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Artificial Intelligence

D&O Liability & Coverage: 2025 Trends, Developments & Decisions

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Commentary

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I. Introduction

The past year has been an interesting and action-packed year in the world of Directors & Officers (D&O) liability and coverage. We begin by examining some of the key trends and developments impacting directors, officers, and their insurers. Significant trends include the impact of the Trump administration on D&O liability, artificial intelligence (AI), environmental, social, and governance considerations (ESG), employment practices and diversity, equity, and inclusion (DEI); the potential of moving from quarterly mandatory reporting to bi-annual reporting; allowing corporate bylaws to provide for arbitration of securities actions; DExits (the movement of company places of incorporation away from Delaware to other states such as Nevada and Texas); and pig butchering.

We then summarize some noteworthy 2025 case decisions impacting D&O liability insurance.

II. D&O Trends & Developments

Below is a summary of some of the key trends and developments in 2025 that are likely to impact directors and officers in the year 2026.

A. The Impact Of Trump 2.0

The most impactful development of 2025 relates to the policies under the second Trump administration (Trump 2.0) and the vast departure they represent from the policies of the Biden administration. Many believe that, on balance, Trump 2.0 will reduce directors' and officers' liability overall. Deregulation is expected to result in an overall decrease in enforcement actions by federal agencies. Commentors' predictions regarding the overall impact on litigation-related liabilities are more variable. The One, Big, Beautiful Bill[1] – which permanently increases the maximum deduction for certain business property, allows full expensing of domestic research and experimentation expenditures, and makes permanent most of the 2017 tax cuts – generally affords more favorable treatment to companies than either preexisting law or the tax hikes and regulatory environment that were expected under a Harris administration.

As we predicted[2], there has been a substantial rollback of ESG regulation in favor of a responsible "drill baby

drill" approach, a displacement of DEI with merits based employment, and the climate-related disclosure rule delayed under the Biden administration has been tabled by the Trump administration. This is likely to lower directors' and officers' exposures for inaccuracies or misrepresentations related to climate emissions and may limit "green washing" liabilities, but the risks are otherwise subject to debate and subsequent development. The Trump administration has also evinced a more permissive approach to cryptocurrencies.

Overall, insofar as the federal government elevates economic concerns over environmental and social considerations, the frequency and severity of D&O claims may be reduced. In general, the expected appointment of more conservative federal judges is viewed as favorable in terms of reducing litigation-related liabilities.[3]

Companies and their managers still face an environment rife with risks, exposures, and uncertainty. Cyber and AI continue to present substantial risks as well as opportunities. Tariffs have injected some uncertainty, but so far, the fears expressed by some economists have not been fully realized. Credit risks, trade risks, and political risks historically have not been viewed as presenting significant concern domestically, but in recent years these risks have presented greater concerns along with social unrest and have caused many companies to seek insurance coverage for these risks.

Global business insolvencies also present risks for D&O liability. For private companies, insolvencies appear to be rising by 6% in 2025 and are predicted to rise another 5% in 2026. Reportedly, the were 17 bankruptcies of companies with over $1 billion in assets during the first half of 2025, the highest number since the COVID-19 pandemic. Accordingly, directors and officers must concern themselves with the solvency of their companies as well as the financial condition of customers and companies in the supply chain.[4]

Health and safety risks remain ever present for companies and their officers and directors.

B. SEC Enforcement Activity Has Declined Overall

The United States Security Exchange Commission's (SEC) enforcement action reached its lowest level in ten years overall, though insider trading and market manipulation enforcement activities have increased. The SEC appears to be focusing greater scrutiny on foreign companies listed on U.S. stock exchanges. This has been attributed to a shift in enforcement priorities under Trump 2.0 and a decline in the size of the SEC's work force.

C. Artificial Intelligence

AI has impacted society and businesses in ways that are both transformative and disruptive. AI presents major opportunities and exposures for companies and their directors, officers, and insurers. AI-washing claims have been brought against companies for publicly overstating their AI capabilities or making material misstatements or omissions regarding the reliability and oversight of complex technological systems. The $65 million pending settlement between Snapchat Inc. (SNAP) and its investors to resolve a putative securities class action served as an eye opener for D&O underwriters where companies adopt AI into their core infrastructure.[5] The case was brought on behalf of investors who purchased SNAP securities under Sections 10(b) and 20(a) of the Securities Exchange Act and Rule 10b-5. Companies and executives touting themselves as safe, transparent, or containing best practices without maintaining a robust compliance infrastructure may face such claims.

There has been a rise in AI-related securities class action litigation. There have been at least 53 AI-related lawsuits filed since 2020. According to the *Stanford Law School Securities Class Action Clearinghouse,* during the first six months of 2025, 12 AI-related securities class action lawsuits were filed on top of the 15 filed in 2024.[6] AI-related securities suits have included lawsuits against companies that are providing AI products or services. Many have been AI-washing claims that contain allegations similar to those that have been the subject of SEC enforcement actions. AI-related securities class action lawsuits also may involve companies that, rather than allegedly overstating their AI capabilities or prospects, allegedly understated their AI-related risks and misled investors by downplaying them. Other AI-related actions may involve use or misuse of AI by companies and their managers, defamation, intellectual property claims, and shareholder derivative suits.

Reportedly, President Trump has paused an alleged draft executive order that would seek to preempt

state laws on AI through lawsuits and by withholding federal funds. Earlier this year, the Senate voted 99-1 against an effort to block states from enacting AI laws through the $42 billion Broadband Equity, Access, and Deployment program. Many expressed concerns about the impact on federalism and limiting the ability of states to protect their residents from fraud, deepfakes, and child abuse or pornographic imagery.[7]

Much of the media coverage has been directed toward degenerative AI. But agentic AI – artificial intelligence systems that are capable of operating and developing autonomously and independently with little or no human oversight – presents significant risks as well when integrated into systems through application programming interfaces. Deepfakes – hyper-realistic media created through AI that can mimic someone's appearance, voice, and behavior – are increasingly being adapted for malicious purposes, particularly with respect to identity fraud. Synthetic identity could be used to bypass security systems, such as voice-activated banking systems, facial recognition used for mobile authentication, and online verification processes employed by financial institutions and others. Overall, the expectations have increased for officers and directors to play a greater role in monitoring and providing for cybersecurity. Insurers are using AI in connection with underwriting, risk management, fraud detection, and claims handling. AI is presenting opportunities and challenges for insurers.[8]

Another concern is AI's displacement of humans in the job market. Although some of these displacements may be offset by the creation of different jobs, several companies have announced reductions in work force attributable to AI. A new Senate Bill S. 3108 – the AI-Related Job Impacts Clarity Act – would create a federal reporting framework to track how AI is impacting employment in the United States.[9]

These AI risks require insurers, insureds, and brokers to review and negotiate policy terms. Although many D&O policies do not contain cyber exclusions or AI exclusions, there is an increased focus on whether to include such exclusions, whether to interpose sublimits on such claims, or to otherwise channel such claims to AI- or cyber-specific covers.

Cybersecurity and privacy claims continue to loom large for companies and their officers and directors. Cyber incidents, such as ransomware attacks and outages, continue to be major drivers of D&O claims frequency and many losses are severe presenting risks of first-party claims (for property damage and lost business and profits), third-party claims, and governmental enforcement actions. Accordingly, an increasing number of companies are purchasing cyber specific coverage. For a detailed discussion on cyber and AI claims and coverage issues, *see generally*, Scott M. Seaman and Jason R. Schulze, *Allocation of Losses in Complex Insurance Coverage Claims* (Thomson Reuters 13th Ed. 2025) at Vol. 1, Chapter 17 (Cybersecurity, Privacy, and Artificial Intelligence Claims).

D. ESG Is Down But Not Out

We have reported extensively on ESG and its impact on exposures faced by companies and their directors and officers, including "greenwashing" claims.[10] This area has been rife for claims by institutional investors, activist shareholders, government regulators, and others. To be sure, ESG has changed markedly from the "all of government" approach of the Biden administration to the responsible "drill baby drill" and "merits based" employment practices approach of Trump 2.0. The insurance industry in particular was seen by the Biden Administration as capable of assisting in supporting its ESG agenda through underwriting, investment, and claims activities.

However, even before Trump 2.0, the Biden administration failed to a get a final climate disclosure rule across the finish line, the U.S. Supreme Court somewhat limited the authority of administrative agencies in the areas of ESG and DEI specifically and more generally, and ESG backlash became a well-developed resistance movement. The Trump administration – through tabling climate disclosure rules, executive orders, regulatory retraction, and budgetary priorities – has taken much of the bite out of ESG. Political dynamics change, but at least for now the ESG tide has ebbed at the federal level. Nonetheless, it is important to keep in mind that companies must still comply with traditional environmental laws. Traditional environmental liabilities represent substantial risks and involve substantial compliance efforts and environmental remedial and investigative expenditures.

Several states, led by California, have picked up the ESG baton. In November, the Ninth Circuit granted an injunction staying the enforcement of California

SB 261 that requires companies to publish climate risk reports in January 2026 identifying their financial risks associated with climate change and their efforts to mitigate these risks.[11] The court, however, did not stay another law, SB 253, that requires companies to disclose their Scope 1 and 2 greenhouse gas emissions by an unspecified date in 2026. Though California is taking the lead, pro-ESG measures have been enacted in other states including Colorado, Florida, Illinois, Maine, Maryland, New Hampshire, Oregon, and Utah.

U.S. companies doing business internationally remain subject to international laws and regulation. Many such laws remain in place, although the European Union announced earlier this year it was dialing back some of its ESG initiatives. For a detailed analysis of ESG, *see generally*, Scott M. Seaman and Jason R. Schulze, *Allocation of Losses in Complex Insurance Coverage Claims* (Thomson Reuters 13th Ed. 2025) at Vol. 1, Chapter 21 (Sustainability/ESG (Environmental, Social, and Governance Considerations) & PFAS).

E. Employment Practices And An End To"Illegal" DEI

The Biden Administration also applied an "all of government" approach to advance its DEI policies throughout the U.S. government and sought to impose DEI on private companies and actors in support.

The U.S. Supreme Court and some initiatives in so-called red states took aim at DEI during the Biden administration. In *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College* and the companion case *Students for Fair Admissions, Inc. v. University of North Carolina*,[12] the Court issued its seminal decision striking down affirmative action admissions policies used by both Harvard and UNC, effectively barring the consideration of race as an independent factor in university admissions. The decision raised questions regarding efforts aimed at increasing diversity in the application and hiring processes for other public institutions and for private sector entities as well.

Trump 2.0 has targeted "illegal" DEI. On inauguration day, President Trump issued Executive Order 14151 "Ending Radical and Wasteful Government DEI Programs and Preferencing." The next day, Executive Order 14173 was issued "Ending Illegal Discrimination and Restoring Merit-Based Opportunity". Attorney General Pam Bondi subsequently issued a memorandum directing the Civil Rights Division of the Department of Justice (Department) to investigate, eliminate, and penalize "illegal DEI and DEIA preferences, mandates, policies, programs, and activities in the private sector and in educational institutions that receive federal funds." In March 2025, the Department and the Equal Employment Opportunity Commission began educating the public about unlawful discrimination related to DEI.

Both the pro-ESG and DEI policies of the Biden administration and the counter policies of the Trump administration present challenges and opportunities that can both limit and increase exposures. Companies that believe DEI and ESG policies are harmful or unhelpful to their missions have an easier time scaling back or eliminating these programs and activities. Companies that wish to continue their ESG and DEI programming, in large measure, are continuing them perhaps with modifications to labeling and other modest adjustments. For example, some companies have revised statements and disclosures, renamed or eliminated programs, and revised policies in an effort to avoid unwanted scrutiny from both regulatory authorities and corporate activists. D&O underwriters are continuing to evaluate the practices and capabilities of companies in areas of employment, environment, sustainability, governance, and supply chain as their ability to manage these matters remains key to the success and exposures of these companies.

Although compliance remains a fundamental concern, other factors impacting employment, governance, and DEI programming and practices include: attracting and retaining talent (Generation Z and Millennials reportedly are more likely to seek out and remain with employers with visible commitment to inclusion and equity); traditional discrimination and harassment litigation; reputational risks; and other business and financial risks. Not only are younger Americans dominating the workforce, but they are also playing a larger role in managing companies. *See generally*, Scott M. Seaman and Jason R. Schulze, *Allocation of Losses in Complex Insurance Coverage Claims* (Thomson Reuters 13th Ed. 2025) at Vol. 1, Chapter 21 (Sustainability/ESG (Environmental, Social, and Governance Considerations) & PFAS).

F. Potential For Bi-Annual Reporting

SEC Chair Paul Atkins has indicated that the agency is prepared to move forward with President Trump's proposal for changing the mandatory periodic reporting requirements for public companies from quarterly to bi-annually. Some support the proposal believing it would reduce reporting costs, cause managers to think longer term, and reduce exposure for companies associated with reporting by virtue of less public statements and more time to contemplate the accuracy of disclosures. Others believe that the reduction in costs associated with quarterly reporting may come at the expense of a larger time period for information to be exploited by insiders (*e.g.*, insider trading), increased market uncertainty or adverse impact, or increased volatility of share prices, and potentially reduce the overall quality of reporting.

At the other end of the reporting spectrum is the issue of when intra-quarter reporting is required. The Ninth Circuit recently adopted the "materiality" test for determining when intra-quarter reporting is required in the context of initial public offering under the Securities Act of 1933.[13] The court rejected the "extreme departure" test applied by the lower court and long followed in the First Circuit. The Ninth Circuit now joins the Second Circuit in following the "materiality" test.

G. Bylaws Requiring Arbitration

The notion of companies avoiding securities class action litigation by adopting bylaws requiring securities law claims to be submitted to arbitration has been flouted for years. The SEC historically has opposed such provisions, but in September the SEC issued a new policy statement (approved by a 3-1 party line vote) that the decision of whether to accelerate the effectiveness of a registration statement will not be impacted by the presence of provisions requiring the arbitration of investor claims arising under the federal securities laws. This issue will be closely watched. The plaintiff's security bar can be expected to oppose these efforts and, if passed, to seek to infiltrate the arbitration arena with pro-plaintiff arbitrators.

H. DExits – The Movement Away From Delaware

Delaware has been the leading corporate home for U.S. companies, sporting more corporate incorporations by far than any other state.[14] The desire of Delaware courts to maintain this status more than anything else explains the Delaware judiciary's reputation for being pro-policyholder in D&O liability insurance coverage matters. However, in recent years, Delaware courts have been seen as less supportive in limiting corporate liability and more inclined to challenge corporate board decisions. As a result, companies have been electing to incorporate in other states such as Nevada and Texas in greater frequency in a movement known as "DExits". Texas and Nevada are coxing companies by enacting laws making it harder for claimants to sue and prevail against companies. In an attempt to stem the tide of corporate departures, the Delaware legislature enacted S.B. 21 effecting numerous changes to the Delaware Corporations Code.

Among other things, the legislation: (1) limits "controlling stockholders" to individuals who own at least half of a company's stock or who own a third of stock plus have a managerial role; (2) installs safe harbors controlling stockholder transaction where approved or recommended by a committee consisting of a majority of disinterested directors or approved or ratified by a majority of votes cast by disinterested stockholders; (3) provides that controlling stockholders and control groups, in their respective capacities, may not be held liable for monetary damages for purported breaches of the duty of care; and (4) narrows the scope of "books and records" that shareholders can obtain under Delaware law to include core materials, effectively eliminating rights to obtain emails, texts, and other documents.

Delaware corporations may face lessor exposures with respect to direct and derivative suits filed in Delaware under Delaware law, such as claims for breach of duties. S.B. 21 does not, however, alter federal securities laws or claims under the laws of other states. D&O insurers may benefit in terms of the reduced exposure faced by their insureds including under Side A, but S.B. 21 does not purport to directly impact the terms of policies or coverage determinations. S.B. 21 is being challenged on constitutional grounds.

I. Beware Of ''Pig Butchering''

The term "pig butchering" traditionally referred to the agricultural practice of fattening pigs before slaughter. In today's world of crypto, it refers to an investment scam where fraudsters gain the trust of victims over time (*e.g.*, grooming them through online romance) and coaxing them to invest in fake

crypto assets or another fraudulent investment opportunities. For companies and their directors and officers, this presents risks of *Caremark*-type and other claims relating to adequate corporate oversight or ignoring suspicious transactions when crypto tokens are integrated into business operations. Regulators appear locked and loaded with the United States Department of Justice moving in October to seize $15 billion in Bitcoin tied to "pig-butchering" fraud and two banks being sued in July for allegedly ignoring red flags related to a $20 million loss resulting from a NFT-related "pig butchering" scam.

III. Some D&O Insurance Coverage Decisions Of Note In 2025

Courts have rendered a number of decisions on coverage under D&O liability policies during the past year.

A. The Fine Line Between Notice Compliance And Time-Bar

In *General Cable Corp. v. Scottsdale Indem. Co.*,[15] the court dismissed a lawsuit against a manufacturer's excess D&O insurers because its claims were either not ripe for adjudication or untimely filed. The court's ruling on the policyholder's anticipatory breach of contract claim turned on when the excess policy attached and required the insurer to cover the claims. A contract is not breached, the court explained, until the time for performance has expired. The excess policy provided that "[i]t is expressly agreed that liability shall attach to the Company only after the full amount of the Underlying Limits is paid in accordance with the terms of the Underlying Policies by any or all of the following . . . ." The court found that this provision meant the excess insurer was entitled to wait out "good-faith coverage disputes" between the manufacturer and its other insurers without breaching its performance obligations. Accordingly, the manufacturer's anticipatory breach of contract claim was not yet ripe for adjudication until the underlying policies were paid, and consequently, the statute of limitations had not yet begun to run. The court dismissed the claim without prejudice.

As for the declaratory judgment claim, the court noted that, under Delaware law, insurance claims become ripe when an insured establishes that there is a "reasonable likelihood" that coverage under the disputed policies will be triggered. Because Scottsdale insured the manufacturer for losses over $25 million, and because the manufacturer had incurred defense costs far above the policy's attachment point, the claim became ripe, the court concluded, the day that the underlying accounting investigations and FCPA lawsuits against the manufacturer were resolved in 2019. It was from that date that Delaware's three-year statute of limitations for the declaratory judgment claim began to run. Unfortunately for the manufacturer, it waited over five years to bring the declaratory judgment action against the recalcitrant excess insurer. Accordingly, that cause of action was time-barred and dismissed with prejudice.

Insurers scored a notice win in *Evanston Ins. Co. v. Frederick*.[16] The policy required the insured to give written notice "as soon as practicable, or within ninety (90) days after expiration" of the policy. As the initial notice only named the entity and not the individuals, the individual insureds failed to comply with the reporting requirement of the policy. The difficulty for the individuals stemmed from the fact that they were named in the suit nearly 2 years after the original notice. Nonetheless, the court held firm to the policy requirements, noting that allowing the insureds to modify or apply constructive notice concepts would be "tantamount to an extension of coverage to the insured *gratis*."

B. Non-Application Of New York Law To Foreign Companies

New York's high court rendered two decisions concerning the application of New York law to disputes between stockholders and companies incorporated in foreign countries. In *Ezrasons, Inc. v. Rudd*,[17] the New York Court of Appeals held that English law applied to the dispute and affirmed the dismissal of the case. The court determined that the internal affairs doctrine, providing for the application of the substantive law of the place of incorporation to disputes relating to the rights and relationships of corporate shareholders and directors and officers, required the application of English law as Barclays was incorporated in England. The court rejected the stockholder's argument that Sections 626(a) and 1319(a)(2) of the New York Business Corporations Law displaced the internal affairs doctrine and mandated application of New York substantive law to standing questions in shareholder derivative litigation, finding these sections provided New York courts with jurisdiction to hear derivative lawsuits brought on behalf of foreign corporations,

but the substantive law of the place of incorporation still determines which stockholders have standing to bring derivative actions.

In *Haussman v. Baumann*,[18] the New York Court of Appeals affirmed the appellate division's decision dismissing a shareholder derivative action filed against a company incorporated in Germany on *forum non coveniens* grounds. Once again, under the internal affairs doctrine, German law controlled and the plaintiff lacked standing to bring a stockholder derivative action.

C. Enforcement Of Forum Selection Clauses

In *Epicentrx, Inc. v. Superior Court,*[19] the California Supreme Court reversed the Court of Appeals' decision that held the forum selection provision in the company's certificate of incorporation providing the Delaware Court of Chancery as the exclusive forum for most stockholder lawsuits was unenforceable on the basis of there being no right to jury trial in the Delaware Court of Chancery. The California Supreme Court followed the modern trend favoring enforcement of voluntarily adopted forum selection clauses. The court noted that courts generally should not decline enforcement of contractual forum selection provisions on public policy grounds, especially where no statute or constitutional provision directly addresses the issue. Although California public policy supports the right to a jury trial, the right may be waived and "concern[s] the right to a jury trial in California courts, not elsewhere."

D. Related/Inter-Related Claims

Similar to the issue of number of occurrences under occurrence-based policies, the subject of related claims under claims made D&O insurance policies is subject to varying decisions that sometimes may be difficult to reconcile. The different results may be driven by the facts associated with the claims, the language of the policy definitions of "claims" or provisions regarding "related claims," the test applied by the court in determining whether the claims are related, and whether the insured or insurer are benefited by the determination. Indeed, D&O insurers and policyholders may take different positions regarding relatedness depending on the circumstances. For example, in some cases an insured may argue in favor of relatedness to avoid multiple retentions. In other cases, an insured may argue against relatedness to recover under greater policy limits across multiple policy years.[20]

Earlier this year, the Delaware Supreme Court provided its "relatedness" analysis under D&O policies with its decision in *In Re Alexion Pharms., Inc. Ins. Appeals.*[21] The Delaware Supreme Court adopted the "meaningful linkage" standard for relatedness analysis. In this case, the 2014-2015 D&O policy tower included a related claim provision that stated, "any Claim which arises out of such Wrongful Act shall be deemed to have been first made at the time such written notice was received by the Insurer." The related claim provision in the 2015-2017 D&O tower contained similar language. The insured reported "a notice of circumstances," based upon an SEC subpoena served on the insured in 2015. At that time, the primary insurer did not consider the company's communication to be a claim and stated it needed additional information. The company later provided notice in January 2017 of a securities class action filed against the company in 2016. The primary insurer ultimately decided that the SEC subpoena and the securities class action were related, and thus took the position that "the Securities Action, among other actions, was a single 'Claim' first made in the 2014-2015 policy period." Some of the excess insurers took different positions on relatedness.

The Delaware Supreme Court examined the language of the related claims provisions in the policies. Because terms used in those provisions were undefined, and there was no other textual evidence of the parties' intent about those terms, the court interpreted the "arises out of" language in the related claim provisions as requiring a "meaningful linkage" between two conditions for them to be related. The court emphasized that the linkage must be meaningful, not merely tangential. The court held that the SEC subpoena and the securities class action were related claims because they involved the same underlying wrongful acts. The common underlying wrongful acts were the company's alleged improper sales tactics worldwide, including its grantmaking activities. The insurance coverage for both was limited to the earlier of two D&O towers and the insured could recover only up to the one policy limit. It is important to note that the Delaware Supreme Court adopted the "meaningful linkage" test based upon the language of the policies at issue and different language may warrant a different test or compel a different result.

In *Nat'l Amusements Inc. v. Endurance Am. Specialty Ins. Co.*,[22] the insurers argued that the 2019 and 2016

lawsuits arising out of the merger of Viacom and CBS were interrelated making the settlement covered under policies in effect in 2016, rather than 2019. The Delaware Superior Court granted the insured's motion for summary judgment holding the 2019 lawsuit was not interrelated with the 2016 lawsuits and, thus, the costs associated with the 2019 suit were covered under the 2019 Policy. The court concluded that the two sets of litigation were not "meaningfully linked." It found the primary relatedness factor – the conduct underlying the lawsuits – weighed in favor of finding that the claims are not meaningfully linked. Although both sets of lawsuits involved alleged breaches of fiduciary duty, the suits challenge distinct wrongful acts and involve different legal theories. Additionally, the plaintiffs in the two suits were slightly different, the time periods involved differed somewhat, while there was some overlap in proofs, some evidence was distinct, and one suit sought monetary damages for inadequate merger consideration, while the other sought declaratory and judgment relief.

In *AmTrust Fin. Servs. v. Liberty Ins. Underwriters Inc.,*[23] the insured sought to recover costs it incurred in connection with two shareholder lawsuits filed in 2017. The insurer participated in a tower of coverage effective September 30, 2016 to September 30, 2017. The insurer argued that an earlier tower provided the proper source of coverage because the 2017 lawsuits "arise out of" circumstances noticed by AmTrust during the earlier period. The policy language provides that claims are not covered if they "aris[e] out of any circumstances of which notice has been given" under any prior policy. Applying *Alexion* here, the court concluded that there is a meaningful link between the 2015 Notice of Circumstance and the 2017 Securities and Derivative Lawsuits. Most important, they involve the same alleged conduct (specific accounting improprieties and material misrepresentations in financial statements regarding those specific improprieties), they rely on the same evidence (financial statements and public statements by officers regarding AmTrust's accounting), the relevant time periods overlap, and the theories of liability are similar (alleging AmTrust committed specific violations of accounting rules causing its financial statements to be materially misleading and/or false). Accordingly, the court determined AmTrust's costs incurred with respect to the Securities and Derivative Lawsuits are excluded under the 2016/2017 policy period and are properly attributed to the 2014–2015 policy period.

In *Navigators Specialty Ins. Co. v. Avertest, LLC*,[24] the court ruled that two claims were not related. Averhealth operates a laboratory that conducts drug testing of biological samples. In 2021 (during a period it was insured by Continental), the *Gonzalez* suit was filed alleging that Averhealth prioritized speed over accuracy in its testing procedures, resulting in false positives that caused plaintiffs to lose custody or visitation rights with their children. In 2022 (during the policy period Averhealth was insured by Navigators Specialty), Averhealth was sued in the *Foulger* case. Plaintiffs in the two cases were represented by the same lawyers, the suits were filed in the same federal district, and the allegations concerned the same core misconduct of prioritizing speed over accuracy and using improper testing methods, and the harms alleged involved frustrating child visitation rights of parents. The court nonetheless ruled in favor of the insured concluding that the allegations in the lawsuits were not sufficiently similar to constitute related claims under the Navigators and Continental policies.

In *Boyne USA, Inc. v. Fed. Ins. Co.,*[25] the court ruled against the insured finding the Montana and Michigan actions were related claims because the actions assert causes of action against Boyne based on the same general business practice and course of conduct concerning a mandatory rental management program. Although the suits were brought by different plaintiffs, in different forums, and concerned different properties, Boyne's mandatory rental management program is at the center of both lawsuits. The main distinction in outcomes in these cases was that, in *Avertest*, the court applied the more restrictive "common nexus" test, whereas here, in *Boyne*, the court emphasized that "the relevant inquiry was whether there is a "single course of conduct" that serves as the basis for the various causes of action. This "single course of conduct" test was previously endorsed by a Delaware bankruptcy court and district courts in California and Illinois. That standard differs from what courts have applied in Delaware ("meaningful linkage") and most recently in Virginia ("common nexus of facts" that "arose from the same occurrence of wrongful acts" to make claims "sufficiently similar"). Issues of what constitutes a claim, when claims are made, and whether claims are related will continue to be among the most litigated issues under D&O liability policies.

E. California Insurance Code Section 533

The United States Court of Appeals for the Ninth Circuit held that coverage for settlement amounts and defense costs incurred in an underlying employee and client poaching lawsuit was barred by California Insurance Code Section 533. Section 533 bars insurance coverage for losses caused by the willful act of the insured. In *United Talent Agency, LLC. v. Markel Am. Ins. Co.*,[26] one of United Talent Agency's (UTA) competitors, Creative Artists Agency (CAA), sued UTA for allegedly stealing CAA's clients and employees. CAA asserted claims against UTA for inducing breach of contract, intentional interference with prospective economic advantage, conspiracy to breach a fiduciary duty, intentional interference with contractual relations, and aiding and abetting a breach of fiduciary duty. Markel, which issued a management liability insurance policy, denied coverage for a variety of reasons including that the claim was precluded by operation of California Insurance Code Section 533. UTA sued the insurer for breach of contract and bad faith. The district court granted the insurer's motion for summary judgment, agreeing coverage was precluded by application of Section 533. UTA appealed. The Ninth Circuit affirmed, concluding that "there is no genuine dispute that the CAA litigation alleged willful acts by UTA, thereby triggering Section 533's exclusionary clause." The Ninth Circuit pointed out the gravamen of the underlying complaint is that UTA conspired to steal and deliberately stole CAA's clients and employees and any alleged non-willful acts were so closely related to UTA's conspiracy to harm CAA as to constitute the same course of conduct for purposes of Section 533." California courts have broadly applied Section 533 to bar coverage claims under D&O liability policies as well as general liability policies.

F. Payment By Non-Insured Does Not Satisfy An SIR

The Delaware Supreme Court in In re *Aearo Techs. LLC Ins. Appeals,*[27] affirmed the lower court's ruling that payment of defense costs by a non-insured did not count toward the insured's self-insured retention, and that the insured's payment of the self-insured retention was a condition precedent to the insurer's obligation to cover losses under the policy. The coverage dispute arose out of the insurers' denial of coverage to 3M Company and Aearo Technologies for coverage, including reimbursement of their defense costs, incurred with respect to thousands of bodily injury claims resulting from allegedly defective earplugs. The relevant policies each included self-insured retention obligations of the insured Aearo for $250,000 per occurrence, subject to an aggregate maximum of $1.5 million.

The court rejected the argument of 3M and Aearo that the payment of defense costs by 3M, an entity not insured under the policies, on behalf of Aearo satisfied Aearo's self-insured retention obligations under the policies. The court found that the self-insured retention clauses unambiguously obligated the insured alone to satisfy the self-insured retention. The court also rejected the argument, based upon the policies' maintenance clause, that the amount of the SIR may be used by the insurers as an offset from the amount of coverage owed rather than as a basis to forfeit coverage. The court held that an insurance policy maintenance clause serves the dual purposes of not relieving an insurer of its coverage obligations if an insured is bankrupt or insolvent and not requiring an insurer's coverage obligations to drop down if an insured fails to pay its self-insured retention. Accordingly, the court determined the maintenance clauses were inapplicable. The court noted the fundamental purpose of a self-insured retention is to obligate the insured to share in the risk and assume the first layer of coverage. The court analogized the situation to a primary and excess insurance relationship, such that failure of the primary coverage to be exhausted means the excess coverage is not triggered.

G. No Action Clauses

Origis USA LLC v. Great Am. Ins. Co.,[28] involved two towers of insurance. In a coverage action filed by Origis, the 2021 insurers filed a motion to dismiss arguing that, because the underlying matter was still pending, the coverage lawsuit violates the policy's "no action" clause. The insureds argued the "no action" clause precludes suits against the insurer while the underlying action is pending *only* for suits brought by third party claimants, but *not* for claims for coverage brought by insured persons. The 2023 insurers moved to dismiss, arguing that the Prior Acts Exclusions preclude coverage because all of the allegedly wrongful acts occurred prior to the past acts date. The insureds argued that three paragraphs in the underlying complaint constituted a separate claim involving alleged wrongful acts occurring after the past acts date. The Superior Court granted both motions to dismiss.

In a unanimous decision, the Delaware Supreme Court affirmed the Superior Court's ruling with respect to the separate claim/past acts date issue. On the "no action" clause issue, the Supreme Court remanded the issue to the Superior Court for further proceedings. The court found that there were various policy provisions, particularly with respect to the advancement and allocation of defense expenses, that potentially could be relevant to the determination of the meaning and application of the "no action" clause. The insureds argued that the insurers' defense cost obligations are present obligations and the provisions requiring advancement and allocation of defense costs required the insurer to make present payments of allocated expense amounts making the "no action" clause inapplicable to these issues. The court did not reject to the lower court's analysis but believed a "more in-depth analysis that considers the combination of these provisions and how they function together" was required.

H. What A Difference A ''The'' Makes

In *Paloma Res., v. Axis Ins. Co.,*[29] the United States Court of Appeals for the Fifth Circuit reversed the grant of summary judgment in favor of the insurers based upon the Intellectual Property exclusion. The insured, Paloma, argued that the placement of the determiner "the" immediately preceding the phrase "misappropriation of ideas or trade secrets" in the exclusion suggests no carryover modification by the phrase "actual or alleged" to the clause – the result being *actual*, as opposed to *alleged*, misappropriation of trade secrets is required to trigger application of the exclusion. Further, Paloma argued it is nonsensible to read the exclusion as applying to "any actual or alleged … the misappropriation of trade secrets" and that the inclusion of the determiner "the" before "misappropriation" signals a break from the series of infringement actions modified by the phrase "actual or alleged." The decision and its acceptance of the insured's linguistic gymnastics is subject to criticism as the underlying claim was the type of IP claim the exclusion was designed to exclude from coverage.

I. Bump-Up Exclusion

In *Towers Watson & Co. v. Nat'l Union Fire Ins. Co.,*[30] the United States Court of Appeals for the Fourth Circuit, applying Virginia law, held that the bump-up exclusion applied to bar coverage for a $90 million settlement of litigation relation to Towers Watson's January 2016 merger with Willis Group Holdings. In a prior decision, the Fourth Circuit reversed the district court ruling that the merger agreement did not involve an "acquisition" within the meaning of the bump-up exclusion. It remanded the case without reaching an ultimate determination of whether the exclusion barred indemnity coverage. In this decision, the Fourth Circuit resolved the applicability of the exclusion. It determined that the district court correctly granted summary judgment on the "bump-up" exclusion because the two remaining elements for the exclusion to apply were satisfied. First, there was a claim alleging the consideration paid for the acquisition was inadequate. Second, the settlement represented an effective increase in the price or consideration shareholders received. The term "represented" and the phrase "effectively increase" were not defined in the polices. Accordingly, the court properly turned to dictionary definitions for the plain meaning of these words.

The Fourth Circuit shot down the major arguments advanced by Tower as to why the exclusion should not apply. It may be true that allegations of violations of Section 14(a) of the Securities Exchange Act involve disclosures rather than adequacy of consideration. Nonetheless, the reality here is that the settlement represented an increase in consideration. The court also rejected Tower's illusory coverage argument. In this case, the insurers actually paid millions of dollars in defense costs in this matter. Further, most security claims do not involve corporate acquisitions so coverage may be afforded in many instances and under many circumstances notwithstanding the presence of a "bump-up" exclusion. Finally, the court rejected Tower's more narrow argument that $17 million of the $90 million settlement was not excluded because it ended up going toward attorneys' fees. The Fourth Circuit recognized that the full $90 million actually was paid into a common fund entirely for the benefit of shareholders. Once paid to the beneficiaries, the ultimate distribution of the funds was of no consequences in terms of the application of the exclusion. Money ultimately going toward attorneys' fees does not mean that this sum did not represent part of the amount of increased consideration.

This case represents a favorable decision for insurers seeking to apply similarly worded "bump-up" exclusions. The decision pumps-up the bump-up exclusion.

Insurers have not fared as well with bump-up exclusions in Delaware. In January 2025, a Delaware Superior Court decision held in *Harman Int'l Indust., Inc. v. Illinois Nat'l Ins. Co.*,[31] that a D&O insurance policy's bump-up exclusion did not preclude coverage for amounts paid in settlement of claims arising out of Harman International's reverse triangular merger with Samsung Electronics America. In that case, Judge Wallace accepted one of the arguments rejected by the Fourth Circuit in the *Towers Watson* case. He ruled that, because the underlying claim involved only allegations under Section 14(a), for which increase consideration is not a remedy, the settlement could not have involved an increase in the deal consideration. Previously, Judge Wallace ruled in *Northrop Grumman Innovation Sys., Inc. v. Zurich Am. Ins. Co*.,[32] that a bump-up exclusion did not apply to preclude coverage for a settlement of a Section 14(a) merger objection lawsuit. In *Viacom Inc. v. U.S. Specialty Ins. Co.,*[33] the court granted summary judgment to the insured finding the exclusion to be ambiguous as to whether it encompassed mergers in addition to pure acquisitions. The court noted that a reverse-triangular merger might be a covered merger rather than an excluded acquisition.

Parties must review the language of the particular bump-up exclusion as there are different wordings.

J. Capacity Exclusion

In *Mist Pharms, LLC v. Berkley Ins. Co*.,[34] the New Jersey intermediate appellate court reversed the decision of the trial court and determined that the claims were barred by the capacity exclusion in a D&O policy. The lower court avoided application of the capacity exclusion by finding that the insurer breached its duties under the policy by unreasonably withholding the insured officer/director's request to consent to a settlement.

Many liability policies require the insurer's written consent to settle without containing any requirement that the insurer not unreasonably withheld consent. Where the policy does not impose any reasonableness requirement, the insurer generally has the absolute right to grant or withhold consent in accordance with its own interests, particularly in the context of general liability policies. After all, the requirement of consent is for the protection of the insurer. Many courts recognize this, but some courts do interpose an obligation to act reasonably as a matter of contract law or based upon the requirement of good faith and fair dealing.

Under policies that expressly provide that the insurer may not withhold consent unreasonably, the refusal to withhold consent of course must be reasonable. Here, the appellate court's determined that the insurer's refusal to provide consent to settle was reasonable under the circumstances. First, the global settlement at issue represented the separate interests of multiple entities not insured under the D&O policy. Second, the insurer reserved its rights under the capacity exclusion. Third, the circumstances put in play the issue of whether the capacity exclusion applied to bar coverage. The insured director/officer is alleged to have engaged in wrongful corporate acts in a dual capacities – first acting in an official capacity as a director/officer of the insured business and second in an official capacity as a director/officer of an uninsured business.

The capacity exclusion provides "T]he Insurer shall not be liable to make any payment for Loss in connection with a claim made against any Insured . . . based upon, arising out of, directly or indirectly resulting from or in consequence of, or in any way involving any Wrongful Act of an Insured Person serving in their capacity as director, officer, trustee, employee, member or governor *of any other entity other than an Insured Entity* or an Outside Entity, or by reason of their status as director, officer, trustee, employee, member or governor of such other entity. The appellate court seized upon the expansive interpretation by New Jersey courts of the phrase "arising out of" whether it appears in a coverage grant or in an exclusion. The court relied upon an Eleventh Circuit decision under Georgia law enforcing a similar capacity exclusion.[35] The New Jersey Supreme Court granted review and the case remains pending.

K. Allocation

In *Flextronics Int'l. Ltd. v. Allianz Glob. Corp.,*[36] the court upheld a $11 million arbitration award in favor of an international supply and manufacturing company. Under the terms of the subject third layer excess D&O policy, where a claim involved both covered and uncovered claims or entities, the parties "shall use their best efforts to determine a fair and proper allocation of loss covered under this policy." The policies applied New York law, except as to "insurability of damages," where "any applicable" law favoring the

insured on that issue would apply. The matter arose out of a trade secrets lawsuit against the company and four executives, which settled for over $42 million. The insured sought to recover $10,963,951 from Allianz (plus pre-award interest), representing the loss that remained after subtracting the $45 million in underlying limits. The insurer argued that Flex's recoverable loss did not exceed $45 million—and therefore could not reach Allianz's layer—because some percentage of the total loss should be allocated to the two non-covered corporate defendants.

The arbitration panel, however, ruled for Flex, holding that the parties' insurance policy entitled it to receive the entirety of its $10,963,951 claim against Allianz. Flex argued for Delaware law's "larger settlement" rule, under which a loss is fully recoverable unless the insurer can show that the non-covered conduct increased its liability. Allianz countered that New York's "relative exposure" rule governs, under which the insurer and insured allocate settlement costs between covered and non-covered parties, with the insurer bearing the burden to prove the amount that should be excluded from coverage. The panel agreed with Allianz, finding New York's relative exposure rule to apply. Applying the relative exposure rule, however, the panel concluded that Allianz should bear the entire covered loss. It determined that the liability of the two uninsured corporate entities was "concurrent and conterminous" with that of the four insured directors and officers, such that those four insured parties had exposure for acts and omissions of the noninsured corporate entities. The panel concluded that Allianz had not met its burden of proving that any part of the settlement should be excluded from coverage. The only evidence that Allianz had offered was an expert's testimony and report that the panel found to be unpersuasive and of little probative value. The panel noted that the expert had never read the policy at issue, did not consider any correspondence among the parties as to allocation, and premised his opinions on the assumption given to him by Allianz, that "the liability of the defendants on any claim should be allocated on a "per capita basis" without any effort to analyze and evaluate the relative exposure of the defendants. The court confirmed the award and denied Allianz's cross-motion to vacate demonstrating the limited grounds and high showing required to vacate an arbitration award.

The decision speaks more to the power of an arbitration panel than to the substance of allocation. For a detailed discussion of allocation issues under D&O policies, *see generally*, Scott M. Seaman and Jason R. Schulze, *Allocation of Losses in Complex Insurance Coverage Claims* (Thomson Reuters 13th Ed. 2025) at Vol. 1, Chapter 14 (Allocation Issues and Satisfaction of Claims-Made Requirements Under Directors and Officers Liability Contracts).

L. Cash Is No Longer King In Delaware

Growing up many of us were told "cash was king." The concept has eroded as reflected by some restaurants and retailers refusing or unable to take cash. The concept of cash being king took another hit with the Delaware Superior Court decision in *AMC Ent. Holdings, Inc. v. XL Specialty Ins. Co.*[37] In this case, the court found that the insured movie theater's settlement payment made in the form of its stock valued at $99.3 million qualified as a covered "Loss" under its D&O policy.

The court rejected the insurer's argument that there was no coverage for the settlement payment because it was not a "Loss" under the terms of the policy. The policy defined "Loss," in relevant part, as "damages . . . settlements . . . or other amounts . . . that any Insured is legally obligated to pay." Further, the policy provides that the insurer will "pay 'Loss' on behalf of AMC." The insurer contended that, because the settlement involved the issuance of stock, not cash, and because the insurer could not pay the settlement on AMC's behalf, it was not a covered "Loss." The court disagreed, finding that "Loss" was not limited to cash payments. It emphasized that, under Delaware law, stock is a form of currency that can be used for a variety of corporate purposes, including settling debts. Thus, AMC's issuance of stock was deemed a covered "Loss," which the court refused to limit in a way not explicitly provided for in the D&O policy. Further, the court looked to the policy's bump-up exclusion, which uses the word "paid" twice. The court stated, "[t]his exclusion is not applicable to the issue presented, but its use of the word 'paid' is relevant" because words used in different parts of a policy are presumed "to bear the same meaning throughout[.]" The court reasoned, that because under Delaware Law the bump-up exclusion, and its use of the word "paid," can apply to stock transfers, it is "necessarily implie[d] that stock can be an amount AMC 'pays' which creates a covered 'Loss'."

The court also rejected the insurer's argument that AMC did not suffer economic harm, noting the policy did not condition coverage on the existence of

such harm. The court refused to "insert a restricting clause into the Policy."

Finally, the court ruled that, whether AMC sought the insurer's consent to settle, or waiver of consent, on a phone call presented a factual issue to be decided by a jury. However, the court noted that Delaware law allows a policyholder that does not comply with consent requirements to obtain coverage by rebutting the presumption that the insurer was prejudiced by the breach and showing that the settlement was reasonable.

Perhaps more than anything this case illustrates the accuracy of the "pro-insured" approach commentators often ascribe to Delaware courts when addressing D&O coverage issues. Apart from bending the "Loss" provision beyond recognition and ignoring the consent to settle requirement, the court's look to the "bump up" exclusion (which Delaware courts have avoided applying) to justify its ruling on "Loss" was a stretch. Decisions such as this may cause insurers to revise policies to prevent or limit the forms or methods of payments that satisfy "Loss" or "exhaustion" requirements. Insureds on the other hand may seek endorsements to accommodate cryptocurrency or other forms of payments.

Endnotes

1. H.R. 1: One Big Beautiful Bill Act, https://www.govtrack.us/congress/bills/119/hr1/text.

2. *See* Scott M. Seaman, "Sustainability Recalibration: What Insurers And Policyholders Should Know About ESG (Environmental, Social, and Governance Considerations) Under Trump 2.0, Part 1 Mealey's Litigation Report: Insurance, Vol. 39, #17 March 5, 2025 and Scott M. Seaman, "Sustainability Recalibration: What Insurers And Policyholders Should Know About ESG (Environmental, Social, and Governance Considerations) Under Trump 2.0, Part 2 Mealey's Litigation Report: Insurance, Vol. 39, #18 March 12, 2025.

3. *See* Russ Banham, "Mixed Bag: What Trump 2.0 Tariffs, DOGE Activities Mean for Insurers" *Carrier Management* (Dec. 11, 2024,) *quoting* Scott Seaman and others.

4. Claire Wilkinson, "Geopolitical tension, AI among emerging D&O risk sources" *Business Insurance* (Dec. 4, 2025).

5. Gillian R. Brassil, "Snap Inks $65 Million Deal to End Investors' Ad Revenue Suit (2)" Bloomberg (Oct. 29, 2025), available at https://news.bloomberglaw.com/securities-law/snap-inks-65-million-deal-to-end-investors-ad-revenue-suit.

6. *See* "Cornerstone Research Discusses Securities Class-Action Filings So Far in 2025" *Cornerstone Research* (July 31, 2025), available at https://cls-bluesky.law.columbia.edu/2025/07/31/cornerstone-research-discusses-securities-class-action-filings-so-far-in-2025/. The report also notes that plaintiffs filed 114 securities class actions in federal and state courts in the first half of 2025 which nearly equaled the number (115) of class actions filed in the second half of 2024. Although the number of AI-related filings and cryptocurrency-related filings are trending up, COVID-19-related filings are on pace to decline significantly.

7. Senate Strikes AI Moratorium from Budget Reconciliation Bill in Overwhelming 99-1 Vote (July 1, 2025), availableathttps://www.commerce.senate.gov/2025/7/senate-strikes-ai-moratorium-from-budget-reconciliation-bill-in-overwhelming-99-1-vote/8415a728-fd1d-4269-98ac-101d1d0c71e0.

8. *See, e.g.*, Patrick Donovan, "Insurers Face and AI Talent Gap," Dec. 1, 2025, available at https://www.insurancethoughtleadership.com/talent-gap/insurers-face-ai-talent-gap?utm_source=slipcase&utm_medium=affiliate&utm_campaign=slipcase.

9. *See* https://www.congress.gov/bill/119th-congress/senate-bill/3108/text.

10. *See* Scott M. Seaman, "Sustainability Recalibration: What Insurers And Policyholders Should Know About ESG (Environmental, Social, and Governance Considerations) Under Trump 2.0, Part 1 Mealey's Litigation Report: Insurance, Vol. 39, #17 March 5, 2025 and Scott M. Seaman, "Sustainability Recalibration: What Insurers And Policyholders Should Know About ESG (Environmental, Social, and Governance Considerations) Under Trump 2.0, Part 2 Mealey's Litigation Report: Insurance, Vol. 39, #18 March 12, 2025.

11. *See* order in *United States Chamber of Commerce v. Randolph*, No. 25-5327 D.C. (Nov. 18, 2025), available at chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://www.uschamber.com/assets/documents/Order-re-Motion-for-Injunction-Pending-Appeal-Chamber-v.-Sanchez-C.D.-Cal.pdf.

12. 600 U.S. 181, 143 S. Ct. 2141, 216 L. Ed. 2d 857 (2023).

13. *See Sodha v. Golubowski*, 154 F.4th 1019 (9th Cir. Aug. 29, 2025), *reh'g denied*, 2025 U.S. App. LEXIS 26250, 2025 WL 3142085 (9th Cir. Oct. 25, 2025).

14. According to Harvard Business Services Inc., over 65 percent of all Fortune 500 companies and more 50 percent of all U.S. publicly-traded companies are incorporated in the State of Delaware. "Delaware has established a reputation around the world as the most business-friendly state to incorporate. In fact, Delaware's corporation laws and statutes serve as a model for business laws in other states across the country." *See* https://www.delawareinc.com/.

15. 2025 U.S. Dist. LEXIS 173304, 2025 WL 2576384 (D. Del. Sept. 5, 2025).

16. 2025 U.S. Dist. LEXIS 142026, 2025 WL 2019379 (C.D. Cal. June 12, 2025).

17. 2025 WL 14360000 (N.Y. May 20, 2025).

18. 2025 N.Y. LEXIS 686, 2025 WL 1435989 (N.Y. May 20, 2025).

19. 2025 Cal. LEXIS 4499, 2025 WL 2027272 (Cal. July 21, 2025).

20. *See* Scott M. Seaman and Jason R. Schulze, *Allocation of Losses in Complex Insurance Coverage Claims* (Thomson Reuters 13th Ed. 2025) at Vol. 1, Chapters 7 (The Issue of Number of Occurrences) and 14 (Allocation Issues and Satisfaction of Claims-Made Requirements under Directors and Officers Liability Contracts).

21. 339 A.3d 694 (Del. Feb. 4, 2025).

22. 2025 Del. Super. LEXIS 114, 2025 WL 720455 (Del. Supr. Feb. 17, 2025).

23. 2025 U.S. Dist. LEXIS 187596, 2025 WL 2720960 (D. Del. Sept. 2025).

24. 2025 U.S. Dist. LEXIS 138002, 2025 WL 2025365 (E.D. Va. July 2025).

25. 2025 U.S. Dist. LEXIS 164762, 2025 WL 2438708 (D. Montana Aug. 2025).

26. 2025 U.S. App. LEXIS 6510, 2025 WL 8699213 (9th Cir. March 2025).

27. 2025 Del. LEXIS 309, *2025 WL 2312921* (Del. Aug. 2025).

28. 2025 Del. LEXIS 284 (Del. July 2025).

29. 2025 U.S. App. LEXIS 16588, 2025 WL 1864957 (5th Cir. 2025).

30. 138 F.4th 786 (4th Cir. May 2005).

31. 2025 Del. Super. LEXIS 3, 2025 WL 84702, at *3–4 (Del. Super. Ct. Jan. 3, 2025).

32. 2021 Del. Super. LEXIS 92, 2021 WL 347015, at *21–22 (Del. Super. Ct. Feb. 2, 2021).

33. 2023 Del. Super. LEXIS 728, 2023 WL 5224690, at *6 (Del. Super. Ct. Aug. 10, 2023).

34. 318 A.3d 744 (N.J. App. Div. 2025), *cert. granted*. 260 N.J. 92. (N.J. 2025).

35. *Langdale Co. v. National Union Fire Ins. Co. of Pittsburgh, Penn.*, 609 Fed. Appx. 578 (11th Cir. 2015). The court also noted that other courts have taken a similar approach to analyzing dual capacity claims and have reached different results depending upon the circumstances. *See Abrams v. Allied World Assur. Co. (U.S.) Inc.*, 657 F. Supp. 3d 1280, 1288 (N.D. Cal. 2023) (applying California law) (holding a capacity exclusion did not apply to underlying fiduciary duty claims against insureds as they arose solely from insureds' actions in their capacities as executives of the insured company); *L. Offs. of Zachary R. Greenhill, P.C. v. Liberty Ins. Underwriters, Inc.*, 46 N.Y.S.3d 105 (New York App. 2017) (holding capacity exclusion barred coverage as the wrongful conduct arose out of plaintiff's dual capacities); *Niagara Fire Ins. Co. v. Pepicelli*, 821 F.2d 216, 220-21 (3d Cir. 1987) (applying Pennsylvania law) (holding an outside business exclusion containing language similar to capacity exclusion barred coverage where a lawsuit arose from an attorney acting simultaneously as both an attorney and officer or director of an uninsured business, but exclusion did not apply to the malpractice claim against the attorney as that claim did not result from the attorney's outside business interests).

36. 2025 U.S. Dist. LEXIS 223418, 2025 WL 3168187 (S.D.N.Y. Nov. 13, 2025).

37. 2025 Del. Super. LEXIS 84 (Del. Supr. Feb. 2025). ■

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