

## Health Care Co. Wins D&O Coverage For SPAC Suits

By Josh Liberatore

*Law360 (February 17, 2023, 9:23 PM EST)* -- Insurers must cover defense costs a health care company racked up in underlying suits stemming from its merger deal with a special purpose acquisition company, a Delaware state court judge said, finding that the company's directors and officers are insured under policies issued to the SPAC.

In a ruling filed Feb. 6 and recently made public, Delaware Superior Court Judge Mary M. Johnston said the directors and officers of Clover Health Investments Corp. count as "insured persons" under a D&O policy issued to Social Capital Hedosophia Holdings Corp., a SPAC that took Clover Health public.

Insurers led by primary carrier Endurance Risk Solutions Assurance Co. argued that the Clover Health members weren't covered under the policy since they weren't directors and officers of Social Capital itself at the time of the alleged wrongful conduct.

But Judge Johnston noted that the policy covered anyone who was or "shall become" a director or officer of Social Capital as well as its "functional equivalents." That should include Clover Health, the judge said, since it was the health care company that came out of the merger.

"Because Social Capital was set to become Clover Health at the time of the alleged wrongdoing," the health care company's directors and officers "were acting in functionally equivalent roles to Social Capital's directors and officers when they committed the alleged wrongdoing," Judge Johnston wrote.

The issue of who should qualify as an insured person "under this type of insurance policy language" is an issue of first impression in the Delaware Superior Court, the judge said.

According to the opinion, the coverage dispute stems from a SPAC merger deal between Social Capital and Clover Health, which led to the health care company becoming public in January 2021. Clover Health is seeking coverage for various lawsuits stemming from the deal, including a securities class action and several shareholder derivative suits, as well as a U.S. Securities and Exchange Commission investigation.



A Delaware state court judge found that a health care company's directors and officers count as "insured persons" under a D&O policy issued to a special purpose acquisition company that took the health care company public. (iStock)

Endurance agreed to provide defense coverage for the suits to Social Capital and the SPAC's own directors and officers, but refused to cover five directors and officers who were affiliated with only Clover Health before the merger, including Chelsea Clinton. The insurer refused to provide any coverage for the SEC probe, arguing its policy didn't cover "investigations."

Clover Health sued Endurance and excess carriers Certain Underwriters at Lloyd's, London, and Hudson Insurance Co. in June, seeking coverage under the Social Capital policies. The health care company has settled with Lloyd's, according to the opinion.

In granting Clover Health's motion for partial summary judgment, Judge Johnston accepted the health care company's argument that its directors and officers were effectively making decisions for Social Capital in the time leading up to the merger, since they were in "positions of power, authority, and control" over the entity that would become the publicly traded Clover Health.

For example, the underlying suits included allegations that Clover Health's directors and officers assisted with filing Social Capital's Form S-4 in preparation for the merger, the judge noted.

Judge Johnston also ruled that the insurers must cover Clover Health's defense costs from the underlying suits in full up to their policy limits, rejecting the carriers' requests to allocate between covered and uncovered costs.

The judge said the "larger settlement rule" affirmed by the Delaware Supreme Court in *RSUI Indemnity Co. v. Murdock et al.* applies to defense-cost calculations, not just settlements. Using that rule, Endurance and the excess carriers are on the hook for the full amount of defense costs, since their policies don't specify how costs should be allocated, the judge said.

In another part of the ruling, Judge Johnston denied the insurers' motion to dismiss Clover Health's claim for coverage of the SEC subpoenas. Different parts of the policies contain "contradictory language" as to whether they cover investigations, so Clover Health's claim can move forward, the judge said.

"The court will permit discovery regarding the ambiguity," Judge Johnston wrote.

Clover Health is also suing its own D&O insurers, Berkley Insurance Co., XL Specialty Insurance Co. and Allied World Specialty Insurance Co., but coverage under those policies wasn't at issue in the order.

Counsel for Clover Health declined to comment. Representatives of the insurers didn't immediately respond to Law360's requests for comment Friday.

Clover Health is represented by Robin L. Cohen, Kenneth H. Frenchman and Cynthia M. Jordano of Cohen Ziffer Frenchman & McKenna and by Jennifer C. Wasson and Carla M. Jones of Potter Anderson & Corroon LLP.

Endurance, Lloyd's and Hudson are represented by Bruce W. McCullough of Bodell Bove LLC.

Endurance is also represented by David F. Cutter and Jonathan R. Walton of BatesCarey LLP.

Hudson is also represented by Courtney E. Scott of Tressler LLP.

The case is Clover Health Investments, Corp. f/k/a Social Capital Hedosophia Holdings Corp. III v. Berkley Insurance Company et al., case number N22C-06-004, in the Superior Court for the State of Delaware.

--Editing by Nick Petruncio.

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