HINSHAW

# Analyzing a Couple of Cases Involving Exclusions in D&O Policies

**Insights for Insurers Alert | 6 min read**

Jul 30, 2026

By: Scott M. Seaman

This alert provides an analysis of a couple of cases from the first half of this year addressing exclusions under D&O insurance policies. It is adapted from the analysis Scott Seaman, Co-Chair of the firm's Insurance Services Practice Group, provided in a recent *Law360 Insurance Authority* story.

## Key Takeaways

- **In *Mist Pharmaceuticals*,** the New Jersey Supreme Court broadly enforced a D&O policy's capacity exclusion, holding that any overlap between alleged misconduct and an insured's role with an uninsured entity is sufficient to bar coverage in full—even where some conduct also involved an insured capacity. The court also rejected estoppel and bad faith arguments where the insurer consistently reserved its rights throughout the claims process.
- **In *Harman International Industries Inc.*,** a Delaware Superior court held that a bump-up exclusion did not preclude coverage for settlement of Section 14(a) claims arising from a reverse triangular merger, continuing Delaware's policyholder-friendly approach to these exclusions. The Fourth Circuit, in contrast, broadly enforced the bump-up exclusion in *Towers Watson* earlier this year.

## I. *Mist Pharmaceuticals:* Capacity Exclusion and Reservation of Rights

The New Jersey Supreme Court's decision in *Mist Pharmaceuticals* delivers two significant holdings for the D&O insurance market.

### Broad Application of the Capacity Exclusion

The court emphasized the breadth of the capacity exclusion's operative phrase—"in any way involving"—and held that the exclusion does not require a strict causal nexus between the excluded conduct and the alleged loss. Rather, any overlap between the alleged misconduct and the insured's role with an uninsured entity is sufficient to trigger the exclusion.

The insured advanced a dual capacity argument, contending that, because some of Krivulka's alleged conduct involved his insured role with Mist Pharmaceuticals, coverage should be preserved for those aspects of the claim. The majority rejected this argument and adopted an expansive approach, ruling that any claim involving overlapping uninsured capacities, even in part, may be barred in full.

## Estoppel, Bad Faith, and Consent to Settle

The court properly rejected the insured's estoppel and bad faith arguments. The record established that the insurer consistently and repeatedly reserved its rights under the capacity exclusion throughout the five-year claims process, reproducing the exclusion language in multiple communications, invoking it at least ten times, and expressly disclaiming waiver or estoppel.

Under these circumstances, the court concluded that Mist could not reasonably rely on any expectation that the insurer would fund a settlement or waive its coverage defenses.

The court further held that, because the claims fell within the capacity exclusion, the insurer had no obligation to fund a settlement or provide indemnity, and the insurer's refusal to participate in settlement negotiations did not constitute bad faith.

The trial court attempted to avoid application of the capacity exclusion by finding that the insurer breached its duties under the policy by unreasonably withholding the insured officer/director's request to consent to a settlement. This ruling completely missed the mark because, absent a policy imposing any reasonableness requirement, an insurer generally has the absolute right to grant or withhold consent in accordance with its own interests. Most courts recognize that the requirement of consent is for the protection of the insurer.

## Implications for Insurers

- This decision reinforces the enforceability of broadly worded capacity exclusions.
- Insurers are well-served by ensuring that reservation letters are detailed and expressly disclaim waiver or estoppel.

# II. *Harman International Industries Inc.* and the Bump-Up Exclusion

Recent decisions illustrate that the tale of the bump-up exclusion may end differently depending on the jurisdiction in which the exclusion is litigated and the language of the particular exclusion.

Insurers have not fared as well with bump-up exclusions in Delaware. In *Harman,* Judge Wallace ruled that a D&O insurance policy's bump-up exclusion did not preclude coverage for amounts paid in settlement of claims arising out of Harman International's reverse triangular merger with Samsung Electronics America. He ruled that, because the underlying claim involved only allegations under Section 14(a), for which an increase in consideration is not a remedy, the settlement could not have involved an increase in the deal consideration.

The decision is not surprising because Judge Wallace previously demonstrated his views on the exclusion in *Northrop Grumman Innovation Sys., Inc. v. Zurich Am. Ins. Co.,* ruling that a bump-up exclusion did not apply to preclude coverage for a settlement of a Section 14(a) merger objection lawsuit.

More recently, in *Viacom Inc. v. U.S. Specialty Ins. Co.,* the Delaware Superior Court granted summary judgment to the insured, finding the bump-up exclusion to be ambiguous as to whether it encompassed mergers in addition to pure acquisitions. The court noted that a reverse-triangular merger might be a covered merger rather than an excluded acquisition. Simply stated, "bump-up" exclusions have been "shot down" in these Delaware Court decisions.

It is noteworthy that, in Harman, Judge Wallace accepted one of the arguments rejected by the Fourth Circuit in the *Towers Watson* case. In *Towers Watson,* the Fourth Circuit, applying Virginia law, held that the bump-up exclusion applied to bar coverage for a $90 million settlement of litigation related to Towers Watson's January 2016 merger with the Willis Group.

The Fourth Circuit had previously ruled that the merger agreement involved an "acquisition" within the meaning of the bump-up exclusion. It remanded the case without reaching a final determination on whether the exclusion barred indemnity coverage. In the more recent decision, the Fourth Circuit determined that the district court correctly granted summary judgment on the "bump-up" exclusion because the two remaining elements for the exclusion to apply were satisfied. First, a claim was made alleging that the consideration paid for the acquisition was inadequate. Second, the settlement represented an effective increase in the price or consideration shareholders received.

The Fourth Circuit shot down the major arguments advanced by the policyholder, Tower Watson, as to why the exclusion should not apply. First, although the allegations of violations of Section 14(a) of the Securities Exchange Act involve disclosures rather than adequacy of consideration, the reality is that the settlement represented an increase in consideration. Second, the court rejected Tower's illusory coverage argument, noting the insurers actually paid millions of dollars in defense costs in this matter.

Further, most security claims do not involve corporate acquisitions, so coverage may be afforded in many instances and under many circumstances, notwithstanding the presence of a "bump-up" exclusion.

Finally, the court rejected Tower Watson's more narrow argument that $17 million of the $90 million settlement was not excluded because it ended up going toward attorneys' fees. The Fourth Circuit recognized that the full $90 million was paid into a common fund entirely for the benefit of shareholders.

Once paid to the beneficiaries, the ultimate distribution of the funds had no consequences in terms of the application of the exclusion. Money ultimately going toward attorneys' fees does not mean that this sum did not represent part of the amount of increased consideration. This case represents a favorable decision for insurers seeking to apply similarly worded "bump-up" exclusions. In other words, the Fourth Circuit decision "pumps up" the "bump-up" exclusion.

Parties, of course, must review the language of the particular bump-up exclusion, as there are different wordings.

There may be something bigger at play. Delaware has been the leading corporate home for many US companies, hosting far more incorporations than any other state. The desire of Delaware courts to maintain this status as much as anything may explain the Delaware judiciary's reputation for being pro-policyholder in D & O liability insurance coverage matters.

This proclivity may be further impacted by the recent "DExits" movement. In recent years, Delaware courts have been seen as less supportive in limiting corporate liability and more inclined to challenge corporate board decisions. As a result, companies have been electing to incorporate or reincorporate in other states, such as Nevada and Texas, with greater frequency, in a movement known as "DExits."

Texas and Nevada are attracting companies by enacting laws that make it harder for claimants to sue and prevail against companies. One online source lists 26 Delaware corporations changing their places of incorporation to another state as of June 1, 2026, compared to five companies moving their place of incorporation to Delaware. Most of the companies exiting Delaware reincorporated in Texas and Nevada.

---

*Hinshaw & Culbertson LLP is a U.S.-based law firm with offices nationwide. The firm's national reputation spans the insurance industry, the financial services sector, professional services, and other highly regulated industries. Hinshaw provides holistic legal solutions—from litigation and dispute resolution, and business advisory and transactional services, to regulatory compliance—for clients of all sizes. Visit www.hinshawlaw.com for more information and follow @Hinshaw on LinkedIn and X.*

## Related People

**Scott M. Seaman**

Partner

**312-704-3699**

## Related Capabilities

Insurance

Insurance Coverage Litigation & Counseling

## Related Insights

Scott Seaman Discusses Top Specialty Insurance Rulings From the First Half of 2026 with *Law360*

## Tags

Complex Casualty & Long-Tail Coverage Claims, Directors' & Officers' Liability ("D&O"), Crime/Fraud, & Financial Institution Claims