Viacom Insureds Prevail . . . Barely.

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On August 10, 2023 the Delaware Superior Court issued its decision in the coverage dispute between Viacom and its D&O insurers.

The main question arising in the action was whether the at-issue Viacom/CBS transaction was an excluded acquisition or a potentially covered merger. If it was found to be an acquisition, then the Insurers were not obligated to pay for the settlement costs attributable to any of the "bumped-up" consideration in the settlement.

As in other decisions involving interpretation of bump up provisions,[1] the Court found it problematic that "acquisition" was not a defined term in the policy.

Under Delaware law, as in many states, Insureds must meet the initial burden that the insurance claims are subject to coverage. If they can do so, then the burden shifts to their Insurers to prove the claim is properly excluded under the insurance policy. And as is the case in a number of jurisdictions, under Delaware law, any ambiguity is resolved in favor of the insured—the reason being that the drafter of the insurance agreement must be unequivocally clear in carving out exclusions to coverage.

The court found the insurance policy ambiguous, but barely.[2]

The court noted that a merger may be "an acquisition of all or substantially all ownership interest in, or assets of, an entity," because all assets of Viacom "vest[ed] in" CBS, and CBS was the surviving corporation. On the other hand, "an acquisition of all or substantially all ownership interest in, or assets of, an entity" may be exclusive of merger transactions based on the reference to mergers in other provisions of the contract. Both interpretations are reasonable, and though two contrary, reasonable interpretations are generally sufficient to defeat a motion for summary judgment, here, any ambiguity is interpreted in favor of the insured.

The Insureds argued that the absence of a reference to "merger" in the Bump-Up Provision, coupled with its presence elsewhere in the insurance policy meant the Merger was not reached under the Bump-Up Provision. The term "Merger" was specifically used in another section of the policy addressing coverage for Merger Objection Claims. Although "merger" was not a defined policy term, the Court noted that references to "merger" in these other policy provisions supported its ruling that mergers and acquisitions were distinct transactions, and the

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[1] Notably, the Court here interpreted the provision as an exclusion despite the fact that it was not contained within the exclusions section of the policy. This effectively shifted the burden of proof as to its applicability to the insurers.

[2] Not to overly digress, but this was a decision of the Superior Court in Delaware which many insurers would contend has a pro-insured bent. Thus, it may be likely that there will be an appeal to the Delaware Supreme Court as a next step.

transaction at issue here could be a merger and not within the scope of an acquisition under the bump up provision.

This decision is significant for at least two reasons.

First, it evidences the substantial difference subtle variations in policy language can make in close cases. Unlike in other bump-up coverage disputes, the Court here looked to other policy provisions such as the definition of a Merger Objection Claim and the Material Changes in Conditions provision to support its ruling.

Second, it shows—yet again—that the way in which any substantial transaction is structured is guaranteed to come under close scrutiny by shareholders. Insureds are well advised to look at insurance-policy language and its potential implications on the front end of any deal. On the other hand, insurers may be well-advised to consider defining the term "acquisition" in these provisions to make it clear that "mergers" also fall within the scope of the provision.

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