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FEDERAL COURT IN ILLINOIS HOLDS INSURER MUST COVER COSTS OF RESPONDING TO DOJ SUBPOENA IN A HEALTH CARE FRAUD INVESTIGATION

July 23, 2018

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If your company been served with a federal subpoena by the Department of Justice ("DOJ") investigating potential Medicare fraud, an Illinois federal district court may have made it easier for you to get your insurer to cover the costs of your document collection, investigation and response to the subpoena even if your company has not been charged with any health care law violations.

Background

U.S. District Judge Manish Shah, in the case of *Astellas US Holdings, Inc. et. al v. Starr Indemnity et al.*,^[1] recently handed a victory to a pharmaceutical manufacturer policyholder against its insurers in denying motions to dismiss the company's insurance coverage claims for the costs of defending and responding to a federal U.S. DOJ subpoena aimed at obtaining documents from the company for alleged Medicare fraud as part of the Department's nationwide investigation into "Federal health care offenses," which included drug companies allegedly providing donations to nonprofits that help poor patients buy the drug companies' products.

In response to the subpoena, the pharmaceutical manufacturer notified its insurer of a potential claim under its insurance policy, which, like many similar policies, broadly provided that the "Insurer shall pay on behalf of the Company the Loss arising from a Claim first made during the Policy Period . . . against the Company for any Wrongful Act, and reported to the Insurer in accordance with the terms of this policy." The policy also broadly defined a "wrongful act" as "any actual or alleged breach of duty, neglect, error, misstatement, misleading statement, omission or act by the Company."

The insurer also argued the subpoena was not a covered "claim" under the policy because the subpoena was not issued "for a wrongful act," as required by the policy, arguing that the subpoena itself did not necessarily allege that the insured committed any wrongdoing.

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The Court's Decision

The court rejected the insurer's arguments, concluding that the subpoena fell within the broad definition of "claim" set forth in the policy, which defined "claim" as any:

- (1) written demand for monetary, non-monetary or injunctive relief made against an Insured;
- (2) judicial, administrative or regulatory proceeding, whether civil or criminal, for monetary, non-monetary or injunctive relief commenced

against an Insured, including any appeal therefrom, which is

commenced by:

- (i) service of a complaint or similar pleading;
 - (ii) return of an indictment, information or similar document (in the case of a criminal proceeding); or
 - (iii) receipt or filing of a notice of charges;
- (3) arbitration proceeding commenced against an Insured by service of a demand for arbitration;
 - (4) formal civil, criminal, administrative or 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...;
 - (5) written request to toll or waive the applicable statute of limitations relating to a potential Claim against an Insured for a Wrongful Act; or
 - (6) Derivative Demand, solely under Insuring Agreement D, if purchased by the Insured.

The court held that based on this broad definition of claim in the policy, the subpoena constituted a “claim,” reasoning that it was: (1) “a written demand” for “non-monetary relief” that required the insured to appear before government officials and to produce specific documents “in response to an accusation of wrongdoing;” and (2) issued as a result of alleged “wrongful acts” against the insured based on alleged violations of federal health care law. The court noted that the subpoena could not be viewed out of context of the broader federal investigation and enforcement proceedings and was properly construed as “a demand for information” because it was “reasonable to infer that enforcement proceedings would swiftly follow any noncompliance” by [the insured] in response to the subpoena.”

The court stressed further that the policy only required that a “claim” was made “for any wrongful act,” not that the insured was alleged to have actually engaged in an actual or alleged wrongful act. In this case, the court found the DOJ issued the subpoena because it asserted the insured potentially had engaged in federal health care violations and that was enough under the policy, even if the subpoena itself “did not contain the allegation” of wrongdoing by the insured.

Conclusion

This decision is the most recent in a string of favorable decisions siding with insureds forcing insurance companies to pay for the significant costs of responding to a government subpoena for alleged violations of federal law.[2]

Although some directors and officers (“D&O”) policies expressly include “subpoena” within the definition of “Claim,” the policy language at issue in the *Astellas* case is found in many D&O policies, requiring the insured to argue that a subpoena nonetheless falls within the definition of “Claim” as a “demand” for “non-monetary relief” or otherwise. If your company receives a similar federal subpoena from the government regarding potential violations of Medicare or other health care laws, you should consult your insurance recovery counsel to determine if you can obtain coverage for the costs in responding to the subpoena, which would include document collection and review, internal investigation, and legal advice and counsel.

Notes

[1]. No. 17 CV 8220 (E.D. Ill.).

[2]. See, e.g., *Patriarch Partners, LLC v. Axis Ins. Co.*, 2017 WL 4233078 (S.D. N.Y. 2017) (SEC subpoena constitutes a “demand” for “non-monetary relief,” noting that the subpoena was an “imperative solicitation” for documents); *Gateway Inc. v. Gulf Insurance Co.*, 2011 WL 3607335, at *8–9 (S.D. Cal. Aug. 15, 2011) (costs of individuals responding to SEC subpoenas covered under Directors & Officers policies even where the individuals were not subject of the SEC’s investigation); *Agilis Ben. Services LLC v. Travelers Cas. and Sur. Co. of America*, 2010 WL 8573372 (E.D. Tex. 2010) (finding duty to pay insured’s costs of defending against grand jury subpoena issued in connection with IRS investigation); see

also *Ace American Ins. Co. v. Ascend One Corp.*, 570 F. Supp. 2d 789 (D. Md. 2008) (costs of responding to Administrative Subpoena issued by the Consumer Protection Division of the Maryland Office of the Attorney General covered under Errors & Omissions policy).

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Reprinted from the Summer 2018 issue of the *Insurance Coverage Law Report*.



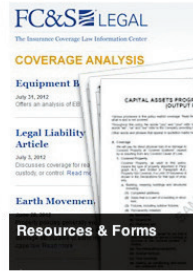
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