IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

AT&T WIRELESS SERVICES INC.,	)	
	)	
	)	
Plaintiff,	)	C.A. No. 03C-12-232 WCC
	)	
v.	)	
	)	
FEDERAL INSURANCE COMPANY, NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA., ST. PAUL MERCURY INSURANCE COMPANY, AND CERTAIN UNDERWRITERS OF LLOYD'S LONDON, AND CERTAIN LONDON MARKET COMPANIES,	)	
	)	
Defendants.	)	

Submitted: September 30, 2009
Decided: December 8, 2009

OPINION

Upon Plaintiff's Motion for Reconsideration
GRANTED IN PART. DENIED IN PART.

CARPENTER, J.

Introduction

Before the Court is Plaintiff AT&T Wireless Services, Inc.'s ("AWS") Motion for Reconsideration, pursuant to the Delaware Supreme Court's Order remanding the case for reconsideration.

Facts

On February 15, 2002, TeleCorp PSC, Inc. ("TeleCorp") merged with AWS. Following the merger, the TeleCorp shareholders filed a derivative action ("Shareholder Litigation") in the Delaware Court of Chancery alleging breach of fiduciary duties by the TeleCorp directors and by AWS due to its control over the "timing, structuring, disclosure and pricing of the merger."[1] The Court of Chancery approved a settlement (the "Shareholder Settlement") of the Shareholder Litigation whereby AWS agreed to pay $47.5 million in exchange for a dismissal of all remaining claims against the defendants named in the Shareholder Litigation.

AWS then filed suit in Superior Court seeking reimbursement from TeleCorp's directors' and officers' ("D&O") insurance carriers – Federal Insurance Company ("Federal Insurance"), National Union Fire Insurance Company of Pittsburgh, PA ("National Union") and St. Paul Mercury Insurance Company ("St.

[1]Am. Compl., *In re TeleCorp PCS, Inc., Shareholders Litigation*, E-File 4284961 ¶184 (Del. Ch. C.A. No. 19260).

Paul") (collectively, the "TeleCorp Insurers") for their appropriate share of the cost of the Shareholder Settlement and the fees associated with defending the Shareholder Litigation. In addition, AWS sought reimbursement from its own primary insurer, Faraday Capital Limited ("Faraday"),[2] and its excess carrier, National Union (collectively, the "AWS Insurers"), relating to the conduct of AWS directors on the TeleCorp board, as well as for the company's own liability.

Since AWS filed its complaint in December of 2003, this Court has issued four opinions on various motions: (1) Defendants' Faraday Capital and National Union's Motion to Quash Plaintiff's Notice of Partial Dismissal, Plaintiff's Motion to Dismiss, Plaintiff's Motion for a Dismissal of Defendants' Counterclaims or a Stay; (2) Defendants National Union and St. Paul's Motion to Dismiss, and Defendant Federal Insurance Company's Motion to Dismiss; (3) Plaintiff's Motion for Reargument; and (4) Defendant Federal Insurance Company's Motion for Partial Summary Judgment.

AWS appealed to the Delaware Supreme Court this Court's decision granting National Union and St. Paul's Motion to Dismiss. The Supreme Court issued a remand order requesting that this Court reconsider the issues of "whether AWS suffered a 'Loss' within the meaning of the applicable insurance policies" and

[2]Faraday is referred to in the Amended Complaint as Certain Underwriters of Lloyd's, London and Certain London Market Companies.

"whether an exclusion for 'Claims' arising out of the service of AWS directors or officers for another entity precludes coverage" [3] in light of two recent Supreme Court cases – *AT&T Corp. v. Clarendon*[4] ("*Clarendon*") and *AT&T Corp. v. Faraday Capital Ltd.*[5] ("*Faraday*") – issued since this Court's opinion was issued.[6]

In *Clarendon*, the Delaware Supreme Court considered an appeal from this Court involving AT&T Corporation ("AT&T"), At Home Corporation ("At Home") and several insurance carriers. AT&T was At Home's largest shareholder, and ten AT&T employees had been designated to serve as At Home directors. Sometime thereafter, At Home became insolvent and filed for bankruptcy, with AT&T and the At Home directors being sued by the trustee of the At Home Bondholder's Liquidating Trust ("BHLT") and three securities class actions by the At Home shareholders. Because At Home was bankrupt, it could not indemnify the directors for the cost of defending the lawsuits. Thus, the directors sought coverage from At Home's D&O insurers which denied coverage. The directors then asked AT&T to cover their litigation expenses. AT&T agreed to pay "defense costs, settlements and

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[3] *AT&T Wireless Servs., Inc. v. Nat'l Union Fire Ins. Co. of Pittsburgh, PA.*, 957 A.2d 1, 2008 WL 3319828 (Del. Aug. 12, 2008) (ORDER).

[4] 931 A.2d 409 (Del. 2007).

[5] 918 A.2d 1104 (Del. 2007).

[6] *Nat'l Union*, 957 A.2d 1, 2008 WL 3319828 (Del. Aug. 12, 2008) (ORDER).

judgments" on behalf of the directors in exchange for the directors assigning to AT&T their claims against the insurers. The BHLT litigation was settled for approximately $400 million and the stockholder's suits were dismissed.

AT&T brought suit in this Court against At Home's insurance carriers seeking reimbursement of the payments it made on behalf of the At Home directors in connection with defense costs arising from two underlying actions (a shareholder action and a bankruptcy action). This Court dismissed AT&T's claims, finding that it was not "inferable from the complaint's allegations that [the] directors became 'legally obligated' or 'financially liable' to pay any defense costs they incurred and any judgment or settlement in the Underlying Actions."[7]

The Supreme Court reversed and remanded this Court's holding, finding that such an inference did exist based on the language of the D&O policies and relevant case law, which did "not affirmatively require, in order to establish a 'Loss,' that the directors who are insured under a D&O policy must actually suffer the entry of a judgment, or otherwise contractually promise to pay any judgment and/or costs of defense."[8]

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[7] *AT&T Corp. v. Clarendon Am. Ins. Co.*, 931 A.2d at 415.

[8] *Id.* at 416.

In *Faraday*, the Delaware Supreme Court heard an appeal again arising from the dispute between AT&T and the D&O carriers arising out of the At Home litigation. The dispute in *Faraday*, however, turned on the interpretation of an exclusionary clause in the insurance policies that could potentially bar coverage for certain claims. The insurers argued that, for the purposes of the exclusion, a "claim" was equivalent to a lawsuit.[9] AT&T argued that "the number of 'Claims' within a complaint equals the aggregated number of causes of action that arise from the same alleged underlying wrongful conduct."[10] The Court analyzed the definition of "claim" in the context of the exclusion's language and held that "each cause of action in the [underlying] lawsuits may constitute a separate 'Claim' within the meaning of the policies at issue."[11]

This is the Court's decision reconsidering its opinion dismissing AWS's claims against National Union and St. Paul in light of those Supreme Court decisions.

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[9] *AT&T Corp. v. Faraday Capital Ltd.*, 918 A.2d at 1107.

[10] *Id.* at 1108.

[11] *Id.* at 1109.

Standard of Review

The standard by which this Court reviews a motion to dismiss is well-established. The Court must accept as true all well-pleaded allegations,[12] however, only claims that are "clearly without merit" will be dismissed.[13] Further, a motion to dismiss shall be denied "unless the plaintiff would not be entitled to recover under any reasonably conceivable set of circumstances susceptible of proof."[14]

Discussion

a. Applicable Law[15]

Under Virginia law, "[c]ourts interpret insurance policies, like other contracts, in accordance with the intention of the parties gleaned from the words they have used in the contracts."[16] Furthermore, the language of an insurance policy shall be

[12] *Sterling Network Exch., LLC v. Digital Phoenix Van Buren, LLC*, 2008 WL 2582920, at *4 (Del. Super. Mar. 28, 2008) (citing *Lesh v. Appriva*, 2006 WL 2788183, at *3 (Del. Super. June 15, 2006)).

[13] *Caldera Properties-Lewes/Rehoboth v. Ridings Dev., LLC*, 2008 WL 3323926, at *11 (Del. Super. June 19, 2008) (quoting *Wilmington Trust Co. v. Politzer & Haney, Inc.*, 2003 WL 1989703, at *2 (Del. Super. Apr. 25, 2003)).

[14] *E.I. Du Pont de Nemours & Co. v. Allstate Ins. Co.*, 2008 WL 555919, at *1 (Del. Super. Feb. 29, 2008) (citing *Atamian v. Gorkin*, 1999 WL 743663, at *5 (Del. Super. Aug. 13, 1999)).

[15] The Court will apply Virginia law to this issue, as the Court previously ruled that Virginia law would apply, and that opinion is not subject to reconsideration. *See AT&T Wireless Servs., Inc. v. Fed. Ins. Co.*, 2007 WL 1849056, at *6 (Del. Super. June 25, 2007).

[16] *RRR, LLC v. N.H. Ins. Co.*, 2007 WL 5963770, at *3 (Va. Cir. Ct. Oct. 17, 2007) (quoting *Floyd v. N. Neck Ins. Co.*, 427 S.E.2d 192, 196 (Va. 1993)).

construed against the insurer as "fundamental principles of contract interpretation require any ambiguities or doubts concerning the intent of the parties be resolved against the insurer."[17]

b. National Union - AWS Insurer

AWS has two insurance policies relevant to the underlying Chancery litigation: D&O policy issued by Faraday Capital Limited ("Faraday") and an excess policy issued by National Union. The Faraday policy is no longer involved in this litigation because they were voluntarily dismissed from the case by the plaintiffs on June 20, 2005. Details of the policy provisions have been set forth in the two previous opinions issued on January 31, 2006 and January 30, 2007 and will not be repeated here. However, it is important to again emphasize that the National Union policy only provided three scenarios which would trigger coverage:

> (a) Underwriters shall pay, on behalf of the directors and officers, loss resulting from any claim first made against the directors and officers during the policy period for a wrongful act
>
> (b) Underwriters shall pay, on behalf of the company, loss which the company is required or permitted to pay as indemnification to any of the directors and officers resulting from any claim first made against the directors and officers during policy period for a wrongful act

[17] *Id.* (citing *Salzi v. Va. Farm Bureau Mut. Ins. Co.*, 556 S.E.2d 758, 760 (Va. 2002)).

> (c) underwriters shall pay, on behalf of the company, loss resulting from any securities action claims first made against the company during the policy period for a wrongful act.[18]

The Court previously held that the scenario outlined in (a) and (b) would not provide a basis for coverage due to the application of Exception K which excludes coverage for the conduct of officers and directors while serving on another corporation's board. The Court does not believe the recent Supreme Court decisions would change this ruling. Coverage under subsection (c) was found appropriate based on the definition of "securities action claim":

> [A]ny judicial or administrative proceeding initiated against any of the Directors and Officers or the Company based upon, arising out of, or in any way involving the Securities Act of 1933, the Securities Exchange Act of 1934, rules or regulations of the Securities Exchange Commission under either or both Acts, similar securities laws or regulations of any state, or any common law relating to any transaction arising out or, involving, or relating to the sale of securities which they may be subjected to a binding adjudication of liability for damages or other relief, including any appeal therefrom.[19]

The Court held that AWS qualified for coverage under section (c) because the complaint in the Shareholder Litigation clearly named AWS as a defendant in a

[18]App. at A128-A129.

[19]*AT&T Wireless Servs., Inc. v. Fed. Ins. Co.*, 2007 WL 404766, at *2 (Del. Super. Jan. 30, 2007).

"separate and distinct count of the complaint and the Chancery action would be included in this broad definition of a securities action."[20] However, the Court ultimately concluded that Exclusion K of the policy barred coverage as the conduct of AWS could not be separated or distinguished from the conduct of AWS employees who had served on TeleCorp's Board. The issue now is whether the Court's analysis of the "claims" alleged in the underlying Chancery action have been affected by the Faraday or Clarendon opinions.[21]

c. The Faraday Impact

AWS argues that the Delaware Supreme Court's interpretation of "claim" in *Faraday* would require the Court to consider each relevant count in the underlying Chancery action as a separate and distinct "claim" and analyze the application of the exclusion provision of the policy as to each count. However, the Insurer asserts that *Faraday* is not applicable because the language of the policy at issue in *Faraday* was different than the language of the policy here as the only basis for coverage by AWS is within the context of a securities action claim. As such, they argue coverage is limited by the overall nature of the stockholder litigation and thus supports the prior finding of the Court that the conduct of AWS is related to the conduct of its

[20] *Id.*

[21] *Id.* at *3. *See* Part B for the Court's reconsideration of Exclusion K's applicability.

directors serving on the TeleCorp Board and that the exclusion provisions of the policy would apply.

AWS' policy contains a clause ("Exclusion K") that excludes from coverage claims based upon or involving the directors' and officers' service for any entity other than AWS:

> Underwriters shall not be liable to make any payment in connection with any Claim based upon, arising out of, directly or indirectly resulting from or in consequence of, or in any way involving the Directors and Officers service for any entity other than the Company. [22]

In the Court's January 30, 2007 opinion it stated:

> The question now is whether the conduct alleged in the Chancery Court action against AWS can be said to be based upon, arising out of, directly or indirectly resulting from, or in consequence of or in any way involving AWS directors' and officers' service to TeleCorp. Given the breadth of this exclusion, the Court feels bound to answer yes. When one cuts to the core of the conduct by AWS in the Chancery Court action, it reveals a masterful manipulation and a compromising of the conduct of the officers and the board of directors of TeleCorp in order to obtain control of that corporation. This was accomplished through the AWS officers who were placed on the TeleCorp board and who provided the necessary votes to approve the merger.
>
> The underlying Chancery Court action certainly was the consequence of, or at a minimum, indirectly resulted from,

[22] The exceptions to this provision are not applicable.

> the conduct of these officers, and thus Exclusion K becomes applicable. This is simply not a case where the conduct of AWS can be separated and distinguished from these officers.

While the Court still believes this is a fair assessment of AWS's conduct, after carefully reviewing the *Faraday* opinion,[23] this Court finds that it supports the argument of AWS that this Court is required to review the assertions contained in each count or "claim" of the underlying Chancery action to determine if it asserts a separate and distinct claim that is not arising out of the same underlying wrongful conduct and then determine whether exclusion K is applicable to it. Since the Court's prior opinion did not unequivocably set forth such a review, the Court agrees that it is necessary in order to resolve the issues now before it.

The counts in which AWS is individually named as a defendant in the Chancery action are Counts II and III. The applicable charging provisions state the following:

Count II

> 183. AT&T Wireless, by virtue of its actual control of the management and affairs of TeleCorp, owed fiduciary duties to TeleCorp and its stockholders.

[23] The Court also reviewed the underlying complaint and other relevant pleadings in the At Home litigation to better appreciate the scope of the Supreme Court's decision. Unfortunately these documents had to be retrieved from the Court archives and delayed the issuance of this decision.

184. By exercising its control over TeleCorp to cause the unfair initiation, timing, structuring, disclosure, and pricing of the Merger and related contracts, to its advantage at the expense of TeleCorp's public stockholders, A&T Wireless has breached its fiduciary duties.

Count III

186. By creating and/or exploiting the conflicts of interest affecting TeleCorp's directors, as described above, and by conspiring with the Director Defendants to (a) cause the TeleCorp Board's approval of the Merger by a process and at a price that lacks entire fairness, (b) divert excessive merger consideration to the holders of the Series E and Series C Preferred Stock and to TMC, and (c) obtain the stockholder votes necessary to approve the Merger in exchange for personal benefits, AT&T Wireless knowingly and actively participated in the reaches of the fiduciary duties of care, loyalty and good faith owed by the Director Defendants to TeleCorp's stockholders.

In the shareholders litigation there can be no dispute that AWS's ability to "control" the management and officers of TeleCorp related to their action in manipulating the Board of TeleCorp either by placing their own employees in director positions or compromising existing TeleCorp directors so that they would side with AWS's interest. In essence, these counts alleged that by the conduct of AWS they created and controlled a Board that would approve a merger at a price and time that favored AWS in breach of the Board's fiduciary obligation to its public stockholders.

The Insurers request the Court to read Exclusion K broadly to bar coverage as long as the alleged wrongful conduct involved, or was connected to, the AWS employees who served on TeleCorp's Board. The problem here is that Exclusion K was written to protect the Insurers from directors and officers conduct outside of AWS while the securities action claim definition expands that protection to the conduct of AWS itself. As such, Exclusion K is easily applied when one is considering the conduct of an AWS officer or director serving in another capacity. However, when the conduct is that of the corporate entity, applying Exclusion K is like attempting to put a round peg in a square hole. If the Court could find that these "claims" solely related to obtaining control and management of TeleCorp by the conduct of AWS employees who were placed on the TeleCorp Board, Exclusion K would clearly apply. However, while the Court continues to believe it is difficult to

separate and distinguish the conduct of AWS from that of its directors on the TeleCorp Board, at the motion to dismiss stage of the litigation, when the Court must find that AWS would not be entitled to recover under any conceivable set of circumstances and where any ambiguity concerning the coverage is construed against the insurer, the Court reluctantly believes in light of the *Faraday* opinion, it must find that Count V of the Plaintiff's Complaint should not be dismissed. The alleged improper control and manipulation of the members of the TeleCorp Board as asserted in the stockholder suit goes beyond the conduct of AWS directors who are also on the Board. The Court does acknowledge, as it did in its previous opinion, the line between AWS corporate actions and those of AWS directors on TeleCorp's board are easily blurred. However, the teaching of *Faraday* requires those matters to be fleshed out during discovery and can be the subject of other motions as the trial gets closer. The Court suggests the parties focus the litigation on the wrongful conduct of AWS regarding their relationship with preferred stockholders and AWS's attempts to improperly influence the decisions of the non-AWS Board members. It is this wrongful conduct that the Court believes may be outside the purview of Exclusion K.

In conclusion, the Court finds that the Supreme Court decision in *Faraday* has affected how the security action claim matter is considered by the Court, and

therefore it has reconsidered its previous decision on the motion to dismiss and that motion is now denied as to Count V.[24] In simple terms, AWS insurers remain potentially liable under the coverage provided to AWS for wrongful conduct related to the security action claims that are separate and distinct from the acts of AWS directors serving on the TeleCorp Board.

d. TeleCorp Insurers - Clarendon Impact

The next issue for the Court is whether the *Clarendon* decision affects the Court's prior opinion regarding the obligation of TeleCorp insurers, Nationwide and St. Paul to pay under their policies for a "loss" associated with the settlement of the underlying Chancery action. The Court appreciates the rationale used by the Delaware Supreme Court that a hypertechnical review of the settlement structure should not be used to undermine the economic substance of the settlement and the obligation of an insurance company. Thus the proper crossing of all the t's and the dotting of all the i's is not necessary as long as the case is clearly in a posture where the corporate entity is assuming the responsibility of the officers and directors affected by the litigation. Unfortunately, in spite of AWS's best effort to spin this litigation in that manner, the facts of this case demonstrate that there was no consolidation of purpose between the two camps of directors regarding the settlement or an agreement, oral, written or otherwise, to participate in the settlement process.

[24] If AWS reconsiders its voluntary dismissal of Faraday Capital Limited from the litigation, this decision may also affect Count IV of the Complaint.

This diversion of interest is evidenced by the settlement agreement itself where (1) AWS and its officers who served on the TeleCorp Board are referred to as "AWS Defendants" and the other TeleCorp directors are distinguished as "Director Defendants"; (2) the AWS defendants agree to provide a release of claims to the plaintiffs where the other defendants were not obligated and did not do so; (3) where paragraph 9 of the settlement agreement reasonably implies that the non-AWS directors have not agreed to the settlement and (4) paragraph 21 of the settlement preserves the right to AWS to seek contribution against the non-AWS directors in connection with the settlement.

This diversion of interest was also evidenced by the non-AWS directors not signing the settlement agreement and their counsel advising the Court that they were not contributing to the agreement. In addition, AWS affirmatively moved to amend its answer in the Chancery stockholder litigation to assert a cross-claim for contribution against the non-AWS TeleCorp directors.

Under these circumstances, what is occurring in this situation is a unilateral decision of AWS to settle the matter regardless of the interest or positions of the non-AWS TeleCorp directors and did so without their consent. This was perhaps an appropriate business decision for AWS, but it stretches one's imagination to believe that they were acting to protect the interest of the non-AWS TeleCorp directors. If

the Court followed the direction advocated by AWS, it would allow an acquiring company to settle litigation even if the Board of the acquiring company objected to the settlement and denied any wrongdoing and then argue that the directors/officers insurance for those directors was activated by the settlement. As such, the business decision of the acquiring company would be paramount and take priority regardless of the positions taken by the Board of Directors for whom the insurance was written. So while *Clarendon* does not require strict legal formality in finding insurance coverage, the Court believes some unity of purpose or commonality of interest between the parties is at least required.

As such, the Court was faced with two options. One, it could simply have found that since there was a settlement, the underlying facts of the litigation would be considered true for insurance coverage issues. Therefore, as long as the insured directors' alleged wrongful conduct as set forth in the Chancery action would have been covered, a loss under the insurance company's obligation would exist. This clearly would establish a clear bright line that could be easily applied, and it has some appeal in this litigation. If the allegations from the stockholder litigation are true, the key non- AWS directors' conduct was motivated by their own interest and greed in violation of their fiduciary duty as directors. And, if the insurance companies are foolish enough to insure such wrongful conduct, they too should pay.

The alternative is to require the parties seeking coverage to take litigation steps to clearly establish that the settlement encompasses the individual liability of the directors covered by the insurance policy. This could be accomplished by having the directors sign a release as was done in *Clarendon* or by having AWS pursue the legal remedies they have preserved in the Chancery litigation. While not as clean or precise a rule to apply, it does act as a safeguard against corporate abuse in the settlement of litigation where the potential availability of insurance significantly undermines the financial consequences to the company for their wrongful conduct.[25]

The Court finds as a fundamental concept of fairness and justice, that the second alternative is required. This usually is not a significant hurdle to overcome since the interest of the parties in resolving these issues most times will cause the alliance to be created. As such, if a director's conduct was alleged to be improper and the director agrees to the settlement, the insurance coverage allowed under the policy becomes applicable, subject to any exclusions the insurance company may find applicable. In addition, if a director's conduct reflects an acquiescence to the settlement such as by the signing of a release or the transfer of their rights under the policy to the company, this too under *Clarendon* would activate the policy provisions

[25] The Court notes that the amount of the directors/officers insurance available from all policies would have covered the settlement reached with the stockholders. As such, if AWS was able to access all of the policies, the settlement would have had no significant economic impact on the corporation.

for coverage. But when you have two groups of officers and directors with diverse interest and opinions regarding settlement, the acquiring company cannot simply activate coverage of the directors and officers insurance by settling the case. Fairness to all parties requires something more to occur.

As such, the Court's previous opinion regarding the coverage of the TeleCorp insurers will not be modified.

Conclusion

Having now written five opinions in this litigation and presiding over a trial of many weeks, I think it is safe to say the conduct surrounding this merger was not a highlight of corporate governance or business ethics that those involved should be proud of. The conduct of many of the members of the TeleCorp board was simply to protect their own interests and motivated by greed and had no relationship to protecting or insuring the interests of other stockholders. The alleged conduct of AWS in this corporate takeover at times reads more like a political scandal of kickbacks and payoffs rather than good business practices. While protecting directors and officers from false allegations or complaints about the good faith exercise of their business judgment by providing insurance to defend those actions is appropriate, one has to wonder whether the availability of such insurance doesn't

just foster wrongful conduct and provide a financial safeguard that eliminates personal or corporate consequences for such actions.[26]

Our system of corporate governance relies upon the directors of a corporation to make good faith decisions for the benefit of its stockholders. When this responsibility is breached, the availability of a pool of insurance money to cover corporate damages eliminates any deterrent to this malfeasance. Whether this is what has occurred here will perhaps be revealed by the evidence developed in the courtroom. But what is clear is that there are no winners in this continuing litigation and no one is wearing a particular white hat. While the Supreme Court's decisions have again opened slightly the door of this litigation, the Court encourages counsel to clear the waters of the past and attempt to come to a resolution that is fair. It is time to end the many years of litigation.

IT IS SO ORDERED.

/s/ William C. Carpenter, Jr.
Judge William C. Carpenter, Jr.

[26] *See generally* Tom Baker & Sean J. Griffith, *The Missing Monitor in Corporate Governance: The Directors' and Officers' Liability Insurer*, 95 Geo. L.J. 1795 (2007) (discussing how corporate managers buy D&O coverage for self-serving reasons and the failure of D&O insurers in playing a monitoring role in corporate governance leads to a moral hazard problem).