

No Coverage for Corporation's Defense Costs and Fees under D&O Policy

November/December 2002

The U.S. Court of Appeals for the Sixth Circuit, applying Ohio law, held that an insurer was not obligated to cover defense costs charged by a corporation's lawyers under a D&O policy that did not provide entity coverage where the corporation's officers retained separate defense counsel. *Telxon Corp. v. Federal Ins. Co.*, 309 F.3d 386 (6th Cir. 2002). A company and two of its officers were sued in 1992 in a class action securities lawsuit. The two officers each retained separate counsel. The applicable D&O policy provided that the insurer would "pay on behalf of each Insured Persons all Loss for which the Insured Person is not indemnified by [the company] and which the Insured Person becomes legally obligated to pay...." An Insured Person was defined in the policy as "[a]ny person who has been, now is, or shall become a duly elected director, or a duly elected or appointed officer of [the company]." The insurer provided coverage for all defense costs of the officers, but denied coverage for the defense costs incurred by the company. Coverage litigation followed.

The court ruled in favor of the insurer, reasoning that on the record it was clear that the company's lawyers were representing the company and not the officers. Accordingly, the officers were never "legally obligated to pay" the company's lawyers. The court also rejected the company's argument that it should apply the "reasonably related" rule and allow payment of the company's defense costs because they were "reasonably related" to the defense of the claims against the officers. The court noted that the Ohio Supreme court has not yet addressed the "reasonably related" rule, but concluded that the rule would not be applicable in these circumstances because the policy language was unambiguous.

For more information, please contact one of WRF's Professional Liability Attorneys at 202.719.7130