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The D&O Diary

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Directors & Officers Liability, With Occasional Commentary

New Jersey Supreme Court Affirms Broad Reading of D&O “Capacity” Exclusion

By Sarah Abrams on May 20, 2026



On May 11, 2026, the Supreme Court of New Jersey issued a **highly anticipated ruling**, holding that when an individual’s actions span both insured and uninsured capacities, that overlap in role-based conduct is sufficient to trigger the D&O policy’s capacity exclusion. Affirming the July 9, 2024, Appellate Court **decision**, with modifications, the Court held that the exclusion properly precluded coverage for an individual acting in multiple capacities, specifically regarding underlying self-dealing claims. **The D&O Diary** previously covered the appellate decision, which had completely denied coverage in full.

A May 12, 2026, *LinkedIn* post by Geoffrey Fehling of the Hunton Andrews Kurth law firm discussing the decision can be found **here**.

The Supreme Court’s ruling provides important guidance on three recurring D&O coverage issues: (1) the breadth of capacity exclusions; (2) dual-capacity conduct; and (3) whether an insurer forfeits coverage defenses by defending under a reservation of rights while declining to fund settlement.

This article reviews the Court’s analysis of the underlying allegations and policy language, as well as the potential implications for future disputes involving overlapping executive roles in private equity, healthcare, and other complex corporate structures.

Background

The underlying litigation involved a multi-entity self-dealing scheme led by principal Joseph Krivulka. Minority investors in Akrimax Pharmaceuticals filed direct and derivative actions alleging that Krivulka systematically stripped Akrimax of valuable pharmaceutical product rights. According to the complaints, he diverted these assets to entities he controlled, including Mist Pharmaceuticals, which collected royalties and ultimately terminated Akrimax’s distribution licenses.

When Mist sought coverage for the lawsuits, its insurer denied the claim. Although Mist was an insured under the private-company D&O policy, its uninsured affiliates, including Akrimax, implicated the policy’s capacity exclusion. That distinction ultimately drove the coverage outcome. That distinction ultimately drove the coverage outcome.

The Capacity Exclusion

The policy’s capacity exclusion precluded coverage for claims “in any way involving” wrongful acts committed by an insured person while serving in various roles for an uninsured entity.

The Supreme Court emphasized the breadth of this language, particularly the phrase “in any way involving.” Relying on its prior decision in *Norman International*, the Court held that the exclusion does not require a strict causal nexus between the excluded conduct and the alleged loss. Rather, any overlap between the alleged misconduct and the insured’s role with an uninsured entity is sufficient to trigger the exclusion.

According to the Court, all material allegations in the underlying complaints involved Krivulka acting in his capacity as a director, member, or manager of uninsured entities, particularly Akrimax. The Court found “no allegation” against Mist, or against Krivulka in his insured role, that was independent of his activities involving uninsured entities. The claims therefore fell squarely within the exclusion.

The “Dual Capacity” Problem

The Court also addressed the increasingly common “dual capacity” issue. The insured argued that some of Krivulka’s alleged conduct occurred in his insured role with Mist and therefore should not

be excluded. The dissent found this argument persuasive, reasoning that the exclusion should apply only to conduct undertaken solely in an uninsured capacity.

The majority rejected this narrower interpretation, adopting instead an expansive approach under which any claim involving overlapping uninsured capacities, even in part, may be barred in full.

For D&O underwriters, the ruling underscores the importance of outside-entity coverage provisions, insured entity definitions, and careful delineation of executive roles.

Reservation of Rights and Estoppel

The Court also considered whether the insurer forfeited its reliance on the exclusion by participating in the defense for several years. Mist argued that the insurer violated New Jersey's good-faith standards by funding the defense and then disclaiming coverage shortly before settlement.

The Court rejected that argument, emphasizing that the insurer consistently and repeatedly reserved its rights under the capacity exclusion throughout the five-year claims process. The insurer reproduced the exclusion in multiple communications, invoked it at least ten times, and expressly disclaimed waiver or estoppel.

Under these circumstances, the Court concluded that Mist could not reasonably rely on any expectation that the insurer would fund a settlement or waive its coverage defenses.

The dissent viewed the issue differently, characterizing the insurer's conduct as an untimely and unreasonable assertion of the exclusion. This divergence may prove significant in future disputes involving prolonged reservation-of-rights defenses.

Settlement Participation and the Duty to Indemnify

Finally, the Court addressed whether an insurer disputing coverage must participate in settlement negotiations. Mist argued that the insurer acted improperly by refusing to contribute to a \$12 million global settlement, under which 25% of liability was allocated to Mist and to Krivulka in his role as chairman of its board.

The trial court agreed with the insured, but the Appellate Division reversed. The Supreme Court affirmed, holding that because the claims fell within the capacity exclusion, the insurer had no obligation to fund the settlement or provide indemnity.

The Court further concluded that the insurer's refusal to participate in settlement negotiations did not constitute bad faith, given its consistent reservation-of-rights position.

Broader D&O Implications

First, it reinforces the expansive reach of capacity exclusions where policies employ language such as "in any way involving," "related to," or "arising out of." Courts may continue to interpret such provisions broadly, increasing the likelihood that coverage will be denied where uninsured entities are intertwined with the alleged misconduct.

Second, the ruling highlights the risks posed by overlapping executive roles in founder-controlled businesses, healthcare enterprises, private equity structures, and affiliated company groups. It underscores the importance of carefully structuring outside-entity coverage and ensuring that relevant entities are properly scheduled.

The decision also highlights a recurring gap between how capacity exclusions are written and how policyholders expect them to operate in real-world "dual capacity" scenarios. One practical takeaway for D&O underwriters is that this outcome may be avoidable through more precise policy wording. For example, policies could clarify that coverage applies to claims "to the extent" the insured person was acting in an insured capacity, even if the same course of conduct also involved service in an uninsured capacity.

Conversely, exclusions could be drafted to apply only "to the extent" the individual was acting in an uninsured capacity, rather than barring coverage in its entirety based on any involvement of such a role. At a minimum, a more balanced approach, consistent with the reasonable expectations of insureds, may recognize that individuals frequently act in multiple capacities and should remain covered at least for that portion of their conduct undertaken in an insured capacity.

Finally, as D&O insurers continue to defend under reservations of rights while evaluating allocation and indemnity issues, disputes over when such reservations become prejudicial may intensify. This decision may emerge as a leading case on dual-capacity claims, reservation-of-rights practices, and the scope of D&O capacity exclusions.