

Eleventh Circuit Holds No Coverage For Investigation Costs

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On October 13, 2011, the Eleventh Circuit held that, by their plain and unambiguous language, the defendants' Executive and Organization Liability Insurance Policies did not cover the costs incurred by plaintiff Office Depot in responding to (1) an investigation by the SEC of Office Depot as an organization to determine whether violations of the federal securities laws had occurred, (2) Office Depot's audit committee's internal investigation of possible accounting irregularities, and (3) the SEC's investigation of Office Depot's officers and directors before they received an SEC subpoena or Wells Notice.

The Court concluded those investigations were not a "Securities Claim" as defined in the policy, nor did the costs result "solely" from a "Securities Claim" as required for coverage. The Court rejected Office Depot's argument that once a "Claim" or "Securities Claim" is made, coverage extends back to the date of a Notice of Circumstances to include all costs incurred. The Court said the plain language of the policy limited covered costs to those "resulting solely" from a covered "Claim." As such, costs only were covered after the SEC issued a subpoena, or it identified an officer as a person against whom a proceeding might be commenced.

The policy at issue in this case stands in stark contrast to the policy at issue in *MBIA, Inc. v. Federal Insurance Company*, 2011 WL 2583080 (2d Cir. Jul. 1, 2011), and this difference leads to the very different results. Taken together, these cases illustrate the fine distinctions of policy language that can result in a regulatory investigation being covered (or not) and highlight the need for attention to these matters when D&O insurance is negotiated and acquired.

A copy of the Eleventh Circuit opinion can be found [here](#).

Carlton Fields attorneys Sylvia H. Walbolt, Gwynne A. Young, Steven J. Brodie, E. Kelly Bittick, Jr., and Kevin P. McCoy served as counsel for Defendant National Union Fire Insurance Company of Pittsburgh, PA in the case discussed in this article.