IMA

EXECUTIVE RISK SOLUTIONS

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Quarterly Update

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+ *Disputes Over Whether Claims are Related Continue to be a Major Source of Coverage Litigation*

Regular readers of our ERS Quarterly Updates know that a significant amount of coverage litigation in the D&O space of late involves whether particular claims are related to one another for purposes of coverage. On January 6, 2025, the Delaware Superior Court issued an opinion in favor of Benefytt Technologies, finding the D&O insurers coverage determinations on the relatedness of different cases filed against Benefytt was not supported by the facts.

Seven different lawsuits or other enforcement actions were filed against Benefytt in 2018 and 2019, spanning the 2017-2018 and 2018-2019 policy periods. Two of these actions (*Keippel* and *Belin*) are principally at issue here. While the primary insurer was the same on both D&O programs, the excess insurers differed. This resulted in insurers taking conflicting positions regarding which cases were related to each other for purposes of coverage. The primary insurer initially accepted coverage for the *Keippel* action under the 2018-2019 policy period but subsequently revised its position, asserting it was related to prior litigation filed during the 2017-2018 policy period. The *Belin* case was noticed under the 2018-2019 D&O program, but insurers denied coverage, arguing that notice was insufficient and that the Belin claim did not become a covered claim until after the 2018-2019 policies expired. Coverage litigation ensued.

The court found the coverage position taken by the primary carrier accepting coverage for the *Keippel* action under the 2017-2018 program to be incorrect. Instead, it should have been covered under the 2018-2019 program because it was properly filed and not related to prior litigation. For the *Belin* action, the court found that it is not covered under the 2018-2019 program, or related to any covered claims. "The *Belin* action isn't interrelated to the *Keippel* action because the ties between the two are just too feeble. Even though Benefytt's misconduct related to Simple Health is central to all the claims, there are insufficient factual overlaps between the consumers' and shareholders' claims. The alleged wrongful acts are separated by multiple years and involve different transactions – e.g., insurance policy sales compared to shareholder disclosures. There must be a reasonable limit when interpreting the term "any" as used in the interrelated coverage provision." Unfortunately for the insureds, the court further held notice was not given properly, resulting in that case not being afforded coverage.

The result here is terribly unfortunate. First, it is disconcerting to see an insurer take an incorrect position on which policy period affords coverage. Whether an ulterior motive – namely, trying to avoid paying full policy limits under successive policies – is the actual reason behind the coverage position taken or not, the optics are not good.

Disputes Over Whether Claims are Related Continue to be a Major Source of Coverage Litigation, cont'd

In addition, policy language in the majority of executive liability policies is drafted with the intent of inter-relating as many claims as possible, thereby limiting insurer exposure to claims under successive policies. Instead of insurance proceeds being available as intended, it spawns additional litigation and financial uncertainty. It also puts insureds in the precarious spot of being extra thoughtful about noticing claims promptly and being proactive about assessing whether different cases or claims are factually related.

The situation is only further complicated by different insurers being on the tower from year to year. We highlight this case as a reminder to policyholders that it is always best to analyze these issues at the beginning of the claims process to ensure coverage is sought under the correct policies. *Benefytt Technologies, Inc. v. Capitol Specialty Insurance Corp.*, 2025 WL 84701, (Del. Super. January 6, 2025).

Breach of Contract Exclusion Inapplicable to Qui Tam Action

Following the denial of coverage by a D&O insurer for litigation brought against its insured under the False Claims Act, the Delaware Superior Court held the insurer's interpretation of the breach of contract exclusion to be far too broad. Reviewing the matter under 'duty to defend' provisions included in the primary policy and applicable caselaw, the court based its conclusion on *Guaranteed Rate, Inc. v. ACE Am. Ins. Co*, 2022 WL 4088596 (Del. Super. Aug 24, 2022.), aff'd, A3d 339 (Del. 2023). In that case, the court found a contract exclusion inapplicable to a *qui tam* complaint which led to the issuance of a Civil Investigative Demand by the DOJ. With the CID not alleging breach of contract, it found the insurer denial improper. The complaint filed against the insureds here involved the alleged submission of false certifications and information regarding rents in Section Eight housing.

"The insurers seek a broad application of the Breach of Contract Exclusion to cases in which a breach of contract cause of action is not brought against [the insureds]. Such an interpretation would effectively extend coverage of the exclusion to just about anything remotely connected to an allegedly breached contract, even where the non-breaching party does not bring the underlying claim and where the underlying action is not one for breach of contract." Noting that the claims in the underlying case alleged violations of federal law, not a breach of contract, the insurer had wrongfully denied coverage. *Pangea Equity Partners, LP et. al. v. Great American Insurance Group, et. al.*, 2025 WL 786050, (Del. Super. March 12, 2025).

M&A Settlement Not Subject to Bump-up Exclusion

Another source of significant ink (and time) in the D&O space involves proper construction (and interpretation) of exclusions intended to remove coverage for settlements in M&A litigation that serve as an increase in consideration following the closing of a transaction. The transaction in question here involved a reverse triangle merger, with the insured ultimately becoming a subsidiary of the acquiring entity. Shareholders brought suit under Section 14(a) and 20 of the 1934 Exchange Act, and the insurers subsequently sought to deny coverage for the $28 million settlement that concluded the shareholder litigation.

First, the court found the deal structure to qualify as an 'acquisition' as defined in the D&O policy's bump-up exclusion. "For the purpose of the insuring (and excluding) language here, a reverse triangular merger is – in its plainest terms – an acquisition that is effectuated, in part, via a merger mechanism."

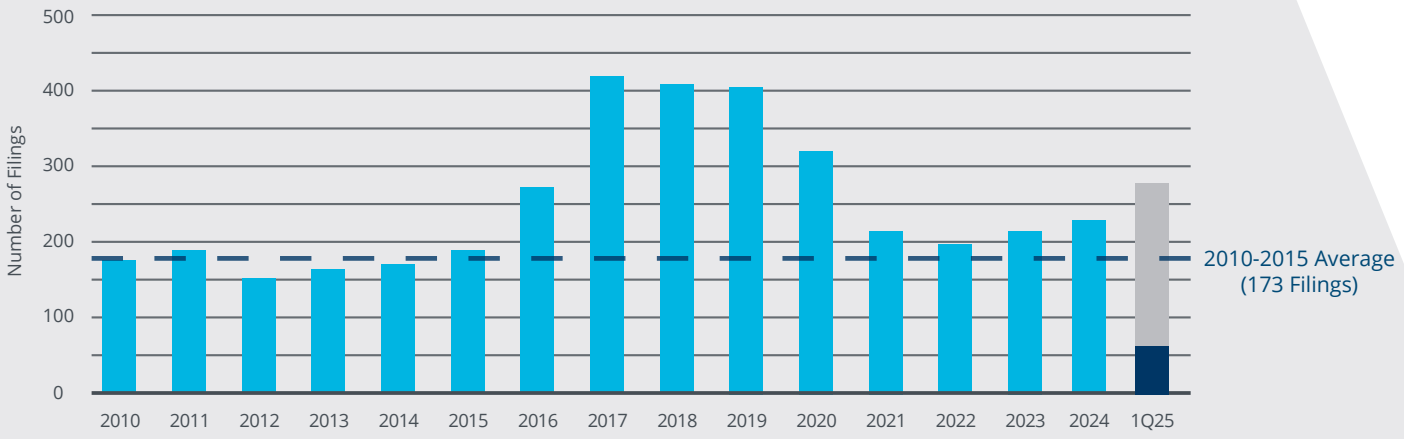
The court then looked at whether any amount of the settlement represented the amount by which the transaction price or consideration was effectively increased. For this to occur, "the underlying 'Claim' must actually allege inadequate consideration." The court went on to state, "a cured inadequate deal price isn't the remedy for Section 14(a) and Section 20 claims… A plaintiff's bare request of relief for inadequate price isn't enough; the court in the underlying action must also be authorized to remedy the inadequate deal price under the claims raised."

With the settlement being explicitly entered into for the purpose of avoiding the costs of litigation and no wrongdoing being admitted, the court refused to find it represented an increase in consideration. We highlight this case to emphasize how important it is for defense counsel to understand the myriad ways in which insurance proceeds can be jeopardized when negotiating the resolution of litigation. By utilizing the approximate costs of defense as the basis of the settlement amount, the court was able to identify a different basis upon which the additional consideration was paid, thereby removing it from the scope of the exclusion relied upon by the insurers seeking to avoid coverage. *Harman International Industries, Inc. v. Illinois National Insurance Co. et. al.*, 2025 WL 84702, (Del. Super. January 7, 2025).

D&O Filings

+ As we have previously reported, D&O Federal Securities Class Action Claims *increased* in 2024 for the second time in as many years, representing a 2022 to 2024 increase of 13%.

+ In 1Q 2025, D&O claim activity increased noticeably, with 67 total Federal Securities Class Action Claims being filed. On an annualized basis, this equates to 268 total filings, which would be a year-over-year increase of 20.7%.



D&O Settlements

+ 88 Federal Securities Class Action settlements were approved in 2024 versus 83 in 2023.

+ Average settlement size in 2024 was $43 million, while the median settlement size was $14 million.

+ 52% of 2024 FSCA settlements included a derivative action, and these had a median settlement value of $18.6 million.

D&O Pricing and Outlook

+ Although D&O litigation continues to increase, overall market conditions remain favorable in the first half of 2025.
  - The downward pressure we saw on pricing (and, in certain instances, retentions) over the last year and a half has slowed down, but capital remains plentiful and competitive.
+ The current pricing environment continues to be a story of "supply and demand." New capacity has entered the market (more supply) during a period where IPOs and de-SPAC transactions have declined sharply (less demand). This combination of events has created more competition for "legacy" business.
+ Carriers do remain cautious regarding companies with near-term capital needs or a high likelihood of M&A.
+ At this point, we remain cautiously optimistic that current market trends will continue for the foreseeable future.

KEY CONTACTS

Brian R. Bovasso
Executive Vice President &
Managing Director
IMA Executive Risk Solutions
303.615.7449
brian.bovasso@imacorp.com

Travis T. Murtha
Director of ERS Claims
IMA Executive Risk Solutions
Legal & Claims Practice
303.615.7587
travis.murtha@imacorp.com

Justin M. Leinwand
Product Leader
IMA Executive Risk Solutions
303.615.7773
justin.leinwand@imacorp.com

Daniel Posnick
Transactional Liability Leader
IMA Executive Risk Solutions
303.615.7747
daniel.posnick@imacorp.com

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