ARONBERG GOLDGEHN

August 17, 2020

Insurance Coverage Update

Investigative Subpoena Not a D&O "Claim"

A subpoena served on a behavioral health care provider as part of a HHS investigation into alleged False Claims Act violations was not a Claim as defined in a D&O coverage part of a Private Company Management Liability Policy, and therefore was not covered, according to the Honorable Claria Horn Boom, U.S. District Court Judge for the Eastern and Western Districts of Kentucky. *Springstone, Inc. v. Hiscox Insurance Company*, 3:19-cv-821-CHB (Aug. 5, 2020). Judge Boom accordingly granted the insurer's motion to dismiss the insured's complaint with prejudice.

Springstone received a subpoena as part of the Department of Health and Human Services' (HHS) investigation into *qui tam* complaint allegations that Springstone violated the False Claims Act by obtaining reimbursement from Medicare and Medicaid for medically unnecessary services. The *qui tam* complaint was filed under seal and Springstone only became aware of its existence after it tendered the subpoena for coverage and after the complaint was dismissed. The insurer denied coverage for the subpoena and *qui tam* complaint, taking the position that the subpoena did not constitute a "Claim" as defined by the policy and did not allege a "Wrongful Act." In the coverage litigation, the insurer also argued an exclusion applicable only to Company Coverage (Coverage C) barred coverage for Claims "seeking non-monetary relief." It asserted as well that the *qui tam* complaint was not first made during the policy period, as it was filed six months before the policy period incepted.

Contact

Christopher J. Bannon
cbannon@agdglaw.com

Lisa J. Brodsky
lbrodsky@agdglaw.com

Thomas K. Hanekamp
thanekamp@agdglaw.com

Amber O. LaFevers
alafevers@agdglaw.com

Lindsay P. Lollio
llollio@agdglaw.com

Catherine Warren
cwarren@agdglaw.com

Samuel R. Leist
sleist@agdglaw.com

Nicole Miller
nmiller@agdglaw.com

Mark A. Swantek
mswantek@agdglaw.com

330 N. Wabash Ave.
Suite 1700
Chicago, IL 60611
T: 312.828.9600
F: 312.828.9635
www.agdglaw.com

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Judge Boom acknowledged that Kentucky law required her to construe the policy liberally and to resolve doubts in favor of the insured, including strictly construing exceptions and exclusions. She also noted however that a liberal interpretation of a policy "is not synonymous with a strained one." Clear and unambiguous words employed in an insurance policy should be given their plain and ordinary meaning.

The Claim definition included "a civil, criminal, administrative or regulatory investigation of an Individual Insured: (1) once such Individual Insured is identified in writing by such investigating authority as a person against whom a proceeding…may be commenced." Company Reimbursement Coverage (Coverage B) covered Claims made against an Individual Insured during the policy period but only when the Company has indemnified such Individual Insured for Loss. Here, no individual had been identified as a target of the investigation by the HHS, as required by the Claim definition, and no individual was indemnified by Springstone. The insured (unsuccessfully) argued that its own attorney's list of document custodians, coupled with the 2015 Yates Memo penned by then-Deputy Attorney General Sally Yates emphasizing prosecuting individuals involved with corporate wrongdoing, constituted a Claim against individual employees. It also argued that it had "effectively" indemnified individuals because the subpoena investigated the conduct its employees and executives. Judge Boom quickly dispensed with the insured's arguments, finding Coverage B inapplicable and noting that Springstone did not indemnify an Individual Insured, and that the subpoena was not a "Claim" against an Individual Insured as it did not identify an Individual Insured.

The policy's Coverage C contained an exclusion applicable to Coverage C only, for Claims "seeking fines or penalties or non-monetary relief against the Company." While the exclusion appeared on its face to apply to the HHS subpoena, Springstone argued that because the Loss definition permitted recovery of Defense Costs for complying with any injunctive relief or other form of non-monetary relief, interpreting the exclusion to bar coverage for those forms of relief would make that Loss definition language illusory. Judge Boom found the insured's argument to be without merit, noting that the Loss definition allowed Defense Costs "provided such Defense Costs result from a covered Claim." Because the exclusion renders the subpoena an uncovered claim, Judge Boom concluded that Springstone was not entitled to Defense Costs for responding to the subpoena. Judge Boom also noted that the exclusion does not implicate the doctrine of illusory coverage because there remained several scenarios under which the insurer would owe Defense Costs for responding to Claims involving non-monetary relief, including those covered under Coverage B to which the exclusion did not apply.

Judge Boom also rejected the insured's argument that the *qui tam* complaint was a Claim covered by the Policy. The *qui tam* complaint was the predicate for the entire Loss in that, without the *qui tam* Complaint, the subpoena would not have been issued and costs would not have been incurred. Whether it knew it or not, according to Springstone, it was defending the *qui tam* complaint when it responded to the subpoena. Judge Boom also rejected this argument, noting that the policy only

responds to Claims first made during the policy period and the *qui tam* complaint was filed six months before the policy period.

Comments

Interestingly, although the issue was fully briefed by the parties, Judge Boom never directly addressed the often-contested issue of whether a regulatory subpoena for documents constitutes a demand for non-monetary relief. The insurer argued the subpoena was not a demand for non-monetary relief, relying on a 6th Circuit case decided under Ohio law that defined "relief" as "easing or lessening of pain or discomfort." The insured argued the subpoena was a demand for non-monetary relief pointing out that a Texas case defined relief to include a "demand for something due." Judge Boom avoided expressly reaching a determination of this issue, which would have been a matter of first impression under Kentucky law.

If you have any questions about this Update, please contact the author listed below or the Aronberg Goldgehn attorney with whom you normally consult:

Thomas K. Hanekamp
thanekamp@agdglaw.com
312.755.3160