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Corporations

Delaware Extends Exculpatory Protections to Corporate Officers

In an important development for Delaware corporations, Delaware recently amended its laws to now allow for the exculpation of corporate ofcers in addition to corporate directors in certain instances. Previously, the Delaware General Corporation Law only allowed exculpation for directors.

Delaware has now extended this exculpatory protection to senior ofcers as well in certain scenarios. Corporations may now include in their certicates of incorporation “a provision eliminating or limiting the personal liability of a director or ofcer to the corporation or its stockholders for monetary damages for breach of fiduciary duty as a director or ofcer.” Generally corporations may now extend these protections to their CEO, CFO, CIO, chief legal ofcer, president, controller, treasurer and other executive ofcers.

Exculpation provisions are not an absolute shield, and this new change still allows for oversight of corporate ofcers to ensure that they are upholding their fiduciary duties to the corporation and its shareholders.

Most notably, the extended exculpation protection does not protect ofcers from derivative claims brought against them by or on behalf of the corporation for breach of fiduciary duty.

There are other important restrictions to the exculpation protection. Both directors and of ces can still be held liable for:

- Any breach of loyalty to the corporation or its stockholders.
- Acts or omissions not in good faith or which involve intentional misconduct or a knowing violation of law.
- Any transaction which the director or of cer derived an improper personal interest.

The change went into effect on August 1, 2022, under Section 102(b)(7) of the DGCL. However, the exculpation for ofcers is not automatic as of August 1. Delaware corporations must amend their certicates of incorporation to afford ofcers similar protections as those given to directors.

From an insurance risk standpoint, the exculpatory protection of ofcers may also result in lower insurance premiums and retentions. Corporations can now put forth these ofcer defenses if and when lawsuits are brought and thus lower their litigation costs and potential reputational harm. Further, we expect that in-demand ofcers will push for these corporate protections.

DGCL Section 102(b)(7)

Breach of Duty Litigation Against SolarWinds Board Dismissed

Construction Industry Laborers’ Pension Fund v. Single

The well-publicized and far-ranging Sunburst Attack against SolarWinds in 2020 spawned numerous lawsuits. In this attack, hackers stole the proprietary information, intellectual property and emails from approximately 18,000 of the company’s clients. SolarWinds’s share price declined nearly 40% once news of the attack became public. Shareholder securities class actions and derivative claims quickly followed. In the derivative suit, the plaintiff alleged the board failed to prepare for such an attack by not implementing or overseeing adequate monitoring systems for such cybersecurity risks. SolarWinds sought to dismiss the complaint.

The court granted the motion to dismiss, finding that the plaintiff failed to establish that the board’s conduct was so egregious as to satisfy the stringent pleading standards to establish a claim alleging a breach of the duty of oversight.

The court stated for the plaintiff to have successfully pled their claim, they would have had to establish failure by directors to impose the monitoring system for reporting such a cyber risk or failure to act knowing of red flags and that their inaction would constitute bad faith.

Given that cyberattacks, in their many different forms, have become commonplace these past several years, most companies have acted in good faith to protect themselves as best as they can. Companies that are entrusted with client and customer information have greater responsibility to protect this information. While the measures in place failed to prevent the attack, the court determined the plaintiff presented no evidence that the board willfully disregarded these risks and did not attempt to address them in a good faith manner.

This decision by the court should give some comfort to directors and of cers who are diligent in assessing cyber threats, and make good faith efforts to implement and oversee measures to prevent or minimize the impact of such attacks in order to protect the company.

Case No. 2021-0940-SG (Del. Ch. Sept. 6, 2022)

Poultry Companies Settle Multimillion-Dollar Class Action Suit

USA v. Cargill Meat Solutions Corporation et al.

The Department of Justice filed an antitrust lawsuit against poultry processors Cargill, Sanderson Farms and Wayne Farms for engaging in a years-long conspiracy to exchange information about wages and benefits for thousands of workers at poultry processing plants, ultimately allowing them to suppress their pay. The companies run roughly two hundred poultry plants in the United States.

By exchanging worker pay information, the DOJ said the companies violated the Sherman Act, which Congress passed in 1890 in order to preserve free and unfettered competition as the rule of trade. Sanderson and Wayne Farms were also accused by the DOJ of violating the Packers and Stockyards Act by using a tournament system to determine a base pay for their chicken growers based on how they perform compared to other growers. A number of companies in the litigation, including Sanderson, had argued that because the named plaintiffs were hourly chicken processing workers, they lacked standing to sue over the alleged conspiracy’s impact on salaries and turkey processing jobs. This argument was rejected in March 2021.

Cargill Meat Solutions, Sanderson Farms and Wayne Farms will pay a combined total of $84.8 million to settle these allegations. Through the agreement, Sanderson Farms will pay $38.3 million in restitution, Wayne Farms will pay $31.5 million and Cargill will pay $15 million. The poultry workers have already settled with several other companies. To date, they have recovered a total of $134.6 million.

The DOJ filed proposed consent decrees with the companies, which would bar them from sharing competitively sensitive information about their employees pay. As part of the proposed consent decrees, Sanderson and Wayne would be required to disclose transparency rules to growers. The poultry processors would also be prohibited from reducing growers’ base payments based on relative performance and retaliating against growers who report antitrust concerns to the government.

The announcement of antitrust action against the three poultry giants lets the DOJ make a statement about targeting anticompetitive behavior in the poultry space.

Case No. 22-cv-01821 (D. Md. July 25, 2022)

Securities Exchange Commission Files Another Suit Involving Cryptocurrency

SEC v. Dragonchain, Inc.

A cryptocurrency company is facing allegations and assertions by the Securities and Exchange Commission that certain crypto assets fit the legal definition of securities, requiring higher levels of federal regulation and scrutiny than commodities do. The SEC’s push to treat crypto assets as securities led to separate lawsuit filed against a former Coinbase employee who was charged with insider trading of cryptocurrency.

The SEC has filed suit against Washington-based cryptocurrency company Dragonchain, inc., founder John Joseph Roets, and two other affiliated companies and organizations he controls. The SEC alleges that it engaged in the illegal sale of unregistered crypto asset securities of erings through its 2017 initial coin of ering and subsequent sales of its DRGN tokens totaling $16.5 million.

After four years of communications between the SEC and Dragonchain, the investigators recommended pursuing the crypto company. The SEC believes that Roets, Dragonchain and the foundation conducted the unregistered of ering in two phases. A discounted “presale” to members of a crypto investment club, and an initial coin of ering marketed to crypto investors.

The SEC charges the defendants with violating Sections 5(a) and (c) of the Securities Act of 1933. The SEC seeks permanent injunctions, disgorgement with prejudgment interest, and civil penalties against and conduct-based injunctions against each defendant.

Case No. 22-cv-01145 (W.D. Wash. Aug. 16, 2022)

Sources

1. Legislation Document (delaware.gov)
In late August 2022, Travelers and the insured reached an agreement stipulating that the policy shall be voided with no defense or indemnity obligations placed upon the insurer. Both sides will pay their own expenses and International Controls will have to respond to the attack without the benefit of insurance. Travelers, along with most cyber insurers in the market are now requiring their insureds have an effective MFA system in place before even considering placing coverage. This case is believed to be the first instance where an insurer has moved to rescind coverage based upon an insured’s failure to employ MFA as a part of their controls.

**Case No. 22-cv-2143 (C.D. Ill. July 6, 2022)**

In May 2022, policyholder International Controls submitted a claim to Travelers for coverage after a ransomware attack. Hackers were able to gain access to Traveler’s network (VPN). It requires the user to provide multiple pieces of evidence before enabling the user to access the system, even if the user has a valid password. This is considered a highly effective security measure to prevent unauthorized access.

Although the insured was utilizing MFA for their firewall protections, Travelers argued that this was woefully insufficient, and its other digital assets remained unprotected. This, they argued, was a material misrepresentation and that the policy contract be rescinded, voided, and the policy. Travelers requested the court rule that due to this misrepresentation, the policy contract be rescinded, voided, and the policy. Travelers argued that due to this misrepresentation, the policy contract be rescinded, voided, and the policy.

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Joint Employment Practices

The National Labor Relations Act employs a “right to control” test in determining joint employment, and this standard has been upheld by federal courts on numerous occasions. While the “right to control” test itself has remained constant, how such control is defined has been modified over time. In the past decade, unsurprisingly, along party lines. How an employer will “share or codetermine those matters governing employees’ essential terms and conditions of employment” is the provision that is at issue.

The existing rule states:

An entity must possess and exercise such substantial direct and immediate control over one or more essential terms or conditions of their employment as would warrant finding that the entity meaningfully affects matters relating to the employment relationship with those employees.

The proposed change states:

For an employer to possess the authority to control (whether directly, indirectly, or both), one or more of the employees’ essential terms and conditions of employment.

The new rule, if adopted, would represent a significant change in the employment relationship as it would not require direct control over the employee. Expanding joint employment based on indirect authority or power to control an employee’s terms and conditions of employment would increase an entity’s risk of being named as a joint employer in litigation brought by employees.

The ability for plaintiffs to name an entity as a joint employer may not only impact those entities, but the insurance market as well, as more claims under employment practices liability insurance policies are likely to result. More claims tend to result in more defense costs and paid losses under policies, and we expect insurers would have to revise their underwriting for these risks.

We will be tracking what changes the NLRB may make, and report on how such may impact our clients.

Healthcare Firm and Executive Indicted in Nurse Wage-Fixing Case

US v. Hee et al.

A healthcare staffing firm and former executive have been indicted in a federal antitrust case alleging they fixed wages of nurses working in Las Vegas Schools and agreed not to hire the nurses from each other. The Department of Justice stated that the agreement between the defendant and a unnamed competitor to not recruit and suppress wages is clearly illegal and a violation of the Sherman Anti-Trust Act. A Sherman Act violation can result in 10 years in prison and a $1 million fine for Mr. Ryan Hee and a fine of $10 million or more for the corporation.

Although judges have denied dismissal bids from the defendants and agreed to let those prosecutions proceed to trial, juries have been less sympathetic to the claims.

Previously, a Texas jury acquitted the former owner and the former clinical director of a physical therapist staffing company of charges of orchestrating a wage-fixing scheme, though the trial judge did not allow the jury to hear that the owner purchased the practice for purposes of controlling the market. The DOJ filed a civil lawsuit against that practice.

West Virginia Case Emphasizes FMLA Notice Requirements

Fairmont Tool Inc. v. Opyoke

The West Virginia Supreme Court issued a decision that emphasized the importance of the Family Medical Leave Act’s (FMLA) notice requirements. The FMLA requires an employer to provide employees with certain information about FMLA leave, commonly referred to as the notice requirements.

In Opyoke, the company failed to provide the requisite notice and capability paperwork to the employee for months after the employee had requested FMLA leave. After a significant delay, Fairmont Tool advised Mr. Opyoke of his eligibility for FMLA leave and provided the employee with the required notice. The company believed the requisite FMLA paperwork, he was laid off as part of a reduction in force. Mr. Opyoke sued the employer for wrongful discharge, FMLA retaliation, and FMLA interference, but the circuit court dismissed the wrongful discharge and retaliation claims.

Generally speaking, once an employee makes a request for FMLA leave, the employer must provide three sets of notices:

- The eligibility notice, which advises the employee as to the eligibility of requested leave.
- The rights and responsibilities notice, which advises the employee of their obligations under the FMLA.

The Department of Justice indictment against VDA and Hee is only one of a number of recent indictments alleging employee no-poach and wage-faring agreements between competing employers. The DOJ has already prosecuted many such cases.

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In the referenced litigation, Fairmont Tool moved for judgment as a matter of law on Opyoke’s interference claim, arguing while the employee did technically violate the FMLA’s notice requirements delaying the paperwork, he had not presented evidence that this violation actually caused him any harm. The circuit court denied the motion, and the employer appealed. After review, the West Virginia Supreme Court held that the employee had in fact failed to of er any evidence that he would have structured his leave differently had he been provided with he notices a timely manner.

The Supreme Court reversed the jury verdict in favor of the employee and held that, in addition to the elements above, an employee must prove that he or she was prejudiced by the employer’s violation of the statute.

FMLA violations are routinely listed within the definition of “Wrongful Employment Practices Acts” in employment practices liability (EPL) policies, and as such employers may look to their EPL insurers for assistance in defending themselves against these allegations. Self-insured entities may need to pay EPL premiums, and as such these, with the pandemic(s) and the high cost of healthcare and nursing facilities, employers are often faced with the prospect of having to take time off work to care for themselves or family members. Having an effective and efficient process for receiving and evaluating FMLA requests can save employers a lot of time and money and mitigate the risk of litigation.

Illinois Healthcare Workers Agree to $10M settlement

The settlement agreement was filed with the court on July 29, 2022. Under the terms of the agreement, NorthShore is required to pay $10,337,500 into a settlement fund for the affected employees. The employer will also be required to alter its vaccine policy to provide accommodations for those with sincerely held religious beliefs. Those terminated employees will also be eligible for rehire. Liberty Counsel, the firm which provided legal services for the plaintiffs is requesting $2M from the defendants for legal fees.
This case represents the first major victory for employees of private employers who enforced absolute vaccine mandates. Horizon Mihel, VP of legal affairs at Liberty Counsel asserts that the settlement should serve as a strong warning to employers across the nation that they cannot refuse to accommodate those with sincere religious objections to forced vaccination mandates. It remains to be seen however if other states will side with the employees.

A similar action was filed in Maine against several large healthcare networks there. That matter was recently dismissed, although Liberty Counsel has indicated it will appeal.

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Florida Employers Advised to Proceed with Caution after Court Temporarily Blocked Enforcement of Florida's Individual Freedom Act

**Honeyfund.com Inc. v. Ron Desantis, et al.**

In April 2022, Florida Governor Ron DeSantis signed into law the Individual Freedom Act (IFA), more commonly known as the Stop the Wrongs to Our Kids and Employees (WOKE) Act, with an effective date of July 1, 2022. The law expanded Florida Statutes Section 760.10 of the Florida Civil Rights Act to provide that it is discriminatory to subject a person, as a condition of employment, to training that endorses various race- and sex-based concepts. IFA provides a private cause of action to employees after exhausting their administrative remedies if such employees are required by an employer to participate in any workplace training that promotes various viewpoints concerning sex, color, race, sex or national origin.

Employers with Florida employees have been advised to proceed with caution in assigning employee training programs. Companies with multistate operations continue to require the same employee training programs to employees across the nation. Employers should note that this new law only prohibits activity that is considered required.

The new law only prohibits activity that is considered required. Companies with multistate operations may want to consult with outside expert employment/labor counsel to discuss obligations and risks particular to Florida should the injunction be lifted.

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**Case No. 4:22-cv-00227 (N.D. Fla. Aug. 18, 2022)**

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**Individual Officer Held Liable For Loss In California Unpaid Wage Litigation**

**Seviour-Iloff v. LaPaille, et al**

California Labor Code section 558.1, of the California Labor Code provides that "any employer or other person acting on behalf of an employer who violates, or causes to be violated" certain provisions of the Labor Code "may be held liable as the employer for such violation." In a decision handed down by an appellate court in California, the court ruled that a company CEO/CFO could be held personally and individually liable for unpaid wages to two individuals.

The plaintiff entered into an arrangement with the Bridgeville Properties, Inc. and its CEO/CFO Cynthia LaPaille where they would provide certain services to BPI in exchange for free rent. After a falling out with Ms. LaPaille, the plaintiff sued for unpaid wages, pursuant to Labor Code Section 558.1.

Having petitioned the CA Division of Labor Standards Enforcement, the Labor Commissioner ruled that Bridgeville violated in the plaintiff’s favor, holding LaPaille personally liable, assessing damages, liquidated damages and penalties. LaPaille and Bridgeville appealed that ruling to the state superior court, who agreed that the plaintiff’s owed wages, but excused BPI and LaPaille from penalties and liquidated damages. The plaintiff appealed the superior court’s decision.

A three-judge panel ruled the superior court erred in declining to impose personal liability on Ms. LaPaille. The appellate judges found that Section 558.1 defines a “person acting on behalf of an employer” as “a natural person who is an owner, director, of a corporation, or managing agent of the employer.” The term “managing agent” includes corporate employees who exercise substantial independent authority and judgment in their corporate role and whose decisions ultimately determine corporate policies. As such, Ms. LaPaille was liable. The court did note that "the free rent given to the plaintiff is a form of remuneration, and could be factored into the wage calculations.

Ms. LaPaille did not dispute that she did not pay the plaintiff’s wages. The appellate court said section 558.1 allows individuals to file a private right of action, and as per it's plain language seek to hold Ms. LaPaille as the person acting on behalf of an employer, and as such may be held liable as the employer for such violation. The matters have been remanded back to the superior court for calculation of the unpaid wages and waiting time penalties due the plaintiff.

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**Case No. A163503 (Col. Ct. App. June 22, 2022)**

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Department of Labor Pushes Against Arbitration of ERISA Claims

**Harrison v. Envision Management Holding Inc. Board et al.**

The US Department of Labor led an amicus brief in support of an individual’s successful challenge to his employer’s arbitration provision before the Tenth Circuit, arguing the trial court was correct in allowing workers to file suit under ERISA.

Robert Harrison sued his employer, Envision Management Holding Inc., for violations of ERISA alleging the company inflated its worth when selling stock to the employee stock ownership plan in a $163.7 million transaction. The company sought to have the matter go to arbitration pursuant to an arbitration agreement. The trial court ruled that ERISA permits Harrison to sue on behalf of the entire plan, and the employer appealed.

The Dept. of Labor argued generally that arbitration agreements that waive employees’ rights under statute to obtain a recovery for alleged violations of the law are unenforceable, and that ERISA allows plan participants to sue for breach of fiduciary duties under the act. The Dept. of Labor said this premise has been upheld by the US Supreme Court, most recently in the Viking River Cruises Inc. v. Moriana case (which was a topic in our Q2 claim journal). The amicus briefs argued the Supreme Court ruled that the Federal Arbitration Act does not prevent all forms of representative actions from moving forward when an arbitration agreement is present.

We will continue to monitor developments in this matter. Companies should be prepared to review and assess arbitration agreements within employee contracts and determine whether or not they would be enforceable.

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**Case No. 22-1098 (10th Cir. Sept. 7, 2022)**
Financial Institutions

SEC hits Financial Institutions for Identity Theft Prevention Violations

Financial institutions are common targets for cybercriminals and have been advised by the Securities Exchange Commission (SEC) to take proactive measures to protect customer accounts. This includes implementing policies and procedures to adequately respond to detected identity theft red flags. The SEC has set forth programs that companies must follow, including the Identity Theft Red Flags Rule, or Regulation S-ID. Regulation S-ID is designed to help protect investors from the risks of identity theft.

The SEC separately charged lenders J.P. Morgan Securities LLC, UBS Financial Services Inc., and online broker TradeStation Securities, Inc. for deficiencies in their programs. It is alleged that between 2017 to 2019, the firm’s programs did not include reasonable preventative measures to surface red flags in connection with customer accounts. The SEC’s orders find that each firm violated Rule 201 of Regulation S-ID.

Without admitting or denying the SEC’s findings, each firm agreed to cease and desist from future violations of the charged provision, to be censured, and to pay the following penalties: JPMorgan: $1.2 million; UBS: $925,000; and TradeStation: $425,000.

These three firms are all alleged to have failed the proper oversight in the implementation of the program.

As we have previously reported, there are separate regulatory actions being taken against JPMorgan, Bank of America, Morgan Stanley and several other large banks over their failure to monitor employees using unauthorized messaging apps. Overall, fines related to these deficiencies total $1 billion.

Jury First to Find in Favor of Policyholder in COVID-19 Coverage Case Awards $48M
Baylor College of Medicine v. XL Insurance America Inc. et al

Baylor College of Medicine was recently awarded $48 million by a Texas jury in its COVID-19 coverage lawsuit against several Lloyd’s of London syndicates. This is the first jury verdict to award a policyholder in a COVID-19 business interruption lawsuit.

After a three-day trial, the jury awarded Baylor $42.8 million in lost prof ts, about $3.3 million in extra expenses for items such as personal protective equipment and Plexiglas barriers, and about $2.3 million in damage to Baylor’s research projects. Baylor remained open as a clinical hospital and thus argued that it continually had infected people on its property during the insurance policy period.

The trial judge previously denied Lloyd’s summary judgment motion, finding that it was a question of fact whether COVID-19 caused direct physical loss of or damage to the insured property. In contrast, the judge granted summary judgment to Baylor’s other insurers, XL Insurance America and ACE American Insurance, finding that their policies explicitly included the term “virus” in their pollution and contamination exclusion.

The verdict will be appealed.

The case and jury verdict highlights that not all COVID-19 coverage cases are the same and although many insurers continue to win these cases and have them dismissed, there can be arguments for coverage under certain types of policies. It also highlights the diferences in a judge versus jury trial.


Class Action Filed Alleging Bank Failed to Learn from Past Cyber Attack and had “Nonchalant Approach” to Cybersecurity
McLaughlin v. Flagstar Bancorp Inc. et al

A Michigan-based bank is facing a purported class action lawsuit regarding a December 2021 data breach, which alleges that it failed to learn from a previous December 2020 data breach and demonstrated a “nonchalant approach” to cybersecurity.

According to the complaint, in December 2021, cybercriminals bypassed Flagstar Bancorp’s security systems and gained access to consumers personally identifi able information (PII). Flagstar became aware that cybercriminals had accessed the PII in June 2022. The stolen PII included 1.5 million consumers’ names, Social Security numbers, addresses, Tax ID numbers, dates of birth, and fnancial account information and numbers.

The complaint alleges that Flagstar’s use of outdated and insecure computer systems and software were easy to hack and that it failed to maintain adequate security measures and an up-to-date technology security strategy. The complaint alleges that this demonstrated a willful and conscious disregard for privacy by Flagstar.

Plaintiff further states that Flagstar’s “failure to learn” from a previous December 2020 data breach demonstrated its “nonchalant approach to cybersecurity and its institutional disregard for consumer data protection.” Flagstar previously agreed to pay $12.9 million to settle a diferent case relating to the earlier breach in which customers’ data was at risk due to the hacked Acellion file-transfer product.

The complaint also alleges that Flagstar’s failure to timely detect and report the data breach made its consumers vulnerable to identity theft without any warnings to monitor their fnancial accounts or credit reports to prevent unauthorized use of their PII. Flagstar’s breach notice obfuscated the nature of the breach and the threat it posed, including underplaying the breach’s severity.


The suit raises questions regarding fnancial institutions’ duty to learn from past cyber incidents and reiterates the importance of taking cybersecurity seriously.

Case No. 22-cv-11470 (E.D. Mich June 29, 2022)

Wells Fargo Agrees to Pay DOL $145M Over ESOP Probe and Subsequently Hit With Employee Class Action
Lawsuit Alleging $400M in Damages
Bleville et al. v. GreatBanc Trust Co. et al

The Department of Labor announced a settlement with Wells Fargo and GreatBanc Trust Company – a plan trustee – that recovers more than $131.8 million for the retirement plan’s participants after a department investigation found that the fund overpaid for company stock purchased for the plan from 2013 through 2018. Wells Fargo also agreed to pay a penalty of nearly $13.2 million as part of the settlement. Following the announcement of the settlement, former Wells Fargo employees filed suit against Wells Fargo alleging “corporate self-dealing at the expense of the retirement savings of company employees.”

The DOL settlement stems from an investigation by the department’s Employee Benefi ts Security Administration that determined Wells Fargo and GreatBanc caused the 401(k) plan to pay between $1,033 and $1,090 per share for Wells Fargo preferred stock. However, the stock, specif cally designed for the plan, converted to a set value of $1,000 in Wells Fargo common stock when allocated to participants.

EBSA investigators also learned over the course of its investigation that Wells Fargo used the dividends paid on the preferred shares to defray its own obligation to make contributions to the 401(k) plan, by using the dividends to repay the stock purchase loans. The investigation revealed the transaction was designed to cause the 401(k) plan to pay more for each share of stock than plan participants would ever receive.

As part of the settlement, GreatBanc agreed to not act as a fiduciary to a public company in connection with any future leveraged transaction involving an employee stock ownership plan, unless the plan acquires only publicly traded stock and pays no more than the fair market value.

In announcing the settlement, Secretary of Labor Marty Walsh stated: “Today’s settlement shows the Department of Labor will act when we find retirement assets are misused and benefi ts plans suf er.” Solicitor of Labor Seema Nanda added “This settlement refl ects the Department of Labor’s resolve to protect America’s workers’ hard-earned retirement savings and to ensure that plan f duciaries comply with their legal requirements.”
Two weeks after the announcement of the settlement, former employees of Wells Fargo filed suit against Wells Fargo alleging that it violated federal benefits law by overcharging their 401(k) plan for stock options. The complaint also brings suit against the then Wells Fargo CEO, the employee benefits review committee and its members, and GreatBanc.

The complaint alleges that defendants, including Wells Fargo as plan sponsor, favored the economic interest of Wells Fargo over those of the plan and its participants, to whom they owe the highest duties known to the law.

The complaint also alleges that Wells Fargo, with the knowledge and consent of the other defendants, converted plan assets for its own use, violating ERISA’s prohibited transaction provisions. The complaint states “This was theft of participants’ retirement savings.”

The complaint alleges that had Wells Fargo not taken dividends for its own use, participants would have received an additional $400 million worth of common stock or cash from 2017 to 2019.

Case No. 22-cv-02354 (D. Minn Sept. 26, 2022)

Insurance Coverage

Notice Prejudice Provision Must Be Explicitly Stated in Policy

Georgian American Alloys, Inc. v. AXIS Ins. Co

The Third Circuit ruled that under Delaware law, the prejudice rule must be explicitly stated in the policy. It cannot be read into the policy.

The policyholder failed to timely report a claim within the policy period, although it did report it before the ninety-day post-policy window closed and during the policy’s next renewal period. The insurer denied the claim for reporting after the close the policy period. The policyholder argued that the insurer had to show prejudice to support a denial of coverage based upon an untimely claim under a claims-made policy. The insurer countered that the prejudice requirement did not apply.

The court ruled that the policy at issue lacked language extending coverage to claims reported during any subsequent renewal and instead required notice during the specified policy period. The court was not willing to read a prejudice requirement into the policy whenever an insurer issues a renewal policy. The court was not willing to read a prejudice requirement into the policy whenever an insurer issues a renewal policy. As such, the insurer did not need to show prejudice to enforce its notice requirement.

Case No. 21-1947 (3rd Cir. Aug 31, 2022)

Seventh Circuit Affirms that Where Insurer has Breached Duty to Defend, Policyholder’s Defense Fees Presumed to Be Reasonable and Necessary

USA Gymnastics v. Liberty Ins. Underwriters, Inc

The Seventh Circuit recently held that where an insurer wrongly denies a duty to defend, any defense fees incurred by the policyholder are deemed to be reasonable and necessary. As part of the ongoing litigation involving USA Gymnastics (USAG) in lawsuits and investigations involving Larry Nassar, USAG sued several insurers in Indiana state court, arguing the companies were required to defend it and pay legal expenses related to the lawsuits and investigations. One of those insurers was Liberty, from which USAG had purchased a claims-made directors and officers liability insurance policy.

The district court previously held that Liberty had a duty to defend USAG against nearly all the athlete lawsuits and investigations, which was affirmed by the Seventh Circuit. Shortly after the district court ordered Liberty to provide coverage and reimburse USAG for its defense costs, USAG sent Liberty a calculation of damages.

These damages included approximately $3.18 million in past defense costs, including $1.77 million for government investigations and $205,000 in prejudgment interest on past defense costs.

Liberty did not agree to USAG’s demand, resulting in further coverage litigation.

The district court ruled, and the Seventh Circuit upheld, that when an insurer has breached the duty to defend and the policyholder “has secured, supervised and paid for a defense without any expectation of payment, those costs are market tested and are presumed to be reasonable and necessary.”

Liberty argued that USAG did not meaningfully supervise outside counsel because it never requested write-offs from outside counsel and rarely followed up with them to ask questions about invoices they submitted. USAG argued that it was not required to request write-offs or ask particular questions about bills as requirements for supervision. The Seventh Circuit affirmed that a litigant may supervise its outside counsel without refusing to pay portions of legal bills or “engaging in hairsplitting” about those bills.

Case No. 21-2914 (7th Cir. Aug. 16, 2022)
Court Holds Informing Underwriter of Claim Does Not Constitute Notice of Claim


As part of a renewal application, an insured informed the excess carrier underwriter it had received a legal hold letter but did not officially notify it as a claim. In subsequent coverage litigation, the court held that informing the underwriter alone did not satisfy the notice requirement under the excess policy.

Beginning in August 2018, the policyholder Heritage Bank purchased multiple excess insurance policies from Zurich. Heritage argued that these policies covered various actions filed by victims of the DC Solar Ponzi scheme, who alleged that Heritage had aided and abetted the wrongdoing by allowing those running the company to transfer funds from investors’ accounts without authorization. They sued Heritage after DC Solar went bankrupt. Heritage first reported the potential losses to its primary insurer the same month it received notice of them. As part of its renewal application in July 2019, Heritage informed the underwriting department at Zurich that there was a legal hold letter relating to DC Solar, but that they expected it to be a “nuisance incident.” Heritage did not send any notice to Zurich’s claims department during the applicable period.

Zurich stated it did not receive notice of the claims until February 2021. When Zurich did receive notice, it denied coverage for late notice. Heritage argued it was entitled to coverage as it notified an employee in Zurich’s underwriting department about the potential claim during the policy period. Heritage subsequently filed suit seeking defense and indemnification for some of its $9 million settlement of a case brought by the bankruptcy trustee.

In a somewhat colorful analogy, the court outlined the differences between claims-made and occurrence policies, writing: “With occurrence or claims-made policies, insurers must allow for some uncertain amount of risk haunting the customer’s past. With claims-made-and-reported policies any skeletons in the closet are irrelevant.” The court further stated that, this being the case, insurers can offer lower premiums on claims-made-and-reported policies because they do not have to account for any reservoir of risk but that “this system only works if the window slams shut at the end of each period.”

As such, the court found that Zurich was not required to show it was prejudiced by the late notice. The court also stated that the email to the underwriter during the renewal process does not suffice as notice.

Case No. 21-cv-10086 (N.D. Cal. Aug. 17, 2022)
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