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Client Alert

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Delaware Court Holds That "Bump-Up" Exclusion Does Not Apply to Section 14(a) Merger Dispute Settlement

On January 7, 2025, the Delaware Superior Court granted summary judgment[1] to Harman International Industries, Inc. ("Harman") on claims that the settlement of a post-merger dispute should be covered by its directors and officers ("D&O") liability insurance. Harman was acquired by Samsung Electronics America, Inc. in 2017 via a reverse triangular merger. Following the merger, class plaintiffs filed a class action complaint against Harman alleging violations of Sections 14(a) and 20 of the Securities Exchange Act of 1934. Class plaintiffs alleged that Harman "issued a materially false and misleading" proxy statement in order to "secure shareholder support for the undervalued Acquisition." Class plaintiffs sought "compensatory and/or rescissory damages" and alleged that they "suffered damage and actual economic loss (i.e. *the difference between the price Harman shareholders received and Harman's true value at the time of the Acquisition*)…."

Following settlement of the class action, the D&O insurers denied coverage on the basis of the "Bump-Up" exclusion in the policies, which provides that:

> 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.

The Court acknowledged that class plaintiffs' requested relief of the difference between the price received and Harman's true value can be read as seeking "inadequate consideration," but held that the inadequate

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[1] *Harman Int'l Indus. Inc. v. Illinois Nat. Ins. Co., et al.*, C.A. No. N22C-05-098 (PRW) (CCD) (Del. Super. Ct.).

consideration request itself "doesn't make it a right or viable remedy." The Court strictly construed the exclusion and held that Section 14(a) and 20(a) claims by their very nature cannot trigger the exclusion because they do not provide for increased consideration as a remedy. For the exclusion to apply, "the court in the underlying action must also be authorized to remedy the inadequate deal price under the claims raised." The Court emphasized that "[a] plaintiff's bare request of relief for inadequate price isn't enough."

Policyholders should be aware of the strict reading that Delaware courts will give exclusionary language in insurance policies, including the "Bump-Up" exclusion. Post-acquisition litigation often relies on the consideration paid as a touchstone for damages calculations. The Harman decision demonstrates why careful analysis is needed when examining whether a policy exclusion applies to the particular claim being presented.

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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