EXECUTIVE RISK SOLUTIONS

JULY 2026

Quarterly Update

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+ *Coverage for Settlement of SEC Enforcement Action Upheld Despite Being Labeled Disgorgement*

Following an investigation and enforcement action by the Securities and Exchange Commission (SEC), the target company agreed to pay $16.35 million in disgorgement, $3.76 million in pre-judgment interest and a $6 million civil money penalty to resolve the matter. The company and its Directors and Officers Liability (D&O) insurers agreed there was no coverage for the civil money penalty, but the company did seek coverage for the disgorgement and interest (plus defense costs). The primary (lead) insurer took the position costs incurred on behalf of the company were not covered and also sought to deny coverage for the settlement (disgorgement + interest) because it constituted a penalty in substance and was uninsurable as a matter of public policy under Delaware law. The company challenged the denial of coverage.

Even though the plain language of the primary D&O policy provided coverage for settlements and pre-judgment interest, the insurer took the position those amounts fell outside the definition of Loss in the policy and were therefore not covered. The insurer pointed to the definition of Loss which excluded penalties imposed by law and "matters which may be deemed uninsurable under the law pursuant to which this policy shall be construed".

The Delaware Superior Court referred to *Kokesh v. SEC*, 581 U.S. 455 (2017), *J.P. Morgan Sec. Inv. v. Vigilant Ins. Co.*, 183 N.E.3d 443 (N.Y. 2021), and *Liu v. SEC*, 591 U.S. 71 (2020) for their treatment of whether disgorgement is considered a penalty. The court came to the conclusion the insurer had not met its burden. "[R]ead in the context of SEC enforcement and the Policy as a whole, the Civil Penalties Exclusion unambiguously excludes the SEC civil monetary penalties but not SEC disgorgement or pre-judgment interest paid in settlement. AIG's interpretation would dissolve the distinction between those remedies." The court further held the Delaware legislature and its Supreme Court had declined to hold alleged wrongful conduct uninsurable on public policy grounds. Thus, treating the disgorgement portion of the settlement as an equitable remedy, as opposed to a penalty, coverage for that portion of the settlement was upheld. *Clear Channel Outdoor Holdings, Inc. v. Illinois National Insurance Co.*, 2026 WL 1347392 (Del. Super. April 28, 2026).

+ *SEC May Pursue Disgorgement Even in the Absence of Pecuniary Loss by Investors*

Continuing on the theme of disgorgement, the U.S. Supreme Court recently upheld the ability of the SEC to pursue that remedy even if it was not for the purpose of compensating investors. The opinion noted that the SEC originally pursued disgorgement as a means of depriving illicit actors of their unlawful gains. Later on, the SEC began routinely seeking and obtaining disgorgement awards that went beyond compensating victims and the funds being paid to the U.S. Treasury. In working through the history of cases setting the confines of what was permissible, the Court noted two primary limitations. "First, because equity seeks to deprive wrongdoers of their profits from unlawful activity, we held that any remedy must be limited to the defendant's net profits (not total revenues) derived from his securities-law violations. Second, because equity aims to deliver 'wrongful gains' to 'wronged victims' … we concluded that any amounts the SEC secures must be awarded for victims."

More recently, Congress explicitly added disgorgement to the list of the SEC's enforcement tools, which brings us to the case at issue. An enforcement action brought against an individual for securities fraud and selling unregistered securities sought $4.1 million in disgorgement.

The defendant objected, arguing investors did not suffer financial losses. The federal district court sided with the SEC, finding enough evidence that investors had suffered pecuniary loss. On appeal to the Ninth Circuit Court of Appeals, the trial court's decision was affirmed. However, because the Second Circuit had taken the opposite view, the U.S. Supreme Court accepted this case to resolve the conflict.

"[W]e conclude that a showing of pecuniary loss is not required before an investor may qualify as a victim of an offender's wrongdoing entitled to compensation." The opinion went on to distinguish disgorgement from compensatory damages by characterizing the former as a remedy designed to deprive the wrongdoer of their net profits, rather than compensating the victim. "Generally, the final award to the plaintiff is not measured by his loss but by the defendant's gain…The point of the remedy is for the defendant to give to the plaintiff the amount by which he has been enriched." *Sripetch v. SEC*, 146 S.Ct. 1403 (2026).

No Voluntary Payments Clause Deprives Insured of Defense Costs Incurred Without Consent

We highlight this case as a reminder that failing to coordinate with an insurer during a claim can be costly. While this case does not deal with a thorny legal question or millions of dollars at stake, it did result in a policyholder being on the hook for e-discovery vendor costs out of pocket that should have been covered under a management liability policy.

After tendering the defense of a claim to its Employment Practices Liability (EPL) insurer, the policyholder engaged a vendor to manage its e-discovery obligations. The policyholder never advised its insurer of the scope of work and costs involved. The insurer begrudgingly agreed to pay the first invoice for the e-discovery vendor. However, when a second invoice was submitted for reimbursement, the insurer refused to pay it and invoked the 'no voluntary payments' clause in the EPL policy.

The policyholder filed a declaratory judgment action against the insurer seeking reimbursement of those costs, and the court found in favor of the insurer. "NVP provisions are enforceable as to costs incurred both pre- and post-tender, in the absence of economic necessity, insurer breach or other extraordinary circumstances…[W]hen the insurer provides a defense to its insured, the insured has no right to interfere with the insurer's control of the defense…To now saddle [the insurer] with expenses to which it never consented strikes the Court as the antithesis of equity. The NVP provision is enforceable here." *The California Endowment v. Radnor Specialty Insurance Co.*, 2026 WL 1243672 (C.D. Cal. May 6, 2026).

Public Offering Exclusion Inapplicable to de-SPAC Transaction; Insurer Obligated to Advance Costs

After a special purpose acquisition vehicle (SPAC) acquired a private company and completed a business combination (i.e., a de-SPAC transaction), two lawsuits were filed alleging misconduct by officers during the transaction. The lawsuits were tendered under the acquired company's private Directors and Officers Liability (D&O) insurance program. The first excess layer insurer sought to deny coverage and refused to advance defense costs. Of the five insurers on the program, only this one insurer denied coverage. The policyholder then initiated litigation over the denial.

The excess layer insurer based its denial on: (1) the public offering exclusion; and (2) that there was no current obligation to advance defense costs. The Delaware Superior Court rejected both arguments and went so far as to leave bad faith liability on the table based on the insurer's conduct.

+ *Public Offering Exclusion Inapplicable to de-SPAC Transaction; Insurer Obligated to Advance Costs, continued*

Diving further into the case, the insurer took the view an investment in the SPAC was fundamentally an investment in the private company acquired as a part of the de-SPAC transaction, thereby bringing the public offering exclusion into play. In support of its position, the insurer cited recent SEC interpretive guidance that a de-SPAC target is a registrant because, in substance, it issues or proposes to issue securities as the securities of the newly combined public company.

The court did not take kindly to these arguments. "This 'substance over form' interpretation fails. It is neither 'plain' nor 'clear' … nor is it supported by case law. By blurring the legal distinction between parent and subsidiary, [the insurer's] reading would undermine the narrow function of insurance exclusions. At best, [the insurer] offers an alternative reading that creates ambiguity-which must be resolved in [the policyholder's] favor."

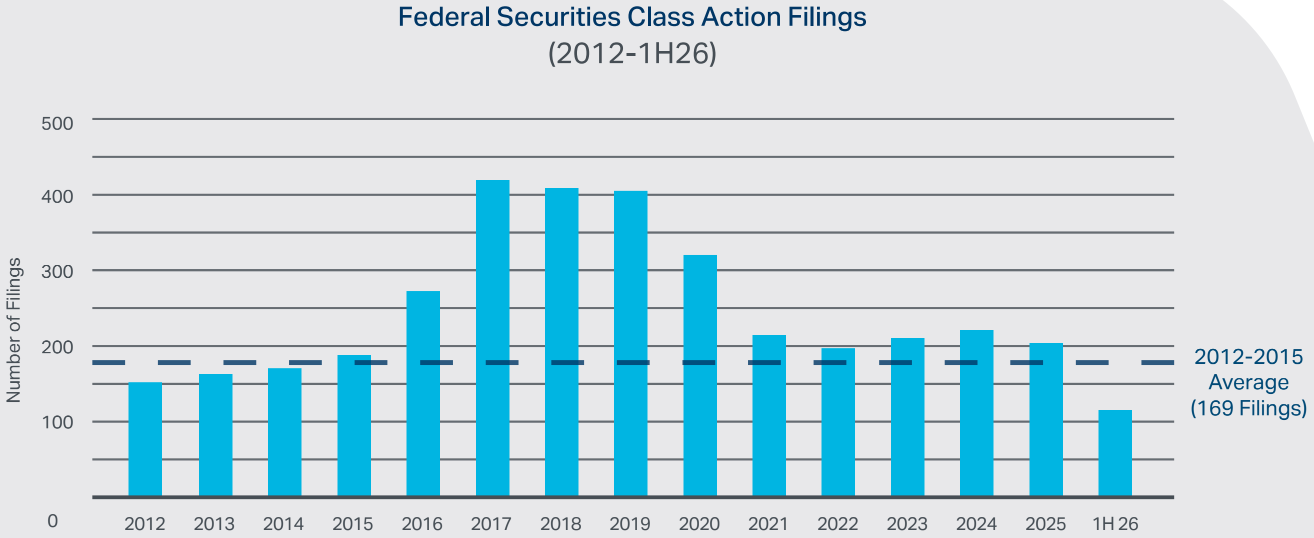
The court took a similar view of the insurer's arguments regarding advancement of defense costs. "Black's Law Dictionary defines 'indemnify' both as 'to reimburse another for a loss and to *promise* to reimburse another for such a loss…The Policy's use of 'pay on behalf of' language further reinforces this conclusion. This Court has previously determined that when parties to an insurance contract use this language, they agree that an insured need not pay for Loss first and then seek coverage in the form of reimbursement...Accordingly, to the extent [the policyholder] is obligated to advance and indemnify [an officer's] defense costs, [the insurer] is required to pay those amounts on behalf of [the policyholder]."

In refusing to dismiss the policyholder's bad faith claim, the court found the insurer's legal arguments 'too nebulous to be deemed colorable' and that they had taken inconsistent positions. As such, the insurer faces potential bad faith liability for its denial of coverage.

As we have highlighted previously in this newsletter, it only takes one excess layer insurer on a program to take an inconsistent coverage position and require additional litigation to secure payment on a covered claim. While it appears the policyholder will prevail in this instance, this case is yet another reminder of the importance of partnering with strong and stable D&O capital providers. *View Operating Corp. v. StarStone Specialty Insurance Co.*, 2026 WL 895939 (Del. Super. March 30, 2026).

D&O Filings

+ As we have previously reported, D&O Federal Securities Class Action (SCA) Claims increased slightly in 2023 and 2024 before declining slightly in 2025.
+ In 1H 2026, there were a total of 118 SCA filings, which would equate to a full-year total of 236.
  - If the current pace of filings holds, this would represent a year-over-year increase of 15% and would be 40% higher than the 2012-2015 average of 169 claims per year.



Note: Data from Cornerstone Research. Data from Stanford Law School. Data from TransRe. Data from IMA proprietary database.

D&O Pricing and Outlook

+ Although D&O litigation is trending up slightly and remains elevated over historical levels, overall market conditions remain favorable. The downward pressure we saw on pricing over the last couple years has slowed, but quality capital remains plentiful and competitive.
+ In a February 2026 market report, insurance rating agency A.M. Best stated that the D&O market "is stabilizing after a prolonged period of aggressive rate reductions and intense competition as pricing seems to be reaching its floor."
+ Carriers do remain particularly cautious regarding companies with near-term capital needs or a high likelihood of M&A.
+ *Partnering with strong and stable D&O capital providers should remain an important consideration.*
  - In our opinion, D&O is first and foremost a legal consideration, and secondarily (but not insignificantly) a *financial* consideration. Without a proper scope of coverage and quality capital, pricing is irrelevant.
+ As we look forward into 2H26, we are optimistic that current trends will continue to hold, with stable capital deployment.

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