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IN THE SUPREME COURT OF THE STATE OF DELAWARE

RSUI INDEMNITY COMPANY, Plaintiff Below, Appellant and Cross-Appellee, v. DAVID H. MURDOCK and DOLE FOOD COMPANY, INC., Defendants Below, Appellees and Cross-Appellants.	No. 154,2020 Court Below - Superior Court of the State of Delaware C. A. N16C-01-104 EMD CCLD PUBLIC VERSION AUGUST 24, 2020

APPELLEES' ANSWERING BRIEF ON APPEAL AND CROSS-APPELLANTS' OPENING BRIEF ON CROSS-APPEAL

Dated: August 7, 2020

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NATURE OF PROCEEDINGS

This appeal concerns insurance coverage for the settlements of two class action lawsuits—one for breach of fiduciary duty and one for securities fraud—brought against Dole Food Company, Inc. and two of its officers/directors, David Murdock and Michael Carter (collectively, "the Insureds").[1]

Plaintiff and appellant RSUI Indemnity Company sold a directors and officers ("D&O") insurance policy to Dole that was part of its 2012-13 "tower." Like all the participating insurers, RSUI promised broad coverage subject only to some narrow exclusions. RSUI promised to indemnify the individual insureds for all Loss arising from Claims for Wrongful Acts and to indemnify Dole for all Loss arising from Securities Claims. The purpose of the insurance was to protect the Insureds against claims alleging breach of loyalty and securities violations. However, when the Insureds were sued for exactly such claims, RSUI refused to honor its obligations. Now RSUI is the last insurer standing. All others either paid their policy limits or settled.

The *Stockholder* litigation stated claims against Mr. Murdock and Mr. Carter for breach of the duty of loyalty. (B1394-B1400). Dole notified RSUI of the

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[1] *In re Dole Food Co. Stockholder Litigation*, Case No. 8703-VCL (Del. Ch.) (the "*Stockholder* litigation"); *San Antonio Fire & Police Pension Fund v. Dole Food Co.*, Case No. 1:99-MC-0999 (D. Del.) (the "*San Antonio* lawsuit").

lawsuit and RSUI reserved its right to deny coverage. (B490). After two years of litigation, a trial and a Memorandum Opinion, the *Stockholder* litigation parties decided to settle rather than litigate through final judgment and likely cross-appeals. Dole kept RSUI apprised of the action and the settlement negotiations. (B492-95). When the settlement went before the Court of Chancery for approval, RSUI neither appeared nor objected. Instead, before the Court could consider the settlement and before the Insureds even asked RSUI to indemnify them, RSUI filed this suit, asserting eleven coverage defenses and seeking a declaration that it had no obligation to fund the *Stockholder* settlement. (A0356-A0386). Mr. Murdock therefore funded the $115,000,000 settlement and filed a counterclaim against RSUI for breach of contract and breach of the implied covenant of good faith and fair dealing. (A0769-A0832).

Meanwhile, before the *Stockholder* settlement was finalized, the *San Antonio* lawsuit was filed, stating claims against the Insureds for securities violations. (A1125-A1223). When the *San Antonio* parties negotiated a settlement, RSUI again refused to consent to or fund the settlement. (B497). Dole paid most of the $74,000,000 settlement and filed a counterclaim herein against RSUI for breach of contract and bad faith.[2] (A0838-A0917). In its answers to Mr. Murdock's and

[2] Another insurer paid part of the settlement, exhausting its limit in doing so.

Dole's counterclaims, RSUI reasserted its coverage defenses. (B044-46; B094-96).

RSUI's coverage defenses have been rejected by the Superior Court or withdrawn by RSUI. In this appeal, RSUI continues to pursue its defenses that: (i) the settlements were uninsurable under Delaware law; (ii) the settlements were uninsurable under California Insurance Code Section 533; (iii) the Profit/Fraud Exclusion bars coverage; and (iv) the policy mandated an allocation of the settlements between covered and uncovered loss.

The policy language and the law support the Superior Court's decisions on each of these issues. The court correctly found that Delaware law applied to interpret the policy and therefore Section 533 did not apply. (RSUI Ex. B at 15-21).[3] The court also correctly rejected RSUI's argument that the settlements were uninsurable under Delaware law, because the Delaware legislature has made no statement that D&O policies may not insure fraud. (*Id*. at 21-23). Further, the court correctly held that unambiguous policy language establishes that the Profit/Fraud Exclusion does not apply to either settlement (RSUI Ex. A) and that the allocation provision does not require that the settlements be allocated between covered and uncovered loss. (RSUI Ex. E). In each instance, the Superior Court's

[3] "RSUI Ex. __" refers to the Exhibits attached to Appellant's Opening Brief.

decision was consistent with and supported by decisions of this Court or other courts. This Court should affirm these rulings.

The Insureds respectfully submit that the Superior Court erred with respect to the Insureds' bad faith claims. After denying RSUI's initial motion for summary judgment on bad faith, the Superior Court granted a renewed motion, even though RSUI presented no additional evidence of its state of mind, while the Insureds offered substantial additional evidence, including the testimony of a qualified expert, of RSUI's bad faith.[4] The Superior Court's order granting RSUI summary judgment on those claims should be reversed.

Finally, if this Court reverses the Superior Court's judgment on any of the grounds asserted by RSUI, the Superior Court's ruling that the Memorandum Opinion in the *Stockholder* litigation has collateral estoppel effect in this litigation (RSUI Ex. B at 11-15) should either be reversed or remanded to the Superior Court for further findings.

[4] The Order Granting Summary Judgment on Counterclaim 3—Breach of Implied Covenant of Good Faith and Fair Dealing (Trans. ID 63215130) (Dkt 397) is attached as Exhibit 1.

SUMMARY OF ARGUMENT

The Insureds' Answer to RSUI's Summary of Arguments on Appeal

1. Denied. The Superior Court correctly held that the Policy should be interpreted under Delaware law. The court correctly applied the *Restatement of Conflict of Laws* and found that, under the factors identified in sections 6(2) and 188, including Delaware's strong interest in the honesty and fidelity of directors and officers of Delaware corporations, Delaware's interests outweighed California's. This is consistent with Delaware authorities, including *Mills Ltd. Partnership v. Liberty Mutual Insurance Co.*, 2010 WL 8250837 (Del. Super. Nov. 5, 2010), and the parties' intentions as expressed in the choice-of-law provision.

2. Denied. The Superior Court correctly decided that, pursuant to this Court's decision in *Whalen v. On-Deck, Inc.*, 514 A.2d 1072 (Del. 1986), fraud is insurable under Delaware law. RSUI's argument that the settlements are uninsurable under California Insurance Code Section 533 also fails. First, the Policy specifies that, in determining whether losses are uninsurable, the law of the jurisdiction most favorable to insurability will apply, if such jurisdiction is where losses were awarded or where either the insurer or the insured is incorporated or has its principal place of business. Therefore, Delaware law rather than California law applies, and the settlements are insurable. Second, even if California law applies, the Profit/Fraud Exclusion requires that any alleged fraud be established by a final

non-appealable adjudication in the underlying lawsuit. There was no such adjudication here. Third, RSUI did not establish that any portion of either settlement constitutes indemnity for fraud or other "willful acts."

3. Denied. The Superior Court correctly held that the Profit/Fraud Exclusion does not preclude coverage for the *Stockholder* litigation. RSUI did not prove that either the Memorandum Opinion or the Final Order and Judgment meets the exclusion's requirements. The Memorandum Opinion was not a "final and non-appealable adjudication," and the Final Order and Judgment contained no findings of fraud adverse to the Insureds. Moreover, RSUI cannot establish that the exclusion applied to the *San Antonio* lawsuit—an issue that was never considered by the Superior Court.

4. Denied. The Superior Court correctly determined that the Larger Settlement Rule applies to any allocation of the underlying settlements. The plain language of the policy's allocation provision does not require application of the "relative exposure" method when the parties cannot agree to a Loss allocation. Additionally, the Superior Court correctly followed the reasoning of numerous cases holding that, when a D&O policy does not require any specific method of allocation, the Larger Settlement Rule applies because it is consistent with policy language and the parties' expectations.

The Insureds' Summary of Arguments on Cross-Appeal

1. The Superior Court erred in granting summary judgment to RSUI on the Insureds' bad faith claim. In finding that RSUI had a reasonable justification for denying coverage, the court relied on RSUI's after-the-fact justifications rather than the facts and circumstances known to RSUI when it made its coverage decision. RSUI's adjuster's testimony establishes that his investigation was insufficient and that RSUI's coverage determinations were not reasonably justified when made. The Superior Court also erred in refusing to allow a jury to determine whether RSUI breached the implied covenant of good faith and fair dealing by asserting pretextual reasons for refusing to consent to the underlying settlements.

2. The Superior Court erred in finding that the Insureds are collaterally estopped from litigating factual issues determined in the Memorandum Opinion because (i) the factual issues in the *Stockholder* litigation are not identical to the issues in this coverage lawsuit; (ii) the Court of Chancery did not actually determine that either Mr. Murdock or Dole committed fraud; (iii) no finding of fraud was necessary to the Memorandum Opinion; and (iv) the Memorandum Opinion was not a final adjudication. Alternatively, if this Court does not reverse the Superior Court's collateral estoppel ruling, it should remand the issue to the Superior Court for more specific findings.

STATEMENT OF FACTS

The RSUI Policy

In 2012, Dole purchased a "tower" of D&O insurance policies comprised of a $15,000,000 primary policy issued by AXIS Insurance Company (the "AXIS Policy") and a series of excess policies, each of which followed form to (that is, incorporated the terms of) the AXIS Policy. (B1058). The RSUI policy ("the Policy") was the tower's eighth "layer," providing $10,000,000 in coverage excess of a $500,000 retention and $75,000,000 in underlying insurance. (*Id.*).

The Policy obligates RSUI to "pay on behalf of the Insured Individual all Loss which is not indemnified by [Dole] arising from any Claim for a Wrongful Act." (A0447). It also obligates RSUI to "pay on behalf of [Dole] all Loss arising from any Securities Claim . . . against" Dole. (A0448).

The Policy defines "Loss" as "all monetary amounts which the Insureds become legally obligated to pay . . . including damages, settlement amounts and judgments, including any award of punitive, exemplary or multiple damages." (A0449). "Loss" does not include:

> matters uninsurable under the law applicable to this Policy, provided:
>
> a. the law of the jurisdiction most favorable to the insurability of such matters shall apply; provided further such jurisdiction is: (i) where such amounts were awarded or imposed; (ii) where any Wrongful Act underlying the Claim took place; (iii) where either the insurer or any insured is incorporated, has its principal

> place of business or resides; or (iv) where this policy was issued or because effective . . . .

(A0449-A0450). The Policy contains an exclusion barring coverage for Loss on account of any Claim based on, arising out of or attributable to

> a. any profit, remuneration or financial advantage to which the insured was not legally entitled; or
> b. any willful violation of any statute or regulation or any deliberately criminal or fraudulent act, error, or omission by the Insured;
> if established by a final and non-appealable adjudication adverse to such Insured in the underlying action.

(A0453).

The *Stockholder* Litigation

The *Stockholder* litigation was a class action arising out of the merger of DFC Merger Corporation and Dole. The plaintiffs stated claims against Mr. Murdock and Mr. Carter for breach of fiduciary duties. (B1394-1400). Dole was ***not*** a party to the *Stockholder* litigation. The *Stockholder* litigation went to trial, and on August 27, 2015, the Court of Chancery issued a Memorandum Opinion finding Mr. Murdock and Mr. Carter liable for breach of their duties of loyalty. (A0386-A0427).

The Insureds then engaged in settlement negotiations with the *Stockholder* plaintiffs. (B483). The Insureds advised RSUI on the progress of the negotiations and provided it with drafts and final versions of both the Term Sheet and Stipulation and Agreement of Settlement. (B485-86). Throughout the

negotiations, the Insureds asked RSUI to advise them if it had any questions or concerns and to confirm that it did not object to the settlement. (B487). RSUI did not object to or comment on any of the settlement terms, nor did RSUI lodge any objection in the Court. (B487-88).

[redacted] RSUI's sole decision-maker determined that there was no coverage for the *Stockholder* litigation shortly after the Memorandum Opinion was issued based on a review of some (but not all) of the relevant Policy language and a brief internet search on California law. (B1150-51). Before the settlement was approved by the Court of Chancery, RSUI filed this lawsuit.

On February 10, 2016, the court approved the *Stockholder* settlement and entered an Order and Final Judgment, which stated:

> Neither the Stipulation [of Agreement and Settlement], nor the fact or any terms of the Settlement, is evidence, or a presumption, admission or concession by any of the Defendants or Plaintiffs . . . of any fault, liability or wrongdoing whatsoever, or lack of any fault, liability or wrongdoing, as to any facts or claims alleged or asserted in the Action, including any findings in the Memorandum Opinion . . . .

(A0923-A0924).

[redacted] Mr. Murdock then made the $115,793,059.57 settlement payment. (B841).

The *San Antonio* Lawsuit

On December 9, 2015, the *San Antonio* lawsuit was filed against Dole, Mr. Murdock, and Mr. Carter. (B841). This class action stated claims against all defendants for violations of Section 10(b) and Rule 10b-5 of the Securities Exchange Act and against Mr. Murdock and Mr. Carter for violations of Section 20(a) of the Act. (*Id*.).

Dole notified RSUI of the *San Antonio* lawsuit. (B1059). RSUI's decision-maker "investigated" this claim by reading the complaint. (B1159). On December 29, 2015, RSUI advised Dole that it "incorporated all statements and rights reserved by RSUI and other Underlying Policies' insurers" in the *Stockholder* litigation. (B491). In other words, RSUI reiterated its coverage position from the *Stockholder* litigation, then sued the Insureds 15 days later.

In fall 2016, the *San Antonio* plaintiffs proposed mediation. (B491). After conferring with the insurers, including RSUI, the Insureds scheduled a mediation in January 2017. (B493). The Insureds requested that RSUI attend the mediation. (*Id*.). RSUI did not attend the mediation, but the Insureds provided RSUI with multiple telephonic updates. (B494-95).

After the mediation, the Insureds informed RSUI that they had agreed to a Term Sheet, subject to the approval of Dole's board of directors, and asked RSUI to confirm that it would contribute to the settlement. (B495-96). [redacted]

[redacted] The Insureds negotiated a final settlement with the *San Antonio* plaintiffs, which was approved by the District Court. (B842). Dole paid more than $66,000,000 of the $74,000,000 *San Antonio* settlement. (*Id*.).

The Coverage Action

RSUI's Amended Complaint for Declaratory Relief sought declarations that (i) it has no obligation to pay for the *Stockholder* settlement for eleven reasons and (ii) to the extent it is required to pay the *Stockholder* settlement, it is entitled to subrogation against Mr. Murdock and Mr. Carter. (A0356-A0385). Mr. Murdock and Dole denied RSUI's allegations and counterclaimed, alleging (i) that RSUI breached the Policy by refusing to reimburse Mr. Murdock for the *Stockholder* settlement and Dole for the *San Antonio* settlement and (ii) that RSUI breached the implied covenant of good faith and fair dealing in its handling of the Insureds' claims. (A0356-A0385).

The Superior Court's Decisions

1. The Motion to Dismiss

Mr. Murdock filed a Motion to Dismiss RSUI's subrogation claim. (A0486-A0504). Because the Policy states that it "will not exercise its right of subrogation against an Insured Individual unless [the Profit/Fraud Exclusion] applies" to that Insured, (A0457), the Superior Court addressed the applicability of that exclusion.

The court correctly held that the "unambiguous language of [the Profit/Fraud Exclusion] means that this exclusion does not apply because (i) the Memorandum Opinion does not constitute a final and non-appealable adjudication and (ii) the Settlement and Order and Final Judgment do not make findings regarding fraudulent acts by an insured." (RSUI Ex. A at 16).

2. RSUI's First Motion for Summary Judgment

In June 2017 RSUI filed its first motion for summary judgment. It argued that (i) California law applied to interpret the Policy; (ii) the Memorandum Opinion had collateral estoppel effect on the Insureds; (iii) coverage is barred by California Insurance Code Section 533; (iv) coverage for alleged fraudulent acts is barred by Delaware public policy; (v) there is no coverage for the underlying settlements because RSUI did not consent to them; (vi) there is no coverage for the settlements because the Insureds violated the Policy's cooperation clause; and (vii) the Insureds' bad faith claims are without merit. (A0932-A0946).

On March 1, 2018, the court issued an order granting in part and denying in part RSUI's motion. The court erroneously held that "collateral estoppel *vis a vis* the Memorandum Opinion applies to this civil action and the Motion" and stated that it would employ collateral estoppel against the Insureds to the extent the factual issues determined in the Memorandum Opinion are relevant to issues herein. (RSUI Ex. A at 15). The Superior Court denied RSUI's motion as to all

other issues. In doing so, it rejected two additional coverage defenses. It ruled that because Delaware law applied, coverage was not barred under Section 533. (*Id*. at 15-21). It also held that Delaware public policy does not prohibit insurers from paying for an insured's fraud. (*Id*. at 21-23).

3. RSUI's Motion for Reconsideration

In August 2018, RSUI filed a motion to vacate or revise the Superior Court's choice of law decision. (A1447-A1469). The Superior Court denied that motion at oral argument on December 7, 2018. (A2580-A2583).

4. The Parties' Cross-Motions for Summary Judgment

In August 2018, RSUI filed a second motion for summary judgment in which it re-asserted its arguments regarding the cooperation condition, the consent to settle condition, and bad faith. (A2130-A2172).

Dole and Mr. Murdock also filed motions for summary judgment as to the following issues: (i) the *Stockholder* and *San Antonio* settlements were "Loss," as defined in the Policy; (ii) the underlying policies had been exhausted; (iii) the cooperation and consent conditions did not excuse RSUI's performance; and (iv) there was no basis to allocate the settlement payments between covered and uncovered Loss. (A2173-A2217; A2218-A2256).

The Superior Court issued a series of rulings on the cross-motions. On May 1, 2019, the Court granted RSUI's motion on bad faith. The court found that while

RSUI's coverage positions had been wrong, they were not taken unreasonably. (Ex. 1 at 10-12).

On May 7, 2019, the court granted the Insureds' summary judgment on the "Loss" issue, holding that the settlement payments were Loss because the policies' definition of Loss included "settlement amounts" and the settlements did not come within any of the exceptions to the definition. (RSUI Ex. D, 19-21). The court also denied both sides' motions on the consent and cooperation conditions, finding that there were genuine issues of material fact. (*Id*. at 21-26).

On January 17, 2020, the Superior Court issued a Memorandum Opinion on Allocation. The court held that (i) the Policy's allocation provision does not specify an allocation method in the event the parties fail to agree on an allocation between covered and uncovered claims; (ii) when the parties fail to agree on an allocation, the Larger Settlement Rule applies to protect the insured's expectations; (iii) with respect to the *San Antonio* lawsuit, the Larger Settlement Rule was dispositive in the Insureds' favor; and (iv) with respect to the *Stockholder* litigation, more factual information was needed to make an allocation determination. (RSUI Ex. E, 12-17).

Just before trial, RSUI agreed to dismiss with prejudice its claims that the Insureds breached the Policy's consent and cooperation conditions, and agreed that the Insureds would prevail on the allocation issue if the Larger Settlement Rule

applied. (RSUI Ex. F). The parties stipulated that no issues remained for trial and Judgment would be entered against RSUI in the amount of $10,000,000, plus interest. (*Id*.). The Superior Court entered judgment; this appeal ensued.

ARGUMENT

The Insureds' Answering Arguments on Appeal

I. The Superior Court Correctly Applied Delaware Law to Interpret the Policy

A. Question Presented

Did the Superior Court correctly determine that Delaware law applied to interpret the Policy?

B. Scope of Review

Choice of law is a legal question that is reviewed *de novo*. *Tumlinson v. Advanced Micro Devices, Inc*., 106 A.3d 983, 986 (Del. 2013). The Superior Court's decision on a motion for summary judgment is also reviewed *de novo*. *Certain Underwriters at Lloyds, London v. Chemtura Corp*., 160 A.3d 457, 464 (Del. 2017) ("*Chemtura*").

C. Merits of the Argument

The Superior Court correctly determined that the Policy should be interpreted under Delaware law. First, with respect to the insurability of the Loss, the Policy contains a choice-of-law provision specifying that the law most favorable to the Insureds (in this case, Delaware) applies. Second, Delaware authority is clear that, in deciding what law applies to determine whether a D&O policy issued to a Delaware corporation provides coverage for breach of fiduciary duty and securities claims against the corporation and its directors and officers,

Delaware's strong interests outweigh those of the state of the corporation's headquarters. Third, the cases relied upon by RSUI below are inapposite because they address choice of law in the context of different types of policies and claims than those presented here.

i. Delaware Choice of Law Principles

Delaware has adopted the "most significant relationship test" to determine which state's law should apply. *Mills*, 2010 WL 8250837, at *5. "For insurance contracts, disputes are resolved by an analysis of the contacts set forth in Restatement (Second) Conflict of Laws Section 188 and Section 193." *Id*. (quotations omitted).

Restatement Section 193 provides that the interpretation of an insurance policy is

> determined by the local law of the state which the parties understood was to be the principal location of the insured risk during the term of the policy, unless with respect to the particular issue, some other state has a more significant relationship under the principles stated in § 6 to the transaction and the parties, in which event the local law of the other state will be applied.

Restatement (Second) of Conflict of Laws § 193 (2017).

Restatement Section 6(2) identifies the following principles relevant to choice of law:

> (a) the needs of the interstate and international systems,
>
> (b) the relevant policies of the forum,

> (c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue,
>
> (d) the protection of justified expectations,
>
> (e) the basic policies underlying the particular field of law,
>
> (f) certainty, predictability and uniformity of result, and
>
> (g) ease in the determination and application of the law to be applied.

Id. § 6(2).

Finally, *Restatement* Section 188 states:

> (1) The rights and duties of the parties with respect to an issue in contract are determined by the local law of the state which, with respect to that issue, has the most significant relationship to the transaction and the parties ***under the principles stated in § 6***.
>
> (2) ***In the absence of an effective choice of law by the parties*** (see § 187), the contacts to be taken into account ***in applying the principles of § 6*** to determine the law applicable to an issue ***include***:
>
> > (a) the place of contracting,
> >
> > (b) the place of negotiation of the contract,
> >
> > (c) the place of performance,
> >
> > (d) the location of the subject matter of the contract, and
> >
> > (e) the domicil, residence, nationality, place of incorporation, and place of business of the parties.
>
> These contacts are to be evaluated according to their relative importance with respect to the particular issue.

Id. § 188 (emphasis added). In its argument, RSUI ignores that Section 188

applies only in the absence of a choice of law by the parties and ignores Section 6 in its entirety. Both are fatal to RSUI's argument.

First, the Policy (by incorporation) contains a choice-of-law provision. It states that "Loss" does not include:

> matters uninsurable under the law applicable to this Policy, provided:
>
> a. the law of the jurisdiction most favorable to the insurability of such matters shall apply; provided further such jurisdiction is: (i) where such amounts were awarded or imposed; (ii) where any Wrongful Act underlying the Claim took place; (iii) where either the insurer or any insured is incorporated, has its principal place of business or resides; or (iv) where this policy was issued or because effective . . . .

(A0450). The *Stockholder* and *San Antonio* settlements were approved by and paid pursuant to judgments in Delaware courts, and Dole was incorporated in Delaware at all relevant times. To the extent Delaware's law is more favorable to the Insureds than California's on "insurability under the law," it applies.

Second, even if a *Restatement* analysis is required, RSUI's is wrong, because RSUI relies on cherry-picked language from Section 188, ignoring its language that the law of the state with the most significant relationship "***under the principles stated in § 6***" governs and that factors (a) through (e) are not the only factors to be considered in applying the principles of section 6.

ii. *Mills* and Its Progeny

Several Delaware cases have applied the *Restatement* to determine which state's law applies to interpret a D&O policy issued to a Delaware corporation. Each holds that Delaware law applies.

In *Mills*, a Delaware corporation's directors and officers were sued in four securities class actions in Virginia, the corporation's principal place of business. The corporation's D&O insurers denied coverage for the settlement of the lawsuits, and the insureds sued in Delaware. The court found that Delaware had the most significant relationship with the risks insured by the D&O policy.

> When the insured risk is the directors' and officers' "honesty and fidelity" to the corporation, and the choice of law is between headquarters or the state of incorporation, the state of incorporation has the most significant relationship. [The insurer's] argument that "the only connection . . . is that Plaintiffs are . . . Delaware corporations" minimizes the importance of that connection. Calling it the *only* connection begs the question of the state of incorporation's importance in this situation.
>
> First, [the insurer] insured [the] directors and officer under Delaware law. Second, Delaware's law ultimately determines whether a director or officer of a Delaware corporation has misbehaved . . . . When the conduct of a corporation's directors and officers is centrally implicated, the place of incorporation is important.
>
> . . . . Virginia has, at best, an indirect interest in whether Delaware corporations insured their directors and officers.

2010 WL 8250837, at *6.

Several Delaware judges have followed *Mills*. In *Pfizer Inc. v. Arch Ins. Co.*, 2019 WL 3306043 (Del. Super. July 23, 2019), the insured was a Delaware corporation with its headquarters in New York. It sought D&O coverage for a securities lawsuit settlement in New York. The insured argued that Delaware law applied because the insured was incorporated in Delaware and the policy's ADR provision required any arbitrator or mediator to "give due consideration" to the laws of the state of incorporation. *Id.* at *8. The insurer argued that New York law applied because (i) the insured's principal place of business was New York; (ii) the policy was issued in New York through a New York broker and contained New York Amendatory endorsements; and (iii) the underlying lawsuit was in New York.

The court found that even though some Section 188 factors favored New York, application of Delaware law "is most consistent with the parties' reasonable expectations at the time of contracting and with this Court's accepted choice-of-law analysis" for D&O policies. *Id*. It stated that using Delaware law to interpret the policy in mediation, but another state's law in resulting litigation, would lead to "the precise kind of uncertainty and inconsistency" that the *Restatement* seeks to avoid. *Id*. The court also found that the reasoning of *Mills* and the Superior Court's decision herein applied to securities cases. *Id. See also Ferrellgas Partners L.P. v. Zurich Am. Ins. Co*., 2020 WL 363677, at *4 (Del. Super. Jan. 21,

2020), *app. denied*, 2020 WL 764155 (Del. Super. Feb. 17, 2020) (Delaware courts "consistently have held" that Delaware law applies to disputes over D&O coverage when insured companies are Delaware corporations); *IDT Corp. v. U.S. Specialty Ins. Co*., 2019 WL 413692 (Del. Super. Jan. 31, 2019) (same).

Most recently, the District of Delaware decided *Calamos Asset Management, Inc. v. Travelers Casualty & Surety Co.*, 2020 WL 3470473 (D. Del. June 25, 2020). *Calamos* addressed whether a Delaware corporation's D&O policy provided coverage for two lawsuits—an appraisal action against the corporation and a breach of fiduciary duty lawsuit against its directors and officers. The insured argued that Delaware law applied and the insurer argued that the law of the corporation's headquarters, Illinois, applied. The court stated:

> Several principles identified in Restatement § 6 favor applying Delaware law. First, under Restatement § 6(b), Delaware as a forum has a specific policy regarding officer and director liability. Delaware has adopted 8 *Del. C*. § 145, which authorizes corporations to (i) provide indemnification and advancement to officers and directors for lawsuits arising out of their status as an officer or director, and (ii) to purchase D&O liability policies which insure officers and directors against such claims. Because Delaware law governs the scope and entitlement to indemnification and advancement, applying Delaware law to the D&O policies that actually cover those costs advances the relevant policies of the forum.
>
> Second, under Restatement § 6(c), applying Delaware law recognizes that insured and insurers assessing the likelihood of needing coverage under a D&O liability policy will be more concerned with the policies of

> Delaware relative to other states.
>
> Third, courts "consistently have held that Delaware law applies to disputes over [D&O] insurance coverage where, as here, the insured companies are Delaware corporations." Thus, under Restatement § 6(d), applying Delaware law will protect "justified expectations."
>
> Finally, "Delaware's law ultimately determines whether a director or officer of a Delaware corporation has misbehaved *vis a vis* the corporation, its shareholders, and its investors." Thus, under Restatement § 6(f), applying Delaware law to D&O coverage disputes will ensure that similar claims against officers and directors of Delaware corporations are similarly covered or not covered by their D&O liability policies.

Id. at *3-4 (citations omitted). Citing *Mills*, *IDT*, *Pfizer*, and the trial court herein, the court followed "a long line of cases holding that where D&O liability coverage is at issue," the state of incorporation has a more significant relationship than the state of the corporation's headquarters. *Id*. at *5.

iii. The *Restatement* Rules Mandate Application of Delaware Law

As in the above cases, Delaware has a more significant relationship than California. First, Delaware has a substantial interest in its law being applied to interpret D&O policies of Delaware corporations. The RSUI policy was purchased pursuant to 8 *Del. C.* § 145(g), which provides that a Delaware corporation may purchase D&O insurance "against ***any liability*** asserted against such person and incurred by such person in any such capacity, or arising out of such person's status as such, ***whether or not the corporation would have the power to indemnify such***

person against such liability under this section." (emphasis added). Delaware also has a substantial interest in the honesty and fidelity of directors and officers of Delaware corporations. *Mills*, 2010 WL 8250837, at *6. Mr. Murdock's and Mr. Carter's duties were established by Delaware law, their liability for breach of fiduciary duty was determined under Delaware law (A0413-A0415), and, by virtue of their positions as directors, they were subject to Delaware jurisdiction. 10 *Del. C.* § 3114. Finally, as the Superior Court noted, under Delaware law the situs of the stock at issue in the underlying lawsuits was Delaware. 8 *Del. C.* § 169. Conversely, California "has, at best, an indirect interest in whether Delaware corporations insure their directors and officers." *Mills*, 2010 WL 8250837, at *6.

Second, as the Policy's choice-of-law provision demonstrates, the parties expected that the jurisdiction with the law most favorable to the insureds would determine whether a loss is insurable. RSUI admits this is not California. (B1149-50).

Third, applying Delaware law would lead to certainty, predictability, and uniformity of result. Under the *Restatement* rules, Delaware law should apply.

iv. RSUI's Arguments That California Law Applies Are Without Merit

RSUI argues that this Court's rulings in *Chemtura* and *Travelers Indemnity Co. v. CNH Industrial America, LLC*, 191 A.3d 288 (Del. 2018), mandate that California law governs. However, *Chemtura* and *Travelers* applied the

Restatement rules to different types of insurance policies and underlying claims than those presented here. Those cases are distinguishable.

In *Chemtura*, this Court addressed which state's law applied in determining the applicability of commercial general liability policies to environmental claims. The Court stated that the *Restatement* Sections 188 and 6 "factors 'vary somewhat in importance from field to field' and, for contracts, 'the protection of the justified expectations of the parties is of considerable importance.'" 160 A.3d at 468 (citation omitted). The Court found that ***in the situation presented in that case***, the principal place of business of the insured had the most significant relationship to the transaction and the parties. A key factor in the Court's decision was that this result "fulfills the need for comprehensive insurance programs to have a single interpretive approach utilizing a single body of law unless the parties to the scheme choose otherwise," *id*. at 460, and ensured "'certainty, predictability and uniformity of result.'" *Id*. at 470 (citation omitted).

Travelers, which involved coverage under general liability policies for asbestos bodily injury cases, followed *Chemtura's* reasoning. It found that Texas, the principal place of business of the policy's purchaser/assignor and the place where the policies were negotiated and purchased, had a more substantial interest than Wisconsin, the principal place of business of the policy's assignee. 2018 WL

3434562, at *6. As in *Chemtura*, this Court stressed that applying Texas law would maintain "certainty, predictability and uniformity" of result. *Id*. at *5.

Unlike *Chemtura* and *Travelers*, this dispute involves a D&O policy, which, rather than providing the broad coverage of a CGL policy, covers actions against directors and officers in their roles as such (i.e., roles governed by Delaware law) and securities claims (i.e., claims arising out of stock whose situs is Delaware) against Dole. As *Mills* and its progeny have held, Delaware has the most significant relationship to the claims covered by this policy and the greatest interest in applying its laws to policies insuring directors and officers of Delaware corporations. Further, applying Delaware law will ensure certainty, predictability and uniformity of results.

Indeed, the argument that *Chemtura* and *Travelers* should be followed in the D&O context was rejected by *Calamos*. "Because those cases addressed a different type of [insurance] contract, is it not surprising that the 'most significant relationship' test, which is context dependent, led to different results." 2020 WL 3470473, at *5.

II. The Superior Court Correctly Determined that the Settlements Were Not Uninsurable as a Matter of Public Policy

A. Question Presented

Did the Superior Court correctly determine that the *Stockholder* litigation and *San Antonio* settlements were not uninsurable as a matter of public policy?

RSUI preserved the question of whether the settlements were insurable under California and Delaware law; however, RSUI did not preserve the question of whether the settlements were insurable under the Policy's choice-of-law provision.

B. Scope of Review

The Superior Court's denial of a motion for summary judgment, and its interpretation of an insurance contract, are reviewed *de novo*. *ConAgra Foods, Inc. v. Lexington Ins. Co*., 21 A.3d 62, 68 (Del. 2011).

C. Merits of the Argument

The Superior Court's ruling is correct for several reasons. First, this Court has held that matters are insurable absent a clear statement of public policy by the Delaware Legislature to the contrary. The legislature has not stated that D&O policies may not insure fraud—in fact, its statements and actions are to the contrary. Second, California law does not apply here. The Policy states that whether a loss is insurable will be determined by the law most favorable to the insureds, and RSUI concedes this is not California's. Third, even if California law

does apply, RSUI has not met the contractual burden of proof to establish fraud. Fourth, even under California law RSUI cannot establish that the settlements are uninsurable.

i. Fraud Is Not Uninsurable Under Delaware Law

RSUI argues that, as a matter of public policy, fraud should be uninsurable under Delaware law. However, RSUI ignores this Court's decision in *Whalen*, which considered and rejected RSUI's arguments.

Whalen addressed whether punitive damages were uninsurable as a matter of Delaware public policy. The trial court held that the purposes underlying punitive damages—to punish the wrongdoer and deter similar conduct—"would be frustrated if one who has acted wantonly were permitted to shift the burden to its insurer, and ultimately to the public." 514 A.2d at 1073. This Court reversed.

> [T]here is no evidence of public policy in this State against such insurance. The Delaware Legislature has formulated no such policy, and this Court has indicated in the past that it would defer to the Legislature on the issue. While the Superior Court and [the insurer] believe the purposes of punitive damages would be frustrated if such damages were insurable, we cannot infer from that concern a policy against such insurance. A wrongdoer who is insured against punitive damages may still be punished through higher insurance premiums or the loss of insurance altogether. More importantly, in light of the importance of the right of parties to contract as they wish, we will not partially void what might otherwise be a valid insurance contract as contrary to public policy in the absence of clear indicia that such a policy actually exists.

Id. at 1074 (citation omitted).

Whalen's reasoning governs here. Even if, as RSUI argues, "Delaware has no specific public policy" regarding the insurability of fraud in D&O policies (OB at 30) *Whalen* mandates that fraud is insurable. However, the Delaware Legislature has indicated that fraud ***is*** insurable—Delaware law allows corporations to purchase insurance for their directors and officers "against any liability" incurred in that capacity "whether or not the corporation would have the power to indemnify such person against such liability under this section." 8 *Del. C.* § 145(g).

Further, *Whalen* was decided in 1986. If the Delaware Legislature wanted to amend Section 145(g) to articulate a public policy limiting the scope of D&O insurance, it has had ample time to do so. The Superior Court correctly deferred to the Delaware Legislature and found that insuring fraud does not violate Delaware public policy.

ii. <u>The Policy Choice-of-Law Provision Mandates that Delaware Law Governs the Insurability of Loss</u>

As stated above, the Policies contain a choice-of law-provision mandating that whether matters are insurable ***will be determined by the law of the jurisdiction most favorable to insurability***, provided that jurisdiction is "(i) where such amounts were awarded or imposed; . . . [or] (iii) where either the Insurer or any Insured is incorporated, has its principal place of business or resides." (A0450).

Dole was incorporated in Delaware and the judgments were entered here. Because fraud is insurable under Delaware law, it is insurable under the Policies.

RSUI argues that this choice-of-law provision is unenforceable. However, Delaware law provides that parties to a written contract may agree that it "shall be governed by or construed under the laws of this State, without regard to principles of conflict of laws" if the parties are subject to Delaware jurisdiction and may be served with legal process. 6 *Del. C.* § 2708(a). "The foregoing shall conclusively be presumed to be a significant, material and reasonable relationship with this State and shall be enforced whether or not there are other relationships with this State." *Id*.

Delaware generally enforces choice-of-law provisions. *See J.S. Alberici Constr. Co., Inc. v. Mid-West Conveyor Co., Inc.*, 750 A.2d 518, 520 (Del. 2000) ("Delaware courts will generally honor a contractually-designated choice of law provision so long as the jurisdiction selected bears some material relationship to the transaction."); *Total Holdings USA, Inc. v. Curran Composites, Inc*., 999 A.2d 873, 884 (Del. Ch. 2009) (upholding choice-of-law provision even through parties had no operations or sales in Delaware).

RSUI cites *Ascension Insurance Holdings, LLC v. Underwood*, 2015 WL 356002 (Del. Ch. Jan. 28, 2015), *Cabela's LLC v. Wellman*, 2018 WL 5309954 (Del. Ch. Oct. 26, 2018), and *Millett v. Truelink, Inc*., 2006 WL 2583100 (D. Del.

Sept. 7, 2006), for the proposition that parties cannot use choice-of-law provisions to contract around public policy concerns. However, these cases state that a Delaware choice-of-law provision will be enforced unless Delaware lacks a substantial relationship to the parties or transaction, or if the policy of a state with a materially greater interest is offended by the application of Delaware law. *Ascension*, 2015 WL 356002, at *5; *Cabela's*, 2018 WL 5309954, at *8; *Millett*, 2006 WL 2583100, at *3.

Neither exception applies here. Delaware has a substantial relationship to and interest in the parties, the policy, and the claims. To the extent California has an interest, it is less than Delaware's. *Pfizer*, 2019 WL 3306043, at *8. Further, California would not be offended by the application of Delaware law. "[F]or claims arising in other jurisdictions, there is no reason to believe that California would interpose *its* public policy concerns, as expressed in section 533, to preclude indemnification under the policy if such a result was not required by the law of the other jurisdiction." *Downey Venture v. LMI Ins. Co.*, 78 Cal. Rptr. 2d 142, 164 (Cal. App. 1998).

> In some states, unlike in California, public policy does *not* forbid an insurer from indemnifying its insured against liability for the insured's wilful misconduct. In those jurisdictions, the public policies favoring enforcement of contracts and compensation of injured third parties are considered paramount and outweigh any concerns about indemnifying wilful wrongdoers. Accordingly, in those jurisdictions, an insurer's agreement

to cover . . . wilful misconduct will be enforced as written.

Id. at 164-65.

RSUI cannot argue that coverage for fraud is barred if the choice-of-law provision governs. Under Delaware law, the settlements are insurable. RSUI has not argued that the settlements are uninsurable under the laws of RSUI's state of incorporation or principal place of business, and has therefore waived any argument that the settlements are uninsurable under those jurisdictions' laws. Supr. Ct. R. 14(b)(vi)(A)(3). RSUI cannot dispute that fraud is insurable under the law most favorable to the insured.

iii. California Insurance Code Section 533 Does Not Bar Coverage

The Superior Court did not "impliedly" rule, as RSUI suggests, that California Insurance Code Section 533 would bar coverage.[5] If this Court determines that California law applies, it should remand this issue to the Superior Court. However, because RSUI addressed this issue, the Insureds respond here.

First, RSUI has not met the burden of proof it agreed to meet for Section 533 to apply. The Policy contains a Profit/Fraud Exclusion which bars coverage for "deliberate fraud" (the matters RSUI claims are uninsurable under Section 533) ***if the fraud is established by a final, non-appealable adjudication in the underlying matter***. (A0453). With this language, the parties agreed to the burden of proof

[5] RSUI provides no citation for this "implicit" holding.

RSUI must satisfy to establish that fraud is uninsurable under Section 533. RSUI has cited no authority that such an agreement is unenforceable.

Indeed, California cases indicate that such an agreement would likely be upheld by California courts. In *Downey*, the policy insured both the defense and indemnity of claims for malicious prosecution. The court held that Section 533 barred ***indemnification*** for malicious prosecution claims but did not preclude a ***defense*** to such claims. Therefore, an insurer who promised insurance for the defense of a malicious prosecution claim was obligated to provide it.

> [E]ven though . . . section 533 precludes an insurer from indemnifying an insured in an underlying action the duty to defend still exists so long as the insured reasonably expect[s] the policy to cover the types of acts involved in the underlying suit [.] . . . Put another way, if the reasonable expectations of an insured are that a defense will be provided for a claim, then the insurer cannot escape that obligation merely because public policy precludes it from indemnifying that claim.

Id. at 160 (quotations omitted).

The same reasoning applies here. The Profit/Fraud Exclusion would lead the Insureds to expect that RSUI is required to meet a specific standard of proof—a final, non-appealable judgment in the underlying litigation—before coverage for fraud is barred. Under *Downey*, this contractual provision should be enforced if it does not seek to provide coverage for the indemnification of "wilful acts." And, as

is discussed in Section III, there has been no final, non-appealable adjudication of fraud in either underlying case.

Finally, even if the standard of proof set forth in the Profit/Fraud Exclusion does not apply, RSUI has the burden of proving that Section 533 applies. *Raychem Corp. v. Federal Ins. Co*., 853 F. Supp. 1170, 1175 (N.D. Cal. 1994). RSUI cannot do so.

With respect to the *San Antonio* lawsuit, RSUI argues that Section 533 applies because the Amended Complaint therein relies on the Memorandum Opinion. OB at 33. However, the Insureds denied these allegations (A1000-A1124) and the court made no factual findings at all, let alone findings of fraud or other "willful acts." Without such findings, Section 533 does not apply.

With respect to the *Stockholder* litigation, RSUI argues that the Memorandum Opinion found "willful fraud" on the part of Messrs. Murdock and Carter. However, the Court of Chancery found them liable for breach of the duty of loyalty, not fraud. (A0413-A0415). Indeed, the court stated that Mr. Murdock was subject to liability for breach of the duty of loyalty regardless of whether he acted with subjective bad faith. (A0414).

Finally, RSUI argues that Section 533 precludes coverage even in the absence of findings of "willful" conduct because all the claims made in the underlying actions require proof of the requisite willfulness. RSUI is incorrect.

The claims against Mr. Carter and Mr. Murdock in the *Stockholder* litigation were for breach of fiduciary duty. (B1394-1400). "Breach of this fiduciary duty . . . is not necessarily a willful act because it does not require a 'knowing, intentional, and purposeful act that is clearly wrongful and necessarily harmful.'" *Unified W. Grocers, Inc. v. Twin City Fire Ins. Co.*, 457 F.3d 1106, 1113 (9th Cir. 2006) (citations omitted). Therefore, Section 533 does not preclude coverage for such claims. *Id*. at 1114.

The *San Antonio* lawsuit stated claims for violations of Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5. (A1125-A1223). Because recklessness can satisfy the element of scienter in an action under Section 10(b) and Rule 10b-5, Section 533 does nor *per se* bar coverage for actions alleging their violation. *Raychem*, 853 F. Supp. at 1179-80. RSUI cites *California Amplifier, Inc. v. RLI Insurance Co.*, 113 Cal. Rptr. 2d 915 (Cal. Ct. App. 2001), for the proposition that claims relating to alleged actions inflating the value of stock are barred by Section 533. However, the claims in *California Amplifier* were for violations of the California Corporations Code, which requires that the defendant knowingly and intentionally made false or misleading statements, not for violations of the securities laws at issue in *San Antonio*, which do not.

For RSUI to escape liability in this lawsuit based on Section 533, it must establish that (i) the Superior Court erred in its choice of law analysis; (ii) the

Policy's choice-of-law provision is unenforceable; (iii) the language of the Profit/Fraud Exclusion should be ignored; ***and*** (iv) there were findings of deliberate fraud in both the *Stockholder* litigation and the *San Antonio* lawsuit. RSUI has not proven any of the above.

III. The Superior Court Correctly Determined that the Profit/Fraud Exclusion Does Not Apply

A. Question Presented

Did the Superior Court correctly determine that Exclusion IV.6 of the AXIS Policy does not preclude coverage for the *Stockholder* litigation?

RSUI preserved the question of whether the exclusion precluded coverage for the *Stockholder* litigation in the Superior Court (A0582-A0611; A0715-A0743), but RSUI did not preserve the question of whether the exclusion precluded coverage for the *San Antonio* lawsuit.

B. Scope of Review

Questions of contract interpretation are reviewed *de novo*. *GMG Capital Invs., LLC v. Athenian Venture Partners I, L.P.*, 36 A.3d 776, 779 (Del. 2012). The Superior Court's decision on a motion to dismiss is also reviewed *de novo*. *Olenik v. Lodzinski*, 208 A.3d 704, 714 (Del. 2019).

C. Merits of the Argument

Without citing a single case discussing insurance law, RSUI submits that the Superior Court erred in holding that the Profit/Fraud Exclusion did not preclude coverage for the underlying settlements. However, the Superior Court correctly concluded that RSUI cannot meet its burden to prove that either the Memorandum Opinion or the *Stockholder* settlement meets the requirements of the exclusion.

Nor can RSUI establish that the exclusion precluded coverage for the *San Antonio* settlement—an issue that was never considered by the Superior Court.

i. Policy Exclusion Interpretation Principles

Under Delaware law, it is the insurer's burden to prove the elements of a policy exclusion. *E.I. du Pont de Nemours & Co. v. Admiral Ins. Co*., 711 A.2d 45, 53 (Del. 1995); *see also Nat'l Union Fire Ins. Co. v. Rhone-Poulenc Basic Chems. Co.*, 1992 WL 22690, at *8 (Del. Super. Jan. 16, 1992) (burden is on the insurer to establish that policy exclusions apply and are subject to no other reasonable interpretation). Exclusionary provisions are construed strictly against the insurer when the policy language is ambiguous. *State Farm Fire & Cas. Co. v. Hackendorn*, 605 A.2d 3, 8 (Del. Super. 1991).[6]

ii. The Profit/Fraud Exclusion

The Policy states that RSUI shall not be liable for Loss on account of any Claim

> based on, arising out of or attributable to
> a. any profit, renumeration or financial advantage to which the Insured was not legally entitled; or
> b. Any willful violation of any statute or regulation or any deliberately criminal or fraudulent act, error, or omission by the Insured;
> if established by a final and non-appealable adjudication adverse to such Insured in the underlying action.

[6] This standard is the same under California law. *See Garvey v. State Farm Fire & Cas. Co.*, 48 Cal. 3d 395, 406 (1989).

(A0453). RSUI cannot prove all elements of this exclusion.

iii. The Exclusion Does Not Apply to the *San Antonio* Settlement

RSUI for the first time argues that the Profit/Fraud Exclusion applies to the *San Antonio* lawsuit because that lawsuit "arose directly" out of the findings in the Memorandum Opinion. RSUI does not (because it cannot) explain how it preserved this issue in the Superior Court, and does not state why the interests of justice exception to Rule 8 applies, as required by Supreme Court Rule 14(b)(vi)(A)(1). Accordingly, RSUI has waived this argument.

Further, RSUI's argument fails under the plain language of the exclusion. For the exclusion to apply, there must be a final, non-appealable adjudication adverse to an insured ***in the underlying action.*** RSUI does not identify any adjudication in the *San Antonio* lawsuit. Even if there were a final non-appealable adjudication in one case, that cannot be a basis on which to assert the Profit/Fraud Exclusion in another underlying case.

iv. The Superior Court's Decision Regarding the Exclusion

The Superior Court examined the applicability of the exclusion to the *Stockholder* litigation in connection with the Insureds' motion to dismiss. The court concluded that the exclusion was unambiguous and that the "Memorandum Opinion, without more . . . was not a final and non-appealable adjudication adverse to such insured in the underlying action." On the contrary, "[t]he only final and

non-appealable adjudication in the [*Stockholder* litigation] was the Order and Final Judgment." RSUI Ex. A at 12.

> The Memorandum Opinion, outlining the Defendants' misconduct, was a step towards a final adjudication. That decision alone was not final and was not appealable. What is necessary is a judgment (by way of an 'order') on all or some of the claims raised by the litigants that could have been appealable. The reality is that before any judgment was entered by Vice Chancellor Laster, the Defendants settled the case and had it dismissed through the Order and Final Judgment.

Id. at 15-16. The court added that, had the Memorandum Opinion been final, there would be "a docket entry showing the entry of an order in connection with that opinion [and] the Order and Final Judgment would have had to vacate the Memorandum Opinion." *Id.* at 16. No such docket entry exists.

v. The Memorandum Opinion Was Not a "Final and Non-Appealable Adjudication"

The Memorandum Opinion was not a "final and non-appealable adjudication" for two reasons. First, contrary to RSUI's argument, the Memorandum Opinion was not an "adjudication." Second, even if it were an adjudication, it was not "final and non-appealable" when issued, and RSUI does not argue otherwise.

The term "adjudication" is not defined anywhere in the Policies. However, one Delaware court has stated:

> The term adjudication has been defined as the "formal giving or pronouncing a judgment or decree in a cause;

> also the judgment given. The entry of a decree by a court in respect to the parties in a case." Additionally, to adjudicate is to "settle in the exercise of judicial authority. To determine *finally*." To adjudicate means "to settle finally (the rights and duties of the parties to a court case) on the merits of issues raised: enter on the records of a court (a final judgment, order, or decree of sentence)."

State v. Anderson, 1993 WL 777373, at *2 (Del. Fam. Ct., Dec. 23, 1993) (citations omitted).

RSUI cannot contend that the Memorandum Opinion is a "judgment."[7] "[A] judicial opinion is not a judgment; it states the reasons for the judgment. It settles no rights between the parties to the litigation, and cannot be the basis for a claim of *res judicata*." *Steiner v. Simmons*, 111 A.2d 574, 577 (Del. 1955). The Memorandum Opinion is an opinion—not a judgment. Therefore, it is not an adjudication.

Moreover, RSUI does not establish that any adjudication was "final and non-appealable." As the Superior Court explained, no docket entry showing the entry of an order in connection with the Memorandum Opinion exists. At most, the Memorandum Opinion "was a step towards a final adjudication," but was not "final and non-appealable." RSUI Ex. A at 15.

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[7] While RSUI characterizes the Memorandum Opinion as the "*August 27, 2015 Decision*," Vice Chancellor Laster identified it as a "Memorandum Opinion."

Nor does RSUI argue that the Memorandum Opinion was "final and non-appealable" when issued, and for good reason: Memorandum Opinion itself indicates that it is not final. It provides that "the parties shall meet and confer about whether further rulings are necessary," and that "[t]he parties will confer and advise the court as to any issues that remain to be addressed." (A0420).

Even RSUI's authority demonstrates that the Memorandum Opinion was not final. RSUI cites Chancery Rule 54(b) to argue that the Memorandum Opinion was an "adjudication." However, Rule 54(b) explains that when an order addresses "fewer than all of the claims," the remaining claims are not terminated, and "the order or other form of decision is ***subject to revision at any time before the entry of judgment*** adjudicating all the claims . . . ." (emphasis added). Accordingly, even if the Memorandum Opinion were an "adjudication," it was neither "final" nor "non-appealable."

vi. The Memorandum Opinion Is Not Final Because the *Stockholder* litigation Was Settled

This Court has held that a settlement of a lawsuit before the entry of judgment renders prior rulings moot and unenforceable. Accordingly, even if there was an "adjudication," as a result of the settlement, it was never made "final."

In *Crescent/Mach I Partners, L.P. v. Dr Pepper Bottling Co.*, 962 A.2d 205 (Del. 2008), the petitioner's shareholders brought an appraisal action and a fiduciary duty action. After trial, the Court of Chancery found in favor of the

shareholders in the appraisal action. *Id.* at *207. After the court entered a stipulated Final Order and Judgment, the parties entered into a settlement agreement that "fully and finally resolve[d]" both actions. *Id.* Later, a disinterested financial analyst discovered errors in the court's appraisal. The petitioner sought relief under Rule 60(a), requesting that the court correct its appraisal opinion. The Court of Chancery did so, and this Court reversed, holding that the Court of Chancery exceeded its powers:

> [T]he parties' settlement agreement "fully and finally resolve[d]" the dispute over the appraised value of the Holdings shares. Upon the execution of that agreement, the appraisal opinion ceased to govern the relationship between the litigating parties. With limited exceptions "[s]ettlement of a dispute between the parties . . . render[s] the case moot," making any remaining disagreements nonjusticiable . . . .
>
> [A]fter the parties settled, the appraisal opinion ceased to have any legal effect as a binding resolution of the dispute and the settlement mooted any pre-existing issues regarding the accuracy of the appraisal.

Id. at 208-09.

Likewise, when the *Stockholder* settlement was entered into and approved, the Memorandum Opinion "ceased to govern the relationship between the litigating parties" and "ceased to have any legal effect."

Moreover, courts have consistently held that similar exclusions do not bar coverage when the insured settles the underlying case prior to judgment. For

example, in *PepsiCo, Inc. v. Continental Casualty Co.*, 640 F. Supp. 656, 660 (S.D.N.Y. 1986), the insureds settled a securities class action and sought coverage from their D&O insurers. The insureds' policy provided coverage for the dishonesty of the Directors and Officers

> *unless a judgment or other final adjudication* thereof adverse to the directors and officers shall establish that acts of active and deliberate dishonesty committed by the Directors and Officers with actual dishonest purpose and intent were material to the cause of action so adjudicated.

Id. at 659. The court found that the exclusion did not apply after a settlement: "The exclusion for 'dishonesty' attaches only after a 'final judgment or other final adjudication' implicates the directors. Such a finding is no longer possible in this case." *Id.* at 660. *See AT&T v. Clarendon Am. Ins. Co.*, 2008 WL 2583007 (Del. Super. June 25, 2008) (settlement did not "adjudicate" anything, and there cannot be an adjudication after the matter is settled).

This rule applies even when the insurer claims the settlement was collusive. In *National Union Fire Insurance Co. of Pittsburgh, Pa. v. Continental Illinois Corp.* 666 F. Supp. 1180 (N.D. Ill. 1987), the insurers argued that the underlying settlements were collusive, and therefore the fraud exclusion should apply. The court rejected this argument:

> It is necessary only to remember the real significance of the fact that the prohibition against *adjudicated* determinations of willful misconduct is the only one Insurers chose to specify in the Policies . . . . Having

> written the Policies as they did, Insurers cannot legitimately expect this or any other court to reshape their contractual provisions to deal with an obvious contingency that could readily have been anticipated: a collusive settlement.

Id. at 1191.

Had RSUI wanted to draft its "contractual provisions to deal with an obvious contingency," such as a settlement, it could have done so. Because the claims against the Insureds were settled, the Profit/Fraud Exclusion does not apply.

vii. There Were No Findings of Fraud Adverse to the Insureds in the Final Order and Judgment

The *Stockholder* Order and Final Judgment was not an adjudication "adverse" to the Insureds because it did not contain any admission of liability. On the contrary, the Order and Final Judgment was not "evidence, or a presumption, admission or concession . . . of any fault, liability or wrongdoing whatsoever, . . . including any findings in the Memorandum Opinion . . . ." (A0923-A0924). There was no adjudication adverse to the Insureds. *See Wojtunik v. Kealy*, 2011 WL 1211529, at *8 (D. Ariz. Mar. 31, 2011) (fraud exclusion requiring final adjudication adverse to the insureds did not bar coverage when parties settled and entered into stipulated judgment; settlement agreement stated that neither it nor the judgment was "a concession that any Insured believes he committed any wrongful act in connection with the circumstances alleged"); *U.S. Bank Nat'l Ass'n v. Indian Harbor Ins. Co.*, 68 F. Supp. 3d 1044, 1050 (D. Minn. 2014) (settlement that

excludes an admission of liability "does not establish that the underlying allegations are true or false").

viii. RSUI's Authority is Misplaced

The case RSUI primarily relies upon in arguing that the Profit/Fraud Exclusion applies does not discuss this exclusion (or insurance) at all. RSUI's argument that the entry of final judgment in the *Stockholder* litigation somehow transformed the Memorandum Opinion into a final adjudication is based upon a case discussing vacatur. *In re IBP, Inc. S'holders Litig. v. Tyson Foods, Inc.*, 793 A.2d 396 (Del. Ch. 2002). In its discussion of *IBP*, RSUI both misinterprets quoted language from the decision and ignores language contrary to its position.

In *IBP*, two corporations involved in a merger, Tyson and IBP, sued each other before the merger was consummated and were also sued by IBP stockholders. Some of the claims went to trial, and the Court of Chancery issued a post-trial opinion which ordered specific performance of the merger agreement. The parties then reached a preliminary settlement agreement on the tried claims. On June 27, 2001, the court "entered various orders, ***including an order, judgment and decree implementing its specific performance decision***, in a manner which reflected the IBP-Tyson settlement agreement." *Id.* at 399 (emphasis added). The parties thereafter settled the remaining claims, and on August 3, 2001, the court

entered an Order and Final Judgment in accordance with that settlement. *Id*. at 400.

Between the issuance of the post-trial opinion and the settlements, federal securities lawsuits were filed against Tyson and its directors and officers. The complaints cited to the post-trial opinion, and Tyson filed a motion to vacate that opinion. The Court of Chancery denied the requested relief, finding that there was no equitable basis for vacatur.

RSUI argues that *IBP* stands for the proposition that entry of a final judgment in a case turns post-trial opinions previously rendered in the case into "final judgments" as well. RSUI is wrong.

First, the *IBP* court held neither that the post-trial opinion was a final judgment, nor that a final judgment entered later in the case turned the post-trial opinion into a final judgment. Its opening sentence states: "I decline to vacate a post-trial judicial opinion at the instance of a party whose own voluntary decision to settle rendered moot the issues decided by that opinion." 793 A.3d at 397. In other words, the post-trial opinion was rendered meaningless, not transformed into a final adjudication, by the settlement.

Second, the lengthy passage from *IBP* upon which RSUI relies does not state that the ***post-trial opinion*** was transformed into a final adjudication by the settlement of the case and subsequent entry of judgment. Instead, the court stated:

> The ordinary effect of the final judgment approving the settlement of the class claims **was to render the previous June 27 order of specific performance in accordance with the IBP-Tyson settlement final as well**, *because the August 3 final judgment addressed the remaining claims in the case*. Put bluntly, the court believed that it had resolved all issues in this case, subject to the parties' compliance with the court's orders and their obligations under the settlement.

793 A.2d at 400-01 (emphasis added). In this paragraph, the Court of Chancery was not discussing the post-trial opinion at all. Instead, the court stated that (i) the August 3 Order and Final Judgment was a final judgment in the case; and (ii) the entry of the August 3 Final Judgment also made ***the June 27 order, judgment and decree***, which resolved the ***other*** claims before the court (and which itself incorporated the findings in the post-trial decision), a final judgment. Indeed, the June 27 order had to become final along with the August 3 order because the two orders addressed different claims. All the claims in the consolidated actions would be resolved only if both orders were final. Notably, the court did not state that the ***post-trial opinion*** was rendered final by the August 3 order, because the August 3 order had made the post-trial opinion moot.

The case presented here is different. The Court of Chancery did not enter an order and judgment in the *Stockholder* litigation based upon the Memorandum Opinion, nor did it incorporate the Memorandum Opinion into the final judgment. By entering the Final Judgment, the Court of Chancery essentially vacated the

findings in the Memorandum Opinion by stating that they had no legal effect. RSUI ignores that, and indeed ignores the *Stockholder* Final Judgment altogether.

IV. The Superior Court Correctly Determined that Allocation Should be Determined Pursuant to Larger Settlement Rule

A. Question Presented

Did the Superior Court correctly determine that the Larger Settlement Rule applies to determine whether the *Stockholder* and *San Antonio* settlements should be allocated between covered and uncovered loss?

B. Scope of Review

Questions of contract interpretation are reviewed *de novo*. *GMG*, 36 A.3d at 779. The Superior Court's decision on a motion for summary judgment is also reviewed *de novo*. *Chemtura*, 160 A.3d at 464.

C. Merits of the Argument

The Superior Court correctly determined that the Larger Settlement Rule applies regarding any allocation of the underlying settlements. Contrary to RSUI's argument, the Policy's allocation provision does not require that a court apply the "relative exposure" method when the parties are unable to agree to a Loss allocation. In addition, the Superior Court correctly followed numerous well-reasoned cases holding that, when a D&O policy does not require any specific method of allocation, the Larger Settlement Rule applies.

i. The Allocation Provision Does Not Require Any Method of Allocation

RSUI argues that the Policy's allocation provision "inserts a relative exposure test." OB at 51. It does not. The Policy provides:

> If in any Claim, the Insureds who are afforded coverage for such Claim incur Loss jointly with others (including other Insureds) who are not afforded coverage for such Claim, or incur an amount consisting of both Loss covered by this Policy and loss not covered by this Policy because such Claim includes both covered and uncovered matters, then the Insureds and the Insurer agree to use their best efforts to determine a fair and proper allocation of covered Loss. The Insurer's obligation shall relate only to those sums allocated matters and Insureds which are afforded coverage. In making such determination, the parties shall take into account the relative legal and financial exposures of the Insureds in connection with the defense and/or settlement of the Claim.

(A0440-A0441). RSUI claims that the "plain language" of the final sentence requires application of the "relative exposure rule." *Id.* at 53. However, RSUI ignores the first sentence, which states that, in the case of an allocation dispute, "the Insureds and the Insurer ***agree to use their best efforts*** to determine a fair and proper allocation of covered Loss." This provision does not mandate any method of allocation by a court. Rather, as the Superior Court observed, it merely explains that when the parties do work together, they will use their "best efforts" to determine a "fair and proper" allocation. The third sentence provides that, when the parties make "such [a] determination," ***the parties*** will "take into account the relative legal and financial exposures." Here, however, the parties did not reach any agreement on a fair and proper allocation. The Policy is silent as to what happens next in that circumstance.

Indeed, courts that have encountered this "best efforts" language have rejected the argument made by RSUI here. For example, in *Safeway Stores, Inc. v. National Union Fire Ins. Co.*, 64 F.3d 1282, 1289 (9th Cir. 1995), the policy required that the parties "use their best efforts to determine a fair and proper allocation of the settlement amount as between the Company and the Insureds." The insurer argued that the policy "*mandates* allocation between [the insured] and its directors and officers." The Ninth Circuit disagreed. "The district court determined that the clause 'requires an allocation *analysis*,' but not necessarily an allocation. This reading comports better with the policy language." *Id.; see also Owens Corning v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa.*, 257 F.3d 484, 492 (6th Cir. 2001) (Larger Settlement Rule applied when policy stated that the parties "will use their best efforts to determine a 'fair and proper allocation'" between covered and uncovered claims); *Silicon Storage Tech., Inc. v. Nat'l Union Fire Ins. Co.*, 2015 WL 7293767, at *6 (N.D. Cal. Nov. 19, 2015) (same).

Despite this authority, RSUI claims this provision was a "clear selection" of the "relative exposure rule." OB at 54. Under RSUI's interpretation, the language requiring that ***the parties*** use their ***best efforts*** to reach an allocation determination would be transformed into language ***requiring*** that ***a court*** allocate under the "relative exposure rule." RSUI's "plain language" argument must fail because the "plain language" of the provision simply does not say what RSUI says it does.

Had RSUI wanted to require allocation under the "relative exposure rule," it could, and should, have done so. When the Policy was issued, there was language available in the marketplace that would have required such an allocation.[8] RSUI did not incorporate that language into the Policy, and this Court should not insert what RSUI chose to omit. *McMillan v. State Mut. Life Assur. Co.*, 922 F.2d 1073, 1076–77 (3d Cir. 1990) (when insurer desired to limit its liability in a specific way, "it was certainly at liberty to adopt more precise language to accomplish that purpose."); *Vargas v. Ins. Co. of N. Am.*, 651 F.2d 838, 841 (2d Cir. 1981) ("[h]ad [the insurer] wished to preclude coverage … language to accomplish that objective was readily available").

Finally, RSUI argues that it was "not given an opportunity to negotiate allocation" and "did not consent to the Settlements," and that the Superior Court's ruling punishes it because it did not reach an allocation agreement with "insureds

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[8] *See, e.g.*, *Miller v. St. Paul Mercury Ins. Co.*, 683 F.3d 871, 873 (7th Cir. 2012) (policy stated: "If on account of any Claim . . . the Insureds incur an amount consisting of both Loss covered by this Policy and loss not covered by this Policy because the Claim includes both covered and uncovered matters, such amount shall be allocated between covered Loss and uncovered loss based upon the relative legal exposures of the parties to covered and uncovered matters."); *Nat'l Bank v. Progressive Cas. Ins. Co.*, 938 F. Supp. 2d 919, 935 (C.D. Cal. 2013) (policy stated: "If in any **Claim** the **Insureds** incur any amount consisting of both covered and uncovered **Loss** because the **Claim** includes both covered and uncovered matters, then the amount shall be allocated between covered **Loss** and uncovered loss based on the relative legal exposures of the **Insureds** to the covered and uncovered matters.").

that had no interest in negotiating the allocation." OB at 54. In other words, RSUI argues that the Insureds' failure to cooperate or obtain RSUI's consent to the settlements negates their right to enforce the allocation clause as written. However, RSUI expressly withdrew its consent and cooperation defenses in stipulating to judgment in the Superior Court. RSUI Ex. F. Having stipulated to drop them, it cannot resurrect them now.

ii. The Superior Court Correctly Applied the Larger Settlement Rule

When a D&O policy does not specify how a court should allocate settlements between covered and uncovered loss, multiple courts have applied the Larger Settlement Rule. The Superior Court correctly held that this rule was the most consistent with the parties' expectations here.

The Larger Settlement Rule was applied in *Nordstrom, Inc. v. Chubb & Son, Inc.*, 54 F.3d 1424 (9th Cir. 1995). In *Nordstrom*, a corporation's shareholders brought a securities lawsuit against the corporation and its directors and officers. The directors and officers were insured under the policies; the corporation was not. The policy did not specifically provide for allocation of a settlement when the lawsuit involved both covered and uncovered costs. *Id.* at 1429. The defendants settled the case and the insurer refused to pay more than half the settlement, claiming that the other half should be allocated to uncovered claims. *Id.* The Ninth Circuit held that the insurer must pay the full amount of the settlement.

The court adopted the Larger Settlement Rule, holding that "responsibility for any portion of the settlement should be allocated away from the insured party *only if the acts of the uninsured party are determined to have increased the settlement.*" *Id*. at 1432 (emphasis in original). In other words, the full amount of a settlement is covered unless the settlement was increased by the presence of uninsured parties or uncovered claims. In adopting this rule, the court relied on policy language providing coverage for "*all Loss . . . which the Insured Person has become legally* ***obligated*** *to pay* on account of any claim . . . *for a Wrongful Act committed . . . by such Insured Person(s).*"

> Under this provision, the parties would expect that [the Insurer] would be responsible for any amount of liability that is attributable in any way to the wrongful acts or omissions of the directors and officers, regardless of whether the corporation could be found concurrently liable on any given claim under an independent theory. Only if the corporation were liable for a claim for which the directors and officers lacked any responsibility, or if the corporate liability increased the amount of loss, would the amount of liability exceed that amount for which [the insurer] was "legally obligated" to pay . . . .

Id. at 1429, 1433 (citations omitted).

Safeway followed *Nordstrom*. In *Safeway*, the insured settled a class action brought after a corporate buyout. The underlying complaint alleged that the directors and officers breached their fiduciary duty and that the purchasing entity aided and abetted that breach. The insurers argued that the settlement should be

allocated between the (covered) directors and officers and the (uncovered) purchasing entity. The court disagreed.

> [W]hatever liability [the purchasing entity] might have would be *concurrent* with the liability of [the corporation's] officers and directors: [the purchasing entity] could not be liable for aiding and abetting their breach of fiduciary duty unless the [ ] officers and directors had indeed breached that duty. . . . There was no showing that [the purchasing entity's] potential concurrent liability increased the amount of the settlement.

Safeway, 64 F.3d at 1288. The court concluded that the "settlement costs were fully recoverable under the policy, unless ***the insurer could show*** that the corporation's liability had increased the amount of the settlement." *Id.* (emphasis added).

Other courts have adopted the Larger Settlement Rule. *See, e.g., Owens Corning*, 257 F.3d at 493 ("we interpret Ohio law as favoring the larger settlement rule . . . and supporting coverage of the settlement except to the extent that uninsured claims have actually increased the insurer's liability"); *Caterpillar, Inc. v. Great Am. Ins. Co.*, 62 F.3d 955, 964 (7th Cir. 1995) (insurer may attempt to allocate settlement only to "the extent to which the settlement was larger because of claims against uninsured persons"); *Piper Jaffray Cos. Inc. v. Nat'l Union Fire Ins. Co.*, 38 F. Supp. 2d 771, 776 (D. Minn. 1999) (following *Caterpillar*).

The Larger Settlement Rule is the better-reasoned standard when a policy provides (as this Policy does) that the Insurers "shall pay on behalf of the Insured

Individual **all Loss** . . . arising from any Claim." As Justice Posner reasoned, "[t]o allow the insurance companies an allocation between the directors' liability and the corporation's derivative liability for the directors' acts would rob [the corporation] of the insurance protection that it sought and bought." *Harbor Ins. Co. v. Cont'l Bank Corp.*, 922 F.2d 357, 368 (7th Cir. 1990). The Sixth Circuit agreed:

> There is some economic rationale behind the larger settlement rule, related to the likely intent of an entity purchasing insurance. The type of corporate liability involved is premised on indirect responsibility for the risky acts of directors, and the combined effect (and reasonable intent) of an indemnification provision and a D & O policy is to shift the risk of directorial acts first to the corporation, but then on to the insurer.

Owens, 257 F.3d at 491-92.

The Superior Court correctly based its decision to apply the Larger Settlement Rule on the same reasoning, stating that its decision "is to protect the economic expectations of the insured—i.e., prevent the deprivation of insurance coverage that was sought and bought." RSUI Ex. E at 13-14. The Insureds expected that the Policy, as promised, would provide coverage for "all Loss." The Larger Settlement Rule should apply.

RSUI argues that the Larger Settlement Rule is most frequently applied to "settlements entered into on behalf of a defendant corporation and its officers and directors, when the corporation is not covered for its own liability under the policy." OB at 52. However, the reasoning behind the Larger Settlement Rule

applies whenever a directors' and officers' policy provides coverage for all loss which an insured is "legally obligated to pay." As in *Nordstrom*, the Insureds would expect that RSUI would be responsible for any liability that is attributable to their wrongful acts or omissions in an insured capacity, regardless of whether they might also be concurrently liable in an uninsured capacity.

The Insureds' Arguments on Cross-Appeal

V. The Superior Court Erroneously Granted Summary Judgment to RSUI on the Insureds' Bad Faith Claim

A. Question Presented

Did the Superior Court err in granting RSUI's motion for summary judgment on Dole and Mr. Murdock's claims for breach of the implied covenant of good faith and fair dealing?

The Insureds preserved the question in the Superior Court in its briefs in opposition to RSUI's first and second motions for summary judgment (A1224-A1274; A2391-2435).

B. Scope of Review

Whether the Superior Court property granted a motion for summary judgment is reviewed *de novo*. *Chemtura,* 160 A.3d at 464.

C. Merits of the Argument

The Superior Court erred in finding as a matter of law that RSUI had a reasonable justification for denying coverage. Rather than looking at the facts and circumstances known to RSUI's adjuster when RSUI made its coverage decision, the Court based its findings on RSUI's after-the-fact justifications for denying coverage. The undisputed testimony of RSUI's adjuster shows that (i) he decided the Profit Fraud Exclusion applied despite doing no investigation as to what constitutes a "final, non-appealable adjudication" and despite insurance industry

consensus that the exclusion did not apply when a case settled; and (ii) he determined that the Insureds' claims were uninsurable under California law (based on a "blurb" he read after an internet search) despite the policy's choice-of-law provision (which he did not read) indicating that California law would not apply. (B1149-50). A jury could find that RSUI's investigation was insufficient and its coverage determinations not reasonably justified when made.

Further, a jury should have been allowed to determine whether RSUI's refusals to consent to settlement and coverage denials based on the Policy's consent and cooperation conditions were pretextual.

i. The Bad Faith Standard

"An insured has a cause of action for bad faith against an insurer 'when the insurer refuses to honor its obligations under the policy and clearly lacks reasonable justification for doing so.'" *Bennett v. USAA Cas. Ins. Co.*, 158 A.3d 877, ¶ 13 (Del. 2017) (citation omitted).

> This standard of reasonableness tests the judgment of the insurer's agent in deciding to contest the insurer's liability . . . . The ultimate question is whether ***at the time the insurer denied liability***, there existed a set of facts or circumstances known to the insurer which created a bona fide dispute and therefore a meritorious defense to the insurer's liability.

Casson v. Nationwide Ins. Co., 455 A.2d 361, 369 (Del. Super. 1982) (emphasis added). "'[T]he strategy, mental impressions and opinion of the insurer's agents concerning the claim . . .' are of central importance." *Bennett*, 158 A.3d 877, ¶ 13.

One factor to be examined in assessing reasonableness is whether the insurer's investigation was sufficient to provide a reasonable basis for denying coverage. *Playtex, Inc. v. Columbia Cas.*, 1993 WL 83343, at *2 (Del. Super. Mar. 10, 1993). A court may consider qualified expert testimony. *See Bennett*, 158 A.3d 877, ¶ 15 (insured did not present sufficient evidence of bad faith when it called neither an insurer representative nor an insurance expert to opine on the arbitrariness of insurer's actions).

Delaware also recognizes an implied covenant of good faith and fair dealing that, in the insurance context, "comprehends duties other than the duty to promptly process and pay claims." *Dunlap v. State Farm Fire & Cas. Co.*, 878 A.2d 434, 444 (Del. 2005). This covenant requires a party to a contract to refrain from arbitrary or unreasonable conduct that prevents the other party from receiving the fruits of the bargain. *Id.* at 442. Parties breach the covenant when "their conduct frustrates the 'overarching purpose' of the contract by taking advantage of their position to control implementation of the agreement's terms." *Id.*

When a contract gives one party discretion in performance, "the discretion-exercising party must exercise its discretion in good faith. If it does not, it will run afoul of the implied covenant." *Amirsaleh v. Board of Trade*, 2009 WL 3756700, at *5 (Del. Ch. Nov. 9, 2009).

"Where the non-moving party brings forth facts which, if believed by the jury, would support a finding of a breach of the implied covenant of good faith, summary judgment is inappropriate." *Thomas v. Harford Mut. Ins. Co*., 2003 WL 220511, at *3 (Del. Super. Jan. 31, 2003). Questions of mental state are particularly unsuited for resolution on summary judgment. *Amirsaleh,* 2009 WL 3756700, at *4.[9]

ii. RSUI Had No Reasonable Bases to Deny Coverage

The Superior Court stated that RSUI "advanced a number of well-reasoned arguments for denying coverage to the Insureds." Ex. 1 at 11. Specifically, the court found that (i) RSUI's determination that the Memorandum Opinion was a final, non-appealable adjudication adverse to the Insureds was rational when made; (ii) the decision to apply California law, while incorrect, was reasonable; and (iii) because there were disputes of material facts regarding RSUI's claims that the Insureds breached the Policy's consent and cooperation conditions, there were reasonable grounds for relying on those conditions as coverage defenses. *Id*. at 11-12.

These findings, however, were impermissibly based on RSUI's ***after-the-fact*** justifications for its denial of coverage, not, as *Casson* requires, on what it

[9] The Superior Court applied Delaware law. To the extent this Court decides that California law should interpret the policy, the bad faith issue should be remanded.

knew and considered at the time of its decision. Evaluating the evidence in light of the *Casson* rule, the Superior Court erred in finding that, as a matter of law, RSUI had a reasonable basis for denying coverage.

iii. Robert Hennelly's Decisions

The only evidence regarding RSUI's investigation and analysis of the Insureds' claims was the testimony of RSUI's claims adjuster, Robert Hennelly, who testified in his individual capacity and as RSUI's corporate designee. (B1088). As RSUI's corporate designee, his testimony binds RSUI. *ADT Holdings, Inc. v. Harris*, 2017 WL 3913164, at *1 (Del. Ch., Sept. 7, 2017).

Mr. Hennelly was the only RSUI representative who investigated or adjusted the Insureds' coverage claims or reviewed the Policies in connection with the claims. He decided whether RSUI was obligated to indemnify the Insureds for the underlying settlements. (B1159-60, B1162). Therefore, the Superior Court should have considered ***only*** what Mr. Hennelly did and considered. Mr. Hennelly further testified that he made his decision about coverage for the *Stockholder* litigation shortly after the Memorandum Opinion was issued (B1140) and made his decision about *San Antonio* after reviewing the complaint. (B1159). Therefore, the Superior Court was not free to use "20-20 hindsight" and assess the reasonableness of RSUI's coverage positions based on arguments its lawyers came up with after the fact in this litigation.

With respect to the Profit/Fraud Exclusion, Mr. Hennelly testified that his understanding of the phrase "final and non-appealable adjudication adverse to such insured" was based solely on the language of the exclusion. (B1145). He did not testify, and RSUI presented no evidence, that he did any investigation as to what constituted a "final and non-appealable adjudication" under any state's law. Therefore, he had no reasonable basis for determining whether the exclusion applied.

Further, the Insureds' expert, Jeffrey Posner, testified that Mr. Hennelly's interpretation was contrary to the customs, practices and standards in the insurance industry. Mr. Posner opined that RSUI's assertion of the Profit/Fraud Exclusion breached the duty of good faith and fair dealing because (i) the exclusion's language "provides the broadest form of protection to the insureds available in the market and is sold on that basis"; (ii) this language was negotiated and added by endorsement to the policy, replacing language barring coverage if the deliberately fraudulent act was "evidenced by any judgment, final adjudication, alternative dispute resolution proceeding or plea agreement"; and (iii) insurers know that most cases settle and that it is rare for a case to go to a final, non-appealable judgment. (B1228). *See also* Dan A. Bailey, *D&O Policy Commentary*, in Insurance Coverage 2004: Claim Trends & Litigation, [PLI Litig. & Admin. Practice, Course Handbook Ser. No. 702], 205, 215 (Feb. 17-18, 2004) ("For those forms which

require a final adjudication, courts have consistently held that the adjudication must occur in the underlying D&O proceeding (not in the coverage litigation) and therefore the exclusion is inapplicable if the claim against the D&O is settled."). In sum, the insurance industry knew that the Profit/Fraud Exclusion did not apply in the case of settlement, and Mr. Hennelly did no investigation upon which he could base a contrary conclusion.

Mr. Hennelly decided that California law applied because Dole was headquartered in California and the individual insureds resided in California. (B1150). Although he considered the possibility that Delaware law might apply, he decided that California law "is going to apply to companies and people who are in California." (B1150-51). There is no evidence that he considered Delaware's interests in the parties or the policy or that he looked at the Policy's choice-of-law provision. Finally, Mr. Hennelly determined that California Insurance Code Section 533 barred coverage despite (i) being unaware of this statute before these claims; and (ii) making that determination by doing an internet search on Section 533 and reading a "blurb." (B1149-50). In sum, the scope of RSUI's investigation—a reading of the policy that ignored a key provision, a brief internet search of Section 533 for the *Stockholder* litigation, and a review of the complaint for the *San Antonio* lawsuit—was insufficient to provide a reasonable basis for denying coverage.

iv. The Superior Court Erred in Holding that RSUI Had a Reasonable Basis for Asserting the Consent and Cooperation Conditions

Finally, the Superior Court's finding that there were material questions of fact regarding the Policy's consent and cooperation conditions does not mandate a finding that there were reasonable grounds for RSUI to deny coverage.

As the parties' cross-motions for summary judgment make clear, there are conflicting versions of the facts on these issues. RSUI claimed that the Insureds breached the cooperation condition by failing to provide it with reasonably requested information about the underlying cases. (A2153-A2162). The Insureds presented evidence that they provided RSUI with all information it ***reasonably*** required, but that RSUI also demanded that the Insureds provide it with privileged information it knew the Insureds could not provide, thereby attempting to manufacture a coverage defense based on the Insureds' "failure to cooperate." (A2199-A2206; A2243-A2249; A2412-A2420). RSUI also argued that the Insureds breached the consent condition by settling the underlying lawsuits without its consent. (A2146-A2153). The Insureds presented evidence that they requested RSUI's consent to each settlement, but that RSUI unreasonably withheld its consent and asserted pretextual grounds for refusing to consent. (A2206-A2210; A2250-A2255; A2402-A2412). Mr. Posner opined that RSUI's actions on these issues "are classic examples of stonewalling and obfuscation," and were RSUI's attempts to set up these additional coverage defenses. (B1230). He also opined

that the Insureds' attempts to obtain RSUI's consent to the settlements were likely futile. *Id*.

The Superior Court found that there were disputes of material facts on these issues. It therefore necessarily held that a jury could have found that RSUI's requests for privileged information and refusal to consent to the settlements were pretextual and/or that RSUI did not have reasonable grounds for refusing to consent to the underlying settlements.

If the jury so found, it could also find that RSUI acted in bad faith. As *Amirsaleh* and *Wilmington* make clear, the implied covenant required RSUI to exercise its discretion to consent to a settlement in good faith. Whether it did so is a question of RSUI's mental state, which is "particularly unsuited for resolution on summary judgment." *Amirsaleh*, 2009 WL 3756700, at *4. This is exactly the scenario outlined in *Thomas*. A non-moving party has presented facts which, if believed by a jury, would support a finding of bad faith. *Thomas*, 2003 WL 220511, at *3.

In sum, whether RSUI might have had a reasonable basis to deny coverage if Mr. Hennelly had (i) read the entire Policy and given due consideration to its choice-of-law provision; (ii) investigated whether the Memorandum Decision was a final, non-appealable adjudication under either California or Delaware law; (iii) determined what contacts Delaware had with the policy and parties and analyzed

whether it or California had more significant contacts; (iv) fully researched Section 533 and its application under California law; and (v) done any investigation with respect to the *San Antonio* lawsuit is irrelevant. The Superior Court should have considered only what RSUI did and considered at the time in assessing RSUI's good faith. What RSUI did was insufficient. Further, after claiming that there was no coverage under the policy, RSUI doubled down and tried to create additional, pretextual grounds for denying coverage. This is bad faith.

v. RSUI Breached the Implied Covenant of Good Faith and Fair Dealing.

The evidence before the Superior Court also presented a genuine issue of material fact as to whether RSUI breached the implied covenant of good faith and fair dealing. *See Premcor Refining Group, Inc. v. Matrix Serv. Indus. Contractors, Inc.*, 2009 WL 960567, at *13 (Del. Super. Mar. 19, 2009) (acknowledging that whether insurer breached implied covenant of good faith and fair dealing is separate issue from whether it acted in bad faith). This evidence shows that RSUI did not preserve the spirit of the bargain.

The Policy provided the broadest coverage for fraud available in the marketplace, covering "deliberate fraud" unless there was a final non-appealable adjudication in the underlying litigation. It also contained a choice-of-law provision regarding insurability providing that the law most favorable to the Insureds applies. This policy language would lead the Insureds to expect coverage

for both underlying settlements. Despite this language, RSUI refused to indemnify Mr. Murdock and Dole.

RSUI also breached the implied covenant by unreasonably demanding privileged documents from the Insureds and unreasonably refusing to consent to the underlying settlements in an attempt to manufacture additional coverage defenses. RSUI attempted to take advantage of its position to prevent the Insureds from receiving the "fruits of their bargain."

VI. The Memorandum Opinion Has No Collateral Estoppel Effect in this Litigation

A. Question Presented

Did the Superior Court err in determining that the Memorandum Opinion had collateral estoppel effect with respect to factual issues in this lawsuit?

The Insureds preserved this question in the Superior Court in their briefs in opposition to RSUI's first motion for summary judgment. (A1224-A1274).

B. Scope of Review

The Superior Court's application of collateral estoppel is reviewed *de novo*. *Rogers v. Morgan*, 208 A.3d 342, 346 (Del. 2019).

C. Merits of the Argument

The Superior Court erred in finding that the Insureds are collaterally estopped from litigating factual issues determined in the Memorandum Opinion, including purported determinations of fraud. Several required elements of collateral estoppel are missing here. First, the factual issues in the *Stockholder* litigation are not identical to the issues in either the *San Antonio* lawsuit or this lawsuit. Second, the Court of Chancery did not ***actually*** determine that either Mr. Murdock or Dole committed fraud. Third, no finding of fraud was ***necessary*** to the court's decision in the Memorandum Opinion. Fourth, the Memorandum Opinion was not a final adjudication.

The Superior Court's collateral estoppel ruling is also impermissibly vague. Therefore, at best, this issue should be remanded to the Superior Court for more specific findings.

i. The Standard for Collateral Estoppel

When a court has decided an issue of fact necessary to its ruling, collateral estoppel precludes relitigation of that issue in a subsequent suit when:

> (1) The issue previously decided is identical with the one presented in the action in question, (2) the prior action has been finally adjudicated on the merits, (3) the party against whom the doctrine is invoked was a party or in privity with a party to the prior adjudication, and (4) the party against whom the doctrine is raised had a full and fair opportunity to litigate the issue in the prior action.

Betts v. Townsends, Inc., 765 A.2d 531, 535 (Del. 2000). For collateral estoppel to apply, the issue of fact must be ***actually*** and ***necessarily*** decided in the first case. *Hercules Inc. v. AIU Ins. Co*., 783 A.2d 1275, 1278 (Del. 2000) ("the question to be answered is whether the rulings or factual findings being challenged in [the] cross-appeals were necessary and material to the final judgment that was entered [] by the Superior Court"); *see also Rogers v. Morgan*, 208 A.3d 342, 346–347 (Del. 2019) (same).

The Superior Court held:

- "the Court will employ collateral estoppel against the Insureds on factual issues determined in the Memorandum Opinion to the extent those factual issues are relevant to issues in this civil action"; and
- "the Insureds are collaterally estopped from relitigating the Memorandum Opinion's factual determinations, including those of fraud and disloyalty, to the extent those factual determinations are relevant to this civil action."

RSUI Ex. B at 11-15. However, the order does not identify (i) what factual issues were "determined" in the Memorandum Opinion; (ii) which "determinations" the court considered relevant to the coverage issues; or (iii) which insured is collaterally estopped with respect to each "determination."

ii. The Superior Court's Collateral Estoppel Ruling Is Impermissibly Vague.

"When a trial judge's findings are ambiguous, the case may be remanded for the making of more specific findings." *Stoner v. State*, 213 A.3d 585, 590 (Del. 2019). "The failure of the lower court to make a specific finding upon a material issue does not upon appeal lay upon this court the duty of examining and analyzing the evidence for the purpose of making its own findings." *Scott v. State*, 117 A.2d 831, 833–834 (Del. 1955). When all relevant information is before the trial court, this Court should remand the case with directions to make a more specific finding.

Id. *See also Disabatino v. Liddicoat*, 582 A.2d 934 (Del. 1990) (remanding because the Superior Court's decision was unclear); *Fridge v. State*, 521 A.2d 247 (Del. 1987) (remanding for further proceedings because the Superior Court's analysis was incomplete).

Therefore, to the extent this Court reverses any of the Superior Court's rulings, it should also remand the collateral estoppel issue with instructions that the court provide further guidance as to which factual issues were necessarily determined in the Memorandum Opinion and relevant to the issues in this case.

iii. The Superior Court's Ruling Was Erroneous

To the extent the Superior Court found that the Insureds were collaterally estopped from asserting that they did not commit fraud, that ruling was in error.

iv. The Memorandum Opinion Did Not Actually or Necessarily Decide Factual Issues Identical to Those Presented Here.

The issues presented in this litigation are whether Mr. Murdock and Dole are entitled to indemnity from RSUI for the *Stockholder* and *San Antonio* settlements. These coverage issues are not identical to the issues raised in the *Stockholder* litigation.

(a) The *San Antonio* Lawsuit

The issues presented in the *San Antonio* lawsuit (let alone coverage for that lawsuit) are very different from those presented in the *Stockholder* litigation. In the *Stockholder* litigation, the issue was whether Mr. Carter and Mr. Murdock breached

their fiduciary duties as officers and directors of Dole. (B1394-1400). The issues presented in the *San Antonio* lawsuit were whether the Insureds violated Sections 10(b) and 20(a) of the Exchange Act and Rule 10b-5 in connection with 15 public statements between January 2, 2013, and August 13, 2013. (A1125-A1223). Not only does the *San Antonio* lawsuit involve different causes of action with different elements than those in the *Stockholder* litigation, but the Memorandum Opinion mentions only three of the public statements at issue in the *San Antonio* lawsuit, and does not address whether those statements violated Rule 10b-5 or Sections 5(b) and 20(a).

Therefore, even if the Memorandum Opinion stated that the three public statements it mentioned were false and misleading, Delaware law is clear that there would be no collateral estoppel effect with respect to the other statements. In *Taylor v. State*, 402 A.2d 373, 375 (Del. 1979), a criminal defendant was alleged to have broken into his victim's home in New Castle County, kidnapped her, taken her to Kent County and raped her. After a trial for rape and kidnapping in Kent County, the defendant was found not guilty by reason of insanity. At his subsequent trial in New Castle County for his actions there, the defendant argued that the jury's finding of insanity had collateral estoppel effect. This Court disagreed.

The Court noted that the Kent County indictment did not include the events that occurred in New Castle County. Therefore, the "question of the defendant's sanity in New Castle County is not a 'question of fact essential to the judgment' that he was insane when he committed the offenses in Kent County. To put it another way, 'a rational jury could have grounded its verdict upon an issue other than that which defendant seeks to foreclose from consideration.'" *Id*. at 375. *See also Betts*, 765 A.2d at 535 (decision that employee was temporarily totally disabled as a result of industrial injury did not have collateral estoppel effect as to causation in employee's subsequent claim for permanent partial disability because the issues in the two claims were not identical).

In sum, because the vast majority of the public statements forming the basis for the *San Antonio* lawsuit were not discussed in the Memorandum Opinion, that opinion did not actually or necessarily determine whether there was "fraud" as to these statements. The Memorandum Opinion has no collateral estoppel effect with respect to coverage for the *San Antonio* lawsuit.

(b) The *Stockholder* Litigation

Nor is there identity of issues between the *Stockholder* litigation and this lawsuit. The stockholders stated no cause of action against the Insureds for fraud. Mr. Murdock and Mr. Carter were sued for breach of their fiduciary duties, and the Memorandum Opinion found them liable for breach of those duties, not fraud.

In addition, the Court of Chancery neither actually nor necessarily found fraud by Mr. Murdock in its opinion. (A0413-A0414). Despite RSUI's representations to the contrary, nowhere in the Memorandum Opinion does the court specifically state that Mr. Murdock engaged in fraud. In fact, each of RSUI's citations to the Memorandum Opinion that it claims constitute findings of fraud all relate to the conduct of Mr. Carter. OB at 9-10. Nor did the Memorandum Opinion need to find fraud by Mr. Murdock. The court found that he breached his duty of loyalty both as a controlling shareholder and a director. "As Dole's controlling stockholder, Murdock 'breached his duty of loyalty to ... the plaintiff shareholder class, by eliminating [Dole's unaffiliated] stockholders for an unfair price in an unfair transaction' . . . ." (A0414). As a director, "[h]e breached his duty of loyalty by orchestrating an unfair, self-interested transaction. In addition, as the buyer, he "'derived an improper personal benefit' from the transaction." *Id.* The court concluded: "As the interested party, 'a finding of unfairness after trial will subject [him] to liability for breach of the duty of loyalty regardless of [his] subjective bad faith.'" *Id*. In sum, Mr. Murdock's liability was not required to be, nor was it, based on any purported fraud.

v. The Memorandum Opinion Was Not a Final Adjudication

Finally, the Memorandum Opinion was not a final adjudication. As the Superior Court stated, it "was, at best, interlocutory." RSUI Ex. A at 16. In fact,

as noted above, the Memorandum Opinion itself concludes by acknowledging that it has not resolved all of the underlying issues. (A0420). *See Advanced Litig., LLC v. Herzka*, 2006 WL 2338044, at *7 (Del. Ch. Aug. 10, 2006) (an order has no collateral estoppel effect when the interlocutory nature of the Order is clear on its face); *Sussex Cty. v. Berzins Enters., Inc.*, 2017 WL 4083131, at *3 (Del. Ch. Sept. 15, 2017) (collateral estoppel does not apply to decision that is explicitly preliminary and required further action by the parties), *aff'd*, 197 A.3d 1050 (Del. 2018). This reasoning is particularly true with respect to Dole because Dole was not a party to the *Stockholder* litigation and therefore the Memorandum Opinion contained no findings at all with respect to Dole.

CONCLUSION

This Court should reverse the Superior Court's ruling on RSUI's motion for summary judgment as to bad faith. This Court should affirm the rulings of the Superior Court with respect to choice of law, insurability of loss, the Profit/Fraud Exclusion, and allocation. However, to the extent this Court reverses the Superior Court's rulings on any of these issues, it should also reverse and/or remand the Superior Court's ruling on collateral estoppel.

Dated: August 7, 2020

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CERTIFICATE OF SERVICE

I, Mary F. Dugan, Esquire, hereby certify that on August 24, 2020, I caused a copy of the foregoing document to be served on the following counsel in the manner indicated below:

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