

New Support For Insureds Facing Government Subpoenas

By **Caroline Meneau and Brian Scarbrough** (July 2, 2018, 3:30 PM EDT)

Policyholders should continue to carefully review their directors and officers liability insurance coverage, and keep abreast of policy language differences and jurisdictional differences in policy interpretation, to determine what coverage is available for the often-substantial expenses of responding to government investigations, including subpoenas.

A recent decision from the United States District Court for the Northern District of Illinois highlights the continued litigation around the scope of D&O liability insurance coverage for government investigation. This decision will be of interest to policyholders seeking coverage of the often-significant costs of investing and responding to government investigations, including subpoenas.

On May 30, 2018, in *Astellas US Holding Inc. v. Starr Indemnity and Liability Co.*,^[1] Judge Manish S. Shah denied a group of insurance companies' motions to dismiss a pharmaceutical company's claim seeking coverage for the expenses of responding to a government subpoena.

The subpoena arose out of a government investigation into potential Medicare anti-kickback violations in the pharmaceutical industry. In March 2016, the United States Department of Justice (DOJ) issued a subpoena to the Astellas plaintiffs, demanding documents and testimony relevant to an industry-wide investigation of certain payment practices. The subpoena warned Astellas that failure to comply could expose them to liability in enforcement proceedings and other penalties. Later, the DOJ and Astellas entered into an agreement to toll the statute of limitations on various criminal statutes with regard to Astellas's payments to certain organizations that provide financial assistance to Medicare beneficiaries. The investigation has continued since that time. At the time of Judge Shah's ruling, the DOJ investigation was ongoing, and the DOJ had issued additional subpoenas to Astellas.

After receiving the first subpoena, Astellas notified its insurers. The relevant policy language required the insurers to pay losses for a "Claim" made "against the Company for any Wrongful Act." "Claim" was defined to include a "written demand for monetary, non-monetary or injunctive relief." "Wrongful Act" was defined to include "any actual or alleged breach of duty, neglect, error, misstatement, misleading statement, omission or act by the Company." Astellas's insurers denied coverage, taking the position



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that there was no “Claim” under the plain language of the policy and that the subpoena was not a “written demand for monetary, non-monetary or injunctive relief made against an Insured” — it was merely a request for information. Astellas responded by filing suit, seeking a declaration that its insurers must pay the costs of investigating and defending the “Claim” in connection with the government subpoenas. The insurers then moved to dismiss the suit.

In denying the insurers’ motion to dismiss, Judge Shah agreed with Astellas’s position that the DOJ had made a “Claim” regarding a “Wrongful Act” in connection with its subpoena — specifically, the DOJ issued the subpoena because it “contended that plaintiffs’ donations to independent charity patient assistance programs violated the law.” Further, the tolling agreement stated that the DOJ was investigating possible violations of federal criminal law. Because the definition of “Wrongful Act” in the policy included “alleged” misconduct, the court found that the policy language was broad enough to reach the DOJ’s allegations in connection with the subpoena and tolling agreement. Judge Shah also agreed with Astellas’s position that the subpoenas did more than merely request information, rather they demanded information, a form of nonmonetary relief. Judge Shah reasoned that there was a basis to conclude the subpoenas were issued for a wrongful act even if the subpoenas did not contain language asserting that Astellas engaged in an actual or alleged wrongful act.

While issued in the context of a motion to dismiss rather than a ruling on the merits, Judge Shah’s ruling is a win for policyholders, interpreting a D&O liability insurance policy such that the plaintiffs stated a claim for coverage for the expenses of responding to a subpoena. Other courts have read similar language more narrowly, supporting insurers’ denial of coverage in responding to subpoenas.[2] Judge Shah’s ruling reviews and distinguishes this and other contrary authority, explaining that at least in the context of the Astellas case, the government’s subpoena was more properly interpreted as a “demand for relief” rather than an “informational investigation.” The court reasoned that compliance was essentially mandatory — “it is reasonable to infer that enforcement proceedings would swiftly follow any non-compliance” with a subpoena. Judge Shah’s ruling will provide helpful support for policyholders who find themselves forced to make insurance claims in the context of government investigations.

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[1] No. 17-cv-8220, 2018 WL 2431969 (N.D. Ill.)

[2] E.g. *MusclePharm Corp. v. Liberty Insurance Underwriters Inc.*, No. 16-1462, 712 Fed. Appx. 745 (10th Cir. Oct. 17, 2017) (no coverage for responding to SEC investigation because government was merely engaging in discovery — it had not determined that a “wrongful act” occurred).