

Court Finds That Policy Does Not Cover Claims Against Directors Serving on Acquired Company's Board

March 2006

In an unreported decision, the Superior Court of Delaware has determined that the D&O insurance carriers of two merging corporations have no obligation to contribute to a settlement that the acquiring company (AWS) paid to settle claims brought by the shareholders of the acquired company (Telecorp), finding that (1) AWS's policy did not cover claims based upon the director's service on Telecorp's board and (2) while Telecorp's insurer was required to pay defense costs, the insurer was not obligated to contribute to a settlement that did not determine the liability of Telecorp's directors. *AT&T Wireless Services, Inc. v. Fed. Ins. Co.*, 2006 WL 267135 (Del. Super. Jan. 31, 2006).

In the underlying litigation, a group of Telecorp shareholders alleged that the involvement and approval of the AWS merger by Telecorp's board violated the director's fiduciary duties. The shareholders also alleged liability against AWS for its control over the merger through the work of three AWS directors sitting on Telecorp's board. In settlement, AWS agreed to pay \$47 million in return for a release of all remaining claims against all remaining defendants. AWS filed this action against Telecorp's D&O insurers and its own insurers for contribution to the settlement.

The court held that AWS's insurer did not have an obligation to contribute to the settlement, which resolved claims against AWS's directors, because those claims arose from the directors' conduct on the board of Telecorp. The policy issued to AWS excepted from coverage claims arising out of a director's or officer's "service for any entity other than" AWS. Because the claims against the AWS directors were premised upon their "service" on Telecorp's board, the court concluded that the exclusion barred coverage. The court also noted that apart from the exclusion, coverage appeared to be currently unavailable because "there has been no indemnification to an officer or director since there has been no finding in any litigation that those officers or directors were required to pay damages."

The court held that Telecorp's insurer was not currently obligated to contribute to the settlement. The Telecorp primary policy defined "loss" to include "the total amount which any Insured person becomes obligated to pay on account of each claim." The court found that the settlement agreement did not establish a specific loss on

the part of the insured. The court explained that there was "no document or reference in any court proceeding which specifically and clearly establishes an obligation personal" to any Telecorp director or officer.

According to the court, establishing the liability of the individual directors was an important prerequisite in this case because the underlying litigation included parties who were not covered by Telecorp's insurers. The court would not require Telecorp's insurer to contribute to the settlement until the liability of Telecorp's directors was determined.

Finally, on the issue of the duty to defend, the court held that Telecorp's insurer had an obligation to reimburse AWS for the reasonable defense costs it paid for the three AWS directors who also sat on Telecorp's board.

The court also refused to dismiss the bad faith claim based on the failure to advance defense costs.