IN THE SUPREME COURT OF THE STATE OF DELAWARE

IN RE SOLERA INSURANCE	:	No. 413,2019
COVERAGE APPEALS	:	No. 418,2019
	:	
	:	Court Below-Superior Court
	:	of the State of Delaware
	:	C.A. No. N18C-08-315 AML CCLD

MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE

Pursuant to Rule 28, United Policyholders moves the Court for leave to file a brief as amicus curiae.[1] The movant respectfully states that movant has read the briefs of the parties as filed and can present additional, substantive argument supporting the position of the Appellee Solera Holdings, Inc. with appropriate citation of authorities.

This appeal involves an issue of great importance to United Policyholders ("UP") and to insurance consumers in Delaware and throughout the country: Whether an insurance company can deny coverage for a policyholder's defense costs solely because the policyholder did not seek the insurer's consent to incur those costs in advance, when the lack of consent did not prejudice the insurer. Consistent with Delaware law regarding similar notice and consent clauses, the policyholder should not be denied coverage on that basis absent prejudice to the insurer.

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[1] A copy of the proposed brief is attached hereto as Exhibit A.

The consent-to-defense costs clause at issue in this case is similar to other policy conditions litigated in Delaware and courts throughout the country. In such cases, courts routinely require prejudice to the insurer in order for them to deny coverage given the strong preference to avoid forfeiture and the purpose of such clauses to prevent prejudice to the insurer. Delaware courts in particular have consistently applied such a standard to notice provisions and consent-to-settlement clauses in insurance policies. In light of such precedent, as well as the fact that notice of a claim is tantamount to a request for defense coverage and that the structure of the insurance policy groups consent to defense and settlement together within the same clause, a prejudice standard should similarly be applied to consent-to-defense requirements.

UP is a non-profit 501(c)(3) organization founded in 1991 that is an advocate and information resource for individual and commercial insurance consumers throughout the United States, including Delaware. The organization informs and assists purchasers of insurance when seeking a policy or pursuing a claim for loss. Grants, donations, and volunteers support UP's work, which is divided into three program areas: Roadmap to Recovery™ (disaster recovery and claim help), Roadmap to Preparedness (insurance and financial literacy and disaster preparedness), and Advocacy and Action (advancing pro-consumer laws and public policy).

Public officials, state insurance regulators, academics, and journalists throughout the U.S. routinely seek UP's input on insurance and legal matters. UP's Executive Director has been appointed to twelve consecutive terms as an official consumer representative to the National Association of Insurance Commissioners. In that role, UP works with regulators on matters related to policy sales, claims and consumer rights. UP also serves on the Federal Advisory Committee on Insurance, which briefs the Federal Insurance Office and in turn, the U.S. Treasury Department.

Since its founding in 1991, UP has filed amicus curiae briefs in federal and state appellate courts across 42 states and in over 450 cases. Amicus briefs filed by UP have been expressly cited in the opinions of state supreme courts as well as the U.S. Supreme Court. *See Humana Inc. v. Forsyth*, 525 U.S. 299, 314 (1999); *Julian v. Hartford Underwriters Ins. Co.*, 110 P.3d 903, 911 (Cal. 2005); *Cont'l Ins. Co. v. Honeywell Int'l, Inc.*, 188 A.3d 297, 322 (N.J. 2018); *Allstate Prop. & Cas. Ins. Co. v. Wolfe*, 105 A.3d 1181, 1185-6 (Pa. 2014).

Appellee Solera Holdings, Inc. consents to UP's filing an amicus brief. Appellants Illinois National Insurance Co., ACE American Insurance Company and Federal Insurance Company oppose UP's motion for leave to file an amicus brief. No one other than UP, its members or its attorneys made any monetary or other contribution to the brief.

For the reasons set forth above, proposed amicus curiae UP respectfully requests that this Court grant the instant motion and accept the attached amicus curiae brief.

Dated: February 7, 2020

Respectfully submitted,

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BRIEF OF AMICUS CURIAE UNITED POLICYHOLDERS IN SUPPORT OF APPELLEE AND AFFIRMANCE

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STATEMENT REGARDING AMICUS CURIAE

United Policyholders ("UP") is a non-profit 501(c)(3) organization founded in 1991 and headquartered in San Francisco, California. UP is an advocate and information resource for individual and commercial insurance consumers throughout the United States, including Delaware. The organization informs and assists purchasers of insurance when seeking a policy or pursuing a claim for loss.

UP's authority to submit this brief would be by leave of this Court, if granted.

This appeal involves an issue of critical importance to insurance consumers in Delaware and throughout the country: whether a liability insurer can deny coverage for a policyholder's defense costs solely because the policyholder did not seek the insurer's consent to incur those costs in advance, when the delay did not have any prejudicial impact on the insurer. As the Superior Court held in this case, failure to obtain consent should not bar coverage unless the insurer has suffered prejudice as a result. Requiring prejudice in the context of consent to defense costs would be consistent with the treatment under Delaware law of similar types of consent clauses and would be consistent with the long-standing precedent applying the notice-prejudice rule in this State.

STATEMENT OF FACTS

In March 2016, dissenting shareholders filed an appraisal action (the "Appraisal Proceeding") against Appellee Solera Holdings, Inc. ("Solera") following a merger transaction. *See Solera Holdings, Inc., v. XL Specialty Ins. Co.*, 213 A.3d 1249, 1253 (Del. Super. Ct. 2019). After trial, the Court of Chancery ruled that the value of Solera's share price was in fact lower than the merger price. *Id.* Although Solera had prevailed, having saved well over $100 million compared to the plaintiff shareholders' demand, it spent over $13 million on its defense to achieve that result. *Id.*; JA1542–43. Solera seeks coverage for these defense costs from Illinois National Insurance Co., ACE American Insurance Company and Federal Insurance Company (together, "Insurers") under excess directors and officers ("D&O") liability policies.[1]

The Insurers' policies follow form to the provisions in Solera's primary D&O policy (the "Primary Policy")—that is, they offer coverage on the same terms and conditions as the Primary Policy, but Insurers do not owe a duty to pay until a loss reaches the attachment point of their excess coverage. Thus, it is the Primary Policy that contains the controlling language.

[1] Solera also seeks coverage for prejudgment interest it was ordered to pay at the conclusion of the Appraisal Proceeding, i.e., on the merger consideration that the Court awarded.

Two Primary Policy provisions, in particular, are central to this appeal, one regarding consent to incur defense costs (which simultaneously addresses consent to settlement) (the "Consent Clause"), and the other regarding notice of a claim (the "Notice Clause"). The Consent Clause, Section V(B) of the Primary Policy, reads as follows:

> No Insured may incur any Defense Expenses in connection with any Claim . . . or settle any Claim without the Insurer's consent, such consent not to be unreasonably delayed or withheld. JA160.

Although the Notice Clause, Section VI(A)(1) of the Primary Policy, is the second key provision in this appeal, notice was not raised below and is not at issue here. Instead, as Part III, *infra*, explains, its significance is the light it sheds on the Consent Clause. The Notice Clause frames notice as a condition precedent to be given "as soon as practicable":

> As a condition precedent to any right to payment under this Policy . . . the Insured shall give written notice to the Insurer of each Claim . . . . Such notice shall be provided as soon as practicable. JA161.

However, the Notice Clause also precludes forfeiture of coverage for tardy notice *in the absence of material prejudice to the insurer*:

> In the event that the Insureds fail to provide timely notice to the Insurer under this Section . . . the Insurer shall not be entitled to deny coverage solely based on such untimely notice unless the Insurer can demonstrate its interests were materially prejudiced by reason of such untimely notice. JA161.

Returning to the consent defense in this appeal, Insurers have not alleged that they suffered any prejudice, much less material prejudice, arising from a purportedly untimely request for consent to Solera's Appraisal Proceeding defense costs. Instead, Insurers interpret the Consent Clause as an absolute bar to Solera's recovery of defense costs incurred before Insurers gave their consent. *See* Brief for Appellant ACE American Insurance Company ("ACE Br.") at 40–1.

ARGUMENT

Both Delaware law and the language of the Primary Policy prevent Insurers from denying coverage for Solera's defense costs absent prejudice.[2] Under Delaware law, notice provisions and consent-to-settlement clauses contain implicit prejudice requirements.[3] *State Farm Mut. Auto. Ins. Co. v. Johnson*, 320 A.2d 345 (Del. 1974) (requiring material prejudice to bar coverage due to untimely notice of a claim); *Hall v. Allstate Ins. Co.*, 1985 WL 1137299, at *8 (Del. Super. Ct. Jan. 11, 1985) (extending the prejudice requirement set forth in *Johnson* to consent-to-settlement clauses).

Similarly, the necessity of a prejudice showing to deny coverage for a policyholder's non-compliance with insurance policy conditions is acknowledged by state supreme courts, *see Campbell v. Allstate Ins. Co.*, 384 P.2d 155, 156 (Cal. 1963) ("[B]reach by the insured of a condition . . . such as a cooperation clause . . . cannot be a valid defense [to coverage] unless the insurer was substantially prejudiced thereby."); *Bankers Ins. Co. v. Macias*, 475 So.2d 1216, 1218 (Fla. 1985) ("a condition can be avoided by a party . . . showing that the insurance carrier was

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[2] For reasons explained in Part III, *infra*, the Primary Policy wording requires that the prejudice to Insurers must be *material* prejudice, but the relevant Delaware case law refers more generically to bare "prejudice." Whether there is a difference between the two is beyond the scope of this brief.

[3] *See also* Part II, *infra.*

not prejudiced by noncompliance with the condition"); *M.F.A. Mut. Ins. Co. v. Cheek*, 363 N.E.2d 809, 813 (Ill. 1977) ("[U]nless the alleged breach of the cooperation clause substantially prejudices the insurer in defending the primary action, it is not a defense under the contract."); *Nathe Bros., Inc. v. Am. Nat. Fire Ins. Co.*, 615 N.W.2d 341, 347 (Minn. 2000) ("[W]hen an insured has failed to timely submit a proof of loss, absent express language making [such] failure . . . fatal to the rights of the insured, an insurer must show it was prejudiced to avoid [coverage]."); ***and*** by federal courts and state appellate courts, *see New England Extrusion, Inc. v. Am. All. Ins. Co.*, 874 F.Supp. 467, 470 (D. Mass. 1995) (stating that "an insurer attempting to be relieved of its obligations under a liability policy on the ground of untimely notice . . . must prove that the breach resulted in actual prejudice to its position"); *Solvents Recovery Serv. of New England v. Midland Ins. Co.*, 526 A.2d 1112, 1115 (N.J. App. Div. 1987) (requiring the insurer to "bear the burden of persuasion of a likelihood of appreciable prejudice" from the policyholder's defense and settlement of a claim without their involvement under a policy with a "no-voluntary payments" provision).

While Insurers argue that Delaware courts have enforced consent clauses without prejudice, they admit that those cases expressly applied non-Delaware substantive law. ACE Br. at 42.

In line with precedent in Delaware and across the country, and under the Primary Policy (as explained in Part III, *infra*), Insurers cannot avoid coverage for Solera's defense costs without a showing of prejudice.

I. SOLERA COMPLIED WITH THE CONSENT CLAUSE

A. Unlike Many Other D&O Policies, the Wording of the Primary Policy Does Not Require "Prior" Consent.

The Primary Policy requires consent to defense costs and settlements, but it makes no mention of *prior* consent, and instead prohibits unreasonable denial or delay of consent. In contrast, policies that require an insurer's prior consent before the policyholder may incur defense costs or enter into a settlement expressly specify as much. *See, e.g.*, *Arch Ins. Co. v. Murdock*, 2018 WL 1129110, at *13 (Del. Super. Ct. Mar. 1, 2018) (involving a policy requiring that "[i]nsureds shall not settle any Claim . . . [or] incur any Defense Costs . . . without the Insurer's prior written consent"); *Sun-Times Media Grp., Inc. v. Royal & Sunalliance Ins. Co. of Canada*, 2007 WL 1811265, at *4 (Del. Super. Ct. June 20, 2007) (same); *Brown v. Am. Int'l Grp., Inc.*, 339 F.Supp.2d 336, 340 (D. Mass. 2004) (same). The Insurers knew how to impose prior consent requirements, whether by using words such as "prior" and "before" or by structuring consent as a condition precedent, akin to the Notice Clause, but they did not do so here. Accordingly, Solera's request for consent after incurring defense costs did not breach the Consent Clause. Instead it shifted the burden to Insurers to refrain from denying consent unreasonably.

Delaware courts widely agree that insurance policy provisions that limit or exclude coverage are "accorded a strict and narrow construction." *See Murdock*, 2019 WL 2005750, at *9 (while "[c]overage language is interpreted broadly to protect the insured's objectively reasonable expectations," "[e]xclusionary clauses, on the other hand, are 'accorded a strict and narrow construction'" (quoting *AT&T Corp. v. Clarendon Am. Ins. Co.*, 2006 WL 1382268, at *9 (Del. Super. Ct. Apr. 13, 2006))); *Sun-Times Media Grp., Inc.*, 2007 WL 1811265, at *11 (exclusionary clauses are construed strictly "to give the interpretation most beneficial to the insured"); Restatement of the Law of Liability Insurance §32.

Policy language that has the effect of reducing or narrowing coverage must be "specific, clear, plain, [or] conspicuous." *See Murdock*, 2019 WL 2005750, at *9. Application of this rule dictates that in the absence of a specific requirement for *prior* consent, such a requirement cannot be implied. *See id.* This Court, therefore, should not read a prior consent requirement into a clause where there is none.

B. The Insurers Have No Reasonable Grounds for Denying Consent.

In view of Solera's compliance with the Consent Clause, the burden is on the Insurers not to unreasonably withhold consent to incur the costs of defense or settlement. A consent provision "do[es] not provide an insurer an absolute right to veto." *Murdock* , 2019 WL 2005750, at *10. Rather, a court must evaluate whether the denial of consent was reasonable. *See id.* (whether the insurers unreasonably

withheld consent to policyholder's settlements is question of fact); *Hilco Capital, LP v. Fed. Ins. Co.*, 978 A.2d 174, 181 (Del. 2009) (trial court correctly instructed the jury "to consider all the facts and circumstances in deciding whether [the insurer] had a reasonable basis to withhold its consent") (applying Missouri law).

In determining whether to consent to defense expenses, an "insurer should agree to the insureds' choice of counsel if such counsel is free from conflicts and generally regarded as highly qualified with respect to the type of claim made against the insureds." John F. Olsen, et al., Dir. & Off. Liab. §12:42. In the absence of a requirement in the Primary Policy that consent be obtained in advance, the same limitation on the Insurers' decision as to whether to consent to defense costs applies here, where the request was made after costs were incurred. The Insurers have not argued that Solera's chosen defense counsel was subject to any conflict or had qualifications of any but the highest caliber. Indeed, any such objections at this stage, in light of Solera's success in the Appraisal Proceeding, would be moot. Objections as to reasonableness of fees, on the other hand, do not go to whether coverage is owed, but to the amount of covered loss, a matter that can be resolved on remand to the Superior Court.

The obligation to pay for a defense is "one of the most important obligations imposed by the policy of insurance and distinguishes liability insurance from most other forms of insurance." 22-136 *Appleman on Insurance Law & Practice Archive*

§136.1 (2d 2011). Because of the centrality of defense coverage to Solera's D&O policies, denial of coverage for defense costs to which it has not consented in advance in the absence of prejudice is unreasonable. Courts strongly disfavor such forfeitures in coverage, especially "absent a showing that the insurer has been prejudiced." 45 Corpus Juris Secundum Insurance §858. When an insured has paid the premiums for a benefit under the policy and the insurer denies that coverage, "the insurance carrier ought to be required to show a sound reason for doing so." *Id.* Exercise of a consent right to deny outright Solera's defense costs—contracted-for benefits at the heart of Solera's insurance policies—under these circumstances would be unreasonable *per se*.

II. IN THE ALTERNATIVE, IF THE CONSENT CLAUSE WERE TO BE READ AS REFERRING TO *PRIOR* CONSENT, UNDER DELAWARE LAW, THE INSURERS MUST SUFFER PREJUDICE FOR THE CONSENT CLAUSE TO FORECLOSE COVERAGE OF DEFENSE COSTS

In the alternative, if the Court regards the Consent Clause as referring to *prior* consent, despite the absence of the word "prior" or any equivalent, then this condition should not be applied to strike coverage unless the Insurers suffered prejudice due to Solera's lack of compliance.

A. Delaware Law Requires Prejudice for Assertion of Notice and Consent Defenses.

Under Delaware law, prejudice to the insurer is required before an insurer may deny coverage based on violation of a notice-of-claim or consent-to-settlement requirement.

Delaware courts have long applied a prejudice requirement to notice clauses in insurance policies. Weighing the purpose of these clauses and recognizing the windfall to insurers that would result if they were strictly enforced, this Court has held that a policyholder's failure to comply with a notice provision does not bar its claim absent an insurer's showing of prejudice. *State Farm Mut. Auto. Ins. Co. v. Johnson*, 320 A.2d 345 (Del. 1974). Recognizing that insurance policies are "adhesion contracts," and not the result of a negotiated bargain between parties, this Court in *Johnson* was concerned about the possibility of forfeiture of coverage as a result of the policyholder's imperfect satisfaction of a notice clause. *Id.* at 347. In light of this aversion to policyholders' facing severe consequence for minor faults, this Court held that the question of prejudice to the insurer does not depend on whether notice was given in a reasonable time. *Id.* at 346-7. In other words, failure to give notice in a reasonable time is not enough to cause complete forfeiture of coverage absent a showing of prejudice to the insurer. *Id.*

Subsequent to *Johnson*'s definitive articulation of the notice-prejudice rule, the Superior Court has repeatedly applied these same principles to consent-to-

settlement clauses. Among the most instructive cases is *Hall v. Allstate Ins. Co.*, where the court held that a policyholder could avoid losing coverage for failure to obtain consent to settlement by showing that no prejudice in fact resulted from the lack of consent. *See* 1985 WL 1137299, at *9 (Del. Super. Ct. Jan. 11, 1985). Paralleling this Court's rationale in *Johnson*, the *Hall* court noted the similarities between consent-to-settlement clauses and notice clauses—namely that the purpose of each is to prevent the insurer from suffering prejudice—and weighed the severe potential consequence (i.e., forfeiture of coverage) if a policyholder did not strictly comply. *Id.* at *8. The court also assessed approaches taken in other states and ultimately agreed with those courts that found forfeiture to be "unduly harsh" when the insurer was not prejudiced by the settlement. *Id.*

Other Delaware decisions reading a prejudice requirement into consent-to-settlement clauses include *U-Haul Co. of Pennsylvania v. Utica Mutual Ins. Co.*, 2013 WL 1726192, at *4 (D. Del. Mar. 28, 2013) (applying Delaware substantive law, holding that an insurer is "not freed from liability on its policy in the absence of a showing that the breach caused the insurer to suffer prejudice" from a settlement for a personal injury claim); *Murdock*, 2018 WL 1129110, at *13 (applying an implied prejudice requirement to a consent-to-settlement clause in a D&O liability policy); *Allstate Ins. Co. v. Fie*, 2006 WL 1520088, at *4 (Del. Super. Ct. Mar. 9, 2006) (holding the same regarding a consent-to-settlement clause in an underinsured

motorist policy); and *E. I. du Pont de Nemours & Co. v. Admiral Ins. Co.*, 1995 WL 654010, at *10 (Del. Super. Ct. Oct. 27, 1995) (reiterating that a breach of a consent-to-settlement clause "does not relieve an insurer of liability under the policy absent a showing of prejudice"); *see also Rhodes v. SilkRoad Equity, LLC*, 2009 WL 1124476, at *7–8 (Del. Ch. Apr. 15, 2009) (applying an implied prejudice standard in a consent-to-settlement clause in an indemnification agreement).

In holding that breaching a consent clause does not justify forfeiture of coverage, courts frequently focus on the fact that the "main purpose" of such provisions is to protect the insurer from prejudice. *See Murdock*, 2018 WL 1129110, at *13; *Fie*, 2006 WL 1520088, at *3–4. Other decisions characterize the prejudice rule as an established principle of Delaware law. *See, e.g.*, *U-Haul Co. of Pennsylvania*, 2013 WL 1726192, at *4; *E. I. du Pont de Nemours*, 1995 WL 654010, at *10.

The Insurers' reliance on *Abrams v. RSUI Indemnity Company* is misplaced. In *Abrams*, a New York federal court sitting in diversity sought to apply Delaware law to interpret a "no voluntary payments" clause dissimilar to the one in Solera's policy. The *Abrams* court mainly relied on decisions by Delaware courts which were themselves obliged to apply ***the substantive law of other states*** and were not in fact a reflection of Delaware law. *Abrams v. RSUI Indemnity Co.*, 272 F.Supp.3d 636, 642 (S.D.N.Y. 2017) (citing *In re Viking Pump, Inc.*, 148 A.3d 633 (Del. 2016)

(applying New York law); *Liggett Grp. Inc. v. Affiliated FM Ins. Co.*, 2001 WL 1456818 (Del. Super. Ct. Sept. 12, 2001) (applying North Carolina law); *Mine Safety Appliances Co. v. AIU Ins. Co.*, 2014 WL 605490 (Del. Super. Ct. Jan. 21, 2014) (applying Pennsylvania law).

The single cited case in *Abrams* applying Delaware law, *Home Ins. Co. v. American Ins. Grp.*, is distinguishable because the policy in that case imposed a duty to defend on the insurer rather than an obligation to indemnify defense costs. *Home Ins. Co. v. Am. Ins. Grp.*, 2003 WL 22683008, at *1, 4 (Del. Super. Ct. Oct. 30, 2003). The *Home Ins.* court appears to have regarded the policyholder's thwarting of the insurer's opportunity to conduct the defense to be inherently prejudicial. No such consideration applies here, because the Primary Policy states that "[i]t shall be the duty of the Insured and not the duty of the Insurer to defend any Claim." JA160.

B. Delaware's Prejudice Requirement Applies Here.

Delaware's prejudice requirement should similarly apply to the Consent Clause given the similar purpose underpinning this Clause and the notice and settlement consent provisions discussed above. (Indeed, in the Primary Policy, the defense consent and settlement consent provisions are tightly bundled in a single sentence. JA160.) As the Superior Court ruling recognized, consent-to-defense provisions, like consent-to-settlement and notice provisions, serve the purpose of providing an insurer with an opportunity to participate in the policyholder's

litigation so as to potentially help avert an adverse outcome. *Solera*, 213 A.3d at 1259. Forfeiture of the policyholder's coverage is as equally disproportionate a remedy for deprivation of that opportunity in the consent-to-defense context as it is with respect to notice and consent to settlement—and thus is equally unjustified. *See Hall v. Allstate Ins. Co.*, 1985 WL 1137299, at *8 (Del. Super. Ct. Jan. 11, 1985) (discussing the "unduly harsh" result of forfeiture of coverage "where the insurer suffers no prejudice").

The Insurers urge the draconian result that Solera should forfeit defense cost coverage due merely to lack of their prior consent. Forfeiture is strongly disfavored in insurance law, as the U.S. Supreme Court long ago emphasized. "[Forfeitures] are often the means of great oppression and injustice. And, where adequate compensation can be made, the law in many cases, and equity in all cases, discharges the forfeiture, upon such compensation being made." *Knickerbocker Life Ins. Co. v. Norton*, 96 U.S. 234, 242 (1877) (holding that "the courts should be liberal in construing the transaction [i.e., life insurance] in favor of avoiding a forfeiture") (cited with approval in *Clements v. Castle Mtg. Serv. Co.* 382 A.2d 1367, 1371 (Del. Ch. 1977)); *see also Milford Power Co. v. PDC Milford Power, LLC*, 866 A.2d 738, 762 & n.62 (Del. Super. 2004) ("Delaware law does not favor interpretations that result in forfeitures") (citations omitted); *Aetna Life Ins. Co. v. Moyer*, 113 F.2d 974, 979 (3d Cir. 1940) ("The law does not look with favor upon an insurer's own

forfeiture of its contract" (citing *McMaster v. New York Life Ins. Co.*, 183 U.S. 25, 26 (1901)) and "a court ordinarily inclines against enforcing such a forfeiture" (citing *Farmers' & Mechanics' Nat. Bank v. Dearing*, 91 U.S. 29, 35 (1875))). *See also* 2 *Couch on Ins*. §22:34 ("[W]hen the strict enforcement of a provision of a policy will result in unreasonable and unjust forfeitures or an absurd result, the courts will refuse to enforce the strict meaning of the language of the policy.") . *A fortiori*, forfeiture should be avoided with respect to coverage for defense costs, which, as noted above, is "one of the most important obligations imposed by the policy of insurance and distinguishes liability insurance from most other forms of insurance." 22-136 *Appleman on Insurance Law & Practice* Archive §136.1 (2d 2011).

While Insurers attempt to justify their rule as forfeiture of a mere portion of defense costs, i.e., the portion incurred *before* consent was sought, *see* ACE Br. at 41-2, this rationalization fails to rebut the Delaware courts' rationale for the prejudice requirement. In establishing and enforcing the notice-prejudice standard in Delaware, this Court expressed concern that strict compliance with the notice provision would result in "a loss or forfeiture with respect to a risk which was undeniably within the policy's coverage," *State Farm Mut. Auto. Ins. Co. v. Johnson*, 320 A.2d 345, 347 (Del. 1974), and sought to avoid "deny[ing] the insured the very thing paid for." *Id.* (quoting *Cooper v. Gov't Emp. Ins. Co.*, 51 N.J. 86, 94 (1968)). Denial of even a portion of covered defense costs based on lack of consent is still

forfeiture of "the very thing paid for," and therefore to be avoided absent prejudice to the insurer. Moreover, as a practical matter in this case, application of Insurers' proposed rule is tantamount to complete forfeiture of defense costs, as the Appraisal Proceeding had already been nearly fully litigated (to a successful result) when Solera sought coverage.

Applying the same prejudice standard to consent to defense costs as for consent to settlement is also consistent with the wording of the Primary Policy here. Both consent requirements appear not only in the same Section V(B), but in fact in the same ***sentence***. "No insured may incur any Defense Expenses in connection with any Claim . . . or settle any Claim without the Insurer's consent, such consent not to be unreasonably delayed or withheld." JA160. That these consent requirements are conjoined in the Primary Policy not only indicates their close relationship and similar purpose, it urges congruent interpretation. *See* 2 *Couch on Ins*. §22:42 ("[I]t is permissible to determine [a clause's] meaning from those which immediately precede and follow it.").

Insurers cannot dispute that in order to deny coverage based on a failure to obtain consent to *settlement* as required in that sentence, they would need to have suffered some prejudice as a result, because as set forth in Section II.A *supra*, it is settled Delaware law that policyholders should not be denied coverage for their failure to obtain consent to settlement in the absence of prejudice to the insurer. *See*

Hall, 1985 WL 1137299, *9; *Murdock*, 2018 WL 1129110, at *13. Insurers' proffered interpretation, then, is that the consent requirement for the defense cost aspect of that sentence should be subject to a different standard (an absolute bar for breach) than for the settlement aspect (where Delaware courts have found an implied prejudice standard) ***within that very same sentence***. That harsh distinction is not supported by the text of the provision, and further is at odds with the rule that limitations or restrictions on coverage must be clearly stated. *See Murdock*, 2019 WL 2005750, at *9.

Accordingly, a purported breach of the requirement for the Insurers' consent to defense costs should be interpreted, like the notice and consent to settlement provisions, as requiring prejudice to the Insurers before defense coverage may be forfeited.

III. IF THE CONSENT CLAUSE WERE TO BE READ AS REFERRING TO *PRIOR* CONSENT, THEN THE POLICY'S EXPRESS *MATERIAL* PREJUDICE REQUIREMENT WOULD BE THE ONLY BASIS FOR DENYING COVERAGE OF DEFENSE COSTS

Even if the Court were to deem the Consent Clause to require prior consent, then based on the wording of the Notice Clause, Solera is entitled to require Insurers to demonstrate *material* prejudice to justify its denial of defense coverage.

This interpretation follows from the express requirement in the Notice Clause that Insurers show material prejudice in order for a more severe lapse in policyholder

communication—late notice—to void coverage.[4] The Notice Clause states that "the Insurer shall not be entitled to deny coverage solely based on . . . untimely notice unless the Insurer can demonstrate its interests were materially prejudiced by reason of such untimely notice." JA161. No less of a showing should be allowed to justify Insurers' denial of an essential part of that coverage—defense cost coverage—in the event of an untimely request for such coverage.

In other words, in the case where an insurer has not established that it suffered material prejudice, if a policyholder's tardy communication with its insurer as to the very existence of a claim is not a sufficiently material breach to excuse any portion of the insurer's coverage obligation, then the policyholder's tardy communication as to the conduct of its defense should not be a sufficiently material breach to excuse the insurer from paying defense cost coverage. This follows both logically and from the principle of insurance policy interpretation that "where a repugnancy exists between different clauses of an insurance policy, the whole should, if possible, be construed so as to conform to the evident consistent purpose of the parties." 2 *Couch on Ins.* §22:44.

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[4] The Insurer's express obligation to demonstrate material prejudice in order to deny a claim on grounds of late notice is a distinctive feature of the Primary Policy, and not a universal feature of D&O policies. *See, e.g.*, *HLTH Corp. v. Clarendon Nat'l Ins. Co.*, 2009 WL 2849779 (Del. Super. Ct. Aug. 31, 2009) (discussing a notice provision lacking a material prejudice clause).

The plain purpose of the Notice Clause is to prevent a draconian result—forfeiture of coverage due only to the insurer's delayed awareness of the matter, without a consequence materially harmful to the insurer. In particular, the distinctive wording of the Notice Clause would lead any reasonable policyholder to expect that untimely communication to its insurer would not automatically forfeit defense coverage. This is because the giving of notice under a *liability* insurance policy is implicitly a request for defense coverage. The policyholder's need to undertake a defense commences at the start of the third party claim against it, and is a feature of every claim against a policyholder.[5] Where an insurer has an obligation to reimburse defense costs, the policyholder's notice of claim also puts the insurer on notice of its defense cost obligation.

Accordingly, the Primary Policy's excuse of late *notice* absent material prejudice (i.e., pursuant to the Notice Clause) compels the excuse of a late *consent request* for defense costs absent "material prejudice."

This principle is self-evident if applied during the period while a claim is being defended, or the claim is for non-monetary relief only, times when defense

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[5] In Solera's case, its giving notice in 2015 of its shareholder litigation implied both that defense costs would be incurred immediately—i.e., in connection with that 2015 action—and that they could be incurred subsequently—i.e., when the Appraisal Proceeding arose in 2016—because that latter proceeding constituted one and the same claim under the Primary Policy as the 2015 shareholder litigation. *See* JA162.

costs are the sole component of coverage. In such circumstances, to treat a policyholder's failure to satisfy the Consent Clause as an absolute bar to coverage would effectively nullify the Notice Clause's material prejudice standard. Under Delaware law, "'a contract should be interpreted in such a way as to not render any of its provisions illusory or meaningless.'" *Osborn v. Kemp*, 991 A.2d 1153, 1159 n.17 (Del. 2010) (quoting *Sonitrol Holding Co. v. Marceau Investissements*, 607 A.2d 1177, 1183 (Del. 1992) (rejecting the interpretation of a contractual clause where it would be "inconsistent with the parties' agreement," and an alternative interpretation would lead to an "illogical" result)); *Seabreak Homeowners Ass'n, Inc. v. Gresser*, 517 A.2d 263, 269 (Del. Ch. 1986), aff'd, 538 A.2d 1113 (Del. 1988) (holding that clause should not be interpreted to give one party a power under the agreement that a separate provision expressly restricts); *Murdock*, 2018 WL 1129110, at *12 (applying this principle to interpretation of an insurance policy). Moreover, any interpretation of an insurance clause that would nullify an express benefit to the policyholder should be rejected. *See, e.g.*, *Qwest Commc'ns Int'l Inc. v. Nat'l Union Fire Ins. Co. of Pittsburgh, PA*, 821 A.2d 323, 328 (Del. Ch. 2002) (rejecting insurer's interpretation of a policy that would render meaningless policyholder's right to reject the insurer's choice of alternative dispute resolution).

CONCLUSION

This Court should affirm the Superior Court's holding that failure to obtain consent to defense costs does not automatically bar coverage and, if necessary, remand for proceedings to determine whether the Insurers suffered prejudice arising from Appellee's request for consent to defense costs after they were incurred.

Dated: February 7, 2020

Respectfully submitted,

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IN THE SUPREME COURT OF THE STATE OF DELAWARE

IN RE SOLERA INSURANCE	:	No. 413,2019
COVERAGE APPEALS	:	No. 418,2019
	:	
	:	Court Below-Superior Court
	:	of the State of Delaware
	:	C.A. No. N18C-08-315 AML CCLD

[PROPOSED] ORDER GRANTING UNITED POLICYHOLDERS' MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE

Upon consideration of United Policyholders' Motion for Leave to File Brief as Amicus Curiae (the "Motion"), and any response thereto,

IT IS HEREBY ORDERED this ___ day of _____2020 that the Motion is GRANTED.

_____
Justice

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CERTIFICATE OF COMPLIANCE WITH TYPEFACE REQUIREMENT AND TYPE-VOLUME LIMITATION

1. This motion complies with the typeface requirement of Rule 13(a)(i) because it has been prepared in Times New Roman 14-point typeface using Microsoft Word 2016.

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Dated: February 7, 2020

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CERTIFICATE OF SERVICE

I, Benjamin P. Chapple, hereby certify that on February 3, 2020, I caused true and correct copies of (i) ***United Policyholders' Motion for Leave to File Brief as Amicus Curiae* (with Proposed Order)**, and (ii) the ***Brief of Amicus Curiae United Policyholders in Support of Appellee and Affirmance*** to be served on the following counsel of record via e-mail (as File & Serve*Xpress* was offline due to technical issues). I further certify that on February 7, 2020, I caused true and correct copies of the same documents to be served on the below listed counsel of record via File & Serve*Xpress*:

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