

Del. High Court Sides With Insurers In \$20M D&O Dispute

By **Josh Liberatore**

Law360 (January 13, 2023, 5:17 PM EST) -- The Delaware Supreme Court upheld a ruling that Stillwater Mining Co. doesn't have insurance coverage for its \$20 million-plus legal bill stemming from a 2017 stockholder appraisal lawsuit, rejecting the company's argument that Montana law should apply to the dispute.



The Delaware Supreme Court said that even though Stillwater's main place of business was in Montana, its coverage dispute should be decided under Delaware law since the mining company was incorporated in Delaware and the underlying stockholder appraisal suit was filed there.

A three-justice Delaware high court panel said in **an opinion Thursday** that Stillwater can't rely on Montana's coverage by estoppel remedy to argue that insurers led by AIG's National Union Fire Insurance Co. of Pittsburgh, Pa. must cover the company's defense costs for appraisal litigation under directors and officers policies.

The justices said that even though Stillwater's main place of business was in Montana, the coverage dispute should be decided under Delaware law since the mining company was incorporated in Delaware and the underlying appraisal suit was filed there.

"Stillwater has not shown that Montana has a relatively greater interest than Delaware for the current dispute, which involves D&O policies purchased by a Delaware corporation and an appraisal action brought in Delaware," the justices wrote.

The coverage dispute stems from Stillwater's \$2.2 billion merger in 2017 with South African company Sibanye Gold Ltd. After that deal closed, Stillwater stockholders **petitioned for appraisal** of their shares in Delaware's Court of Chancery, asserting that the \$18 per share that Stillwater investors received was too low.

The Chancery Court **upheld the deal price** in August 2019, and the Delaware Supreme Court

affirmed that decision in October 2020.

Stillwater then sued National Union and its two excess insurers, Ace American Insurance Co. and QBE Insurance Corp. in Delaware Superior Court, arguing that its D&O policies should cover costs it incurred in defending the appraisal actions.

Judge Abigail M. LeGrow dismissed Stillwater's complaint in December 2021, finding that an appraisal action didn't constitute a "securities claim" under the policies. The trial court judge leaned on the Delaware Supreme Court's decision in *In re Solera Insurance Coverage Appeals*, which overturned a lower court ruling and held that Solera Holdings Inc. **wasn't covered** for an appraisal action under its D&O policies.

According to Thursday's high court opinion, Stillwater sought in its original complaint against its insurers to apply Delaware law based on the trial court's then-favorable holding in *Solera*. The Delaware justices said that after the high court's reversal "doomed Stillwater's original complaint," the mining company reversed course and amended its complaint to argue that Montana law should apply instead.

Stillwater argued that the insurers had a duty to cover its defense costs under Montana law based on the theory of coverage by estoppel. **During oral arguments**, Stillwater's attorney said that because the insurers didn't defend the mining company in the appraisal action and also didn't properly explain their reasons for denying coverage, they're estopped, or prevented, from arguing against coverage now.

The case effectively boiled down to which state's law applied to the dispute, since Delaware doesn't recognize coverage by estoppel, the justices noted.

The justices pointed to the state Supreme Court's ruling in *RSUI Indemnity Co. v. Murdock et al.*, where the **high court found that** Delaware has a strong interest applying its law to D&O policy disputes involving Delaware corporations, regardless of where those companies are headquartered.

The justices noted that Stillwater was incorporated in Delaware and the underlying appraisal action was also filed in the state, so the reasoning used in *Murdock* should apply.

The justices rejected what they characterized as Stillwater's argument that its case is distinguishable from *Murdock* because the mining company raised arguments based on claims-handling and Montana's estoppel law rather than whether the policy language itself provides coverage for appraisal actions.

In its totality, the case is still "mainly a contract dispute" and not a claims-handling one, the justices said, noting that Stillwater itself originally wanted Delaware law to apply. That the new estoppel claims may favor the application of Montana law isn't enough to tip the balance away from Delaware, they said.

In *Murdock*, "We emphasized the importance of applying a single body of law to comprehensive insurance policies like those here," the justices wrote.

Representatives of Stillwater and the insurers didn't immediately respond to requests for comment Friday.

Chief Justice Collins J. Seitz Jr. and Justices James T. Vaughn Jr. and Gary F. Traynor sat on the Delaware Supreme Court panel.

Stillwater Mining is represented by Martha Sheehy of Sheehy Law Firm, Kyle A. Gray of Holland & Hart LLP and David J. Baldwin and Peter C. McGivney of Berger Harris LLP.

National Union is represented by Kurt M. Heyman and Aaron M. Nelson of Heyman Enerio Gattuso & Hirzel LLP and by Scott B. Schreiber, William C. Perdue, Andrew T. Tutt and Samuel I. Ferenc of Arnold & Porter.

Ace is represented by John L. Reed of DLA Piper and Gregory F. Fischer and Angelo G. Savino of

Cozen O'Connor.

QBE Insurance Corp. is represented by Geoffrey W. Heineman, Jung H. Park and John J. Iacobucci Jr. of Ropers Majeski Kohn Bentley PC and John C. Phillips Jr. and David A. Bilson of Phillips McLaughlin & Hall PA.

The case is Stillwater Mining Co. v. National Union Fire Insurance Co. of Pittsburgh, PA, et al., case number 24, 2022, in the Supreme Court of the State of Delaware.

--Additional reporting by Leslie A. Pappas, Morgan Conley, Jeff Montgomery, Vince Sullivan and Ryan Boysen. Editing by Emma Brauer.