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# Client Alert

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## Delaware Supreme Court Affirms D&O Coverage—"Bump-Up" Exclusion Does Not Apply to Section 14(a) Merger Disclosure Settlement

On January 27, 2026, the Delaware Supreme Court affirmed coverage for Harman International Industries, Inc. ("Harman") in a $28 million federal securities class action settlement. The court held that the D&O policies' "bump-up" provision did not apply to exclude the settlement, even though the underlying Section 14(a) claim alleged inadequate deal consideration in connection with a merger. Harman was acquired by Samsung in a reverse triangular merger.[1] Following the closing, a federal securities class action (the "Baum Action") was filed alleging violations of Section 14(a) due to allegedly misleading proxy disclosures. The complaint alleged that the management projections used to support the board's recommendation understated Harman's standalone strategy and value, thereby depriving stockholders of a fully informed vote and full and fair value. The parties reached a $28 million settlement. Harman tendered the settlement to its D&O carriers, who denied coverage under the policies' "bump-up" provision.

The insurance policies at issue followed form to a "bump-up" provision found in the definition of "Loss" in the primary policy which states that, in the event of a claim alleging inadequate price or consideration for an acquisition of all or substantially all of an entity, "Loss" shall not include any amount of any judgment or settlement representing the amount by which such price or consideration is effectively increased (defense costs and non-indemnifiable loss excepted). The Delaware Supreme Court construed this provision applying a two-pronged analysis: (1) did the claim allege inadequate consideration; and (2) does the settlement represent an effective increase in the consideration.

The Delaware Supreme Court affirmed judgment for Harman, concluding that the insurance companies failed the second prong of the analysis even though they satisfied the first. The court held that the underlying Section

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[1] *Illinois National Insurance Co. v. Harman International Industries, Inc.*, C.A. No. N22C-05-098 (Del. Jan. 27, 2026).

14(a) claim alleged inadequate consideration, but the record did not show that any portion of the $28 million settlement "represented" an effective increase in the merger consideration. Accordingly, the bump-up provision did not apply, and coverage for the settlement was affirmed.

This decision reinforces the importance of the precise wording of the bump-up provision in D&O policies. Under Delaware law, carefully negotiated and narrow "bump-up" language should be strictly construed, and insurance companies bear the burden of proving that the exclusionary language applies. The exclusion may not apply where a settlement reflects litigation risk, covers a class not limited to closing-date holders, or lacks valuation evidence tying consideration to a per-share delta.

The nuances of D&O policy wording can significantly impact coverage and may lead to coverage disputes. Policyholders should review their D&O policies for bump-up wording and work with their brokers to negotiate favorable language.

Please contact the Olshan attorney with whom you regularly work or the attorney listed below if you would like to discuss further or have questions.

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