

Court Rules That State Attorney General Subpoenas Constituted a Claim and That Prior Notice Exclusion Does Not Apply

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The United States District Court for the District of Maryland has held that subpoenas issued by the Maryland and Texas attorneys general constitute a Claim alleging Wrongful Acts and that coverage for this Claim is not barred by the policy's prior notice exclusion. *Ace Am. Ins. Co. v. Ascend One Corp.*, 2008 WL 3275644 (D. Md. Aug. 7, 2008).

The errors and omission policy at issue defined "Claim" to include "[a] civil, administrative or regulatory investigation against any Insured commenced by the filing of a notice of charges, investigative order or similar document." The policy excluded coverage for any Claim "alleging, based upon, arising out of, or attributable to . . . any Wrongful Act, fact, circumstance or situation which has been the subject of any written notice given under any other policy . . . or . . . any other Wrongful Act whenever occurring which, together with a Wrongful Act which has been the subject of such notice, would constitute Interrelated Wrongful Acts." The policy defined "Interrelated Wrongful Acts" to mean "all Wrongful Acts that have as a common nexus any fact, circumstance, situation, event, transaction, cause or series of related facts, circumstances, situations, events, transactions or causes."

The policyholder was a non-profit entity that provided credit counseling services. A U.S. Senate report in 2004 cited several of the policyholder's business practices as improper, which led to a lawsuit for which coverage was sought under a prior policy. During the relevant policy period, the policyholder received subpoenas from the Maryland and Texas attorneys general seeking information about the policyholder's current practices regarding the conduct cited in the 2004 report and lawsuit. The insurer denied coverage, asserting that the subpoenas (i) did not constitute a Claim for Wrongful Acts, and (ii) involved Interrelated Wrongful Acts that were the subject of the prior lawsuit, such that coverage was barred by the prior notice exclusion.

The court noted that subpoenas issued by government investigative agencies in connection with investigations of a policyholder's activities have been held to be claims, while custodian-of-record subpoenas and subpoenas issued by private counsel generally have not. The court concluded that the subpoenas fell within the definition of Claim because they came from government agencies and "[b]oth the caption on the

Subpoena ('*In re*: [the policyholder]') and the specific inquiries into [the policyholder's] marketing and credit counseling activities indicate that [the policyholder] is a target of the investigation, not simply a source of information."

Having determined that the subpoenas constituted a Claim, the court considered whether they alleged Wrongful Acts. The court noted that the subpoenas on their face, and statements made by an assistant attorney general, indicated that the subpoenas were issued in connection with possible violations of consumer protection laws. As such, the court concluded that the subpoenas were issued in connection with alleged Wrongful Acts.

The court then determined that the subpoenas and the prior lawsuit were insufficiently related for the prior notice exclusion to bar coverage. The court opined that while the lawsuit was limited to the facts at issue in the 2004 Senate report, the subpoenas targeted the policyholder's conduct following the 2004 report, including whether the policyholder had continued to engage in the types of acts discussed in the 2004 report. Additionally, the court reasoned that the lawsuit was a private action by individuals seeking monetary damages, while the subpoenas were part of a government investigation that could lead to injunctive relief, civil or criminal penalties. Finally, the court noted that the subpoenas were broader in scope than the lawsuit in that they targeted the insured's activities and relationships with entities that were not parties to the lawsuit. For these reasons, the court held that the two Claims were not interrelated and that the prior notice exclusion did not bar coverage.