

'Bump-Up' Exclusion Doesn't Bar Viacom Execs' Coverage Bid

By **Ganesh Setty**

Law360 (August 11, 2023, 5:48 PM EDT) -- Viacom's insurers cannot rely on a so-called bump-up exclusion to avoid covering a \$122.5 million settlement resolving shareholder litigation stemming from the company's \$30 billion merger with CBS, a Delaware court ruled, finding the exclusion is ambiguous as to whether it distinguishes between acquisitions and mergers.



A state judge ruled that under Delaware law, any ambiguity in Viacom's insurance tower must be construed against the company's 15 remaining excess insurers. (AP Photo/Mark Lennihan)

Granting **partial summary judgment** for Viacom and Shari Redstone, nonexecutive chairwoman of successor company Paramount Global, Judge Sheldon K. Rennie said Thursday that under Delaware law, any ambiguity in Viacom's \$200 million insurance tower must be construed against Viacom's 15 remaining excess insurers. The court had previously dismissed Viacom's primary insurer, Chubb unit ACE American Insurance Co., along with three other excess carriers.

According to Thursday's decision, the coverage dispute stems from consolidated shareholder litigation in Delaware chancery court alleging in part that Redstone pushed Viacom's controlling stockholders and executives into approving the all-stock merger at the expense of other shareholders. The court in the underlying case found in part that there was a "reasonable inference" that in exchange for appointing Redstone's preferred CEO, a committee of Viacom directors approved a share-exchange ratio that valued Viacom \$1 billion less than what was previously bargained for.

The litigation **ultimately settled** for \$122.5 million, while a similar \$167.5 million proposed settlement related to CBS shareholder litigation over the merger is still pending.

In June 2022, Redstone and Viacom filed separate complaints against Viacom's insurers seeking coverage for the derivative actions, after they denied coverage on two grounds. They argued that Redstone was not acting in an insured capacity as a Viacom director at the time of the merger, and further cited the bump-up exclusion.

As of Thursday's decision, those insurers include: Markel American Insurance Co., XL Specialty Insurance Co., Old Republic Insurance Co., National Casualty Co., Freedom Specialty Insurance Co., Endurance American Insurance Co., Illinois National Insurance Co., Starr Indemnity & Liability Co., Swiss Re Corporate Solutions America Insurance Corp., Continental Casualty Co., QBE Insurance Corp., National Liability & Fire Insurance, Berkley Insurance Co., AXIS Insurance Co. and Hudson Insurance Co.

Viacom subsequently filed its motion for partial summary judgment with respect to the exclusion in September, and Redstone's followed in March.

The provision specifically stated that coverage was barred for any amount the insured shelled out to resolve a claim that the price paid for "an acquisition of all or substantially all ownership interest in, or assets of, an entity" was inadequate.

The merger constituted such an acquisition, the insurer argued, since while Viacom ceased to exist at the merger's close, CBS still acquired all of Viacom's assets, including Viacom's ownership stakes in its subsidiaries.

Meanwhile, Redstone and Viacom argued in part that the exclusion's use of "acquisition" specifically referred to a "takeover transaction," in which both entities survive, but just one owns the other. But in the merger, Viacom did not survive, they said.

The pair further pointed to separate "merger objection claim" and "material changes in conditions" provisions in the policies, which both used the same "acquisition" language as in the bump-up exclusion, but further referred to merger transactions as separate from acquisitions.

"Here, the contract is ambiguous. On one hand, 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," Judge Rennie said. "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."

The Fourth Circuit in **May had reversed** a Virginia federal court in a similar dispute between Towers Watson and its insurers regarding the applicability of a bump-up exclusion over its reverse-triangular merger in 2016. While Towers Watson's policy did not define acquisition, the transaction fit within the plain meaning of the term, a three-judge panel unanimously held.

Counsel in the insurers' consolidated opposition brief declined to comment.

Representatives of Viacom and Redstone did not immediately respond to requests for comment.

Viacom is represented by David J. Baldwin, Peter C. McGivney, Harry W. Shenton of Berger Harris LLP and by Robin L. Cohen, Adam Ziffer and Jillian Raines of Cohen Ziffer Frenchman & McKenna LLP.

Redstone is represented by Matthew Fischer, Jennifer Wasson, Jacqueline Rogers, Carla Jones and Brandon Harper of Potter Anderson & Corroon LLP and by David B. Goodwin, Neema Sahni and Mitchell F. Dolin of Covington & Burling LLP.

The excess insurers are separately represented by attorneys from Smith Katzenstein & Jenkins LLP, Bailey Cavaliere LLC, Heyman Enerio Gattuso & Hirzel LLP, Arnold & Porter Kaye Scholer LLP, Phillips, McLaughlin & Hall PA, Ropers Majeski PC, Gellert Scali Busenkell & Brown LLC, Chasnoff Mungia Valkenaar Pepping & Stribling LLP, Troutman Pepper Hamilton Sanders LLP, Lewis Brisbois Bisgaard & Smith LLP, Kennedys CMK LLP, Elzufon Austin & Mondell PA, Wilford LLP, Morris James LLP, Baute Crochetiere Hartley & McCoy LLP, White and Williams LLP, Robinson & Cole LLP, Cooch and Taylor PA, BatesCarey LLP and Tressler LLP.

The cases are Viacom Inc. v. U.S. Specialty Insurance Co. et al., and Shari E. Redstone v. ACE American Insurance Co. et al., case numbers N22C-06-016 and N22C-06-020, in the Delaware Superior Court.

--Additional reporting by Jeff Montgomery and Abraham Gross. Editing by Nick Petruncio.