Delaware Supreme Court Affirms D&O Coverage for Settlement of Post-M&A Shareholder Litigation and Limits Scope of "Bump-Up" Exclusion

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On Jan. 27, 2026, in *Illinois National Insurance Co. v. Harman International Industries, Inc.* ("*Harman*"), the Delaware Supreme Court issued a notable, pro-policyholder decision addressing the scope of directors and officers (D&O) insurance coverage for settlements arising from post-M&A shareholder litigation.[1]

The Court affirmed coverage for a $28 million settlement paid by Harman International Industries, Inc. to resolve a shareholder class action that arose from a corporate transaction between Samsung Electronics Co., Ltd.'s and Harman.[2] In doing so, the Court provided important guidance on the interpretation and application of the "Bump-Up" exclusion commonly found in D&O policies. That guidance is important because, as we previously have discussed, the scope of the Bump-Up exclusion has been one of the hottest issues in D&O insurance coverage.[3]

Before diving into the details of the decision, here are **three key takeaways for policyholders:**

1. **Words matter**. The Delaware Supreme Court noted that not all Bump-Up exclusions are the same, and that the precise exclusion language at issue in *Harman* supported the Court's decision.[4]

2. **Do not accept denials at face value**. Policyholders should scrutinize any denial of coverage. To some, the insurers' denial of coverage for Harman's claims may have made sense, but upon a closer analysis of the facts against the policy language, the inapplicability of the Bump-Up exclusion became clear.

3. **The timing, bases and terms of underlying settlements matter**. Policyholders should carefully consider the timing and terms of their underlying settlement agreements, and the bases for them, to avoid scenarios where insurers (and courts) can use such factors to support a denial of coverage. Here, the Delaware Supreme Court scrutinized the timing and terms of the underlying settlement agreement, and the bases for it, to support its conclusion that the Bump-Up exclusion did not apply.[5]

Background

Following the referenced corporate transaction between Samsung and Harman in 2017, Harman shareholders initiated federal securities claims alleging that the proxy disclosures were inadequate and thus deprived the shareholders of the full value of their shares.[6] Harman settled these claims for $28 million and sought coverage under its D&O insurance program, which included policies from multiple insurers.[7] Harman's insurers denied coverage, invoking the following Bump-Up exclusion:

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> In the event of a **Claim** alleging that the price or consideration paid or proposed to be paid for the acquisition or completion of the acquisition of all or substantially all the ownership interest in or assets of an entity is inadequate, **Loss** with respect to such **Claim** shall not include any amount of any judgment or settlement representing the amount by which such price or consideration is effectively increased; provided, however, that this paragraph shall not apply to Defense Costs or to any Non-Indemnifiable Loss in connection therewith.[8]

The Delaware Superior Court Decision

The Delaware Superior Court granted summary judgment in favor of Harman, holding that the insurers failed to carry their heavy burden to demonstrate that the Bump-Up exclusion applied.[9] The Superior Court found that, although the underlying securities claim challenged the transaction, the insurers did not establish either element of the exclusion at issue. Specifically, the insurers did not establish either (1) that the underlying complaint sought an increase in the transaction consideration received by the shareholders, nor (2) that the settlement amount represented an effective increase in that deal consideration.[10] And because the insurers had to prove both elements, the exclusion did not apply.[11]

The Delaware Supreme Court Decision

On appeal, the Delaware Supreme Court affirmed the Superior Court's decision.[12]

On the first element, the Court disagreed with the Superior Court and concluded that the underlying complaint did effectively seek an increase in the transaction consideration.[13] But on the second element, the Court held that the insurers did not prove that the underlying settlement represented an effective increase in deal consideration.[14]

The First Element – Did the Complaint Seek an Increase in the Transaction Consideration?

As for the first element, the Court concluded that the insurers met their burden to show that the underlying litigation was a claim seeking to increase transaction consideration because, in the Court's view, the underlying plaintiffs' federal securities claims relied upon allegations of inadequate consideration.[15] More specifically, the Court concluded that the underlying plaintiffs' claims required a showing that the defendants "caused the plaintiff injury," and in that regard, the Court viewed the underlying complaint as alleging that defendants' violations of federal securities laws deprived them of their right to "the full and fair value for [their] Harman shares."[16] The Court also stated that the underlying plaintiffs alleged that their "actual economic losses" were comprised of "the difference between the price Harman shareholders received and Harman's true value" at the time of the transaction.[17] Taking those pieces together, the Court held that "allegations of inadequate consideration were 'intrinsic to the theory of the Section 14(a) claim.'"[18]

Although we believe that the Superior Court's contrary analysis of the underlying Section 14(a) litigation was sound, and thus should have been affirmed, the Delaware Supreme Court's conclusion on this element was unavailing to the insurers given the Court's holding on the second element of the exclusion.

The Second Element – Did the Settlement Represent an Effective Increase in Deal Consideration?

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As to the second element, the Court held that the insurers did not satisfy their burden of establishing that the settlement amount represented an effective increase in deal consideration, for two reasons.

First, the Court held that the settlement amount could not have represented an increase in deal consideration because the settlement class included certain shareholders who did not receive any consideration in connection with the transaction.[19] Indeed, the Court noted that "the record does not indicate that all settlement class members relinquished shares in the Transaction and received Transaction consideration which would be increased."[20]

Second, the Court held that the insurers "did not present any evidence that the Settlement Amount was in any way arrived at or calculated based on how much the recovering class members should or could have received in the Transaction."[21] Thus, it could not be said that the settlement amount represented an increase in deal consideration.[22] The Court held that, instead, "it seems more likely, as the Superior Court concluded, that the Settlement Amount [of $28 million] was based upon the cost of continuing the litigation," since Harman "estimated that the defense costs for continuing the litigation would have been about $25 to $30 million."[23] This determination was buttressed by the settlement agreement, which stated "that the parties' decision to settle 'was based solely on the conclusion that further conduct of the Litigation would be protracted and expensive' and 'that it would be beneficial to avoid [the] costs, uncertainty, and risks inherent to any litigation, especially in complex cases like this Litigation.'"[24] That said, the Court also cautioned that "reliance upon settlement language alone may be ill-advised because 'the settlement process can leave insurers on the outside and potentially be collusive.'"[25]

Notably, in support of the above two-step analysis, the Court looked to the specific language of the "Bump-Up" exclusion itself, which by its terms, applied only when (1) the underlying claim alleged inadequate deal consideration for the transaction, and (2) the settlement amount, or any portion of the settlement amount, represented the amount by which such alleged inadequate deal consideration was effectively increased.[26] The Court also examined case law interpreting similarly worded exclusions that applied a similar two-step analysis.[27] In doing so, the Court stated that "not all Bump-Up provisions contain the same [two] requirements."[28] As stated at the outset, words matter.

We made similar points about the importance of specific exclusionary language in our prior writings on this issue. We noted that some Bump-Up exclusions expressly exclude plaintiffs' counsel fees awarded in settlements of M&A litigation while others do not, and that some Bump-Up exclusions expressly apply only when the policyholder is the buyer in a transaction (and not when the policyholder is the target entity (which is consistent with the purpose and understanding of the exclusion anyway)).[29]

Additional Key Takeaways

1. The Bump-Up Exclusion Remains a Central Issue in D&O Coverage Disputes

    a. The *Harman* decision highlights the ongoing complexity in addressing whether Bump-Up exclusions apply to settlements in post-M&A shareholder litigation. The outcomes of such disputes likely will continue to depend on the specific versions/language of the exclusions at issue, on the facts of the underlying transactions, and on the facts of the underlying litigations

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and any resulting settlements. Policyholders should anticipate continued disputes over the scope and application of these provisions.

2. Exclusions Will Be Construed Narrowly

a. Insurers bear a heavy burden to prove that Bump-Up exclusions clearly and unambiguously apply. Thus, courts will require clear evidence that, among other requirements, a settlement amount constitutes an effective increase in deal consideration before finding that it applies.

3. Policyholders Must Continue to Monitor This Issue and its Many Nuances

a. Although the *Harman* decision provides important clarification, it does not purport to address all possible future disputes regarding Bump-Up exclusions. On the contrary, continued coverage litigation both in Delaware and in other jurisdictions regarding the exclusion indicates that the law in this area continues to evolve. In that regard, as with multiple coverage issues, disputes over choice of law (which state's law applies in interpreting the exclusion) and corresponding venue disputes will be important. Policyholders should monitor developments and be prepared to address factual nuances, including regarding the bases for settlement amounts, to combat the application of the Bump-Up exclusion.

Conclusion

Harman represents an important win for policyholders seeking insurance coverage for settlements arising from post-M&A shareholder litigation. The decision highlights the fact that distinctions in policy language may be critical, that denials of coverage must be carefully scrutinized, and that policyholders should carefully consider the timing and the terms of, and the bases for, underlying settlements, to avoid scenarios where insurers (and courts) can use such factors to support a denial of coverage.

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[1] C.A. No. N22C-05-098 (Del. Jan. 27, 2026). Two Justices dissented, and thus the decision was 3-2.

[2] *Id.* at 1–2.

[3] *See* Barry Buchman, Michael Scanlon, and Jake Todd, *Guest Post: Bump-Up Exclusion: Recent Delaware Decisions Support Policyholders*, The D&O Diary (Apr. 9, 2025); Barry Buchman & Michael Scanlon, *Guest Post: Avoiding Bumps in the Road to Coverage: Limitations on the "Bump-Up Exclusion*," The D&O Diary (Dec. 28, 2021).

[4] *See Harman,* at 29 (noting that "[b]ecause the bump-up provision in *Joy Global* did not require a second step of analysis, *Joy Global* is irrelevant in determining what this Settlement represents").

[5] *See, e.g.*, *id.* at 32–33.

[6] *See id.* at 6–7.

[7] *See id.* at 7–9.

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[8] *Id.* at 17.

[9] *See id.* at 10.

[10] *See id.* at 10–12.

[11] *See id.* at 12.

[12] *See id.* at 1–2.

[13] *See id.* at 19.

[14] *See id.*

[15] *See id.* at 24.

[16] *Id.* at 23.

[17] *Id.* at 24.

[18] *Id.* (citing *Towers Watson & Co. v. Nat'l Union Fire Ins. Co. of Pittsburgh, PA*, 2024 WL 993871, at *4 (E.D. Va. Mar. 6, 2024)).

[19] *See id.* at 29–30.

[20] *Id.* at 30.

[21] *Id.* at 31.

[22] *See id.* at 33.

[23] *Id.* at 32.

[24] *Id.* at 32–33 (citing underlying settlement agreement).

[25] *Id.* at 33, n.127 (citing *In re CVS Opioid Ins. Litig.*, 2025 WL 2383644, at *13 (Del. Aug. 18, 2025)).

[26] *See id.* at 17–18.

[27] *See id.*

[28] *Id.* at 18.

[29] *See* Barry Buchman, Michael Scanlon, and Jake Todd, *Guest Post: Bump-Up Exclusion: Recent Delaware Decisions Support Policyholders*, The D&O Diary (Apr. 9, 2025); Barry Buchman &

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