

Fourth Circuit Upholds Bump-Up Exclusion in Towers Watson Insurance Case

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On May 28, 2025, the United States Court of Appeals for the Fourth Circuit ruled against Towers Watson, finding that its claim for loss related to the settlement of shareholder litigation arising from the 2016 transaction that combined Towers Watson with Willis Group Holdings was barred by the bump-up exclusion in the applicable D&O insurance policies.

The decision likely ends a long-running and closely-watched coverage litigation.

When we last discussed this lawsuit back in 2021, the United States District Court for the Eastern District of Virginia had construed the bump-up exclusion narrowly, finding that the Towers Watson - Willis merger transaction was not an acquisition within the scope of the exclusion. *District Court Narrowly Construes Bump-Up Exclusion in Merger*, NYLJ Vol. 266 – No. 94 (Nov. 15, 2021).

On appeal, the Fourth Circuit reversed that ruling, holding that the transaction was indeed an acquisition as defined in the exclusion.

The case was remanded back to the District Court, which, the second time around, granted

summary judgment to the insurers based on the applicability of the bump-up exclusion. Towers Watson filed an appeal but, in the recent decision, the Fourth Circuit affirmed the District Court's ruling in favor of the insurers.



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The Bump-Up Exclusion

A bump-exclusion may appear in a D&O insurance policy either as a separate exclusion or as an exception to the policy definition of loss.

In either case, in the context of a claim that the amount paid for acquisition of an entity was insufficient, the purpose of the exclusion or the exception is to bar coverage for that portion of loss that represents an increase (or bump-up) in the consideration originally paid for acquisition of the entity. The exclusion at issue in *Towers Watson* provided as follows:

“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.” *Towers Watson & Co., v. National Union, et al.*, 138 F.4th 786, 789 (4th Cir.2025).

The Transaction and Shareholder Claims

The Fourth Circuit described the Willis Towers Watson transaction as a “reverse triangular merger.” According to the recent decision, the end result of the complicated transaction was that Towers Watson, with all of its pre-merger assets, became a wholly-owned subsidiary of Willis and the former Towers Watson entity ceased to exist.

Following the merger, one shareholder class action was filed in Virginia Federal District Court and two (which were later consolidated) were filed in Delaware State Court.

The class actions asserted federal securities law and state law claims alleging that Towers Watson’s former CEO negotiated the merger agreement despite an undisclosed conflict of interest and that the CEO had agreed to a below-market valuation of Tower Watson.

The shareholder actions were ultimately resolved by separate settlements for a combined \$90 million.

The Insurance Dispute

While the shareholder actions were still pending, Towers Watson sought insurance coverage for the claims. The insurers agreed to fund Towers Watson’s defense but denied coverage for the \$90 million paid to settle the class actions based on the bump-up exclusion. Towers Watson filed a declaratory judgment action against the insurers

seeking a declaration that the exclusion was inapplicable.

After the Fourth Circuit held that the merger transaction was an acquisition within the meaning of the exclusion, the case was remanded to the District Court. On its second look, the District Court held that the bump-up exclusion barred coverage and granted summary judgment to the insurers.

Towers Watson appealed that ruling to the Fourth Circuit which reviewed the case according to a *de novo* standard of review.

The key issue presented on appeal was whether the sums paid to settle the shareholder actions represented an amount by which the price or consideration for the merger was “effectively increased.” If so, then the bump-up exclusion would be applicable.

Fourth Circuit Affirms

The Court of Appeals closely examined the bump-up exclusion, explaining that two conditions must be satisfied in order for the exclusion to apply.

“First, there must be a claim alleging that the consideration paid for the acquisition was inadequate.” Second, the settlement must represent “an effective increase in the price or consideration” received by the shareholders.

Towers Watson conceded the first condition because there was no real dispute that the shareholders claimed the consideration paid by Willis for Towers Watson was inadequate.

Consequently, the court turned to the issue of whether the settlement represented an increase in that consideration.

After discussing the meaning of the terms “represent” and “effectively increased”, the court concluded that the second condition was satisfied, agreeing with the District Court that the result of “the settlements is that the

shareholders receive additional consideration for their relinquished shares.”

The court explained that the shareholders had claimed that their shares were devalued in the merger process due to the former CEO’s conflict of interest. The shareholders brought suit to rectify the alleged shortfall and what they sought was “effectively an increase (or bump-up) in the consideration paid for their shares” The settlements represented that bump-up. *Id.* at 793-794.

In so ruling, the court rejected several Towers Watson arguments including the argument that the bump-up exclusion cannot apply because the shareholders’ claims were made under Section 14(a) of the Securities Exchange Act.

According to Towers Watson, Section 14(a) governs inadequate disclosures and such a claim cannot form the basis for recovery of inadequate merger consideration.

The Fourth Circuit dismissed this argument as irrelevant, pointing out that it was not tasked with assessing whether the relief sought was actually available under Section 14(a).

The court even conceded that it is perhaps doubtful whether such relief can be sought pursuant to Section 14(a). But since the shareholder claims were settled, the court determined that the only question remaining was whether the settlement amount was covered or barred by the bump-up exclusion.

Notably, the Fourth Circuit’s analysis of this issue differs from a recent Delaware case, in which the Delaware court held that a bump-up exclusion did not bar coverage in part because Section 14(a) and 20(a) claims do not support

a claim for inadequate merger consideration. *Harman International Industries, Inc. v. Illinois National Ins. Co.*, 2025 WL 84702 (Superior Court of Delaware, Jan. 3, 2025).

The Fourth Circuit, however, determined that the Towers Watson settlement amount represented an increase in merger consideration and therefore affirmed the District Court ruling holding that the bump-up exclusion barred coverage.

Looking Forward

The Towers Watson ruling highlights for policyholders the importance of conducting a review of the key terms of their D&O policies. The bump-up exclusion should be included on any checklist of terms to examine so that the application of the exclusion in connection with an acquisition does not come as a surprise.

Policy language setting forth the bump-up exclusion is not uniform. For example, in some policy forms, the exclusion may apply only where the insured is the acquiring entity. In other forms, the exclusion may also apply where the insured is acquired.

Consequently, policyholders should connect with their broker and counsel to determine if the scope of the exclusion in their policy is appropriate.

Claims over merger compensation typically involve large sums of money. As a result, disputes over the bump-up exclusion tend to be high stakes.

Consequently, we can expect to see additional lawsuits filed over the application of bump-up exclusions in the future.

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