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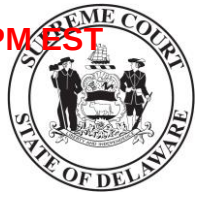

IN THE SUPREME COURT OF THE STATE OF DELAWARE

IN RE SOLERA INSURANCE COVERAGE APPEALS	No. 413,2019 No. 418,2019 COURT BELOW – SUPERIOR COURT OF THE STATE OF DELAWARE, C.A. No. N18C-08-315 AML CCLD

ANSWERING BRIEF OF PLAINTIFF-BELOW/APPELLEE SOLERA HOLDINGS, INC.

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Dated: January 27, 2020

TABLE OF CONTENTS

PAGE

TABLE OF CITATIONS

Page(s)

Cases

Statutes and Codes

Other Authorities

NATURE OF PROCEEDINGS

This is an insurance case, not a corporate law case. What matters here is not whether Section 262 falls under Title 6 or 8 of the Delaware Code, but whether coverage for a claim under Section 262 is within the policy's plain language and the policyholder's "reasonable expectations" as an insured.

Specifically, the issue before this Court is whether a policyholder may reasonably expect that its D&O liability policy insures against Section 262 claims when its policy insures against claims alleging a "violation" (an undefined term) of law — including statutory and common law — regulating securities?

The Superior Court properly rejected the Insurers' argument that the word "violation" is freighted with an implication of "wrongdoing" or "wrongful conduct" in the absence of any other specific limiting language. The Superior Court held that the "plain and ordinary meaning" of a "broader word, like violation," in the context of the primary policy's Securities Claim definition, is a "breach of the law and the contravention of a right or duty."[1] That usage of the word "violation," the Superior Court held, does not require an allegation of any wrongdoing or scienter. That

[1] Appellants ACE American Insurance Company and Federal Insurance Company's Opening Brief ("ACE/Federal Brief"), Exhibit A, Superior Court Opinion dated July 31, 2019 in *Solera Holdings, Inc. v. XL Specialty Insurance Co., et al.*, C.A. No. N18C-08-315 ("Opinion"), at 11.

interpretation is consistent with the fact that various types of securities claims do not require such allegations. It also gives necessary meaning to the phrase "violation of . . . common law regulating securities" in the definition of Securities Claims.[2]

Contrary to the Insurers' arguments, under Delaware law, minority shareholders have the common law right to be compensated fairly for their shares in a merger over their objections. Section 262 affords such shareholders a remedy for the infringement of that right — alongside injunctive relief and damages for breach of common law duties — in the form of an appraisal action to determine and direct payment of the "fair value" of their shares. Section 262 compels the compensatory remedy of "fair value," stating that the Court of Chancery "***shall direct payment of the fair value of the shares***" being appraised. Thus, as the Superior Court held, "[b]y its very nature, a demand for appraisal is an allegation that the company contravened that right [to fair value] by not paying shareholders the fair value to which they are entitled. This interpretation corresponds with the general understanding that a 'violation' is the 'contravention of a right or duty' or a 'breach of the law.'"[3] When the policy's drafters added common law claims to the Securities Claim definition, they necessarily modified the word "violation" to include the

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[2] *See* JA157.

[3] Opinion at 11.

breach of common law duties, such as those addressed by Section 262. The Insurers' narrow interpretation fails to recognize that expansion.

Importantly, appraisal litigation has evolved dramatically in recent years. In essence, the case law directs the Court of Chancery to accept the negotiated "deal price" as a default measurement of market value absent evidence of collusion, self-dealing, bias, or other indicia of a faulty sales process that would render the negotiated price an inaccurate reflection of fair value. Thus, appraisal petitioners must now prove a defective sales process. And that is precisely what the petitioners alleged in the appraisal proceeding against Solera.

Solera presented the record in the appraisal action against it to the Insurers, and that record was replete with allegations of misconduct by Solera and its management in the process of selling the company. The petitioners alleged, *inter alia*, that Solera's founder and CEO rigged the sale process to obtain a personal stake in the deal allegedly worth over a billion dollars, and that Solera withheld information from stockholders that they needed to properly value the transaction.[4] Under Delaware authority, these allegations must be considered when evaluating a

[4] *See* JA495-96; JA1445-48. While the issue was fully briefed and the record fully presented, the Superior Court declined to rule on this second branch of Solera's argument, noting that its ruling that appraisal claims inherently allege a "violation" made the fact-specific analysis unnecessary.

policyholder's coverage claim after a case has been concluded.[5] The Insurers avoid this point and ignore the actual allegations in the appraisal action -- allegations of "violations" even under the Insurers' construction of that term. This provides an independent basis on which to affirm the Superior Court's decision.

The Insurers also raise for the first time on appeal the additional argument that an appraisal action is not a "Securities Claim" because Section 262 is not a law "regulating securities," citing this Court's recent decision in *Verizon*. There is good reason this point was not argued below. The plain language of the Securities Claim definition in Solera's policy encompasses appraisal actions, as it includes any alleged violation of "statute, regulation, or rule *or common law* regulating securities."[6] In order to give meaning to the phrase "common law regulating securities," as is required by well-established principles of Delaware law, the word "regulating" must be construed not in its prescriptive sense (*i.e.*, stating rules and regulations), but in the way the common law regulates corporate behavior. Delaware common law recognizes standards of conduct like the "entire fairness doctrine" and the *Schnell* doctrine requiring corporations to treat their stockholders fairly, which

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[5] *See* JA494-95 and cases cited therein. This is distinct from a situation where the policyholder is seeking a defense under a "duty to defend" policy, in which only the "four corners" of the complaint are considered.

[6] JA157.

create causes of action for damages, injunctive relief and quasi-appraisal for the failure to treat minority shareholders fairly. In this sense, "regulating" means "governing" or "addressing." Granting broad meaning to the term "common law regulating securities" also meets the reasonable expectations of the insured, which is the interpretational lens through which Delaware law requires such language to be analyzed.

In any event, this Court's recent decision in *Verizon* is distinguishable and does not dictate the result the Insurers seek. To begin with, unlike a Section 262 claim, the claims at issue in *Verizon* did not involve the purchase or sale of securities, nor were they brought by a security holder with respect to its interest in securities. In fact, those claims did not depend on the existence of securities at all.[7] Further, the policy at issue in *Verizon* was materially different. First, it did not include coverage for "common law" claims. In addition to modifying the term "regulating," the inclusion of "common law" in the Securities Claim definition here adds express coverage for common law claims such as those alleging an infringement of a minority shareholder's right to be paid fair value for its shares in a merger to which the shareholder objects. Second, Solera's policy includes an endorsement

[7] *In re Verizon Ins. Coverage Appeals*, 2019 WL 5616263, at *7 (Del. Oct. 31, 2019) ("*Verizon*").

recognizing coverage for "Bump-up" claims, *i.e.*, any claim involving "an allegation that any Insured received or will receive inadequate consideration in connection with any merger," which the Insurers admitted includes the appraisal action.[8] Such claims are certainly not limited to the securities regulatory scheme that the Insurers now argue comprises the full scope of covered Securities Claims.

Based on the plain language of Solera's policy, the Court may properly conclude that an appraisal action alleges the violation of law "regulating securities." If the Court finds any ambiguity in this (or any other) policy language, however, then it should hold in Solera's favor, under Delaware's long-standing canon of construction that ambiguous policy terms should be construed against the insurer.

The Superior Court also properly rejected the Insurers' denial of coverage for interest imposed under Section 262(h), holding that such interest falls within the plain language of the policy's definition of "Loss." Here, Solera purchased a policy that insures against Loss, defined as "damages, judgments, settlement, pre-judgment and post-judgment interest or other amounts . . . that the Insured is legally obligated to pay . . . ."[9] The only requirement imposed by this language for coverage of interest is that the insured must be "legally obligated to pay" such interest. As the

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[8] JA453.

[9] JA156.

Superior Court held, the Insurers opted not to use standard language that limits coverage to interest on a "covered judgment," and they cannot rewrite the policy after the fact to impose that restriction.[10] Absent such a limitation, coverage for statutory interest imposed under Section 262, "interest . . . that the Insured is legally obligated to pay," is well within the insured's reasonable expectations. As this Court has held, this is not the proper forum for rewriting unrestricted policy language.

The Insurers also seek to avoid coverage for Solera's pre-notice defense costs by invoking the policy's provision requiring Solera to obtain consent before incurring defense costs. The Superior Court correctly adhered to Delaware precedent implying a prejudice requirement in such consent provisions.[11] Here, in circumstances in which (1) Solera successfully defended the appraisal action against it by obtaining a fair value determination for *less* than the merger price, and (2) the Insurers would have withheld consent in any event given their position in this litigation that an appraisal action is not a covered Securities Claim, Solera has amply rebutted any presumption of prejudice. At worst, genuine issues of material fact remain as to whether the Insurers were materially prejudiced by any non-compliance with the consent provision.

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[10] Opinion at 7.

[11] Opinion at 8.

The Superior Court's judgment on each of these issues should be affirmed.

SUMMARY OF ARGUMENT

A. Answer to Illinois National's Summary of Argument

1. Denied. The Superior Court correctly held that the Securities Appraisal Action was a "Securities Claim" that alleged a violation of law governing the petitioners' right to receive "fair value" for their shares in the merger.

In addition, the petitioners' extensive allegations of wrongdoing in the merger process alleged a violation of law – an independent basis for affirmance.

2. Denied. The issue of whether the law allegedly violated in the Securities Appraisal Action was one "regulating securities" was not raised below. This Court should reject the argument, as the Securities Appraisal Action alleges the violation of law "regulating securities" that is entirely different from the claims at issue in *Verizon*, and Solera's policy provides broader coverage for Securities Claims than the policy at issue in *Verizon*.

B. Answer to ACE and Federal's Summary of Argument

1. Denied. *See* Answer to Illinois National's Summary of Argument.

2. Denied. The Superior Court correctly held that the statutory interest that Solera was ordered to pay the petitioners in the Securities Appraisal Action pursuant to Section 262 was covered "Loss" under the policies.

3. Denied. The Superior Court correctly held that the defense costs incurred by Solera prior to giving notice of the Securities Appraisal Action are

covered unless the Insurers were prejudiced by such delay. The Insurers presented no evidence that Solera's successful defense of the Securities Appraisal Action caused them prejudice.

STATEMENT OF FACTS

A. The Policies

Appellants ACE, Federal and Illinois National (collectively, the "Insurers") issued Solera excess directors and officers ("D&O") liability insurance policies for securities claims made between June 10, 2015 and June 10, 2016.[12] Solera also purchased "tail coverage" from the Insurers, which extended the claim reporting period under the policies for six years after the merger.[13] The primary policy no. ELU139451-15 with an aggregate limit of $10 million (the "Policy") was issued to Solera by XL Specialty Insurance Company.[14]

The Insurers issued excess policies to Solera as follows:

- Appellant ACE issued first excess policy no. DOX G23661950 007, which provides a $5 million aggregate limit in excess of the Policy's $10 million limit;[15]
- Appellant Illinois National issued second excess policy no. 01-415-85-50, which provides a $5 million aggregate limit in excess of $15 million in underlying insurance;[16]

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[12] JA148-JA345.

[13] *See* JA1329; JA1516-1517.

[14] JA150.

[15] JA185-JA196.

[16] JA198-JA213.

- Appellant Illinois National also issued fourth excess policy no. 01-415-95-89, which provides a $5 million aggregate limit in excess of $25 million in underlying insurance;[17] and

- Appellant Federal issued ninth excess policy no. 8240-7270, which provides a $5 million aggregate limit in excess of $50 million in underlying insurance.[18]

The policies issued by the Insurers are referred to collectively as the "Excess Policies." Except as otherwise expressly provided in the Excess Policies, those policies "follow form" to the terms and conditions of the Policy, meaning that they adopt those terms and conditions as if fully set forth in their policy language.[19] The Court's interpretation of the Policy's terms and conditions therefore applies to the Excess Policies.

1. The Expanded Definition of Securities Claim

Under the terms of the Policy, the Insurers agreed to pay any "Loss resulting solely from any Securities Claim first made against [Solera] during the Policy Period for a Wrongful Act."[20] The Policy defines a "Securities Claim" as any claim:

> (1) [M]ade against [Solera] for any actual or alleged violation of any federal, state or local statute, regulation, or rule *or common law* regulating securities, including but not limited to the purchase

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[17] JA234-JA249.

[18] JA322-JA345.

[19] *See* ACE/Federal Brief at 14; Illinois National Brief at 8.

[20] JA153.

> or sale of, or offer to purchase or sell, securities, which is:
>
> (a) brought by any person or entity resulting from, the purchase or sale of, or offer to purchase or sell, securities of [Solera]; or
>
> (b) brought by a security holder of [Solera] with respect to such security holder's interest in securities of [Solera] . . .[21]

Unlike some other D&O policies, the Policy expands the definition of "Securities Claim" to include claims under common law.

The Policy also broadly defines "Wrongful Act" to include "any actual or alleged act, error [or] omission" by Solera.[22]

2. The Added Bump-up Coverage

The Policy includes an endorsement specifically acknowledging coverage under the definition of "Securities Claim" for "Bump-up Claims," which the Policy defines as:

> [A]ny Claim based upon, arising out of, directly or indirectly resulting from, in consequence of or in any way involving an allegation that any Insured received or will receive inadequate consideration in connection with any merger or acquisition activity involving the Company.[23]

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[21] JA157 (emphasis supplied).

[22] JA158.

[23] JA173; JA150.

The endorsement provides that, with respect to any Bump-up Claim that is also a Securities Claim under Insurance Agreement I(C), *i.e.*, a Securities Claim against Solera, the self-insured retention (which is similar to a deductible) is $2 million.[24]

3. The Broad Coverage for Loss Including Interest

The Policy covers interest that the insured is "legally obligated to pay." "Loss" covered by the Policy is broadly defined as follows:

> "Loss" means damages, *judgments*, settlements, *prejudgment and post-judgment interest or other amounts* (including punitive, exemplary or multiplied damages, where insurable by law) *that any Insured is legally obligated to pay* and Defense Expenses, including that portion of any settlement which represents the claimant's attorneys' fees.[25]

Neither the definition of "Loss" nor any other provision of the Policy restricts the recoverable amounts to interest on a covered judgment.

4. The Protections Against Forfeiture

The Policy requires Solera to "give written notice to the Insurer of each Claim or Investigation Demand as soon as practicable after it is first made . . . ."[26]

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[24] JA173. The retention applicable to Securities Claims against Solera that are not Bump-up Claims is $1,250,000.

[25] JA156 (emphasis supplied).

[26] JA168.

However, by endorsement, the Policy includes protections against forfeiture of coverage in the event of untimely notice, as follows:

> In the event that the Insureds fail to provide timely notice to the Insurer under this Section VI (A)(1), the Insurer shall not be entitled to deny coverage solely based on such untimely notice *unless the Insurer can demonstrate its interests were materially prejudiced by reason of such untimely notice*. Notifications must be provided no later than 30 days after the end of the Policy Period.[27]

The Policy also limits the insurers' ability to withhold consent to Defense Expenses incurred by Solera, stating: "No Insured may incur any Defense Expenses in connection with any Claim . . . without the Insurer's consent, *such consent not to be unreasonably delayed or withheld . . . .*"[28]

B. The Stockholder Lawsuits Against Solera Alleging Wrongdoing in the Merger Process

Solera was founded in 2005 by Tony Aquila and was publicly traded from May 2007 until March 3, 2016, when all of its publicly traded shares were acquired by an affiliate of Vista Equity Partners ("Vista Equity") in a merger transaction for $55.85 per share ("Merger").[29] Solera Holdings, Inc., the company that purchased the Policy and the Excess Policies, was the surviving corporation after the Merger.

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[27] *Id.* (emphasis supplied).

[28] JA160 (emphasis supplied).

[29] JA599; JA601.

Shortly after the Merger was announced on September 13, 2015, dissenting stockholders filed a securities class action in the Delaware Court of Chancery naming Solera, certain Solera directors and officers, and other companies involved in the Merger, captioned *In Re Solera Holdings, Inc. Shareholder Litigation* ("Securities Class Action"), C.A. No. 11524-CB.[30] In the Securities Class Action, the dissenting stockholders sought to enjoin the Merger on the basis that Solera's directors and officers allegedly breached their fiduciary duties by entering into a transaction that undervalued the company, and that Solera and Vista Equity allegedly aided and abetted those breaches.[31] The Securities Class Action was dismissed on January 5, 2017.

Prior to the Merger, from December 1, 2015, certain dissenting stockholders made demand upon Solera for appraisal of their shares under 8 *Del. C.* § 262.[32] Following closure of the Merger on March 3, 2016, a dissenting Solera stockholder filed the lawsuit *Muirfield Value Partners, LP v. Solera Holdings, Inc.*, C.A. No. 12080-CB in Delaware Court of Chancery against Solera, seeking the "fair value" of its shares, plus interest, under Section 262.[33] That lawsuit was consolidated with

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[30] JA689-774.
[31] JA124-28.
[32] *See* JA138.
[33] JA131-38.

another appraisal lawsuit and re-captioned *In Re Appraisal of Solera Holdings, Inc.* ("Securities Appraisal Action").[34]

The petitioners in the Securities Appraisal Action demanded that Solera pay an alleged "fair value" of $84.65 per share – $28.80, or more than 50%, over the per-share deal price. As the litigation progressed, the petitioners made extensive allegations as to the reasons they claimed the sale process was so deficient that it failed to adequately achieve a fair value for the company. Among other allegations, they claimed that Solera's founder and CEO was coopted by the purchaser, who offered him a personal benefit in the deal allegedly worth over a billion dollars. The CEO allegedly rigged the sale process in favor of the preferred buyer, excluding other bidders, and withholding information from prospective bidders and stockholders needed to properly value the proposed transaction.[35]

Trial was held in the Securities Appraisal Action from June 26, 2017 to June 30, 2017.[36] Shortly after the trial, on August 1, 2017, this Court reversed Chancellor Bouchard's decision in *DFC*.[37] Solera and the petitioners submitted supplemental

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[34] JA602.

[35] JA839-44.

[36] JA629; JA809-80; JA1190-1214.

[37] *DFC Glob. Corp. v. Muirfield Value Partners, L.P.*, 172 A.3d 346, 348 (Del. 2017) ("*DFC*").

post-trial briefs to address the adequacy of the sale process and the weight to be given to the deal price in light of *DFC* and other significant appraisal decisions in *Dell* and *Aruba* issued by this Court and the Court of Chancery.[38] Following post-trial briefing, on July 30, 2018, Chancellor Bouchard issued a Memorandum Opinion in favor of Solera.[39] The Court concluded that the fair value of petitioners' shares at the time of the Merger was $53.95 per share, which is $1.90 less per share than the actual deal price negotiated by Solera.[40]

C. The Insurers' Improper Denials

Solera timely reported the Securities Class Action and the facts and circumstances alleged therein on October 13, 2015.[41] The primary insurer promptly denied coverage for the company on the grounds that the lawsuit did not assert any

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[38] *Dell, Inc. v. Magnetar Glob. Event Driven Master Fund Ltd.*, 177 A.3d 1, 5 (Del. 2017) ("*Dell*"); *Verition Partners Master Fund Ltd. v. Aruba Networks, Inc.*, 2018 WL 922139, at *1 (Del. Ch. Feb. 15, 2018), *rev'd and remanded*, 210 A.3d 128 (Del. 2019) ("*Aruba*").

[39] JA597-688.

[40] JA688.

[41] JA555-65.

violation of securities law.[42] The Securities Class Action was dismissed before Solera's defense costs met the Policy's retention.[43]

The Securities Appraisal Action was filed after the insurers' denial of coverage for the Securities Class Action. After trial in the Securities Appraisal Action, Solera, through its broker, informed the Insurers of the case developments in connection with the facts and circumstances initially reported as set forth in the Securities Class Action.[44] Solera also requested the Insurers' consent to Solera's selection and retention of defense counsel.[45]

The primary insurer denied coverage for the Securities Appraisal Action on the same basis as its response to the Securities Class Action, arguing that it did not assert a Securities Claim under the Policy, while acknowledging that the Securities Appraisal Action was a Bump-up Claim.[46] No response was provided to the request for consent to the engagement of defense counsel.[47] The Insurers each adopted the

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[42] *Id.* The initial denial improperly failed to recognize that the policies' coverage for "common law" claims applied to the breach of fiduciary duty claims in the Securities Class Action objecting to the proposed merger.

[43] *See* JA775-808.

[44] JA566-69.

[45] *Id.*

[46] JA570-76.

[47] JA570-90; JA1220-238.

position set forth by the primary insurer or simply refused to accept coverage under the Excess Policies.[48]

Despite Solera's successful defense, the Court of Chancery nevertheless held that, pursuant to the statutory interest provisions in 8 *Del. C.* § 262(h), petitioners were entitled to interest on the appraised fair value of their shares.[49] On August 20, 2018, the Court entered an Order and Final Judgment compelling Solera to pay a judgment amount of $253,487,604.56 consisting of: (1) the value of petitioners' shares at $53.95 per share totaling $215,099,782.95; and (2) the interest award in the amount of $38,387,821.61 (the "Interest Award").[50] Solera promptly paid these amounts.[51] In addition, Solera incurred more than $13 million in legal fees defending the Securities Appraisal Action.

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[48] JA570-90; JA1220-238; *see also* JA1215-219.

[49] JA688.

[50] JA140-144.

[51] Effective August 1, 2016—after appraisal demands had been made to Solera and after the Securities Appraisal Action had been filed—Section 262 was amended to permit the prepayment of sums to stockholders seeking appraisal, thereby limiting the accrual of interest on an ultimate fair-value award. 8 Del. C § 262(h). The timing of this amendment was such that Solera could not take advantage of it. *See* 2016 Reg. Sess. H.B. 371.

D. The Coverage Lawsuit

On August 31, 2018, Solera filed a lawsuit against its insurers, including the Insurers, seeking declarations that the Interest Award and Solera's Defense Expenses in the Securities Appraisal Action are covered, and for reimbursement of those costs.[52]

After the pleadings closed but before significant discovery, Appellants ACE and Federal filed a motion seeking summary judgment to prohibit coverage on the grounds that (i) the Securities Appraisal Action was not a "Securities Claim" as defined in the Policy, (ii) the Interest Award was not "Loss" as defined in the Policy, and (iii) Defense Expenses incurred by Solera prior to notifying the insurers of the Securities Appraisal Action were excluded for lack of consent. Appellant Illinois National and most of the other insurers joined the motion. Solera opposed the motion and oral argument was held on April 9, 2019.

On July 31, 2019, Judge LeGrow issued an opinion rejecting each of the Insurers' arguments and denying summary judgment.

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[52] Solera settled with its primary insurer, XL Specialty, and dismissed them from this case prior to the summary judgment proceedings below. XL is therefore no longer a party to this litigation and not a party to this appeal. *See* JA150; JA457-459.

ANSWERING ARGUMENT ON APPEAL

I. THE SECURITIES APPRAISAL ACTION CONSTITUTED A SECURITIES CLAIM BECAUSE IT INHERENTLY ALLEGED A VIOLATION OF A LEGAL STANDARD.

A. Counterstatement of the Question Presented

Did the Superior Court correctly determine that the Securities Appraisal Action constituted a covered Securities Claim within the meaning of the Policy? Yes. (Preserved at JA 484-493).

B. Standard and Scope of Review

This Court reviews the Superior Court's grant or denial of a summary judgment motion *de novo*.[53] The construction and interpretation of insurance policy language is also subject to *de novo* review.[54]

The principles for evaluating insurance policy language are well settled under Delaware law. Policy language must be given its plain meaning, and be read in accordance with the reasonable expectations of the policyholder so far as the language will permit.[55] Further, should the Court determine the language to be

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[53] *ConAgra Foods, Inc. v. Lexington Ins. Co*., 21 A.3d 62, 68 (Del. 2011).

[54] *In re Viking Pump, Inc*., 148 A.3d 633, 659 (Del. 2016); *ConAgra Foods*, 21 A.3d at 68.

[55] *Axis Reinsurance Co. v. HLTH Corp*., 993 A.2d 1057, 1064 (Del. 2010); *State Farm Mut. Auto. Ins. Co. v. Johnson*, 320 A.2d 345, 347 (Del. 1974); *see also Med. Depot, Inc. v. RSUI Indem. Co*., 2016 WL 5539879, at *7 (Del. Super. Sept. 29, 2016).

susceptible to more than one reasonable meaning—*i.e.*, ambiguous—the policy terms must be strictly construed against the insurers and in favor of coverage.[56] In other words, if the insurers cannot show that theirs is the *only* reasonable interpretation of the policy language, the policy must be construed in accordance with the policyholder's reasonable interpretation as a matter of law.[57]

C. Merits of the Argument

1. The Securities Appraisal Action Alleged a "Violation" of Law.

The Insurers argue that the Securities Appraisal Action is not a "Securities Claim" under the Policy because it did not allege sufficient wrongdoing to constitute an alleged "violation" of law. The Superior Court correctly rejected the Insurers' argument, holding that (i) the term "violation" does not require wrongful conduct, but simply the contravention of a right or duty; (ii) shareholders have a right to receive "fair value" for their shares in certain mergers under Delaware law; and (iii) the Securities Appraisal Action alleged that Solera contravened that right and, accordingly, alleged a "violation" of a "statute . . . or common law regulating securities."

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[56] *See, e.g.*, *Shuba v. United Services Auto. Ass'n*, 77 A.3d 945, 948 (Del. 2013); *SI Mgmt. L.P. v. Wininger*, 707 A.2d 37, 42 (Del. 1998).

[57] *See, e.g.*, *ConAgra Foods*, 21 A.3d at 73; *Alstrin v. St. Paul Mercury Ins. Co.*, 179 F. Supp. 2d 376, 389 (D. Del. 2002).

a. The Definition of "Securities Claim" Does Not Require Allegations of Wrongdoing.

The Policy does not define the term "violation," and so the Superior Court properly consulted dictionary definitions to determine its plain meaning.[58] The Black's Law Dictionary definition of "violation" notes two different meanings:

> 1. An infraction or breach of the law; a transgression.
>
> 2. The act of breaking or dishonoring the law; the contravention of a right or duty.[59]

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[58] Delaware courts regularly use dictionary definitions to construe the plain meaning of undefined contract terms. *See, e.g., Lorillard Tobacco Co. v. Am. Legacy Found.*, 903 A.2d 728, 738 (Del. 2006)("dictionaries are the customary reference source that a reasonable person in the position of a party to a contract would use to ascertain the ordinary meaning of words not defined in the contract"). Where the issue is a legal term, courts turn to Black's Law Dictionary. *Virtual Bus. Enterprises, LLC v. Md. Cas. Co*., 2010 WL 1427409, at *5 (Del. Super. Apr. 9, 2010) (interpreting undefined policy term based on its Black's Law Dictionary definition).

[59] Black's Law Dictionary (11th ed. 2019). Appellant Illinois National cites a treatise on legal usage rather than a dictionary to claim that "violation" is a term that "generally connotes" more serious disregard of the law. Illinois National Brief at 18. In fact, the treatise does not define "violation" in that way, and merely discusses it as a "near synonym" of the term "breach." Bryan A. Garner, Garner's Dictionary of Legal Usage 119 (3d. ed. 2011). It also defines "violate" more broadly as a synonym for "abridge" with respect to statutory rights. *Id.* at 929. Another dictionary cited by Appellant Illinois National in its brief defines "violate" as "[t]o disregard or act in a manner that does not conform to (a law or promise, for example)" and "violation" as "[t]he act or an instance of violating." The American Heritage Dictionary (5th Ed. 2020).

In neither of the two meanings (breaching or acting out of conformance with the law, or contravening another's right or one's own duty) is there an inherent implication of wrongdoing.[60] Applying the first meaning, the Superior Court noted the various securities laws that can be breached without any showing of scienter or wrongdoing.[61] For example, failure to meet the disclosure requirements of Section 11 of the Securities Act of 1933 is a "strict liability offense;" an issuer may commit a violation based on strictly innocent misstatements.[62] As the Superior Court held,

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[60] Opinion at 11.

[61] *See, e.g.*, 11 *Del. C.* § 251 ("It is unnecessary to prove the defendant's state of mind with regard to: (1) Offenses which constitute violations, unless a particular state of mind is included within the definition of the offenses; or (2) [non-Criminal Code offenses] insofar as a legislative purpose to impose strict liability . . . plainly appears"); Edward K. Esping, *et al.*, Registration provisions, 29A Fed. Proc., L. Ed. § 70:460 (noting that violation of Securities Act Section 12 is "very nearly strict liability; no showing of scienter is required"); Jennifer J. Johnson, Secondary Liability for Securities Fraud: Gatekeepers in State Court, 36 Del. J. Corp. L. 463, 476 (2011) (noting that under state Blue Sky Laws modeled on the Uniform Securities Act, "plaintiffs need not prove that the seller acted with scienter").

[62] 15 U.S.C. § 77k (providing a cause of action to stockholders based on untrue statements or omissions in a registration statement, regardless of intent); *Omnicare, Inc. v. Laborers Dist. Council Const. Indus. Pension Fund*, 135 S. Ct. 1318, 1331 (2015) (*citing Herman & MacLean v. Huddleston*, 459 U.S. 375, 382 (1983). Similarly, issuers may be held liable for violating state "Blue Sky" securities laws without proof of fault or knowledge. Joseph C. Long, *et al.*, *Pleading and Proving Liability for Statutory and Rule Violations—Securities-registration provisions*, 12A Blue Sky Law § 9:17 (noting state Blue Sky laws pose "virtually strict liability for violations of securities-registration provisions").

if the insurers "intended to limit coverage to claims alleging wrongdoing, the Policy could have used limiting language. Their choice to use a broader word, like violation, must be given effect by this Court."[63] Further, to the extent that the term "violation" may be amenable to more than one reasonable interpretation, it is ambiguous and should be construed against the Insurers and in favor of coverage.[64]

Likewise, a corporate executive may be convicted of violating any number of health and safety laws, or financial reporting laws such as Sarbanes-Oxley or Dodd-Frank (also explicitly covered under the Policies), under the various statutory formulations of the "responsible corporate officer" doctrine, which "permits conviction, without a finding of fault." *Hermelin v. K-V Pharm. Co*., 54 A.3d 1093, 1098 (Del. Ch. 2012), *citing U.S. v. Park*, 421 U.S. 658, 672-74 (1975).

[63] Opinion at 11, *citing Segovia v. Equities First Holdings, LLC*, 2008 WL 2251218, at *9 (Del. Super. May 30, 2008); *Emmons v. Hartford Underwriters Ins. Co*., 697 A.2d 742, 746 (Del. 1997). ("Contract interpretation that adds a limitation not found in the plain language of the contract is untenable."). The Insurers also had an opportunity to include a wrongdoing requirement in the definition of "Wrongful Act"; however, that term is also broadly defined to include "any actual or alleged act" and any "breach of duty." Policy, § II(U)(3). This is so clear that the Insurers did not even raise an argument below as to whether the Securities Appraisal Action alleged Wrongful Acts, as Judge LeGrow noted in her opinion. Opinion at 3, n. 2 ("For reasons that are not clear, the movants did not argue in the pending motions that the Policy's limitation of coverage to claims made for 'a [w]rongful [a]ct' precluded coverage for the Appraisal Action."). Illinois National states in a footnote that the Securities Appraisal Action is not for a "Wrongful Act" despite never raising the issue below, but also admits that the issue is not before this Court. Illinois National Brief at 24, n.5.

[64] *See, e.g., SI Mgmt. L.P.*, 707 A.2d at 42.

b. Delaware Law Affords Shareholders the Right to "Fair Value" for Their Shares in a Merger and a Means to Enforce that Right.

Attempting to avoid their broad policy language, the Insurers focus on the operation of the Delaware appraisal statute, 8 *Del. C.* § 262.

Under Section 262, minority shareholders have the right to be compensated fairly when they object to a merger.[65] The Insurers acknowledge that this statutory right was developed "as a substitute for a stockholder's right at common law to veto a merger by refusing to consent."[66] However, the Insurers argue that Section 262 only provides dissenting stockholders with a right to receive a determination of their shares' value.[67] This is belied by Section 262 itself, which provides that the "Court *shall direct the payment* of the fair value of the shares, together with interest, if any, by the surviving or resulting corporation to the stockholders entitled thereto."[68]

The Insurers also argue that Section 262 does not create a right to payment of such consideration at the time of the merger, instead providing for the dissenting

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[65] 8 *Del. C.* § 262(h).

[66] ACE/Federal Brief at 21; *see also* Illinois National Brief at 22-23.

[67] ACE/Federal Brief at 21; Illinois National Brief at 27.

[68] 8 *Del. C.* § 262(i) (emphasis supplied). Appellant Illinois National attempts to distinguish this payment requirement from the statutory requirement that the corporation "shall . . . pay in cash the fair value of fractions of a share" under Section 155 – a distinction without a difference.

stockholders to receive fair value at the conclusion of the appraisal process.[69] But the timing of when a party is entitled to judgment on a claim does not determine when that party's rights were breached. Section 262 provides a remedy for a company's alleged failure to secure fair value for the shares of dissenting or minority shareholders, and the acts or omissions associated with that alleged failure necessarily occur prior to the merger.

As this Court has held, the very purpose of Section 262 is to protect minority shareholders from exploitation in the merger process.[70] The statute "operates as a check on corporate managers," and serves "to deter wrongful conduct in the first instance."[71] "[T]he main focus of the appraisal remedy today is to provide to shareholders a 'cash exit at fair value,' typically in the context of a conflict of interest transaction that involves the elimination of minority shareholders, and to monitor

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[69] ACE/Federal Brief at 21; Illinois National Brief at 27.

[70] *Dell*, 177 A.3d at 33 ("[T]he key inquiry is whether the dissenters got fair value and were not exploited."); *In re Stillwater Mining Co.*, 2019 WL 3943851, at *21 (Del. Ch. Aug. 21, 2019) (same); *Aruba*, 2018 WL 922139, at *36 ("The *Dell* test turns on exploitation.").

[71] B. Wertheimer, The Purpose of the Shareholders' Appraisal Remedy, 65 Tenn. L. Rev. 661, 679, 690 (1998).

majority shareholder behavior."[72] Again, the behavior on which Section 262 litigation is focused occurs pre-merger.

The Insurers further argue that stockholders' rights relating to conduct in the merger process is limited to *directors' and officers'* compliance with their fiduciary duties, claiming that the corporation's only obligations are procedural, and because such procedural obligations were not at issue in the Securities Appraisal Action, coverage as to Solera has not been triggered.[73] This myopically narrow argument is directly contrary to the recent evolution of this Court's appraisal jurisprudence which has had the effect of requiring petitioners to show wrongful corporate conduct in the merger process, as discussed in detail below. As explained in one recent Court of Chancery decision, in determining under Section 262 whether a corporation's sales process is sufficient to serve as a market check, the court considers whether the process would "satisfy enhanced scrutiny in a breach of fiduciary duty case."[74]

Further, the Insurers' argument ignores other obligations of corporations under Delaware common law. It is a fundamental precept of Delaware law that corporations may not take actions towards their stockholders which, though legally

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[72] B. Wertheimer, The Purpose of the Shareholders' Appraisal Remedy, 65 Tenn. L. Rev. 661, 678 (1998) (quoting Siegel, 32 Harv. J. on Legis. 79 (1995)).

[73] ACE/Federal Brief at 19-21; Illinois National Brief at 25-27.

[74] *In re Stillwater Mining Co.*, 2019 WL 3943851 at *24.

possible, are inequitable.[75] Under this longstanding "*Schnell*" doctrine, Delaware courts have prohibited corporate conduct such as entering into an asset sale without the approval of common stockholders,[76] allowed claims that a leveraged buy-out was unfair to a class of stockholders,[77] and reversed dismissal of claims akin to appraisal that the controlling shareholder paid too little for the minority shareholder's interest.[78]

While this Court has found that the corporation's equitable obligations do not expand the *remedy* in the appraisal statute, it has found them to be another relevant factor in determining whether the petitioners were offered fair value in the merger.[79]

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[75] *Schnell v. Chris-Craft Indus., Inc.*, 285 A.2d 437, 439 (Del. 1971) (granting preliminary injunction against company precluding changes to annual stockholder meeting).

[76] *Esopus Creek Value LP v. Hauf*, 913 A.2d 593, 597, 604-05 (Del. Ch. 2006) (holding that financially healthy company's plan to file bankruptcy in order to sell its principal asset without a stockholder vote violated the equitable rule articulated in *Schnell*).

[77] *Dart v. Kohlberg, Kravis, Roberts & Co.*, 1985 WL 21145, at *4-5 (Del. Ch. May 9, 1985) (denying motion to dismiss preferred stockholders' claims that structure of leveraged buy-out transaction negatively impacted the security of their shares; "Although everything done by defendants may have been in strict compliance with the letter of Delaware law, it is possible that the totality of actions resulted in an impermissible inequality to the holders of the preferred stock.").

[78] *Rabkin v. Philip A. Hunt Chem. Corp.*, 498 A.2d 1099, 1106-07 (Del. 1985) (reversing dismissal of minority shareholders' claims that controlling shareholder manipulated timing of its purchase of minority shares to avoid payout commitment).

[79] *Alabama By-Products Corp. v. Neal*, 588 A.2d 255, 258 (Del. 1991).

This Court has also allowed for a "quasi-appraisal" remedy under the Delaware Court of Chancery's historic powers to grant equitable relief in circumstances where stockholders did not qualify under Section 262, but "whose rights to challenge the element of fair value must be preserved."[80] This Court has further characterized the quasi-appraisal remedy as providing "compensatory damages" awarded "'using the same methodologies employed in an appraisal [proceeding].'"[81] Delaware common law also imposes other obligations on Delaware corporations.[82]

Thus, under the Delaware General Corporation Law ("DGCL") and the extensive body of common law giving rise to and arising out of the DGCL, minority shareholders have rights to a fair merger process and a fair price for their shares. It

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[80] *Weinberger v. UOP, Inc*., 457 A.2d 701, 714 (Del. 1983) (reversing dismissal of minority shareholders' unfairness claim with respect to controlling shareholder's acquisition of minority interest and holding that prospectively such claims belong under Section 262). Appraisal is the remedy for breach of duties in connection with a merger. *See Singer v. Magnavox*, 367 A.2d 1349 (Del. Ch. 1976), *aff'd and rev'd in part*, 380 A.22d 969 (Del. 1977).

[81] *RBC Capital Markets, LLC v. Jervis*, 129 A.3d 816, 866 (Del. 2015) (citation omitted).

[82] *See, e.g*., *In re Dataproducts Corp. Shareholders Litig*., 1991 WL 165301, at *6 (Del. Ch. Aug. 22, 1991) ("[T]he plaintiffs concede that a corporation qua corporate entity is not a fiduciary of, and thus cannot owe a fiduciary duty to, its shareholders. That is not to say that a corporation owes no duty or can never be held liable under Delaware law if it promulgates false and misleading disclosures to its shareholders. Rather, it means that under Delaware law any disclosure duty owed by the corporation to its shareholders must be predicated upon a theory of legal or equitable fraud.").

is well within the reasonable interpretation of the Policy's language and expectations of an insured that a lawsuit to enforce such rights, such as an appraisal action under Section 262, would constitute an alleged "violation" within the scope of the Policy's coverage.

c. The Securities Appraisal Action Inherently Alleged That Solera Violated the Dissenting Shareholders' Rights.

As demonstrated, minority shareholders' rights to be paid fair value, whether arising under statute or common law, may be infringed by a company's decision to sell itself at an allegedly unfair price, or in connection with an unfair sales process. Here, the appraisal petitioners filed a lawsuit requesting a determination of their right to fair value in Solera's merger transaction and seeking to enforce that right. The Superior Court correctly held that: "[b]y its very nature, a demand for appraisal is an allegation that the company contravened that right [to fair value] by not paying shareholders the fair value to which they are entitled."[83] That "interpretation corresponds with the general understanding that a 'violation' is the 'contravention of a right or duty' or a 'breach of the law.'"[84] The Superior Court thus held that "the

[83] Opinion at 12.

[84] *Id.*

Appraisal Action is a claim against Solera for a violation of law and therefore is a Securities Claim under the Policy."[85]

Appellant Illinois National posits that the appraisal petitioners' claim is not against *Solera* but against its acquiror, Vista Equity.[86] The premise for this argument is a misstatement of the record. As its sole factual support, Appellant Illinois National cites to Joint Appendix pages 140-143, which is a copy of the underlying judgment entered against Solera. The judgment explicitly orders payment by *Solera* and refers to no other defendant. That is because Section 262 imposes liability explicitly upon the surviving corporation post-merger.[87] In this case, Solera, the party that purchased the Policy and is thus the named Insured, is also the surviving corporation and therefore liable under Section 262(i). There is nothing in the record even remotely supporting Appellant Illinois National's contention.

While admitting that the issue is not before this Court, Appellant Illinois National also asserts that the Securities Appraisal Action does not allege any Wrongful Act prior to the Merger, and is thus not covered under the Policy's change-of-control provision.[88] However, as just discussed, the alleged violation necessarily

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[85] *Id.*

[86] Illinois National Brief at 24.

[87] *See, e.g.*, 8 *Del. C.* § 262(i).

[88] Illinois National Brief at 24, n. 5.

arose prior to the Merger, in the process by which the parties to the transaction arrived at the deal price. Indeed, the parties are required to provide notice of appraisal rights to affected shareholders *prior to* the effective date,[89] and the petitioners in the Securities Appraisal Action did make a demand upon Solera for a higher stock price prior to the effective date of the Merger.[90] As a result, the actions of Solera by which the allegedly unfair stock price in the Merger was established (the alleged Wrongful Acts) necessarily occurred before the Merger.

[89] 8 *Del. C.* § 262(d).

[90] JA138.

II. THE SECURITIES APPRAISAL ACTION ALSO CONSTITUTED A SECURITIES CLAIM BECAUSE THE PETITIONERS ALLEGED WRONGFUL CONDUCT IN THE APPRAISAL PROCESS.

A. Question Presented

Do the petitioners' extensive allegations of wrongdoing in the merger process allege a violation of law? Yes. (Preserved at JA493-497).

B. Scope of Review

See Section I(B) *supra*.

C. Merits of the Argument

1. The Evolution of Delaware Appraisal Jurisprudence Requires Allegations of Wrongdoing for Petitioners to Show Fair Value in Excess of the Deal Price.

Even if the Insurers were correct that the term "violation" requires allegations of wrongdoing, their argument fails because the petitioners in the Securities Appraisal Action did allege misconduct by Solera in the sale process, and presented extensive evidence attempting to prove those allegations. Petitioners attempted to demonstrate, as required under this Court's recent appraisal jurisprudence, that the process and negotiations were not arms-length and thus the deal price was not an accurate measure of the company's fair value.

In *DFC* and *Dell*, this Court evaluated the details of the merger sale processes at issue and held that, because the sale processes functioned as sufficient market

checks, this Court would adopt the deal price as the "best evidence of fair value"[91] or give it "heavy, if not dispositive weight."[92] These decisions, with the addition of this Court's opinion in *Aruba*,[93] make it clear that the Delaware Court of Chancery should adhere to the "deal price" negotiated by a publicly-traded company *when the sale process is found to be fair*. Conversely, if there is evidence of collusion, self-dealing, a rigged sale process, or if there is other evidence that the alleged failure to obtain an accurate price for the company's shares was the result of a defective sale process, then the court may give less weight to the deal price and look at discounted cash flow and other factors. Therefore, as a practical matter, Delaware appraisal petitioners must show deficiencies in the sale process in order to overcome the contention that the deal price reflected fair value, despite the appraisal statute's

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[91] *DFC*, 172 A.3d at 349. Notably, Judge LeGrow was on the panel of this Court that decided the *DFC* case.

[92] *Dell*, 177 A.3d at 23.

[93] *See Aruba*, 210 A.3d at 135 ("*DFC* and *Dell* recognized that when a public company with a deep trading market is sold at a substantial premium to the preannouncement price, after a process in which interested buyers all had a fair and viable opportunity to bid, the deal price is a strong indicator of fair value, as a matter of economic reality and theory."); *DFC*, 172 A.3d at 349 ("[E]conomic principles suggest that the best evidence of fair value was the deal price, as it resulted from an open process, informed by robust public information, and easy access to deeper, non-public information, in which many parties with an incentive to make a profit had a chance to bid.").

superficial indifference to wrongdoing.[94]

The Court of Chancery has implemented this Court's *Dell/DFC* analysis in recent appraisal cases, effectively applying common law fiduciary duty standards to determine the adequacy of the sale and transaction process. For example, the Court of Chancery explained in *Stillwater* that "The Delaware Supreme Court's enhanced scrutiny jurisprudence becomes pertinent to appraisal proceedings because, as commentators have perceived, the deal price will provide persuasive evidence of fair value in an appraisal proceeding involving a publicly traded firm ***if the sale process would satisfy enhanced scrutiny in a breach of fiduciary duty case***."[95] In another

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[94] *See, e.g.*, *Dell*, 177 A.3d 1, 23-24. The *Dell* and *DFC* decisions were not made in a vacuum. The decisions were presaged by extensive debate among academicians and jurists over a period of several years concerning the parameters of appraisal proceedings. *See* Subramanian, *et al*., Using the Deal Price for Determining 'Fair Value' in Appraisal Proceedings, Harvard Law School Forum on Corporate Governance (Feb. 21, 2017), http://corpgov.law.harvard.edu/2017/02/21 (arguing for use of this approach in *Dell* and *DFC* while pending before this Court); Hon. Sam Glasscock III, Ruminations on Appraisal, Del. Lawyer (2017) (same).

[95] *In re Stillwater Mining Co*., 2019 WL 3943851, at *24 (emphasis supplied). *See also, e.g.*, *Blueblade Capital Opportunities LLC v. Norcraft Companies, Inc*., 2018 WL 3602940, at *2 (Del. Ch. July 27, 2018) (agreeing with petitioners' arguments that there were "significant flaws in the process leading to the Merger"); *In re AOL Inc.*, 2018 WL 1037450, at *9 (Del. Ch. Feb. 23, 2018) (holding that the deal process was insufficient to warrant deal price deference under *Dell*); *In re of SWS Grp., Inc*., 2017 WL 2334852, at *11 (Del. Ch. May 30, 2017) (finding merger consideration to be unreliable due to a "problematic process," including a credit agreement that granted the acquirer certain veto rights over competing offers).

case, the Court of Chancery held that discovery in the appraisal litigation supported a breach of fiduciary duty action against the acquired company's former CEO, which was consolidated with the appraisal suit.[96] Appraisal petitioners are also changing the way they present their claims. As an example, an appraisal petition recently filed in the Court of Chancery incorporated extensive allegations of alleged wrongdoing in the merger process at issue.[97]

The Insurers ignore the pertinent developments in Delaware appraisal jurisprudence, citing and discussing at length numerous Delaware decisions on appraisal, *all* of which pre-date this Court's August 2017 analysis in *DFC* and *Dell*, and many of which are decades old.[98] The Insurers repeatedly characterize appraisal as merely providing "an optional, no-fault, post-merger mechanism for dissenting shareholders to have their shares valued by a court."[99] This characterization ignores the current realities of appraisal litigation, and how they resulted in the specific allegations of misconduct by Solera in the present case.

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[96] *In re Xura, Inc., Stockholder Litig*., 2018 WL 6498677, at *1 (Del. Ch. Dec. 10, 2018).

[97] *Daly v. Marsh USA Inc*., C.A. No. 2019-1030, Verified Petition for Appraisal of Stock, 2019 WL 7284075 (Del.Ch.).

[98] ACE/Federal Brief at 22-24; Illinois National Brief at 28-29.

[99] Illinois National Brief at 25-26.

2. The Record in the Securities Appraisal Action Includes Extensive Allegations of Wrongdoing.

Leading up to and at trial in the Securities Appraisal Action, the petitioners presented testimony and other evidence to support their allegations of wrongdoing by Solera and its management in the merger process. The allegations of wrongdoing presented at trial provide an independent basis for this Court to find that the Securities Appraisal Action alleged a "violation" of law and therefore a "Securities Claim" under the Policy.

The petitioners alleged that Solera's founder and CEO rigged the merger sale process to obtain a personal stake in the deal allegedly worth over a billion dollars.[100] The petitioners alleged that, in order to further the CEO's personal interests, private equity firms other than the favored purchaser who wanted to bid were excluded from the sale process, and the transaction was pushed though while the stock price was depressed. The petitioners also argued that the sale process was flawed because Solera's CEO allegedly withheld information from the market that analysts needed to properly value the company.[101]

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[100] JA657 (Chancellor Bouchard's Opinion in the Securities Appraisal Action discussing petitioners' argument that "Aquila's conflicts of interest tainted the sales process"), 62 (discussing petitioners' argument that "the Merger was a de facto MBO"); JA809-80; JA960-1012; JA1190-1214; JA1239-1313.

[101] JA1295; *see also* JA665 (Chancellor Bouchard's Opinion discussing argument

The Court of Chancery considered but ultimately rejected the petitioners' claims, holding that the Merger was the product of a sufficiently open process that had the requisite objective indicia of reliability.[102] Nonetheless, Solera incurred Defense Expenses and was still required to pay the Interest Award as a direct result of petitioners' allegations of wrongdoing.

3. Because the Securities Appraisal Action Has Been Concluded, the Entire Record Must Be Considered to Determine Coverage.

The Insurers narrowly focus on the superficially bare-bones nature of the Securities Appraisal Action petition, which is typical of such "formulaic" appraisal petitions.[103] But this Court has held that, when considering a policyholder's coverage claim for reimbursement of defense costs and other loss after a case has been concluded, a court may consider the entirety of the record of the underlying dispute.[104] As one Superior Court opinion explains:

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that "management struggled to disclose sufficient information, due to competitive concerns, to allow the market to value the Company properly").

[102] JA597-688.

[103] Illinois National Brief at 11-12. Such a pleading approach was typical in appraisal petitions. *See Northeast Capital and Advisory, Inc. v. Ecolab Inc*., 2008 WL 2328199 (Del.Ch. June 3, 2008) (Verified Petition for Appraisal); *2017 Clarendon LLC, et al. v. Bob Evans Farms, Inc*., 2018 WL 2084141 (Del.Ch. April 30, 2018) (Petition for Appraisal of Stock); *Verition Partners Master Fund Ltd. v. AmTrust Financial Services, Inc*., 2019 WL 1372157 (Del.Ch. March 26, 2019) (Verified Petition for Appraisal of Stock).

[104] *See Am. Ins. Group v. Risk Enter. Mgmt., Ltd*., 761 A.2d 826, 829 (Del. 2000).

> When the demand for indemnification or defense is made after development of a complete discovery record, this Court should not limit its analysis solely to the allegations in the complaint.[105]

As Solera argued below, because the Securities Appraisal Action was already tried and judgment was entered, the entire record from that case should be considered in determining coverage. (The Superior Court did not reach this issue, having held that the Securities Appraisal Action inherently alleges a violation of law).

The Insurers contend that courts should look solely to the allegations in the petition to determine coverage. They ignore this Court's recent precedent and cite a 1974 opinion that is inapplicable because the case involved a policyholder seeking a defense under a "duty to defend" policy.[106] Here, the Policy did not require insurers to defend, but instead required Solera to defend any claim and seek reimbursement of those costs afterward, so the pertinent allegations are those presented in the entirety of the litigation as detailed above, not just in the four corners of the petition.

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[105] *Home Ins. Co. v. Am. Ins. Group*, 2003 WL 22683008, at *2 (Del. Super. Oct. 30, 2003); *see also Am. Legacy Found., RP v. Nat'l Union Fire Ins. Co. of Pittsburgh, PA*, 623 F.3d 135, 142-43 (3d Cir. 2010) (finding that, under Delaware law, where the underlying litigation is settled, the "determination of coverage must be based on the whole record").

[106] *See* ACE/Federal Brief at 29, n. 11, *citing Cont'l Cas. Co. v. Alexis I. duPont Sch. Dist*., 317 A.2d 101, 103 (Del. 1974).

III. THE INSURERS' NEWLY-RAISED "REGULATING SECURITIES" ARGUMENT IS MERITLESS.

A. Question Presented

Under Delaware law, did the appraisal petitioners allege Solera violated law "regulating securities" under the Policy's "Securities Claim" definition? The Insurers did not present this issue to the Superior Court, and so it is not preserved in the record on appeal.

B. Scope of Review

While the Insurers litigated the definition of "Securities Claim" extensively on summary judgment below, they did not seek the trial court's construction of the phrase "regulating securities" within that definition, which they candidly admit.[107] The Insurers have raised this issue for the first time in this appeal based on this Court's decision in *Verizon*. However, both the underlying claim and policy language at issue here are materially different than those at issue in *Verizon* and, under the Court's analysis in *Verizon*, Insurers' argument should be rejected as a matter of law, under the standards of review set forth in Section I(B) *supra*.

[107] *See* Illinois National Brief at 34.

C. Merits of the Argument

1. The Securities Appraisal Action Alleged Violation of Law "Directed Towards Securities."

The Insurers first argue that Section 262 is not "specifically directed towards securities," because the statute relates to mergers and consolidations, and it appears in the DGCL and not in the Delaware Securities Act.[108]

The Insurers cannot avoid the fact that Section 262 is *solely* directed towards securities. Where it falls in the Delaware Code is not what matters. Section 262 establishes rights and a remedy only for "[a]ny stockholder of a corporation of this State who holds shares of stock" in a Delaware corporation who qualifies under the statute.[109] The rights and remedy established by Section 262 direct payment of the "fair value" of such securities, and no other interests that the stockholders may have in the corporation. And while Section 262 only applies when the corporation undergoes certain mergers or consolidations, Section 262 does not govern any aspect of such mergers other than dissenting stockholders' rights in their securities.[110] Section 262 uses the term "stock" or "share" some seventy-five times, stating

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[108] Illinois National Brief at 37-41; ACE/Federal Brief at 28.

[109] 8 Del. C § 262(a).

[110] Numerous other Sections in the DGCL, such as Sections 251 and 252, govern other aspects of the merger or consolidation of Delaware corporations.

specifically that "the words 'stock' and 'share' mean and include what is ordinarily meant by those words" in the statute.[111]

In *Verizon*, this Court found that certain laws governing fiduciary duties, unlawful distribution of dividends, fraudulent transfers, unjust enrichment and alter ego liability did "not depend on securities being present" so that "the fact that stock might be involved is incidental."[112] In contrast, Section 262 does not apply in the absence of securities and the involvement of stock in a Section 262 claim is fundamental.[113]

The Insurers' attempt to limit the Policy's coverage of Securities Claims to statutes in the Delaware Securities Act also fails under the Policy's broadened "Securities Claim" definition, which includes claims "for any actual or alleged violation of any federal, state or local statute, regulation, or rule *or common law* regulating securities."[114] This contrasts with the policy at issue in *Verizon*, where

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[111] 8 *Del. C.* § 262(a); *see also* 6 *Del. C.* § 73-103(a)(23) ("'Security' means any . . . stock . . . .").

[112] *In re Verizon Ins. Coverage Appeals*, 2019 WL 5616263, at *6-7 (Del. Oct. 31, 2019).

[113] For the same reason, the Insurers' comparison of Section 262 to the state reorganization law at issue in *Michigan Carpenters Council Health & Welfare Fund v. C.J. Rogers, Inc*., 933 F.2d 376 (6th Cir. 1991), which that court found only impacted securities in the sense that it generally governed corporations, also fails. *See* Illinois National Brief at 40.

[114] JA157 (emphasis supplied).

the drafting history showed that the phrase "common law" had been included in an earlier policy form and was removed.[115] In fact, a still earlier version of the policy form at issue in *Verizon* had an even more restrictive definition of Securities Claim limited to "rules and regulations promulgated under the 1933 and 1934 Securities Acts and state or foreign 'securities laws.'"[116]

The Insurers ask this Court to interpret the Policy's definition as if it were written to *exclude* common law claims. The proper construction, however, is to interpret the language so as to give meaning to all relevant words and phrases, including the phrase "common law regulating securities."[117] The common law regulating securities cannot just be limited to the prescriptive statutes and rules promulgated under the federal and state securities statutes; it must logically include the equitable doctrines applied by the Court of Chancery, including the *Schnell* duty of fairness owed to minority shareholders.

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[115] *Verizon Communications Inc. v. Ill. Nat'l Ins. Co.*, 2017 WL 1149118, at *11 (Del. Super. Mar. 2, 2017) (describing the policy's drafting history and the insurers' arguments based on the removal of "common law" from the Securities Claim definition), *rev'd and remanded sub nom. Verizon*, 2019 WL 5616263, at *8 (Del. Oct. 31, 2019) (holding that common law claims did not fall under Securities Claim definition where the term "common law" was not included).

[116] *Verizon Communications Inc.*, 2017 WL 1149118, at *11.

[117] *See Segovia*, 2008 WL 2251218, at *9 ("[T]he Court must view the contracts as a whole and interpret them in a manner that gives 'a reasonable, lawful, and effective meaning to all the terms.'")

If the Insurers had raised this issue in the Superior Court, Solera would have presented evidence relating to the drafting history of the form used for the Policy, showing why the term "common law" was specifically added and how it expanded the scope of claims covered under the Securities Claim definition. Earlier versions of the primary insurer XL Specialty's policy form did not include the term "common law" in the Securities Claim definition.[118] The term was later added by endorsement, and then included in the base policy form as in the Policy at issue here.[119]

Solera also would have pointed to an endorsement added to the Policy that explicitly recognizes coverage for "Bump-up" claims, increasing the retention applicable to such claims. Bump-up claims are defined in the endorsement as any Claim involving "an allegation that any Insured received or will receive inadequate consideration *in connection with any merger*."[120] The insurers expressly acknowledged that the Securities Appraisal Action was a "Bump-up Claim" under this provision.[121] This is an important concession because (a) the definition plainly

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[118] *See XL Specialty Ins. Co. v. Loral Space & Comm'n, Inc*., 82 A.D.3d 108, 111 (N.Y. App. 2011) (quoting "Securities Claim" definition from 2005 XL policy form that does not include "common law").

[119] *See Calamos Asset Mgmt., Inc. v. Travelers Cas. and Sur. Co. of Am*., No. 1:18-cv-01510 (D. Del.), Doc. 1-1 at 50.

[120] JA173 (emphasis supplied).

[121] JA453.

encompasses appraisal claims, and (b) the definition also plainly encompasses common law and Title 8 merger objection claims, and is not limited to the securities regulatory scheme that the Insurers now argue comprises the scope of covered Securities Claims.

2. The Securities Appraisal Action Alleged Violation of Law "Regulating" Securities.

The Insurers also argue that Section 262 does not "regulate" securities in the sense that it does not "control or direct the securities industry by prescribing rules or restrictions."[122] As noted above, the interpretation of "regulating securities" cannot be so limited here because the Policy's definition includes "common law regulating securities." In interpreting this broader definition, "regulating" must be given a more expansive definition because common law does not regulate by prescribing rules, but rather by stating principles and imposing liability when parties are not in compliance with such principles.[123] Appellant Illinois National even left out this

[122] Illinois National Brief at 42; *see also* ACE/Federal Brief at 31.

[123] *See, e.g.*, *Gulko v. Gen. Motors Corp*., 710 A.2d 213, 216 (Del. Super. 1997) ("It should also be noted that common law claims may impose liability requirements that are, in effect, equivalent to regulations issued by a legislature or state agency."); Black's Law Dictionary, "Common Law" (11th ed. 2019) ("The code articulates in chapters, sections, and paragraphs the rules in accordance with which judgments are given. The common law on the other hand is inarticulate until it is expressed in a judgment.").

more expansive reading in truncating the quote of a definition of "regulate," which in full states "[t]o control or direct according to rule, *principle or law*."[124]

By its very nature, a demand for appraisal is an allegation that the company failed to comply with the principle that stockholders are entitled to fair value for their shares in a merger.[125] By imposing liability on a company for that fair value, Section 262 "regulates" the company's conduct in relation to its securities.

[124] The American Heritage Dictionary (5th Ed. 2020), cited in part in Illinois National Brief at 42 (emphasis supplied).

[125] *See* Opinion at 12.

IV. THE SUPERIOR COURT CORRECTLY HELD THAT THE SECURITIES APPRAISAL ACTION WAS "FOR" A WRONGFUL ACT.

A. Counterstatement of the Question Presented

Did the Superior Court correctly determine that the Securities Appraisal Action was "for" a Wrongful Act under the Policy? Yes. (Preserved at JA1386).

B. Scope of Review

See Section I(B) *supra*.

C. Merits of the Argument

The Superior Court flatly rejected the Insurers' argument that the Securities Appraisal Action was not a claim "for" a violation of law, correctly holding that the undefined preposition "for" did not create a separate element of proof needed to meet the definition of Securities Claim. Further, even if it did create an additional element, the Securities Appraisal Action was "for" a violation of law because it sought a remedy "in response to" what the petitioners contended was Solera's failure to obtain fair value for their shares.[126]

Again, the Insurers are attempting to imbue undefined policy terms with meaning intended to limit coverage. If the Insurers wished for a more restrictive meaning, such as "solely as a result of," they certainly could have used such

[126] Opinion at 9, n. 19.

restrictive language in place of "for." Absent such additional verbiage, the word "for" should be given its plain meaning, consistent with the reasonable expectations of an insured. That is, "for" is simply a shorter way of stating "by reason of" or "related to."[127] To the extent that the word "for" can be interpreted in more than one way in this context, it should be found ambiguous and accorded the foregoing reasonable interpretation.[128]

Further, the one opinion cited by the Insurers on this issue is inapposite, as it involved not a "Claim" against the insured, but an investigation of the insured into whether it had committed criminal conduct and was thus not for a violation.[129] As detailed above, the petitioners were not investigating whether Solera paid fair value for their shares, but rather alleging that Solera failed to do so.

Moreover, even if the word "for" adds an increased burden on the policyholder to show some sort of causation in order to trigger coverage, Solera did

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[127] Indeed, earlier standard D&O forms contained the "by reason of" wording. *See, e.g., Nat'l Union Fire Ins. Co. of Pittsburgh, PA. v. Cont'l Ill. Corp.*, 666 F. Supp. 1180, 1192 (N.D. Ill. 1987) (policy provided coverage for "loss . . . arising from any claim or claims made against the insureds . . . by reason of any wrongful act"); *Conklin Co., Inc. v. Nat'l Union Fire. Ins. Co*., 1987 WL 108957, at *2 (D. Minn. Jan. 23, 1987) (same).

[128] *See, e.g*., *SI Mgmt. L.P.*, 707 A.2d at 42.

[129] *RSUI Indem. Co. v. Desai*, 2014 WL 4347821, at *4 (M.D. Fla. Sept. 2, 2014) (holding that warrant and grand jury investigation did not constitute a Claim for a Wrongful Act against the insured).

meet that burden because, as discussed above, the petitioners alleged that Solera conducted a flawed sales process and thus the deal price did not properly reflect "fair value." Thus, even if the word is given a restrictive meaning, the Securities Appraisal Action was "for" a violation of the duties owed to minority shareholders, including the duty to obtain fair value.

V. THE SUPERIOR COURT CORRECTLY HELD THAT THE INTEREST AWARD PAID BY SOLERA WAS COVERED LOSS.

A. Counterstatement of the Question Presented

Did the Superior Court correctly determine that the Interest Award Constituted "Loss" under the Policy? Yes. (Preserved at JA497-502).

B. Scope of Review

See Section I(B) *supra*.

C. Merits of the Argument

1. The Superior Court Correctly Held That the Interest Award Falls Within the Policy's Broad and Unconditional Definition of "Loss."

If this Court holds that the Appraisal Action is a Securities Claim, then Loss, including interest, incurred as a result of the Claim is covered under the Policy. Appellants ACE and Federal[130] contend, without any support in the Policy's language or any legal authority, that because Solera prevailed in the Appraisal Action, and Solera did not seek coverage for the "fair value" amount of the judgment, the Interest Award also included in that judgment is not covered "Loss."[131] Their position is entirely groundless.

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[130] Appellant Illinois National does not address the Interest Award and Defenses Expenses issues in its brief.

[131] ACE/Federal Brief at 37; *see also* Opinion at 13 ("Defendants admit this is a purely 'logical' argument and cite to no authority or Policy provision supporting their interpretation.").

Solera is not seeking coverage for the fair value of the petitioners' shares, so whether that amount is covered is irrelevant. Solera would have paid the deal price to the petitioners in the Merger except that they filed the Securities Appraisal Action, so the below-deal price "fair value" amount was not a loss to Solera.[132]

Although Solera technically prevailed in the Securities Appraisal Action, the Court of Chancery entered judgment requiring Solera to pay the Interest Award of more than $38 million to the petitioners based on Section 262, which states:

> Unless the Court in its discretion determines otherwise for good cause shown, and except as provided in this subsection, interest from the effective date of the merger through the date of payment of the judgment shall be compounded quarterly and shall accrue at 5% over the Federal Reserve discount rate (including any surcharge) as established from time to time during the period between the effective date of the merger and the date of payment of the judgment.[133]

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[132] If the Court of Chancery had found the fair value of petitioners' shares to be greater than the deal price, then the additional consideration, as well as any interest on that additional consideration, would have been covered under the "Bump-up Endorsement." ACE and Federal are arguing in effect that Solera is entitled to *less* coverage because they successfully defended the Securities Appraisal Action than they would have if they had lost – not a reasonable interpretation.

[133] 8 *Del. C.* § 262(h).

Interest accrued on the "fair value" of the petitioners' shares, even though the Court of Chancery determined that it was less than the deal price in the Merger.[134]

As the Superior Court held, such interest falls squarely within the policy's broad definition of "Loss":

> "Loss" means damages, *judgments*, settlements, *pre-judgment and post-judgment interest or other amounts* (including punitive, exemplary or multiplied damages, where insurable by law) *that any Insured is legally obligated to pay* and Defense Expenses, including that portion of any settlement which represents the claimant's attorneys' fees.[135]

That is, the Interest Award is pre-judgment "interest or other amounts . . . that any Insured is legally obligated to pay" by operation of Section 262 and as imposed by judgment against Solera.[136]

Appellants ACE and Federal do not claim that this definition or any other policy language precludes coverage for the Interest Award.[137] Instead, they argue

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[134] *See, e.g., ACP Master, Ltd. v. Sprint Corp*., 2017 WL 3421142, at *39 (Del. Ch. July 21, 2017), *aff'd*, 184 A.3d 1291 (Del. 2018) (awarding interest in an appraisal action on the fair value of $2.13 per share where the deal price was $5.00 per share).

[135] JA156 (emphasis supplied); *see* Opinion at 14.

[136] Should this Court affirm the Superior Court's interpretation of the Loss definition, Solera would present additional evidence to the Superior Court of its payment of the Interest Award. *See* Opinion at 15.

[137] *See* Opinion at 14 (finding that this argument was "untethered to the language in the Policy").

"logic dictates" that the Interest Award is not covered because it was calculated based on the below-deal price "fair value" of the petitioners' shares for which Solera does not seek reimbursement, claiming it is "not logical or commercially reasonable for a policy to cover the time-value of an amount that is itself not covered under the policy."[138]

Courts have found that where an insured incurs losses that fall within the type covered by a liability policy, it is unnecessary that they be accompanied by a covered "damages" award.[139] If the Insurers wanted to include such a limitation, there is standard policy language that the Insurers could have inserted into the definition of "Loss" to that effect, limiting coverage to "interest on a covered judgment."[140] The Insurers chose not to do so. Delaware courts reject attempts by insurers – like this one – to imply language narrowing the scope of coverage that the insurers have

[138] ACE/Federal Brief at 37.

[139] *See, e.g., XL Specialty Ins. Co.*, 82 A.D.3d at 116 (holding that underlying plaintiff's attorneys' fee award qualified as "Loss" under D&O policy even where there were no damages awarded, and thus no covered judgment, because carriers could point to no policy language precluding coverage).

[140] *See, e.g., Verizon Communications Inc*., 2017 WL 1149118, at *2 (quoting D&O policy's definition of "Loss" as including, among other things, "interest on a covered judgment").

contractually agreed to provide, and the Superior Court correctly rejected that argument here.[141]

Appellants ACE and Federal argue that the Superior Court should not have considered this other available policy language.[142] Ironically, the "interest on a covered judgment" language that the Superior Court referred to was also at issue in *Verizon* – the case that the Insurers now claim is dispositive of this Court's interpretation of the "Securities Claim" definition. The Insurers cannot have it both ways and, in any event, Delaware courts commonly consider alternative language that was available to insurers when interpreting insurance policy provisions.[143]

Finally, the Insurers' circular argument that the Interest Award is not covered Loss because it does not result from a Securities Claim is merely a re-hash of their arguments on the definition of "Securities Claim,"[144] and it shows that the converse

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[141] *See, e.g., Gallup, Inc. v. Greenwich Ins. Co.*, 2015 WL 1201518, at *10 (Del. Super. Feb. 25, 2015) (finding coverage for settlement amounts allegedly constituting restitution where the policy covered "Loss," defined to include "settlements," and excluded restitution only where the issue was finally adjudicated); Opinion at 14 ("The Court will not now insert more favorable language than the language Defendants chose during drafting.").

[142] ACE/Federal Brief at 37, n. 16.

[143] *See Twin City Fire Ins. Co. v. Del. Racing Ass'n*, 840 A.2d 624, 629-30 (Del. 2003) (comparing policy exclusion to other language used in similar policy exclusions).

[144] ACE/Federal Brief at 38.

is actually true: Because the Securities Appraisal Action is a Securities Claim, the Interest Award resulting from the Claim is covered Loss.

2. Upholding the Superior Court's Ruling Will Not Have the Adverse Consequences That ACE and Federal Claim.

As Appellants ACE and Federal note, Section 262 has been amended to allow companies to pre-pay any amount to appraisal petitioners and halt the accrual of interest on the prepaid amount, as follows:

> At any time before the entry of judgment in the proceedings, the surviving corporation may pay to each stockholder entitled to appraisal an amount in cash, in which case interest shall accrue thereafter as provided herein only upon the sum of (1) the difference, if any, between the amount so paid and the fair value of the shares as determined by the Court, and (2) interest theretofore accrued, unless paid at that time.[145]

This prepayment mechanism was not available to Solera because it was only effective "with respect to transactions consummated pursuant to agreements entered into on or after August 1, 2016."[146] Because the Merger closed on March 3, 2016, the amendment did not apply to the Securities Appraisal Action.[147] Thus it is disingenuous for Appellants ACE and Federal to argue here that Solera could have

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[145] 8 *Del. C.* § 262(h).

[146] 2016 Reg. Sess. H.B. 371.

[147] *See* JA599.

mitigated its losses by prepaying the deal price to the petitioners in order to stop interest from running.[148]

Appellants ACE and Federal also claim that, if this Court affirms the Superior Court's ruling that the Interest Award against Solera is covered "Loss," then "no companies will make such pre-payments" because they will "pass[] off the interest obligation to their insurers."[149] That "public policy" argument ignores the reality that no rational person would take the approach of incurring an unnecessary loss just so they can pursue coverage, as well as the fact that insurers can and do prevent such an outcome with more restrictive policy language, as discussed above.

[148] *See* JA381; JA410.

[149] ACE/Federal Brief at 39.

VI. THE SUPERIOR COURT CORRECTLY HELD THAT THE INSURERS CANNOT DENY COVERAGE FOR SOLERA'S DEFENSE EXPENSES BASED ON LACK OF CONSENT UNLESS THEY WERE PREJUDICED.

A. Counterstatement of the Question Presented

Did the Superior Court correctly determine that the Insurers cannot deny coverage for Solera's Defense Expenses absent prejudice? Yes. (Preserved at JA502-508).

B. Scope of Review

See Section I(B) *supra*.

C. Merits of the Argument

1. The Insurers Cannot Deny Consent to Defense Expenses Without a Showing of Prejudice.

Finally, Appellants ACE and Federal contend, contrary to general principles of Delaware law that strongly disfavor forfeiture of coverage based on a policyholder's failure to meet a policy condition, that Solera's delay in notifying its insurers of the Securities Appraisal Action and in obtaining their consent to the choice of counsel and rates, results in loss of coverage for Defense Expenses incurred – even in the absence of prejudice to the insurers. This position contradicts a plain reading of the Policy, in light of an insured's reasonable expectations and Delaware insurance law.

The Policy's notice provision requires as a "condition" to coverage, that the policyholder provide notice of a Claim "as soon as practicable."[150] If such notice is not provided in that time frame, the Policy's "savings clause" is activated. That clause states:

> [T]he Insurer shall not be entitled to deny coverage solely based on such untimely notice unless the Insurer can demonstrate its interests were *materially prejudiced* by reason of such untimely notice.[151]

This savings clause comports with longstanding Delaware precedent. [152]

A parallel provision, relied upon here by Appellants ACE and Federal, is the Consent Clause, which states:

> No Insured may incur any Defense Expenses in connection with any Claim or admit liability for, make any settlement offer with respect to, or settle any claim without the Insurer's consent, such consent not to be unreasonably delayed or withheld . . ."[153]

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[150] JA171.

[151] *Id*. (emphasis supplied).

[152] *See, e.g., State Farm Mut. Auto. Ins. Co. v. Johnson*, 320 A.2d 345 (beginning line of cases holding that insurer must be prejudiced by late notice before forfeiture will result); *see also Med. Depot, Inc. v. RSUI Indemn. Co*., 2016 WL 5539879 at *11 (refusing to allow insurers to deny coverage based on late notice under D&O policy; "Delaware law abhors forfeiture where to do so would deny the insured the very thing paid for.").

[153] JA160.

In requiring the policyholder to obtain the insurer's consent to Defense Expenses, the Policy simply asks that the policyholder request approval of its choice of counsel and their rates,[154] and provides that consent cannot be unreasonably withheld. Delaware courts have also interpreted such consent provisions to preserve coverage for settlements entered into without insurer consent unless there is a showing of prejudice to the insurers.[155] As the Superior Court held, nothing in the language of the Consent Clause supports a different interpretation of the same sentence of the Policy when applied to Defense Expenses.[156]

The rationale for these decisions is the fundamental principle of fairness, that the minor inconvenience to the insurer of late notice of a Claim or of a request for consent is far outweighed by the potentially harsh economic consequences of depriving a policyholder of coverage.[157] Insurers can hardly claim such

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[154] *See* David E. Bordon, *Defense Obligations—Indemnity Policies*, 4 Law and Prac. of Ins. Coverage Litig. § 47:23 (June 2019) (explaining that insurer consent to incur defenses costs refers to insurers' approval of the insured's choice of counsel, including providing or withholding consent due to expense).

[155] *Arch Ins. Co. v. Murdock*, 2019 WL 2005750, at *10-11 (Del. Super. May 7, 2019); *Sun-Times Media Grp., Inc. v. Royal & Sun Alliance Ins. Co. of Canada*, 2007 WL 1811265, at *12-13 (Del. Super. June 20, 2007); *Hall v. Allstate Ins. Co.*, 1985 WL 1137299, at *9-11 (Del. Super. Jan. 11, 1985).

[156] Opinion at 9.

[157] It is worth noting that while the Policy, like most D&O policies, is a "claims-made and reported" policy, meaning that it provides coverage only for claims

inconvenience here, where Solera is merely seeking reimbursement of the Defense Expenses it incurred, at its own risk, and it will have to prove up those expenses in court and counter the Insurers' arguments of prejudice.

Likewise, it would contradict a policyholder's reasonable expectations to excuse late notice of a Claim, but then to deprive it of coverage for failing to request approval of defense counsel. That would render the "notice prejudice" protection illusory. In this respect, the Consent Clause must be read in conjunction with the "notice prejudice" saving provision, and the prejudice standard should apply to both.

2. The Insurers' Denial of Consent Is Unreasonable.

The Consent Clause itself includes additional protection for Solera, as it provides that the Insurers' consent is "not to be unreasonably delayed or withheld."[158] When Solera provided the Insurers notice of the Securities Appraisal Action, it specifically requested consent to its Defense Expenses.[159] The Insurers denied coverage on the grounds that the Securities Appraisal Action was not a

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made and reported during the policy period, Solera did purchase "tail" coverage which, in effect, extended the reporting period by six years. Thus, the argument courts sometimes have relied upon to strictly enforce notice provisions – that carriers otherwise would never be able to "close their books" on the risks they are insuring – is not implicated here. Notably, the Insurers have not raised that concern.

[158] JA160.

[159] JA448.

covered Securities Claim; they did not otherwise respond to the request for consent to the engagement of defense counsel.[160] As a result, if coverage is afforded under the Policy, the refusal of consent should be considered "unreasonable" and thus of no consequence. Also, because the Insurers completely denied coverage for the Securities Appraisal Action, and on the same basis that they denied company coverage for the timely-noticed Securities Class Action, it would have been futile for Solera to have requested consent. In such circumstances, Delaware courts hold that the policyholder's obligations are excused.[161]

Finally, the Policy requires that Solera – not any of the insurers – defend any claim.[162] Solera did so, and with great success, resulting in a fair value determination that was less than the Merger deal price.[163] The Insurers cannot show that receiving notice earlier would have resulted in a materially better outcome, and so there is no basis for them to claim prejudice or reasonably reject Solera's Defense Expenses.

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[160] JA570-90; JA1220-238.

[161] *See Sun-Times Media Group, Inc. v. Royal & Sunalliance Ins. Co. of Canada*, 2007 WL 1811265 at *12 ("Because the [insurers] reserved their rights with respect to coverage and later denied coverage, they should not have 'veto power.'"); *Mine Safety Appliances Co. v. AIU Ins. Co*., 2016 WL 498848, at *5 (Del. Super. Jan. 22, 2016) (request for consent futile if insurers would not have consented or "would have denied coverage" regardless of the merits of the claim).

[162] JA160.

[163] JA597-688; JA140-144.

CONCLUSION

The judgment of the Superior Court holding that (i) the Securities Appraisal Action is a "Securities Claim" under the Policy, (ii) the Interest Award is "Loss" under the Policy, and (iii) the Defense Expenses incurred by Solera prior to notice of the Securities Appraisal Action are not excluded under the Consent Clause without prejudice to the Insurers, should be affirmed in their entirety.

Respectfully submitted,

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