

CORPORATE INSURANCE LAW

Expert Analysis

## Delaware Supreme Court Rules On Appraisal Action Issue

In a unanimous decision issued in late October, the Delaware Supreme Court reversed a trial court ruling and held that an appraisal action is not a “Securities Claim” as defined in the applicable directors’ and officers’ (D&O) liability insurance policy. Consequently, the court ruled that the insured was not entitled to coverage for defense costs and pre-judgment interest incurred in connection with an appraisal proceeding. *In re Solera Insurance Coverage Appeals*, 2020 WL 6280593 (Del. Oct. 23, 2020).

As regular readers of this column will recall, D&O liability insurance policies generally include multiple coverage sections. Typically, Section A provides coverage to insured individuals for non-indemnifiable loss—loss for which the insured entity either cannot or will not indemnify the insured person.

HOWARD B. EPSTEIN is a partner at *Schulte Roth & Zabel*, and THEODORE A. KEYES is special counsel at the firm.



By  
**Howard B.  
Epstein**



And  
**Theodore A.  
Keyes**

Section B provides coverage to the insured entity to the extent that it has indemnified an individual insured. Section C typically provides entity coverage for claims asserted

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directly against the insured entity.

In the case of a public company D&O policy, coverage under Section C is typically limited to coverage for Securities Claims as defined in the policy. Consequently, if a claim against a public company insured does not meet the definition of Securities Claim, there is no coverage for the entity. As a result, in *Solera*, the court’s holding that an appraisal

action does not constitute a Securities Claim was dispositive of the insurance dispute.

### Background of Dispute

Solera was a publicly traded software company until it was acquired by an affiliate of Vista Equity Partners in a merger announced in September 2015, which became effective in March 2016. A group of Solera shareholders filed a class action against Solera, its directors and officers and other parties alleging a breach of fiduciary duties in connection with the merger. The action was dismissed for failure to state a claim and the majority of Solera’s shareholders approved the merger. *Solera Holdings v. XL Specialty Ins. Co.*, 213 A.3d 1249 (Del. Superior Court 2019), rev’d, 2020 WL 6280593 (Del. Oct. 23, 2020).

The merger transaction closed on March 3, 2016 based on an agreed merger price of \$55.85 per share. On March 7, 2016, several Solera shareholders filed an

appraisal action pursuant to Delaware statutory law seeking fair value for their shares and claiming that the value of the shares at the time of the merger was \$84.65 per share. 8 Del. C. §262. Following a trial and post-trial briefing, in July 2018, the court held that the fair value of the Solera shares at the time of the merger was \$53.95 per share, a bit less than the actual merger price. The court ordered Solera to pay the petitioners the fair value for their shares plus more than \$38 million in pre-judgment interest. *Id.* at 1253.

Solera sought coverage from its insurers for approximately \$13 million in defense costs incurred defending the appraisal action as well as the pre-judgment interest award. Solera did not seek coverage for the required fair market value payment. The insurers denied coverage for the claim and Solera commenced litigation against the insurers for breach of contract and declaratory judgment. The primary insurer settled with Solera but certain excess insurers continued to deny the claim and filed motions for summary judgment.

### **Superior Court Rules For the Insured**

The Superior Court correctly identified the definition of Securities Claim as the key contract term. Under the applicable excess

insurance policies, which follow form to the primary policy, Securities Claim is defined as a claim:

(1) made against [Solera] for any actual or alleged violation of any federal, state or local statute, regulation, or rule or common law regulating securities, including but not limited to the purchase or sale of, or offer to purchase or sell, securities, which is:

(a) brought by any person or entity resulting from the purchase or sale of, or offer to purchase or sell, securities of [Solera]; or

(b) brought by a security holder of [Solera] with respect to such security holder's interest in securities of [Solera] ... . 2020 WL 6280593 at \*3.

The parties and the Superior Court focused on whether the appraisal action alleged a violation of securities laws as required by the policy definition. The defendant insurers argued that the appraisal action did not constitute a Securities Action because it is not a claim for "violation" of statutes, regulations, rules or common law. Defendants contended that a violation requires wrongdoing and an appraisal proceeding does not involve wrongdoing. In response, in opposition to the insurers' motion for summary judgment, Solera argued that a claim can be for a violation of law even in the

absence of allegations of wrongdoing. 213 A.3d 1249, 1253-55. Solera also contended that an appraisal action inherently alleges a violation of the statutory obligation to provide shareholders fair value in exchange for their shares. *Id.* at 1255.

The Superior Court, finding the policy language to be unambiguous, ruled in favor of Solera, holding that the word "violation" does not limit Securities Claims to only claims involving wrongdoing. For support, the Superior Court looked to the common meaning of the word "violation," explaining that "violation" may simply mean "among other things, a breach of the law and the contravention of a right or duty." In addition, the Superior Court relied on the fact that several securities laws can be violated "without any showing of scienter or wrongdoing." *Id.* at 1256.

### **Delaware Supreme Court Reverses**

The insurers submitted an application to certify the Superior Court's ruling for interlocutory appeal to the Delaware Supreme Court. Solera did not oppose interlocutory review. The Superior Court granted certification and the Supreme Court accepted the request. On review, the Supreme Court unanimously reversed the ruling below.

The Supreme Court agreed with the insurers that the appraisal action did not constitute a Securities Claim within the policy definition because it does not involve a “violation” of law. In contrast to the Superior Court, the Supreme Court concluded that the plain meaning of the word “violation” necessarily involves some element of wrongdoing. In support of its ruling, the court relied on Black’s Law Dictionary, the historical background of the appraisal remedy, the text of the Delaware appraisal statute, the purpose of the appraisal remedy and a line of Delaware case law authority which holds that an appraisal action does not involve an inquiry into wrongdoing. 2020 WL 6280593 at \*\*9-14.

To ascertain the plain meaning of “violation,” the court relied on Black’s Law Dictionary, which defines the term as an “infraction or breach of the law; a transgression,” or “the act of breaking or dishonoring the law” or “the contravention of a right or duty.” The court also reviewed the definition of “transgress”, which means “to exceed the limits of (a law, rule, regulation, etc.); to break or violate,” and the definition of “contravention”, which means “[t]o violate or infringe (the law, a rule, etc.); to defy.” Based on these definitions, the court determined that a violation requires wrongdoing. *Id.*

Next, the court discussed the history of the appraisal remedy, the text of the relevant appraisal statute and the nature of the appraisal proceeding. The court explained that, originally, Delaware law required the unanimous approval of shareholders to effect a merger. As this proved unworkable, the law was modified so that only the approval of a majority of shareholders is required. At the same time, the appraisal remedy was created for minority shareholders who did not approve of the sale—and this limited remedy was codified by statute. The court further explained that the nature of the appraisal proceeding is neutral—both sides have the burden of establishing their valuation positions by a preponderance of the evidence. The court then makes an independent assessment of the value based on the relevant factors.

Finally, the Supreme Court cited to a line of Delaware cases that hold that an appraisal action does not involve claims of wrongdoing. *Id.* at \*\*12-13. These cases emphasize that the only issue in an appraisal action is the value of the dissenting shareholders’ stock on the date of the merger. *Id.* at \*13.

As a result, since a Securities Claim requires alleged wrongdoing and an appraisal action does not involve wrongdoing, the court held that an appraisal action is not

a Securities Claim and reversed the Superior Court ruling.

### Looking Forward

The Delaware Supreme Court’s decision in *Solera* was no doubt welcomed by insurers. Although there was no danger that the court would rule that the fair market value payment was covered—since *Solera* did not even attempt to argue that issue—the defense costs and pre-judgment interest at issue were substantial and a contrary decision would have established significant precedent. While appraisal actions may not be as prevalent as they were earlier in this decade, insurers were likely relieved not to face the prospect of routinely paying defense costs incurred in connection with appraisal actions in Delaware under D&O liability insurance policies.

## Schulte Roth & Zabel

Schulte Roth & Zabel LLP  
919 Third Avenue, New York, NY 10022  
212.756.2000 tel | 212.593.5955 fax | www.srz.com  
New York | Washington DC | London