State of the Law on the Applicability of D&O Insurance Bump-Up Clauses

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Summary

- This article examines recent bump-up cases to demonstrate where courts have found a bump-up clause to bar coverage and why.
- The aim of these clauses is often described as preventing the use of insurance to cover the costs of inadequate deal consideration.
- Whether the settlement of a shareholder lawsuit is excluded under a bump-up clause has substantial repercussions for both insurers and insureds.

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Over the past few years, courts in Delaware, Virginia, Wisconsin, and California, as well as the Fourth and Seventh Circuit Courts, have addressed the applicability of bump-up clauses in directors' and officers' (D&O) insurance policies. This article summarizes recent case law discussing when bump-up clauses have been found to apply to claims involving allegedly inadequate consideration for a transaction.

Overview

Bump-up clauses often bar coverage for settlements or judgments in lawsuits where a company's shareholders sue the company's officers and directors for agreeing to a lower price than the company should have in connection with a merger or acquisition transaction. The clause is known as a "bump-up" clause because it prohibits coverage for settlements that have the practical effect of "bumping up" the purchase price paid to shareholders in such a transaction. The aim of such clauses is often described as preventing the use of insurance to cover the costs of inadequate deal consideration. Otherwise, directors and officers may be incentivized to agree to below-market prices for merger and acquisition deals, while relying on insurance proceeds to fill in the gap. The Seventh Circuit illustrated this concept as follows:

> Suppose Company X is worth $100 million. Company Y agrees to buy X for $80 million and promises that X's shareholders will be made whole. The shareholders sue, contending that X has withheld the "fact" that the company is worth $100 million. X and Y settle that claim for $20 million and turn to their insurer for indemnity. The shareholders get their $100 million, but if this maneuver works Y completes the purchase for only $80 million, with the rest coming from insurance. [1]

To apply, many bump-up clauses require there to be a transaction that constitutes an acquisition of all or substantially all of an entity's assets or ownership, a claim that alleges that the price or consideration paid for that transaction was inadequate, and a judgment or settlement resulting from the claim that represents the amount by which the price or consideration is effectively increased. [2] Nonetheless, the specific language of bump-clauses can significantly differ from policy to policy, leading to different requirements and court interpretation.

Over the last few years, courts have addressed bump-up clauses in *Northrop*, [3] *Joy Global*, [4] *Ceradyne*, [5] *Onyx*, [6] *Komatsu*, [7] *Viacom*, [8] *Towers Watson I*, [9] *Harman I*, [10] *Towers Watson II*, [11] *Harman II*, [12] and *MSG Networks*. [13] In each of these cases, the parties disputed whether the policy's bump-up clause applied to preclude coverage of an underlying shareholder lawsuit in connection with a merger or acquisition transaction. Each of these shareholder lawsuits alleged, in relevant part, a violation of section 14 of the Securities Exchange Act of 1934, breach of fiduciary duty, or both. Below, we walk through these recent decisions to provide an overview of the current state of the law on bump-up clauses in D&O policies.

Northrop

In February 2021, the Delaware Superior Court decided *Northrop*. The underlying transaction was a reverse triangular merger involving the creation of a subsidiary of Alliant Techsystems, Inc., which merged into Orbital ATK, Inc. (OATK). [14] Orbital Sciences stock was then converted into a right to receive Alliant stock. [15] Thereafter, Alliant was renamed OATK, and Alliant's stock was canceled and converted to OATK stock. [16] The target company survived, and the acquiring company did not. [17] After the completion of this transaction, a class of OATK stockholders brought suit asserting a section 14 claim that alleged a coerced shareholder vote because false or misleading statements in the proxy solicitation materials overvalued Alliant and deprived the shareholders "of their right to a fully informed vote and induc[ed] them to vote their shares and accept inadequate consideration." [18] The shareholder suit settled, allocating $45.6 million to the section 14 claim. [19] The insured sought coverage for the settlement. After coverage was denied, coverage litigation ensued in which the parties disputed whether the policy's bump-up clause applied to bar coverage for the settlement of the section 14 claim. [20] The bump-up clause stated:

> In the event of a Claim alleging that the price or consideration paid for the acquisition or completion of the acquisition of all or substantially all the ownership interest or assets in 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 is effectively increased . . . ; provided, however, that this paragraph shall not apply to Defense Costs or to any Non-Indemnifiable Loss in connection therewith. [21]

First, the court stated that the bump-up clause applies where the claim alleges "only [that] the 'consideration' exchanged . . . was 'inadequate'" and held that the section 14 claim was not "exclusively" about the shareholders' inadequate consideration because it primarily was about false and misleading misrepresentations made in the proxy statement. [22]

Second, the court held that the transaction was not an acquisition of all or substantially all of an entity's assets or ownership because "Alliant did not retain a separate legal existence once the transaction had been completed" because "its stock was cancelled and converted to OATK stock," "both sets of stockholders voted—the hallmark of a merger," and the underlying allegations referred to the transaction as a merger, not an acquisition. [23] The court rejected the insurers' argument that a bump-up clause applied to the underlying reverse triangular merger because it "involved" an acquisition. [24] The court stated, "Narrowly read," the bump-up clause "bars Loss from a transaction which can only be called an 'acquisition'" and not "an 'acquisition' that is the penultimate step in a stock-for-stock merger." [25]

Third and last, the court held that the settlement did not represent an effective increase of inadequate consideration because "[t]he Orbital Sciences stockholders didn't seek an appraisal to 'effectively increase[ ]' their stake or its value. They sought unelaborated 'compensatory damages' for the 'overvalued' Alliant-turned-OATK stock extracted through falsified proxy forms to effectively decrease what they 'paid.'" [26] Thus, the court held that the bump-up clause did not bar coverage for the shareholders' section 14 claim. [27]

Joy Global and *Komatsu*

In August 2021, the U.S. District Court for the Eastern District of Wisconsin decided *Joy Global*. In the underlying transaction, Komatsu America Corp. acquired Joy Global Inc., resulting in an acquisition of all the ownership interest of Joy Global. [28] Thereafter, shareholders filed eight lawsuits. [29] Seven lawsuits settled before the merger, and the eighth lawsuit settled after the merger. [30] The suits alleged violations of section 14 and breaches of fiduciary duties. [31] The plaintiffs of the eighth lawsuit filed an amended complaint after the merger, which contended that "Joy Global and its directors and officers had issued a false or misleading proxy report for the purpose of inducing shareholders to vote their shares in support of a merger agreement which secured inadequate compensation for Joy Global's shares." [32] The eighth lawsuit settled for $20 million. [33] In *Joy Global*, the parties disputed whether the settlements of all eight shareholder suits were excluded under the policy, which provided:

> Loss (other than Defense Costs) shall not include: . . . any amount of any judgment or settlement of any Inadequate Consideration Claim other than Defense Costs and other than [loss incurred by directors and officers that is not indemnified by Joy Global]. . . . [34]

The term "Inadequate Consideration Claim" was defined as follows:

> [T]hat part of any 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 of the ownership interest in or assets of an entity is inadequate. [35]

The court explained that each suit alleged "that Joy Global issued a false or misleading proxy report for the purpose of inducing shareholders to vote in support of a merger agreement which secured inadequate consideration for Joy Global's shares"; thus, each complaint alleged that the price paid or proposed to be paid for the acquisition transaction was inadequate. [36] Each settlement resolved the suit and therefore the allegation of inadequate consideration. [37] Lastly, the transaction "involved the acquisition of all the ownership interest of an entity, namely Joy Global." [38] Thus, the court held that the settlements were excluded from the definition of "Loss." [39]

The court also noted that *Northrop* was unpersuasive for two reasons. [40] First, the *Northrop* court read the bump-up clause as "limited to a claim alleging 'only' that inadequate consideration was paid for an acquisition, despite the word 'only' not appearing in the provision"; and, second, the bump-up clause in *Northrop* was narrower and applied only to that part of a settlement of an inadequate consideration claim "representing the amount by which such price is effectively increased." [41] Thus, the court held that all eight shareholder suits were excluded from coverage under the policy. [42]

In January 2023, the U.S. Court of Appeals for the Seventh Circuit decided *Komatsu*, which affirmed *Joy Global*'s holding that the bump-up clause applied to preclude coverage for the shareholder settlements. [43] The insured primarily argued on appeal that federal securities suits could not be about inadequate consideration because inadequate consideration is governed by state law. [44] The court rejected this argument, stating that although federal claims are assertedly about inadequate disclosure, "the loss from any legal wrong depend[s] on a conclusion that the price offered in the merger was too low." [45] The court concluded that there was an inadequate consideration claim within the meaning of the bump-up clause because the shareholders alleged that, by concealing information, the proxy statements induced them to vote in favor of a merger whose price was not as advantageous as it could have been. [46]

Ceradyne

In October 2022, the U.S. District Court for the Central District of California decided *Ceradyne*. In the underlying transaction, Cyborg Acquisition Corp., a subsidiary of 3M Co., commenced a tender offer to acquire all outstanding shares of Ceradyne, Inc., followed by a short-form merger. [47] Shareholders filed suit, alleging the Ceradyne directors breached their fiduciary duty by intentionally undervaluing the company and agreeing to sell Ceradyne to 3M for a knowingly inadequate price. [48] The shareholder suit settled for $11.3 million. [49] The parties in *Ceradyne* disputed whether the policy's bump-up clause applied to exclude coverage for the settlement. [50] The bump-up clause stated:

> 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. [51]

The court first held that the transaction was an acquisition under the meaning of the bump-up clause. [52] The court rejected the insured's argument that the bump-up clause was not intended to exclude coverage where the insured was being acquired by another entity, as opposed to being the acquirer. [53] The court concluded that the bump-up clause's "unambiguous language does not lend itself to such a narrow interpretation." [54]

Next, the court held that the shareholder suit alleged inadequate consideration paid for Ceradyne. [55] The court explained that "the allegations are clear that the plaintiffs sought compensation for Ceradyne's directors' undervaluing how much Ceradyne was worth in the transaction with 3M, resulting in inadequate consideration paid for Ceradyne." [56] The insured relied on *Northrop* to argue that the bump-up clause could not apply because the lawsuits did not allege *only* inadequate consideration. [57] The court disagreed, stating, "the Court declines to read in the word 'only' to the Bump-Up [Clause]'s unambiguous language." [58]

Lastly, the court held that the settlement effectively increased the consideration paid for the acquisition of Ceradyne. [59] In reaching this conclusion, the court noted that the settlement was intended to, and did, increase the consideration paid to shareholders in relation to Ceradyne's acquisition. [60] The court cited the Summary of Settlement Terms, which informed class members that they would receive up to $0.50 per share "in addition to the $35.00 per share consideration" they had previously received, and the Stipulation of Settlement, which defined the class as shareholders who received consideration for their shares in the sale at $35.00 per share. [61] The court also noted that neither Ceradyne nor its directors paid the settlement; rather, "the additional $0.50 per share was paid by 3M, resulting in an effective increase of the consideration 3M paid to Ceradyne's shareholders for its acquisition of Ceradyne." [62] Thus, the court held that the bump-up clause barred coverage for the settlement. [63]

Onyx

In December 2022, the Superior Court of California for San Mateo County decided *Onyx*. In the underlying transaction, Amgen acquired all ownership of Onyx Pharmaceuticals Inc.'s stock, and Onyx became a wholly owned subsidiary of Amgen. [64] Thereafter, Onyx shareholders sued Onyx and its directors for breach of fiduciary duties arising from the transaction. [65] The shareholders alleged that "Onyx and its Board of Directors failed in their duty 'to seek the highest price for Onyx shareholders in its sale process,' by selling to Amgen for $125 per share when the market price was higher, analysts priced it higher, and another suitor Company D had offered to pay more." [66] The parties ultimately settled the lawsuit for $26 million. [67] The parties in *Onyx* disputed whether the bump-up clause barred coverage of this settlement, which stated:

> 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 of 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. [68]

The court concluded that there was an acquisition because Amgen acquired 100 percent ownership of Onyx. [69] Like the court in *Ceradyne*, the court in *Onyx* stated that the bump-up clause excluded coverage regardless of whether the insured was the acquiror or the acquiree. [70] The court also concluded that there was a claim for inadequate consideration because the primary allegation in the underlying lawsuit was that the board "failed to obtain the highest price for the sale of Onyx, particularly as there was another suitor willing to pay more, and thus the payment of $125 per share was inadequate." [71] Accordingly, the shareholders alleged that $125 per share was less than the highest price that could have reasonably been obtained. [72] Thus, the court held that the bump-up clause applied to preclude coverage for the settlement. [73]

Viacom

In August 2023, the Delaware Superior Court decided *Viacom*. The underlying transaction involved an all-stock merger in which Viacom, Inc. n/k/a Paramount Global (Viacom) merged into CBS Corp., ceasing Viacom's separate corporate existence. [74] Thereafter, shareholders brought suit, asserting claims for breaches of fiduciary duty against Viacom's directors, officers, and controlling stockholders for their role in negotiating and recommending the merger, causing shareholders to approve the merger on terms detrimental to them. [75] The lawsuit settled for $122.5 million. [76] In *Viacom*, the parties disputed whether the bump-up clause barred coverage for this settlement. [77] The bump-up clause stated that "loss" did not include

> any amount representing the amount by which the price of or consideration paid or proposed to be paid for the acquisition or completion of the acquisition of all or substantially all of the ownership interest in, or assets of, an entity, including a Company, was inadequate or effectively increased. However, this paragraph shall not apply to Defense Costs. . . . [78]

The court found the bump-up clause ambiguous because the policy's "Material Changes in Condition Provision" [79] and definition of "Merger Objection Claim" [80] suggested that the bump-up clause applied only to standard acquisitions, given that both referred specifically to merger transactions, whereas the bump-up clause did not. [81] Therefore, the court held that the bump-up clause was ambiguous because it could reasonably be interpreted to both include and exclude mergers, and accordingly held in favor of coverage. [82] Thus, the court held that the bump-up clause did not preclude coverage. [83]

Towers Watson I and *Towers Watson II*

In March 2024, the U.S. District Court for the Eastern District of Virginia decided *Towers Watson I*. The underlying transaction involved a reverse triangular merger between Willis Group Holdings plc and Towers Watson & Co. [84] Thereafter, Towers Watson's former shareholders brought two lawsuits, one alleging violations of fiduciary duties and the other alleging violations of the Securities Exchange Act. [85] The shareholders alleged that the former chairman and chief executive officer of Towers Watson failed to disclose an alleged conflict of interest while negotiating the merger, and rather than seeking to maximize the return to Towers Watson shareholders, he negotiated the lowest deal he believed Towers Watson shareholders would accept. [86] The parties settled the shareholder actions for a total of $90 million. [87] In *Towers Watson I*, the parties disputed whether the bump-up clause precluded coverage for the shareholder actions. [88] The bump-up clause provided:

> 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. [89]

Prior to *Towers Watson I*, the Fourth Circuit had already held that the reverse triangular merger here resulted in an acquisition under the policy's bump-up clause. [90] The transaction was described as follows: "A subsidiary of Willis was created for the transaction, which merged into Towers Watson." [91] Thereafter, Towers Watson was acquired by Willis, becoming a 100 percent owned subsidiary of Willis. [92] After this transaction, a legally distinct merger occurred whereby Towers Watson merged into another wholly owned subsidiary of Willis and then ceased to exist. [93] The Fourth Circuit stated that the initial merger was the focus of the shareholder suit, not the second. [94] After the initial merger, Willis gained total control of Towers Watson, and Towers Watson retained its own legal existence. [95] Thus, the Fourth Circuit held that the transaction was an acquisition that came within the bump-up clause and remanded the case back to the district court to determine whether the other requirements of the bump-up clause were met. [96]

On remand, the *Towers Watson I* court held that the shareholder actions alleged inadequate consideration. [97] The court explained that the underlying complaints repeatedly alleged that the consideration received by Towers Watson's shareholders for the merger was inadequate. [98] These factual allegations, according to the court, were the basis for the harms underlying the section 14 and fiduciary claims; therefore, the shareholder actions necessarily "alleged" inadequate consideration. [99] The court agreed with *Komatsu* that a section 14 claim can allege inadequate consideration for the purposes of a bump-up clause. [100]

The court further held that the settlement represented an effective increase in consideration. [101] The court stated that the question is "whether, at the end of the day, the former Towers Watson shareholders were paid additional monies because the amount they received in the merger was inadequate." [102] The court concluded, "[t]hat is the case here, where the Actions' allegations of harm were solely predicated on the theory that shareholders got less in the merger than Towers Watson was worth." [103] Thus, the court held that the bump-up clause barred coverage for the shareholder actions. [104]

In May 2025, the U.S. Court of Appeals for the Fourth Circuit decided *Towers Watson II*, which affirmed *Towers Watson I*'s holding that the bump-up clause barred coverage for the shareholder actions. [105] On appeal, the court held that the shareholders filed a "Claim" alleging that the consideration paid for Willis's acquisition of Towers Watson was inadequate and that the settlements represented the amount by which such consideration was effectively increased. [106] The court explained that the shareholders alleged that their shares were devalued in the merger process, and that their lawsuit sought to rectify this by seeking an increase in the consideration paid for their shares. [107] Thus, the settlements "constituted—i.e., 'represent[ed]'—precisely such a bump-up." [108] The court rejected the insured's argument that settlements of alleged violations of section 14 are categorically immune from bump-up clauses. [109] In doing so, the court expressly declined to follow the *Harman I* court's holding that a cured inadequate deal price isn't the remedy for a section 14 claim, and stated that "we find *Komatsu* to have the better reasoning on this issue." [110] Thus, the court concluded that the bump-up clause applied to preclude coverage.

Harman I and *Harman II*

In January 2025, the Delaware Superior Court decided *Harman I*. The underlying transaction involved a subsidiary of an audio electronics company that was created and merged into Harman International Industries, Inc. [111] Thereafter, shareholders filed a class action lawsuit alleging violations of sections 14(a) and 20(a) of the Securities Exchange Act of 1934. [112] The shareholders asserted that the proxy used to obtain shareholder approval of this transaction was false or misleading (or both) and deprived shareholders of their right to a fully informed shareholder vote and the fair value for their shares. [113] The shareholders sought the difference between the price Harman shareholders received and Harman's true value at the time of the transaction, in an amount to be determined at trial. [114] The lawsuit ultimately settled for $28 million. [115] The parties in *Harman I* disputed whether the bump-up clause precluded coverage of this settlement. [116] Like the bump-up clauses in *Ceradyne*, *Onyx*, and *Towers Watson*, the bump-up clause at issue in *Harman I* stated:

> 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. [117]

First, the Delaware Superior Court held that the reverse triangular merger transaction was an acquisition, as the company used a merger to complete its acquisition of ownership interest in Harman. [118] The court explained that, based on its characteristics, the transaction was an acquisition because (1) Harman retained its own legal existence after the transaction, (2) only Harman shareholders voted on the transaction agreement, and (3) the underlying allegations refer to the transaction as an acquisition. [119]

However, the court held that "[d]amages for inadequate deal price were not a viable remedy requested" in the shareholder suit. [120] The court stated that to come within the bump-up clause, damages for an inadequate deal price must be a viable remedy sought for a claim. [121] The court reasoned that "[a] cured inadequate deal price isn't the remedy for Section 14(a) and Section 20(a) claims" and because only violations of sections 14(a) and 20(a) of the Securities Exchange Act were alleged, there was no claim pled where damages for an inadequate deal price was a viable remedy. [122]

In determining what the settlement amount represented, the court stated it would consider four non-dispositive factors: "(1) the language of the settlement; (2) indications that the settlement amount represents compensation for an inadequate deal price; (3) the stage of litigation at the time of the settlement; and (4) the composition of the settlement class." [123] As to the first factor, the court noted that the Stipulation of Settlement denied that Harman engaged in any wrongdoing and stated that the reason for settling was to avoid further litigation costs. [124] As to the second factor, Harman estimated that defense costs for continuing litigation would have been $25 to $30 million and that the settlement for $28 million was "right in the middle of the litigation-cost estimate." [125] The court also stated that the difference between the actual share price and the shares' true value at the time of the transaction would have been significantly greater than the $28 million settlement. [126] As to the third factor, the parties were in the early stages of litigation with only minimal discovery completed at the time of settlement. [127] Finally, as to the fourth factor, the court highlighted that "the settlement class included only former Harman shareholders that held at the time of the merger vote but sold prior to receiving any deal consideration." [128] Accordingly, the court held that the settlement did not represent an effective increase in consideration. [129] Thus, the court held that the bump-up clause did not exclude coverage of the shareholder settlement. [130]

In January 2026, the Delaware Supreme Court decided *Harman II*, which affirmed *Harman I*'s holding that the shareholder settlement did not come within the bump-up clause. [131] On appeal, the court considered (1) whether there was a claim alleging inadequate price or consideration and (2) whether the settlement amount represented an effective increase in price or consideration for the transaction. [132] *Harman I*'s finding that the underlying transaction was an acquisition under the bump-up clause was not appealed by the parties, nor affected by *Harman II*. [133]

As to the first issue, the Delaware Supreme Court disagreed with the superior court's conclusion that there was not a claim alleging inadequate price, and particularly the conclusion that damages for an inadequate deal price must be a viable remedy sought for a claim. [134] The court stated that "we agree with Insurers that there is no language in the Policy that gives rise to a 'viability' requirement. We are not inclined to read such a requirement into the language of the Policy." [135] The court further explained that, as in *Towers Watson*, the shareholders' allegations of inadequate consideration were "intrinsic" to the theory of the section 14 claim. [136] Because the federal securities claims relied on allegations of inadequate consideration, the court held that there was a claim alleging that the price or consideration paid for the transaction was inadequate. [137]

As to the second issue, the Delaware Supreme Court agreed with the superior court's conclusion that the settlement amount did not represent an effective increase in consideration. [138] The court focused on the composition of the settlement class and the evidentiary record relating to the settlement amount. [139] The court explained that "the composition of the settlement class was not limited to shareholders who received consideration in connection with the Transaction." [140] Rather, the definition of the settlement class encompassed all shareholders who held stock "at any time" from the date of the shareholder vote through the date the transaction closed, and therefore may have encompassed shareholders who sold their shares before the transaction actually closed. [141] By contrast, the court noted that in *Towers Watson*, "every shareholder who received a *pro rata* portion of the settlement amount also received consideration in connection with the underlying transaction." [142]

Regarding the settlement amount, the court explained 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." [143] Even though the shareholders' complaint sought damages representing "the difference between the price Harman shareholders received and Harman's true value at the time of the Acquisition," the court held that there was not sufficient evidence that the settlement amount in fact represented this amount. [144] The court distinguished *Towers Watson*, in which there was an expert report that calculated the true value of the shares minus the actual consideration received. [145] The dissent in *Harman II* disagreed with this conclusion. The dissent concluded that because the complaint sought damages representing the difference between the price shareholders received and the true value at the time of the transaction, the settlement represented an increase in consideration. [146] The dissent stated, "Litigants settle cases for any number of reasons[,]" and "[i]n our view, it would be far simpler and more efficient if the court limited its review to the 'real effect' of the settlement rather than plumb the depths after an evidentiary proceeding in search of the true motivations of the settling parties." [147]

MSG Networks (*MSGN*)

Most recently, in June 2026, the Delaware Superior Court decided *MSG Networks* (*MSGN*). In the underlying transaction, MSG Networks, Inc., merged with a subsidiary of Madison Square Garden Entertainment Inc. (MSGE) in a reverse triangular merger. [148] After the merger, MSGN shareholders sued, claiming "that the merger process was unfair and that their stock had been undervalued." [149] The case settled for $48.5 million. [150] In *MSGN*, the parties disputed whether the bump-up clause precluded coverage of this settlement.

[151] The bump-up clause carved out from the definition of loss any portion of such amount that constitutes any

> amount that represents, or is substantially equivalent to, an increase in the consideration paid (or proposed to be paid) in an acquisition (or proposed acquisition) of more than 50% of the outstanding securities or other ownership interest of an entity, including an Organization, or in the right to vote for election of, or to appoint, more than fifty percent (50%) of the directors or limited liability company managers or members, or the equivalent of such positions, of an entity, including an Organization; except for any amount otherwise covered under Insuring Clause (A). [152]

First, the court held that the settlement represented an increase in consideration. [153] The court evaluated the same four non-dispositive factors set out in *Harman I*: the settlement's language, indications the settlement amount represents compensation for an inadequate deal price, the stage of litigation at the time of settlement, and the composition of the settlement class. [154] First, as to the settlement's language, the court noted that the language suggests that the parties settled to avoid litigation costs. [155] However, in discussing the first factor, the court stated that, while it is true that the settlement may have been motivated at least in part by a desire to avoid litigation costs, this does not foreclose a conclusion that a settlement represented an increase in consideration. [156] Nevertheless, the court found that there was "substantial—and more compelling—evidence" that the settlement represented an increase in consideration because it "was paid by MSGN; distributed on a pro-rata, per-share basis to the Class A Shareholders; and directly increased the Shareholders' initial compensation from the Merger." [157] The court also noted that the parties had completed extensive discovery and had mediated, settling just a month before trial, lending to a finding of increased consideration given that the parties were deep into the case and likely not intending merely to avert litigation. [158] Fourth and last, the settlement class consisted of shareholders who exclusively sought an increase in consideration. [159]

Next, the court held that the settlement was also "substantially equivalent" to an increase in consideration. [160] The court held that, not only does the settlement represent an actual increase in deal consideration, but it is also largely equal to one because the consideration given to the shareholders increased the deal consideration. [161] The court explained that "[t]hese facts are analogous to *Towers II*, since the underlying suit sought an increase in consideration, the Settlement went to the aggrieved shareholders on a pro-rata basis, and the parties settled on the eve of trial, with an expert report that resembles the Settlement amount." [162]

Finally, the court held that the reverse triangular merger constituted an acquisition under the bump-up clause. [163] The court noted that it had previously ruled "that a reverse triangular merger is—in its plainest terms—an acquisition effectuated via a merger mechanism" and that the Fourth Circuit held the same. [164] The court further stated that "MSGE no doubt secured more than half of MSGN's outstanding securities and voting rights." [165] The court rejected the insured's argument that there was not an acquisition because the same controlling family controlled the relevant entities before and after the transaction. [166] The court "decline[d] to accept MSGN's invitation to read words [i.e., a change-in-control requirement] into the Bump-Up Clause that aren't there." [167] Thus, the court concluded that the bump-up clause applied to preclude coverage. [168]

Conclusion

Whether the settlement of a shareholder lawsuit is excluded under a bump-up clause has substantial repercussions for both insurers and insureds. The settlements from the recent bump-up cases discussed in this article, for example, ranged from $11.3 million to $122.5 million. [169] Consequently, it is becoming increasingly more important for insurers and insureds alike to understand the state of the law on bump-up clauses.

This article has looked at recent bump-up cases to demonstrate where courts have found a bump-up clause to bar coverage and why. While the body of case law that has developed provides significant guidance in the relevant jurisdictions, these issues will likely continue to be litigated due to the stakes involved. As the cases discussed above show, the courts' application of bump-up clauses turns closely on the specific language of the clause and the facts of the underlying litigation and settlement.

Endnotes

1. *Komatsu Mining Corp. v. Columbia Cas. Co.*, 58 F.4th 305, 307 (7th Cir. 2023).

2. *See, e.g.*, *Harman Int'l Indus., Inc. v. Ill. Nat'l Ins. Co.* (*Harman I*), No. N22C-05-098 PRW CCLD, 2025 WL 84702, at *6 (Del. Super. Ct. Jan. 7, 2025) (explaining that for the policy's bump-up clause "to exclude any settlement or portion thereof: (1) the settlement must be related to an underlying acquisition; (2) inadequate deal price must be a viable remedy that was sought for at least one claim in the [underlying action]; and (3) the settlement, or a portion of the settlement, must represent an effective increase in consideration").

3. *Northrop Grumman Innovation Sys., Inc. v. Zurich Am. Ins. Co.*, No. CV N18C-09-210, 2021 WL 347015 (Del. Super. Ct. Feb. 2, 2021).

4. *Joy Glob. Inc. v. Columbia Cas. Co.*, 555 F. Supp. 3d 589 (E.D. Wis. 2021).

5. *Ceradyne, Inc. v. RLI Ins. Co.*, No. 221CV6373 JVS (KES), 2022 WL 16735360 (C.D. Cal. Oct. 31, 2022).

6. *Onyx Pharms. Inc. v. Old Republic Ins. Co.*, No. CIV 538248, 2022 WL 18143421 (Cal. Super. Ct. Dec. 30, 2022).

7. *Komatsu Mining Corp. v. Columbia Cas. Co.*, 58 F.4th 305 (7th Cir. 2023).

8. *Viacom Inc. v. U.S. Specialty Ins. Co.*, No. N22C-06-016 SKR CCLD, 2023 WL 5224690 (Del. Super. Ct. Aug. 10, 2023).

9. *Towers Watson & Co. v. Nat'l Union Fire Ins. Co. of Pittsburgh, PA* (*Towers Watson I*), No. 1:20-CV-810 (AJT/JFA), 2024 WL 993871 (E.D. Va. Mar. 6, 2024).

10. *Harman Int'l Indus., Inc. v. Ill. Nat'l Ins. Co.* (*Harman I*), No. N22C-05-098 PRW CCLD, 2025 WL 84702, (Del. Super. Ct. Jan. 7, 2025).

11. *Towers Watson & Co. v. Nat'l Union Fire Ins. Co. of Pittsburgh, PA* (*Towers Watson II*), 138 F.4th 786 (4th Cir. 2025).

12. *Ill. Nat'l Ins. Co. v. Harman Int'l Indus., Inc.* (*Harman II*), No. 47, 2025, 2026 WL 204209 (Del. Jan. 27, 2026).

13. *MSG Networks Inc. v. Fed. Ins. Co.*, No. N23C-01-103 PRW CCLD, 2026 WL 1822345 (Del. Super. Ct. June 11, 2026).

14. *Northrop Grumman Innovation Sys., Inc. v. Zurich Am. Ins. Co.*, No. CV N18C-09-210, 2021 WL 347015, at *4 (Del. Super. Ct. Feb. 2, 2021).

15. *Northrop*, 2021 WL 347015, at *4.

16. *Northrop*, 2021 WL 347015, at *4.

17. *Northrop*, 2021 WL 347015, at *17 n.177.

18. *Northrop*, 2021 WL 347015, at *5.

19. *Northrop*, 2021 WL 347015, at *5.

20. *Northrop*, 2021 WL 347015, at *5.

21. *Northrop*, 2021 WL 347015, at *3.

22. *Northrop*, 2021 WL 347015, at *20.

23. *Northrop*, 2021 WL 347015, at *21.

24. *Northrop*, 2021 WL 347015, at *21.

25. *Northrop*, 2021 WL 347015, at *21.

26. *Northrop*, 2021 WL 347015, at *22.

27. *Northrop*, 2021 WL 347015, at *22.

28. *Joy Glob. Inc. v. Columbia Cas. Co.*, 555 F. Supp. 3d 589, 592 (E.D. Wis. 2021).

29. *Joy Global*, 555 F. Supp. 3d at 592.

30. *Joy Global*, 555 F. Supp. 3d at 592.

31. *Joy Global*, 555 F. Supp. 3d at 592.

32. *Joy Global*, 555 F. Supp. 3d at 592.

33. *Joy Global*, 555 F. Supp. 3d at 592.

34. *Joy Global*, 555 F. Supp. 3d at 593.

35. *Joy Global*, 555 F. Supp. 3d at 593.

36. *Joy Global*, 555 F. Supp. 3d at 594.

37. *Joy Global*, 555 F. Supp. 3d at 594.

38. *Joy Global*, 555 F. Supp. 3d at 594.

39. *Joy Global*, 555 F. Supp. 3d at 594.

40. *Joy Global*, 555 F. Supp. 3d at 595.

41. *Joy Global*, 555 F. Supp. 3d at 595.

42. *Joy Global*, 555 F. Supp. 3d at 596.

43. *Komatsu Mining Corp. v. Columbia Cas. Co.*, 58 F.4th 305, 309 (7th Cir. 2023).

44. *Komatsu*, 58 F.4th at 308.

45. *Komatsu*, 58 F.4th at 308.

46. *Komatsu*, 58 F.4th at 308.

47. *Ceradyne, Inc. v. RLI Ins. Co.*, No. 221CV6373 JVS (KES), 2022 WL 16735360, at *2 (C.D. Cal. Oct. 31, 2022).

48. *Ceradyne*, 2022 WL 16735360, at *2.

49. *Ceradyne*, 2022 WL 16735360, at *2.

50. *Ceradyne*, 2022 WL 16735360, at *2.

51. *Ceradyne*, 2022 WL 16735360, at *8.

52. *Ceradyne*, 2022 WL 16735360, at *9 (explaining that "unlike in *Northrop*, the transaction at issue here was an acquisition, a fact which is not in dispute").

53. *Ceradyne*, 2022 WL 16735360, at *9.

54. *Ceradyne*, 2022 WL 16735360, at *9.

55. *Ceradyne*, 2022 WL 16735360, at *9–10.

56. *Ceradyne*, 2022 WL 16735360, at *9.

57. *Ceradyne*, 2022 WL 16735360, at *9.

58. *Ceradyne* 2022 WL 16735360, at *10.

59. *Ceradyne*, 2022 WL 16735360, at *10–11.

60. *Ceradyne*, 2022 WL 16735360, at *11.

61. *Ceradyne*, 2022 WL 16735360, at *11.

62. *Ceradyne*, 2022 WL 16735360, at *11.

63. *Ceradyne*, 2022 WL 16735360, at *11.

64. *Onyx Pharms. Inc. v. Old Republic Ins. Co.*, No. CIV 538248, 2022 WL 18143421, at *2 (Cal. Super. Ct. Dec. 30, 2022).

65. *Onyx*, 2022 WL 18143421, at *2.

66. *Onyx*, 2022 WL 18143421, at *2.

67. *Onyx*, 2022 WL 18143421, at *2.

68. *Onyx*, 2022 WL 18143421, at *4.

69. *Onyx*, 2022 WL 18143421, at *19.

70. *Onyx*, 2022 WL 18143421, at *19.

71. *Onyx*, 2022 WL 18143421, at *19.

72. *Onyx*, 2022 WL 18143421, at *19.

73. *Onyx*, 2022 WL 18143421, at *19.

74. *Viacom Inc. v. U.S. Specialty Ins. Co.*, No. N22C-06-016 SKR CCLD, 2023 WL 5224690, at *1 (Del. Super. Ct. Aug. 10, 2023).

75. *Viacom*, 2023 WL 5224690, at *1.

76. *Viacom*, 2023 WL 5224690, at *1.

77. *Viacom*, 2023 WL 5224690, at *4–5.

78. *Viacom*, 2023 WL 5224690, at *3.

79. The “Material Changes in Conditions Provision” modifies coverage if certain events occur, including, in relevant part, “[t]he acquisition of the Named Insured, or of all or substantially all of its assets, by another entity, *or the merger or consolidation of the Named Insured into or with another entity such that the Named Insured is not the surviving entity*. . . .” *Viacom*, 2023 WL 5224690, at *3 (emphasis added).

80. A “Merger Objection Claim” is defined as “[a] Claim based upon, arising from, or in consequence of any proposed or actual acquisition of a Company, or of all or substantially all of the Company’s assets by another entity, *or the merger or consolidation of the Company into or with another entity such that the Company is not the surviving entity*. . . .” *Viacom*, 2023 WL 5224690, at *3 (emphasis added).

81. *Viacom*, 2023 WL 5224690, at *8 (explaining “[t]he presence of language referring to merger transactions in the Merger Objection Claim and Material Changes in Conditions Provision, and their corresponding absence in the Bump-Up Provision raise the reasonable inference that the Bump-Up Provision does not encompass the Merger”).

82. *Viacom*, 2023 WL 5224690, at *6 (concluding that “[o]n the one hand, the Merger may be ‘an acquisition of all or substantially all ownership interest in, or assets of, an entity,’ because all assets of Viacom ‘vest[ed] in’ CBS. On the other hand, the Merger Objection Claim and Material Changes in Condition Provision suggest that ‘an acquisition of all or substantially all ownership

interest in, or assets of, an entity,' exclude merger transactions, such as the Merger. Because the Bump-Up Provision is subject to two, contrary reasonable interpretations, ambiguity should be resolved in favor of Plaintiffs").

83. *Viacom*, 2023 WL 5224690, at *9.
84. *Towers Watson & Co. v. Nat'l Union Fire Ins. Co. of Pittsburgh, PA* (*Towers Watson I*), No. 1:20-CV-810 (AJT/JFA), 2024 WL 993871, at *1 (E.D. Va. Mar. 6, 2024).
85. *Towers Watson I*, 2024 WL 993871, at *1.
86. *Towers Watson I*, 2024 WL 993871, at *1.
87. *Towers Watson I*, 2024 WL 993871, at *1.
88. *Towers Watson I*, 2024 WL 993871, at *2.
89. *Towers Watson I*, 2024 WL 993871, at *4.
90. *Towers Watson & Co. v. Nat'l Union Fire Ins. Co. of Pittsburgh, PA*, 67 F.4th 648, 654–57 (4th Cir. 2023).
91. *Towers Watson*, 67 F.4th at 654.
92. *Towers Watson*, 67 F.4th at 654.
93. *Towers Watson*, 67 F.4th at 654.
94. *Towers Watson*, 67 F.4th at 656.
95. *Towers Watson*, 67 F.4th at 654.
96. *Towers Watson*, 67 F.4th at 657.
97. *Towers Watson I*, 2024 WL 993871, at *5.
98. *Towers Watson I*, 2024 WL 993871, at *5.
99. *Towers Watson I*, 2024 WL 993871, at *5.
100. *Towers Watson I*, 2024 WL 993871, at *5.
101. *Towers Watson I*, 2024 WL 993871, at *8.
102. *Towers Watson I*, 2024 WL 993871, at *8.

103. *Towers Watson I*, 2024 WL 993871, at *8.

104. *Towers Watson I*, 2024 WL 993871, at *9.

105. *Towers Watson & Co. v. Nat'l Union Fire Ins. Co. of Pittsburgh, PA* (*Towers Watson II*), 138 F.4th 786, 792 (4th Cir. 2025).

106. *Towers Watson II*, 138 F.4t at 793–94.

107. *Towers Watson II*, 138 F.4t at 794.

108. *Towers Watson II*, 138 F.4t at 794.

109. *Towers Watson II*, 138 F.4th at 794–795.

110. *Towers Watson II*, 138 F.4t at 795 n.10.

111. *Harman Int'l Indus., Inc. v. Ill. Nat'l Ins. Co.* (*Harman I*), No. N22C-05-098 PRW CCLD, 2025 WL 84702, at *2 (Del. Super. Ct. Jan. 7, 2025).

112. *Harman I*, 2025 WL 84702, at *9.

113. *Harman I*, 2025 WL 84702, at *2.

114. *Harman I*, 2025 WL 84702, at *2.

115. *Harman I*, 2025 WL 84702, at *3.

116. *Harman I*, 2025 WL 84702, at *4.

117. *Harman I*, 2025 WL 84702, at *1.

118. *Harman I*, 2025 WL 84702, at *8.

119. *Harman I*, 2025 WL 84702, at *9.

120. *Harman I*, 2025 WL 84702, at *9.

121. *Harman I*, 2025 WL 84702, at *9.

122. *Harman I*, 2025 WL 84702, at *10.

123. *Harman I*, 2025 WL 84702, at *10 (further explaining that "[w]hile all are important characteristics of the settlement that the Court may consider, none are dispositive").

124. *Harman I*, 2025 WL 84702, at *11.

125. *Harman I*, 2025 WL 84702, at *11.

126. *Harman I*, 2025 WL 84702, at *11.

127. *Harman I*, 2025 WL 84702, at *11.

128. *Harman I*, 2025 WL 84702, at *12.

129. *Harman I*, 2025 WL 84702, at *12.

130. *Harman I*, 2025 WL 84702, at *12.

131. *Ill. Nat'l Ins. Co. v. Harman Int'l Indus., Inc.* (*Harman II*), No. 47, 2025, 2026 WL 204209, at *8 (Del. Jan. 27, 2026).

132. *Harman II*, 2026 WL 204209, at *7.

133. *Harman II*, 2026 WL 204209, at *8.

134. *Harman II*, 2026 WL 204209, at *9.

135. *Harman II*, 2026 WL 204209, at *9.

136. *Harman II*, 2026 WL 204209, at *10.

137. *Harman II*, 2026 WL 204209, at *10.

138. *Harman II*, 2026 WL 204209, at *12.

139. *Harman II*, 2026 WL 204209, at *12–14.

140. *Harman II*, 2026 WL 204209, at *12.

141. *Harman II*, 2026 WL 204209, at *13.

142. *Harman II*, 2026 WL 204209, at *12.

143. *Harman II*, 2026 WL 204209, at *13.

144. *Harman II*, 2026 WL 204209, at *13.

145. *Harman II*, 2026 WL 204209, at *13.

146. *Harman II*, 2026 WL 204209, at *14–15 (Seitz, C.J., dissenting).

147. *Harman II*, 2026 WL 204209, at *15 (Seitz, C.J., dissenting).

148. *MSG Networks Inc. v. Fed. Ins. Co.* (*MSGN*), No. N23C-01-103 PRW CCLD, 2026 WL 1822345, at *2 (Del. Super. Ct. June 11, 2026).

149. *MSGN*, 2026 WL 1822345, at *2.

150. *MSGN*, 2026 WL 1822345, at *3.

151. *MSGN*, 2026 WL 1822345, at *3.

152. *MSGN*, 2026 WL 1822345, at *3.

153. *MSGN*, 2026 WL 1822345, at *8.

154. *MSGN*, 2026 WL 1822345, at *8–10.

155. *MSGN*, 2026 WL 1822345, at *8.

156. *MSGN*, 2026 WL 1822345, at *8–9.

157. *MSGN*, 2026 WL 1822345, at *9.

158. *MSGN*, 2026 WL 1822345, at *10.

159. *MSGN*, 2026 WL 1822345, at *10.

160. *MSGN*, 2026 WL 1822345, at *10.

161. *MSGN*, 2026 WL 1822345, at *10.

162. *MSGN*, 2026 WL 1822345, at *10.

163. *MSGN*, 2026 WL 1822345, at *11–12.

164. *MSGN*, 2026 WL 1822345, at *11.

165. *MSGN*, 2026 WL 1822345, at *11.

166. *MSGN*, 2026 WL 1822345, at *11–12.

167. *MSGN*, 2026 WL 1822345, at *12.

168. *MSGN*, 2026 WL 1822345, at *14.

169. *See, e.g.*, *Northrop*, 2021 WL 347015, at *5 (two separate settlements for $62.4 million and $45.6 million); *Joy Global*, 555 F. Supp. 3d at 592 ($20 million settlement); *Ceradyne*, 2022 WL 16735360, at *2 ($11.3 million settlement); *Onyx*, 2022 WL 18143421, at *2 ($26 million

settlement); *Viacom*, 2023 WL 5224690, at *1 ($122.5 million settlement); *Harman I*, 2025 WL 84702, at *3 ($28 million settlement); *Towers Watson I*, 2024 WL 993871, at *1 ($90 million settlement); *MSGN*, 2026 WL 1822345, at *3 ($48.5 million settlement).

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