

Stephen Raptis in Law360: Biggest D&O Liability Insurance Rulings Of 2021

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Law360 quoted Partner [Stephen Raptis](#) in an article about about some of the biggest rulings on directors and officers (D&O) cases this year.

Here is an excerpt:

In one high-profile ruling, the Delaware Supreme Court in March held that Delaware law, rather than California law, applied to Dole's D&O coverage dispute with RSUI Indemnity Co., as part of its holding that RSUI had to pay the full \$10 million limit of an excess policy toward the food giant's settlement of stockholder lawsuits.

Dole is a game-changer, said Stephen Raptis, a partner at Haynes Boone LLP who represents policyholders. "If you're a policyholder incorporated in Delaware, why would you file a D&O coverage action anywhere other than Delaware now?" he said.

The Delaware high court's holding that fraud is not uninsurable is also significant, Raptis added, because underlying suits "are almost always based on allegations of fraud, mismanagement, and insider dealing," and "there are states like California where it's not that easy to get those kinds of allegations insured."

The Dole ruling was just the tip of the iceberg for choice-of-law rulings in the First State in 2021.

JP Morgan Notches Win in \$140M SEC Deal Coverage Fight

A few days before Thanksgiving, a 6-1 majority of New York's highest court said that a \$140 million settlement payment by J.P. Morgan Securities Inc.'s predecessor to the U.S. Securities and Exchange Commission wasn't an uninsurable penalty, reversing a state appellate court's ruling in a decades-long insurance case.

The majority backed J.P. Morgan's position that the settlement predecessor Bear Stearns paid to the SEC over late trading activities was restitutionary rather than punitive and is therefore covered by the finance giant's D&O policy. The insurers didn't prove that what the SEC called a "disgorgement" payment fell under the exclusion for "penalties imposed by law," according to the majority.

"Whenever the government gets involved and requires a payment, such as the False Claims Act or SEC settlements, insurers always want to dress it up as an uncovered penalty," said Raptis, of Haynes Boone. But the New York Court of Appeals said the \$140 million in question was not a penalty but money damages, since J.P. Morgan proved that the settlement amount was not all

about punishment.

"There are a lot of instances where they are really hard on policyholders. But in recent years, New York law has really softened a lot for policyholders," Raptis agreed. "Anytime you have a court of appeals coming down on it on a coverage issue, it just carries a lot of clout all over the country."

Courts Grapple With 'Bump-Up' Exclusion

The so-called bump-up exclusion featured in many D&O policies bars coverage for amounts paid to shareholders of an acquired company who allegedly received lower compensation for their shares. Policyholder attorneys say that the exclusion only applies to companies' acquisitions and takeovers instead of mergers, and that argument has gained some traction in court.

"We now have policyholder-friendly cases in both Delaware and Virginia addressing the exclusion," said Raptis of Haynes Boone. "The rulings went through a very painstaking analysis. It's been a huge year on the bump-up exclusion."

Policyholder attorneys argue that carriers are overly relying on the bump-up exclusion to bar coverage for all M&A transactions, when it does not apply to mergers. They say that a company acquiring another is a different situation from stock-to-stock mergers in which existing shareholders get a portion of the final merged company.

"Mergers and acquisitions are not the same thing. An acquisition tends to imply one company takes over another with the shareholders of the acquired company basically ceasing to be shareholders. They get money and they're done," Raptis said. "But in a merger nobody goes out of existence, because both sets of shareholders continue to have interest in the merged company going forward."

The partner said the two cases boost policyholders' confidence on the issue because there aren't a lot of rulings on the exclusion yet.

To read the full article, click [here](#).