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California Court Rules that "Bump-Up Exclusion" Bars Coverage of Settlement of Deal Litigation Claims

A California court has held that a D&O insurance policy's "bump-up" exclusion permitted the carrier to disclaim coverage for sums paid to settle a class action against target-side directors arising from a corporate sale. *Onyx Pharmaceuticals Inc.* v. *Old Republic Insurance Co.*, Case No. CIV 538248 (Cal. Super. Ct., San Mateo Cty. Oct. 1, 2020).

The decision centered on Amgen's 2013 acquisition of Onyx Pharmaceuticals. A class of Onyx stockholders sued, alleging that the Onyx board breached its fiduciary duties by agreeing to an unacceptably low sale price. That case settled, with Onyx agreeing to pay the class $26 million. The primary carrier insurer paid its full $10 million policy limit, but the excess carriers refused coverage, invoking a "bump-up" exclusion in the policy for claims "alleging that the price or consideration paid or proposed to be paid for the acquisition . . . of an entity is inadequate."

Coverage litigation ensued. Onyx argued that the "bump-up" exclusion should apply only to a buyer who underpays, not a target alleged to have sold too cheaply, but the court disagreed. Relying on an extensive factual record and the specific language in the Onyx policy, the court held that "[i]t is reasonable that the insurance carriers did not want to have insurance proceeds to be a means of funding the purchase of assets by a corporation—which, as a pragmatic matter, would be the result [i]f insurance funds were paid to Onyx, which is now wholly owned by its acquirer Amgen."

The decision is subject to appeal, and the trial court rooted its decision in the words and history of the policy at issue. But "bump-up" exclusions appear in many D&O policies, and if *Onyx* is widely followed, companies and directors may face a further obstacle to resolving lawsuits alleging an inadequate deal price—the kinds of lawsuits that are filed nearly every time a merger is announced.

The decision serves as an important reminder for companies to pay careful attention to D&O policy language, to review policy language in light of insurance litigation developments at least annually, and to use caution when selecting insurers. With respect to "bump-up" exclusions in particular, companies should consider whether they have such an exclusion in their policies and whether they should attempt to negotiate for narrower versions of the exclusion—or eliminate it entirely.

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