

Grand Jury Subpoena for Documents Not Claim, But Audit Letter from State Comptroller Was a Claim for Which Timely Notice Was Required

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A federal court in Illinois has held that a grand jury subpoena for documents did not constitute a "claim" within the meaning of a D&O Policy issued to the administrator of a pre-need burial trust fund, but that an audit letter from the state comptroller taking issue with the insured's management of the fund and fees charged did constitute a claim. *Fed. Ins. Co. v. Illinois Funeral Director's Assoc.*, 2010 WL 5099979 (N.D. Ill. Dec. 8, 2010). The court also held that coverage was not available for the audit letter and the subsequently filed, related lawsuits because of the insured's failure to provide timely notice of the audit letter.

The policy at issue afforded coverage on a claims-made basis for the period of August 11, 2005 to August 11, 2006 and was renewed several times for successive one-year periods. On June 21, 2006, the state comptroller sent a letter to the insured asserting that, based on an audit of the trust fund, it appeared that the insured had taken unauthorized fees of approximately \$8.6 million and that the insured owed the fund \$793,163 to account for the interest that would have been generated had those fees not been taken out of the fund's assets. The letter further indicated that the comptroller had "serious concerns" about a number of management practices employed by the insured and that the comptroller believed that the insured's actions had resulted in a \$39 million shortfall in trust assets. The comptroller demanded that the insured provide written responses to the audit findings within 21 days of the date of the letter.

The insured did not report the audit letter to the insurer at the time. In November 2008, however, the first of several civil actions was filed against the insured and its directors and officers alleging, among other things, that the insured had mismanaged the fund and charged unauthorized and excessive fees. The insured reported this action along with the audit letter to the insurer in December 2008. Five months later, the insured also reported to the insurer a grand jury subpoena that it had received on March 25, 2009, seeking documents relating to the trust and any loans made by or on behalf of the trust.

The insurer denied coverage for the lawsuits and the grand jury subpoena. In the coverage litigation that followed, the court held that the grand jury subpoena did not constitute a claim. In this regard, the policy defined "claim" to mean, in relevant part: "a written demand for monetary damages or non-monetary relief . . . against an Insured Organization for a Wrongful Act." The court concluded that the subpoena did not meet this definition because it only sought documents from the insured and did not allege that the insured had engaged in a wrongful act.

Turning to the lawsuits, the court first addressed the audit letter from the comptroller and determined that it constituted a claim. In making this determination, the court rejected the insured's argument that an explicit threat of civil litigation was required to meet the definition set forth in the policy. The court pointed out that the letter identified alleged wrongdoing and demanded non-monetary relief, including that the insured take steps to "rectify . . . an intolerable situation" and provide the comptroller with a written response within a specified time frame.

Next, the court determined that the audit letter and the lawsuits were related claims such that they constituted a single claim deemed to have been first made at the time of the audit letter. The policy defined "related claims" to mean "all Claims for Wrongful Acts based upon, arising from, or in consequence of the same or related facts, circumstances, situations, transactions or events or the same or related series of facts, circumstances, situations, transactions or events." In this regard, the court noted that the complaints in each of the lawsuits referenced the comptroller's investigation and included allegations concerning, among other things, unauthorized fees, the purported shortfall in assets and the overall mismanagement of the trust. The court rejected the insured's argument that the lawsuits and the audit letter were not related claims because the lawsuits named as defendants directors and officers while the letter was addressed only to the insured entity. Similarly, the court rejected the insured's argument that the lawsuits themselves were not related because they involved different parties, sought different damages, advanced different legal theories and were brought in different venues. According to the court, these differences were "irrelevant" because the various claims were based upon, arose out of or involved the same or related facts and circumstances.

After determining that the audit letter and the lawsuits constituted a single claim, the court addressed whether notice of that claim was timely. The policy required that the insured provide written notice to the insurer of any claim "as soon as practicable." According to the court, because the insured did not provide notice of the letter until more than two years after it was received, the insured did not provide timely notice of the claim. The court therefore concluded that coverage was not available for the audit letter as well as the lawsuits.