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IN THE SUPREME COURT OF THE STATE OF DELAWARE

RSUI INDEMNITY COMPANY,

Plaintiff Below, Appellant/Cross-Appellee,

v.

DAVID H. MURDOCK and DOLE FOOD COMPANY, INC.,

Defendants Below, Appellees/Cross-Appellants,

No. 154,2020

Court Below - Superior Court of the State of Delaware

C. A. N16C-01-104 EMD CCLD

PUBLIC VERSION
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APPELLANT'S OPENING BRIEF

June 23, 2020

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NATURE OF PROCEEDINGS

On April 8, 2016, plaintiff-appellant RSUI Indemnity Company ("RSUI") filed an Amended Complaint for Declaratory Relief against defendants-appellees David H. Murdock, Dole Food Company ("Dole"), and DFC Holdings, LLC ("DFC"), and defendant C. Michael Carter (subsequently dismissed by stipulation). (A0356-A0385).[1] The Amended Complaint sought a declaration that insurance coverage under RSUI's excess policy No. NHS648907 ("the RSUI Policy"), which follows-form to a primary policy issued by AXIS Insurance Company, was not available for a settlement reached by Murdock, Carter, and DFC in connection with a lawsuit filed in Delaware's Court of Chancery, styled *In re Dole Food Co., Inc. Stockholder Litig.,* C.A. No. 8703-VCL (Del. Ch.) ("the *Stockholder* Action").[2]

On January 6, 2017, defendants-appellees filed counterclaims against RSUI alleging breach of contract. (A0805-A0832). On April 18, 2017, Dole filed an Amended Counterclaim against RSUI alleging another breach of contract under the RSUI Policy in connection with a second settlement reached by Murdock, Carter,

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[1] "A ___" references are to the Appendix to Appellant's Opening Brief filed contemporaneously with this brief.

[2] RSUI was joined in its complaint by five other excess insurers. (A0358-A0359). Those insurers were subsequently voluntarily dismissed and are not parties to this appeal. *See* D.I. 215, 220, 246, 320, and 517 (A0143; A0145; A0154; A0191; A0348).

and Dole in a lawsuit filed in the United States District Court for the District of Delaware, styled *San Antonio Fire & Police Pension Fund v. Dole Food Co., Inc.,* No. 1:15-CV-01140 (D. Del.) ("the *San Antonio* Action"). (A0873-A0917).

At issue in this case is RSUI's assertion that coverage is not available for the settlements of the *Stockholder* or *San Antonio* Actions because, among other reasons, (1) Murdock and Carter were found by Delaware's Court of Chancery to have committed fraud; (2) Murdock's and Carter's liability was based, at least in part, on actions taken outside their insured capacities; and (3) DFC, which is not an insured under the RSUI Policy, was found jointly and severally liable in the *Stockholder* Action, but did not pay anything towards that settlement. (A0379-A0382). RSUI asserts the settlements are not covered under the Policy language and are uninsurable as a matter of public policy, and even if partially covered, RSUI is entitled to allocation between covered and non-covered loss.

On April 28, 2016, defendants-appellees filed a motion to dismiss RSUI's Amended Complaint. (A0486-A0504). On December 21, 2016, the Superior Court granted in part and denied in part the motion, dismissing Count II (Subrogation) of the Amended Complaint as against Murdock and Carter and holding as a matter of law that Exclusion IV.6., which precludes coverage for fraudulent acts, did not preclude coverage for the *Stockholder* Action.[3] (Ex. A at 10-16).

On June 30, 2017, RSUI filed its first motion for summary judgment. (A0947-A0999). On March 1, 2018, the Superior Court granted in part and denied in part the motion, determining:

1. The collateral estoppel doctrine applies to Appellees with respect to the August 27, 2015 decision reached by the Court of Chancery in the *Stockholder* Action[4] (Ex. B at 11-15);

2. Delaware law, and not California law, applies to interpret the insurance policies (Ex. B at 15-21);

3. Delaware law does not prohibit insurance coverage for fraud (Ex. B at 21-23);

4. Summary judgment was premature on the remaining issues (Ex. B at 23-28); and

5. Appellees' fraudulent inducement counterclaims failed as a matter of law (Ex. B at 28-29).

On August 22, 2018, RSUI filed a motion to vacate or revise the Superior Court's choice of law determination in its March 1, 2018 summary judgment ruling based on a new Delaware Supreme Court case and additional discovery. (A1451-

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[3] The Opinion and Order Upon Defendants' Motion to Dismiss (Trans. ID 59981712) (D.I. 48) is attached as Exhibit A.

[4] The Opinion and Order Upon Plaintiffs' Motion for Summary Judgment (Trans. ID 61746514) (D.I. 249) is attached as Exhibit B.

A1469). At a hearing held on December 7, 2018, the Superior Court denied the motion from the bench.[5] (Ex. C at 20-23).

On August 22, 2018, the parties filed cross-motions for summary judgment. (A2124-A2268). On May 7, 2019, the Superior Court granted in part and denied in part the cross-motions, determining:

1. The settlements in the *Stockholder* and *San Antonio* Actions constituted covered "Loss" under the RSUI Policy[6] (Ex. D at 19-21); and

2. Issues of material fact existed with respect to application of the RSUI Policy's cooperation and consent provisions (Ex. D at 21-26).

On January 17, 2020, the Superior Court issued a memorandum opinion in response to the parties' cross-motions, determining that the "Larger Settlement Rule", instead of Section VIII.A. of the AXIS Primary Policy, applied to any allocation between covered and non-covered loss for the settlements of the *Stockholder* and *San Antonio* Actions.[7] (Ex. E at 12-17).

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[5] The Proceedings Worksheet (Trans. ID 62743452) (D.I. 388) and Transcript of Motions Hearing (Trans ID 65587784) (D.I. 528) are attached as Exhibit C.

[6] The Opinion and Order Upon Insurers' Second Motion for Summary Judgment (Trans. ID 63237865) (D.I. 398) is attached as Exhibit D.

[7] The Memorandum Opinion and Order on Allocation (Trans. ID 64633009) (D.I. 478) is attached as Exhibit E.

On March 26, 2020, the parties filed a stipulation whereby RSUI withdrew its claims and defenses under the consent and cooperation provisions of the RSUI Policy. (D.I. 523). RSUI stipulated that there were no genuine issues of material fact concerning application of the facts to the "Larger Settlement Rule", such that if Defendants prevail on appeal on this issue, no trial would be necessary on allocation. The parties agreed that no issues remained for trial and judgment was entered against RSUI.[8] (Ex. F). This appeal followed.

[8] The Entry of Final Judgment (Trans. ID 65541806) (D.I. 524) is attached as Exhibit F.

SUMMARY OF ARGUMENT

1. The Superior Court erred in holding that Delaware law, and not California law, applies to interpret the RSUI Policy and AXIS Primary Policy. The overwhelming evidence demonstrates that the policies were contracted, negotiated, and managed in California and covered insured directors and officers of Dole who worked primarily from Dole's corporate headquarters in Westlake Village, California. The sole connection to Delaware was Dole's state of incorporation, but that factor is insignificant under established Delaware law and application of the Second Restatement's "most significant relationship" analysis. The Superior Court's application of Delaware law is contrary to *Travelers Indem. Co. v. CNH Indus. Am., LLC*, 191 A.3d 288 (Del. 2018) (Table) ("*CNH*") and creates an unprecedented, categorical, and inflexible rule that Delaware law applies to every directors and officers policy issued to any company incorporated in this state, notwithstanding any other factors.

2. The Superior Court erred in concluding that Murdock's and Carter's fraud, and the settlements and liability resulting from their fraud, are insurable under the RSUI Policy. Fraud is uninsurable under California Insurance Code Section 533. The Superior Court erred in applying Delaware law instead of California law. Even

if Delaware law were to apply, Delaware law and public policy should likewise dictate that fraudulent conduct is uninsurable.

3. The Superior Court erred in concluding that Exclusion IV.6. (the Profit/Fraud Exclusion) of the AXIS Primary Policy did not apply to the settlements of the *Stockholder* and *San Antonio* Actions. The Exclusion applies to any "fraudulent act, error or omission by the Insured; if established by a final and non-appealable adjudication adverse to such Insured." The Court of Chancery in the *Stockholder* Action found Murdock and Carter committed fraud, and that decision became final and non-appealable when Appellees chose to settle *Stockholder* and forego an appeal. The *San Antonio* Action was based upon and arose out of the Court of Chancery's findings of fraud in *Stockholder*.

4. The Superior Court erred in concluding that Section VIII.A. (the Allocation provision) of the AXIS Primary Policy did not apply to the settlements of the *Stockholder* and *San Antonio* Actions. The Superior Court incorrectly applied the "Larger Settlement Rule", which is contrary to the plain language of the Policies and reads out the requirements of Section VIII.A. agreed upon by the contracting parties.

STATEMENT OF FACTS

I. The *Stockholder* Action

In 2013, Murdock (Dole's Chairman, CEO, and 40% largest shareholder) took Dole private by having the acquisition company he owned, DFC, pay $13.50/share to purchase Dole's stock. (A1065). Before the merger closed, Dole stockholders began to file lawsuits challenging the merger's fairness. The cases of those who tendered shares were consolidated in the *Stockholder* Action. (*Id*.). Those who had not tendered shares sought an appraisal pursuant to 8 *Del. C.* § 262, consolidated in *In re Appraisal of Dole Food Co., Inc.*, C.A. No. 9079-VCL (Del. Ch.) (the "*Appraisal* Action"). (*Id*.). In the *Stockholder* Action, the class plaintiffs alleged Murdock and Carter (Dole's COO and General Counsel) engaged in misleading and deceptive practices to drive the price of Dole common stock down before the merger in order to obtain an unfairly low price for Murdock's benefit. (A1009).

On August 27, 2015, after a nine-day trial, Vice Chancellor J. Travis Laster found that "Murdock and Carter's pre-proposal efforts to drive down the market price and their fraud during the negotiations reduced the ultimate deal price by 16.9%." *In re Dole Food Co., Inc. Stockholder Litig.*, 2015 WL 5052214 (Del. Ch. Aug. 27, 2015) (the "*August 27, 2015 Decision*") (A0388, A0419). The Court found that Carter "intentionally [gave] the market a subterranean estimate" of cost savings

Dole was expecting. (A0407). Carter also misled the market about the reasons for suspending a share repurchase plan that the Board had approved only three weeks earlier, knowing that "the announcement would drive down the stock price," and "Dole's stock price tumbled 10% after the announcement." (*Id.*).

After Murdock delivered his initial proposal to the board, Carter gave the Special Committee "a set of projections that contained falsely low numbers," (A0408), one day before telling Murdock's lenders that "Dole would outperform" those projections, likely by $18-19 million. (A0401). Carter also provided the Special Committee different budgets and projections than those prepared a month later to run the Company post-merger. (A0409). The Court found the "contrast" in these numbers "confirm[ed]" a "fraud." (*Id.*).

The Court of Chancery found that:

- "Murdock and Carter's conduct throughout the Committee process, as well as their credibility problems at trial, demonstrated that their actions were not innocent or inadvertent, but rather intentional and in bad faith," (A0388);
- "The evidence at trial established that the Merger was not a product of fair dealing … Carter engaged in fraud," (A0406);
- "The projections Carter provided were knowingly false. Carter intentionally tried to mislead the Committee for Murdock's benefit," (A0409);
- Carter "engaged in fraud, misrepresentation, self-dealing, [and] gross and palpable overreaching," (A0413);

- Murdock "breached his duty of loyalty by orchestrating an unfair, self-interested transaction" and "derived an improper personal benefit," (A0414);

- "Carter demonstrated that his primary loyalty was to Murdock, not to Dole or to its unaffiliated stockholders. Through Dole, Murdock was Carter's employer, and Carter would continue to run Dole for Murdock after the Merger. Carter knew of Murdock's plans at least as early as January 2013, and he consistently acted to promote Murdock's interests." (A0414); and

- Murdock and Carter engaged in "fraud" during the negotiations with respect to the transaction. (A0419).

The Court of Chancery also concluded DFC aided and abetted Murdock's breach as a result of DFC's being the acquisition vehicle its controlling shareholder, Murdock, used to effectuate the unfair merger. (A0414).

The Court of Chancery awarded damages as follows: "Under these circumstances, assuming for the sake of argument that the $13.50 price still fell within a range of fairness," the Court ruled that "the stockholders are not limited to a fair price. They are entitled to a fairer price ***designed to eliminate the ability of the defendants to profit from their breaches of the duty of loyalty***. This decision holds Murdock and Carter jointly and severally liable for damages of $148,190,590.18, representing an incremental value of $2.74 per share," making the total $16.24. (A0388) (emphasis added).

Murdock, Carter, and DFC thereafter negotiated a settlement term sheet with the *Stockholder* plaintiffs (executed November 5, 2015) without the consent of the insurers, under which Murdock agreed to pay 100% of the award of the Court of Chancery, plus interest. (A0793, Ex. B at 25). Neither Carter nor DFC were asked to contribute to the settlement. (A0794). The settlement was approved on February 10, 2016 and final judgment was entered. (A0919-A0931).

II. The *San Antonio* Action

On December 9, 2015, two days after the motion for approval of the *Stockholder* settlement was filed, the San Antonio Fire & Police Pension Fund sued Dole, Murdock and Carter in federal court on behalf a putative class of those who sold Dole's common stock between January 2 and October 31, 2013 (A0891, A1125-A1223). In Dole's words, the San Antonio plaintiffs alleged that Dole, Murdock and Carter "made a series of false and misleading statements about Dole's operations and finances that were intended to deceive the investing public and artificially lower the price of Dole's stock so that Murdock could buy that stock at a reduced price." (A0891). "The plaintiffs alleged that they suffered financial losses by selling Dole stock at artificially reduced prices as a result of these false and misleading statements," in violation of §§10(b) and 20(a) of the Securities Exchange Act of 1934 and Rule 10b-5. (A0891-A0892).

As Dole stated in answering the *San Antonio* Complaint, the *San Antonio* allegations "ride the coattails of Vice Chancellor Laster's memorandum opinion" and "rely almost entirely on reflexive citation to that opinion." (A1002). The *San Antonio* Plaintiffs "quoted testimony from and referred to the Chancery Court's opinion in the *Stockholders Lawsuit* throughout the complaint." (A0892). The complaint stated: "[r]emarkably, a court has already held Defendants Murdock and Carter liable for the misconduct alleged herein". (A1131).

In November 2016, Dole, Murdock, and Carter informed the insurers that they had agreed to mediate *San Antonio* before a private mediator. (Ex. B at 7; A0968-A0969). The mediation took place on January 9, 2017. (A0895). At the time, the insurers informed Appellees they did not have sufficient information to evaluate *San Antonio* or any proposed settlement. (Ex. B at 8; A0971-A0972). Dole, Murdock, and Carter then settled the *San Antonio* Action at the mediation, without insurer consent, for $74 million. (Ex. B at 8-9; A0972).

III. The Insurance Policies

RSUI issued an excess directors and officers liability policy to Dole for the policy period of October 31, 2012 to October 31, 2013, which provided for insurance limits of $10 million in excess of underlying policies totaling $75 million and a $500,000 self-insured retention. (A0465-A0485). The RSUI Policy follows form to a primary policy issued by AXIS Insurance Company ("the AXIS Primary Policy"). (A0429-A0463).

Provisions of the AXIS Primary Policy at issue in this appeal include the Profit/Fraud exclusion in Section IV. 6 (as amended by Endorsement No. 3) (A0453) and the "Allocation" provision in Section VIII.A. (A0440-A0441). RSUI recites the specific language for these provisions in the argument Sections III and IV below.

IV. Facts and Claims Not At Issue In This Appeal

RSUI's Amended Complaint also disputed whether or not Appellees breached the Policies' consent and cooperation provisions when they entered into the *Stockholder* and *San Antonio* settlements without the insurers' prior written consent, (A0381), and addressed the issues on summary judgment. (A0949-A0999; A2126-A2166). The Superior Court determined that questions of fact remained for trial. (Ex. B at 23-28; Ex. D at 21-27). After the issues remaining were narrowed by the Superior Court, RSUI elected to withdraw its claims and defenses under the consent and cooperation provisions of its Policy with prejudice. (Ex. F). Accordingly, those issues are not the subject of this appeal.

RSUI's Amended Complaint also asserted it was entitled to allocate between covered and non-covered "Loss" based on application of Section VIII.A. of the AXIS Primary Policy. (A0381-A0382). After the Superior Court determined that

Section VIII.A. did not apply and instead applied the "Larger Settlement Rule" (Ex. E at 12-17), RSUI chose to stipulate that if the "Larger Settlement Rule" applied, judgment in Appellees favor was appropriate under the law of the case. (Ex. F). Accordingly, the application of facts to the "Larger Settlement Rule" is not a subject of this appeal, rather application of the Rule itself, and whether it overrides Section VIII.A. of the Policy, is a subject of this appeal.

ARGUMENT

I. California Law Should Apply to Interpret the Insurance Policies.

A. Question Presented:

Did the Superior Court err in concluding that Delaware law, not California law, applies to the interpretation and enforcement of AXIS Primary Policy and RSUI Policy?

RSUI preserved the question in the Superior Court in its briefs in support of its first motion for summary judgment (A0949-A0999; A1275-A1303) and motion to vacate or revise the Superior Court's summary judgment decision (A1451-A1469).

B. Scope of Review:

Whether the Superior Court properly granted a motion to dismiss is reviewed *de novo*. *Central Mortgage Co. v. Morgan Stanley Mortgage Capital Holdings LLC*, 27 A.3d 531, 535 (Del. 2011). The Superior Court's interpretation of an insurance contract is also reviewed *de novo*. *ConAgra Foods, Inc. v. Lexington Ins. Co.*, 21 A.3d 62, 68 (Del. 2011).

C. Merits of the Argument:

RSUI challenges the rulings of the Superior Court that Delaware law applies to interpret the insurance policies. Instead, California law should apply. As will be discussed in Section II below, the Superior Court found a distinction between Delaware and California law that is outcome determinative. Under California law, Appellees are precluded from recovering insurance proceeds for liability and settlements stemming from fraud. While it is an issue of first impression, the Superior Court determined that fraud is insurable under Delaware law, which is another subject of this appeal discussed in Section II.

The Superior Court's choice of law determination departs from well-established precedent of this Court and is contrary to undisputed facts demonstrating the overwhelming focus of the insurance contracts is in California. Dole's insurance policies were contracted, negotiated, and managed exclusively in California and, aside from the fact that Dole happened to be incorporated in this state until 2016, the insurance contracts had no contact whatsoever with Delaware. The Superior Court impermissibly created an inflexible rule that choice of law for directors and officers insurance policies is conclusively determined solely by the insured's state of incorporation, no matter how strongly other contacts compel application of the law of another state.

1. Delaware Choice of Law Principles.

Delaware follows the Second Restatement's "most significant relationship" analysis when considering choice of law in contract disputes. *Certain Underwriters* *at Lloyd's, London v. Chemtura Corp.*, 160 A.3d 457, 464 (Del. 2017) ("*Chemtura*"). Absent a choice of law provision or agreement between the parties, and in the event of a conflict of laws, Delaware courts undertake to determine which state has the most significant relationship with the contract in accordance with §6 and §188 of the Second Restatement. *Id*. The §188 factors include:

(a) the place of contracting,

(b) the place of negotiation of the contract,

(c) the place of performance,

(d) the location of the subject matter of the contract, and

(e) the domicile, residence, nationality, place of incorporation and place of business of the parties.

Chemtura, 160 A.3d at 465.

With respect to insurance contracts, §193 of the Second Restatement presumes that the law of the state of the principal location of the risk applies as that state will typically have the most significant relationship. *Id*. The §188 factors and the §193 presumption are evaluated "based on their relative importance in the particular case and in light of the Second Restatement's general considerations found in §6." *Id*.

Applying these principles, another Delaware court has held: "[T]he most significant factor for conflict of laws analysis in a complex insurance case with multiple insurers and multiple risks *is the principal place of business of the insured because it is 'the situs which link[s] all the parties together*.'" *Liggett Group, Inc. v. Affiliated FM Ins. Co.*, 788 A.2d 134, 138 (Del. Super. Ct. 2001) (citation omitted) (emphasis added). Where insurers "are located among many different states, the insured's principal place of business naturally assumes a greater significance in the Court's conflict of laws analysis." *Id*.

In *Travelers Indemnity Company v. CNH Industrial America, LLC*, 191 A.3d 288, this Court reinforced its decision in *Chemtura*, stating:

> [W]hen dealing with a corporate insurance program covering risks across many jurisdictions, the dispute is not about the underlying claims triggering insurance coverage. Rather, it is better described as a contract dispute involving interpretation of the insurance policies. And the justified expectations of the parties "are best served by providing terms in the contract with a meaning that does not vary based on the happenstance of the locations of a particular claim." Second, the subject matter of the contracts is not the narrow coverage claims regarding liability at two specific sites. Instead, the subject matter is the policies that "provide expansive non site-specific coverage, throughout the United States." Thus, the court should not be constrained by the particular claims in a suit when deciding the choice of law issue.

Id. ¶ 15. "[T]he question is which state has a material interest in applying its law to the interpretation of the insurance contracts – not [the underlying] liabilities. *Id*. ¶ 18. *See also Homeland Ins. Co. of New York v. CorVel Corp.*, 197 A.3d 1042, 1046 n. 13 (Del. 2018) (centrality of California to nationwide insurance relationship significant).

2. The Superior Court's Choice of Law Determination

In its March 1, 2018 decision, the Court determined that California and Delaware law conflicted as to whether insurance can indemnify Appellees for fraud, and concluded that Delaware law applies to interpret the Policies. (Ex. B at 15-21). The Superior Court stated that the following factors informed its decision under the choice of law analysis:

- Dole is a Delaware corporation and Murdock and Carter are directors and officers of a Delaware corporation. (Ex. B. at 21).
- The suit was brought by stockholders of Dole in the Chancery Court [of Delaware]. (*Id.*).
- The situs of Dole's stock is Delaware. (*Id.*); and
- The Chancery Court applied Delaware law in holding that the duty of loyalty had been breached and that the value of Dole's stock had been artificially decreased due to fraudulent conduct. (*Id.*).

On March 9, 2018, RSUI applied for certification of an interlocutory appeal of the Superior Court's summary judgment decision (A1419-A1425), which the Superior Court denied (A1439-A1446). In denying the application, the Superior Court stated:

> Moreover, the Court did not only look to the place of incorporation in determining whether Delaware or California law should apply. The Court looked at all relevant contacts with Delaware—place of incorporation, Delaware officers and directors, location of the underlying lawsuits, application of Delaware law in the underlying lawsuits, situs of the stock at issue. Understanding the reality that the

> facts underlying the fraud occurred in California, the Court still decided that Delaware, and its law, had the more significant interest in the interpretation of the Policies.

(A1443).

On August 22, 2018, RSUI moved the Superior Court to vacate or revise its choice of law determination based upon *CNH* and in light of additional undisputed facts revealed in discovery. (A1451-A1469). On December 7, 2018, the Superior Court denied RSUI's motion, stating:

> Well, there's a difference between [*CNH*] and *Chemtura*. [*CNH*] is not an opinion. You have to look at it's another […] order, and basically, you know, may have been giving me too much credit, but they were basically saying, look, the law changed between the time Judge Davis issued his opinion and this appeal, and so, you know, it's not really his fault, but I'm not going to go there, because, I mean, you know, I think that, you know, the rationale in *Chemtura* is strong; and, you know, the reality is that I didn't apply it that way. It wasn't a fact analysis, because as you read [*CNH*], I did the fact analysis. I just didn't apply it in a way they agreed with.
>
> …
>
> Look, I hear you, and I don't think it's improper for [you] to have asked for this, but the problem is I didn't analyze this case the way it was analyzed in [*CNH*] or *Chemtura*.
>
> …
>
> I think there's a difference between a D&O policy and professional errors or omission, or whatever. I can't remember exactly the type, but there, you really might go to where the harm is occurring and where the company is located, because that's where you're really going to be

> looking at the negligence or malpractice or whatever in that particular location.
>
> …
>
> I just - - I'm going to deny the motion, because I think I undertook the analysis. I may be wrong. I don't think I am. I think [*Mills Ltd. Partn. v. Liberty Mut. Ins. Co.*, 2010 WL 8250837 (Del. Super. Nov. 5, 2010)] is well decided.

(Ex. C at 18:16 to 23:15).

3. The Undisputed Facts Demonstrate California Law Applies.

The Superior Court's determination that Delaware law applies discards the "most significant relationship" analysis in *Chemtura* and *CNH*. The undisputed facts all point to application of California law. The single fact of Dole's incorporation in Delaware – which is largely irrelevant to where the insurance contracts were actually formed – does not remotely override the remaining facts.

The Policies at issue are directors and officers insurance policies that broadly cover multiple types of risk all across the United States (A0428-A0463). Dole's negotiation and procurement of insurance policies were handled by its Director of Risk Management, Jeffrey Stolle, at Dole's headquarters in Westlake Village, California. (A1544). The Policies were procured on Dole's behalf by its broker of record, Marsh & McLennan ("Marsh"), through Marsh employees located in Los Angeles and San Francisco. (A1584-A1587; A1799-A1808). Mr. Stolle met with

Marsh representatives at Dole's California headquarters on numerous occasions to discuss insurance procurement strategies. (A1575-A1577). When the Policies were issued, they were delivered to Marsh's Los Angeles office and Marsh subsequently delivered them to Dole at its California headquarters. (A1800-A1802). The primary insurer, AXIS, handled the Dole account from its west coast regional office. (A1818; A1832). Moreover, the formulation of the AXIS Primary Policy used an updated version of AXIS's public D&O form that was recently approved in California. (A1835). The AXIS Primary Policy also uses California amendatory endorsements. (A0445).

All of these facts are undisputed. (A2292-A2296). There is no evidence of any relationship between the policies' negotiation or placement and Delaware, nor is there evidence that Dole had any expectation that Delaware law would apply to its insurance policies until it opportunistically asserted one before the Superior Court. Johan Linden, Dole's Chief Operating Officer and its current CEO (A1884), testified that [redacted]:

- [redacted]
- [redacted]
- [redacted]

- [redacted]

The Superior Court's determination to apply Delaware law relied principally on Dole's state of incorporation and the venue of the underlying litigation, noting that the *Stockholder* Action was brought in Delaware and that Delaware law applied to the *Stockholder* Action. (Ex. B at 21). That rationale is contrary to this Court's decision in *CNH*, which held that the facts relating to underlying claims are <u>irrelevant</u> to the choice of law analysis. *CNH*, 191 A.3d ¶¶ 15, 18, 22. This Court also stated that the relevant time period for choice of law determinations is the time of the creation of the contract. *Id.* ¶ 15. The Superior Court ignored that rule, as the underlying claims did not even exist at the time the Policies were negotiated.

Without the underlying claims to look to, the only connection left is Dole's incorporation in Delaware. This is a very insignificant factor in an insurance context, when evidence establishes the Policies were negotiated, contracted, and managed in California, and that Dole has very little presence or operations in Delaware. *See* *CNH*, 191 A.3d ¶¶ 19, 21 (rejecting argument that it should look to Section 193 for the specific location of the risk, because under Section 188 the focus should be "on the insurance program itself and where the parties negotiated and managed the program.").

Based on these undisputed facts and application of this Court's precedent, RSUI submits that the Superior Court erred in determining that Delaware law, and not California law, applies.

4. The Superior Court's Determination Creates an Unprecedented and Inflexible Rule for Directors and Officers Policies.

Notwithstanding this Court's statement in *CNH* that "the question is which state has a material interest in applying its law to the interpretation of the insurance contracts – not [the underlying] liabilities," *id.* ¶ 18, the Superior Court adopted a rule that choice of law for interpreting directors and officers insurance will be different from choice of law for all other types of claims.

The Superior Court's determination not only contradicts this Court's precedent in *Chemtura* and *CNH*, it creates a categorical, inflexible rule that state of incorporation is the <u>determining factor</u> when evaluating choice of law for D&O policies, no matter how overwhelming the connections to another state may be.

The Superior Court primarily cited *Mills Limited Partnership v. Liberty Mutual Insurance Co.*, 2010 WL 8250837 (Del. Super. Nov. 5, 2010) for the proposition that, because D&O policies primarily insure directors and officers, and because directors and officers are subject to the law of the state of incorporation, it follows that state of incorporation takes on heightened importance in the analysis.

(Ex. B at 20-21). This is incorrect for several reasons. First, it overreads *Mills*, which did not make such a sweeping proclamation. In fact, the Superior Court in *Mills* first observed that there <u>was no conflict of laws</u>, therefore no choice of law analysis was necessary, 2010 WL 8250837, at *3, therefore the remaining discussion was *dicta*. *Mills* also noted that there was no evidence where the directors were located or held board meetings, and that the policy instructed arbitrators to give "due consideration" to the law where the insured is incorporated. *Id*. at *4. None of these considerations match the circumstances presented here.

The Superior Court also suggested that *Chemtura* and *CNH* are limited solely to "general comprehensive liability" policies. (Ex. C at 19:13-18). There is nothing in Delaware jurisprudence, nor in the Restatement, which supports this arbitrary distinction. Further, this assertion is directly dispelled by this Court's decision in *CorVel Corp.*, which stated the principles of *Chemtura* and *CNH* apply to errors and omissions policies, 197 A.3d at 1046 n.13, which are not general liability policies and in fact are more similar to D&O insurance. Errors and omissions policies insure against negligent acts, errors, and omissions of insureds in connection with their professional services. *See Catlin Specialty Ins. Co. v. CBL & Associates Properties, Inc.,* 2017 WL 4784432, at *6 (Del. Super. Sept. 20, 2017). D&O insurance, like the

AXIS Primary Policy, insures against negligent acts, errors, and omissions of insureds in connection with their corporate responsibilities. (A0431-A0434).

More importantly, the proposition itself is flawed. D&O policies do not limit coverage to directors' and officers' liability under corporate laws of the applicable state of incorporation. D&O policies are generic insurance historically limited by *who* is sued (corporate directors and officers), not where they are sued (which can be anywhere), or where they committed the conduct (which is more likely to be at the corporate headquarters than in the state of incorporation). *See e.g.* Marisa Jeffrey, Nuts & Bolts: Directors & Officers Liability Policies, 15 J. Tex. Ins. L. 13, 17 (2017) ("D&O policies generally contain expansive insuring agreements that could cover a broad swath of claims against the insureds"); Joshua Ackerman, 79 U. Chi. L. Rev. 1429, 1431 (2012) ("the scope of possible claims against directors and officers is broad").

The coverage grant of the AXIS Primary Policy is much more expansive than claims that might only be raised in Delaware under Delaware law. The most obvious example is the coverage extended to Dole for "Securities Claims", which is the coverage at issue in the *San Antonio* Action. (A0429; A0435). Securities claims are subject to federal law, not Delaware law, and can be brought anywhere a federal court has jurisdiction. It is mere happenstance that the *San Antonio* Action was brought in Delaware federal court and not, for example, California or Texas federal courts. Furthermore, the AXIS Primary Policy covers insureds for "Wrongful Acts", which are broadly defined and not limited solely to breaches of Delaware's corporation law. Thus, the fundamental premise on which *Mills* and the Superior Court based their reasoning is factually and legally incorrect.

The Superior Court's decision is the first case in the United States that RSUI is aware of that holds the insured's state of incorporation is the dispositive factor in choice of law for D&O policies. Such an inflexible rule contravenes the core premise of the Second Restatement, that courts should employ a multi-factor analysis to determine the "most significant relationship" to the parties and contract, *CNH*, 191 A.3d ¶¶ 12-16, and instead creates a single-factor test.

It is difficult to conceive of a set of facts that demonstrate more clearly that the law of a state other than the state of incorporation should apply. This is not a case where contract formation activities took place in multiple jurisdictions, such that no single state predominates the Restatement factors. The Policies here were negotiated, procured, and managed in California. The insured directors and officers lived and worked in California at the Company's headquarters. The Policies contain California amendatory endorsements and were subject to California insurance regulation. The only contact with Delaware is Dole's state of incorporation, but even that contact was incidental, technical, fleeting, and had nothing to do with the process of contract formation. Thus, if this Court affirms the Superior Court, it will be creating a first-of-its-kind *per se* choice of law rule in this state. RSUI submits that this Court should decline to do so and instead follow the well-reasoned Delaware jurisprudence and the guidance of the Second Restatement.

II. Acts and Findings of Fraud Are Uninsurable in California and Should Be Uninsurable in Delaware.

A. Question Presented:

Did the Superior Court err in concluding that Appellees' liability and settlements in the underlying actions were insurable as a matter of law and public policy, despite findings of fraud?

RSUI preserved the question in the Superior Court in its briefs in support of its first motion for summary judgment (A0949-A0999; A1275-A1303), and motion to vacate or revise the Superior Court's summary judgment decision (A1451-A1469; A2436-A2464).

B. Scope of Review:

The granting or denial of summary judgment, and the interpretation of an insurance contract, are both reviewed *de novo*. *ConAgra Foods, Inc.*, 21 A.3d at 68.

C. Merits of the Argument:

RSUI challenges the ruling of the Superior Court that Appellees' settlements were insurable despite Vice Chancellor Laster's findings of fraud in the *Stockholder* Action. The Superior Court implicitly recognized that Appellees' settlements are not insurable under California law, but applied Delaware law and then determined that fraud is insurable in Delaware.

The Superior Court held there was a conflict of law between California and Delaware concerning whether fraud is insurable. Under California statute and jurisprudence, Appellees' liability and settlements flowing from fraud are not insurable. Delaware has no specific public policy on the subject. While the Superior Court determined that fraud is insurable in Delaware, it recognized this is an issue of first impression. RSUI submits that this Court's jurisprudence and sound public policy indicate that fraud is likely uninsurable in Delaware, and that this Court can and should make such a pronouncement.

1. Appellees' Fraud is Uninsurable Under California Law

California Insurance Code Section 533 provides "[a]n insurer is not liable for a loss caused by the willful act of the insured; but he is not exonerated by the negligence of the insured, or of the insured's agents or others." Section 533 is "an implied exclusionary clause which by statute is to be read into all insurance policies," regardless of the policy's language. *J.C. Penney Cas. Ins. Co. v. M.K.*, 52 Cal. 3d 1009, 1019 (1991) (citations omitted).

Because "Section 533 reflects a fundamental public policy of denying coverage for willful wrongs," and the "parties to an insurance policy therefore cannot contract for such coverage," a court "need not" and should not "decide whether coverage would be excluded by the explicit policy exclusion in the absence of section 533." *Id.* at 69 n.8. *Accord Unified W. Grocers, Inc. v. Twin City Fire Ins. Co.*, 457 F.3d 1106, 1112 (9th Cir. 2006). Nor can a court construe "a contractual exclusionary clause… more narrowly in favor of coverage than section 533." *Marie Y. v. Gen. Star Indem. Co.*, 110 Cal.App.4th 928, 952-53 (2003).

"A 'willful act' under section 533 will include either 'an act deliberately done for the express purpose of causing damage or intentionally performed with knowledge that damage is highly probable or substantially certain to result.'" *Mez Indus., Inc. v. Pac. Nat. Ins. Co.,* 76 Cal.App.4th 856, 875-76 (1999). It also includes any intentional and wrongful act 'in which the harm is inherent in the act itself.'" *Id*.

Under Section 533, "insurance may not indemnify anyone from fraud" or even "from negligent misrepresentation." *Employers Ins. of Wausau v. Musick, Peeler & Garrett*, 871 F. Supp. 381, 386 (S.D. Cal. 1994); *Dykstra v. Foremost Ins. Co.*, 14 Cal.App.4th 361 (1993)). Section 533 bars coverage for fraud because fraud is inherently intentional and harmful. *See Employers Ins. of Wausau*, 871 F. Supp. at 386. It bars coverage for negligent misrepresentation, because "negligent misrepresentation requires intent to induce reliance and, therefore, is a subspecies or variety of fraud which is excluded from policy coverage." *Dykstra*, 14 Cal.App.4th at 366. The court in *California Amplifier, Inc. v. RLI Ins. Co.*, for example, ruled that Section 533 bars coverage for a settlement of a lawsuit alleging that the insureds violated provisions of California's Blue Sky law by making false statements in order to increase the value of a company's stock. 94 Cal.App.4th 102, 109-117 (2001).

Where there is a finding of fraud, it does not matter whether the insured could have been liable without such a finding. *See, e.g.*, *Raychem Corp. v. Fed. Ins. Co.*, 853 F. Supp. 1170, 1180 (N.D. Cal. 1994) (proof at trial of "knowing misrepresentations" would trigger §533 even if case law would permit liability without actual knowledge); *California Amplifier*, 94 Cal.App.4th at 117; *Uhrich v. State Farm Fire & Cas. Co.*, 109 Cal.App.4th 598, 611-17 (2003).

Section 533 bars coverage for both the Stockholder and San Antonio Actions. Both are based on what the *August 27, 2015 Decision* found was willful fraud:

- "Murdock and Carter's conduct throughout the Committee process, as well as their credibility problems at trial, demonstrated that their actions were not innocent or inadvertent, **but rather intentional and in bad faith**," (A0388);

- "The evidence at trial established that the Merger was not a product of fair dealing … **Carter engaged in fraud**," (A0406)

- "The projections Carter provided were **knowingly false**. Carter **intentionally tried to mislead** the Committee for Murdock's benefit," (A0409);

- Carter "**engaged in fraud**, misrepresentation, self-dealing, [and] gross and palpable overreaching," (A0413);

- Murdock "breached his duty of loyalty by **orchestrating an unfair, self-interested transaction**" and "derived an improper personal benefit," (A0414); and

- Murdock and Carter engaged in "**<u>fraud</u>**" during the negotiations with respect to the transaction. (A0419).

(Emphasis added).

Dole affirmatively acknowledged that the *San Antonio* allegations of federal securities fraud "ride the coattails of Vice Chancellor Laster's memorandum opinion" and "rely almost entirely on," what Dole called "reflexive citation to that opinion." (A1002). As the *San Antonio* Plaintiffs put it: "[r]emarkably, a court has already held Defendants Murdock and Carter liable for the misconduct alleged herein." (A1131). As Section 533 barred coverage for defendants' alleged actions to inflate the value of stock at issue in *California Amplifier*, 94 Cal.App.4th at 116-19, the statute has to bar coverage for actions the Court of Chancery found intentionally drove down the value of stock and defrauded Dole's stockholders.

Appellees' primary arguments below addressing California law were: (1) that the claims at issue in the *Stockholder* Action did not require a finding of fraud, therefore the findings can be ignored (A1252-A1253); (2) that there was no final adjudication of fraud because Appellees settled the *Stockholder* Action before the decision became "final" (A1249-A1252); and (3) that a provision in the Policy's definition of "Loss" avoided application of Section 533 (A1247-A1249).

Appellees' first argument misses the mark because, no matter the required elements of the causes of action, Vice Chancellor Laster in fact found fraud and was clear that his liability and damages determinations were directly influenced by his finding of fraud. For example, Vice Chancellor Laster rejected Murdock and Carter's "entire fairness" defense because they committed fraud. (A0406; A0410; A0412). Vice Chancellor Laster also rejected the exculpation defense because of his findings of fraud. (A0413-A0415). Lastly, Vice Chancellor Laster explicitly stated that the fraud was the reason for the damages awarded: "an award exceeding the fair value of the plaintiffs' shares may be appropriate 'particularly ***where fraud [is] involved***'" and "***because the defendants engaged in fraud*** ... the plaintiffs are entitled to the full incremental $2.74 per share in damages." (A0418-A0419) (emphasis added).

Essentially, Appellees ask this Court to ignore Vice Chancellor's findings of actual fraud because the law may not have required it in order for liability to issue. This is contrary to the statute's language, which precludes coverage for "willful acts", not "willful acts, but only if they are necessary elements of liability". The *Raychem* court addressed exactly this question when it ruled that, even if a federal securities action might not require proof of a "knowing" misrepresentation, if there was proof at trial of knowing misrepresentation it would trigger Section 533. 853 F. Supp. at 1180.

As to the second argument, Section 533 does not require that there be a "final adjudication." In *California Amplifier*, for example, the court affirmed a judgment entered on the pleadings and ruled that Section 533 barred coverage for a settlement entered without any trial of the underlying action, because the theories at issue in the case would all involve proof of the requisite willfulness. 94 Cal.App.4th at 109-117. Thus, mere allegations of willful acts are enough to trigger Section 533. A factual finding entered after a nine-day trial certainly qualifies to meet the standards required by Section 533.

Secondary to this argument, Appellees also asserted below that the Policy's conduct exclusion supersedes Section 533 and creates the "final adjudication" requirement. (A1249-A1252). As will be discussed in Section III below, Vice Chancellor Laster's decision became a "final adjudication" when Appellees chose to settle. Nevertheless, the argument is incorrect under California law. Courts cannot construe an "exclusionary clause … more narrowly in favor of coverage than section 533," *Marie Y*, 110 Cal.App.4th at 953, and should not even look at the policy in determining the scope of Section 533. *J.C. Penney*, 52 Cal.3d at 101 & n.8. The law requires courts to incorporate Section 533 into insurance policies, regardless of the exclusions in the policies.

Appellees' third argument – that a most-favored-nation clause in the Policies' definition of "Loss" somehow evades the requirements of Section 533 – is also contrary to the long-established California jurisprudence discussed above. Section 533 is an exclusionary clause that is read into every California policy and <u>cannot be contracted around</u>. Appellees' argument advocates exactly this when it interprets the Policies' definition of "Loss" to prevent application of Section 533.

Appellees' argument is also contrary to established Delaware law. Contracting parties cannot use choice of law provisions to contract around public policy. The court in *Ascension Insurance Holdings, LLC v. Underwood*, 2015 WL 356002 (Del. Ch. Jan. 28, 2015) refused to apply Delaware law enforcing a covenant not to compete to a contract containing a Delaware choice of law provision, because the contract was entered into in, and the defendant sought to compete in, California, and California barred such covenants. 2015 WL 356002, at *2. *See also Cabela's LLC v. Wellman*, 2018 WL 5309954, at *7 (Del. Ch. Oct. 26, 2018) ("[A]llowing parties to circumvent state policy-based contractual prohibitions through the promiscuous use of [choice-of-law] provisions would eliminate the right of [other] state[s] to have control over enforceability of contracts concerning [their] citizens.");

Millett v. Truelink, Inc., 2006 WL 2583100, **3-4 (D. Del. Sept. 7, 2006) (parties cannot use Delaware choice of law clause to avoid applying the Kansas Consumer Protection Act).

Additionally, California law holds that the restitution/disgorgement awarded against Murdock and Carter is uninsurable. In *Bank of the West v. Superior Court*, 2 Cal. 4th 1254, 1267 (1992), the California Supreme Court ruled that "to permit the retention of even a portion of the illicit profits, would impair the full impact of the deterrent force that is essential if adequate enforcement of the law is to be achieved" (interlineations and citations omitted). *See also, e.g., Unified W. Grocers*, 457 F.3d at 1115 (D&O case citing Bank of the West for the position that "California case law precludes indemnification and reimbursement of claims that seek the restitution of an ill-gotten gain").

Accordingly, if this Court determines that California law and public policy apply to the Policies, this Court should also determine that coverage is unavailable for Appellees' liability and settlements in the *Stockholder* and *San Antonio* Actions by operation of Section 533.

2. Appellees' Fraud Should Be Uninsurable in Delaware

While fraud is clearly uninsurable in California, this is a question of first impression in Delaware. The Superior Court concluded that fraud is insurable in the absence of clear Delaware law stating otherwise. (Ex. B at 21-23). This Court should make clear to Delaware insureds that fraud is not tolerated in Delaware and is not insurable.

The Court of Chancery's reasoning for awarding damages was that it would violate the Delaware public policy to allow Murdock to retain any of the ill-gotten profits from his fraudulent conduct. (A0418-A0419) (citing *Thorpe v. CERBCO, Inc.* 676 A.2d 436, 445 (Del. 1996); *In re Tri–Star Pictures, Inc., Litig.*, 634 A.2d 319, 334 (Del. 1993) and *Oberly v. Kirby*, 592 A.2d 445, 463 (Del. 1991) (*en banc*)).

As the *August 27, 2015 Decision* explained, when there is a breach of loyalty, "[t]he rule … [rests] upon a broader foundation of a wise public policy that, ***for the purpose of removing all temptation, extinguishes all possibility of profit flowing from a breach*** of the confidence imposed by the fiduciary relation." (A0418-A0419) (*quoting Guth v. Loft, Inc.*, 5 A.2d 503, 510 (Del. 1939) (emphasis added).

Murdock's demand, that his D&O insurers now indemnify him for those profits from his fraud, likewise violates this "inveterate and uncompromising" public policy. *Guth*, 5 A.2d at 510. Ninety-six percent of publicly-traded corporations have D&O insurance. *See* William E. Knepper & Dan A. Bailey, *Liability of Corporate Officers and Directors*, §23.01 (8th ed. 2010). If directors like Murdock could recover their fraud-related disgorgement from D&O insurance, it would guarantee the "possibility of profit" that Delaware's disgorgement rule exists to prevent. That result would undermine both the *August 27, 2015 Decision* and the long history of Delaware law it relied upon.

This Court recently indicated that insurance should not be available for intentional wrongdoing as a matter of public policy. In *USAA Cas. Ins. Co. v. Carr*, this Court addressed liability insurance coverage under a homeowners policy arising from a fight between an insured and a schoolmate. 225 A.3d 357, 358-59 (Del. 2020). While *Carr* primarily addressed the definition of "accident" under that policy, this Court also stated that finding coverage for intentional acts would "subvert the 'well-established common law principle that an insured should not be allowed to profit, by way of indemnity, from the consequences of his own wrongdoing' in a context where no announced Delaware public policy applies. *Id.* at 362, *quoting Hudson v. State Farm Mut. Ins. Co.*, 569 A.2d 1168, 1170 (Del. 1990).

If this Court were to affirm that fraud is insurable in Delaware under these circumstances, this case would provide fraudulent actors with a roadmap of how to engage in fraud and reap the benefits even if found guilty. As an illustration, this D&O insurance was purchased as of October 31, 2012, *after* Murdock already planned what the Court of Chancery called his "freeze out." (A0388; A0391-A0394). After Murdock and Carter were sued and found to have committed fraud, they then "settled" the *Stockholder* Action for 100 cents on-the-dollar plus interest, and then presented the bill for the "settlement" to the D&O policies they procured after their fraudulent scheme was already underway. Stated differently, the Court of Chancery found that Murdock defrauded Dole investors of over $148 million in share value, Murdock "settled" that claim, and then asked his insurers to pay for the benefit in share value he received.

If these circumstances were held to be insurable in Delaware, it would send the wrong message to directors and officers of Delaware companies that they need not be concerned with committing fraud. If fraud is discovered, one simply defends the case (with insurance proceeds covering defense costs) and "settle" lawsuits if there is a finding of fraud before the finding becomes "final." This would reward rather than discourage fraud, which is contrary to Delaware's long-established jurisprudence.

III. The Policies' Profit/Fraud Exclusion Precludes Insurance Coverage for Appellees' Actions

A. Question Presented:

Did the Superior Court err in concluding that Exclusion IV.6. of the Primary Policy does not preclude coverage?

RSUI preserved the question in the Superior Court in its post-hearing briefs on the issue of Exclusion IV.6. (A0582-A0611; A0715-A0743).

B. Scope of Review:

The granting or denial of summary judgment, and the interpretation of an insurance contract, are both reviewed *de novo*. *ConAgra Foods, Inc.*, 21 A.3d at 68.

C. Merits of the Argument:

RSUI appeals the Superior Court's ruling that Exclusion IV.6. of the AXIS Primary Policy did not apply to Appellees' settlements. Even if this Court determines that insurance coverage for Appellees' fraud is not precluded by California or Delaware public policy, coverage is expressly excluded by Exclusion IV.6., which states in relevant part as follows:

> The Insurer shall not be liable for **Loss** on account of any **Claim**…
>
> 6. based upon, arising out of or attributable to:
>
>   a. any profit, remuneration or financial advantage to which the **Insured** was not legally entitled; or

> b. any willful violation of any statute or regelation or any deliberately criminal or fraudulent act, error or omission by the **Insured**;
>
> if established by a final and non-appealable adjudication adverse to such **Insured** in the underlying action.

(A0453) (hereinafter the "Profit/Fraud Exclusion"). At issue before the Superior Court was whether the *August 27, 2015 Decision* meets the Exclusion's requirement of a "final and non-appealable adjudication."

The Superior Court erred when it concluded that the *August 27, 2015 Decision* was not a "final and non-appealable" adjudication within the scope of the Exclusion. The *August 27, 2015 Decision* was an "adjudication" in accordance with Chancery Court Rule 54(b) because it "adjudicate[d] fewer than all of the claims or the rights and liabilities." There can be no genuine argument by Appellees that the *Decision* is not an "adjudication." The only reason a formal judgment was not entered on August 27, 2015 is because the Court of Chancery invited the parties to advise whether any issues remained viable in the *Appraisal* Action, given the Court's post-trial findings and conclusions for *Stockholder*. (*See* A0388 ("This decision likely renders the appraisal proceedings moot. The parties will confer on this issue and inform the court of their views"); A0420 ("The parties will confer and advise the court as to any issues that remain to be addressed")).

Appellees argued below that the *August 27, 2015 Decision* was not an "adjudication" because it was not "final" on August 27, 2015. (A0692-A0693). Appellees cited the Fifth Edition Black's Law Dictionary definition of "adjudication", published in 1979, emphasizing the phrase "to determine finally". (A0692). Appellees ignored the modern definition of "adjudication", however, which is "the legal process of resolving a dispute; the process of judicially deciding a case." *Adjudication*, Black's Law Dictionary (11th ed. 2019). Additionally, "[a]djudication is the effort to identify the rights of the contending parties now by identifying what were, in law, the rights and wrongs, or validity or invalidity, of their actions and transactions when entered upon and done." *Id.*, *citing* John Finnis, Philosophy of Law 399 (2011).

Describing the *August 27, 2015 Decision* as anything other than an "adjudication" elevates form over substance and conflates the term with "final judgment." Under Appellees' definition of "adjudication", no order of a trial court could constitute an "adjudication" unless the entire case has become final and a formal judgment entered. This is contrary to Rule 54(b). The *August 27, 2015 Decision* was plainly "adjudicating" the *Stockholder* Action claims against Murdock and Carter as it made extensive findings of fact, holdings of law, and awarded damages. The mere fact that other issues potentially remained in the consolidated action before a final judgment could be entered for the entire case does not render the *Decision* any less an "adjudication."

Even if Appellees' strained definition of "adjudication" were accurate, the *Decision* clearly met that definition when Appellees settled the *Stockholder* Action. Upon entry of the "Order and Final Judgment" on February 10, 2016 (A0613; A0919-A0931), the *August 27, 2015 Decision* was no longer subject to revision and was merged into the Final Judgment. It became final, and the appeal period began to run.

As this Court explained in *Tyson Foods, Inc. v. Aetos Corp.*, 809 A.2d 575 (Del. 2002) ("*Tyson I*"): "interlocutory rulings achieve finality at the trial level, through incorporation in the final judgment of the trial court," and "review of those subsidiary rulings must be achieved through a timely appeal of that final order." *Id.* at 580. In *Tyson Foods, Inc. v. Aetos Corp.*, 818 A.2d 145 (Del. 2003) ("*Tyson II*"), the court went on to rule that parties who settle after an adverse decision cannot use their own settlement to obtain vacatur of the decision – thus concluding that the settlement not only makes the decision final, but prevents it from being changed. *Id.* at 148-49.[9]

[9] While California law applies to interpret the Policies, the question of whether the *August 27, 2015 Decision* became "final and non-appealable" is subject to Delaware procedural law.

The decisions in *Tyson I* and *Tyson II* affirmed a decision by then Vice Chancellor Strine. In his decision, Vice Chancellor Strine noted that "[t]he ordinary effect of the final judgment approving the settlement of the class claims was to render the previous [interlocutory order] final as well, because the [] final judgment addressed the remaining claims in the case." *In re IBP, Inc. S'holders Litig. v. Tyson Foods, Inc.*, 793 A.2d 396, 400-01 (Del. Ch. 2002) ("*IBP*").

The circumstances here are remarkably similar to those presented by *IBP*. In *IBP*, a post-trial decision adverse to the defendant (Tyson) had been rendered (after a nine-day trial) but was interlocutory and could not be immediately appealed. *Id.* at 398-99. After the Court of Chancery rendered that decision, Tyson chose to settle the case. *Id.* at 399. The parties sought and received the Chancery Court's approval of the settlement, the Chancery Court issued an "Order and Final Judgment", and Tyson did not appeal. *Id.* at 400, 407. When Tyson attempted to avoid the effect of the interlocutory order by arguing that it was not a "final judgment" and moved to vacate it, *id.* at 401-02, both the Court of Chancery and this Court ruled otherwise.

The Court of Chancery in *IBP* ruled that the interlocutory order became a "final judgment", explaining:

> *In the ordinary case, it would be trite to observe that the [August 3] order presented by Tyson on behalf of all the parties was titled "Order and Final Judgment."* Here, it is worth noting because Tyson now takes the position that no final judgment was entered as to the claims between

> it and IBP. That is not the most natural reading of the August 3 order. The ordinary effect of the final judgment approving the settlement of the class claims was to render the previous [interlocutory] June 27 order of specific performance in accordance with the IBP-Tyson settlement final as well, *because the August 3 final judgment addressed the remaining claims in the case*.

Id. at 400-01 (citing Ch. Ct. R. 54(b)) (italics original).

Then Vice Chancellor Strine ruled that Tyson could not vacate the decision because Tyson made "a mature judgment to proceed as it did, knowing that its own actions would moot any controversy between itself, on the one hand, and IBP and its stockholders, on the other"; made a "voluntary, tactical decision to settle"; "gave up its statutory right to appeal voluntarily and without coercion"; "chose to waive its appellate rights"; "decided to pursue a course that would leave it with no ability to seek appellate review"; and "voluntarily causing the mootness of the decision it now seeks to vacate." *Id.* at 407-10. Thus, Vice Chancellor Strine ruled that the interlocutory order, which was final and non-appealable, remained in place and was not erased by the parties' settlement, reasoning:

> In this republican democracy, our citizens place great value on public decisionmaking and on the rule of law. It seems unnecessarily Orwellian to encourage a practice that erases – in some vague but perceptible way – a decision of a court rendered when a dispute was "live" at the instance of a party whose own conduct caused that decision not to be reviewed. A judicial decision is a public document. Tyson's approach would convert the decisions of this court into a species of private property.

Id. at 408–09. This Court affirmed *IBP* in *Tyson II*. *See Tyson II*, 818 A.2d at 149 ("Justice does not require vacatur where the parties voluntarily settle a matter unless exceptional circumstances abound … Rather than take an appeal from the trial court's August 3, 2001 final order, Tyson adopted a course of inaction with respect to its procedural options.").

These facts align very closely with the circumstances here. Murdock and Carter chose to take the *Stockholder* Action to trial, received an adverse adjudication that they committed fraud, and then chose to settle and forego an appeal. The Final Judgment was entered on February 10, 2016, and Appellees did not file an appeal. Vice Chancellor Laster twice questioned why Murdock and Carter determined not to appeal and to settle instead. (A0635-A0636; A0638; A0643). Getting no answer other than a statement of defendants' support for approval of the settlement, the Vice Chancellor cautioned the parties that the settlement and Final Judgment they requested would "foreclose" their right to appeal the findings of the *August 27, 2015 Decision*. (A0645).

Just as in *IBP/Tyson*, follow-on securities litigation arose in the *San Antonio* Action that clearly intended to use the *August 27, 2015 Decision* for its collateral estoppel effect. Appellees' position is that their decision to settle effectively vacated or nullified the *August 27, 2015 Decision* for purposes of collateral estoppel and application of the Profit/Fraud Exclusion. This is directly contrary to the holdings in *IBP/Tyson*.

The Superior Court's determination that the Profit/Fraud Exclusion does not apply here ignored the holdings in *IBP/Tyson* and treated Appellees' settlement of the *Stockholder* Action as if it vacated the *August 27, 2015 Decision*. (Ex. A at 16). This is incorrect as a matter of fact and law. Under the circumstances, Murdock and Carter were adjudicated to have committed fraud, and that adjudication became final and non-appealable when they chose to settle and forego appellate rights.

As for *San Antonio*, the allegations arose directly out of the findings contained in the *August 27, 2015 Decision*. Thus, the settlement is "based upon, aris[es] out of, or attributable to" the adjudication of fraud in the *Stockholder* Action, meaning the Profit/Fraud Exclusion applies equally to both *Stockholder* and *San Antonio*.

Contrary to Appellees' arguments below, the purpose of the "final and non-appealable adjudication" requirement in the Profit/Fraud Exclusion is not to permit insureds to settle a case after a trial court has found fraud but has yet to issue a final judgment. The clear purpose is to extend insurance coverage to insured individuals to <u>defend</u> allegations of fraud through trial and appeal. Stated differently, it only prevents insurance coverage if insureds ***actually commit fraud***, are adjudicated to have done so, and fail to obtain reversal on appeal. The policies here served this purpose as their defense costs were paid for both underlying matters. Interpreting the Exclusion as Appellees insist is contrary to its plain language, Delaware procedural law, California public policy, and should be contrary to Delaware public policy.

IV. The Policies' Allocation Provision Should Be Enforced as Written and the "Larger Settlement Rule" Does Not Apply.

A. Question Presented:

Did the Superior Court err in concluding that Section VIII.A. of the Primary Policy does not apply and instead the "Larger Settlement Rule" applies to allocate between covered and non-covered loss?

RSUI preserved the question in the Superior Court in its brief in opposition to Appellees' Motion for Summary Judgment. (A2372-A2379).

B. Scope of Review:

The granting or denial of summary judgment, and the interpretation of an insurance contract, are both reviewed *de novo*. *ConAgra Foods, Inc.*, 21 A.3d at 68.

C. Merits of the Argument:

Importantly, this Court need not address this issue if it decides that Appellees are not entitled to recover insurance proceeds as a result of settlements arising from a finding of fraud. The "Allocation" issue arises only if Appellees can establish that some portion of their settlements is covered. RSUI submits that no portion of the settlements is covered for the reasons discussed above.

If this Court does determine some portion of the settlements is covered, RSUI challenges the Superior Court's determination that Section VIII.A. of the Primary Policy does not apply and, instead, the "Larger Settlement Rule" applies to any allocation between covered and non-covered loss. The Superior Court follows outdated California decisions that, ironically, were superseded by the allocation language found in Section VIII.A, which invalidates the "Larger Settlement Rule" and inserts a relative exposure test.

The Primary Policy provides that allocation is required when Loss is incurred jointly between Insureds and others who are not insureds, and when a Claim involves both covered and uncovered matters. Section VIII.A "Allocation" states:

> If in any Claim, the Insureds who are afforded coverage for such Claim incur Loss jointly with others (including other Insureds) who are not afforded coverage for such Claim, or incur an amount consisting of both Loss covered by this Policy and loss not covered by this Policy because such Claim includes both covered and uncovered matters, then the Insureds and the Insurer agree to use their best efforts to determine a fair and proper allocation of covered Loss. The Insurer's obligation shall relate only to those sums allocated to matters and Insureds which are afforded coverage. In making such determination, ***the parties shall take into account the relative legal and financial exposures of the Insureds in connection with the defense and/or settlement of the Claim***.

(A0440-A0441).

Despite recognizing that the Allocation Provision is not ambiguous, the Superior Court nonetheless ignored this plain language and instead applied the "Larger Settlement Rule" (Ex. E at 12-13, *citing Safeway Stores, Inc. v. Natl. Union Fire Ins. Co. of Pittsburgh, Pa.*, 64 F.3d 1282, 1287 (9th Cir. 1995) (California law); *Nordstrom, Inc. v. Chubb & Son, Inc.*, 54 F.3d 1424, 1433 (9th Cir. 1995) (California law); *Harbor Ins. Co. v. Continental Bank Corp.*, 922 F.2d 357, 368 (7th Cir. 1990) (Illinois law)).

The "Larger Settlement Rule" states that "allocation is appropriate only if, and only to the extent that, the defense or settlement costs of the litigation were, by virtue of the wrongful acts of uninsured parties, higher than they would have been had only the insured parties been defended or settled." *Safeway Stores*, 64 F.3d at 1287. This "Rule" is most frequently used in the Ninth and Seventh Circuits and applied to settlements entered into on behalf of a defendant corporation and its officers and directors, when the corporation is not covered for its own liability under the policy. *Clifford Chance Ltd. Liab. P'ship v. Indian Harbor Ins. Co.*, 836 N.Y.S.2d 484, *4 (N.Y. Sup. Ct. 2006), *aff'd*, 838 N.Y.S.2d 62 (N.Y. App. Div. 1st Dept. 2007) (Table). Since corporations cannot act independently of its officers and directors, the "Rule" is intended to prohibit insurers from allocating a portion of the settlement to the uninsured corporation. *Id*.

That is not the issue presented here – RSUI's position is not that an uninsured corporation bore derivative liability for the actions of its officers and directors, rendering a portion of the settlements uninsurable. Instead, significant liability was placed on non-insured DFC, and liability was incurred for actions taken in uninsured capacities (Murdock as a controlling shareholder and Carter as General Counsel). Thus, the genesis of the "Rule" does not apply here.

The Allocation provision's plain language intentionally avoids application of the "Larger Settlement Rule", which is contrary to the Policy's requirement that the parties "*shall* take into account the *relative legal and financial exposures* of the Insureds". This language is sometimes referred to as the "relative exposure rule", *Clifford Chance*, 836 N.Y.S.2d 484, at *4; *PepsiCo, Inc. v. Cont'l. Cas. Co.*, 640 F. Supp. 656, 662 (S.D.N.Y. 1986); *Caterpillar, Inc. v. Great Am. Ins. Co.*, 62 F.3d 955, 961 (7th Cir. 1995); *Owens Corning v. Natl. Union Fire Ins. Co. of Pittsburgh, PA*, 257 F.3d 484, 492 (6th Cir. 2001). One court succinctly explained the history:

> Courts have adopted two distinct approaches for calculating reimbursement for plaintiffs seeking recovery for settlement and defense costs under D & O liability insurance policies: (1) the "relative exposure rule"—allocating costs according to the relative risk of exposure and proportional fault of the parties involved; and (2) the "larger settlement rule"—allocating costs only to the extent that overall losses incurred are *higher* by virtue of wrongful acts of uninsured parties.

Piper Jaffray Companies Inc. v. Natl. Union Fire Ins. Co. of Pittsburgh, 38 F. Supp. 2d 771, 774 (D. Minn. 1999). None of the "Larger Settlement Rule" cases discussed by the Superior Court or by Appellees discussed an insurance policy containing this "relative exposure" language. The Allocation provision at issue here specifically contracts for use of the "relative exposure rule" to allocation scenarios.

Despite this clear selection of the "relative exposure rule" by the parties to the contract, the Superior Court declined to follow the rule primarily because the parties "fail[ed] to agree" on an allocation at the time of the Settlements. (Ex. E at 13). This conclusion is contrary to the plain language and intent of the provision, which was to embrace one legal approach and reject another. Based on the Superior Court's reasoning, all an insured need do if it wishes to avoid the "relative exposure rule" is refuse to negotiate an allocation with the insurer, despite a contractual obligation to negotiate. Insureds can openly enter into insurance contracts that invoke the rule, but refuse to negotiate and negate the rule they agreed upon. This is contrary to Delaware law. *See In re Verizon Ins. Coverage Appeals*, 222 A.3d 566, 575 (Del. 2019) ("Contracts are to be interpreted in a way that does not render any provisions 'illusory or meaningless").

The Superior Court's conclusion also ignores that the insurers, including RSUI, were not given an opportunity to negotiate allocation. In prior decisions, the Superior Court expressly found that the insurers did not consent to the Settlements. (Ex. B at 25). Despite this, the Superior Court effectively punishes RSUI for failing to reach an agreement on allocation with insureds that had no interest in negotiating allocation.

Finally, the Superior Court stated that its decision to apply the Larger Settlement Rule was "to protect the *economic expectations* of the insured – *i.e.*, prevent the deprivation of insurance coverage that was sought and bought." (Ex. E at 13) (emphasis added). This reference to the "economic expectations" of the insured is not the law of Delaware, California, or any other jurisdiction. First, both Delaware and California reject application of the "reasonable expectations" doctrine where policy language is not ambiguous. *Hallowell v. State Farm Mut. Auto. Ins. Co.*, 443 A.2d 925, 928 (Del. 1982); *Ananda Church of Self-Realization v. Massachusetts Bay Ins. Co.*, 95 Cal.App.4th 1273, 1279 n. 2 (2002). The Superior Court expressly held the Allocation provision is not ambiguous, (Ex. E at 12), so its reference to the insured's expectations is inconsistent with that holding.

The insured's "economic expectations" cannot be viewed as anything other than receiving the contract it bargained for, inclusive of its election of the "relative exposure" rule. No other conclusion is supported by the record or law. No fact or testimony was offered indicating Appellees' "economic expectation" was for the Policy to be applied according the Larger Settlement Rule instead of its plain language.

By the terms of its contract, RSUI was entitled to make its case at trial that the "relative exposures" between covered and non-covered Loss demonstrate that covered Loss does not reach RSUI's excess layer.[10] For example, the *August 27, 2015 Decision* recognized that Murdock acted in two capacities in connection with the Merger: (1) as Dole's director – an insured role; and (2) as Dole's controlling stockholder – a non-insured role. (A0414; A0451). Carter also acted in two capacities: (1) as director and officer – a covered capacity; and (2) as General Counsel – for which coverage is excluded. (A0414; A0460). The aspects of both settlements attributable to the conduct of Murdock and Carter acting in their non-covered capacities as Dole's controlling stockholder and General Counsel are not covered "Loss."

Additionally, the *Stockholder* settlement (at least in part) constitutes a non-covered "Loss" because it includes payments on behalf of and a release of non-insured DFC. The *August 27, 2015 Decision* held DFC jointly and severally liable with Murdock and Carter, (A0414; A0420), and DFC received a release by virtue of

[10] The Superior Court did not determine which party bears the burden of proof on allocation at trial. (Ex. E at 17). RSUI's position is that insureds bear the burden of proof when allocation issues are presented. (A2377-A2378). *See, e.g., UnitedHealth Group Inc. v. Columbia Cas. Co.*, 941 F. Supp. 2d 1029, 1039 (D. Minn. 2013), *aff'd*, 870 F.3d 856 (8th Cir. 2017); *Executive Risk Indem., Inc. v. CIGNA Corp.*, 2011 WL 10638179 (Phila. Cty. C.C.P. Nov. 15, 2011), *aff'd*, 74 A.3d 179 (Pa. Super. 2013); *Clackamas Cty. v. Midwest Emp'rs Cas. Co.*, 2009 WL 4916364, *10 (D. Or. Dec. 14, 2009), *aff'd*, 473 Fed. Appx. 782 (9th Cir. 2012); *John Hancock Healthplan v. Lexington Ins. Co.*, 1990 WL 21137 (E.D. Pa. Mar. 6, 1990).

the settlement. Thus, any amounts of the settlement paid on behalf of and to extinguish the claims against DFC do not constitute covered "Loss."

These issues extend to any defense costs Appellees incurred in defending the *Stockholder* and *San Antonio* Actions. Under the Policy's allocation provision, RSUI is entitled to make its case at trial that a significant portion of the defense costs and settlement amounts were incurred for non-covered conduct, such that Appellees cannot establish Loss reaching RSUI's excess insurance layer. The Superior Court's decision nullified that contractual right and should be reversed.

CONCLUSION

For the reasons stated above, RSUI prays this Court reverse the judgment of the Superior Court and remand with a direction to enter judgment in favor of RSUI and declare that there is no insurance coverage for the claims at issue.

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