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Standard Insurance Policy May Cover Government Subpoena

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Responding to a government subpoena presents unique and significant challenges for in-house counsel. Government agencies often wield broad subpoena powers and may demand reams of information with minimal explanation. And many state and federal regulators have recently become more aggressive than ever in issuing and pursuing subpoenas.[1] In this context, the expensive work of responding to subpoenas — reviewing documents, protecting privileges, contesting overbroad requests — can become especially time consuming and costly.

But, even though most in-house counsel know all too well about the challenges and costs of defending government subpoenas, they may not realize that their existing insurance policies might provide coverage for these defense costs — even if those policies do not expressly address subpoenas. In particular, under standard language found in many directors and officers policies, coverage for government subpoenas is often available: (1) with respect to private companies, to both the company and individual insureds; and (2) with respect to public companies, to at least the individual insureds.[2]

Private Company Insureds: D&O Insurance Often Covers Government Subpoenas to Both Companies and Individual Insureds

Private company D&O policies typically cover losses suffered by the company or individual insureds because of a "claim" for a "wrongful act." Insurers often argue that government subpoenas fall outside the definitions of these two terms. But most courts examining the standard definitions of these terms have found broad coverage for government subpoenas.

"Claim" is generally defined to include language comparable to "a written demand for monetary or non-monetary relief." Courts generally acknowledge that such language encompasses government subpoenas, since subpoenas are written instruments that demand relief, namely information, from the recipient.[3] Applying the logic of these rulings more broadly, such language should also encompass most informal government investigations, so long as the government's information requests are somehow committed to writing.

"Wrongful act" is typically defined as something equivalent to "any actual or alleged error, omission, misleading statement, misstatement, neglect, breach of duty or act." Most courts agree that such

language is satisfied when a subpoena recipient is a "target" of a government investigation.[4] While insurers often argue that a "target" must be formally identified or face allegations of potential misconduct, courts have instead concluded that an insured is neither "required to prove that it was a named target of an investigation" nor be the subject of any "allegations of a wrongful act" to be a "target" for purposes of insurance coverage.[5] Rather, so long as information is sought "pursuant to an ongoing investigation of [an insured's] activities," the term wrongful act is satisfied — regardless of whether the insured is formally named or faces allegations of potential wrongdoing.[6] Even where an insured must respond to numerous requests relating to the acts of others and only one request focused on its own conduct, courts have found a wrongful act.[7] This approach, favoring coverage so long as a government subpoena has any bearing on an insured's activities, comports with general principles of insurance law, under which (1) an insurer's defense obligations are triggered by the mere potential of a claim falling within a policy's scope, and (2) any doubt or ambiguity concerning the scope of coverage must be resolved in the insured's favor.[8]

This broad view of a "target" is especially consequential when one considers that government investigations often have an expansive and shifting scope. For instance, in a Sept. 9, 2015, memo (commonly referred to as the "Yates memo"), the U.S. Department of Justice mandated that all "criminal and civil corporate investigations should focus on individuals from the inception of the investigation." Under this approach, which many other government agencies emulate, any individual receiving a subpoena should presume (regardless of their conduct) that they may already be (or soon become) a "target," and should investigate potential insurance coverage.

Of course, as with any insurance coverage issue, the precise terms of each policy control, so it is critical to closely review your D&O policy to see if any provisions specifically address subpoena coverage or differ from those discussed above. Additionally, keep in mind that many D&O policies (both private and public) exclude essentially all coverage pertaining to certain subject matters — for instance, policies may exclude claims related to pollution, antitrust or the Employee Retirement Income Security Act of 1974.

Public Company Insureds: D&O Insurance Often Covers Government Subpoenas to at Least Individual Insureds

Public company D&O policies generally differ in significant ways from standard private company policies. Of particular relevance here, public company policies often afford broader coverage to individual insureds than to the company. This is typically done by covering individual insureds against any "claim" (generally defined as discussed above) for a "wrongful act" (also generally defined as discussed above), while covering the company against only a "securities claim" (which is usually limited to claims related to rules regulating securities and often expressly excludes regulatory proceedings) for a "wrongful act."

The effect of these definitions is that, with respect to government subpoenas, coverage for individual insureds typically mirrors the coverage available under private company D&O policies discussed above, while coverage for the company is often unavailable (especially when securities regulations are not at issue).

Again, it is critical in evaluating coverage to review the precise terms of any D&O policy, as a particular policy may contain pertinent definitions, exclusions, and endorsements not discussed above. For instance, some public company D&O policies include language that expands coverage to include investigations of the company, so long as the investigation is simultaneously maintained against any individual insureds.

All Insureds: The Importance of Providing Timely Notice to Insurers of a Government Subpoena

Most D&O policies contain notice requirements that make timely notice of any claim very important. D&O policies are typically "claims made," requiring an insured to provide notice of any Claim during the policy period (or sometimes shortly thereafter). If notice is provided only after the designated timeframe, an insurer may argue that notice was late and that its coverage obligations are thus excused. Unfortunately, some courts have accepted this argument, even when the insurer suffered no prejudice from the timing of the notice.[9] Therefore, when an insured receives a government subpoena that may be covered by D&O insurance, providing timely notice to insurers is critical to avoid the risk of late notice arguments.

Although providing notice is typically straightforward, it can become complicated when a subpoena concerns highly sensitive information. Navigating how to appropriately notify insurers of a sensitive subpoena and keep them informed of its progression while simultaneously addressing privacy concerns is one of the many areas in which experienced coverage counsel can assist insureds seeking coverage.

Conclusion

Although standard D&O policy language provides coverage for many government subpoenas (and possibly some informal investigations), it is important to remember that the scope of coverage under any policy is driven by that policy's exact wording (including endorsements) and that many policies contain language that, either by expressly addressing subpoenas or by altering the general scope of coverage, provides broader or narrower coverage than discussed above.

Additionally, while D&O insurance is the most likely source of coverage for many government subpoenas (and thus addressed here in detail), coverage may also be available under other lines of insurance (such as errors & omissions and general liability policies), depending on the nature of the subpoena and the specific wording of such other policies.

For these reasons, it is critical for any insured (whether a company or an individual) receiving a government subpoena to closely review all applicable insurance policies to determine whether to provide notice and pursue coverage.

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[1] While there has been much speculation about how the change in presidential administrations may affect various regulators, a variety of state and federal regulators are likely to continue aggressively pursuing subpoenas on an array of issues.

[2] "Individual insureds" under a D&O policy typically include a company's directors and officers, and may also include other employees, depending on the policy's wording.

[3] See Agilis Benefit Services LLC v. Travelers Cas. and Sur. Co. of Am., No. 5:08-CV-213, 2010 WL 8573372, at *6–7 (E.D. Tex. April 30, 2010) ("'relief' is broad enough to include a demand to produce documents"); Syracuse Univ. v. Nat'l Union Fire Ins. Co. of Pittsburgh, PA, 40 Misc. 3d 1205(A), at *2 (N.Y. Sup. Ct. 2013) aff'd, 112 A.D.3d 1379 (N.Y. Sup. Ct. App. Div. 2013) ("The relief sought by a subpoena is the production of documents or testimony."); Richardson Electronics, Ltd. v. Federal Ins. Co., 120 F. Supp. 2d 698, 701 (N.D. Ill. 2000) (subpoenas constituted a claim because they "required [the insureds] to comply with various demands for testimony and production of documents"); Minuteman Int'l, Inc. v. Great Am. Ins. Co., No. 03 C 6067, 2004 WL 603482, at *6 (N.D. Ill. Mar. 22, 2004) (same). But see RSUI Indem. Co. v. Desai, No. 8:13-CV-2629-T-30TGW, 2014 WL 4347821, at *5 (M.D. Fla. Sept. 2, 2014). When "claim" is undefined in a policy, courts have also found the term to encompass subpoenas. Polychron v. Crum & Forster Ins. Companies, 916 F.2d 461, 463 (8th Cir. 1990).

[4] See, e.g., Syracuse Univ., 40 Misc. 3d 1205(A), at *6; MBIA Inc. v. Fed. Insurance Co., 652 F.3d 152, 157 (2d Cir. 2011); ACE Am. Insurance Co. v. Ascend One Corp., 570 F. Supp. 2d 789, 797 (D. Md. 2008). But see Desai, 2014 WL 4347821, at *5.

[5] Syracuse Univ., 40 Misc. 3d 1205(A), at *2, 5; see also MBIA, 652 F.3d at 161(finding that an investigation was covered — even though the insured was not identified by name in either the caption or the text of a formal order, available on that action's docket at ECF No. 69, p. 199–202); Gateway Inc. v. Gulf Insurance Co., No. 10CV1720-WQH-JMA, 2011 WL 3607335, at *8–9 (S.D. Cal. Aug. 15, 2011) (directors' and officers' defense costs in responding to subpoena covered, even though they were not parties to the government's action); Ascend One, 570 F. Supp. 2d at 796–97 (stating that the caption and text of a formal order are informative, but not dispositive, as to the existence of coverage for a government investigation).

[6] Ascend One, 570 F. Supp. 2d at 796 (finding that "specific inquiries into [the insured's] marketing and credit counseling activities indicate that [the insured] is a target of the investigation" and trigger coverage); see also Polychron, 916 F.2d at 463 (holding that a grand jury subpoena "related to the [insured's] conduct" triggered coverage).

[7] See Syracuse Univ., 40 Misc. 3d 1205(A), at *2, 4.

[8] See Minuteman Int'l, 2004 WL 603482, at *7 (stating that any doubt regarding whether a subpoena satisfied a policy's definition of claim should be resolved in favor of the insured); Syracuse Univ., 40 Misc. 3d 1205(A), at *2–3 ("defense [of a subpoena] may be denied only if there is no possible or factual legal basis upon which the [insurer] may eventually [be] held to be obligated to indemnify the [insured] under any provision of the subject policy").

[9] See Templo Fuente De Vida Corp. v. Nat'l Union Fire Insurance Co. of Pittsburgh, 224 N.J. 189, 207–10 (2016).
