

Insured Directors and Officers Incurred No "Loss" When Uninsured Corporation Paid Settlement and Defense Costs

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The Superior Court of Delaware, applying California law, dismissed a complaint brought by a corporation that had paid defense costs and a settlement on behalf of individual insureds, holding that the insured directors and officers suffered no "Loss" because they "are not, and never have been, 'legally obligated to pay' or 'financially liable' for the amounts at issue." *AT&T Corp. v. Clarendon Am. Ins.*, 2006 WL 2685081 (Del. Super. Ct. Sept. 18, 2006). Wiley Rein & Fielding represented one of the primary insurers in this dispute.

Most of the policies at issue defined "Loss" to include "any amounts which the Directors or Officers are legally obligated to pay." Another policy defined "Loss" to include "damages, judgments . . . settlements, Defense Costs . . . however, Loss shall not include . . . any amount for which the Insureds are not financially liable or which are without legal recourse to the Insureds." The court drew no distinction between the policies' language in reaching its decision.

The insured directors and officers and the non-insured parent company of the insured corporation were defendants in several underlying corporate and securities actions. The parent company paid the directors' and officers' defense costs and agreed that it "shall pay on behalf of itself and the Individual Defendants" an amount to settle one of the suits. The parent company then brought this coverage suit against the directors' and officers' insurers, claiming it had been assigned and/or was equitably subrogated to the directors' and officers' rights under the insurance policies.

According to the court, controlling California law, such as *Pan Pacific Retail Properties, Inc. v. Gulf Insurance Co.*, 2004 WL 2958479 (S.D. Cal.), and *PLM, Inc. v. National Union Fire Ins. Co. of Pittsburgh PA*, 1986 WL 74358 (N.D. Cal.), *aff'd*, 848 F.2d 1243 (9th Cir. 1988), makes clear that unless the individuals made payment or incurred an obligation to pay, there is no "'loss' under the policies." The court determined that the complaint did not allege any such payment obligation, and concluded that the directors and officers "are not, and never have been, 'legally obligated to pay' or 'financially liable.'" The court also rejected the parent company's equitable subrogation claim, holding that it had failed to plead sufficiently that it did not act as a volunteer.