

## Delaware Court Ruling Creates New Wrinkle for Defendants Evaluating Appraisal Claims

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In 2016, Delaware amended Section 262(h) of the General Corporation Law to permit defendants in appraisal actions to prepay claimants and cut off pre-judgment interest that would otherwise accrue under Delaware law on the fair value payment that occurs at the conclusion of such actions. Since then, much has been written about the pros and cons of prepaying appraisal claimants. The benefits include preventing claimants from engaging in appraisal “arbitrage”—since an appraisal action inevitably results in payment to a claimant of some fair value price (whether above, below, or equal to the deal price), a claimant who is not prepaid can effectively guarantee receiving pre-judgment interest (at a high statutory interest rate) on some amount at the end of a litigation. The downsides include uncertainty around whether a defendant is permitted to recoup their prepayment if they eventually convince a court to award the claimant less than the prepaid amount (which often matches the deal price) and the risk that paying the claimant a substantial sum at the outset will help fund the claimant’s litigation.

In a recent ruling, the Delaware Superior Court added a new wrinkle to this calculus when it held—as a matter of first impression—that D&O policies generally cover pre-judgment interest paid in appraisal actions. *Solera Holdings, Inc. v. XL Specialty Insurance Co.*, No. N18C-08-315 AML CCLD, 2019 WL 3453232 (Del. Super. Ct., July 31, 2019). Prior to this decision, insurers regularly refused to cover pre-judgment interest, asserting that a fair value payment was not covered “Loss” and that pre-judgment interest on such a payment similarly could not be covered “Loss.” *Solera* squarely rejects this argument. Despite the parties’ stipulation that a fair value payment itself “is not a covered Loss,” the Court observed that the policy’s definition of “Loss” includes “damages, judgments, settlements, pre-judgment and post-judgment interest. . .” and so accepted the policyholder’s argument that the “plain reading of the definition of Loss includes the pre-judgment interest,” even where that interest flows from an uncovered payment. In short, *Solera* held that the D&O policy covered pre-judgment interest paid by the appraisal action defendant to the claimant.<sup>[1]</sup>

Any Delaware corporation defending an appraisal action and assessing whether to prepay a claimant (either in whole or in part) should be aware that D&O insurance coverage may be available for pre-judgment interest paid to a claimant and should be sure to include this as one of the factors to weigh in the decision-making process. Given that appraisal actions often take years to resolve and can result in substantial pre-judgment interest—for example \$38,387,821.61 in pre-judgment interest accrued over the two years in *Solera*—the value of this potential coverage should not be ignored.

Further, while *Solera* does not directly address coverage for settlements in appraisal actions, defendants who choose not to prepay claimants in full should bear in mind that the reasoning of the *Solera* ruling indicates that any portion of an appraisal action settlement attributable to pre-judgment interest should fall within the obligations of the defendant's D&O insurers. Given how many appraisal actions are resolved by settlement, the possibility of coverage for those portions of settlement payments attributable to pre-judgment interest may eventually prove to be the most long-lasting impact of the *Solera* decision.

[1] In addition to holding that pre-judgment interest constitutes "Loss" under D&O policies, the court also held that an appraisal action satisfies the definition of "Securities Claim" commonly found in D&O policies, another matter of first impression on an issue that D&O insurers regularly invoke to

deny coverage for appraisal actions. *Solera* is thus an important decision for all policyholders defending appraisal actions, even those that prepay the

full deal price to claimants but seek coverage for other losses, such as defense costs.

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