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NEWSLETTER

Eleventh Circuit Affirms No Coverage for Breach-of-Contract Claims under D&O Policy

December 2006

The United States Court of Appeals for the Eleventh Circuit has held that a D&O liability policy affords no coverage for breach-of-contract claims against the insured company. *See Waste Corp. of Am. Inc. v. Genesis Ins. Co.*, No. 05-14908, 2006 WL 3505383 (11th Cir. Dec. 6, 2006). In a *per curiam* opinion, the Eleventh Circuit affirmed the district court's ruling that, under both Texas and Florida law, the plain language of the policy's insuring agreement and public policy preclude coverage for breach-of-contract claims. Wiley Rein & Fielding LLP represented the insurer in this case.

The underlying lawsuit involved the insured company's purchase of two businesses. Under the purchase agreement, the sellers had the potential to earn certain future royalty payments based on the businesses' performance. The sellers sued the insured company, alleging that the company had breached the terms of the purchase agreement by failing to allow the sellers to manage the day-to-day operations of the acquired businesses, thus harming the sellers' ability to earn future royalty payments. Two of the sellers settled before trial. The third seller proceeded to trial and won a $3 million jury verdict on his breach-of-contract claim. The insured company subsequently settled the case for $2 million and sought coverage for the settlement.

The district court held that the insurance policy afforded no coverage for the $2 million settlement. The district court held that breach-of-contract damages did not constitute covered "loss," defined as amounts the insured was "legally obligated to pay." The court distinguished between a "legal" obligation imposed by tort law and voluntary obligations undertaken pursuant to contract. The district court also held that the breach-of-contract damages did not result from a "wrongful act" as required by the policy, but rather from the insured company's voluntary act of entering into contractual obligations. Finally, the district court held that strong public policy concerns buttressed its interpretation of the text of the insuring agreement, as allowing parties to insure against breaches of contract would incentivize parties to breach such contracts.

On appeal, the insured company argued that, although the underlying plaintiff had sued under a breach-of-contract theory, in reality the plaintiff was alleging mismanagement of the businesses. The Eleventh Circuit rejected the argument, holding that the entire $2 million settlement represented amounts the insured was required to pay as a result of breaching the purchase agreement.