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Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

Del. 'Bump-Up' Rulings Muddy Policyholders' High Court Win

By **Abraham Gross**

Law360 (August 13, 2026, 10:23 PM EDT) -- Policyholder losses in a pair of recent Delaware court decisions may complicate a ruling earlier this year by the state's highest court that seemed to chart a course for overcoming an exclusion for settlements representing what is commonly known as a bump-up in shareholder consideration.

Two recent Delaware court rulings may muddy insurance coverage for settlements with shareholders seeking compensation for a company's acquisition price. (iStock.com/Алексей Белозерский)

Delaware Superior Court Judge Paul R. Wallace **ruled Aug. 6** that telecom company Zayo Group Holdings Inc. was not owed coverage for a $27 million settlement with shareholders alleging they were undercut in an acquisition, saying that the deal was excluded under the company's directors and officers coverage.

The decision followed another ruling by Judge Wallace in June that similarly ruled against Madison Square Garden Networks Inc. over its coverage bid for a $48.5 million settlement with shareholders over its merger with a related MSG entity.

Both decisions rejected policyholder efforts to tie their case to the state high court's **January ruling** in Harman International Industries Inc. v. Illinois National Insurance Co. et al., which found that insurers failed to show Harman's settlement "represented an effective increase" to shareholders' consideration for the company's acquisition.

Insurance experts who spoke to Law360 had differing views of the rulings and what they signify for future bump-up disputes.

Counsel for carriers, like Steven Burgess Davis of Stradley Ronon, found that the decisions illustrated that Harman was a unique circumstance where the policyholder had a set of factors and evidence to support its claim that the settlement was made to avoid litigation costs rather than increase acquisition payouts.

"I think it just reinforces the breadth of the bump-up exclusion and the narrow set of facts that are necessary to argue that it shouldn't apply in these types of settlements," he told Law360.

Policyholder representatives were more mixed in their views, with some emphasizing the complexity and fact-intensive nature of bump-up disputes that made it difficult to draw direct comparisons between cases.

Others, like Lilit Asadourian, co-chair of Barnes & Thornburg's insurance recovery practice, said that the recent rulings appeared to be a departure from the standard set by the justices.

"We have a controlling Supreme Court decision in Harman, and it's one that we're going to, as policyholder practitioners, repeatedly come back to, and I'm not sure that I believe that it's some unicorn," she said. "I'm not even confident that a Supreme Court would agree with Judge Wallace's analysis here."

The recent rulings are also noteworthy because Judge Wallace had also ruled **in favor of Harman** in January 2025 and because the policyholders in the two latest bump-up cases also share some of the same counsel as Harman.

For most practitioners, the three most contentious issues at the heart of the rulings boil down to settlement pricing, structure and timing.

Judge Wallace found that while the settlements made by Zayo and MSG claimed that they were done to save on litigation costs, Harman was able to point to an expert analysis of defense costs.

"Harman was unique in that there was a cost estimate, and the settlement amount fell directly within that estimate — demonstrating that the settlement didn't represent an increase in consideration," he wrote in Zayo.

Wylie Donald of McCarter & English, who represents policyholders, said that policyholders have to point to evidence to back up their settlement statements, adding that "if you're in Delaware and you don't have an estimate of your litigation cost, then you're going to be stuck with Zayo and MSG."

He said that the decision reinforces that policyholders have to be mindful in the lead-up to a settlement to develop the record that can support a coverage claim.

"Think about structuring your case so that when you get to settlement, you've got the things that the Harman court says you will need to defeat the bump-up exclusion," he said.

The composition of the class receiving the settlement is also key to determining if the deal is a way of increasing payouts for an acquisition, according to Judge Wallace's decisions.

According to him, the two cases were distinguishable from Harman because Harman's settlement also went to individuals who were not shareholders at the time of the contested acquisition, and so the settlement could not have constituted a post-deal price increase.

"Although there were no cost or damages prediction pre-settlement, the settlement amount here went only to the injured shareholders who received consideration from the acquisition. This is largely determinative and carries more weight than Zayo's arguments that the settlement represented the costs of litigation," Judge Wallace ruled.

Sean Mahoney of Kennedys, who represents insurers, said the determination of where the settlement actually ended up was one of the strongest factors in the Zayo case.

"That's something that counsels in favor of a bump-up clause precluding coverage for a settlement that seeks an increase in consideration: where the settlement itself is paid out on a per-share basis, and then it's paid to investor claimants who actually had stock at the time of the transaction itself," he said.

Donald of McCarter & English questioned how, under the standards set by the decisions, a policyholder could ever structure a settlement to avoid the bump-up exclusion if the underlying suit was filed by individuals who were shareholders at the time of an acquisition.

The timing of the MSG and Zayo settlements also appeared to stand apart from Harman's, according to Judge Wallace.

In his view, the timing of the MSG settlement — just a month before a scheduled trial — "lends to a finding of increased consideration since the parties were deep into the case when they settled and were likely not intending to merely avert litigation."

While Judge Wallace acknowledged that Zayo's underlying litigation had not advanced as far along as MSG's did, "there was still some discovery and mediation complete at the time of the settlement."

It's not entirely clear from the rulings how early a case has to settle to bolster the claim that a deal was made to avoid litigation costs, according to Mahoney of Kennedys.

Future policyholders will probably have to show that a settlement came at a similarly early stage in litigation as Harman did, Mahoney said, noting that Zayo settled after about a year of discovery reviewing over 16,000 documents.

"I think that's a pretty good sign that it doesn't have to be all the way through discovery and nearing dispositive motions or trial — it may not necessarily have to be extensive document exchange or discovery or motions practice, etc.," he said.

For Asadourian of Barnes & Thornburg, that extent of discovery was not enough to show that the parties were not concerned with the additional costs to move a case through trial.

"Getting through a year of discovery in a case like this can be a drop in the bucket in terms of what you would need to do to prepare it for trial and line up experts and witnesses, etc.," she told Law360.

William Passannante, co-chair of Anderson Kill's insurance recovery group, said that Judge Wallace is experienced in coverage issues and that Delaware courts will deal with more layers of nuance than other jurisdictions because of the extent of developed case law around D&O issues.

"Part of it is [that] Judge Wallace will see more D&O disputes in the next 18 months than most judges will see in a decade, and Delaware's judiciary is relatively small in terms of the number of superior court judges," he said.

In his view, policyholders would do well to preserve factual questions — like litigation costs — in bump-up disputes so that future judges would analyze issues of fact in the light most favorable to the nonmoving party.

Daniel Wolf, policyholder attorney with Gilbert LLP, echoed the recommendation, saying that Harman set out an in-the-weeds approach to evaluate the bump-up exclusion and that the Zayo case can be informative of some of the pitfalls that policyholders may want to avoid even in the underlying litigation

"Both Harman and the Zayo case reflect that these are areas where drawing bright lines or creating one-size-fits-all tests is difficult, and I think Harman tries to avoid doing that," he said.

Counsel for Zayo Group Holdings and National Union Fire Insurance Co. of Pittsburgh, as well as MSG insurers Endurance American Insurance Co., XL Specialty Insurance Co., U.S. Specialty Insurance Co. and Homesite Insurance Co., declined to comment.

Counsel for MSG Networks Inc. and other insurers involved in the cases did not immediately respond to requests for comment Thursday.

The cases are Zayo Group Holdings v. National Union Ins., case number N23C-04-260, and MSG Networks Inc. v. Federal Insurance Co., case number N23C-01-103, in the Superior Court of Delaware.