IN THE SUPREME COURT OF THE STATE OF DELAWARE

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

Submitted: September 16, 2020
Decided: October 23, 2020

Before **SEITZ**, Chief Justice; **VALIHURA**, **TRAYNOR**, **MONTGOMERY-REEVES**, Justices, and **KERR**, Judge,[1] constituting the Court *en Banc*.

Upon appeal from the Superior Court of the State of Delaware. **REVERSED.**

John L. Reed, Esquire, (*argued*) Matthew Denn, Esquire, Peter H. Kyle, Esquire, Kelly L. Freund, Esquire, DLA Piper LLP, Wilmington, Delaware. Gregory F. Fischer, Esquire, Cozen O'Connor, Wilmington, Delaware. *Of Counsel:* Angelo G. Savino, Esquire, Cozen O'Connor, New York, New York for Appellants ACE American Insurance Company and Federal Insurance Company.

Kurt M. Heyman, Esquire, (*argued*), Aaron M. Nelson, Esquire, Heyman Enerio Gattuso & Hirzel LLP, Wilmington, Delaware. *Of Counsel*: Scott B. Schreiber, Esquire, James W. Thomas, Jr., Esquire, William C. Purdue, Esquire, Jennifer Wieboldt, Esquire, Arnold & Porter Kaye Scholer LLP, Washington, D.C. *Of Counsel*: R. Reeves Anderson, Esquire, Arnold & Porter Kaye Scholer LLP, Denver, Colorado for Appellant Illinois National Insurance Company.

David J. Baldwin, Esquire, Berger Harris LLP, Wilmington, Delaware. *Of Counsel*: Peter M. Gillon, Esquire, (*argued*) Alexander D. Hardiman, Esquire, Tamara D. Bruno, Esquire, Pillsbury Winthrop Shaw Pittman LLP, Washington, D.C. for Appellee Solera Holdings, Inc.

[1] Sitting by designation pursuant to Del. Const. art. IV, § 12 and Supreme Court Rules 2(a) and 4(a) to complete the quorum.

VALIHURA, Justice:

In this appeal, insurance providers ask whether certain costs incurred in connection with an appraisal action under 8 *Del. C.* § 262 are precluded from coverage under the primary and excess directors' and officers' insurance policies (the "D&O Policies") issued to Solera Holdings, Inc. ("Solera"). An affiliate of Vista Equity acquired Solera in 2016. This transaction gave rise to litigation, including an appraisal action (the "Appraisal Action"). Solera requested coverage under the D&O Policies for the Appraisal Action. The insurers denied the request. Solera then filed an action in the Superior Court against the insurers for breach of contract and declaratory judgment, seeking coverage for pre-judgment interest and defense expenses incurred in connection with the Appraisal Action. However, Solera did not seek coverage for the underlying fair value amount paid to the dissenting stockholders, upon which the pre-judgment interest was based.

The issuer of the primary policy settled, and the excess policy insurers moved for summary judgment. The Superior Court denied the motion, interpreting the policy to hold that (1) a "Securities Claim" under the policy is not limited to a claim alleging wrongdoing, and the Appraisal Action is for a "violation" under the Securities Claim definition; (2) because the "Loss" definition is not limited by any other language, the policy covers pre-judgment interest on a non-covered loss; and (3) as to defense expenses, Delaware law implies a prejudice requirement in insurance contract consent clauses, and Solera's breach of the consent clause does not bar coverage for defense expenses absent a showing of prejudice.

The Insurers appealed, contending that the Superior Court erred in holding that the Appraisal Action could be covered under the D&O Policies for a violation of a "Securities Claim." In addition to the arguments made below, the Insurers rely on our decision in *In re Verizon Insurance Coverage Appeals*,[2] a decision issued three months after the Superior Court's decision in this case, and they now argue, for the first time on appeal, that an appraisal claim is not for a violation of law "regulating securities." They argue further that the court erred when it found that pre-judgment interest was indemnifiable under the definition of "Loss" regardless of whether the underlying judgment is a covered loss, and that the Appraisal Action defense expenses are not covered under the insurance policies because the policies require the Insurers' consent prior to incurring defense costs.

We disagree with the Superior Court's determination that the Appraisal Action was for a "violation," and therefore, we conclude the Appraisal Action does not fall within the definition of a "Securities Claim." Because the Appraisal Action is not a Securities Claim, the remaining issues are moot. For these reasons, as more fully explained below, we REVERSE the Superior Court's decision.

I. Factual and Procedural Background

Plaintiff-below Appellee Solera is a software corporation incorporated in Delaware and headquartered in Texas.[3] Defendants-below are insurers who issued the D&O Policies to Solera. The primary policy (the "Primary Policy") was issued by XL Specialty Insurance

[2] 222 A.3d 566 (Del. 2019).

[3] *Solera Hldgs., Inc. v. XL Specialty Ins. Co.*, 213 A.3d 1249, 1251 (Del. Super. 2019) [hereinafter *Opinion*].

Company ("XL"), and the other insurers provided excess coverage. Excess coverage insurers ACE American Insurance Company ("ACE"), Federal Insurance Company ("Federal"), and Illinois National Insurance Co. ("Illinois National") are the appellants in this appeal. We refer to them collectively as the "Insurers" or the "Appellants."

A. The D&O Policies

The D&O Policies provided Solera liability coverage from June 10, 2015 to June 10, 2016. The Primary Policy covered $10 million, and the excess policies covered $45 million, for a total coverage of $55 million in the "tower" of insurance.[4] Above the Primary Policy issued by XL, the $55 million tower included nine excess insurance policies. Of these nine, the Insurers involved in this appeal issued excess policies as follows:

- ACE issued the first excess policy (No. DOX G23661950 007) which provided a $5 million aggregate limit in excess of the Policy's $10 million limit;[5]

- Illinois National issued the second excess policy (No. 01-415-85-50) which provided a $5 million aggregate limit in excess of $15 million in underlying insurance;[6]

- Illinois National also insured the forth excess policy (No. 01-415-95-89) which provided a $5 million aggregate limit in excess of $25 million in underlying insurance;[7] and

[4] *Id*. at 1251–52.

[5] J.A. at 185 – 196. ("J.A." refers to the Joint Appendix filed by the parties participating in this appeal.).

[6] J.A. at 198 – 213.

[7] J.A. at 234 – 249.

- Federal issued the ninth excess policy (No. 8240-7270) which provided a $5 million aggregate limit in excess of $50 million in underlying insurance.[8]

We refer to the policies issued by the Insurers collectively as the "Excess Policies." The Superior Court noted that because the Excess Policies follow form and incorporate the Primary Policy's provisions, the court's interpretation of the Primary Policy applies to the D&O Policies, and the Primary Policy, thus, contains the controlling language.[9] The parties confirmed these facts in oral argument before this Court.[10]

Under Section I(C) of the Primary Policy (the "Insuring Agreement"), XL agreed to pay for any "Loss resulting solely from any Securities Claim first made against an Insured during the Policy Period for a Wrongful Act."[11] "Loss" includes "damages, judgments, settlements, pre-judgment and post-judgment interest or other amounts (including punitive, exemplary or multiplied damages, where insurable by law) that any Insured is legally obligated to pay."[12] "Loss" also includes "Defense Expenses," meaning "reasonable and

[8] J.A. at 322 – 345.

[9] *Solera Hldgs. Inc.*, 213 A.3d at 1251 n.1; *see also Solera Hldgs., Inc. v. XL Specialty Ins. Co.*, 2019 WL 4733431, *1 at n.1 (Del. Super. Sept. 26, 2019) (hereinafter "Sept. 26 Op.") (in its order granting leave to appeal on a interlocutory basis, the Superior Court noted that, because the excess policies follow form and incorporate the primary Policy's provisions, "[t]he Court's interpretation of the Policy's terms and conditions therefore applied to all Defendants.").

[10] *See* Oral Argument video: 2:39 – 2:59, https://livestream.com/delawaresupremecourt/events/9276122/videos/211025162/player.

[11] J.A. at 153 (Primary Policy § I(C)). The Primary Policy contains several Insuring Agreements, but the parties here agree that the one that controls is Section I(C). *See* J.A. at 153 ("The Insurer shall pay on behalf of the Company Loss resulting solely from any Securities Claim first made against the Company during the Policy Period for a Wrongful Act.").

[12] J.A. at 156 (Primary Policy § II(O)).

necessary legal fees, expenses and other costs . . . incurred in the investigation, adjustment, settlement, defense and/or appeal of any Claim, Investigation Demand or Interview. . . ."[13]

The Primary Policy defines a "Securities Claim" as a claim:

> (1) made against [Solera] for any actual or alleged violation of any federal, state or local statute, regulation, or rule or common law regulating securities, including but not limited to the purchase or sale of, or offer to purchase or sell, securities, which is:
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> (a) brought by any person or entity resulting from, the purchase or sale of, or offer to purchase or sell, securities of [Solera]; or
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> (b) brought by a security holder of [Solera] with respect to such security holder's interest in securities of [Solera] . . .[14]

"Wrongful Act" refers to "any actual or alleged act, error, omission, misstatement, misleading statement, neglect, or breach of a duty by an Insured Person while acting in his or her capacity as such or due to his or her status as such. . . ."[15]

Section V(B) of the Primary Policy (the "Consent Provision") contains a consent provision relating to defense expenses:

> No Insured may incur any Defense Expenses in connection with any Claim, Interview or Investigation Demand, or admit liability for, make any settlement offer with respect to, or settle any Claim without the Insurer's consent, such consent not to be unreasonably delayed or withheld . . . .[16]

Section VI of the Primary Policy (the "Notice Provision") requires Solera to provide the Insurers with notice of a claim as a condition to receiving coverage:

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[13] J.A. at 154 (Primary Policy § II(F)).

[14] J.A. at 157 (Primary Policy § II(S)).

[15] J.A. at 158 (Primary Policy § II(U)).

[16] J.A. at 160 (Primary Policy § V(B)).

> As a condition precedent to any right to payment under this Policy with respect to any Claim or Investigation Demand, the Insured shall give written notice to the Insurer of each Claim or Investigation Demand as soon as practicable after it is first made . . . . In the event that the Insureds fail to provide timely notice to the Insurer under this Section VI (A)(1), 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.[17]

The Primary Policy includes various "retentions," *i.e.*, self-insured amounts of otherwise covered losses that Solera must incur before coverage attaches.[18] For example, the Primary Policy includes a $2 million retention for covered losses resulting from "bump-up" claims, which are defined as "any Claim based upon, arising out of, directly or indirectly resulting from, in consequence of or in any way involving an allegation that any Insured received or will receive inadequate consideration in connection with any merger or acquisition activity involving the Company."[19] Further, a $1.25 million retention applies if the Appraisal Action constitutes a Securities Claim.

B. The Litigations

Solera was a publicly traded company until it was acquired by an affiliate of Vista Equity Partners in March of 2016.[20] Solera announced the transaction in September of 2015 and, following the announcement, a group of its investors filed a class action lawsuit

[17] J.A. at 161 (Primary Policy § VI(A)(1)).

[18] J.A. at 150 (Primary Policy Declarations).

[19] J.A. at 173 (Primary Policy Mergers and Acquisitions Retention Endorsement). Pursuant to that Endorsement, a $2 million retention applies for any Securities Claim that is also a "Bump-up Claim." *Id.* Solera thus retained the risk from Bump-up Claims up to $2 million, and XL would be liable for covered losses only in excess of that amount, capped at an aggregate limit of $10 million.

[20] *Opinion*, 213 A.3d at 1253.

against Solera, its directors and officers, and other companies for breach of fiduciary duties (the "Fiduciary Action"). The Court of Chancery later dismissed the Fiduciary Action for failure to state a claim.[21] Solera notified the Insurers of the Fiduciary Action on October 13, 2015, but the case was dismissed before Solera's costs reached the D&O Policies' retention amount.[22]

Meanwhile, a majority of Solera's stockholders approved the merger and on March 3, 2016, the transaction closed for an agreed price of $55.85 per share. Four days later, on March 7, 2016, several shareholders who objected to the merger filed the Appraisal Action under 8 *Del. C.* § 262, seeking a determination of the fair value of their shares. The petitioners in the Appraisal Action asserted that Solera's fair value at the time of the merger was $84.65 per share. On January 31, 2018, after the trial in the Appraisal Action, Solera notified the Insurers of the Appraisal Action and requested coverage under the insurance policies. XL denied the request on April 17, 2018. The Court of Chancery issued its final decision on July 30, 2018, concluding that the fair value of Solera's common stock as of March 3, 2106 was $53.95 per share, an amount less than the merger price of $55.85.[23] It ordered Solera to pay the petitioners the value of their shares at $53.95 per share plus the pre-judgment interest amount of $38,387,821.61 (the "Interest"). In defending the

[21] *In re Solera Hldgs., Inc. S'holder Litig.*, 2017 WL 57839, at *13 (Del. Ch. Jan. 5, 2017).

[22] *Opinion*, 213 A.3d at 1253.

[23] *In re Appraisal of Solera Hldgs., Inc.*, 2018 WL 3997578 (Del. Ch. Aug. 20, 2018) (Order).

Appraisal Action, Solera also incurred over $13 million in attorneys' and other fees (the "Defense Expenses").[24]

C. The Proceedings Below

On August 31, 2018, Solera filed an action against the Insurers in Superior Court for breach of contract and declaratory judgment, seeking coverage for the Interest and Defense Expenses incurred in the Appraisal Action.[25] Solera alleged that pursuant to the Primary Policy, the Insurers agreed to pay for Loss "resulting solely from any Securities Claim first made against the Company during the Policy Period for a Wrongful Act,"[26] and that the Appraisal Action constitutes a Securities Claim "because, among other things, the petitioners alleged a violation of Delaware's appraisal statute, which is a law regulating securities, and the petitioners claimed a host of supposed securities violations in connection with the sales process."[27] Solera also alleged that the Appraisal Action constituted a "Bump-up Claim" because the parties opposing the merger alleged "Wrongful Acts" under the" Primary Policy's broad definition of those terms."[28] Thus, Solera contended, the Insurers were obligated to indemnify it for the Interest and Defense Expenses. Notably, Solera did not seek indemnification for the fair value of the shares paid to the dissenting stockholders in the Appraisal Action, upon which the Interest is based.

[24] *Opinion*, 213 A.3d at 1253.

[25] J.A. at 72–76 (Compl.).

[26] J.A. at 67 (Compl. ¶39).

[27] J.A. at 71 (Compl. ¶51).

[28] *Id*.

Insurers ACE and Federal moved for summary judgment, and XL settled with Solera after ACE and Federal filed the motion. The remaining insurers joined the motion for summary judgment, except for Hudson Insurance Company.

The movants contended that they were not obligated to cover the costs because the Appraisal Action did not meet the definition of "Securities Claim" as defined in the Primary Policy. Specifically, they argued that there was no "violation" of any federal, state, or local statute, regulation, rule, or common law regulating securities.[29] They argued that a "violation" of law must involve wrongdoing and "[w]rongdoing is not a required element of an appraisal action brought under Section 262 of the DGCL,"[30] and that this Court previously has ruled that "a determination of fair value does not involve an inquiry into claims of wrongdoing in the merger."[31] The Insurers argued that "Delaware courts consistently distinguish appraisal actions from shareholder class actions" based on allegations of wrongdoing.[32] The Insurers concluded that, "[g]iven the great weight of these authorities, it is clear that the Appraisal Action does not involve a 'violation' of the Delaware appraisal statute (or any other statute or law)."[33] In their view, accordingly, the Appraisal Action did not constitute a Securities Claims as defined in the Primary Policy.

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[29] J.A. at 431 (Mem. In Supp. of Mot. for Summ. J. at 10).

[30] *Id*.

[31] *Id*. (citing *Cede & Co. v. Technicolor*, 542 A.2d 1182, 1189 (Del. 1988); *Cavalier Oil Corp. v. Harnett*, 564 A.2d 1137, 1143 (Del. 1989)).

[32] J.A. at 432 (Mem. In Supp. of Mot. for Summ. J. at 11).

[33] J.A. at 433 (Mem. In Supp. of Mot. for Summ. J. at 12).

The Insurers also noted that the petitioners in the Appraisal Action did not allege any misconduct by Solera's directors or any violation or wrongdoing in connection with the merger.[34] They argued that the Appraisal Action is not a claim "for" a violation of law because Section 262 does not require any allegation of proof of wrongdoing, and a court in an appraisal action does not grant "relief" to any party as redress "for" any wrongdoing.[35] Further, the movants contended that, "the Appraisal Action does not involve a 'violation' of the Delaware appraisal statute (or any other statute or law)."[36] Rather, according to Insurers, a Section 262 appraisal action is a neutral proceeding in which a court solely adjudicates the fair value of a company's shares on the date of a merger or acquisition.[37]

As to the follow-on issues, the movants argued that the Interest was not a Loss covered by the D&O Policies because the underlying amount, the monies due for the fair value of Solera stock as determined by the Court of Chancery, is not covered under the policies.[38] Finally, they argued that the pre-notice Defense Expenses were not covered because Solera incurred those expenses without their consent.

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[34] J.A. at 433 - 434 (Mem. In Supp. of Mot. for Summ. J. at 12-13); *see also* J.A. at 131 – 133 (Pet. for Appraisal).

[35] J.A. at 436 (Mem. In Supp. of Mot. for Summ. J. at 15) (citing *RSUI Indem. Co. v. Desai*, 2014 WL 4347821, at *4 (M.D. Fla. Sept. 2, 2014)).

[36] J.A. at 433 (Mem. In Supp. of Mot. for Summ. J. at 12).

[37] J.A. at 1383 (Reply Mem. in Supp. of Mot. for Summ. J. at 5). The Insurers stated that, "[u]nlike in an action where wrongdoing has been alleged, 'in a statutory appraisal proceeding, both sides have the burden of proving their respective valuation positions by a preponderance of the evidence.'" *Id.* (*citing Reis v. Hazlett Strip-Casting Corp.*, 28 A.3d 442, 456 (Del. Ch. 2011)) (quoting *M.G. Bancorporation, Inc. v. Le Beau*, 737 A.2d 513, 520 (Del. 1999)).

[38] In this regard, the Insurers observed that "Solera does not contend that its insurers should reimburse its $215 million 'fair value' payment to shareholders, presumably because Solera recognizes that this payment reflects part of the new owner's acquisition costs and does not

Solera responded that allegations of wrongdoing were not required in order to succeed on a "violation" of law claim, and, therefore, the Appraisal Action was a Securities Claim as defined in the Primary Policy. Solera argued that many laws, including many strict liability securities laws such as Section 11 of the Securities Act and Blue Sky laws, can be "violated" without any wrongdoing.[39] According to Solera, section 262 protects minority stockholders by establishing a legal standard requiring that a company ensure that minority stockholders receive "fair value" for their shares in a merger. They argued that section 262 creates a right of action for minority stockholders who claim the company violated that standard, as well as a remedy in the form of damages representing the "fair value" of their shares plus interest.

Solera also contended that the Interest also met the definition of Loss, and that because the Insurers were not materially prejudiced by the late notice, they must pay the Defense Expenses.[40] The Superior Court noted that Solera suggested that the court should *sua sponte* grant summary judgment in Solera's favor.[41]

On July 31, 2019, the Superior Court denied the Insurers' motion for summary judgment, holding that an appraisal action under 8 *Del. C.* § 262 constituted a Securities Claim within the meaning of the Primary Policy (the "Opinion"). The court held that a

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constitute an insurable "Loss" suffered by Solera." J.A. at 436 (Mem. In Supp. of Mot. for Summ. J. at 15).

[39] J.A. at 472 (Mem. of Law in Supp. of Pl.'s Resp. to Insurers' Mot. for Summ. J. at 1).

[40] *Opinion* at 1254. As the Superior Court stated, "Solera admits it breached the Consent Clause by failing to give Defendants timely notice of the Appraisal Action." *Opinion* at 1259.

[41] *Id*. at 1254.

"violation" under the policy did not require an allegation of "wrongdoing." It found that the policy did not define a violation, and in this context, it "simply means, among other things, a breach of the law and the contravention of a right or duty."[42] The court also observed that there are securities law violations where scienter or wrongdoing are not required. Thus, it concluded, a violation under the policy was "not limited under the Policy to violations of law alleging wrongdoing."[43] The court agreed with Solera's description of an appraisal action and held that "the appraisal petition necessarily alleges a violation of law or rule" because "[u]nder Delaware law, shareholders have the right to receive 'fair value' for their shares when they are cashed out of their positions through certain types of mergers or consolidations."[44] "By its very nature, a demand for appraisal is an allegation that the company contravened that right by not paying shareholders the fair value to which they are entitled."[45]

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[42] *Id*. at 1256.

[43] *Id*.

[44] *Id*.

[45] *Id*. The court noted that although the definition of "Loss" includes a "Wrongful Act," the Insurers did not argue that the Policy's limitation of coverage to claims made for a Wrongful Act precluded coverage for the Appraisal Action. As the Superior Court noted:

> For reasons that are not clear, the movants did not argue in the pending motions that the Policy's limitation of coverage to claims made for 'a [w]rongful [a]ct' precluded coverage for the Appraisal Action. Instead, the movants limited their argument to the meaning of the word 'violation' in the definition of 'Securities Claim.' Accordingly, this opinion does not address or resolve the effect, if any, of the 'wrongful act' language.

Opinion, 213 A.3d at 1252 n.2.

In addition, the court refused to grant summary judgment on the issue of whether the Interest award was a Loss under the policy. Rejecting the movants' arguments, it held that under the Policy's plain language, the definition of "Loss" was not limited to pre-judgment interest on a covered judgment, and it ruled that factual issues, including mitigation of damages, precluded summary judgment. The court further held, as a matter of Delaware law, that the Policy's clause requiring the insurer's prior consent to Defense Expenses impliedly contained a prejudice requirement. It ruled that whether the moving defendants had suffered such prejudice presented a factual issue.

On August 7, 2019, excess insurer Sompo International (formerly known as Endurance American Insurance Company) filed a motion for reconsideration or clarification of the court's July 31, 2019 Opinion. It argued that Texas law, rather than Delaware law, likely applied to the Consent Provision breach, and that there likely is no implied prejudice requirement under Texas law. The Superior Court clarified in an August 29, 2019 letter order that it did not rule on the choice of law issue.[46] Rather, it "held that even if Delaware law applied, factual issues made summary judgment inappropriate at this stage," and that the parties are free to raise the conflict of laws issues at a later stage in the litigation.[47]

On September 4, 2019, Ace and Federal submitted an application to certify the Opinion for interlocutory appeal to this Court. Solera did not oppose interlocutory review,

[46] *Solera Hldgs., Inc. v. XL Specialty Ins. Co.*, 2019 WL 4120688, at *2 (Del. Super. Aug. 29, 2019).

[47] *Id*.

provided such review would not delay the case.[48] The Superior Court agreed that interlocutory review could terminate the litigation, but that its pendency need not interfere with continuing discovery, and so granted certification without staying pretrial litigation. Specifically, it concluded "that the definition of a 'Securities Claim,' and whether an appraisal constitutes such a claim, is case-dispositive if the Moving Defendants prevail on their appeal,"[49] and that, "[i]f the Appraisal Action does not fall within a 'Securities Claim,' the parties other coverage disputes are moot."[50] This Court accepted the request for certification on October 1, 2019.

D. The Issues on Interlocutory Appeal

Appellants raise three issues on appeal. First, they contend that the Superior Court erred in holding that the Appraisal Action is a Securities Claim as defined in the Primary Policy. According to the Insurers, the Superior Court erred when it determined that the Appraisal Action was for a "*violation*" of a law. Notwithstanding their failure to raise the issue below, the Insurers further contend that before holding that the Appraisal Action is a Securities Claim, this Court also must determine that the law allegedly violated is one "*regulating securities*."[51]

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[48] J.A. at 1554 (Solera's Resp. to the Appl. for Certification of Interlocutory Order at 1).

[49] *Sept. 26 Opinion*, at *4.

[50] *Id*.

[51] In their Opening Brief, Illinois National states that, "[w]hile this issue was not the focus of the briefing or decision below, it is squarely within the questions certified for appeal." Op. Br. at 5. We note that Illinois National was also a party in the *Verizon* case.

Secondly, Appellants argue that even if the Appraisal Action were a Securities Claim, the Superior Court erred in holding that the pre-judgment Interest payable in connection with that action is not an indemnifiable Loss. Although the definition of Loss includes pre-judgment interest, Appellants argue that the policy should be read as a whole, together with the Insuring Agreement. In Appellants' view, because the interest is derived solely from an amount that admittedly is not covered, the Interest based on that amount should not be covered.

Finally, assuming the Appraisal Action is a Securities Claim, Appellants argue that the court erred in holding that under Delaware law, the Consent Provision contains an implied prejudice requirement. They contend that this holding is unsupported by Delaware law and contradicts the plain language of the Consent Provision, and thus, the Defense Expenses incurred prior to Solera's noticing of the Appraisal Action are not covered.

Solera responds that the word "violation" does not contain either an explicit or implicit requirement of wrongdoing.[52] It contends that the Superior Court correctly held that the Appraisal Action is a "Securities Claim" that alleged a violation of law governing the petitioners' right to receive fair value for their shares in the merger. As an alternative basis for affirmance, Solera argues that the petitioners' "extensive allegations of wrongdoing in the merger process alleged a violation of law."[53]

[52] Ans. Br. at 24–25.

[53] *Id*. at 9.

II. Standard of Review

This Court reviews a grant or denial of a motion for summary judgment *de novo*.[54] We review the interpretation of insurance contracts *de novo*.[55]

III. Analysis

A. The Appraisal Action Does Not Involve a "Violation" of Law

The threshold question is whether the Appraisal Action is a Securities Claim because it is a "claim . . . made against [Solera] for any actual or alleged *violation* of any federal, state, or local statute, regulation, or rule or common law regulating securities, including but not limited to the purchase or sale of, or offer to purchase or sell, securities. . . ." We disagree with the Superior Court that the Appraisal Action implicated the "*violation*" portion of the definition of Securities Claim. Because we hold the Appraisal Action is not for a *violation* of law, we do not reach the secondary issue of whether it is for a violation of a law *regulating securities*.

Under Delaware law, insurance policies "are construed as a whole, to give effect to the intentions of the parties."[56] When the language of an insurance policy is "clear and unambiguous, the parties' intent is ascertained by giving the language its ordinary and usual meaning."[57] An insurance policy is not ambiguous merely because the parties do not

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[54] *ConAgra Foods Inc. v. Lexington Ins. Co.*, 21 A.3d 62, 68 (Del. 2011); *Genecor Int'l, Inc. v. Novo Nordisk A/S*, 766 A.2d 8, 13 (Del. 2000).

[55] *In re Verizon Ins. Coverage Appeals*, 222 A.2d 566, 572 (Del. 2019); *ConAgra*, 21 A.3d at 68.

[56] *AT&T Corp. v. Faraday Capital Ltd.*, 918 A.2d 1104, 1108 (Del. 2007).

[57] *Id*.

agree on its construction.[58] Rather, a contract "is ambiguous only when the provisions in controversy are reasonably or fairly susceptible of different interpretations or may have two or more different meanings."[59] Delaware courts will not "destroy or twist" the words of a clear and unambiguous insurance contract.[60]

In determining that an appraisal action under 8 *Del. C.* § 262 is a Securities Claim because it alleges a "violation," the Superior Court first analyzed the meaning of "violation" as used in the Primary Policy. It noted that the word was undefined, but determined that the Primary Policy was unambiguous and that the term was not limited to allegations of wrongdoing.[61] The court cited *Black's Law Dictionary* and stated that "'[v]iolation' simply means, among other things, a breach of the law and the contravention of a right or duty."[62] It further reasoned that "the use of a word like 'violation,' which does not require a particular state of mind, was logical in the context of defining a Securities Claim, because several laws regulating securities can be violated without any showing of scienter or wrongdoing."[63] Based on its holding that a violation does not require wrongdoing, the Superior Court declined to reach Solera's allegations that the "Appraisal Action involved substantial discovery and trial presentation around the dissenting

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[58] *O'Brien v. Progressive Northern Ins. Co.*, 758 A.2d 281, 288 (Del. 2001).

[59] *See E.I. du Pont de Nemours & Co. v. Allstate Ins. Co.*, 693 A.2d 1059, 1061 (Del. 1997) (quoting *Rhone–Poulenc Basic Chems. Co. v. Am. Motorists Ins. Co.*, 616 A.2d 1192, 1196 (Del. 1992).

[60] *Hallowell v. State Farm Mut. Auto Ins. Co.*, 443 A.2d 925, 926 (Del. 1981).

[61] *Opinion*, 213 A.3d at 1256.

[62] *Id*.

[63] *Id*.

shareholders' claim that the merger price was an unreliable measure of fair value because the process was 'rigged' by Solera's founder."[64] The court then held that:

> [T]he Appraisal Action is a Securities Claim under the policy because the appraisal petition necessarily alleges a violation of law or rule. Under Delaware law, shareholders have the right to receive "fair value" for their shares when they are cashed out of their positions through certain types of mergers or consolidations. By its very nature, a demand for appraisal is an allegation that the company contravened that right by not paying shareholders the fair value to which they are entitled.[65]

On appeal, the Insurers challenge this determination and reassert the arguments they raised below, including that Section 262 is not a statute that can be violated (other than for failing to provide notice of appraisal rights to stockholders under Section 262(d)).[66] According to Appellants, appraisal is a neutral proceeding, where the sole issue is the "fair value" of the dissenters' shares.

We agree that the Appraisal Action is not a Securities Claim because it does not involve a "violation." We believe, as explained below, that this conclusion is compelled by the plain meaning of the word "violation," which involves some element of wrongdoing, even if done with an innocent state of mind. It is also compelled by section 262's historical background, its text, and by a long, unbroken line of cases that hold that an appraisal under section 262 is a remedy that does not involve a determination of wrongdoing. Rather, it is

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[64] *Id*. at 1255 n.22.

[65] *Id*. at 1256.

[66] *See* Opening Br. at 20 ("With specific regard to Section 262 . . . the corporation's only obligation is to ensure that its stockholders receive proper notice of appraisal rights as required by Section 262(d).").

a remedy limited to the determination of the fair value of the dissenters' shares as of the effective date of the merger or consolidation.

1. The Plain Meaning of "Violation" Suggests An Element of Wrongdoing

The Securities Claim definition requires that a claim be for a *violation* of a law regulating securities. When resolving a dispute involving the interpretation of an insurance policy, a court should attempt to determine the parties' intent from the language of the insurance contract itself. This Court often looks to dictionaries to ascertain a term's plain meaning.[67] A "violation" is "[a]n infraction or breach of the law; a transgression," or "[t]he act of breaking or dishonoring the law" or "the contravention of a right or duty."[68] "Transgress" is in turn is "to exceed the limits of (a law, rule, regulation, etc.); to break or violate."[69] Black's Law Dictionary cross-references "Transgression" to "misdemeanor."[70] "Contravention" is "[a]n act violating a legal condition or obligation,"[71] and "contravene"

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[67] *See Lorillard Tobacco Co. v. Am. Legacy Found.*, 903 A.2d 728, 738 (Del. 2006); *see also State of Delaware Dep't of Nat. Res. and Envir. Control v. McGinnis Auto & Mobile Home Salvage LLC*, 225 A.3d 1251, 1260–61 (Valihura, J. dissenting) ("'Delaware case law is well settled that undefined words are given their plain meaning based upon the definition provided by a dictionary.'") (citing *State v. Taye*, 54 A.3d 1116, 1121 (Del. Super. 2009)).

[68] *Black's Law Dictionary* (11th ed. 2019); *see also Black's Law Dictionary* 1800 (10th ed. 2014) (same); *Violation, Webster's Third New Int'l Dictionary of the English Language* 2554 (2002) ("an infringement or transgression") [Hereinafter, *Webster's*].

[69] *Black's Law Dictionary* (11th ed. 2019); *see also Black's Law Dictionary* 1728 (10th ed. 2014) (same); *Transgress, Webster's* ("to go beyond the limits set or prescribed by (law or command).").

[70] *Black's Law Dictionary* (11th ed. 2019); *see also Black's Law Dictionary* (10th ed. 2014) (same); "Misdemeanor" is likewise "[a] crime that is less serious than a felony and is usu. punishable by fine, penalty, forfeiture, or confinement (usu. for a brief term) in a place other than a prison (such as a county jail)." *Id*.

[71] *Black's Law Dictionary* (11th ed. 2019); *see also Black's Law Dictionary* 402 (10th ed. 2014) (same); *Contravention, Webster's* ("the act of contravening" or "the lowest class of offenses in the law codes of many European countries constituted by those punishable in police courts.").

means "[t]o violate or infringe (the law, a rule, etc.); to defy."[72] We think the term "violation" suggests an element of wrongdoing. Scienter may not be required, but contravention of a statute's prohibition is, nevertheless, a wrongdoing.[73] We conclude, as explained further below, that appraisal actions are not proceedings that adjudicate wrongdoing (including breaches of fiduciary duty). Because appraisal actions involve no adjudication of wrongdoing, they do not involve "violations" of any law or rule, and thus, they do not fall within the definition of a "Securities Claim."

2. The Historical Background of the Appraisal Remedy

At common law, before the Delaware appraisal statute was enacted, "no consolidation or merger of corporations could be effected except with the consent of all the stockholders."[74] That scheme proved unworkable "since one or more minority stockholders, if he or they desired to do so, could impede the action of all the other stockholders."[75]

The Delaware General Assembly created the appraisal remedy in 1899 to allow the sale of a corporation upon the consent of a majority of its stockholders rather than upon

[72] *Black's Law Dictionary* (11th ed. 2019); *see also Black's Law Dictionary* 402 (10th ed. 2014) (same); *Contravene*, *Webster's* ("to go or act contrary to; obstruct the operation of: infringe, disregard."). Notably, the Black's Law Dictionary definition of "wrongful conduct" is "[a]n act taken in violation of a legal duty; an act that unjustly infringes on another's rights." *Id.*

[73] The Superior Court's reference to strict liability provisions of the Securities Exchange Acts of 1933 and 1934 are also statutes that "regulate securities."

[74] *Schenley Indus., Inc. v. Curtis*, 152 A.2d 300, 301 (Del. 1959).

[75] *Id.*

unanimous approval.[76] As we said in *Dell*, "[g]iven that a single shareholder could no longer hold up the sale of a company, the General Assembly devised appraisal in service of the notion that 'the stockholder is entitled to be paid for that which has been taken from him.'"[77] Minority shareholders who disagree with the sale or who "view[] the sale price as inadequate [can] seek 'an independent judicial determination of the fair value of their shares'" rather than accept the per-share merger consideration.[78] Accordingly, appraisal "is a limited legislative remedy developed initially as a means to compensate shareholders of Delaware corporations for the loss of their common law right to prevent a merger or consolidation by refusal to consent to such transactions."[79] As such, we have said that "[t]here is one issue in an appraisal trial: 'the value of the dissenting stockholder's stock.'"[80]

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[76] *Dell, Inc. v. Magnetar Global Event Driven Master Fund Ltd.*, 177 A.3d 1, 19 (Del. 2017); *see also Salomon Bros. Inc. v. Interstate Bakeries Corp.*, 576 A.2d 650, 651–52 (Del. Ch. 1989) (appraisal is "is a 'statutory right ... given the shareholder as compensation for the abrogation of the common law rule that a single shareholder could block a merger.'") (quoting *Francis I. duPont & Co. v. Universal City Studios*, 343 A.2d 629, 634 (Del. Ch. 1975)).

[77] *Id*. at 19 (citing *Tri-Continental Corp. v. Battye*, 74 A.2d 71, 72 (Del. 1950)); s*ee also Schenley*, 152 A.2d at 301 (As this Court explained, "it became necessary to protect the contractual rights of such stockholders . . . by providing for the appraisement of their stock and the payment to them of the full value thereof in money.").

[78] *Id*. at 19.

[79] *Ala. By–Prods. Corp. v. Cede & Co.*, 657 A.2d 254, 258 (Del. 1995); *see also Applebaum v. Avaya*, 812 A.2d 880, 893 (Del. 2002) ("the right to an appraisal is a narrow statutory right that seeks to redress the loss of the stockholder's ability under the common law to stop a merger.") (citing *Ala. By–Prods.*).

[80] *Dell*, 177 A.3d at 19 (citing *Cede & Co. v. Technicolor, Inc.*, 542 A.2d 1182, 1186 (Del. 1988)).

3. The Text of Section 262

To the extent Solera suggests that the Appraisal Action is a Claim for a violation of the common law, we reject that suggestion.[81] Rather, an appraisal is entirely a "creature of statute."[82] The appraisal statute, set forth in 8 *Del. C.* § 262, affords a limited remedy only to those stockholders who "perfect[]" their appraisal rights.[83] Under Delaware's appraisal statute, "[a]ny stockholder of a corporation . . . who continuously holds such shares through the effective date of [a] merger or consolidation . . . who has neither voted in favor of the merger or consolidation nor consented thereto . . . shall be entitled to an appraisal [of their share value] . . . ."[84] Section 262 provides that, in an appraisal action, the Court of Chancery "shall determine the fair value of the shares exclusive of any element of value arising from the accomplishment or expectation of the merger or consolidation" plus interest.[85]

Section 262 imposes limited duties on the corporation. One such duty is to provide notice to stockholders pursuant to Section 262(d).[86] The notice must include a copy of

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[81] Further to this point, we note that under the 1899 appraisal statute, fair value was determined not by a court, but by a panel of "three disinterested persons, one of whom shall be chosen by the stockholder, one by the directors of the consolidated corporation[,] and the third by the two selected as aforesaid." 21 Del. Laws 445, 462-63, ch. 273 § 56 (1899). *See also Scott v. Arden Farms Co.*, 28 A.2d 81, 82-83 (Del. Ch. 1942) (regarding a merger that became effective on August 1, 1940, the "complainants demanded an appraisal under Section 61 of the Delaware Corporation Law by three disinterested appraisers.").

[82] *Dell*, 177 A.3d at 20; *Aspen Advisors LLC v. United Artists Theatre Co.*, 861 A.2d 1251, 1264, n.29 (Del. 2004); *Ala. By-Prod. Corp.*, 657 A.2d at 258; *Matter of ENSTAR Corp.*, 604 A.2d 404, 413 (Del. 1992); *Kaye v. Pantone, Inc.*, 395 A.2d 369, 374 (Del. Ch. 1978).

[83] 8 *Del. C.* § 262(d)(1).

[84] 8 *Del. C.* § 262(a).

[85] 8 *Del. C.* § 262(h).

[86] The surviving corporation must also give notice to stockholders if a merger of consolidation is effected pursuant to sections 228, 251(h), 253 or 267. 8 *Del. C.* § 262(d)(2).

section 262. The required notice must also provide specific instructions to all stockholders regarding the manner of executing and filing a valid demand for payment under section 262. Section 262(e) also requires the corporation, upon request of any stockholder entitled to appraisal, to supply to the stockholder a statement setting forth certain information including the aggregate number of shares not voted in favor of the merger for which appraisal demands have been submitted, as well as the aggregate number of holders of such shares. The surviving or resulting corporation also must file in the office of the Register in Chancery a verified petition containing the names and addresses of stockholders who have demanded payment for their shares and with whom agreements as to the value of their of their shares have not been reached by the surviving or resulting corporation.[87]

In this case, the appraisal petition alleges no violation by Solera of these requirements, and Solera does not contend that section 262 itself was violated.[88] Instead, the appraisal petition in this case is a ten-paragraph petition that contains no allegations of wrongdoing.[89] It seeks a determination of the fair value of the petitioner's share as of the

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[87] 8 *Del. C.* § 262(f).

[88] At oral argument the following exchange occurred:

> Justice Traynor: Mr. Gillon, sorry for interrupting you on that, but relevant to that point, in your brief, you specifically say that the petitioners alleged wrongful conduct in the appraisal process. Could you help me understand what specifically, in the appraisal process, separate and apart from the merger sale process, you're referring to when you say that?
>
> Mr. Gillon: Yes, Justice Traynor, we're talking about the process by which the price of the stock was negotiated, not the appraisal process itself.

Oral argument video 27:53 – 28:33, https://livestream.com/delawaresupremecourt/events/9276122/videos/211025162/player.

[89] J.A. at 131–134.

March 3, 2016 closing date of the transaction. That the valuation date under section 262 is as of the date of the execution of the merger, not the date the merger agreement is executed, further suggests that an appraisal action is not designed to address alleged wrongdoing relating to the merger process.[90] Rather, any such alleged wrongdoing is frequently addressed, as it was here, in a separate stockholder fiduciary litigation brought by stockholders against the target board's directors.[91] Finally, under section 262(i), the "surviving or resulting corporation" must pay the fair value of the shares as determined by the Court of Chancery.[92] That the appraisal remedy is directed to the surviving or resulting corporation, and the fact that the corporation itself does not owe fiduciary duties,[93] suggest

[90] *See Brigade*, ___ A.3d ____, 2020 WL 6038341 (Del. Oct. 12, 2020) ("The time for determining the value of a dissenter's shares is the date on which the merger closes.") (citing *Cede & Co. v. Technicolor, Inc.*, 684 A.2d 289, 298 (Del. 1996)). In *Zale Corp. v. Berkley Ins. Co.*, 2020 WL 4361942 (Tex. Ct. App. July 30, 2020), a Texas court of appeals affirmed a determination that Zale Corp. was not covered under two excess director and officer liability policies for its $34.2 million settlement of a Delaware appraisal action. Zale contended that the "wrongful act" that triggered the appraisal action was the entire merger process. The court of appeals disagreed, stating that, "the instrumental act that confers appraisal litigation rights is not the merger process but the execution of the merger, which did not occur in this case until after Zale's excess insurance coverage policy period ended." *Id*. at *6.

[91] In *Cede*, this Court held that the plaintiff could not amend and enlarge its appraisal action to include its claim for rescissory relief because this would impermissibly expand the legislative remedy. But we held that a stockholder could proceed simultaneously with both a statutory claim for appraisal and an equitable fairness claim. *Cede & Co. v. Technicolor, Inc.*, 542 A.2d 1182 (Del. 1988).

[92] 8 *Del. C.* § 262(i) ("The Court shall direct the payment of the fair value of the shares, together with interest, if any, by the surviving or resulting corporation to the stockholders entitled thereto.").

[93] *See A.W. Fin. Servs., S.A. v. Empire Resources, Inc.*, 981 A.2d 1114, 1127 n.36 (Del. 2009) ("Under Delaware law the issuing corporation does not owe fiduciary duties to its stockholders."); *Arnold v. Soc'y for Savings Bancorp, Inc.*, 678 A.2d 533, 539 (Del. 1996) ("Plaintiff has not cited a single case in which Delaware courts have held a corporation directly liable for breach of the fiduciary duty of disclosure. Fiduciary duties are owed by the directors and officers to the corporation and its stockholders."); *Standard General L.P. v. Charney*, 2017 WL 6498063, at *8 n.69 (Del. Ch. Dec. 19, 2017), *aff'd*, 195 A.3d 16 (Del. 2018) ("It is well established that corporations themselves do not owe fiduciary duties."); *Buttonwood Tree Value Ptrs, L.P. v. R.*

that appraisal actions are not designed to address breaches of fiduciary duty or other wrongdoing.

4. The Purpose of an Appraisal Proceeding Is Neutral

Appraisal proceedings are neutral in nature. Unlike most proceedings, "[i]n a statutory appraisal proceeding, both sides have the burden of proving their respective valuation positions by a preponderance of evidence.[94] "'In discharging its statutory mandate the Court of Chancery has discretion to select one of the parties' valuation models as its general framework or to fashion its own.'"[95] In an appraisal action, the Court of Chancery is limited by the record created by the parties and must determine the fair value of the shares after examining the evidence, including expert testimony, and according it

L. Polk & Co., Inc., 2014 WL 3954987, at *5 (Del. Ch. Aug. 7, 2014) ("corporations do not owe fiduciary duties to their stockholders"); *In re Dataproducts Corp. S'holders Litig.*, 1991 WL 165301, at *6 (Del. Ch. Aug. 22, 1991) ("a corporation *qua* corporate entity is not a fiduciary of, and thus cannot owe a fiduciary duty to, its shareholders."); 1 David A. Drexler et al., *Delaware Corporation Law and Practice* § 15.02 (2019) ("The [fiduciary] duty is only owed by the directors personally and is not owed by the corporation qua corporation, either directly or by way of *respondeat superior*.").

[94] *M.G. Bancorp. Inc. v. Le Beau*, 737 A.2d 513, 520 (Del. 1999); *see also In re Appraisal of SWS Grp., Inc.*, 2017 WL 2334852, at *9 (Del. Ch. 2017) ("Unlike traditional adversarial legal proceedings, the burden of proof is not specifically allocated to a party -- rather the Court, via statute, has the duty to determine the fair value of the shares."), *aff'd sub nom. Merlin Partners, L.P. v. SWS Grp., Inc.*, No. 295 (Del. Feb 23, 2018).

[95] *M. G. Bancorp. Inc.*, 737 A.2d at 525-26. We have emphasized the importance of a developed record and "the traditional hallmarks of a Court of Chancery appraisal proceeding" which include the "crucible of pre-trial discovery, expert depositions, cross-expert rebuttal, expert testimony at trial, and cross examination at trial." *Verition P'rs Master Fund Ltd. v. Aruba Networks, Inc.*, 210 A.3d 128, 140 (Del. 2019). "What is necessary in any particular case . . . is for the Court of Chancery to explain its [analysis] in a manner that is grounded in the record before it." *DFC*, 172 A.3d at 388.

appropriate weight.[96] The court makes an "independent" assessment of the fair value by considering "all relevant factors."[97] Further, in a number of cases, including in this litigation, the Court of Chancery has determined that the fair value of the shares was less than the negotiated deal price.[98] That dissenting stockholders can receive less than they were entitled to receive upon consummation of the merger illustrates that appraisal proceedings are neutral where both sides bear some risk.

5. The Consistent Line of Cases

Finally, there is an unbroken line of cases that hold that an appraisal under section 262 "does not involve any inquiry into claims of wrongdoing."[99] As we recently stated in

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[96] Although appraisal actions are adversary proceedings, they resemble other proceedings, like partition, that involve distributions or divisions of property without any determination that any party acted unlawfully. *See* Hon. Sam Glasscock III, *Ruminations on Appraisal*, Del. Lawyer 8, 9 (2017) (comparing the appraisal remedy with the remedy of partition).

[97] *Dell*, 177 A.3d at 21 (*citing Golden Telecom, Inc. v. Global GT LP*, 11 A.3d 214, 217–18 (Del. 2010)).

[98] *See, e.g.*, *Fir Tree*, ___ A.3d at ____, 2020 WL 3885166 at *1 (affirming the Court of Chancery's determination that the fair value of each share of Jarden stock as of the date of the merger was $48.31 where the merger price was $59.21); *In re Appraisal of Solera Hldgs., Inc.*, 2018 WL 3997578 (Del. Ch. Aug. 20, 2018) (determining the fair value to be $53.95 where the deal price was $55.85); *In re Appraisal of SWS Grp., Inc.*, 2017 WL 2334852 (Del. Ch. 2017), *aff'd sub. nom. Merlin Partners, L.P. v. SWS Grp., Inc.*, No. 295 (Del. Supr. 2017) (determining fair value to be $6.38 per share when Hilltop Holdings Inc. acquired SWS Group Inc. for consideration worth $6.92 per share); *ACP Master, Ltd. v. Clearwire Corp.*, 2017 WL 3421142 (Del. Ch. July 21, 2017) (determining fair value of $2.13 per share arising out of Sprint's acquisition of 49.8 percent of Clearwire that it did not already own for $5.00 per share), *aff'd ACP Master, Ltd. v. Sprint Corp.*, 184 A.3d 1291 (Table), 2018 WL 1905256 (Del. Apr. 23, 2018); *see also Cornerstone Research, Appraisal Litigation in Delaware: Trends in Petitions and Opinions 2006 – 2018* at 8 ("Of the 34 cases that went to trial between 2006 and 2018, 16 resulted in awards above the deal price and 18 resulted in awards at or below the deal price.").

[99] *Cede*, 542 A.2d at 1189 ("A determination of fair value does not involve an inquiry into claims of wrongdoing in the merger."); *see also Kaye v. Pantone, Inc.*, 395 A.2d 369, 375 (Del. Ch. 1978) ("[T]he sole issue raised by an action seeking an appraisal should be the value of the dissenting stockholder's stock."); *Pinson v. Campbell-Taggart, Inc.*, 1989 WL 17438, at *6 (Del. Ch. Feb.

Dell, "[t]here is **one** issue in an appraisal trial: 'the value of the dissenting stockholder's stock.'"[100] In *Cede*, we explained that:

> The only litigable issue [in an appraisal action under Section 262] is the determination of the value of the appraisal petitioners' shares on the date of the merger, the only party defendant is the surviving corporation and the only relief available is a judgment against the surviving corporation for the fair value of the dissenters shares. In contrast, a fraud action asserting fair dealing and fair price claims affords an expansive remedy and is brought against the alleged wrongdoers to provide whatever relief the facts of a particular case may require. . . . Statutory appraisal is limited to the payment of fair value of the shares . . . by the surviving or resulting corporation. . . . In contrast, in a fraud action seeking monetary relief for unfair dealing, the focus of the suit is whether wrongdoing can be established.[101]

Similarly, in *In re Trados*, the Court of Chancery also held that "[t]he breach of [a] fiduciary duty claim seeks an equitable remedy that requires a finding of wrongdoing [while] [an] appraisal proceeding seeks a statutory determination of fair value that does not require a finding of wrongdoing."[102]

Solera argues that appraisal litigation has evolved in light of our rulings in *Dell, DFC, and Aruba*.[103] It contends that after these cases, as a practical matter, Delaware

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28, 1989) ("[L]iability need not be established in an appraisal, because no inquiry is made into claims of wrongdoing in the merger.").

[100] *Dell*, 177 A.3d at 19 (citing *Cede*, 542 A.2d at 1186) (emphasis in original).

[101] *Cede*, 542 A.2d at 1187, 1189.

[102] *In re Trados Inc. Shareholder Litigation*, 73 A.3d 17, 35 (Del. Ch. 2013) (*citing Cede*, 542 A.2d at 1182); *see also Zale Corp. v. Berkley Ins. Co.*, 2020 WL 4361942 (Tex. Ct. App. July 30, 2020) (citing to Delaware authorities and holding that an appraisal proceeding is entirely a creature of statute, and that, "[t]he appraisal action statute does not require a 'wrongful act' or fiduciary breach.").

[103] *Dell, Inc. v. Magnetar Global Event Driven Master Fund Ltd.*, 177 A.3d 1 (Del. 2017); *DFC Global Corp. v. Muirfield Value P'rs, L.P.*, 172 A.3d 346 (Del. 2017); *Verition P'rs Master Fund Ltd. v. Aruba Networks, Inc.*, 210 A.3d 128 (Del. 2019).

appraisal petitioners must show deficiencies in the sale process in order to overcome the contention that the deal price reflected fair value. We disagree that these cases change the nature of appraisal actions. Although we have stated that a merger price "that results from a robust market check, against the backdrop of a rich information base and a welcoming environment for potential buyers, is probative of the company's fair value,"[104] we have also emphasized that there is no presumption that the deal price reflects fair value.[105] In fact, in *Dell*, we said that, "we doubted our ability to craft the precise preconditions for invoking such a presumption."[106]

Delaware courts have considered evidence relating to the price negotiation process leading to the signing of a transaction, but this evidence bears on the weight, if any, to be accorded to the deal price. For example, in *Dell*, we concluded that the Court of Chancery erred when it gave no weight to the market value or the deal price as part of its valuation analysis.[107] In *Aruba*, we noted the "considerable weight" a court should accord to the deal

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[104] *DFC*, 172 A.3d at 366 (noting also that our "refusal to craft a statutory presumption in favor of the deal price when certain conditions pertain does not in any way signal [this Court's] ignorance to the economic reality that the sale value resulting from an robust market check will often be the most reliable evidence of fair value, and that second-guessing the value arrived upon by the collective views of many sophisticated parties with a real stake in the matter is hazardous."); *Dell*, 177 A.3d at 23, 35 (describing the sale process as demonstrating "fair play, low barriers to entry, outreach to all logical buyers, and the chance for any topping bidder to have the support of Mr. Dell's own votes," and concluding that, "[o]verall, the weight of evidence shows that Dell's deal price has heavy, if not dispositive weight.").

[105] *Dell*, 177 A.3d at 21; *DFC*, 172 A.3d at 366–67.

[106] *Dell*, 177 A.3d at 21-22.

[107] *Id*. at 30 ("The transaction process exemplifies many of the qualities Delaware courts have found favor affording substantial, if not exclusive, weight to deal price in the fair price analysis.").

price absent deficiencies in the deal process."[108] And most recently, in *Fir Tree Value Master Fund v. Jarden Corp.*,[109] we affirmed the decision of the Court of Chancery holding that, of all the valuation methods presented by the parties' experts, only the unaffected market price of Jarden stock could be used reliably to determine the fair value. There the Court of Chancery placed "little to no weight on the other valuation metrics," including the deal price. In particular, it held that the Jarden sale process "'raise[d] concerns'" and "'left much to be desired.'"[110] Thus, appraisal decisions analyzing the merger process do not support the contention that appraisal actions adjudicate wrongdoing. For all of the reasons set forth above, we hold that an Appraisal Action does not fall within the definition of a "Securities Claim."

B. The Remaining Issues of Whether Pre-Judgment Interest was a Loss and Whether Defense Expenses Are Covered Are Now Moot

Under Section I(C) of the Primary Policy, XL agreed to pay for any "Loss resulting solely from any Securities Claim made against an Insured during the Policy Period for a Wrongful Act."[111] "Loss" includes "damages, judgments, settlements, pre-judgment and *post-judgment interest* or other amounts (including punitive, exemplary or multiplied damages, where insurable by law) . . . ."[112] "Loss" also includes "*Defense Expenses*," meaning "reasonable and necessary legal fees, expenses and other costs (including experts'

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[108] *Aruba*, 210 A.3d at 137.

[109] ___ A.3d ____, 2020 WL 3885166 (Del. 2020).

[110] *Id*. at *5 (quoting *In re Appraisal of Jarden*, 2019 WL 3244085, at *2 (Del. Ch. July 19, 2019).

[111] J.A. at 153 (Primary Policy § I(C)).

[112] J.A. at 156 (Primary Policy § II(O)) (emphasis added).

fees) . . . incurred in the investigation, adjustment, settlement, defense and/or appeal of any Claim . . . ."[113] Thus, if the Loss does not arise from a Securities Claim, then there is no coverage and Appellee's claims of error on appeal are moot.[114] Because we have determined that the Appraisal Action is not a Securities Claim, we do not reach the remaining issues, which are now moot.

IV. Conclusion

For the reasons set forth above, we REVERSE the Superior Court's opinion.

[113] J.A. at 154 (Primary Policy § II(F)) (emphasis added).

[114] At oral argument, Appellants confirmed that the excess policies follow form and incorporate the Primary Policy's provisions in all material respects relevant to the Pre-Judgment Interest issue and the Defense Expenses issue on appeal. The following exchange took place:

> Justice Valihura: Do you agree with Mr. Reed that if the appraisal action does not fall within the definition of a securities claim the other two issues concerning pre-judgment interest and defense expenses are moot?
>
> Mr. Gillon: Yes, Your Honor.

Oral Argument video: 23:40 – 23:55, https://livestream.com/delawaresupremecourt/events/9276122/videos/211025162; *see also* Oral Argument video: 39:43 – 40:06, https://livestream.com/delawaresupremecourt/events/9276122/videos/211025162/player.