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Law360: Bump-Up' Exclusion Doesn't Bar Viacom Execs' Coverage Bid

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. Granting for Viacom and Shari Redstone, nonexecutive chairwoman of successor company , 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.

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"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."

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