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NEWSLETTER

D&O Insurance Policy Must Be Produced in Securities Litigation Despite the PSLRA's Prohibition on Discovery While Motion to Dismiss Is Pending

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A federal judge in Chicago ordered the production of the D&O policy issued to the defendants despite the automatic stay on discovery in a securities fraud suit under the Private Securities Litigation Reform Act of 1995 when a motion to dismiss is pending. *In re Comdisco Securities Litigation*, No. 01 C 2110, 2001 U.S. Dist. LEXIS 15824 (N.D. Ill. Oct. 1, 2001).

The plaintiff class in a securities fraud suit sought an order compelling the production of defendants' D&O policies. The defendants refused, arguing that the prohibition against discovery that was enacted as part of PSLRA trumped the initial disclosure mandate of Federal Rule of Civil Procedure 26(a)(1)(B).

Holding that the policies should be disclosed, the court noted that the PSLRA specifically allows for discovery when the court finds that it is necessary to preserve evidence or to prevent prejudice. Focusing on the issue of prejudice, the court considered the two concerns that motivated the discovery stay provisions of the PSLRA: preventing the imposition of an unreasonable burden on the defendants and avoiding suits where the plaintiff does not have an adequate factual basis for its claims. The court reasoned that neither concern was implicated. First, the policies had no bearing on the viability of the plaintiffs' claims. Second, the court noted that there was no "burden at all involved in the simple photocopying of readily available insurance policies." Further observing that the knowledge of the existence and scope of any possible coverage was "essential to the exercise of the [class action counsel's] ability to carry out its fiduciary obligations" to its clients, the court held that a disclosure of the insurance policies was appropriate, particularly given that the corporate defendant, Comdisco, had filed for bankruptcy.