

Reining in Transactional Exclusions: Delaware Courts Narrow D&O Coverage Bars and Raise the Burden on Insurers

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"Two decisions issued within months of each other, Illinois National Insurance Co. v. Harman International Industries, Inc. and View Operating Corporation v. StarStone Specialty Insurance Co., demonstrate a common judicial theme. Delaware courts are insisting that insurers prove that the specific exclusionary language fully fits the underlying claim and/or settlement at issue, rather than relying on broad appeals to "economic reality," transaction labels, or generalized assumptions about what the litigation supposedly represents."

Recent Delaware decisions reinforce a trend that policyholders and coverage practitioners have increasingly sensed over the last several years: courts are becoming less receptive to insurer efforts to apply transaction-related exclusions beyond their text and are requiring insurers to carry a meaningful evidentiary burden before denying coverage under D&O policies.

That trend is particularly significant in the context of modern transactional litigation, where insurers frequently attempt to characterize claims arising from mergers, acquisitions, and de-SPAC transactions as falling within broadly read exclusions. Historically, insurers often relied on the overall nature of the transaction itself to support denial positions. If the claim arose from an acquisition, merger challenge, or securities dispute connected to a transaction, carriers frequently argued that the exclusion should apply almost categorically.

Recent Delaware decisions suggest that approach is losing traction.

Two decisions issued within months of each other, *Illinois National Insurance Co. v. Harman International Industries, Inc.* and *View Operating Corporation v. StarStone Specialty Insurance Co.*, demonstrate a common judicial theme. Delaware courts are insisting that insurers prove that the specific exclusionary language fully fits the underlying claim and/or settlement at issue, rather than relying on broad appeals to "economic reality," transaction labels, or generalized assumptions about what the litigation supposedly represents.

Harman and the Limits of the "Bump Up" Exclusion

In *Harman*, the Delaware Supreme Court considered whether insurers could invoke a so-called "bump up" exclusion to deny coverage for a \$28 million settlement arising from federal securities litigation following Samsung's acquisition of Harman. The exclusion provided that where a claim alleged inadequate consideration in connection with an acquisition, covered "loss" would not include amounts "representing the amount by which such price or consideration is effectively increased."

The insurers argued that the underlying securities claims fundamentally alleged that Harman shareholders received inadequate consideration in the transaction and that the settlement therefore functioned as a de facto increase in merger consideration. The Delaware Supreme Court agreed in part, concluding that the underlying complaint did sufficiently “allege” inadequate consideration under the language of the exclusion.

Critically, the court did not stop there. Instead, it focused on the second and ultimately dispositive requirement: whether the settlement itself actually represented an effective increase in transaction consideration.

On that issue, the insurers failed.

The court emphasized that the policy language imposed two distinct requirements and that the insurers bore the burden of proving both. It was not enough to point to the existence of merger-related allegations or to characterize the settlement broadly as compensation flowing from a transaction dispute. Rather, the insurers were required to demonstrate that the settlement payment itself represented an increase in deal consideration. The court found that the evidentiary record did not support that conclusion.

Among other things, the settlement class included shareholders who did not hold stock at the time of the transaction and therefore did not receive merger consideration at all. The record also lacked evidence establishing the “true value” of the shares or connecting the settlement amount to any actual pricing deficiency in the merger. And the Court further emphasized that the material cost of defense had the case proceeded, may itself justify the settlement amount.

The significance of the decision extends well beyond the specific bump-up exclusion at issue. The Delaware Supreme Court effectively rejected the notion that courts should presume a settlement arising from transaction-related securities litigation necessarily represents an increase in deal price. Instead, the court required insurers to prove the connection through evidence grounded in the actual record.

That distinction matters. D&O insurers frequently attempt to frame transactional settlements in the broadest possible terms in order to fit within exclusions. *Harman* demonstrates that Delaware courts are increasingly unwilling to accept those characterizations at face value.

View Operating and the Narrow Construction of Public Offering Exclusions

The Delaware Superior Court reached a similar conclusion in *View Operating*, albeit in a different transactional setting and involving a different exclusion.

In *View Operating*, the dispute arose from claims tied to a de-SPAC transaction involving a technology company that developed smart windows. Following the merger, the company faced securities litigation and SEC enforcement proceedings concerning alleged accounting misstatements during the transaction process. The insurer denied coverage based on a “public

offering” exclusion applicable to claims “arising out of” a public offering of the insured company’s equity securities.

The insurer’s argument rested heavily on the purported “economic reality” of the de-SPAC transaction. According to the insurer, although the public shares technically belonged to the SPAC parent entity, the transaction effectively functioned as a public offering of the private operating company because investors were ultimately purchasing exposure to that business. The insurer urged the court to look beyond formal corporate distinctions and treat the transaction as substantively equivalent to an IPO of the operating company itself.

The court rejected that argument.

Focusing closely on the policy text, the Court held that the exclusion applied only to public offerings of the insured company’s own equity securities. Here, however, the operating company’s shares had been canceled at closing and replaced with shares of the SPAC parent. The court refused to disregard the distinction between parent and subsidiary entities simply because the transaction involved a de-SPAC structure.

Just as importantly, the court emphasized several foundational principles of Delaware insurance law. Exclusions are construed narrowly. The insurer bears the burden of establishing that an exclusion clearly applies. Ambiguities must be resolved in favor of coverage and against the insurer that drafted the policy.

The court’s treatment of the insurer’s “substance over form” argument is particularly notable. While the insurer repeatedly invoked economic equivalence and the practical realities of the transaction, the court refused to allow those general concepts to override. The court recognized that Delaware corporate law respects distinctions between parent and subsidiary entities and declined to effectively rewrite the exclusion through hindsight characterization of the transaction.

A Common Theme: Substance Must Match the Policy Language

Viewed together, *Harman* and *View Operating* reflect a broader judicial trend that should matter to policyholders, insurers, and coverage practitioners alike.

First, Delaware courts are increasingly requiring exclusions to be applied with precision rather than approximation. Insurers cannot simply identify a transaction-related dispute and assume that transaction-related exclusions automatically follow. Courts are requiring a direct connection between the actual exclusionary language and the actual claim, loss, or settlement at issue.

Second, courts are imposing a meaningful evidentiary burden on insurers seeking to deny coverage. *Harman* is particularly instructive in this respect. The Delaware Supreme Court did not merely examine the allegations in the underlying complaint. It examined what the settlement actually represented. The insurers’ inability to establish that the settlement functioned as a genuine increase in consideration proved fatal to the denial position.

Third, these decisions suggest a judicial reluctance to permit insurers to rely on broad conceptual arguments untethered from policy text. In both cases, the insurers advanced expansive theories based on “economic reality” or generalized characterizations of the transaction. In both cases, the courts instead focused on the actual language.

Practical Implications for Policyholders, Insurers, and Coverage Counsel

Harman and *View Operating* carry significant practical implications.

For policyholders and their counsel, the decisions reinforce the importance of carefully developing the factual and legal record surrounding transactional claims and settlements. Settlement structure and language, class definitions, allocation analyses, and the framing of underlying allegations may all prove critical in future coverage disputes. *Harman* in particular demonstrates that courts will look beyond the mere existence of a settlement payment and examine what the settlement actually compensates for and how it is structured, a concept equally applicable to other exclusions, such as for disgorgement.

The decisions also underscore the importance of resisting insurer attempts to broadly characterize claims at the outset of a dispute. Insurers frequently seek to define transaction-related claims in the broadest possible terms early in the coverage process. Delaware courts are increasingly signaling that such characterizations are not dispositive and that exclusionary language must be completely aligned with the facts and policy wording.

For insurers, these cases likely mean that transactional exclusions may become more difficult to invoke through early dispositive motions absent a well-developed factual record. Courts appear increasingly unwilling to allow exclusions to operate as broad catchall provisions divorced from the specific language chosen by the insurer.

Delaware’s Message to Insurers

Ultimately, these decisions do not represent a judicial expansion of coverage. Delaware courts are not rewriting policies in favor of insureds. Rather, they are enforcing longstanding principles of insurance law that exclusions must be applied narrowly and proven carefully. But in an environment where insurers increasingly rely on expansive readings of transaction-related exclusions to avoid significant D&O exposure, those principles may have substantial consequences.

The message from Delaware appears increasingly clear. Transactional context alone is not enough. If insurers intend to rely on exclusions to deny D&O coverage, they must prove that the exclusion they drafted precisely fits the claim and loss before the court.

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