Barry Buchman and Michael Scanlon in The D&O Diary: 'Avoiding Bumps in the Road to Coverage: Limitations on Bump-Up Exclusion'

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In the following guests post, Barry Buchman and Michael Scanlon take a look at the issues that can arise in disputes over the application of the "bump up" exclusion and consider the practical consequences. Barry is partner and Michael is counsel in the insurance recovery group at the Haynes Boone law firm. I would like to thank Barry and Michael for allowing me to publish their article as a guest post on this site.

One of the principal purposes of public company directors and officers (D&O) liability insurance is to protect directors and officers from exposure to shareholder lawsuits stemming from merger and acquisition (M&A) activity. As one high-ranking executive of a major D&O insurer stated publicly, allegations of "wrongful acts" by board members of a target entity in such transactions fall within the "breadbasket" of D&O coverage.

This protection has become only more important over the past decade as M&A claims have increased in both frequency and severity. Historically, settlements of M&A claims typically involved only additional disclosures and plaintiffs' counsel fees. More recently, however, multi-million-dollar settlements have become more common.

In response to this escalation in underlying M&A litigation, D&O insurers increasingly have invoked the so-called "bump-up" exclusion ("BUE") to avoid covering M&A claims. According to insurers, the exclusion precludes coverage for settlements of M&A litigation that "bump up" the consideration that was paid to the shareholders of the target entity in the original M&A deal. But exactly when and how the BUE does so has been the subject of great debate and increasing amounts of novel litigation over the past five years.

To read the full article, click here.

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