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D&O "Capacity Exclusion" May Bar Coverage When Acting Outside the Scope of Insured Status

By Ellis I. Medoway

Directors' and officers' (D&O) policies insure against claims arising from alleged wrongful acts attributed to directors and officers of the insured entity—provided they were principally engaged in that capacity at the time the alleged wrongful conduct was committed. In other words, such coverage is placed in question when the insureds accused of the alleged wrongful conduct were not acting strictly within their insured role.[1] In that circumstance, the D&O insurer will undoubtedly invoke its policy's "capacity exclusion" to bar coverage.

Not many cases have addressed this coverage issue, and only a few appellate courts have rendered rulings on the exclusion. Recently, a New Jersey appeals court, in a case of first impression, applied the exclusion and barred coverage.[2] That decision and other more recent decisions on the D&O policy's capacity exclusion are the subject of this article.

Overview

D&O policies are "claims made" policies. They cover claims brought against the insured during the time the policy is in effect, even if the conduct leading to that potential liability did not occur during the policy period.

These policies offer protection to those who sit on boards of directors, so they are shielded from the significant liability risks associated with their corporate roles. But like all policies, D&O policies contain several exclusionary provisions. One such exclusion is the "capacity exclusion." As long as the insured is acting strictly in his or her capacity as a director or officer on behalf of the company (the insured entity), the insured may be covered. However, if that board member acts outside his or her corporate role, the exclusion may be triggered to bar coverage. Although the capacity exclusion may not be identical in every D&O policy, the language is often very similar. One example of that exclusion is as follows:

> [T]he Insurer shall not be liable to make any payment for Loss in connection with a claim made against any Insured:
> * * *
> G. based upon, arising out of, directly or indirectly resulting from or in consequence of, or in any way involving any Wrongful Act of an Insured Person serving in their capacity as director, officer, trustee, employee, member or governor *of any other entity other than an Insured Entity* or an Outside Entity, or by reason of their status as director, officer, trustee, employee, member or governor of such other entity.[3]

This exclusion eliminates coverage if the insurer can demonstrate that the insured's alleged wrongful act or acts arose from conduct outside his or her capacity as a director or officer of the insured entity. The burden, of course, rests with the insurer to establish this. The insurer thus

must show the insured's wrongful acts arose from conduct in his or her capacity as a director or officer of some entity *other than the insured entity.*

In the four cases to be discussed next, in which insurers invoked the capacity exclusion, only one court found the exclusion did not apply.

Recent Decisions: *Langdale Co. v. National Union Fire Insurance*

In 2015, the Eleventh Circuit Court of Appeals concluded that a family-owned company's D&O policy did not cover claims made against officers and directors of that insured entity based on the policy's capacity exclusion. In *Co. of Pittsburgh, Pennsylvania*,[4] the underlying litigation involved alleged misconduct committed by family members who were serving simultaneously as officers of the family business and as trustees of a family trust that held a substantial amount of the company's stock. The trust beneficiaries sued two company officers in Georgia state court, asserting, among other things, that they breached their fiduciary duty as directors of the company by, essentially, causing the beneficiaries to sell their stock interests to the family-owned business at a price far below fair market value.[5]

After the trust beneficiaries filed suit, the company filed a separate action in Georgia state court against the beneficiaries seeking a declaration that it held clear title to certain company stock. In that second action, the beneficiaries filed a counterclaim asserting, among other things, the company's respondeat superior liability for its directors' and officers' misconduct. These two state court actions were later "consolidated into one action in Georgia state court" (the underlying litigation).[6]

The company notified its insurer, National Union, of the underlying litigation, seeking defense and indemnity for the directors and officers and the family-owned business. National Union denied coverage based on its Capacity Exclusion 4(g). That exclusion barred coverage for any claim "alleging, arising out of, based upon or attributable to" the company directors' or officers' "actual or alleged act[s] or omission[s]" in any capacity other than as a director or officer of the family company.[7] The company then filed suit against National Union in federal court, seeking damages as well as declaratory relief.[8]

The district court granted National Union's motion for summary judgment. The court held the D&O policy's Exclusion 4(g) barred coverage because, "but for" the acts of the insureds in their capacity as "trustees" in breaching their fiduciary duty, there could not have been any claim made against those insureds. Applying Georgia law, the court emphasized that the "genesis" of the underlying litigation and those causes of action arose out of the trustees' alleged wrongful acts, rather than the alleged wrongful conduct of the insureds in their capacity as officers and directors of the family company.[9]

On appeal, the Eleventh Circuit affirmed, finding the D&O policy's capacity exclusion barred coverage. The appeals court rejected the insureds' argument that because the underlying litigation also contained allegations that the directors' and officers' wrongful conduct occurred in their insured capacity contributed to the beneficiaries' alleged loss, that was sufficient to trigger coverage under the company's D&O policy. Applying Georgia's "but for" test based on the

exclusion's "arising out of" language, the court observed: "[T]he causes of action alleged against [the company] could not have existed in the absence of the claims that [the officers and directors] committed wrongful acts in [their] uninsured capacity as trustees."[10] In other words, even though the court recognized the underlying litigation involved "dual-capacity misconduct committed by the same actors," that could not override the capacity exclusion's application.[11]

Recent Decisions: *Goggin*

A similar result followed a few years later in *Goggin v. National Union Fire Insurance Co.*,[12] in which a Delaware trial court concluded that a D&O policy's identical capacity exclusion barred coverage under Delaware law.[13]

In *Goggin*, two directors (Goggin and Goodwin) of a company (U.S. Coal Corporation) sued its insurer, National Union, seeking declaratory relief to determine the scope of coverage available under the company's D&O policy. The company had filed for Chapter 7 bankruptcy. After that filing, the trustee for U.S. Coal sued the two directors, claiming they engaged in self-dealing at the company's expense. The directors tendered the claim to National Union, requesting defense and indemnity coverage, which request was denied based on the same capacity exclusion discussed previously in *Langdale* (i.e., Exclusion 4(g)). Suit followed in Delaware state court with the directors seeking a declaration that the capacity exclusion did not apply and thus National Union had to defend them.[14]

Goggin and Goodwin were both directors of U.S. Coal, as well as investors in that company. In their "uninsured" capacity as investors, they "purportedly attempted to reinvigorate U.S. Coal through debt purchase and other capital restructuring by forming two investment vehicles" (referred to as the ECM Entities).[15] According to the trustee, however, the two directors "breached their fiduciary duties and committed other acts in favor of their own personal interests" at the expense of U.S. Coal.[16] Specifically, the trustee alleged Goggin and Goodwin "schemed to form and use the ECM Entities to control U.S. Coal and defraud its creditors by, among other things, entering various agreements that secured them: benefits of a high return on investment; preferred recovery in the event of U.S. Coal's liquidation; and a loan at a discounted value." This "self-interested dealing . . . [thus] undermined the interest of U.S. Coal and its debtors and creditors."[17]

In moving for judgment on the pleadings[18] and a declaration that National Union had a duty to defend them under the company's D&O policy, the directors argued that the capacity exclusion did not apply because it was designed solely to address "a wholly 'uninsured' activity or duty." The directors further argued the exclusion was not intended to bar coverage unless the alleged misconduct was "taken 'solely' in an insured capacity."[19] Under their interpretive construction, Goggin and Goodwin would be entitled to coverage in their dual capacity as investors and directors of the company because whatever alleged wrongful acts they engaged in, in their capacity as directors, was independent from their alleged misconduct in their uninsured capacity as investors of the company.

The court rejected that interpretation, finding the capacity exclusion's language to be "clear and unambiguous."[20] The court observed the exclusion's "arising out of" language must be construed

broadly under Delaware law, and the court adopted the same "but-for" test applied in *Langdale*.[21] Applying that test, the court concluded National Union's capacity exclusion barred coverage because "but for" Goggin's and Goodwin's alleged misconduct in their roles as "members/managers of [the] ECM Entities," the trustee's claims could not be established.[22]

The *Goggin* court, like the court in *Langdale,* thus ultimately concluded that National Union's capacity exclusion applied to bar coverage even when the insured director or officer was alleged to have breached his fiduciary duty while acting in his insured capacity under the D&O policy. In other words, both courts rejected the argument that the exclusion might not apply when the director or officer was acting in a dual capacity and the alleged wrongful acts included misconduct that was attributed to the director or officer while acting in his insured capacity on behalf of the insured entity. The rationale for applying the exclusion in these dual-capacity circumstances was the court's adoption of the "but for" test to determine whether a claim may be covered under the D&O policy. In short, applying the "but for" test apparently leaves no room for flexibility to consider the independent allegations involving the director's or officer's misconduct in his or her insured capacity.[23]

Recent Decisions: *Abrams*

A contrary result was obtained more recently in *Abrams v. Allied World Assurance Co. (U.S.) Inc.*,[24] in which the court determined that the D&O policy's capacity exclusion did not apply. In *Abrams*, the court concluded the breach of fiduciary duty claims asserted against the insured directors in the "underlying action" arose solely from their alleged misconduct while engaged in their insured capacities as directors of the insured entity; thus, the exclusion was not triggered.[25] In arriving at that conclusion, the district court did not consider the factual backdrop presented to align with a "dual capacity" situation as was presented in *Langdale* and *Goggin*.

Abrams involved five former officers and directors of a California corporation (Altierre) who also held various positions simultaneously at another company, Stratim Capital, LLC. One Altierre officer (Abrams) was the principal of Stratim, another Altierre officer (Such) was a Stratim partner, and the other three Altierre officers held positions at a Stratim-related company.[26] One of Altierre's minor shareholders (Kline Hill) filed the underlying action against the five Altierre officers and directors, claiming they breached their fiduciary duties owed Altierre. That action also asserted similar claims against various Stratim-related companies.

It was alleged that once Abrams took control of Altierre's board of directors, he was able to take certain actions benefiting Stratim to the detriment of Altierre. The defendants' alleged wrongful acts included approving "a secret agreement" with Altierre's main secured creditor, thereby allowing that creditor to foreclose on Altierre's assets, and then flipping those assets to a "Stratim affiliate" on the same day. The stripping of Altierre's assets allegedly left the company's other shareholders with a shell corporation worth nothing.[27]

Abrams and the other four defendants tendered the underlying action to Altierre's insurer, Allied World Insurance Company (U.S.) Inc., which denied coverage based on its D&O policy's "Insured Capacity Exclusion." That exclusion barred coverage for any loss, "alleging, arising out of, based upon or attributable to any actual or alleged act or omission of any Insured Person serving in any capacity other than as an Executive. . . ."[28]

The insureds then sued Allied in federal court, asserting claims for (1) declaratory relief requiring Allied to defend and indemnify them against the underlying action, (2) breach of contract, and (3) bad faith. The insureds moved for partial summary judgment, contending Allied's capacity exclusion was not applicable to the allegations in the underlying action.[29] They argued they should be covered under Allied's D&O policy because the claims brought against them in the underlying action arose from alleged wrongful acts that were taken *solely* in their insured capacities as executives of Altierre. In contrast, Allied argued there should be no coverage because the claims in the underlying action arose "at least in part from the [i]nsureds' acts in their uninsured capacities as agents of Stratim and Stratim-related companies."[30] In essence, Allied was claiming its capacity exclusion applied because the insureds were acting in a dual capacity on behalf of themselves and Stratim-related entities at the expense of Altierre and its minority shareholders. Indeed, the allegations in the underlying action suggested as much, leading the court to observe that the "gist" of the underlying action was that the insureds "took control of and looted Altierre for the benefit of Stratim and Stratim-related companies."[31]

Abrams served in a dual capacity as an Altierre executive and principal of Stratim. Abrams allegedly took control of Altierre's board of directors "'to entrench Stratim's position' in Altierre while taking various actions that were detrimental to Kline Hill and other investors." The underlying action even referred to Abrams as an "agent" of the Stratim companies who executed documents on Stratim's behalf to assist in the foreclosure of Altierre's assets.[32] In evaluating the coverage dispute under California law, the court initially observed that there was "a surprising dearth of cases interpreting capacity exclusions under California insurance law."[33] Indeed, the court noted the parties cited only one such case—*XL Specialty Insurance Co. v. AIG Specialty Insurance Co.*[34]—in which another California district court concluded a D&O policy's capacity exclusion did not apply because the alleged wrongful conduct asserted against the director defendants arose solely from their actions taken in their insured capacities as executives of the insured entity.[35] Although the *Abrams* court recognized that the underlying allegations clearly made this a "closer call" than in *XL Specialty*, ultimately it found the capacity exclusion was not triggered. Agreeing with the reasoning of *XL Specialty*, the court found the exclusion did not apply because the claims asserted against the insureds similarly were for breach of fiduciary duties they owed solely based on their insured capacities as executives of Altierre.[36]

In finding the capacity exclusion did not bar coverage "as a matter of law," the *Abrams* court expressly declined to follow the decisions in *Langdale* and *Goggin* because they were "out-of-state cases" that did not apply California law.[37] The *Abrams* court also rejected those decisions because the courts in *Langdale* and *Goggin* "found that the insureds were acting in dual capacities, which impacted application of the capacity exclusions." However, in *Abrams*, the court concluded the insured directors were not acting in a "dual capacity" because the underlying claims against them focused solely on their alleged misconduct committed in their insured capacities as directors of Altierre.[38]

Because the *Abrams* court concluded the underlying actions did not present a "dual capacity" situation, presumably there was no need to address the "but-for" test adopted in *Langdale* and *Goggin*.[39]

In July 2024, a New Jersey appellate court adopted the "but-for" test in a dual-capacity case and, as in *Langdale* and *Goggin*, concluded the D&O capacity exclusion barred coverage. In *Mist Pharmaceuticals, LLC v. Berkley Insurance Co.*, the court noted the coverage issue before it presented "a matter of first impression" involving "the operation of capacity exclusion language in a directors and officers commercial insurance policy where the insured director/officer is alleged to have engaged in wrongful corporate acts in a dual capacity: first, acting in an official capacity as a director/officer of the insured business; and second, in an official capacity as a director/officer of an uninsured business."[40]

Recent Decisions: *Mist Pharmaceuticals*

Mist Pharmaceuticals presented a rather complex factual record. The underlying action involved Mist being sued by CelestialRX Investments, LLC, in Delaware state court along with several other named parties.[41] These other parties included (a) Joseph Krivulka, (b) Akrimax Pharmaceuticals, LLC, and (c) various other Krivulka family entities. Celestial alleged that Krivulka—who was the chairman of Mist's board of directors and held a majority interest in that company, while simultaneously serving as a director of Akrimax—engaged in self-dealing that defrauded Celestial. Specifically, Celestial alleged that Krivulka improperly inserted various entities he controlled as "middlemen" between Akrimax and other pharmaceutical companies from which Akrimax sought to receive certain drug-related rights. These "middlemen" allegedly received "a cut of the sales or marketing performed by Akrimax." Mist was identified as one of the "middlemen" entities that engaged in this alleged wrongful conduct.[42]

Mist and Krivulka sought coverage from their insurer—Berkley Insurance Co.—for the claims in the underlying action. Mist was covered for wrongful acts under a D&O policy issued by Berkley with a $2 million policy limit. Krivulka also was covered under the Berkley policy, provided no exclusion applied. The policy contained a "capacity exclusion" (Exclusion G) that stated:

> [T]he Insurer shall not be liable to make any payment for loss in connection with a claim made against any Insured:
>
> G. based upon, arising out of, directly or indirectly resulting from or in consequence of, or in any way involving any Wrongful Act of an Insured Person serving in their capacity as director, officer, trustee, employee, member or governor *of any other entity other than an Insured Entity* or an Outside Entity, or by reason of their status as director, officer, trustee, employee, member or governor of such other entity.[43]

Berkley sent Mist a reservation of rights letter reserving its right to deny coverage on several grounds, one of which was that its capacity exclusion might "either bar or limit coverage." When Mist later requested settlement authority for an upcoming mediation with Celestial, Berkley again emphasized the potential for no coverage and expressly reserved its rights based on the policy's capacity exclusion. Berkley further advised that it was no longer obligated to participate in Mist's or Krivulka's defense. As a result, Mist filed a declaratory judgment action in the New

Jersey Superior Court, Law Division, making the following claims: (i) breach of contract; (ii) duty to defend; (iii) duty to indemnify; (iv) bad faith; (v) estoppel for failure to timely deny coverage; and (vi) estoppel for failing to inform Mist of its right to reject a defense.[44]

Eventually, the Delaware court in the underlying action approved a $12 million global settlement, allocating 25 percent liability to Mist. Prior to that Mist, in the course of settlement negotiations, requested that Berkley consent to settlement and also provide indemnification, which requests were denied. Thereafter, Mist and Berkley filed several dispositive motions in the declaratory judgment action.[45] In ruling on those motions, the New Jersey trial court ultimately concluded that Berkley's withholding consent to settle was unreasonable and therefore Mist was entitled to coverage under the New Jersey Supreme Court's decision in *Fireman's Fund Insurance Co. v. Security Insurance Co. of Hartford.*[46] Based on that ruling, the court found it was unnecessary to reach the other coverage issues raised, including Berkley's argument that the capacity exclusion barred coverage. On appeal, Berkley argued its motion for summary judgment should have been granted and that the trial court erred by failing to apply that exclusionary provision.[47]

In reversing the trial court, the appeals court first rejected the lower court's reliance on *Fireman's Fund*. Although the appellate court found a similarity of facts presented in *Fireman's Fund*, the court concluded there were "material distinctions" in *Mist Pharmaceuticals* that required a review and analysis of the capacity exclusion. The appeals court thus observed:

> However, unlike *Fireman's Fund*, Berkley asserted withholding consent to settle was reasonable given the relevant facts—that the global settlement represented the separate interests of multiple entities not insured under the policy, and Berkley reserved its rights under the capacity exclusion repeatedly from its earliest communications with Mist regarding the claim. These are material distinctions that the trial court should have considered, and the court's legal analysis would have been better informed if it had first addressed the application of the policy's capacity exclusion.[48]

Turning to the exclusion, the court pointed out that New Jersey courts "have not analyzed a capacity exclusion paragraph in a commercial D&O policy on facts like this before."[49] Nonetheless, the court noted that the exclusion's language "'arising out of,' which frequently appears in insurance policies, has been interpreted expansively by New Jersey courts in insurance coverage litigation."[50] In the absence of any New Jersey precedent on the capacity exclusion and looking for guidance from outside jurisdictions, the appeals court found the Eleventh Circuit decision in *Langdale* to be persuasive. The New Jersey appeals court thus "adopt[ed] [the] Eleventh Circuit's sound interpretation of the . . . capacity exclusion given the similarity in language, operation and effect between *Langdale's* and Berkley's capacity exclusion."[51]

In further step with *Langdale*, the New Jersey appeals court also adopted the "but for" coverage analysis employed in *Langdale*[52] (as well as in *Goggin*). By employing that test, the court believed that it was not required to "unpack the percentage of Krivulka's conduct attributable to

his role as a director/officer at Akrimax and compare it to the percentage of Krivulka's conduct attributable to his role as a director/officer at Mist."[53] The court's rationale for not having to engage in the more complicated and messy exercise of "unpacking" and allocating what conduct of Krivulka's was covered as an insured director/officer as opposed to an uninsured director/officer was predicated on "[t]he clear language in the policy" and because the "jurisprudence . . . applied to it foster a simpler approach."[54]

In light of the above analysis, the New Jersey appeals court concluded that Krivulka's conduct "constituted a sufficient basis to trigger the capacity exclusion";[55] thus, there was no coverage under Berkley's policy for Krivulka, as well as Mist—which raises a separate question as to why no coverage was available to the insured entity for its own liability. In any event, because the court held that the capacity exclusion barred coverage, it "follow[ed] that Berkley's refusal to consent to a settlement by Mist was not unreasonable."[56]

Conclusion

While there is a dearth of cases that have addressed the D&O capacity exclusion in a dual-capacity setting, the majority of courts that have evaluated that exclusionary language have ruled favorably for insurers when the exclusion is invoked. Whether future courts will continue to follow that trend—employing the "but for" test and refusing to "unpack" what might be covered and not covered when dual-capacity allegations are presented—is yet to be seen. However, what is clear from these decisions is the potential for significant consequences when a director or officer also sits on other boards or is engaged in other businesses or activities and there is some overlap between that director's or officer's actions taken in an insured capacity as opposed to actions he or she might take in an uninsured capacity. These decisions simply highlight why it is important for directors and officers sitting on boards to consider legal consultation so they understand the coverage risks involved and the potential significant exposure they face when their actions might be construed as inconsistent with their fiduciary duties owed the insured entity they serve.

Ellis I. Medoway is a partner with Archer & Greiner, P.C., and cochair of the firm's Insurance Recovery and Counseling Practice Group. The views and opinions expressed in this article are those of the author and not necessarily those of the firm or its clients.

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[1] A similar "capacity" exclusion appearing in a lawyer's professional liability policy has also been applied to bar coverage when the lawyer's alleged wrongful acts are found not to have been performed principally in his professional capacity as an attorney. *See, e.g.*, *Law Offices of Zachary R. Greenhill, P.C. v. Liberty Ins. Underwriters, Inc.*, 147 A.D.3d 418 (N.Y. App. Div. 2017) (applying capacity exclusion under New York law and barring coverage based on pleadings in the underlying action and record evidence that showed lawyer's questionable conduct occurred only in his capacity as president and chief executive officer of a corporate entity, rather than in providing professional services as a lawyer); *Associated Indus. Ins. Co. v. Kleinhendler*, 2023 U.S. App. LEXIS 32327, at *3 (2d Cir. Dec. 23, 2023) (applying New York law where lawyer was alleged to have committed malpractice and concluding lawyer was not

entitled to a defense because his alleged wrongful conduct included actions he took on behalf of his company in connection with the sale of his client's property); *but see Niagara Fire Ins. Co. v. Pepicelli, et al.*, 821 F.2d 216, 220 (3d Cir. 1987) (rejecting exclusion's application under Pennsylvania law because core "claims" at issue involved alleged breach of contract and professional negligence by insureds in rendering services in their principal capacity as lawyers).

[2] *Mist Pharms., LLC v. Berkley Ins. Co.*, 479 N.J. Super. 126 (N.J. Super. Ct. App. Div. 2024). Mist, the policyholder, filed a petition for certification to the New Jersey Supreme Court, which appeal is still pending. (*See* N.J. Supreme Court Docket No. 089689; *see also* N.J. Court Rule 2:12-3). By orders entered on December 2, 2024, the parties were granted additional time for briefing that appeal. Research has not disclosed any state supreme court that has addressed this coverage issue.

[3] Emphasis added. This "Exclusion G" was the subject of analysis in the New Jersey appeals court decision in *Mist Pharmaceuticals*, 479 N.J. Super. at 132, which will be discussed in the next section of this article.

[4] *Langdale Co. v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa.*, 609 F. App'x 578 (11th Cir. 2015).

[5] *Langdale*, 609 F. App'x at 579–81. The trust beneficiaries received approximately $27 million for their stock sold to the family company but claimed the true value of that stock was worth more than $150 million.

[6] *Langdale*, 609 F. App'x at 582–83.

[7] *Langdale*, 609 F. App'x at 582–83, 586.

[8] *Langdale*, 609 F. App'x at 583.

[9] *Langdale*, 609 F. App'x at 584.

[10] *Langdale*, 609 F. App'x at 590.

[11] *Langdale*, 609 F. App'x at 592, 596. As the Eleventh Circuit ultimately concluded in its application of the capacity exclusion, the claims against the family company based on the alleged wrongful conduct of the directors and officers in their insured capacity could not be separated "from their alleged misconduct as trustees of the [beneficiaries] Trust." Likewise, the claims against the directors and officers in their insured capacity "could not have existed independent from their alleged misconduct as trustees."

[12] *Goggin v. Nat'l Union Fire Ins. Co.*, C.A. No. N17C-10-083 PRW CCLD, 2018 Del. Super. LEXIS 1533 (Del. Super. Ct. Nov. 30, 2018).

[13] *Goggin*, 2018 Del. Super. LEXIS 1533, at *11 (noting the National Union D&O policy exclusion in *Langdale* was "identical to this one" in *Goggin*).

[14] *Goggin*, 2018 Del. Super. LEXIS 1533, at *1–2.

[15] *Goggin*, 2018 Del. Super. LEXIS 1533, at *3–4.

[16] *Goggin*, 2018 Del. Super. LEXIS 1533, at *4.

[17] *Goggin*, 2018 Del. Super. LEXIS 1533, at *11–12.

[18] *Goggin*, 2018 Del. Super. LEXIS 1533, at *6. Under Delaware law, a party may move for judgment on the pleadings pursuant to Delaware Civil Rule 12(c), which standard of review is almost identical to the standard for a motion to dismiss.

[19] *Goggin*, 2018 Del. Super. LEXIS 1533, at *8.

[20] *Goggin*, 2018 Del. Super. LEXIS 1533, at *10.

[21] *Goggin*, 2018 Del. Super. LEXIS 1533, at *11.

[22] *Goggin*, 2018 Del. Super. LEXIS 1533, at *12 (noting the directors' "alleged ECM-related misconduct . . . [was] the core of the Trustee's Claims").

[23] *Goggin*, 2018 Del. Super. LEXIS 1533, at *11 (Del. Super. Ct. Nov. 30, 2018) (court noting that "[a] claim does not 'arise out of' a circumstance or conduct if, *independent* of that circumstance or conduct, the claim is still valid" (emphasis added)).
In the latter regard, it is also worth noting that the two directors in *Goggin* created the ECM Entities while they were acting as directors of U.S. Coal, with the apparent goal to assist and advance the company's interests. Further, "but for" their role as directors of U.S. Coal, the trustee's claims could not exist. Nonetheless, and despite the independent nature of the trustee's claims against Goggin and Goodwin in their insured capacity as directors, National Union's capacity exclusion was applied to bar coverage; consequently, no defense was provided.

[24] *Abrams v. Allied World Assurance Co. (U.S.) Inc.*, 657 F. Supp. 3d 1280 (N.D. Cal. 2023).

[25] *Abrams*, 657 F. Supp. 3d at 1287 (finding "claims asserted against the Insureds in the [underlying action] are for breach of fiduciary duties owed solely based on their capacities as [the insured company's] executives").

[26] *Abrams*, 657 F. Supp. 3d at 1282.

[27] *Abrams*, 657 F. Supp. 3d at 1283.

[28] *Abrams*, 657 F. Supp. 3d at 1284. Allied also denied coverage based on another exclusion—the "Major Security Holder Claims Exclusion." The court found that exclusion was not "plausible" and was also ambiguous based on California law; accordingly, the exclusion was not applicable and did not bar coverage. *Abrams*, 657 F. Supp. 3d at 1289.

[29] *Abrams*, 657 F. Supp. 3d at 1284.

[30] *Abrams*, 657 F. Supp. 3d at 1286.

[31] *Abrams*, 657 F. Supp. 3d at 1287.

[32] *Abrams*, 657 F. Supp. 3d at 1287.

[33] *Abrams*, 657 F. Supp. 3d at 1286.

[34] *XL Specialty Ins. Co. v. AIG Specialty Ins. Co.*, No. 2:20-cv-06540-VAP-SHKx, 2021 U.S. Dist. LEXIS 143269 (C.D. Cal. July 13, 2021).

[35] *Abrams*, 657 F. Supp. 3d at 1286. Notably, in *XL Specialty*, 2021 U.S. Dist. LEXIS 143269, at *59–60, the court—applying California law and construing AIG's D&O policy's capacity exclusion narrowly—found that, even if the allegations in the underlying matters could be viewed as creating a "dual capacity" situation for the defendant directors, AIG's capacity exclusion still would not apply. The *XL Specialty* court explained that the exclusion's language did "not address when liability arises from actions taken by covered executives in a covered and non-covered capacity" and, thus, that created an ambiguity that had to be resolved in the insureds' favor and "consistent with the insureds' reasonable expectations." *XL Specialty*, 2021 U.S. Dist. LEXIS 143269, at *60.
The *Abrams* court did not see a need to consider this alternative holding by the *XL Specialty* court because it concluded the underlying action's asserted claims for breach of fiduciary duties arose solely from the insureds' capacities as Altierre executives. *Abrams*, 657 F. Supp. 3d at 1287.

[36] *Abrams*, 657 F. Supp. 3d at 1287 (recognizing that the allegations involving the Stratim companies "certainly provided a motive for [the defendant directors'] actions," but emphasizing that the defendant directors were "not sued for breach of any fiduciary duties arising from their roles as Stratim executives").

[37] *Abrams*, 657 F. Supp. 3d at 1287–88.

[38] *Abrams*, 657 F. Supp. 3d at 1288.

[39] As noted above in endnote 35, the *XL Specialty* court reasoned in the alternative that even if a dual-capacity situation was presented, the capacity exclusion was ambiguous and thus coverage should be available to the insured directors. *XL Specialty*, 2021 U.S. Dist. LEXIS 143269, at *60. In discussing the dual-capacity scenario, the *XL Specialty* court did not suggest that a but-for test should be applied as it was in *Langdale* and *Goggin*.

[40] *Mist Pharmaceuticals, LLC v. Berkley Ins. Co.*, 479 N.J. Super. 126, 129 (N.J. Super. Ct. App. Div. 2024).

[41] *CelestialRX Invs., LLC v. Krivulka et al.*, No. 11733-VCG, 2017 Del. Ch. LEXIS 22 (Del. Ch. Jan. 31, 2017). Named defendant Krivulka passed away after the Delaware action was filed, prompting Celestial to file a corporate suit in New Jersey seeking a stay of and distribution of Krivulka's estate. *Mist Pharmaceuticals*, 479 N.J. Super. at 132. The "underlying action" referred to in this article focuses mainly on the Delaware Chancery action.

[42] *Mist Pharmaceuticals*, 479 N.J. Super. at 130–31.

[43] Emphasis added. *Mist Pharmaceuticals*, 479 N.J. Super. at 131–32.

[44] *Mist Pharmaceuticals*, 479 N.J. Super. at 133. Initially, Berkley agreed to contribute 10 percent of the legal fees incurred by Mist and Krivulka in their defense of the underlying action. In other words, it appears that Berkley initially believed its capacity exclusion did not bar all potential coverage, including an allocated amount for the insureds' defense.

[45] *Mist Pharmaceuticals*, 479 N.J. Super. at 135.

[46] *Fireman's Fund Ins. Co. v. Sec. Ins. Co. of Hartford*, 72 N.J. 63 (1976). In *Fireman's Fund*, the New Jersey Supreme Court held that where a policy has a consent to settle provision, the insurer has a duty not to unreasonably withhold consent to settle, and when the insurer breaches that duty, it is liable for indemnification in the amount of the settlement. The court observed that this obligation arises from "considerations of good faith and fair dealing," which "require that the insurer make such an investigation [of the insured's claim] within a reasonable time." *Fireman's Fund*, 72 N.J. at 69–70.

[47] *Mist Pharmaceuticals*, 479 N.J. Super. at 136.

[48] *Mist Pharmaceuticals*, 479 N.J. Super. at 138.

[49] *Mist Pharmaceuticals*, 479 N.J. Super. at 139.

[50] *Mist Pharmaceuticals*, 479 N.J. Super. at 139.

[51] *Mist Pharmaceuticals*, 479 N.J. Super. at 141. The court emphasized that, as in *Langdale*, Celestial's alleged loss stemmed from Krivulka's self-dealing as he "was acting in his capacity as both a director of Akrimax and majority shareholder of Mist," and it was "undisputed that Krivulka acted in a dual capacity." In that regard, the court further noted that the loss in the underlying action "arose from and could not have occurred but for Krivulka's conduct in his capacity as a director of Akrimax." *Mist Pharmaceuticals*, 479 N.J. Super. at 142.

[52] *Mist Pharmaceuticals*, 479 N.J. Super. at 142.

[53] *Mist Pharmaceuticals*, 479 N.J. Super. at 142.

[54] *Mist Pharmaceuticals*, 479 N.J. Super. at 142. Although New Jersey, like all jurisdictions, construes exclusions narrowly and places the burden on the insurer "to bring the case within the policy exclusion," *Mist Pharmaceuticals*, 479 N.J. Super. at 139, the appeals court found there was no need to "unpack" the allegations against Krivulka to determine what conduct might be covered as opposed to the excluded conduct he performed in an uninsured capacity. However, as previously noted in *XL Specialty*, 2021 U.S. Dist. LEXIS 143269, at *60 (C.D. Cal. July 13, 2021), the California district court, construing narrowly a similar D&O capacity exclusion, concluded that even if the factual record suggested the insured director was acting in a dual capacity, the capacity exclusion should not apply because that exclusion did not address when the alleged wrongful conduct arises from actions taken by a covered executive in a covered versus uncovered capacity. Similarly, the capacity exclusion in *Mist Pharmaceuticals* does not address that situation.

[55] *Mist Pharmaceuticals*, 479 N.J. Super. at 142.

[56] *Mist Pharmaceuticals*, 479 N.J. Super. at 142. If the New Jersey Supreme Court agrees to hear Mist's appeal, it will presumably have to determine whether it agrees with the appellate court's treatment of *Fireman's Fund* and, thus, whether Berkley's refusal to consent requires a reversal and reinstatement of the trial court's decision.