IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

ARCH INSURANCE COMPANY, LIBERTY MUTUAL INSURANCE COMPANY, CONTINENTAL CASUALTY INSURANCE COMPANY, NAVIGATORS INSURANCE COMPANY, RSUI INDEMNITY COMPANY, and BERKLEY INSURANCE COMPANY,	)	
Plaintiffs,	)	
v.	)	C.A. No. N16C-01-104 EMD CCLD
DAVID H. MURDOCK, DOLE FOOD COMPANY, INC., and DFC HOLDINGS, LLC,	)	
Defendants.	)	

MEMORANDUM OPINION ON ALLOCATION

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DAVIS, J.

I. INTRODUCTION

This breach of contract case is assigned to the Complex Commercial Litigation Division of this Court. Plaintiffs Arch Insurance Company, Liberty Mutual Insurance Company, Continental Casualty Insurance Company, Navigators Insurance Company ("Navigators"), RSUI Indemnity Company ("RSUI"), and Berkley Insurance Company are six excess insurance carriers. The insurance carriers filed a declaratory judgment against Defendants David H. Murdock, Dole Food Company, Inc. ("Dole"), and DFC Holdings, LLC ("DFC") (collectively, the "Defendants").[1] The insurance carriers seek a declaratory judgment concerning indemnification relating to two settlements due to Defendants' alleged breaches of the applicable insurance policies (the "Policies"). The insurance carriers also request declaratory judgment concerning rights of subrogation under the Policies.

On August 22, 2018, Navigators and RSUI (collectively, the "Insurers") filed their second motion for summary judgment (the "Insurers' Motion"). In addition, on August 22, 2018, the Defendants each filed motions for summary judgment (collectively the "Defendants' Motions"). On December 7, 2018 and January 22, 2019, the Court held hearings (the "Hearings") on the Insurers' Motion and the Defendants' Motion (collectively, the "Motions"). After the Hearings, the Court took the matter under advisement.

The Court issued a partial decision on the Motions on May 7, 2019 (the "Initial Decision").[2] On December 23, 2019, the Court issued a memorandum opinion on subrogation issues. This is the Court's memorandum opinion on the issue of which theory of allocation will

[1] To the extent Defendants are also insureds under the Policies, the Court will refer to those Defendants as "Insureds." Dole executed the Policies with the Insurers. At times relevant to this civil action, Mr. Murdock and C. Michael Carter were directors and officers of Dole. The Court is unaware of any facts that demonstrate that DFC Holdings is an insured under the Policies.

[2] The Court incorporates by reference the determinations and ruling made in the Initial Decision. Any capitalized term not defined in this memorandum opinion shall have the definition ascribed in the Initial Decision.

apply to the Policies. For the reasons set forth more fully below, the Court holds that the "Larger Settlement Rule" applies given the facts and language of the Policies.

II. RELEVANT FACTS

A. PARTIES

The Insurers provided part of Dole's overall tower of Directors' and Officers' Liability insurance coverage.[3] The Policies are in excess of, and follow form to, Axis Insurance Company's Primary Policy (the "Primary Policy") and two, non-party, excess carriers: National Union Fire Insurance Company and Federal Insurance Company.[4] The Primary policy provides $15,000,000 in coverage.[5] Navigators' and RSUI's policies were the seventh and eighth "layers" in the tower, and each provided $10,000,000 in coverage excess of a $500,000 retention (to be paid by Dole) and $65,000,000 and $75,000,000 in underlying insurance, respectively.[6]

Navigators is a New York corporation with its principal place of business in New York.[7] RSUI is a New Hampshire corporation with its principal place of business in Georgia.[8] Dole is a Delaware corporation.[9] Mr. Murdock owned 40% of Dole's stock and was a director and officer of Dole.[10] C. Michael Carter was Dole's president and CEO.[11] DFC is a Delaware LLC that acts as an acquisition vehicle.[12]

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[3] Plaintiffs' Amended Complaint for Declaratory Relief ("Compl.") at ¶ 21.
[4] *See Arch Ins. Co. v. Murdock*, 2016 WL 7414218, at *1 (Del. Super. Dec. 21, 2016) (setting out the Insurers' range of coverage).
[5] Stolle Aff. at ¶ 4.
[6] *Id.* at ¶ 5.
[7] Compl. at ¶ 11.
[8] *Id.* at ¶ 12.
[9] *Id.* at ¶ 16.
[10] *Id.* at ¶ 14.
[11] *Id.* at ¶ 15.
[12] *Id.* at ¶ 17. Mr. Carter was initially named as a defendant but he was subsequently dismissed him from this civil action.

B. Relevant Policy Provision

Dole executed the Policies with the Insurers. The Policies are claims-based insurance for the directors, officers, and corporate liability. Section 1 of the Primary Policy, as amended by Endorsement 3, lists the situations in which the Insurers are obligated to provide coverage to insureds.[13] In the Policies, the term "Insureds" refers to the "Policyholder" and "Insured Individuals."[14] The term "Policyholder" refers to Dole and its subsidiaries and "Insured Individuals" include the directors and officers of Dole.[15] Section 1 of the Primary Policy provides:

> A. The Insurer shall pay on behalf of the Insured Individual all Loss which is not indemnified by the Policyholder arising from any Claim for a Wrongful Act first made against or Insured Inquiry first received by such Insured Individual during the Policy Period or the Extended Reporting Period, if applicable.
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> B. The Insurer shall pay on behalf of the Policyholder all Loss for which the Policyholder grants indemnification to any Insured Individual, as permitted or required by law, arising from any Claim for a Wrongful Act first made against or Insured Inquiry first received by such Insured Individual during the Policy Period or the Extended Reporting Period, if applicable.
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> C. The Insurer shall pay on behalf of the Policyholder all Loss arising from any Securities Claim first made against the Policyholder during the Policy Period or the Extended Reporting Period, if applicable, for a Wrongful Act.[16]

The Primary Policy goes on to discuss "Loss" which means:

> "Loss means all monetary amounts which the Insureds become legally obligated to pay on account of a Claim, including damages, ***settlement amounts*** and judgments, . . . , costs and fees awarded pursuant to judgments, Defense Costs . . .
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> Loss does not include: ...
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> 4. any amount representing the increase in the consideration paid (or proposed to be paid) ***by the Policyholder*** in connection with ***its*** purchase of any securities or assets;"

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[13] Stolle Aff., Ex. 1, End. 3.
[14] *Id.*
[15] *Id.*
[16] *Id.*

The Court has previously found that the Settlement and the San Antonio Settlement payments constitute "Loss" under the Policies. The Settlement is a "Loss" because the settlement payment was clearly a "Claim, including . . . settlement amounts." The Settlement does not fall within the exception for being an "increase in the consideration paid" because the settlement was paid by Mr. Murdock, not the Policyholder. Specifically, the "Policyholder" is defined as "the Parent Company and its Subsidiaries." The "Parent Company" is defined as "the company designated in Item 1 in the Declarations," which is Dole. Also, the Settlement was not paid in connection with Dole's "purchase of any securities or assets." The San Antonio Settlement was paid in part by Mr. Murdock and in part by Dole. Still, this settlement is a "Loss" because Dole did not acquire shares in connection with the merger.

Section VIII.A of the Primary Policy (the "Allocation Provision") addresses allocation of insurance coverage between Insureds and non-Insureds. The Allocation Provision provides:

> If in any Claim, the Insureds who are afforded coverage for such Claim incur Loss jointly with others (including other Insureds) who are not afforded coverage for such Claim, or incur an amount consisting of both Loss covered by this Policy and loss not covered by this Policy because such Claim includes both covered and uncovered matters, then the Insureds and the Insurer agree to use their best efforts to determine a fair and proper allocation of covered Loss. The Insurer's obligation shall relate only to those sums allocated to matters and Insureds which are afforded coverage. In making such determination, the parties shall take into account the relative legal and financial exposures of the Insureds in connection with the defense and/or settlement of the Claim.[17]

The factual record is bereft of any fact that show that the Insurers and/or the Insureds engaged in any efforts to determine any allocation of covered Loss. Moreover, the parties do not discuss any allocation efforts undertaken by anyone in the various motions for summary judgment.

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[17] *Id.*

C. PROCEDURAL HISTORY

The Insurers filed a complaint on January 13, 2016. The parties stipulated to dismiss the Insurers' claims against DFC, because DFC, is not an insured under any of the policies."[18] The Insurers filed an Amended Complaint for Declaratory Judgment (the "Amended Complaint") on April 8, 2016. The Amended Complaint has two counts. In Count I, Insurers seek a declaratory judgment that the Insurers have no obligation to pay for the Settlement under the terms of the Policies. The Insurers disclaim coverage for the Settlement because, among other reasons, (i) the Policies do not cover Dole, (ii) California Insurance Code Section 533 bars coverage, (iii) the Settlement does not constitute "Loss" covered under the Policies, (iv) the Defendants were not acting in an insured capacity in the circumstances under which the Defendants claim coverage, (v) the Employed Attorney Exclusion in Primary Policy Section IV, as amended by Endorsement No. 5 bars coverage, (vi) applicable law and public policy bar coverage, (vii) Primary Policy Section IV.A.6, as amended by Endorsement No. 3 bars coverage, (viii) Section VIII as amended by Endorsement No. 3 bars coverage, (ix) the Defendants breached the Written Consent Provision and the Cooperation Clause in Primary Policy Section V.D, as amended by Endorsement No. 3, and (x) excess coverage is not available until the Defendants have exhausted their primary coverage. In Count II, Insurers seek declaratory judgment that the Insurers are subrogated to any rights the Defendants have to recover payments from the Mr. Carter, Mr. Murdock, and DFC.

On April 28, 2016, the Defendants filed a Motion to Dismiss.[19] Then, on December 21, 2016, the Court issued the MTD Decision, partially granting the Motion to Dismiss.[20] As set out

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[18] MTD Decision, at *2 (hereafter defined).
[19] *Id.* at *2.
[20] *Id.* at *8.

more fully in the MTD Decision, the Court found that: (i) the Insurers have sufficiently plead a claim for declaratory judgment in Count I, (ii) Primary Policy Section IV.A.6 does not apply to this case, and (iii) the Insurers cannot subrogate claims against the Defendants.[21]

The Defendants filed their amended answer, affirmative defenses, and counterclaims (the "Counterclaims") on April 18, 2017. The Defendants assert five counterclaims: (i) Counterclaim 1—the Insurers breached the Policies by refusing to pay for the Settlement; (ii) Counterclaim 2—the Insurers breached the Policies by refusing to pay for the San Antonio Settlement; (iii) Counterclaim 3—the Insurers breached the implied covenant of good faith and fair dealing in denying coverage for the Settlement and the San Antonio Settlement;[22] (iv) Counterclaim 4—the Insurers committed fraud because the Insurers never had any intention of fulfilling its obligations under the Policies; and (v) Counterclaim 5—fraud in the inducement. In addition to compensatory damages, the Defendants seek punitive damages.

All of the insurance carriers answered the Counterclaims. The insurance carriers assert many of the reasons for disclaiming coverage in the Amended Complaint as affirmative defenses in the insurance carriers' answers to the Counterclaims.

On March 1, 2018, the Court partially granted insurance carriers Arch Insurance Company's, Liberty Mutual Insurance Company's, Continental Casualty Insurance Company's, Navigators', RSUI's, and Berkley Insurance Company's First MSJ.[23] In the First MSJ, the Court held that: (i) the Defendants are collaterally estopped from relitigating the Memorandum Opinion's factual determinations, including those of fraud and disloyalty, to the extent those factual determinations are relevant to this civil action, (ii) Delaware law applies to the Policies,

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[21] *Id.* at *4-8.
[22] On May 1, 2019, the Court issued a decision granting summary judgment in favor of the Insureds on the Defendants' Counterclaim 3. D.I. No. 397.
[23] *Arch Ins. Co. v. Murdock*, 2018 WL 1129110 (Del. Super. Mar. 1, 2018).

(iii) Delaware law and public policy do not excuse the Insurers from indemnifying the Defendants for breach of loyalty based upon fraud, and (iv) Counterclaim 5 was dismissed with prejudice for failing to state a claim upon which relief can be granted. [24]

Thereafter, on August 22, 2018, Insurers filed the Insurers' Motion. Then, on September 19, 2018, Defendants filed the Defendants' Opposition. Insurers responded with the Insurers' Reply on October 10, 2018. In addition, on August 22, 2018, Defendants filed the Defendants' Motions. Next, on September 19, 2018, Insurers submitted their Insurers' Opposition. Finally, on October 10, 2018, Defendants responded with Defendants' Reply.

The Court issued the Initial Decision but left open issues relating to subrogation, allocation and exhaustion. The Court heard further argument on these issues on August 27, 2019. This is a decision on the issues relating to the Allocation Provision.

The Court holds that, under the facts and circumstances here, the Larger Settlement Rule will be applied with respect to allocation under the Policies.

III. STANDARD OF REVIEW

The standard of review on a motion for summary judgment is well-settled. The Court's principal function when considering a motion for summary judgment is to examine the record to determine whether genuine issues of material fact exist, "but not to decide such issues."[25] Summary judgment will be granted if, after viewing the record in a light most favorable to the nonmoving party, no genuine issues of material fact exist and the moving party is entitled to judgment as a matter of law.[26] If, however, the record reveals that material facts are in dispute,

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[24] The Court issue an Order clarifying that it made a mistake in its earlier opinion and that the Court should have dismissed Counterclaim 4 when it dismissed Counterclaim 4. *See* D.I. No. 449.
[25] *Merrill v. Crothall-American Inc.*, 606 A.2d 96, 99-100 (Del. 1992) (internal citations omitted); *Oliver B. Cannon & Sons, Inc. v. Dorr-Oliver, Inc.*, 312 A.2d 322, 325 (Del. Super. 1973).
[26] *Id.*

or if the factual record has not been developed thoroughly enough to allow the Court to apply the law to the factual record, then summary judgment will not be granted.[27] The moving party bears the initial burden of demonstrating that the undisputed facts support his claims or defenses.[28] If the motion is properly supported, then the burden shifts to the non-moving party to demonstrate that there are material issues of fact for the resolution by the ultimate fact-finder.[29]

Where, as here, the parties have filed cross motions for summary judgment and have not argued that there are genuine issues of material fact, "the Court shall deem the motions to be the equivalent of a stipulation for decision on the merits based on the record submitted with the motions."[30] Neither party's motion will be granted unless no genuine issue of material fact exists and one of the parties is entitled to judgment as a matter of law.[31]

IV. PARTIES' CONTENTIONS

A. DEFENDANTS' CONTENTION ON ALLOCATION

In the Defendants' Motion, Defendants—specifically, Mr. Murdock—contended that summary judgment should be granted against the Insurers on their defense that any indemnifiable Loss from the Settlement or the San Antonio Settlement should be allocated between covered and uncovered Loss. Defendants argue that the Court should adopt the Larger Settlement Rule when determining whether any indemnifiable Loss suffered in a settlement should be allocated between covered and uncovered loss. Defendants claim that under the Larger Settlement Rule the entire amounts of the Settlement and the San Antonio Settlement are

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[27] *Ebersole v. Lowengrub*, 180 A.2d 467, 470 (Del. 1962); *see also Cook v. City of Harrington*, 1990 WL 35244 at *3 (Del. Super. Feb. 22, 1990) (citing *Ebersole*, 180 A.2d at 467) ("Summary judgment will not be granted under any circumstances when the record indicates . . . that it is desirable to inquire more thoroughly into the facts in order to clarify the application of law to the circumstances.").
[28] *Moore v. Sizemore*, 405 A.2d 679, 680 (Del. 1970) (citing *Ebersole*, 180 A.2d at 470).
[29] *See Brzoska v. Olsen*, 668 A.2d 1355, 1364 (Del. 1995).
[30] Super. Ct. Civ. R. 56(h).
[31] *E.I. DuPont de Nemours and Co. v. Medtronic Vascular, Inc.*, 2013 WL 261415, at *10 (Del. Super. Jan. 18, 2013).

recoverable unless the Insurers can establish that some uncovered liability increased the amount of these settlements.

B. INSURERS' CONTENTION ON ALLOCATION

The Insureds counter, contending that it is Defendants' burden to prove allocation between covered and uncovered Loss related to the Settlement and the San Antonio Settlement. The Insurers argue that the Allocation Provision is drafted in a manner that is specific enough that the Larger Settlement Rule does not apply. Instead, the language of the Allocation Provision explicitly requires an allocation between covered and uncovered Loss. Moreover, the Insurers claim that the circumstances surrounding the Settlement and the San Antonio Settlement requires Defendants carry the burden of proving whether a Loss related to the Settlement and the San Antonio Settlement are covered or uncovered losses.

V. DISCUSSION

Insurance contract interpretation is a determination of law.[32] Insurance policies "are construed as a whole, to give effect to the parties' intentions."[33] In other words, the Court is to interpret the insurance policy through a reading of all of the relevant provisions of the contract as a whole, "and not on any single passage in isolation."[34] Moreover, an interpretation that gives effect to all the terms of an insurance policy is preferable to any interpretation that would result in a conclusion that some terms are uselessly repetitive.[35] The Court is also to interpret an insurance policy in a manner that does not render any provisions "illusory or meaningless."[36]

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[32] *CNH Am., LLC v. Am. Cas. Co. of Reading, Pennsylvania*, 2014 WL 626030, at *4 (Del. Super. Jan. 6, 2014).
[33] *AT&T Corp. v. Faraday Capital Ltd.*, 918 A.2d 1104, 1108 (Del. 2007); *see also AIU Insurance Co. v. Superior Court*, 729 P.2d 1253, 1264 (Cal. 1990).
[34] *O'Brien v. Progressive Northern Ins.*, 785 A.2d 281, 287 (Del. 2001); *see also Safeco Ins. Co. of America v. Robert S.*, 28 P.3d 889, 894 (Cal. 2001) ("When reasonably practical, contracts are to be interpreted in a manner that makes them reasonable and capable of being carried in effect[.]").
[35] *O'Brien*, 785 A.2d at 287; *see also Safeco Ins. Co. of America*, 28 P.3d at 894.
[36] *O'Brien*, 785 A.2d at 287 (quoting from *Sonitrol Holding Co. v. Marceau Investissements*, 607 A.2d 1177, 1183 (Del. Super. 1992)). *See also Safeco Ins. Co. of America*, 28 P.3d at 894.

Where the language of an insurance policy is "clear and unambiguous, the parties' intent is ascertained by giving the language its ordinary and usual meaning."[37] Ambiguous insurance policy language is construed in the insured's favor—*i.e.*, under the doctrine of *contra proferentem*, the language of an insurance policy must be construed most strongly against the insurance company that drafted the policy.[38] An insurance policy is ambiguous when the provisions at issue "are reasonably or fairly susceptible of different interpretations or may have two or more different meanings."[39] An insurance policy is not ambiguous merely because the parties do not agree on the proper construction.[40]

Coverage language is interpreted broadly to protect the insured's objectively reasonable expectations.[41] Exclusionary clauses, on the other hand, are "accorded a strict and narrow construction."[42] Even so, courts will give effect to exclusionary language where it is found to be "specific," "clear," "plain," "conspicuous" and "not contrary to public policy."[43] The Court also recognizes that case law exists that permits judicial application of the reasonable expectation doctrine to fulfill an insured's expectations even where those expectations contravene the unambiguous, plain meaning of exclusionary

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[37] *Faraday Capital Ltd.*, 918 A.2d at 1108. *See also AIU Insurance Co.*, 729 P.2d at 1264–65.
[38] *O'Brien*, 785 A.2d at 288; *see also Weiner v. Selective Way Ins. Co.*, 793 A.2d 434, 440 (Del. Super. 2002); *AIU Insurance Co.*, 729 P.2d at 1264–65.
[39] *Weiner*, 793 A.2d at 440; *see also Waller v. Truck Ins. Exchange, Inc.*, 900 P.2d 619, 627 (Cal. 1995).
[40] *O'Brien*, 785 A.2d at 288; *see also Waller*, 900 P.2d at 627 ("Courts will not strain to create an ambiguity where none exists.").
[41] *AT&T Corp. v. Clarendon Am. Ins. Co.*, 2006 WL 1382268, at *9 (Del. Super. Apr. 13, 2006), *rev'd in part on other grounds, AT&T Corp. v. Faraday Capital Ltd.*, 918 A.2d 1104 (Del. 2007). *See also Safeco Ins. Co. of America*, 28 P.3d at 893.
[42] *AT&T Corp.*, 2006 WL 1382268, at *9; *see also E.M.M.I. Inc. v. Zurich American Ins. Co.*, 84 P.3d 385, 389 (Cal. 2004).
[43] *Id.*; *see also MacKinnon v. Truck Ins. Exchange*, 73 P.3d 1205, 1213 (Cal. 2003).

clauses.[44] Further, in Delaware, an insurer bears the burden of proving that a loss or claim is excluded under the policy.[45]

The Supreme Court has recently addressed coverage issues and insurance policy interpretation in *In re Verizon Insurance Coverage Appeals*.[46] In that case, the Supreme Court reemphasized that insurance policies are to be interpreted by Delaware contract law.[47] Specifically, the Supreme Court provided that an insurance policy is ambiguous only when the provision in controversy is reasonably or fairly susceptible to different interpretations or may have two or more different meanings.[48] Moreover, absent ambiguity, a court should not destroy or twist policy language under the guise of construing the language.[49]

The Court does not find the Allocation Provision to be ambiguous. The Court also does not find that the Allocation Provision sets out a specific formula to be applied in the event that parties fail to agree on allocation issues. In fact, the Allocation Provision seems mostly unhelpful under the facts presented here. The Allocation Provision speaks only as to a situation where the "Insureds" and "Insurer" work together with "best efforts" to arrive at a fair and proper allocation of covered Loss. The language relied upon by the Insurers continues to address the situation where the parties work together to arrive at a "fair and proper allocation," stating that "the parties shall take into

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[44] *Id.* at *9, n.123 (citing and reviewing cases that utilized the "reasonable expectation doctrine").
[45] *See Nat'l Union Fire Ins. Co. Pittsburgh, P.A. v. Rhone-Poulenc Basic Chemicals Co.*, 1992 WL 22690 (Del. Super. Jan. 16, 1992), *aff'd sub nom, Rhone-Poulenc Basic Chemicals Co. v. Am. Motorists Ins. Co.*, 616 A.2d 1192 (Del. 1992).
[46] __ A.3d __, 2019 WL 5616263 (Del. Oct. 31, 2019).
[47] *Id.* at *4-5
[48] *Id.* at *3, n.21.
[49] *Id.* at *5, n.34.

account the relative legal and financial exposures of the Insureds in connection with the defense and/or settlement of the Claim."

The Allocation Provision does not address the situation where the parties fail to agree. In other words, the Allocation Provision does not provide "In the event the parties cannot come to an agreement on allocation then…" Moreover, the record provides no facts that support that either party requested an allocation or, if an allocation was requested, one party failed to use best efforts to try and determine a fair and proper allocation.

The Court believes that the situation here (where the parties fail to agree to an allocation and the particular language of the Allocation Provision) requires the application of the Larger Settlement Rule. The Larger Settlement Rule provides that "allocation is appropriate only if, and only to the extent that, the defense or settlement costs of the litigation were, by virtue of the wrongful acts of the uninsured parties, higher than they would have been had only the insured parties been defended or settled." Looking to applicable policies and state law, the United States Court of Appeals, Ninth Circuit and the United States Court of Appeals, Seventh Circuit have adopted and applied the Larger Settlement Rule.[50]

The decision to apply the Larger Settlement Rule is to protect the economic expectations of the insured—*i.e.*, prevent the deprivation of insurance coverage that was sought and bought. The Larger Settlement Rule applies in those situations where (i) the settlement resolves, at least in part, insured claims; (ii) the parties cannot agree as to the

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[50] *See, e.g., Safeway Stores, Inc. v. Nat'l Union Fire Ins. Co. of Pittsburgh, PA*, 64 F.3d 1282, 1287 (9th Cir. 1995); *Nordstrom, Inc. v. Chubb & Sons, Inc.*, 54 F.3d 1424, 1433 (9th Cir. 1995); *Caterpillar, Inc. v. Great Am. Ins. Co.*, 62 F.3d 1424 (7th Cir. 1995); *Harbor Ins. Co. v. Continental Bank Corp.*, 922 F.2d 357, 368 (7th Cir. 1990).

allocation of covered and uncovered claims; and (iii) the allocation provision does not provide for a specific allocation method (*e.g., pro rata* or alike).

Delaware courts have not addressed application of the Larger Settlement Rule. Moreover, Delaware courts have not seemingly adopted any other form of allocation rule in the event that there are covered and uncovered claims and the parties cannot agree on allocation. The Court notes that the insurance contract law used by the courts applying the Larger Settlement Rule does not differ in any material way from the way Delaware courts interpret insurance contracts.

In addition, the Court finds the reasoning underlying the Larger Settlement Rule to be persuasive. The Court is to interpret the insurance policy through a reading of all of the relevant provisions of the contract as a whole, "and not on any single passage in isolation."[51] The Policies cover all Loss that the Insured(s) become legally obligated to pay. Such language implies that a complete indemnity for Loss regardless of who else might be at fault for similar actions. The Policies do not limit coverage because of the activities of others that might overlap the claims against the Insureds. Any type of *pro rata* or relative exposure analysis seems contrary to the language of the Policies.

The question then becomes whether the Allocation Provision sets out an allocation method that would govern over the Larger Settlement Rule. The Insurers rely upon the Allocation Provision's following language and contend that it would control over the Larger Settlement Rule:

> In making such determination, the parties shall take into account the relative legal and financial exposures of the Insureds in connection with the defense and/or settlement of the Claim.

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[51] *O'Brien v. Progressive Northern Ins.*, 785 A.2d 281, 287 (Del. 2001); *see also Safeco Ins. Co. of America v. Robert S.*, 28 P.3d 889, 894 (Cal. 2001) ("When reasonably practical, contracts are to be interpreted in a manner that makes them reasonable and capable of being carried in effect[.]").

The Insurers note that this language is not contained in those cases applying the Larger Settlement Agreement. This language, according to the Insurers, provides exactly how to allocate between covered and uncovered Loss.

First, the Court does not see how the Allocation Provision establishes a method of allocation in the event the parties cannot, using best efforts, agree upon allocation between covered and uncovered claims.[52] Second, the Court notes that this language seems to support the economic rationale of the Larger Settlement Rule—protect the economic expectations of an insured when purchases coverage under an insurance policy. In a situation where an insured is jointly and severally liable, the insured would be legally and financially liable for the entire amount of any judgment. And, absent contribution (voluntarily or by way of a cross-claim) from any other defendant, the insured would have to pay the entire amount of the judgment. The insured would be entitled to full indemnification if that amount is an insured loss.

The Court finds that the Allocation Provision is not drafted in a manner that would provide for a specific allocation manner in the event that the Insureds and Insurers cannot agree to allocation. This is especially true here where the parties did not even attempt to allocate covered and uncovered claims.

This does not mean the Insurers are deprived of the economic deal they bargained for under the Policies. The Court cannot read the Allocation Provision in isolation and not apply the scope of coverage for Claims or the Subrogation Provision. All of which work to address the concerns of both the Insurers and the Defendants. For example, the

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[52] *See, e.g.*, Joseph P. Monteleone & Nicholas J. Conca, *Directors and Officers Indemnification and Liability Insurance: An Overview of Legal and Practical Issues*, 51 Bus. Law. 573, 618-20 (1996)(discussing "predetermined allocation provisions).

Subrogation Provision. The Insurers still have a right to exercise subrogation rights of the Insureds under the Settlement and the San Antonio Settlement.

Here, the Court has held that there is Loss that constitutes a Claim. The Insureds, therefore, have an economic expectation of indemnification under the Policies. Moreover, the Court has held that the Insureds have not improperly waived subrogation rights, by way of releases, against certain Defendants. As such, the Insurers could pay the full amount of the Claim here without *pro rata* allocation and still pursue uncovered Defendants through the Subrogation Provision. This is the economic deal that was stuck under the Policies and remains despite the Settlement and the San Antonio Settlement.

The remaining issue is whether the Court can use the Larger Settlement Rule and Civil Rule 56 to determine allocation without further fact finding. The Court has reviewed the relevant complaint in *In re Dole Food Company, Inc. Stockholder Litigation*, C.A. No. 8703-VCL ("*In re Dole*") and the San Antonio Action.

The causes of action and the defendants in *In re Dole* are: (i) Breach of Fiduciary Duty (Mr. Murdock, Mr. Carter, Mr. DeLorenzo as directors of Dole); (ii) Breach of Fiduciary Duty (Mr. Murdock, Mr. Carter, Mr. DeLorenzo as officers of Dole); (iii) Breach of Fiduciary Duty (Mr. Murdock as controlling shareholder of Dole); (iv) Breach of the Duty of Disclosure (Mr. Murdock, Mr. Carter, Mr. DeLorenzo); (v) Aiding and Abetting a Breach of Fiduciary Duty (DBNY); (vi) Aiding and Abetting a Breach of Fiduciary Duty (Deutsche Bank Securities and DFC Holdings): (vii) Aiding and Abetting the Outside Directors' Breaches of their Duty of Care (Mr. Murdock, Mr. Carter, Mr. DeLorenzo, Deutsche Bank Securities and DFC Holdings).

The plaintiffs in the San Antonio Action assert two cause of action. These are: (i) Violation of Section 10(b) of the Exchange Act and Rule 10b-5 (Dole, Mr. Murdock and Mr. Carter) and (ii) Violations of Section 20(a) of the Exchange Act (Mr. Murdock and Mr. Carter).

The Defendants rely on the Memorandum Opinion in *In re Dole* to contend that all liability in that action is joint and several. However, the operative complaint in In re Dole and the Settlement would seem to be the controlling documents for that determination. The San Antonio Action seems simpler. The plaintiffs there ask for an award of compensatory damages "against all Defendants, jointly and severally, for all damages sustained as a result of Defendants' wrongdoing...."

From the relevant pleadings, it appears the factual record needs to be expanded with respect to *In re Dole*. As for the San Antonio Action, the Court does not see how the Larger Settlement Rule would not be dispositive in favor of the Defendants. The Court has a pre-trial conference set for January 23, 2020. At this conference, the Court will address these issues and the burden of proof going forward at trial. .[53] In addition, the Court notes that allocation will not be an issue if the Insurers prevail on their claims at trial.

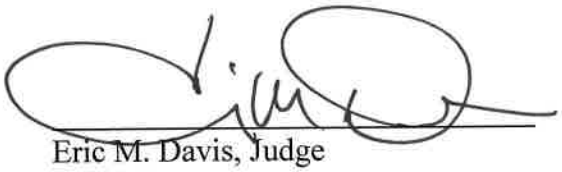
[53] A case relevant to burden of proof seems to be *Nat'l Union Fire Ins. Co. Pittsburgh, P.A. v. Rhone-Poulenc Basic Chemicals Co.*, 1992 WL 22690 (Del. Super. Jan. 16, 1992), *aff'd sub nom, Rhone-Poulenc Basic Chemicals Co. v. Am. Motorists Ins. Co.*, 616 A.2d 1192 (Del. 1992). The parties should review this prior to the pre-trial conference.

VI. CONCLUSION

For the reasons set forth above, the Court **GRANTS** in part and **DENIES** in part the Defendants Motion as it relates to the Allocation Provision.

IT IS SO ORDERED.

January 17, 2020
Wilmington, Delaware



Eric M. Davis, Judge

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