DOLLARS AND SENSE: MAKING THE MOST OF YOUR COMPANY'S INSURANCE POLICY WHEN SERVED WITH A GOVERNMENT SUBPOENA

Date: 16 July 2018

U.S. Investigations, Enforcement and White Collar and Insurance Coverage Alert

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SERVED WITH A SUBPOENA?

When a company receives a subpoena or otherwise learns it is a witness, subject or target of a government investigation, its initial response typically involves contacting outside counsel specializing in government investigations and then complying with and/or defending against the government's inquiry. However, a company's response should not end there. A corporate subpoena recipient should also consider whether the costs incurred in responding to the government's inquiry—including legal fees and expenses and/or potential settlements—may be covered under its insurance policies, such as its Directors and Officers' ("D&O") liability policies and Errors and Omissions ("E&O") liability policies. If there is a potential for coverage, the company should consult with coverage counsel to preserve its rights under those policies.

On May 30, 2018, the Northern District of Illinois reinforced this premise by denying three insurers' motions to dismiss a policyholder's complaint seeking coverage for defense costs incurred with respect to an investigation by the U.S. Department of Justice ("DOJ") in *Astellas US Holding Inc. v. Starr Indemnity and Liability Co., et al.* [1] Similar to many other cases addressing the availability of coverage for regulatory investigations, the *Astellas* court focused on the specific definition of "Claim" in the policy. Like many other current policies, the definition of Claim at issue included numerous particular sub-parts, including (1) one sub-part that potentially afforded coverage for certain regulatory investigations, and (2) other more general sub-parts, including a "written demand for monetary, non-monetary or injunctive relief" and a "written request to toll or waive the applicable statute of limitations." [2] The *Astellas* court rejected the insurers' position that the availability of coverage turned solely on the applicability of the sub-part expressly related to regulatory investigation. [3] Alternatively, the court reasoned that the various sub-parts offered "alternative" and "overlapping" forms of coverage. [4] Based on the facts, the court denied the insurers' motions to dismiss on the grounds that the DOJ subpoena was a demand for non-monetary relief and that a tolling agreement at issue satisfied the sub-part dealing with such agreements.

While policy language and state law varies widely, *Astellas* should serve as a reminder that policyholders facing a regulatory investigation should consider the availability of insurance coverage. Even if the sub-part of the definition of Claim related to regulatory investigations refers expressly to formal investigations, the independent sub-part for tolling agreements may afford valuable coverage if a regulator requests a tolling agreement during an informal phase of an investigation.

ASTELLAS: THE LATEST IN A LINE OF CASES HIGHLIGHTING THE IMPORTANCE OF POLICY LANGUAGE

The Definition of Claim Varies Widely

The definition of Claim varies widely in D&O and E&O policies, including with respect to regulatory investigations. Some definitions include one subpart that expressly addresses regulatory investigations (as well as other subparts), but the terms of such subparts also vary widely. For example, the policy at issue in *Astellas* included a subpart for a "regulatory investigation of an Insured Person, which is commenced by the filing or issuance of a notice of charges, formal investigative order or similar document identifying such Insured Person as a person against whom a proceeding … may be commenced." [5] In contrast to the *Astellas* policy (which refers to certain investigations of an Insured Person), other policies include subparts that expressly afford coverage for certain regulatory investigations related to all insureds (including entity insureds). Some policies expressly cover "any investigation" (e.g., no restriction to "formal" investigations), while others might refer to specific parts of an investigation, such as subpoenas, target letters, formal orders, and/or Wells notices.

As noted, many policies include a definition of Claim that includes numerous subparts, such as subparts for civil and criminal proceedings and, more generally, for written demands for monetary or non-monetary relief and/or any written request for a tolling agreement. As illustrated by the *Astellas* case, policyholders may be entitled to coverage for a regulatory investigation under such subparts, even if the regulatory subpart does not apply.

Recap of Astellas

The *Astellas* case involves plaintiff-policyholder Astellas Pharma, Inc. and its U.S.-based subsidiary, Astellas Pharma US, Inc. (together, "Astellas"), which are both pharmaceutical companies. [6] After receiving a subpoena from the DOJ in March of 2016, [7] Astellas promptly notified its primary D&O insurer, Starr Indemnity and Liability Company, and its excess D&O insurers, Beazley Insurance Company and Federal Insurance Company (collectively, the "Insurers"). [8] On October 26, 2017, the DOJ and Astellas entered into a "tolling agreement," whereby the parties agreed to toll the applicable statutes of limitation for Astellas' possible violations of law in making payments to organizations that gave financial assistance to Medicare beneficiaries. [9]

The Insurers denied coverage. [10] Thereafter, Astellas filed a declaratory judgment action seeking a declaration that the subpoena and the tolling agreement [11] amounted to covered Claims under the policies and that, therefore, the defense costs incurred in responding were covered. [12] The Insurers moved to dismiss Astellas's complaint, arguing that (1) the court should consider only the subpart of the definition of Claim related to regulatory investigations, (2) even if the court considered other subparts of the definition of Claim, the subpoena was not a "demand for nonmonetary relief," and (3) that even if there was a Claim, there was no allegation of a "Wrongful Act" sufficient to trigger coverage. [13]

The court rejected the Insurers' arguments. First, the court rejected the Insurers' position that the subpart of the definition of Claim that specifically addressed regulatory investigations would be rendered "superfluous" if the policyholder was able to establish coverage for a regulatory investigation under other subparts. [14] The court reasoned that the subparts provided "alternative forms of coverage" and that they provided "overlapping coverage" by design. [15] The court held that the subpart for regulatory investigations "[does] not limit" the other subparts at issue. [16]

Second, the court held that the subpoena was a Claim, in particular a "demand for non-monetary relief." [17] As noted by the court, the subpoena "commanded plaintiffs to appear before government officials and to produce specific documents." [18] Further, in the subpoena, the DOJ expressly advised Astellas that failure to comply could potentially result in "judicial enforcement proceedings" and "punishment for disobedience." [19] The court reasoned: "I do not conclude that the subpoena merely requested, as opposed to demanded, information. Because courts may compel parties to give testimony or to produce documents as demanded in the subpoena, I also conclude that the subpoena demanded a form of non-monetary relief…." [20]

Third, the court rejected the Insurers' position that no Wrongful Act had been alleged. [21] In so doing, the court rejected the Insurers' suggestion that the subpoena itself must contain these sorts of allegations. The court reasoned that "it is not necessary for the subpoena to include language that asserts that plaintiffs engaged in an actual or alleged wrongful act. Here, [the policyholders] have alleged [in the coverage complaint] that the DOJ issued the subpoena because the DOJ had alleged that plaintiffs engaged in health care violations. That allegation provides a basis to conclude that the subpoena was issued 'for' a 'Wrongful Act,' even if the subpoena itself did not contain an allegation." [22] In other words, given that the court considered the DOJ's allegations noted in the policyholder's complaint, the court did not expressly address the issue of whether the subpoena itself alleged a Wrongful Act for purposes of triggering coverage. [23]

Similarly, the court found that the tolling agreement amounted to a Claim because it memorialized a request for a tolling agreement between the parties, included statements indicating that the DOJ was conducting a civil and criminal investigation of Astellas and warned that Astellas may be charged with violations of the law. [24] The court went on to explain that the tolling agreement's description of "potential violations" was sufficient to satisfy the definition of Wrongful Act. [25] The subpart for "tolling agreements" is potentially a valuable source of coverage for policyholders. For example, even if the subpart addressing regulatory investigations refers to formal orders of investigation, this "tolling agreement" subpart could afford coverage when a regulator requests a tolling agreement during the informal phase of an investigation.

The Backdrop: Claims-Made Policies and Coverage Disputes

Astellas is the latest in a line of D&O and E&O cases involving coverage for subpoenas and related government action against policyholders. Generally speaking, the cases turn on state law, policy language, and the facts at issue. State law varies widely on relevant issues, including (1) whether subpoenas and/or formal orders allege Wrongful Acts for purposes of triggering coverage, and (2) whether subpoenas are "demands for non-monetary relief," as opposed to requests for information.

Certain courts have reasoned that, when an insurer defines Claim by reference to a formal order of investigation (with full knowledge of the legal process involved and the language typically used by regulators in such orders), the insurer cannot then argue that a formal order does not trigger coverage. For example, in *National Stock Exchange v. Federal Insurance Company*, the relevant policy defined Claim to include a "formal regulatory proceeding … commenced by the filing of a … formal investigative order." [26] The insurer argued that a formal order of investigation did not trigger coverage on the grounds that the formal investigation was not a "proceeding." [27] The court flatly rejected this argument, reasoning that "[i]f a formal investigative order did not commence a formal … regulatory proceeding, then the term 'formal investigative order' would have no meaning." [28] Further, the court held that the references in the formal order that the policyholder "may have" committed violations were sufficient to satisfy any requirement in the policy of an alleged Wrongful Act. [29]

Other courts have held that subpoenas trigger coverage. For example, in *MBIA Inc. v. Fed. Ins. Co*., the Second Circuit upheld a lower court's decision to grant more than $20 million in coverage to a policyholder for defense costs incurred in response to a lengthy SEC investigation. [30] In *MBIA*, coverage turned on the definition of the term "Securities Claim," which included "a formal or informal administrative or regulatory proceeding or inquiry commenced by the filing of a notice of charges, formal or informal investigative order or similar document." [31] In reviewing subpoenas that were issued in connection with the SEC's investigation and a related investigation by the New York Attorney General's Office, the Second Circuit held that the subpoenas at issue both qualified as an "informal or formal investigative order" and a "similar document," and thus held that the defense costs incurred in responding to the subpoenas were covered. [32]

Similarly, in *Syracuse University v. National Union Fire Ins. Co.,* a New York trial court found that Syracuse University was entitled to coverage for defense costs incurred in responding to subpoenas related to a criminal investigation of the university's associate basketball coach, who allegedly committed crimes of sexual abuse. [33] In *Syracuse University*, Claim was defined to include a "written demand for monetary, non-monetary or injunctive relief." Considering the context of the investigation, which included a grand jury proceeding, and the subpoena's admonition that failure to produce documents could result in fine or imprisonment, the court found that the subpoenas amounted to covered demands for nonmonetary relief and were therefore covered Claims. [34]

In contrast, the Tenth Circuit affirmed a trial court's opinion denying coverage for subpoenas requesting production of documents and testimony in connection with an SEC investigation in *MusclePharm Corp. v. Liberty Insurance Underwriters, Inc*. [35] In *MusclePharm*, the policies at issue defined Claim to include, among other things, "a written demand for monetary or non-monetary relief." [36] In rejecting coverage based on the subpoenas, the court found that the SEC was not seeking "relief" from MusclePharm, but was "only gathering information." [37] The court further held that the SEC had not alleged that the insureds had engaged in any Wrongful Acts, and as a result, determined that there could not be a Claim for a Wrongful Act. [38]

Notably, courts have reached mixed results on whether formal orders allege a Wrongful Act for purposes of triggering coverage. As noted, if the insurer expressly defines Claim by reference to a formal order with full knowledge of language typically used in such orders and the underlying legal process, certain courts have viewed with skepticism any arguments by Insurers that formal orders do not trigger coverage. In *MusclePharm*, the court cited language in the formal orders at issue stating that "the Commission has not determined whether any of the persons or companies mentioned in the order have committed any of the acts described or have in any way violated the law." [39] But courts that have reached the opposite conclusion have cited other language that typically appears in formal orders, namely language that the staff has evidence that "tends to show" that violations of law have been committed.

On the whole, and despite mixed law on this issue, courts have indicated a growing willingness to consider subpoenas as "demands for non-monetary relief" and therefore as covered Claims. [40] Perhaps cognizant of this fact, and in response to demands from policyholders for greater clarity, many Insurers have begin offering D&O policy wording that expressly provides coverage for subpoenas and/or for formal and informal administrative and regulatory proceedings. This policy language is not uniform and has not been litigated extensively to date, so it is likely that there will be continued coverage disputes regarding these issues.

TAKEAWAY

Policyholders and Insurers will likely continue to dispute the scope of coverage available for subpoenas and other actions taken as part of government investigations and proceedings. However, regardless of geographical location or jurisdiction, courts will likely continue to look to specific policy language and relevant facts at issue in determining the outcomes of these cases. Given that costs associated with government investigations are often substantial, policyholders would be wise to familiarize themselves with their existing insurance policies and consult coverage counsel where appropriate regarding the coverage afforded by their current policies and the opportunity to improve policy language at renewal.

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[1] *Astellas US Holding Inc. v. Starr Indemnity and Liability Co*., No. 17-cv-08220 (N.D. Ill. filed Nov. 13, 2017). The Memorandum Opinion and Order dismissing Defendants' Motion to Dismiss (referred to herein as "*Astellas* Order"), issued on May 30, 2018, is available in full here.

[2] *Id*. at 9.

[3] *Id*. at 10.

[4] *Id*. at 11, 12.

[5] *Id.* at 9.

[6] *Id.*

[7] *Id*. at 3 ("On March 3, 2016, the United States Department of Justice issued a subpoena to plaintiffs demanding certain documents relating to the DOJ's industrywide investigation of pharmaceutical companies for alleged 'Federal health care offenses.'").

[8] *Id*. at 4.

[9] Am. Compl. at ¶ 31, ECF No. 39.

[10] *Astellas* Order at 5.

[11] The tolling agreement stated that the DOJ is conducting a criminal and civil investigation of Astellas and its officers and employees for the possible violation of various federal criminal statutes.

[12] *Id*. at 6.

[13] *Id*.

[14] *Id*. at 11, 12.

[15] *Id*.

[16] *Id*. at 11.

[17] *Id*. at 9–11.

[18] *Id*. at 3.

[19] *Id*. The subpoena included the following statement: "Failure to comply with the requirements of this subpoena will render you liable to proceedings in the district Court of the United States to enforce obedience to the

requirements of this subpoena, and to punish default or disobedience." Amended Complaint at Exhibit D, *Astellas*, No. 17-cv-08220 (N.D. Ill. filed Nov. 13, 2017), ECF Nos. 39, 39-4.

[20] *Astellas* Order at 11.

[21] *Id*. at 13.

[22] *Id*.

[23] As discussed below, other courts have directly tackled this issue.

[24] *Astellas* Order at 9,10.

[25] *Id*. at 13,14.

[26] 2007 WL 1030293, at *3 (N.D. Ill. Mar. 30, 2007).

[27] *Id*. at 4, 5.

[28] *Id*. at 3.

[29] *Id*. at 5.

[30] 652 F.3d 152 (2d Cir. 2011).

[31] *Id*. at 139.

[32] *Id*. at 162.

[33] 40 Misc. 3d 1205(A), 975 N.Y.S.2d 370 (Sup. Ct.), *aff'd*, 112 A.D.3d 1379, 976 N.Y.S.2d 921 (2013).

[34] *See id*. at *2.

[35] 712 F. App'x 745, 758 (10th Cir. 2017).

[36] *Id*. at 753.

[37] *Id*. at 754.

[38] *Id*.

[39] *Id*. at 755.

[40] *See, e.g., Patriarch Partners, LLC v. AXIS Ins. Co.*, No. 16-CV-2277 (VEC), 2017 WL 4233078, at *5–6 (S.D.N.Y. Sept. 22, 2017) (holding "nonmonetary relief" includes an SEC subpoena); *Agilis Ben. Servs. LLC v. Travelers Cas. & Sur. Co. of Am.,* No. 5:08-CV-213, 2010 WL 8573372, at *6–7 (E.D. Tex. Apr. 30, 2010) (acknowledging that "'relief' is broad enough to include a demand to produce documents"); *Minuteman Int'l, Inc. v. Great Am. Ins. Co*., No. 03 C 6067, 2004 WL 603482, at *7 (N.D. Ill. Mar. 22, 2004). *But see Employers' Fire Ins. Co. v. ProMedica Health Sys., Inc.,* 524 F. Appx. 241, 252 (6th Cir. 2013) (holding that subpoenas and civil investigative demands sent by Federal Trace Commission sought information other than "relief" and therefore did not amount to a Claim under the applicable policy).

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