

## Reinforcing Insurance Coverage For Gov't Investigations

By **Donovan Hicks** and **Brian Scarbrough** (August 20, 2019, 4:13 PM EDT)

Courts continue to confront the issue of whether subpoenas, civil investigative demands, or CIDs, and other documents issued as part of governmental investigations satisfy both the “claim” and “wrongful act” definitions in directors and officers and other claims-made professional liability insurance policies.

A Delaware state court recently weighed in on this issue, canvassing both sides of the case law and ultimately, and correctly, ruling in favor of the policyholder. Given that the outcome of this issue can be policy-language dependent, policyholders should continue to review their D&O liability insurance coverage and other claims-made financial lines and professional liability insurance coverages, staying aware of policy language differences and varying case law interpretations to determine what coverage is available for responding to government investigations, including subpoenas and CIDs.

A recent decision from the Superior Court of Delaware expands the continued case law around the scope of D&O and other claims-made professional liability insurance coverage for government investigations. This recent decision — a win for policyholders — continues to add to the authority that subpoenas and CIDs constitute a “claim” and allege a “wrongful act” for purposes of meeting those definitions under D&O and other claims-made liability insurance policies.

Given the often-significant costs of responding to government investigations, policyholders should be aware of this case, both when reviewing policy language during initial placement or renewal and when seeking coverage for costs to comply with governmental investigations.

In *Conduent State Healthcare LLC v. AIG Specialty Insurance Company*,<sup>[1]</sup> the court denied a partial motion to dismiss brought by two insurers regarding Conduent’s — a state health care company — claim seeking coverage for the expenses of responding to a government CID. The CID arose out of a Texas government investigation into potential Medicaid fraud “involving Conduent’s prior authorization process for orthodontia services.” In June 2012, the Texas attorney general issued a CID to Conduent, demanding documents relevant to the investigation. After receiving the CID in 2012, Conduent notified its professional liability insurers.



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The relevant policy language required the insurers to pay losses Conduent “was legally obligated to pay resulting from a Claim alleging a Wrongful Act.” “Claim” in turn was defined in part as a “written demand for ... non-monetary relief or injunctive relief.” “Wrongful act” was defined in part as “any negligent act, error or omission, misstatement or misleading statement in an Insured’s performance of professional services for others occurring on or after the retroactive date and prior to the end of the policy period.”

Conduent asserted that the CID issued by the Texas attorney general constituted a “Claim” alleging a “Wrongful Act.” The insurers denied coverage, arguing that the CID was just a request for information. The insurers then moved to dismiss Conduent’s suit against them.

The central issues were whether the CID met the policy definition of “claim” and if so, whether that “claim” alleged a “wrongful act.” That the CID was a “request for information” in connection with a governmental investigation did not defeat coverage. Rather, the court agreed with Conduent’s position that the CID issued by the Texas attorney general was indeed a “claim” because it was a “demand ... for non-monetary relief” targeted at Conduent.

The CID also alleged a “wrongful act” — the CID was issued in connection with an investigation of the possibility of Medicare fraud and was focused on Conduent. Notably, the court reasoned that there was no real difference between investigating an alleged unlawful act and actually alleging an unlawful act. This was supported by the insurers’ broad duty to pay defense costs “whenever factual allegations raise the possibility of liability covered by the policy.”

The court’s ruling is a win for policyholders, especially for plaintiffs seeking coverage for the expenses of responding to a CID. The opinion helpfully distinguished the opinions of other courts that have read similar policy language more narrowly. For example, the court cited *MusclePharm Corp. v. Liberty Insurance Underwriters Inc.*,<sup>[2]</sup> as a counterexample. There, the court ruled that a U.S. Securities and Exchange Commission order of investigation, or its related subpoenas, were not a “claim” alleging a “wrongful act” because the filings did not specifically identify any wrongdoing.

Interestingly, however, the Conduent court omitted citing the later-decided decision *Astellas US Holding Inc. V. Starr Indemnity and Liability Co.*,<sup>[3]</sup> as support. *Astellas* was significant in at least two ways: (1) it reasoned that a subpoena was a “claim” by demanding nonmonetary relief and (2) it reasoned a subpoena did not have to contain specific language asserting that the policyholder engaged in wrongdoing in order to satisfy the policy’s definition of “wrongful act.” The Conduent court could have included this case as support that a CID met the policy definition of “claim” and did not need to contain specific allegations of wrongdoing, if issued in connection with an investigation, in order to meet the policy definition of “wrongful act.”

This decision provides further support for what courts will focus on in determining whether a CID, subpoena or other document issued in connection with a governmental investigation is a “claim” alleging a “wrongful act.” For instance, the court agreed with *Weaver v. Axis Surplus Insurance Co.*,<sup>[4]</sup> that an attorney general’s letter was a demand for nonmonetary relief because it was (1) a “request for relief under a claim of right” and (2) “puts [the party] on notice that legal obligations have been triggered.”

Based on this decision, policyholders should examine whether a CID, subpoena or other document was issued in connection with a governmental investigation that targeted the policyholder rather than an unrelated third party. Moreover, policyholders should examine whether the “request” at issue was

issued by an adjudicative body or law enforcement authority that could compel compliance without judicial intervention. Both of these factors were important to the court's decision.

To further strengthen coverage, policyholders also should consider obtaining policies that explicitly include coverage for governmental investigations. There is a variety of language available in the marketplace, and this can be accomplished in a number of ways. For example, the definition of "claim" could be supplemented to add formal and informal investigations, including subpoenas, CIDs, formal and informal investigative orders, requests for documents or interviews, Wells notices and target letters, among other similar documents.

Or coverage can be added for a "pre-claim inquiry," including coverage for document productions and other discovery costs that are part of an investigation. Moreover, the requirement for there to be an actual or alleged "wrongful act" could be removed, at least for preclaim inquiry coverage and perhaps more broadly.

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[1] *Conduent State Healthcare LLC v. AIG Specialty Insurance Company*, C.A. No. N18C-12-074 MMJ CCLD, 2019 WL 2612829 (Del. Super. Ct. Jun. 24, 2019)

[2] *MusclePharm Corp. v. Liberty Insurance Underwriters, Inc.*, 712 Fed. App'x 745 (10th Cir. 2017)

[3] *Astellas US Holding Inc. V. Starr Indemnity and Liability Co.*, No. 17-cv-8220, 2019 WL 2431969 (N.D. Ill. May 30, 2018)

[4] *Weaver v. Axis Surplus Ins. Co.*, No. 13-CV-7374 SJF ARL, 2014 WL 5500667 (E.D.N.Y. Oct. 30, 2014), aff'd, 639 F. App'x 764 (2d Cir. 2016)