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IN THE SUPREME COURT OF THE STATE OF DELAWARE

IN RE SOLERA INSURANCE COVERAGE APPEALS	:	No. 413,2019
	:	No. 418,2019
	:	
	:	Court Below-Superior Court
	:	of the State of Delaware
	:	C.A. No. N18C—08-315 AML CCLD

OPENING BRIEF OF APPELLANT ILLINOIS NATIONAL INSURANCE CO.

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NATURE OF PROCEEDINGS

This is the second recent appeal involving efforts by an insured under a directors-and-officers ("D&O") insurance policy to expand the scope of coverage for "Securities Claims." In *In re Verizon Insurance Coverage Appeals*, -- A.3d --, 2019 WL 5616263 (Del. Oct. 31, 2019), this Court rejected an attempt to expand Securities Claim coverage to encompass claims for improper dividends, fraudulent transfers, and breach of fiduciary duty and other common-law doctrines because those claims did not involve alleged violations of laws "regulating securities." Here, Appellee Solera Holdings, Inc. ("Solera") argues that Securities Claim coverage under materially identical policy language should encompass appraisal actions under 8 *Del. C.* § 262 ("Section 262"). This Court should reach the same result again.

This appeal arises out of a transaction in which Solera was acquired by and merged with an affiliate of a private equity firm, with Solera emerging as the named surviving entity. Shortly after the transaction closed, several Solera stockholders who dissented from the merger initiated an appraisal action in the Court of Chancery under Section 262 (the "Appraisal Action"). The stockholders did not seek relief for any wrongdoing or unlawful conduct by Solera, its directors or officers, or any other party involved in the merger. In a petition solely against Solera, the stockholders merely sought a judicial determination of the "fair value" of their shares at the time of the merger. At trial, the stockholders argued that the fair value of their shares was

significantly higher than the deal price, while Solera argued that the fair value was slightly lower than the deal price. The Court of Chancery agreed with Solera and entered judgment for the adjudged fair value of the appraised shares, as well as statutory prejudgment interest totaling $38.3 million. Solera allegedly incurred $13.5 million in litigation expenses responding to the Appraisal Action.

Solera now seeks to recoup the prejudgment interest and litigation expenses it incurred in the Appraisal Action under D&O policies issued by nine insurers, including two policies issued by Appellant Illinois National Insurance Co. ("Illinois National"). The Illinois National policies are excess and follow-form to an initial policy (the "Primary Policy") issued by XL Specialty Insurance Co. ("XL"). While the Primary Policy covers Solera's D&Os, as well as Solera's indemnification of those D&Os, for losses resulting from any "Claim," it covers Solera's non-indemnification losses only when they result from a "Securities Claim." The Primary Policy narrowly defines a "Securities Claim" in relevant part as a "Claim … made against [Solera] for any actual or alleged violation of any federal, state or local statute, regulation, or rule or common law regulating securities."

Even though an appraisal under Section 262 is a neutral, no-fault valuation proceeding, the Superior Court held that the Appraisal Action is a Claim "for an actual or alleged violation" of the law. The court made no attempt to reconcile that conclusion with an unbroken line of cases holding that an appraisal under Section

262 "does not involve an inquiry into claims of wrongdoing." *Cede & Co. v. Technicolor, Inc.*, 542 A.2d 1182, 1189 (Del. 1988). In any event, any notion that the Appraisal Action falls within the Securities Claim definition is irreconcilable with *Verizon*, which held, under a materially identical Securities Claim definition, that the term "regulating securities" is limited to laws that are "specifically directed towards securities." 2019 WL 5616263, at *7. Here, Section 262 is directed not towards securities, but towards internal corporate relationships in the context of mergers and consolidations. And regardless, Section 262 does not prescribe rules or restrictions for securities transactions. It simply gives dissenting stockholders the option to have the Court of Chancery determine the fair value of their shares.

This Court accepted interlocutory review in this case in recognition of the significance of the issues presented. The decision below misconceives the fundamental nature of appraisal actions and, to the extent it held that Section 262 "regulat[es] securities," contravenes a recent decision of this Court interpreting a materially identical D&O policy. The Court should reverse.

SUMMARY OF ARGUMENT

1. The Appraisal Action is not a Securities Claim because it is not a "Claim … made against [Solera] for any actual or alleged violation" of the law. That policy language makes clear that Securities Claim coverage is limited to Claims that seek relief based on past unlawful conduct by Solera. The Appraisal Action did not do that. Under Section 262, appraisal is a no-fault valuation of a stockholder's shares. The statute does *not* prescribe that the price in any merger or consolidation must reflect "fair value," nor does it authorize enjoining or unwinding any transaction. It merely provides an optional post-closing mechanism whereby dissenting stockholders may decline the negotiated deal terms and elect instead to have an impartial third party—the Court of Chancery—determine the going-concern value of their shares.

Other considerations underscore the no-fault neutrality of appraisal. Historically, the legislature enacted Section 262 to provide recourse for dissenting stockholders who could no longer exercise their common-law right to veto mergers and consolidations. Appraisal affords these stockholders the option to eschew the negotiated deal terms and seek a judicial determination of the value of their shares instead. Appraisal proceedings thus resemble other no-fault mechanisms for ending economic relationships—partition, for example, and divorce. The judgment in an appraisal action, moreover, always runs solely against the surviving corporation,

even when other parties were responsible for setting the deal price. And the surviving corporation pays the adjudged fair value regardless of whether that value is equal to, greater than, or even—as here—*less* than the deal price. Appraisal proceedings bear no resemblance to traditional civil litigation under laws that prescribe rules of conduct and then allow injured parties to sue for violations.

This Court and the Court of Chancery have consistently held that appraisal actions under Section 262 do not adjudicate the lawfulness of the underlying corporate transaction. And until the decision below, not a single judicial opinion had ever stated that a party "violat[ed]" Section 262 by failing to pay "fair value." The Superior Court's conclusion that the Appraisal Action involved an alleged "violation" of the law rested on a fundamental misconception of both the Securities Claim definition and Section 262.

2. The Appraisal Action independently is not a Securities Claim because it is not a Claim for any actual or alleged violation of a law "regulating securities." While this issue was not the focus of the briefing or decision below, it is squarely within the questions certified for appeal. And the Court may address the issue in the interests of justice because it is outcome-determinative, has significant implications for other cases, and will avoid the need for the Court to revisit the very same issue on a subsequent appeal from final judgment.

In *Verizon*, this Court held that the term "regulating securities" is limited to laws that are "specifically directed towards securities." 2019 WL 5616263, at *7. Section 262, however, is not specifically directed towards securities. It is directed towards internal governance in the context of certain entity-level transactions that effect a fundamental change in the corporate enterprise. In particular, the statute provides stockholders who dissent from mergers or consolidations with a mechanism to have their conceptions of "fair value" weighed and resolved, without allowing minority holdouts to block transactions altogether.

Even if Section 262 were directed at securities, moreover, the statute still does not "regulat[e]" securities. "[R]egulat[ion]" entails controlling or directing securities-related activities by prescribing rules or restrictions. Section 262 does not do that. It merely permits dissenting stockholders, if they so choose, to decline negotiated deal terms and instead seek a judicial determination of the "fair value" of their shares.[1]

[1] Appellants ACE American Insurance Co. and Federal Insurance Co. also argue (1) that the prejudgment interest in the Appraisal Action is not covered because it accrued on the uncovered underlying adjudged fair value of the appraised shares and (2) that the litigation expenses in the Appraisal Action are not covered because they were incurred without the insurers' consent. Illinois National joins in those arguments.

STATEMENT OF FACTS

A. Solera's D&O Insurance Policies

Solera is a software company that provides risk and asset management programs and services to companies in the auto insurance and related industries. *See In re Appraisal of Solera Holdings, Inc.* ("*Appraisal Action*"), 2018 WL 3625644, at *2-3 (Del. Ch. July 30, 2018). Organized under Delaware law and headquartered in Texas, Solera was founded in 2005 and went public in 2007. *Id.* Illinois National is one of nine insurers that provided D&O liability insurance coverage to Solera during the policy period from June 10, 2015 to June 10, 2016. *See* Ex. A at 2.

Together, these policies form a "tower" of $55 million in total coverage. *Id.* The Primary Policy was issued by XL, with $10 million in coverage. *Id.* The Primary Policy includes various "[r]etentions"—self-insured amounts of otherwise covered loss that the insured must incur before coverage attaches. JA150.[2] As relevant here, the Primary Policy includes a $2 million retention for covered losses resulting from so-called "bump-up" claims, which allege "inadequate consideration in connection with any merger or acquisition." JA173. Solera thus retained the risk from bump-up claims up to $2 million, and XL would be liable for covered losses only in excess of that amount, capped at an aggregate limit of $10 million.

[2] Citations to "JA" refer to the Joint Appendix filed with this brief.

Above the Primary Policy issued by XL, the tower also includes nine excess insurance policies issued by the remaining insurers, including two separate excess policies issued by Illinois National. The Illinois National policies each have a $5 million limit of coverage—one for covered losses in excess of $15 million over any applicable retention, and the other for covered losses in excess of $25 million over any applicable retention. JA395. The Illinois National policies "follow-form and incorporate the [Primary] Policy's provisions." Ex. A at 2.

The Primary Policy contains three pertinent Insuring Agreements. The first, Agreement I(A), covers Solera's directors and officers for any "Loss resulting from a Claim" if those directors and officers are not indemnified by Solera. JA153-55. The second, Agreement I(B), covers Solera for any "Loss resulting from a Claim," but only to the extent Solera indemnifies a director or officer. *Id.* The third, Agreement I(C)—most directly relevant here—covers Solera for any "Loss resulting solely from any Securities Claim first made against an Insured during the Policy Period for a Wrongful Act." JA153. This third Insuring Agreement thus covers Solera's own "Loss," including non-indemnification loss, but only to the extent it results from a "Securities Claim." The policy defines "Loss" to include "damages, judgments, settlements, pre-judgment and post-judgment interest or other amounts … that any Insured is legally obligated to pay and Defense Expenses." JA156.

The policy defines "Claim" broadly to include a "written demand" for "monetary relief." JA154. But the policy defines "Securities Claim" more narrowly. As relevant here, a "Securities Claim" is a "Claim" that is

> (1) made against any Insured 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 the Company; or
> >
> > (b) brought by a security holder of the Company with respect to such security holder's interest in securities of the Company; or
>
> (2) brought derivatively on behalf of the Company by a security holder of the Company ….

JA157. The policy defines "Company" to include Solera and its subsidiaries. JA154. The policy defines "Insured" to include Solera, its subsidiaries, and its directors and officers. JA155.

B. The Merger Transaction and the Fiduciary Action

On September 13, 2015, Solera announced a transaction in which an affiliate of Vista Equity Partners—a private equity firm—would acquire Solera's outstanding stock, take the company private, and merge with Solera, with Solera emerging as the named surviving entity. JA390. On December 8, 2015, a majority of Solera's stockholders voted to approve the merger. *Appraisal Action*, 2018 WL 3625644, at

*5. The transaction closed on March 3, 2016 for a negotiated deal price of $55.85 per share. Ex. A at 5.

On September 21, 2015—shortly after the merger transaction was announced, but before it closed—a Solera stockholder sued Solera, its directors and officers, and other companies involved in the merger for alleged breaches of fiduciary duty (the "Fiduciary Action"). On October 22, 2015, a second Solera stockholder filed a similar suit, which was consolidated with the first. *See In re Solera Holdings, Inc. Stockholder Litig.* ("*Fiduciary Action*"), 2017 WL 57839, at *5 (Del. Ch. Jan. 5, 2017). In a consolidated amended complaint asserting claims on behalf of a putative class of all Solera stockholders, the plaintiffs alleged extensive wrongdoing by Solera's directors, including that they "improperly favored the interests of [the CEO] and the Company's management, failed to establish an effective Special Committee or to extract the highest price possible for the Company, implemented preclusive deal protection devices, and failed to disclose material information about the value of the Company's stock." *Id.* at *6. On January 5, 2017, the Court of Chancery dismissed this Fiduciary Action for failure to state a claim. *Id.* at *13.

Solera provided prompt notice about the Fiduciary Action to Illinois National and the other insurers on October 13, 2015. JA556. On November 6, 2015, XL issued a preliminary coverage letter to Solera indicating that Insuring Agreement I(B) of the Primary Policy covered Solera's losses in connection with the Fiduciary

Action to the extent Solera indemnified its directors. JA559. But under Insuring Agreement I(C), XL explained that "there does not appear to be coverage presently available to Solera" itself because "it does not appear that a Securities Claim, as defined by the Policy, has been made against Solera." JA562. "The allegations against the Company," XL explained, "are limited to aiding and abetting breach of fiduciary duties, which do not appear to constitute a violation of any federal, state or local statute, regulation or rule or common law regulating securities." *Id.* In any event, Solera incurred approximately $270,000 in expenses defending the Fiduciary Action before it was dismissed, within the $2 million retention. JA568.

C. The Appraisal Action

On March 7, 2016—four days after the merger transaction closed—a Solera stockholder commenced the Appraisal Action against the surviving corporation under Section 262, seeking a determination of the fair value of the stockholder's shares. JA131. Another group of stockholders filed a similar petition on March 10, 2016, and the two cases were consolidated. *See Appraisal Action*, 2018 WL 3625644, at *11.

The initial appraisal petition was neutral and formulaic. It alleged that Solera entered into a merger transaction and that the petitioner delivered a written demand for an appraisal within the statutorily prescribed period. JA131-33. The petitioner also alleged that it did not vote in favor of the merger transaction or consent to it in

writing, had not reached any agreement with Solera about the value of its shares, and had not withdrawn its appraisal demand. *Id.* While the petition sought an order directing the surviving corporation to pay the fair value of the appraised shares, along with statutory prejudgment interest at the Federal Discount Rate plus five percent, JA133, it did not allege any wrongdoing or unlawful conduct by Solera, nor did it seek relief against its directors or officers. Unlike the Fiduciary Action, Solera did not promptly notify the insurers about the Appraisal Action.

Without the insurers receiving any notice from Solera, Chancellor Andre Bouchard presided over a five-day trial in June 2017, and held post-trial argument on December 4, 2017. *Appraisal Action*, 2018 WL 3625644, at *11. The petitioners argued, based on a discounted cash-flow model prepared by their expert, that the fair value of their shares was $84.65 per share. *Id.* at *16. Solera argued that the fair value was $53.95 per share, representing the deal price ($55.85) minus synergies generated by the merger ($1.90). *Id.* On July 30, 2018, the court issued an opinion agreeing with Solera's valuation. *Id.* at *28. The court entered judgment requiring the surviving corporation to pay the petitioners $215 million as the adjudged fair value of the petitioners' shares—roughly $8 million *less* than they would have received under the negotiated deal terms—plus $38.3 million in statutory pre-judgment interest. JA140-43. Solera also allegedly incurred $13.5 million in litigation expenses responding to the Appraisal Action. JA65.

Solera first notified Illinois National and the other insurers about the Appraisal Action on January 31, 2018. JA567. The insurers thus received no notice from Solera until nearly two years after the petitions were filed, more than seven months after the trial, and almost two months after post-trial oral argument—after effectively *all* litigation expenses in the matter already had been incurred. On April 17, 2018, XL issued a preliminary coverage letter to Solera determining that Solera's losses in connection with the Appraisal Action were not covered because, among other reasons, the Appraisal Action "d[id] not appear to be a Claim for any actual or alleged violation of any rule or law regulating securities." JA574. XL also noted that even if the Appraisal Action constituted a Securities Claim, the adjudged fair value of the appraised shares would not constitute a covered "Loss." JA575.

On August 18, 2018, Illinois National adopted XL's coverage position, while "continu[ing] to reserve all rights under the Illinois National policies." JA1228.

D. Procedural History

On August 31, 2018, Solera filed this lawsuit, asserting that XL, Illinois National, and the other insurers breached their coverage obligations under the Primary Policy and the excess policies. Solera alleges that the Appraisal Action is a "Securities Claim" and that the policies therefore cover Solera's resulting losses. Solera does not dispute that the $215 million representing the adjudged fair value of the appraised shares is not a covered "Loss"; instead, Solera seeks coverage for the

$38.3 million in statutory pre-judgment interest and the $13.5 million in litigation expenses. JA76-77.

On February 4, 2019, Solera reached a settlement with XL. JA34. On January 11, 2019, Defendants ACE American Insurance Co. ("ACE") and Federal Insurance Co. ("Federal") moved for summary judgment, arguing, among other things, that the Appraisal Action is not a Securities Claim because it is not a Claim "for any actual or alleged violation" of any law. JA25. Illinois National joined the motion, while "expressly reserv[ing] [its] rights," JA460-61, and making clear that "[t]here remain numerous additional defenses to coverage that have been preserved by Illinois National," JA1315.

On July 31, 2019, the Superior Court denied ACE and Federal's motion. As to the Securities Claim definition, the court reasoned that "the word 'violation' in this context is not limited to wrongdoing" and encompasses, "among other things, a breach of the law and the contravention of a right or duty." Ex. A at 11. Even though Section 262 does not require any assertion of wrongdoing, and even though the appraisal petition here did not allege that Solera violated, breached, or contravened any law, right, or duty, the court concluded that "the appraisal petition necessarily alleges a violation of law or rule." Ex. A at 12. The court reasoned that "[b]y its very nature, a demand for appraisal is an allegation that the company contravened [a] right by not paying shareholders the fair value to which they are entitled." *Id.*

On September 26, 2019, the Superior Court certified its summary judgment decision for interlocutory appeal under Delaware Supreme Court Rule 42. Ex. C. Illinois National filed a notice of appeal on September 27, 2019, and on October 17, 2019, this Court accepted the appeal. JA1572-77.

ARGUMENT

I. The Appraisal Action Is Not a "Securities Claim" Because It Is Not a Claim "for any Actual or Alleged Violation" of Law

A. Question Presented

Whether Solera carried its burden to establish coverage under the Primary Policy and follow-form excess policies by demonstrating that the Appraisal Action is a Claim "made against an Insured for an[] actual or alleged violation of a[] federal, state or local statute, regulation, or rule or common law." (Preserved at JA415-436, 460-61.)

B. Scope of Review and Legal Standard

This Court "review[s] the interpretation of an insurance contract *de novo*." *Verizon*, 2019 WL 5616263, at *4. The Court also "reviews *de novo* the Superior Court's grant or denial of summary judgment." *Pavik v. George & Lynch, Inc.*, 183 A.3d 1258, 1265 (Del. 2018) (quotation source omitted).

The rules for construing an insurance contract are well settled. The insured "ha[s] the burden of proving that it [i]s entitled to coverage." *E.I. du Pont de Nemours & Co. v. Allstate Ins. Co.*, 693 A.2d 1059, 1061 (Del. 1997). The burden shifts to the insurer to disprove coverage only if the insured proves that the loss falls within the policy, and the insurer then seeks to avoid coverage under an exclusion. *See id.* & n.5 (citing *E.I. du Pont de Nemours & Co. v. Admiral Ins. Co.*, 711 A.2d

45, 54 (Del. Super. Ct. 1995)); 17A Couch on Insurance §§ 254:11-12 (3d ed. Dec. 2018 Update).

Like any contract, an insurance contract is read "as a whole[,] … applying the plain and ordinary meaning of the words used by the parties." *Verizon*, 2019 WL 5616263, at *4. "Where the language of a policy is clear and unequivocal, the parties are to be bound by its plain meaning." *ConAgra Foods, Inc. v. Lexington Ins. Co.*, 21 A.3d 62, 69 (Del. 2011) (quotation source and brackets omitted). "[E]xtrinsic evidence may not be used to interpret the intent of the parties, to vary the terms of the contract[,] or to create an ambiguity." *Eagle Indus., Inc. v. DeVilbiss Health Care, Inc.*, 702 A.2d 1228, 1232 (Del. 1997).[3]

C. Merits of Argument

1. The Securities Claim Definition Is Limited to Claims that Seek Relief Based on Unlawful Conduct

Solera's demand for coverage in connection with the Appraisal Action fails on the plain text of the Primary Policy. As relevant here, the Securities Claim definition in that policy is limited to a "Claim … made against an Insured for an[] actual or alleged violation of a[] federal, state or local statute, regulation, or rule or

[3] On reconsideration, the Superior Court clarified that its summary judgment decision "did not rule on choice of law" and merely assumed without deciding that Delaware law applies to all issues presented. Ex. B at 3. Illinois National accordingly assumes, solely for purposes of this appeal, that Delaware law applies.

common law." JA157. By its plain meaning, that language does not encompass Claims that do not seek relief on the basis of some past conduct by Solera that "violat[ed]" the law. Three textual elements of the Securities Claim definition bear special emphasis in this regard.

First, the Securities Claim definition is limited to Claims brought for an actual or alleged "violation" of the law. The Superior Court correctly recognized that a "[v]iolation simply means, among other things, a breach of the law and the contravention of a right or duty." Ex. A at 11. Because that term is "not defined" in the policy, the Court may "look to dictionaries for assistance in determining the [term's] plain meaning." *Lorillard Tobacco Co. v. Am. Legacy Found.*, 903 A.2d 728, 738 (Del. 2006). According to a leading legal dictionary, the word "violation" denotes "[a]n infraction or breach of the law; a transgression." *Black's Law Dictionary* (11th ed. 2019). "[V]iolation" also can refer to "[t]he act of breaking or dishonoring the law" or "the contravention of a right or duty." *Id.* When compared to near-synonyms like breach, infraction, transgression, or contravention, the term "violation" generally connotes "a more serious disregard of the law or a willful indifference to the rights of others." Bryan A. Garner, *Garner's Dictionary of Legal Usage* 119 (3d ed. 2009). At a minimum, however, the term denotes conduct that transgresses what the law allows. If a Claim does not allege conduct that is

prohibited by law, it does not allege a violation; and if there is no actual or alleged violation, then the Claim is not a Securities Claim.

Second, the Securities Claim definition only encompasses Claims brought "for" a violation of the law. In its ordinary meaning, the preposition "for" is "[u]sed to indicate the object or purpose of an action or activity." *The American Heritage Dictionary* 329 (3d ed. 1994). To fall within the Securities Claim definition, therefore, a Claim cannot merely involve or relate to a violation of the law in some generalized sense. The violation must have actually or allegedly occurred in the past and must form the basis for the relief the Claim seeks. As one court has put it, the word "for" conveys that a Securities Claim must "seek redress in response to, or as requital of," a violation. *RSUI Indem. Co. v. Desai*, 2014 WL 4347821, at *4 (M.D. Fla. Sept. 2, 2014).

Third, in order to fall within the Securities Claim definition, a Claim "for a[] … violation" must be "made against an Insured." The phrase "made against an Insured," followed immediately by the phrase "for a[] … violation," conveys that the "violation" that forms the basis for the Claim cannot have been committed by just anyone—it must have been committed by Solera.

In sum, the plain text of the Primary Policy provides that a Securities Claim must seek relief on the ground that Solera engaged in past conduct that was unlawful.

2. The Appraisal Action Did Not Seek Relief Based on Unlawful Conduct

The Appraisal Action here did not seek relief based upon any kind of unlawful past conduct by Solera. By its nature, appraisal is a no-fault, post-merger mechanism to determine the "fair value" of a dissenting stockholder's shares and does not adjudicate the lawfulness of any past conduct by anyone.

a. The Statutory Text, Structure, History, and Purpose Show that the Appraisal Action Did Not Seek Relief Based on Unlawful Conduct

By statute, an appraisal under Section 262 is a no-fault judicial valuation. The statute describes an "appraisal" as a determination by the Court of Chancery of "the fair value of [a] stockholder's shares of stock." 8 *Del. C.* § 262(a).[4] A corporation must notify stockholders about their appraisal rights within 20 days before stockholders vote on whether to approve certain types of mergers and consolidations. *Id.* § 262(b), (d). Appraisal then is available to stockholders who (1) "continuously hold[] [their] shares through the effective date of the merger or consolidation," (2) "neither vote[] in favor of the merger or consolidation nor consent[] thereto in writing," and (3) "perfect[]" their rights by submitting a "written demand" to the corporation before the stockholder vote is held. *Id.* § 262(a), (d). After the

[4] Since the Appraisal Action, the General Assembly has amended Section 262 twice. *See* 82 Del. Laws 2019, ch. 45, § 15; 81 Del. Laws 2018, ch. 354, §§ 9, 10. All citations to Section 262 in this brief are to the version in force at the time of the Appraisal Action.

transaction closes, eligible stockholders who "elect[] to demand the appraisal of [their] shares" may commence an appraisal action "by filing a petition in the Court of Chancery demanding a determination of the value of the stock of all such stockholders." *Id.* § 262(d), (e). The Court of Chancery then must "determine the fair value of the shares … together with interest, if any, to be paid upon the amount determined to be the fair value." *Id.* § 262(h). When the proceedings conclude, "[t]he Court shall direct the payment of the fair value of the shares, together with interest, if any, by the surviving or resulting corporation to" the eligible stockholders. *Id.* § 262(i).

Notably, Section 262 does *not* require the parties in any merger or consolidation to ensure that the deal price reflects the "fair value" of the target corporation's shares. Instead, the statute provides an optional post-merger procedural mechanism whereby dissenting stockholders may choose to decline the negotiated deal terms and instead have the going-concern value of their shares determined by a court. As this Court has explained, "[b]y demanding appraisal, … a shareholder elects to withdraw from the corporate enterprise and take the value of his stock," as determined by the Court of Chancery. *Ala. By-Prod. Corp. v. Cede & Co. on Behalf of Shearson Lehman Bros.*, 657 A.2d 254, 258 (Del. 1995) (quotation marks omitted). Because stockholders may commence an appraisal action only after the merger or consolidation becomes effective, *see* 8 *Del. C.* § 262(a), (e), they may

not invoke Section 262 to enjoin the transaction before it occurs. And after the transaction closes, Section 262 does not authorize the Court of Chancery to unwind it. Rather, the judgment in an appraisal action always reflects a purely monetary award for the adjudged fair value of the eligible stockholders' shares, regardless of whether that value is equal to, greater than, or even—as here—*less* than the negotiated deal price. JA140-43; 8 *Del. C.* § 262(i).

The neutral purpose of appraisal reflects Section 262's historical origins. "At common law," before the appraisal statute was enacted, "no consolidation or merger of corporations could be effected except with the consent of all the stockholders." *Schenley Indus., Inc. v. Curtis*, 152 A.2d 300, 301 (Del. 1959). That scheme "brought about an intolerable situation, since one or more minority stockholders, if he or they desired to do so, could impede the action of all the other stockholders." *Id.* When that situation eventually "was changed by statute in Delaware[] to permit the consolidation or merger of two or more corporations without the consent of all the stockholders, it became necessary to protect the contractual rights of such stockholders … by providing for the appraisement of their stock and the payment to them of the full value thereof in money." *Id.* Appraisal thus "is a limited legislative remedy developed initially as a means to compensate shareholders of Delaware corporations for the loss of their common law right to prevent a merger or

consolidation by refusal to consent to such transactions." *Ala. By-Prod.*, 657 A.2d at 258.

Appraisal proceedings are similar to other court-supervised mechanisms that distribute monetary awards without a determination that any party acted unlawfully. Co-owners of real property, for example, may petition the Court of Chancery for "partition," which "eliminate[s] a present concurrent interest in the same property so that each owner may enjoy and possess his or her interest in severalty." *Peters v. Robinson*, 636 A.2d 926, 929 (Del. 1994); *see* Hon. Sam Glasscock III, *Ruminations on Appraisal*, Del. Lawyer 8, 9 (2017) (analogizing appraisal to partition). If physically dividing the property in question "will be detrimental to the interests of the parties entitled," the statute directs the court to order a sale of the property at auction and distribute the proceeds to the entitled persons. 25 *Del. C.* § 729; *see id.* § 730. Partition "is a statutory right that inheres in joint estates in real property," *Collins v. Collins*, 2017 WL 2983080, at *2 (Del. Ch. July 13, 2017), and co-owners may seek and obtain partition for any reason or no reason at all, without proving any violation of the law. Similarly, in divorce proceedings, Delaware law provides that the family court may distribute and assign marital property between the parties and award alimony "without regard to marital misconduct." 13 *Del. C.* §§ 1512(c), 1513(a).

Underscoring the no-fault nature of Section 262, the judgment in an appraisal action always runs solely against the surviving corporation, regardless of whether it was the target or the acquirer. 8 *Del. C.* § 262(i). That feature of Section 262 alone is inconsistent with any notion that the Appraisal Action here sought relief for unlawful conduct by Solera. If an appraisal action sought relief for wrongdoing, then logically the judgment should run against whomever the court finds to be the wrongdoer. But in every appraisal under Section 262, "[t]he respondent … is technically the surviving corporation," but "the real party in interest is the acquirer." *In re Stillwater Mining Co.*, 2019 WL 3943851, at *1 (Del. Ch. Aug. 21, 2019). In the Appraisal Action here, the dissenting stockholders' "true opponent" thus was not pre-merger Solera, but rather the private-equity acquirer. *Id.* Inasmuch as the acquirer owned Solera post-merger, it was the acquirer that effectively paid the adjudged fair value of the appraised shares, as well as the statutory prejudgment interest accruing thereon. JA140-43.[5]

[5] This feature of Section 262 reinforces that the Appraisal Action separately is not covered because it is not a Securities Claim brought "for a Wrongful Act," defined in the Primary Policy to include certain acts and omissions by Solera or its directors and officers. *See* JA154, 158. The Appraisal Action also is not covered under the Primary Policy's change-of-control provision. *See* JA162-63 ("If during the Policy Period there is a Change in Control, the coverage provided under this Policy shall continue to apply but only with respect to a Claim against an Insured for a Wrongful Act committed or allegedly committed up to the time of the Change in Control …."). Neither of these issues is currently before this Court.

Appraisal proceedings stand in stark contrast to traditional civil litigation, in which laws prescribe rules of conduct and then authorize injured parties to sue for redress if those rules are violated. The common law, for example, requires a corporation's directors to abide by certain fiduciary duties and allows injured stockholders to sue in the event of a breach. Directors can breach these fiduciary duties in the course of merger transactions—indeed, that is precisely what the plaintiffs in the Fiduciary Action alleged in connection with the merger here. *See Fiduciary Action*, 2017 WL 57839, at *5. Federal and state securities laws likewise may prohibit participants from making certain false or misleading statements in connection with a merger transaction, and injured parties may sue if those laws are broken as well. *See Halliburton Co. v. Erica P. John Fund, Inc.*, 573 U.S. 258, 267 (2014); 6 *Del. C.* § 73-605.

In contrast to traditional regulatory and enforcement laws that require or prohibit specified conduct or outcomes, Section 262 does *not* declare that the deal price in any merger or consolidation must reflect the "fair value" of the target corporation's shares. The *only* legal duty Section 262 imposes is to require the corporation to provide stockholders with notice of their appraisal rights not less than 20 days before the meeting at which the merger or consolidation is voted upon. *See id.* § 262(d). There has been no allegation that Solera violated that notice requirement. Beyond that notice requirement, the statute merely provides an

optional, no-fault, post-merger mechanism for dissenting stockholders to have their shares valued by a court.

To be sure, the General Assembly *could* have structured Section 262 differently to require the payment of "fair value" in specified transactions. In fact, the General Assembly did just that in Section 155. That statute provides that if a corporation effects a transaction that results in fractional shares, it may opt to compensate stockholders in lieu of issuing fractional shares, in which case the corporation "*shall* … pay in cash the *fair value* of [the] fractions of a share." 8 *Del. C.* § 155(a) (emphases added). The word "shall" unambiguously denotes a prescriptive requirement, which corporations can "violat[e]" if they pay less than fair value in lieu of issuing fractional shares. *Zutrau v. Jansing*, 2014 WL 3772859, at *42 (Del. Ch. July 31, 2014), *aff'd*, 123 A.3d 938 (Del. 2015).

Section 262, by contrast, contains no similar prescriptive requirement to pay fair value in a merger or consolidation. And "when provisions are expressly included in one statute but omitted from another, [this Court] must conclude that the General Assembly intended to make those omissions." *Leatherbury v. Greenspun*, 939 A.2d 1284, 1291 (Del. 2007). Indeed, this Court has held that "[t]he Delaware General Assembly could not have intended Section 155(2) to have the same meaning as the fair value concept employed in Section 262." *Applebaum v. Avaya, Inc.*, 812 A.2d 880, 892 (Del. 2002).

Section 155 thus reinforces that—beyond the notice requirement in Section 262(d)—nothing in Section 262 creates any legal right or duty that is capable of being "violat[ed]" in the course of a merger or consolidation. The statute merely enables dissenting stockholders, after the transaction closes, to decline the negotiated deal terms and instead have the "fair value" of their shares determined by the Court of Chancery. That determination has an unavoidable "human element," this Court has recognized, since "the factfinder is asked to choose between two competing, seemingly plausible valuation perspectives, forge its own, or apportion weight among a variety of methodologies." *Dell, Inc. v. Magnetar Glob. Event Driven Master Fund Ltd*, 177 A.3d 1, 22 (Del. 2017). In that context, "it is possible that a factfinder, even the same factfinder, could reach different valuation conclusions on the same set of facts if presented differently at trial." *Id.* If the factfinder concludes that "fair value" differs from the deal price, then that is what the surviving corporation must pay. But it does not mean that the deal participants are branded as lawbreakers who have engaged in prohibited conduct under Section 262.

b. Case Law Confirms that the Appraisal Action Did Not Seek Relief Based on Unlawful Conduct

In keeping with the statutory text, structure, purpose, and history, this Court has made clear that an appraisal action under Section 262 centers upon a "determination of fair value" and "does *not* involve an inquiry into claims of

wrongdoing in the merger." *Cede & Co. v. Technicolor, Inc.*, 542 A.2d 1182, 1189 (Del. 1988) (emphasis added). "The scope of [an] appraisal action," in other words, "is limited." *Cavalier Oil Corp. v. Harnett*, 564 A.2d 1137, 1142 (Del. 1989). "[T]he only litigable issue is the determination of the value of the appraisal petitioners' shares on the date of the merger, the only party defendant is the surviving corporation[,] and the only relief available is a judgment against the surviving corporation for the fair value of the dissenters' shares." *Cede*, 542 A.2d at 1187.

This Court has recognized that "[a]ppraisals are odd." *Dell*, 117 A.3d at 19. "In a statutory appraisal proceeding, both sides have the burden of proving their respective valuation positions by a preponderance of evidence." *M.G. Bancorporation, Inc. v. Le Beau*, 737 A.2d 513, 520 (Del. 1999). So "[u]nlike other cases, where one side loses if the other side fails to persuade the court that the evidence tilts its way, appraisals require the court to determine a number representing the fair value of the shares." *Dell*, 177 A.3d at 19-20 (footnote omitted).

Recognizing appraisal's atypical characteristics, this Court has held that claims under Section 262 must be analyzed separately from claims for breach of fiduciary duty. Non-appraisal fiduciary claims, after all, raise "issues which an appraisal cannot address." *Rabkin v. Philip A. Hunt Chem. Corp.*, 498 A.2d 1099, 1106 (Del. 1985). Indeed, this Court has even held that, because it would "impermissibly broaden the legislative remedy" under Section 262, a dissenting

stockholder may not "amend and enlarge its appraisal action to include … claim[s] … for conspiracy, illegality, fraud, … and breach of fiduciary duty." *Cede*, 542 A.2d at 1189.

In keeping with this Court's case law, the Court of Chancery has recognized that, even when appraisal and non-appraisal breach-of-fiduciary-duty claims are consolidated for administrative purposes, "[t]he breach of fiduciary duty claim seeks an equitable remedy that requires a finding of wrongdoing," while "[t]he appraisal proceeding seeks a statutory determination of fair value that does not require a finding of wrongdoing." *In re Trados Inc. S'holder Litig.*, 73 A.3d 17, 35 (Del. Ch. 2013). In such cases, the Court of Chancery takes care to ensure that any judgment in the fiduciary action runs against the wrongdoers, while any judgment in the appraisal action runs solely against the surviving corporation. *See Del. Open MRI Radiology Assocs., P.A. v. Kessler*, 898 A.2d 290, 344 (Del. Ch. 2006).

These teachings are reflected in the neutral, formulaic nature of the initial appraisal petition here. The express terms of the petition did not allege any wrongdoing leading up to the merger. The petition did not allege that the petitioner was injured or that the deal price was unlawful. In fact, the petition did not allege much of *anything* except that Solera entered into a merger and that the petitioner perfected its appraisal rights. *See* JA131-33. And when the case concluded, the petitioners obtained a significant monetary judgment, including prejudgment

interest, even though the court determined that the deal price was *greater* than fair value—again confirming the no-fault neutrality of Section 262.

Other than the decision below, Illinois National is not aware of any published decision by any Delaware court—or any other court interpreting Delaware law—that has ever stated that Section 262's references to "fair value" create a legal right or duty that a party or transaction can "violat[e]." That courts do not say that paying less than "fair value" is a "violation" of Section 262 is striking. Appraisal actions simply do not seek relief for any actual or alleged "violation" of the law. Because it is not a Claim for any "violation" of the law, the Appraisal Action here is not a Securities Claim.

3. The Decision Below Misconstrues the Primary Policy and Section 262

The Superior Court reached a contrary conclusion below only by misconstruing both the appraisal statute and the Primary Policy.

In its brief discussion of this issue, the Superior Court erred most seriously when addressing Section 262. In the court's view, a petition under that statute "necessarily alleges a violation of a law or rule." Ex. A at 12. The court therefore held that, "[u]nder Delaware law, shareholders have *the right* to receive 'fair value' for their shares when they are cashed out of their positions through certain types of mergers or consolidations," and "[b]y its very nature, a demand for appraisal is an allegation that the company contravened *that right* by not paying shareholders the

fair value to which they are entitled." *Id.* (emphases added). In a footnote, the Superior Court also suggested that the appraisal petition here was brought "for" a violation "because it sought a remedy 'in response to' what petitioners contended was a merger price that did not confer fair value on Solera's shareholders." Ex. A at 9 n.19.

But in fact, nothing in Section 262 guarantees stockholders a pre-merger "right" to any particular price in a merger or consolidation. Nor does the statute suggest that any such right is "violat[ed]" or "contravened" if a merger or consolidation closes at a negotiated deal price that is different from the "fair value" the Court of Chancery later determines in an appraisal. The Superior Court's assertions to the contrary lack supporting citations for a reason. As explained, an appraisal action does not seek relief for an allegedly unlawful deal price. It is simply an optional post-closing mechanism through which dissenting stockholders may "elect" a judicial determination of fair value. *Ala. By-Prod.*, 657 A.2d at 258.

As for the notion that an appraisal petition "[b]y its nature" "necessarily" alleges a "violation" or "contraven[tion]" of a right to receive fair value, Ex. A at 12, that is irreconcilable with both the record and the statute. The appraisal petition here contains no allegation that the "fair value" of the petitioner's shares was in fact greater than the deal price, let alone that the negotiated deal price violated dissenting stockholders' "right" to receive fair value. No such allegation is required under

Section 262, which provides that an appraisal action is commenced by "filing a petition in the Court of Chancery demanding a determination of the value of the [petitioner's] stock." 8 *Del. C.* § 262(e). In keeping with that plain statutory text, the initial petition here commenced the Appraisal Action not by alleging that the deal price was too low, but instead by simply requesting that the Court of Chancery "[d]etermine the fair value of Petitioner's Appraised Shares as of the Effective Date." JA133.

The Superior Court made no effort to square its ruling with the text, structure, purpose, or history of Section 262, or with the extensive case law holding that an appraisal action "does not involve an inquiry into claims of wrongdoing in the merger." *Cede*, 542 A.2d at 1189. At most, the court suggested that while an appraisal action may not adjudicate the existence of "wrongdoing," it does adjudicate the existence of a "violation." In the court's view, a "violation" is different from, and "broader" than, "wrongdoing." Ex. A at 11. While the court never fully explained this distinction, it suggested that "wrongdoing" might require a "showing of scienter," thereby excluding laws that "impos[e] strict liability." Ex. A at 11 & n.33. The court thus reasoned that "[i]f Defendants intended to limit coverage to claims alleging wrongdoing, the [Primary] Policy could have used limiting language." Ex. A at 11.

In ordinary parlance, however, the terms "violation" and "wrongdoing" are coextensive. The same edition of Black's Law Dictionary cited by the Superior Court defines "wrongful conduct" as "[a]n act taken in violation of a legal duty." *Black's Law Dictionary* (11th ed. 2019); *see* Ex. A at 11 n.31. Regardless, the Superior Court's hairsplitting distinction between "violation" and "wrongdoing" misses the critical point—that appraisal actions do not seek relief for *any* type of unlawful conduct in the triggering merger or consolidation, whether purposeful, reckless, negligent, strict liability, or otherwise. As the Court of Chancery has explained, appraisal actions do not adjudicate "wrongdoing" or even "*liability* on anyone's part." *Andra v. Blount*, 772 A.2d 183, 192 n.22 (Del. Ch. 2000) (emphasis added) (quotation source omitted).

Because the Appraisal Action did not seek relief for any past violation of Section 262 or any other law by Solera, it was not a Claim "made against an Insured for any actual or alleged violation." The Appraisal Action therefore is not a Securities Claim.

II. The Appraisal Action Is Not a "Securities Claim" Because Section 262 Is Not a Law "Regulating Securities"

A. Question Presented

Whether Solera carried its burden to establish coverage under the Primary Policy and follow-form excess policies by demonstrating that Section 262 is a "statute … regulating securities."

This Court may address this question on this appeal even though it was not the focus of the briefing or decision below. While the proceedings below centered on whether the Appraisal Action is a Securities Claim based on whether it is a Claim "for any actual or alleged violation" of the law, the Superior Court stated in a footnote that its "interpretation … constitutes its final resolution of the definition of a 'Securities Claim.'" Ex. A at 12 n.34.

Whether Section 262 is a "statute … regulating securities" also falls squarely within the questions certified for appeal. The Superior Court's September 26, 2019 certification order framed the first question presented for appeal broadly, stating that it concerned "the meaning of 'Securities Claim' within a D&O policy and whether an appraisal action is such a claim." Ex. C at 7. This Court's October 17, 2019, certification order likewise framed the first issue for appeal broadly as involving whether "an appraisal action is a 'Securities Claim' as defined in the [Primary] Policy." JA1574.

To the extent the question whether Section 262 is a "statute … regulating securities" was not "fairly presented to the trial court," this Court may address it in "the interests of justice." Del. Sup. Ct. R. 8. The Court has held that "the interests of justice require that [the Court] decide [an] issue," for example, where "(1) the issue is outcome-determinative and may have significant implications for future cases; and (2) [the Court's] consideration of the issue will promote judicial economy because it will avoid the necessity of reconsidering" the issue later. *Sandt v. Del. Solid Waste Auth.*, 640 A.2d 1030, 1034 (Del. 1994). Here, this issue is outcome-determinative if resolved in the insurers' favor. The issue also is highly significant, as the term "regulating securities" appears in numerous D&O policies and appraisal actions are a common form of merger litigation. *See* David F. Marcus et al., *Appraisal Litigation in Delaware: Trends in Petitions and Opinions (2006-2018)*, Cornerstone Research (2019), http://bit.ly/37rdeOh. And addressing this issue now will avoid the need for the Court to address the very same issue in a later appeal from final judgment. Furthermore, on October 31, 2019—after the decision below—this Court issued an intervening decision resolving the meaning of the term "regulating securities" in a materially identical Securities Claim definition. *See Verizon*, 2019 WL 5616263.

At a minimum, if the Court declines to address this issue now and does not end the case by reversing on the first question presented, the Court's opinion should

make clear that the insurers remain free to raise this issue on remand before the Superior Court. In joining ACE and Federal's motion below, Illinois National and other insurers "expressly reserve[d] their right[]" to assert "additional defenses to coverage"—including additional defenses based on other elements of the Securities Claim definition. JA461, 1381.

B. Scope of Review and Legal Standard

The applicable scope of review and governing rules of contract interpretation are set forth in Part I.B, *supra*.

C. Merits of Argument

Even if the Appraisal Action somehow were a Claim "made against an Insured for an[] actual or alleged violation of" a law, it still falls outside the Securities Claim definition because it does not involve any actual or alleged violation of a law "regulating securities." This Court recently held in *Verizon* that the term "regulating securities" is limited to laws that are "specifically directed towards securities." *Verizon*, 2019 WL 5616263, at *5. Here, Section 262 is directed not towards securities, but towards the internal relationship between dissenting stockholders and the corporation in the context of mergers and consolidations. And even if Section 262 somehow were directed towards securities, it does not control or "regulat[e]" that area, but instead provides an optional mechanism for dissenting stockholders to obtain a judicial determination of the "fair value" of their shares.

1. Section 262 Is Not a Law "Regulating Securities" Because It Is Directed at Mergers and Consolidations, Not Securities

In *Verizon*, this Court held that the term "regulating securities," as used in a D&O insurance policy Securities Claim definition, did not encompass laws that merely touch upon securities. Rather, to "regulat[e] securities," a law must be "specifically directed towards securities, such as the sale, or offer for sale, of securities." *Verizon*, 2019 WL 5616263, at *5. For that reason, the Court determined that provisions of the Delaware General Corporation Law ("DGCL") governing unlawful dividends, state and federal fraudulent transfer statutes, and common-law doctrines related to fiduciary duties, unjust enrichment, and alter ego all do not "regulat[e] securities." *Id.* at *6-7. The Court therefore held that an underlying Claim asserting violations of those laws was not covered as a Securities Claim. *Id.* at *10.

In reaching this conclusion, the Court in *Verizon* relied principally on the "plain meaning" of the term "regulating securities." *Id.* at *1, 3, 5-6, 9. The Court also relied upon decisions by other courts addressing "the same or similar issues"—both in the insurance context and "in other contexts," such as federal court decisions interpreting ERISA. *Id.* at *5-6 & n.43. And the Court's interpretation was "confirmed by the fundamental rule of contract interpretation to give effect to all terms of the instrument." *Id.* at *6 (quotation marks omitted). The Securities Claim definition at issue, the Court explained, "separately require[d] [that] the claim either

arise from a 'purchase or sale' of securities or be brought 'by a security holder.'" *Id.* That requirement already "separately establishes a connection to a securities transaction." *Id.* As a result, the law allegedly violated in a Securities Claim "must be directed specifically towards securities laws for 'regulating securities' to have meaning in the definition." *Id.*

In applying that interpretation to the particular laws at issue, the Court in *Verizon* focused on each law's "regulatory purpose." *Id.* at *7. For each underlying cause of action, the Court concluded that securities were "incidental" to the law's purpose. *Id.* Fiduciary duties, the Court explained, regulate relationships of "special trust." *Id.* at *6. Fraudulent transfer statutes "prevent debtors from prejudicing creditors by moving assets beyond their reach." *Id.* at *7 (quotation marks omitted). The DGCL's unlawful dividend provisions "regulate dividends, not securities." *Id.* And unjust enrichment is a general "equity-based claim," while "the alter ego doctrine is focused on fraud in the corporate form." *Id.*

Here, the Securities Claim definition in the Primary Policy has all the same elements that this Court relied upon in *Verizon*. It uses the term "regulating securities" in the same fashion and contains a materially identical requirement that a Securities Claim must either "result[] from" a "purchase or sale … of securities" or be "brought by a security holder." JA157. And the insurance and ERISA cases cited in *Verizon* are equally applicable here. As in *Verizon*, the term "regulating

securities" therefore is limited to laws that are "specifically directed towards securities." 2019 WL 5616263, at *5.

Applying that plain meaning here, the "regulatory purpose" of Section 262—to the extent it has any "regulatory" purpose at all—is not specifically directed towards securities. Rather, the statute governs the internal corporate relationship between dissenting stockholders and the corporation in the context of mergers and consolidations. As explained above, Section 262 compensates dissenting stockholders for the loss of their common-law right to veto mergers and consolidations—entity-level transactions that effect a fundamental change in the corporate enterprise. When such a transaction is negotiated, some stockholders may value their ownership interests more highly than the deal price. But without common-law veto rights, dissenting stockholders are unable to insist that the deal price reflect their higher valuations, since they can be outvoted by the majority. The appraisal statute accordingly permits dissenting stockholders to decline the deal terms negotiated by the corporation and approved by a majority of stockholders, enabling them instead to have the "fair value" of their shares determined by the Court of Chancery. Section 262 thus protects the ability of dissenting stockholders to seek to vindicate their own perceived valuations of their shares in connection with their exit from the corporation, while preventing minority holdouts from blocking merger or consolidation transactions altogether.

In keeping with its focus on internal corporate governance in the mergers-and-consolidations context, the appraisal statute is codified in the DGCL—Chapter 1 of Title 8 of the Delaware Code. The DGCL, of course, is a general corporate statute governing the formation of corporations, their structure and powers, and the rights and obligations of various stakeholders. Section 262 in particular is codified in Subchapter IX, which governs the "Merger, Consolidation or Conversion" of corporations. The unlawful dividend provisions at issue in *Verizon* are codified nearby in Subchapter V, governing "Stocks and Dividends." Notably, the appraisal statute is *not* codified as part of the Delaware Securities Act—Delaware's blue-sky law—which is set forth in Chapter 73 of Title 6.

In this respect, the appraisal statute bears a striking resemblance to the provisions at issue in *Michigan Carpenters Council Health & Welfare Fund v. C.J. Rogers, Inc.*, 933 F.2d 376 (6th Cir. 1991), which this Court cited favorably in *Verizon*, *see* 2019 WL 5616263, at *5 n.43. The Sixth Circuit in *Michigan Carpenters* held that certain provisions of the Michigan Business Corporation Act governing creditors' rights did not "regulate … securities" under ERISA's preemption savings clause, 29 U.S.C. § 1144(b)(2)(A). *See* 933 F.2d at 383-84. The "express purposes" of the Michigan Business Corporation Act, the court explained, were "to simplify and modernize the law governing business corporations; provide a general corporate form for the conduct or promotion of a lawful business; and to

give special recognition to the legitimate needs of close corporations." *Id.* The court acknowledged that the provisions at issue "undisputedly" *related* to securities, because "any statutory provision which redefines a creditor's right in a corporation necessarily has an impact upon 'securities.'" *Id*. "That is not to say, however, that the Michigan Act was designed to 'regulate securities.'" *Id*.

"To the contrary," the court explained, only the separate state *securities* act qualified as "regulating securities." *Id.* at 383-84. That separate law—Michigan's blue-sky law—was "designed to protect the public against fraud and deception in the issuance, sale, exchange, or disposition of securities within the State of Michigan by requiring the registration of certain securities and transactions." *Id.* at 384 (quotation source omitted). In other words, state blue-sky laws regulate securities, but general corporate governance laws do not.

Here, Section 262 is part of a general corporate governance law, not a state blue-sky law. That fact reinforces that—even though mergers and consolidations *relate* to securities—the appraisal statute is not "specifically directed towards securities" and falls "outside the securities regulation area." *Verizon*, 2019 WL 5616263, at *5. For that reason, Section 262 is not a law "regulating securities," and the Appraisal Action is not a Securities Claim.

2. Section 262 Is Not a Law "Regulating Securities" Because It Does Not Prescribe Rules for Securities Transactions

Even if the appraisal statute were directed towards securities in some sense, it independently is not a law "regulating securities" because it does not seek to control how securities transactions are conducted by prescribing rules or restrictions that parties to such transactions must follow.

By its ordinary meaning, the verb "regulate" means "[t]o control (an activity or process), esp[ecially] through the implementation of rules." *Black's Law Dictionary* (11th ed. 2019). As other dictionaries put it, to "regulate" is "[t]o control or direct according to rule," *The American Heritage Dictionary* 695 (3d. ed. 1994), or "by means of rules and restrictions," *Oxford American Dictionary* 761 (Heald Coll. ed. 1980). Similarly, the noun "regulation" typically refers to "a specific prescription by authority for the control or management of an agency, organization, system, or industry." Bryan A. Garner, *Garner's Dictionary of Legal Usage* 790 (3d ed. 2009).

Accordingly, as *Verizon* holds, in order to qualify as a law "regulating securities," a law must be specifically directed towards securities—but that alone is not enough. In addition, the law also must control or direct the securities industry or securities transactions by prescribing rules or restrictions that relevant parties must follow. And Section 262 simply does not do that.

As explained above, by its terms, Section 262 does not require that the deal price in any merger or consolidation must reflect the "fair value" of the target corporation's shares. Indeed, beyond the notice requirement in Section 262(d), the statute does not prescribe *any* rule or impose *any* restriction on what the parties to a merger or consolidation transaction may or may not do consistent with the law. Nor does the statute authorize enjoining or unwinding any transaction. The text, structure, purpose, and history of Section 262 all make clear that appraisal is merely an optional, no-fault mechanism whereby dissenting stockholders may decline the negotiated deal terms and elect instead to have their conceptions of "fair value" weighed and resolved by a court. Section 262 stands in contrast to traditional securities regulations like SEC Rule 10b-5 or the Delaware Securities Act, which control and direct securities-related activities by prescribing rules of conduct in connection with securities transactions. Those kinds of laws "regulat[e]" securities; Section 262 does not.

For all these reasons, Section 262 is not a "statute … regulating securities." The Appraisal Action therefore is not a Securities Claim, and Solera's claimed losses resulting from that action are not covered under the Primary Policy or Illinois National's or the other insurers' excess policies.

CONCLUSION

The decision of the Superior Court should be reversed.

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