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NEWSLETTER

FTC Investigation Does Not Constitute a Claim for a Wrongful Act

June 2013

The United States Court of Appeals for the Sixth Circuit has held that a formal investigation of an insured by the Federal Trade Commission (FTC) sought only to determine *whether* a wrongful act had occurred—and did not *allege* an antitrust violation—and therefore did not constitute a "claim," defined in part as a demand or proceeding "against an Insured for a Wrongful Act." Because the FTC's investigation did not allege wrongdoing and was thus not a claim, the court held that the insured's failure to provide notice of the investigation did not preclude coverage for the subsequent administrative and civil actions brought by the FTC. *Employers' Fire Ins. Co. v. ProMedica Health Sys., Inc.*, 2013 WL 1798978 (6th Cir. Apr. 30, 2013).

In July 2010, the FTC opened a "non-public preliminary investigation" into the insured healthcare provider's proposed acquisition of a not-for-profit hospital "to determine whether the acquisition . . . may be anticompetitive." In August 2010, the FTC transitioned the investigation to "full-phase"; issued a resolution authorizing the use of compulsory process in connection with the investigation; issued subpoenas to employees of the insured and the hospital and issued subpoenas and Civil Investigatory Demands (CIDs) to the insured and the hospital. Because the transaction was set to close within the month, the FTC also requested that the insured enter into a "Hold Separate Agreement" whereby it agreed to limit its integration of the hospital into its health care system. In January 2011, the FTC filed administrative and civil complaints against the insured, alleging that the acquisition violated Section 7 of the Clayton Act and seeking an injunction restraining further consolidation of the insured's and hospital's operations. The insured provided notice of the actions to its insurer that month.

Taking the position that the FTC's investigation constituted a claim first made in August 2010, during the policy period of the insured's September 2009 to September 2010 claims-made policy, the insurer denied coverage based on the insured's failure to provide notice "as soon as practicable . . . and in no event later than . . . ninety (90) days after the end of the Policy Period." The insurer also denied coverage under the subsequent policy based on the "Related Claims" provision and, alternatively, the insured's failure to disclose the acquisition or FTC investigation in its renewal application. The insurer sought a declaration that the insured was not entitled to coverage under either policy. Ruling on cross-motions for summary judgment, the district court held in favor of the insurer, finding that the FTC investigation constituted a claim first made in August 2010.

The Sixth Circuit reversed, holding that the FTC's investigation was not a claim as defined by the policies and that the insured's notice of the litigation was thus sufficient. Interpreting the policies under Ohio law, the court held that there were four elements required for a claim: 1. a "written demand" or "proceeding"; 2. seeking "monetary, non-monetary or injunctive relief"; 3. "against an Insured"; 4. "for a Wrongful Act." Focusing on the fourth element and the policies' definition of "Wrongful Act" as "any actual or alleged" antitrust violation, the court first gave the term "alleged"—not defined in the policies—"its common, ordinary, and usual meaning" of "asserted to be true as described" or "accused but not yet tried." The court then held that the FTC's investigation was not a claim because "the FTC did not 'assert to be true' or 'declare' that antitrust violations had occurred or would occur . . . . Rather, the communications . . . only indicated that the FTC sought to determine 'whether' such violations had occurred or would occur." In particular, the court noted that the resolution authorizing compulsory process stated that the commission sought "to determine *whether*" the acquisition would violate the antitrust law; that "even 'full-phase' FTC investigations do not necessarily lead to litigation"; and that CIDs can be issued "to 'any person' for the purpose of obtaining information about potential antitrust violations" and do "not indicate that the recipient is accused of antitrust violations."

In reaching its holding, the court rejected the argument that its interpretation of claim rendered meaningless the portion of the definition addressing a "formal investigative order." The court acknowledged that "other formal investigative orders may give rise to a 'claim' because they 'allege' wrongdoing," but stated that "those at issue in this case did not." The court also declined to follow two non-binding district court opinions, *ACE American Insurance Co. v. Ascend One Corp.*, 570 F. Supp. 2d 789 (D. Md. 2008) (holding that an administrative subpoena and CID constituted claims), and *National Stock Exchange v. Federal Insurance Co.*, 2007 WL 1030293 (N.D. Ill. 2007) (holding that formal investigative order alleged a wrongful act). According to the court, neither of those cases "analyzes the plain meaning of the term 'alleged.'"

Separately, the court held that the FTC's investigative actions in August 2010 did not constitute demands or proceedings for "monetary, non-monetary or injunctive relief" as required by the second element of the policies' definition of claim. Finding that "relief" means "the redress or benefit . . . that a party asks of a court," the Sixth Circuit rejected the district court's implied holding that "the 'relief' requirement may be satisfied if 'relief' may be sought in the future" as contrary to the "plain language" of the policies.

Concluding that the FTC first made a claim against the insured in January 2011, during the policy period of the 2010 policy, the court remanded the case to the district court to determine whether the insured's failure to disclose the acquisition or FTC investigation in its renewal application barred recovery under that policy.