

ALERT

SEC Lawsuit Does Not Create Coverage for Costs of Voluntary Response to Preceding Investigation

February 17, 2011

Declining to reconsider its October 15, 2010 order granting summary judgment to insurers, the United States District Court for the Southern District of Florida has determined under Florida law that a lawsuit and administrative proceedings filed by the Securities and Exchange Commission (SEC) against insureds did not retroactively create coverage for non-covered costs incurred in response to the SEC investigation preceding the suit. *Office Depot, Inc. v. National Union Fire Insurance Co. of Pittsburgh, Pa.*, No. 09-80544-CIV (S.D. Fla. Feb. 16, 2011). Wiley Rein LLP represents the first-layer excess insurer in the case, and the court's order granting the insurers' motions for summary judgment and its order clarifying the summary judgment decision were discussed in the November and December 2010 issues of *Executive Summary*.

The insured purported to bring to the court's attention "new evidence" that, following the court's summary judgment order, the SEC filed administrative cease and desist orders against the company and two of its officers and filed a complaint against the company, which was dismissed by consent order pursuant to a settlement one week later. The company contended that the filing of the SEC's lawsuit and administrative orders demonstrated that costs the company had incurred responding to a preceding SEC investigation were covered defense costs. The court concluded instead that, although the insured may seek defense costs that "arise from" and "result[] solely from" the newly filed lawsuit, the lawsuit "does not convert the expenses [the insured] voluntarily incurred in pre-suit activity . . . into covered 'Loss' simply because that activity proved to be a useful and

Practice Areas

D&O and Financial Institution Liability
E&O for Lawyers, Accountants and Other Professionals
Professional Liability Defense
Insurance

economically efficient means of managing the SEC litigation that materialized.”

The insured also contended that public policy required the court to reconsider its grant of summary judgment, because denying coverage for voluntary pre-suit SEC response costs would discourage policyholders from cooperating with the SEC. The court rejected the insured’s “public policy override argument.” Instead, the court reasoned that “[i]t is not the business of the courts to re-write insurance policies to achieve the greatest economic efficiency or socially redeeming results. . . . [T]he sophisticated commercial parties to this contract were free to negotiate the boundaries of the insurance coverages purchased with a corresponding adjustment in the policy premiums.”