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Fourth Circuit Paves a Bumpier Path to Post-Deal D&O Coverage

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On May 28, 2025, the Fourth Circuit in *Towers Watson & Co. v. National Union Fire Insurance Co.* affirmed the denial of D&O liability insurance coverage to Towers Watson in connection with its 2015 merger with Willis Group. This marked the Fourth Circuit's second opinion in the case since 2023, each time issuing significant rulings on the "bump-up" exclusion in D&O policies. Reflecting the principle that D&O policies are not deal warranty insurance, the bump-up exclusion bars coverage for awards or settlements on claims that a company overpaid or received too little in a merger or similar transaction.

For background, in 2021, Towers Watson (now WTW Delaware Holdings, LLC) sought coverage under its D&O policies for a $90 million settlement resolving shareholder litigation alleging violations of federal securities laws and Delaware state law claims. The shareholders alleged that Towers Watson's CEO had negotiated the merger under an undisclosed conflict of interest that led him to accept a below-market valuation of the company's shares in order to complete the deal.

In refusing coverage, Towers Watson's D&O insurers argued that the settlement amount fell within the primary policy's bump-up exclusion. The applicable policy language stated that for claims "alleging that the price or consideration paid . . . for the acquisition . . . of all or substantially all the ownership interest in or assets of an entity is inadequate," judgments or settlements are not covered where they "represent[] the amount by which such price or consideration is effectively increased."

The subsequent coverage dispute led to several notable rulings relating to the scope of the bump-up exclusion. For example, in a 2023 decision vacating summary judgment for Towers Watson, the Fourth Circuit held that the exclusion's requirement of an "acquisition" was met, even though Towers Watson became a subsidiary of Willis through a reverse triangular merger. Because the policy did not define "acquisition," the court looked to its ordinary dictionary meaning—"possession or control." It reasoned that reverse triangular mergers result in precisely that outcome as a "practical end result," noting that they "mirror[] an acquisition rather than a conventional merger."

In its more recent ruling, the Fourth Circuit addressed whether Towers Watson's $90 million settlement of the shareholder litigation "represented" an "effective[] increase" in the consideration paid to its shareholders for the merger. In opposition, Towers Watson argued, *inter alia*, that settlements of claims under Section 14(a) of the Securities Exchange Act cannot represent an increase in consideration because Section 14(a) focuses on inadequate disclosures—not inadequate deal prices.

The Fourth Circuit once again turned to the dictionary, noting that "represent" means "to constitute or amount to," and "effectively" means "the real result of a situation." Relying on these definitions, the court centered its analysis on the practical outcome of the settlement. It concluded that because the settlement amount provided additional value to shareholders for the shares they relinquished in the merger, the amount effectively represented an increase in consideration and thus triggered the bump-up exclusion.

In reaching this conclusion, the Fourth Circuit embraced the Seventh Circuit's reasoning in *Komatsu Mining Corp. v. Columbia Casualty Co.*, 58 F.4th 305, 307 (7th Cir. 2023), which held that a Section 14(a) inadequate-disclosure claim may fall within the scope of the bump-up exclusion when the theory of liability is premised on the transaction price being too low. In contrast, the Delaware Superior Court took the opposite approach earlier this year in *Harman International Industries Inc. v. Illinois National Insurance Co.*, 2025 WL 84702 (Del. Super. Ct. Jan. 3, 2025). In *Harman*, which is currently on appeal, the court adopted a narrower interpretation of the bump-up exclusion, holding that it applies only to the settlement of claims that provide a remedy aimed at curing an inadequate deal price.

The Fourth Circuit's recent opinion in *Towers Watson* concluded with another significant ruling: that the entire settlement amount, including the portion that went to attorneys' fees, fell within the scope of the bump-up exclusion. Because the settlement amount was paid into a common fund for the benefit of the shareholders—who then paid their attorneys from that same fund—the court found that the full amount effectively constituted an increase in consideration under the merger.

The Fourth Circuit's rulings highlight the need for companies and their directors and officers to keep a current, detailed grasp of the coverage exclusions in their D&O policies, both in the M&A context and more broadly. Exclusions can cause policies that may initially appear broad to fail precisely when coverage is needed most, and courts may interpret exclusionary language differently across jurisdictions or shift those interpretations over time based on factual differences or other considerations. Relatedly, insureds cannot assume that the *contra proferentem* doctrine—providing that ambiguous contract terms should be interpreted against the drafter, typically the insurer in this context—will always tip close calls on the applicability of exclusions in their favor. While many courts recognize the doctrine, they often apply it narrowly, limiting its use to situations where, as the Fourth Circuit explained in *Towers Watson*, competing interpretations are "*equally*" possible given the text and context of the provision. Regular review, reevaluation, and renegotiation of D&O exclusions by insureds are therefore essential to ensure meaningful protection.

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