

## Your Board of Directors: Considering Whether to Settle a Claim? Involve Your Insurer.

Liability policies, including directors and officers (D&O) policies, typically require that the policyholder, among other things, cooperate with, and obtain the prior written consent of, the insurer in settling the underlying claim(s) for which insurance is requested. The text of standard “cooperation” and “prior written consent” clauses are relatively straightforward. However, complying with them can become a thorny issue. Arch Insurance Company v. Murdoch, 2018 Del. Super. LEXIS 96 (Del. Super. Ct. March 1, 2018), involving Dole Food Company, Inc.’s decision to sell the remainder of its stock to one of its shareholders, David Murdoch, and the settlement of the shareholder litigation (two lawsuits) arising from that decision, illustrates how important it is to involve your insurer(s) throughout the process by which you consider settling a claim or lawsuit against your organization and/or board members.

Murdoch is a decision based on summary judgment motions, not a trial, and the Court held, in part, that, at that stage in the coverage dispute, it was too early to rule that Dole had in fact breached its cooperation and/or prior written consent obligations to lose coverage for the settlement agreements in question, as Dole’s D&O insurers argued. The D&O insurers had not provided their prior written consent to those settlement agreements, but they had been kept apprised of the negotiations leading up to the signing of them. Accordingly, in light of applicable law, the Court determined that a further development of the facts was necessary before ruling on the validity of the insurers’ “cooperation” and/or “prior written consent” defenses.

The Court’s summary of Dole’s settlement negotiations, including the following statements, underscores how fact-specific the issue can be:

### **Dole’s Settlement of the First Shareholder Litigation**

- “On September 21, 2015, Dole’s insurance recovery counsel wrote to the Insurers. The letter notified the Insurers that Dole was considering settlement and mediation. It asked that the Insurers consider funding the settlement. The Insurers all responded, citing various potential exclusions and requesting more information from Dole.”

- “On November 5, 2015, Dole signed a term sheet settling the underlying action. On December 7, 2015, the underlying parties signed a formal Stipulation and Agreement of Settlement . . . Vice Chancellor Laster approved the settlement on February 10, 2016.”
- “On February 26, 2016, Dole’s counsel wrote to the insurers, seeking indemnification for the Settlement. The Insurers did not in the Chancery Court object to the Settlement or appeal the Order and Final Judgment.”
- “On January 13, 2016, prior to the Chancery Court’s approving the Settlement, the Insurers filed this [coverage] action.”

### **Dole’s Settlement of the Second Shareholder Litigation**

- “In October 2016, the Delaware District Court scheduled an Alternative Dispute Resolution teleconference in the [underlying] Action. The Insureds notified the Insurers of this teleconference. The [underlying] plaintiffs then approached the Insureds about mediation. . . . The Insureds then scheduled a teleconference to discuss potential mediation with the Insurers. . . . The Insurers provided some feedback on potential mediators but none objected to the mediation. . . .”
- “The Insureds refused to provide [certain] information [requested by the Insurers], claiming that it was work product or attorney-client privileged information.”
- “The Insureds relayed to the Insurers the mediation dates . . . [and] . . . provided the mediation briefs to the Insurers. . . . [O]nly [two of the Insurers] attended the mediation[;] the other Insurers received telephonic updates.”
- “After the mediation, the Insureds told the Insurers that the Insureds had provisionally agreed to terms of a term sheet. . . . The Insureds asked the Insurers to confirm that the Insurers would contribute to the settlement reached in the Term Sheet. The Insureds also provided the Insurers the information requested . . . and asked if they needed any additional information.”

“The Insurers did not provide prior written consent for” either settlement at issue.

Murdoch offers a window into the murky waters of settling a claim and ensuring that your insurance is available to pay for it.

For assistance with your risk management and/or insurance needs, please call or email Fannie Minot at: [fannie@minotreports.com](mailto:fannie@minotreports.com); (978) 578-2076.

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