The Bump-Up Exclusion provides:

In the event of a Claim alleging that the price or consideration paid or proposed to be paid for the acquisition or completion of the acquisition of all or substantially all the ownership interest in or assets of an entity is inadequate, Loss with respect to such Claim shall not include any amount of any judgment or settlement representing the amount by which such price or consideration is effectively increased; provided, however, that this paragraph shall not apply to Defense Costs or to any Non-Indemnifiable Loss in connection therewith.

Bump-Up Redux

Court’s Holdings:

- Defendants have established that the Actions unambiguously alleged inadequate consideration for the purpose of evoking the Exclusion
- Based on the ordinary and customary meaning of the term "entity," Towers Watson constitutes an "entity" for the purposes of the Exclusion
- After giving all the words in the Exclusion their reasonable and ordinary meaning, the Court concludes that the Settlements "represent" amounts that "effectively increased" the consideration for the merger, such that the Exclusion unambiguously applies to the Settlements.

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