

D&O, Cyber Issues Top Specialty Line Cases To Watch In 2025

By **Abraham Gross**

Law360 (January 1, 2025, 8:01 AM EST) -- 2025 promises to usher in significant developments in ongoing litigation fights over crucial specialty line insurance issues, including directors and officers and cyber risk policies.

The cases are notable for making waves in prior rulings this past year on issues ranging from the so-called bump-up exclusion to cyberinsurance coverage for loss mitigation costs, and both policyholders and carriers are watching to see if courts will build on their prior wins or undo their losses.

Here, Law360 spoke to experts for carriers and policyholders on the top cases to watch in the new year.

Towers Watson Returns to 4th Circuit Over D&O Woes

The new year marks the fourth in the winding dispute between Towers Watson and its insurers over its D&O coverage, and the second time the parties have appeared before the Fourth Circuit to clarify the application of the policy's bump-up exclusions.

Towers Watson is **urging the panel** to overturn a Virginia federal court ruling that found the pair of shareholder suit settlements totaling \$90 million tracing to a 2016 merger met the definition of the exclusion, which bars payouts for settlements that effectively increase the price or consideration for an acquisition.

Its insurers, led by primary insurer National Union Fire Insurance Co. of Pittsburgh, Pa., are asking the panel to **uphold the decision** and its "facially obvious" conclusion that the settlements represented an effective increase in consideration.

A separate Fourth Circuit panel in May 2023 **reversed** Towers Watson's initial coverage win after it determined the company's reverse triangular merger qualified as an "acquisition" — which is undefined in the policy — and remanded the case back to the lower court to determine if the settlements otherwise fit the exclusion.

Rukesh Korde, a policyholder-side attorney for Covington & Burling LLP, told Law360 that, originally, the bump-up exclusion was fairly limited, intending to address instances of problematic price collusion.

"But we have seen in recent years a significant attempt by insurance companies to use that bump-up exclusion much more aggressively and to use it to limit coverage to a much larger array of securities class actions," he said.

Towers Watson prevailing in this case could end a recent streak of carrier wins on the bump-up exclusion: a California district court's **October 2022 ruling** in Ceradyne Inc. v. RLI Insurance Co. et al. and a January 2023 Seventh Circuit decision in Komatsu Mining Corp. v. Columbia Casualty Co. et al.

As of Dec. 17, the parties are waiting for a date for oral arguments.

The case is Towers Watson & Co. v. National Union Fire Insurance Co., case number 24-1302, in the

U.S. Court of Appeals for the Fourth Circuit.

Southwest Airlines Tests Cyber Disruption Coverage

Southwest Airlines is moving toward a jury trial to determine if it could recover under a cyber risk policy for over \$35 million in costs for remediating a 2016 network issue, offering guidance on how closely business expenses must be connected to a covered cyber disruption.

The Fifth Circuit made waves in January 2024 when it **revived Southwest's** coverage bid after finding that customer compensation packages and other expenses tied to the disruption are not excluded solely because they are discretionary.

Instead, the panel instructed the Texas district court to review if the system failure was the sole cause of the costs, which include discounts, travel vouchers, refunds and rewards for certain affected customers, and the advertising costs for a sale that Southwest extended an extra week because of the system failure.

Experts for policyholders and carriers both noted that a decision on the intricacies of covered loss mitigation expenses gained additional importance following 2024's string of high-profile cyber disruptions, such as the security software provider CrowdStrike's **error** that grounded much of North American air travel (though Southwest was largely unaffected).

"Establishing coverage for these types of losses following a cyber incident is going to have a really wide-ranging impact, because it touches so many industries that do this if they have a cyber incident," said policyholder attorney Andrea DeField of Hunton Andrews Kurth LLP.

Jonathan Schwartz of Freeman Mathis, who represents insurers, said the Fifth Circuit's decision maps out potential soft spots in coverage for the industry to review when considering revising forms.

He added that the jury's ultimate decision would be very fact-specific and "will probably be something that will be felt by the insurer and by Southwest Airlines, but I doubt that other courts and the insurance industry will look at this as a harbinger of things to come."

The jury trial date is set for March 4 before Judge Ada Brown.

The case is Southwest Airlines Co. v. Liberty Insurance Underwriters Inc., case number 3:19-cv-02218, in the U.S. District Court for the Northern District of Texas.

Delaware Judge Revisits Bump-Up Exclusion

Another bump-up exclusion fight, this time in Delaware state court, could also prove pivotal for D&O coverage.

Harman International Industries and its insurers, Illinois National Insurance Co., Federal Insurance Co. and Berkley Insurance Co., are locked in a battle over the insurers' decision to deny coverage for a 2016 settlement totaling \$28 million.

The settlement ended claims that the company misled investors regarding a merger with Samsung's American branch.

Though the parties did not say what the settlement represented, the insurers pointed to the fact that the plaintiffs' suit had sought "compensatory and/or rescissory damages" as the basis to deny coverage under their bump-up exclusions.

In April 2023, Superior Court Judge Paul R. Wallace declined a quick win for Harman and a dismissal bid from Illinois National, saying it needed to develop the record on whether the "reverse triangular merger" qualified as an acquisition and if the underlying damages were inadequate for consideration.

Though relegated to a lower court, the outcome of the bump-up exclusion fight in Harman could even supplant the importance of a decision in Towers Watson because of Delaware's status as a prime corporate law jurisdiction, where other D&O cases are likely to follow it.

"Courts in other jurisdictions are less likely to look to Virginia for guidance than they are to look to Delaware," Covington's Korde said.

Court-watchers have been keeping close watch of Judge Wallace since his February 2021 ruling that Northrop Grumman Innovation Systems Inc.'s bump-up exclusion **did not apply** to a \$45.6 million proposed class action settlement.

In that case, Judge Wallace rejected the insurers' bump-up exclusion bid because the merger did not tick the boxes for an "acquisition," and the claims — alleging Northrop's predecessor misled investors on its financial condition and the details of a 2015 merger — were not limited to inadequate consideration.

Korde noted that the language of the contested policies in the Harman and Northrop cases differed, which may lead to different outcomes.

"I think that the prior case will certainly have an impact on how Harman gets resolved — the court can't just ignore a prior decision," he said. "The harder question is how much weight the Harman court is going to put on Northrop Grumman."

The parties await Judge Wallace's ruling on cross-motions for summary judgment as of Dec. 17.

The case is Harman International Industries Inc. v. Illinois National Insurance Co., case number N22C-05-098, in the Superior Court of the State of Delaware.

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