

D&O Liability and Coverage: Updated Insurance Trends, Developments, and Decisions in 2026

Insights for Insurers Alert | 10+ min read

Jul 15, 2026

By: Scott M. Seaman, Pedro E. Hernandez

This article is based upon commentaries initially published in various Mealey's Litigation Reports, including Mealey's Litigation Reports: Artificial Intelligence, Vol. 3, #4, December 2025, and has been updated to reflect some developments during the first half of 2026. This article is for general information purposes and is not intended to be and should not be taken as legal advice. Any commentary or opinions do not reflect the opinions of Hinshaw & Culbertson LLP or its clients. Copyright © 2026 by Scott M. Seaman.

I. Introduction

The past 18 months have been an interesting and action-packed period in the world of directors & officers (D&O) liability and coverage. We begin by examining key trends and developments affecting directors, officers, and their insurers.

Significant Recent D&O 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 the arbitration of securities actions;
- DExits (the movement of company places of incorporation away from Delaware to other states such as Nevada and Texas); and
- the growing threat of “pig butchering” investment scams.

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

II. D&O Trends and Developments

Below is a summary of some key trends and developments in 2025 and the first half of 2026 that are likely to impact directors and officers for the remainder of 2026 and beyond.

A. The Impact of Trump 2.0

The most impactful development in some respects 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 merit-based employment, and the climate-related disclosure rule delayed under the Biden Administration has been tabled by the Trump Administration.

On May 4, 2026, the US Securities and Exchange Commission moved to formally rescind its 2024 climate disclosure rule. The foregoing are likely to lower directors' and officers' exposures to 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 prioritizes 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 favorably for 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, and the impact of tariffs has been negated by the United States Supreme Court decision in *Learning Resources, Inc. v. Trump*.^[4] Several securities actions have been filed alleging misleading disclosures or non-disclosures regarding companies' ability to address the consequences of tariff and trade policies.

Credit, trade, and political risks have historically 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 percent in 2025 and are predicted to rise another 5 percent in 2026. Reportedly, there 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.^[5]

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

B. SEC Enforcement Activity Has Declined Overall

The United States Securities Exchange Commission's (SEC) enforcement action reached its lowest level in 10 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 US 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 workforce.

C. Federal Securities Class Action Filings Have Increased

The total number of federal court securities class actions fell slightly in 2025 as compared to 2024. There were approximately 205 federal court securities class action lawsuit filings in 2025, down from 222 in 2024, representing a 7 percent decrease.

This is the lowest number of filings since 2022. However, there were 118 federal court securities class action lawsuits filed during the first six months of 2026, which is ahead of the 2025 pace.

D. Artificial Intelligence

AI has impacted society and businesses in ways that are both transformative and disruptive. AI presents significant 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 as companies adopt AI into their core infrastructure.^[6] 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 also been a rise in AI-related securities class action litigation:

- There have been at least 53 AI-related lawsuits filed between 2020 and 2025.
- There were 13 AI-related federal securities action filings in the first six months of 2026, compared to 14 in all of 2025.

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 the 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 by filing lawsuits and 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 focused on degenerative AI. But agentic AI—artificial intelligence systems 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, expectations have increased for officers and directors to play a greater role in monitoring and ensuring cybersecurity. Insurers are using AI for underwriting, risk management, fraud detection, and claims handling. AI continues to present 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 workforce attributable to AI. For instance, 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 sub-limits 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).

E. 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 “merit-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 get a final climate disclosure rule across the finish line, the US 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 a large 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 pose substantial risks, 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 them.

^[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 regulations. Many such laws remain in place, although the European Union announced earlier this year that 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).

F. Employment Practices and an End to “Illegal” DEI

The Biden Administration also applied an “all of government” approach to advance its DEI policies across the US 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 targeted 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 about efforts aimed at increasing diversity in the application and hiring processes for other public institutions and 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 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 a 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).

G. 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 biannually.

On May 5, 2026, the SEC proposed a rule that would provide companies currently subject to the agency’s quarterly reporting requirements with the option to instead file interim reports semiannually. It appears that optional semiannual reporting will soon be put into effect.

- 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 fewer 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 longer 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.
- Some have expressed concern that less frequent reporting could weaken corporate governance and even potentially lead to more frequent corporate and securities litigation. This speculation aside, many companies may elect to continue reporting on a quarterly basis.

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 an 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.

H. 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.

Some believe that companies adopting forced arbitration provisions may actually be disadvantaged:

- First, the plaintiff’s security bar can be expected to infiltrate the arbitration arena with pro-plaintiff arbitrators.
- Second, legal costs may increase because instead of litigating one consolidated case, companies may defend multiple individual arbitrations, each involving individual discovery obligations, separate depositions or hearing testimony of numerous officers and directors, and multiple expert costs.

The Private Securities Litigation Reform Act of 1995 (the PSLRA) stay of discovery during the pendency of a defendant’s motion to dismiss in federal court is inapplicable to arbitration. Settlement values may increase as investors pursuing claims may not resolve their individual actions for a percentage of total estimated class damages, and recoveries per claimant will vary greatly depending on the investors that file claims and the law firms that represent them. Others believe that the traditional advantages of arbitration will be realized.

I. DExits: The Movement Away From Delaware

Delaware has been the leading corporate home for many US companies, with far more corporate incorporations 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 with greater frequency in a movement known as “DExits”. Texas and Nevada are steering companies by enacting laws that make it harder for claimants to sue and prevail against companies. In an attempt to stem the tide of corporate departures, the Delaware legislature enacted SB 21, which effected 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 the stock plus have a managerial role;
2. installs safe harbors controlling stockholder transactions 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 lesser exposures with respect to direct and derivative suits filed in Delaware under Delaware law, such as claims for breach of duties. SB 21 does not, however, alter federal securities laws or claims under the laws of other states.

D&O insurers may benefit from the reduced exposure faced by their insureds, including under Side A, but SB 21 does not purport to directly impact the terms of policies or coverage determinations. S.B. 21 is being challenged on constitutional grounds.

One online source lists 26 Delaware corporations changing their places of incorporation to another state as of June 1, 2026, compared to five companies moving their place of incorporation to Delaware. Most of the companies leaving Delaware reincorporated in Texas and Nevada.[\[15\]](#)

J. 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 coax them to invest in fake crypto assets or other fraudulent investment opportunities.

For companies and their directors and officers, this presents *Caremark*-type risks and other claims related to inadequate 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 (DOJ) 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. Noteworthy D&O Insurance Coverage Decisions

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

A. Disgorgement

On June 4, 2026, in *Sripetch v. Securities and Exchange Commission*,^[16] the United States Supreme Court issued a unanimous decision holding that the SEC may seek disgorgement as a remedy even if the agency cannot prove that investors suffered a financial loss. The decision resolves a split among the federal circuits on the issue and represents an affirmation of the SEC's disgorgement authority. The issue did not address D&O insurance coverage issues.

The issue of insurance coverage for disgorgement was addressed recently by a Delaware Superior Court decision in *Clear Channel Outdoor Holdings, Inc. v. Illinois National Ins. Co.*^[17]

In this case, the SEC reached a negotiated resolution with Clear Channel and entered a cease-and-desist Order requiring Clear Channel to “pay disgorgement” of approximately \$16.3 million, prejudgment interest of approximately \$3.7 million, and a “civil money penalty” of \$6 million.

Clear Channel instituted coverage litigation against its insurers seeking coverage for the disgorgement amount and prejudgment interest. The parties filed cross-motions for summary judgment. On April 28, 2026, the Delaware Superior Court awarded summary judgment to the policyholder.

The policy's definition of the term “Loss” provided that Loss “shall not include ... civil or criminal fines or penalties imposed by law” or “matters which may be deemed uninsurable under the law pursuant to which this policy shall be construed.” The court rejected the insurer's arguments that disgorgement was a “penalty” for which the policy precluded coverage and that the disgorgement amount was uninsurable as a matter of public policy.

Instead, it held that the insurance contract provides coverage for disgorgement and prejudgment interest. It noted that the SEC's statutory authority to seek monetary remedies “delineates” between civil penalties on the one hand, and “equitable relief” and “disgorgement” on the other hand.

According to the court, the policy's definition of Loss “mirrors” this distinction. The policy's definition of Loss, like the relevant statutory provisions, expressly references “penalties” but not “equitable relief” or “disgorgement.” The court was not persuaded by the two Supreme Court decisions—a 2017 decision in *Kokesh* and a 2020 decision in *Liu*.

Although those cases did conclude that “disgorgement” was a “penalty” within the meaning of relevant statute of limitations provisions, the United States Supreme Court expressly cautioned that “its ruling should not be read to address matters beyond the sole question in the case” having to do with the relevant limitations period. The Superior Court relied upon the New York Court of Appeals' 2021 decision in the J.P. Morgan/Bear Stearns case that rejected the insurer's argument in that case, made in reliance on *Kokesh*, that “disgorgement” is a “penalty.”

B. The Fine Line Between Notice Compliance and Time-Bar

In *General Cable Corp. v. Scottsdale Indem. Co.*,^[18] the court dismissed a lawsuit against a manufacturer's excess D&O insurers because its claims were either not ripe for adjudication or were 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 this 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 win on late notice in *Evanston Ins. Co. v. Frederick*.^[19]

- The policy required the insured to give written notice "as soon as practicable, or within 90 days after expiration" of the policy.
- Because 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 two 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*."

C. 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:

1. In ***Ezrasons, Inc. v. Rudd***,^[20] 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, 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.

2. In ***Haussman v. Baumann***,^[21] 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 conveniens* grounds.

Once again, under the internal affairs doctrine, German law controlled, and the plaintiff lacked standing to bring a stockholder derivative action.

D. Enforcement of Forum Selection Clauses

In *Epicentrx, Inc. v. Superior Court*,^[22] the California Supreme Court reversed the Court of Appeals' decision and upheld the forum selection provision in the company's certificate of incorporation. This provided that the Delaware Court of Chancery was the exclusive forum for most stockholder lawsuits, which was unenforceable on the basis of there being no right to a jury trial in the Delaware Court of Chancery.

The California Supreme Court followed the modern trend favoring the 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."

E. Related/Inter-Related Claims and Number Of Claims

Similar to the issue of the number of occurrences under occurrence-based policies, the number of related claims under claims-made D&O insurance policies is subject to varying decisions that 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 is 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 higher policy limits across multiple policy years.[\[23\]](#)

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*.[\[24\]](#)

- 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 the 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.*,^[25] 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.*,^[26] 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 importantly, 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*,^[27] the court ruled that two claims were not related.

- Avertest 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 Avertest 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 the parents' frustration over child visitation rights.
- 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.*,^[28] 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.

In *Navigators Ins. Co. v. Under Armour, Inc.*,^[29] the United States Court of Appeals for the Fourth Circuit reversed the district court and held that various securities class actions, shareholder derivative suits, and federal government investigations against Under Armour all stemmed from a "single scheme" to misrepresent the company's financial growth.

- Because the underlying matters were "logically or causally related" under the terms of the insurance policy, they were treated as a single claim subject to a single \$100 million liability cap, preventing Under Armour from obtaining a subsequent \$100 million excess insurance tower.

F. 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.*,^[30] 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 the 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.

G. Payment by Non-Insured Does Not Satisfy an SIR

The Delaware Supreme Court in *In Re Aearo Techs. LLC Ins. Appeals*,^[31] 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.

H. No Action Clauses

Origis USA LLC v. Great Am. Ins. Co.,^[32] 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 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.

I. What a Difference the Word "The" Makes

In *Paloma Res., v. Axis Ins. Co.*,^[33] 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 nonsensical 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 are subject to criticism, as the underlying claim was the type of IP claim the exclusion was designed to exclude from coverage.

J. Bump-Up Exclusion

In *Towers Watson & Co. v. Nat’l Union Fire Ins. Co.*,^[34] 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 related 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 that 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 policies. 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 had 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.*,^[35] 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 an increase in 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.*,^[36] 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.*,^[37] 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.

K. Capacity Exclusion

In *Mist Pharms, LLC v. Berkley Ins. Co.*,^[38] 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 withhold 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 determined that the insurer's refusal to provide consent to settle was reasonable under the circumstances.

1. First, the global settlement at issue represented the separate interests of multiple entities not insured under the D&O policy.
2. Second, the insurer reserved its rights under the capacity exclusion.
3. 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 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.[\[39\]](#)

On May 11, 2026, the New Jersey Supreme Court affirmed. The court emphasized the breadth of the exclusion, particularly the phrase “in any way involving,” and held that the exclusion does not require a strict causal nexus between the excluded conduct and the alleged loss. Rather, any overlap between the alleged misconduct and the insured's role with an uninsured entity is sufficient to implicate the exclusion.

The court determined that the allegations in the underlying complaints involved Krivulka acting in his capacity as a director, member, or manager of uninsured entities, particularly Akrimax, and that no allegation against Mist, or against Krivulka in his insured role, was independent of his activities involving uninsured entities. Accordingly, the claims therefore fell squarely within the exclusion.

The insured argued that some of Krivulka's alleged conduct involved his insured role with Mist and, therefore, should not be excluded. The majority rejected this dual capacity argument, adopting an expansive approach for the application of the exclusion under which any claim involving overlapping uninsured capacities, even in part, may be barred in full. The court rejected the insured's estoppel argument, noting the insurer consistently and repeatedly reserved its rights under the capacity exclusion throughout the five-year claims process.

The insurer reproduced the exclusion in multiple communications, invoked it at least ten times, and expressly disclaimed waiver or estoppel. Under these circumstances, the majority concluded that Mist could not reasonably rely on any expectation that the insurer would fund a settlement or waive its coverage defenses. Finally, the court held that, because the claims fell within the capacity exclusion, the insurer had no obligation to fund the settlement or provide indemnity, and the insurer's refusal to participate in settlement negotiations did not constitute bad faith.

L. Contractual Liability Exclusion

Whether a contractual liability exclusion in a D&O insurance policy bars coverage for not only a breach of contract claim but also for related tort claims is a recurring issue that depends upon the claim-specific facts and language of the exclusion.

In *Cincinnati Ins. Co. v. Metropolis Condominium Assoc.*,^[40] applying Illinois law, the court considered the scope of a contractual liability exclusion and determined on summary judgment that the insurer had a duty to defend.

- In the underlying complaint, plaintiffs sued the insured for breach of a management agreement (to which the insured was a party) and for tortious interference with a collective bargaining agreement (to which the insured was not a party).
- The exclusion provided the insurer is “not liable to . . . defend any claim for any actual or alleged liability of any insureds under . . . any oral or written contract or agreement, except . . . [t]o the extent the liability would have attached to any such insureds in the absence thereof.”
- The court held the exclusion did not apply to the tortious interference count, reasoning that the count did not rely on the insured's liability under the terms of the management agreement in any way. Instead, it involved the insured's alleged inducement of another entity's breach of the collective bargaining agreement to which the insured was not a party.
- Because the tortious interference claim did not involve a claim “for . . . alleged liability of [the insured] under the terms . . . of any . . . contract,” the exclusion did not apply to that count.

Some contractual exclusions apply more broadly to any claim alleging, arising out of, based upon, attributable to, or in any way involving any liability under any contract or agreement.

M. Allocation

In *Flextronics Int'l. Ltd. v. Allianz Glob. Corp.*,^[41] the court upheld an \$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 from 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. However, applying the relative exposure rule, 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).

More recently, a Delaware Superior Court decision addressed the merits of allocation. In ***Hemisphere Media Group, Inc. v. Fair Am. Select Ins. Co.***^[42] the Delaware Superior Court applied the “Larger Settlement Rule” and granted the policyholder’s motion for summary judgment with respect to a \$15 million settlement of an underlying stockholder class action against Hemisphere directors and other entities. Under Delaware’s Larger

Settlement Rule, where settlements involve both covered and uncovered parties or claims, they are allocated to covered claims unless

1. the insurer proves that the alleged uncovered conduct increased the insurance company's liability; or
2. the policy provides a specific allocation method for covered and uncovered claims.

The policy's allocation provision stated that, if the parties did not agree on an allocation, the insurer would "advance that portion of Loss which the Insured and the Insurer agree is not in dispute until a final amount is agreed upon or determined pursuant to the provisions of this Policy and applicable law." The insurer argued that the "disagreement clause" mandated an allocation using the "relative legal and financial exposures" and "benefits obtained" language referenced in the "best efforts" clause.

The Superior Court rejected that argument, holding "that is not what the disagreement clause says," but instead that it "contemplates that a final amount will be determined pursuant to 'the provisions of this Policy'—that is, the whole Policy—and 'applicable law.'" The Superior Court held that "none of the 'provisions of this Policy,'" including the "best efforts" clause, mandated an allocation using the "relative legal and financial exposures" and "benefits obtained" language referenced in the "best efforts" clause.

The court determined that the policy as a whole "mandates broad coverage for 'settlements . . . that any Insured is legally obligated to pay'" and "does not exclude coverage where a settlement also relates to conduct by an uninsured person, nor does it mandate a particular allocation method." Many D&O policies contain "best efforts" or "relative exposure" language. Insurers often argue these clauses require them to only pay a fraction of a settlement because the uncovered corporation shares blame. Under this decision, an "agreement to agree" on allocation does not count as a formal allocation method.

In essence, the court ruled that the language of the policy was closer to the language in *Murdock* Superior Court, 2020 WL 1865752, where the Delaware Supreme Court applied the Larger Loss Rule than to the language in *Verizon* 2020 WL 8509725, where the allocation provision provided:

"In connection with any Claim, other than a Claim that is or includes a Securities Claim, with respect to: (i) Defense Costs jointly incurred by, (ii) any joint settlement entered into by, or (iii) any Judgment of joint and several liability against any Organization and any insured Person, there shall be a fair and equitable allocation as between any such Organization and any such Insured Person, taking into account the relative legal and financial exposures and the relative benefits obtained by any such Insured Person and any such Organization, without any presumption that the coverage afforded to the Insured Person shall in any way reduce the allocation to the Organization which shall not be Insured for such allocation.

In the event that a determination as to the amount of Defense Costs to be advanced under the policy cannot be agreed to, then the Insurer shall advance Defense Costs excess of any applicable retention amount which the insurer states to be fair and equitable until a different amount shall be agreed upon or determined pursuant to the provisions of this policy and applicable law."

According to the court, here, like Murdock and unlike Verizon, the Policy lacks language mandating an allocation method.

N. Cash is No Longer King in Delaware

Growing up, many of us were told that “cash was king.” The concept has eroded, as reflected by some restaurants and retailers refusing or being unable to take cash. The concept of “cash is king” took another hit with the Delaware Superior Court decision in [*AMC Ent. Holdings, Inc. v. XL Specialty Ins. Co.*](#)^[43] 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 payment.

[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] *Learning Resources, Inc. v. Trump*, 607 U.S. __ (2026). The 6-3 decision issued in February 2026 authored by Chief Justice John Roberts, ruled that the International Emergency Economic Powers Act (IEEPA) does not grant the President unilateral authority to impose tariffs, as that power is exclusively reserved for Congress under Article I of the U.S. Constitution. Time will tell the impact of the decision and the resulting refunds. However, Trump 2.0 continues to impose tariffs under various other authorities, including under Section 301 of the Trade Act of 1974.

[5] Claire Wilkinson, “Geopolitical tension, AI among emerging D&O risk sources” *Business Insurance* (Dec. 4, 2025).

[6] 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>.

[7] Senate Strikes AI Moratorium from Budget Reconciliation Bill in Overwhelming 99-1 Vote (July 1, 2025), available at <https://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>.

[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 <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 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] <https://www.businesslawprofessors.com/2026/06/reincorporation-update-june-1-2026/>.

[16] 608 U.S. ____ (June 4, 2026).

[17] No. N24C-02-208 PAW CCLD (Del. Super. Ct. Apr. 28, 2026).

[18] 2025 WL 2576384 (D. Del. Sept. 5, 2025).

[19] 2025 WL 2019379 (C.D. Cal. June 12, 2025).

[20] 2025 WL 14360000 (N.Y. May 20, 2025).

[21] 2025 WL 1435989 (N.Y. May 20, 2025).

[22] 2025 WL 2027272 (Cal. July 21, 2025).

[23] 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).

[24] 339 A.3d 694 (Del. Feb. 4 2025).

[25] 2025 WL 720455 (Del. Supr. Feb. 17, 2025).

[26] 2025 WL 2720960 (D. Del. Sept. 2025).

[27] 2025 WL 2025365 (E.D. Va. July 2025).

[28] 2025 WL 2438708 (D. Montana Aug. 2025).

[29] 165 F. 4th 171 (4th Cir. Jan. 20, 2026)

[30] 2025 WL 8699213 (9th Cir. March 2025).

[31] 2025 WL 2312921 (Del. Aug. 2025).

[32] 2025 Del. LEXIS 284 (Del. July 2025).

[33] 2025 WL 1864957 (5th Cir. 2025).

[34] 138 F. 4th 786 (4th Cir. May 2005).

[35] 2025 WL 84702, at *3–4 (Del. Super. Ct. Jan. 3, 2025).

[36] 2021 WL 347015, at *21–22 (Del. Super. Ct. Feb. 2, 2021).

[37] 2023 WL 5224690, at *6 (Del. Super. Ct. Aug. 10, 2023).

[38] 318 A. 3d 744 (N.J. App. Div. 2025), *cert. granted*. 260 N.J. 92. (N.J. 2025).

[39] *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).

[40] No. 24 C 4328 (N.D. Ill. Mar. 31, 2026).

[41] 2025 WL 3168187 (S.D.N.Y. Nov. 13, 2025).

[42] 2026 WL 1970729 (Del. Super. Ct. June 18, 2026).

[43] 2025 Del. Super. LEXIS 84 (Del. Supr. Feb. 2025).

Hinshaw & Culbertson LLP is a U.S.-based law firm with offices nationwide. The firm's national reputation spans the insurance industry, the financial services sector, professional services, and other highly regulated industries. Hinshaw provides holistic legal solutions—from litigation and dispute resolution, and business advisory and transactional services, to regulatory compliance—for clients of all sizes. Visit www.hinshawlaw.com for more information and follow @Hinshaw on LinkedIn and X.

Related People



Pedro E. Hernandez

Partner

☎ 305-428-5043



Scott M. Seaman

Partner

☎ 312-704-3699

Related Capabilities

Bad Faith, Market Conduct & Extra-Contractual Liability

Claims Resolution, Management & Social Inflation Containment

Environmental

Insurance

Insurance Coverage Litigation & Counseling

Insurance Regulatory & Compliance

Insurance Transactions

Regulatory & Compliance

Reinsurance

Related Insights

2025 Key Insurance Developments and Trends for 2026

Tags

Complex Casualty & Long-Tail Coverage Claims, Directors' & Officers' Liability ("D&O"), Crime/Fraud, & Financial Institution Claims, Cyber, Privacy, Cybersecurity, & Artificial Intelligence, Employment Practices, Workers Compensation & Employee Liability Claims, Environmental-Related Claims, Fee & Independent Counsel Disputes, Property Claims, Policyholder Bankruptcy & Insurer Insolvency Matters Impacting Insurers, Professional Liability/Errors & Omissions Claims, Viruses & Pandemic Coverage, Construction & Construction Defect Claims