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Illinois Federal Court Holds That DOJ Subpoena Qualifies As A Claim For A Wrongful Act

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In *Astellas US Holding, Inc. v. Starr Indem. & Liab. Co.*, 2018 U.S. Dist. LEXIS 89725 (N.D. Ill. 2018), the U.S. District Court for the Northern District of Illinois held that a government-issued subpoena can qualify as a demand for non-monetary relief, thereby constituting a “Claim” against an insured. Astellas US Holding, Inc. (“Astellas”), a US based pharmaceutical company, sued its insurers for denying coverage for the expenses incurred in responding to a government-issued subpoena and investigation. The government’s investigation focused on potential kickbacks where patients receiving financial assistance from pharmaceutical companies like Astellas were also using those companies’ products. The U.S. Department of Justice issued a subpoena to Astellas demanding certain documents relating to the alleged Federal health care offenses. The subpoena stated that failure to comply exposed Astellas to liability in judicial enforcement proceedings and punishment for disobedience.

Astellas gave timely notice of the subpoena to its primary insurer and two excess insurers. The insurers denied coverage for the costs associated with responding to the subpoena, arguing that the subpoena did not constitute a “Claim” under the policy as it was not a demand for monetary, non-monetary or injunctive relief. Instead, the insurers argued, it was merely a request for production of documents. Astellas subsequently complied with the government subpoenas and incurred defense costs that exceeded the insurers’ limits of liability.

Astellas filed suit against all three insurers seeking a declaration that they owed reimbursement for the defense costs incurred, and all three insurers moved to dismiss the complaint. The motions argued that the subpoena did not constitute a “Claim” for a “Wrongful Act” as required by the policy.

The policy defined “Wrongful Act” as “any actual or alleged breach of duty, neglect, error, misstatement, misleading statement, omission or act by the Company.” Although the subpoena did not expressly identify the “Wrongful Act” committed by Astellas, the DOJ allegedly told Astellas that its donations to charities violated the law. As such, the court determined that the subpoenas concerned a potential “Wrongful Act” as the government was investigating Astellas for allegedly unlawful acts. This was apparent from the language of the tolling agreement entered into between the DOJ and Astellas, which addressed the investigation of a “possible violation” of the law.

The court also found that the subpoena qualified as a “Claim” pursuant to the policy’s definition of that term. The policy defined “Claim” to include a demand for non-monetary relief, as well as a written request to toll the statute of limitations. The court held that the subpoena sufficiently demanded Astellas to appear and produce specific documents, and therefore sought some form of “relief” from Astellas. To that point, the DOJ had the ability to initiate enforcement proceedings for Astellas’ non-compliance, thereby making the subpoena more than an informal request for information. The subpoena also was a written request that Astellas toll the statute of limitations as the government required Astellas to enter a tolling agreement halting the statute of limitations during the investigation of possible violations. The court therefore denied the insurers’ motion to dismiss.