HUNTON ANDREWS KURTH

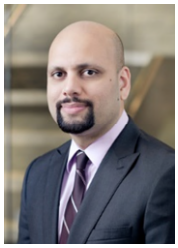
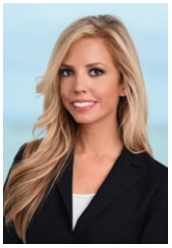
Lawyer Insights

July 30, 2019

Delaware Court Weighs In on the CID Coverage Debate

By Syed S. Ahmad and Andrea L. DeField

Published in The D&O Diary

A common misconception among policyholders, including their officers and board members, is that regulatory investigations and informal requests for information are definitively covered by their directors and officers (D&O) or professional liability insurance policies. There is often coverage. But not always. To trigger coverage under D&O or professional liability policies, a subpoena, investigation or other action must constitute a "Claim" alleging a "Wrongful Act" by an insured. Insurers often dispute whether government investigations, including a civil investigative demand (CID) or request for documents, constitutes a "Claim" and whether such claim alleges a "Wrongful Act" so as to trigger coverage. Courts around the country have reached different results on the issue.

Recently, the Delaware Superior Court weighed in on the debate as it analyzed whether a CID issued to the insured by the Texas Attorney General constituted a "Claim" for a "Wrongful Act" under a professional liability insurance policy. After carefully considering the body of law on both sides of the issue, the court held that the CID did in fact constitute a "Claim" that triggered the insurers' duties to defend and indemnify. *See Conduent State Healthcare, LLC v. AIG Specialty Ins. Co*., CVN18C12074MMJCCLD, 2019 WL 2612829 (Del. Super. Ct. June 24, 2019).

In that case, the insured sought coverage for three alleged claims under its professional liability policy issued by AIG, including a Medicaid investigation by the Texas Attorney General. The Texas Attorney General had issued a CID to the insured that stated that the Attorney General was "investigating the possibility of Medicaid fraud involving the prior authorization process for orthodontia services" and further stating that the Attorney General "has reason to believe you may have information relevant to its investigation." AIG denied coverage, arguing that the CID does not constitute a "Claim" as defined in the policy. In the resulting coverage litigation, AIG and the insured's excess insurer, Chartis Specialty, sought to dismiss the insured's claim for coverage for the investigation.

In analyzing coverage, the court identified the "split of authority as to what constitutes a claim" under the policy language in the AIG policy, which defined Claim as "(a) a written demand for money, services, non-monetary relief or injunctive relief; or (2) a Suit." First, the court recognized authority finding that a CID was not a claim. For example, the court looked to *MusclePharm Corp. v. Liberty Ins. Underwriters, Inc*., 712 Fed. Appx. 745 (10th Cir. 2017), where the Tenth Circuit held that an SEC investigation prior to the issuance of a Wells notice was not a "claim" sufficient to trigger coverage. In MusclePharm, the Tenth Circuit explained that there was no "covered 'claim' without an allegation of wrongdoing against an insured person, and the SEC stated in both the July 8 Order and the related subpoenas that these

documents were not alleging wrongdoing." The Delaware court also cited several other cases where courts found that a request for information or subpoena did not constitute a "Claim" because they failed to allege "Wrongful Acts" by an insured. *See Employers' Fire Ins. Co. v. ProMedica Health Sys., Inc*., 524 Fed. Appx. 241, 243 (6th Cir. 2013) (preliminary investigation by and letter from FTC were not "Claims" because investigations did not amount to "allegations"); *First Horizon Nat'l Corp. v. Houston Cas. Co*., 2017 WL 2954716, at *9 (W.D. Tenn. June 23, 2017), aff'd, 742 Fed. Appx. 905 (6th Cir. 2018), reh'g denied (Aug. 3, 2018) (CIDs issued by the Department of Justice did not constitute a "Claim" because the documents did not contain allegations of "Wrongful Acts"). The Delaware court also cited an Eastern District of Texas case finding that a US Department of Justice request for information was not a claim because "a request for information that was not accompanied by a subpoena" was not sufficient to constitute a "demand" or "claim" sufficient to trigger coverage. *W.R. Starkey Mortgage, LLP v. Chartis Specialty Ins. Co*., 2013 WL 12138896 (E.D. Tex. June 27, 2013).

Next, the Delaware court analyzed authority supporting that a CID is a "Claim" as a demand for "non-monetary relief." *See Syracuse Univ. v. Nat'l Union Fire Ins. Co. of Pittsburgh*, *PA*, 40 Misc. 3d 1205(A), 975 N.Y.S.2d 370 (Sup. Ct. 2013), aff'd, 112 A.D.3d 1379, 976 N.Y.S.2d 921 (2013) (grand jury investigations and subpoenas constitute a "written demand … for non-monetary relief" and investigations constituted "criminal proceedings for monetary or non-monetary relief" sufficient to trigger coverage); *MBIA Inc. v. Federal Ins. Co*., 652 F.3d 152 (2d Cir. 2011) (investigative subpoenas were a "claim"); *Weaver v. Axis Surplus Ins. Co*., 2014 WL 5500667 (E.D.N.Y. Oct. 30, 2014), aff'd, 639 Fed. Appx. 764 (2d Cir. 2016) (letter from Maryland Attorney General was a "Claim" as it was a written demand for non-monetary relief because it put the insured on notice that legal obligations had been triggered); *Minuteman Int'l, Inc. v. Great Am. Ins. Co* 2004 WL 603482, at *1 (N.D. Ill. Mar. 22, 2004) (SEC order and subpoenas were demands for something due and thus "claims").

The Delaware court agreed with this body of law finding coverage, explaining "[t]he Court finds the authority that supports the CID constituting a 'Claim' more persuasive. The Texas CID to Conduent is a 'Claim' as defined in the insurance policy because it is a 'demand for … non-monetary relief' specifically targeted at the insured …. The 'no claim' opinions do not address the ability of the issuer to compel compliance without judicial intervention." The Delaware court held that the CID alleged a "wrongful act" based on the CID's statement that "The Office of the Attorney General of Texas is investigating the possibility of Medicaid fraud involving the prior authorization process for orthodontic services. Such activities may violate the Texas Medicaid Fraud Prevention Act … and other Texas law." The court explained that there "is a broad duty to pay defense costs" and that for purposes of interpreting the AIG policy, there was no material difference between investigating an unlawful act by the insured and an allegation of an unlawful or "Wrongful" act by the insured. Accordingly, the court ruled that the "CID is a Claim for non-monetary relief, alleging a Wrongful Act under the Policy terms. This finding is consistent with the view that the duty to pay defense costs should be construed broadly, and in favor of coverage whenever factual allegations raise the possibility of liability covered by the policy."

While this opinion is a win for policyholders, the uncertainty created by the conflicting decisions—as noted by the Delaware court—highlights the importance of clearly defining coverage for investigations and information requests. Indeed, many cases seem to turn on the wording used by regulators in the subpoena or demand itself—wording that is of course outside of the control of the insured. For example,

just a month before the Delaware court decision, the First Circuit held that deposition requests and document subpoenas were not "Claims" because they contained no references to misconduct so as to allege "Wrongful Acts." *BioChemics, Inc. v. AXIS Reinsurance Co*., 924 F.3d 633, 644 (1st Cir. 2019). Meanwhile, earlier this spring, the Eastern District of Texas held that a subpoena from the Office of Inspector General did constitute a "Claim" for non-monetary relief as a "demand for something due" that also alleged wrongdoing. *See Oceans Healthcare, L.L.C. v. Illinois Union Ins. Co*., 379 F. Supp. 3d 554, 563 (E.D. Tex. 2019). These mixed results demonstrate that insureds are best served by obtaining terms clearly providing coverage for such investigations and document requests.

Syed S. Ahmad *is a partner in the insurance coverage practice in the Washington, DC office of Hunton Andrews Kurth LLP. Syed represents clients in connection with insurance coverage, reinsurance matters and other business litigation. He can be reached at +1 202 955 1656 or sahmad@HuntonAK.com.*

Andrea L. DeField *is an associate in the insurance coverage practice in the Miami office of Hunton Andrews Kurth LLP. Andrea finds risk management, risk transfer, and insurance recovery solutions for public and private companies. She can be reached at +1 305 810 2465 or adefield@HuntonAK.com.*