

Kentucky Supreme Court Rules That Government Subpoena Does Not Trigger Policy's Prior Notice Exclusion (Insurance Law Alert)

11.30.22



(Article from *Insurance Law Alert*, November 2022)

For more information, please visit the [Insurance Law Alert Resource Center](#).

The Kentucky Supreme Court ruled that the policyholder's tender of a government subpoena to its D&O insurer a few years before it was named as a defendant in civil litigation did not trigger a prior notice exclusion in a professional liability policy. *Ashland Hospital Corp. v. Darwin Select Ins. Co.*, 2022 WL 12198051 (Ky. Oct. 20, 2022).

In 2011, the Department of Justice ("DOJ") served a *subpoena duces tecum* on a hospital, seeking files relating to its treatment of cardiac patients. The hospital's D&O insurer agreed to cover the costs incurred in complying with the subpoena. In 2013, the hospital notified Allied, its professional liability insurer, of the subpoena and ongoing investigation, as well as a litigation hold letter it received from counsel said to represent hundreds of potential claimants against the hospital. Allied argued that those notifications did not constitute proper "notice of circumstances that might give rise to a claim" because they failed to include certain specific details required under the policy. In addition, Allied asserted that coverage was barred by Exclusion 15, which applied to claims "based on, arising out of, directly or indirectly resulting from, or in consequence of, or in any way involving . . . any facts, matters, events, suits or demands notified or reported to, or in accordance with, any policy of insurance . . . in effect prior to October 16, 2012." Allied's position was that Exclusion 15 applied because the hospital had submitted the subpoena claim to its D&O insurer in 2011. Nonetheless, Allied agreed to defend the underlying civil suit under a reservation of rights.

The DOJ investigation ended with a settlement in which the hospital did not concede liability but agreed to pay approximately \$40 million in fines. Thereafter, the hospital filed a declaratory judgment action, seeking a ruling as to its rights under Allied's policy as well as an excess policy. A trial court ruled in the hospital's favor, finding that neither Exclusion 15, nor two other exclusions (relating to intentional acts or government-related claims) barred coverage. An intermediate appellate court reversed, finding that Exclusion 15 applied.

The Kentucky Supreme Court reversed. The court held that Exclusion 15 did not apply because the subpoena did not constitute adequate notice of circumstances giving rise to a claim in 2011. In particular, the subpoena failed to specify the "time, date and place" of the claim or "a description of the injury or damage which has allegedly resulted." The court explained that while subsequent events that unfolded over the following two years ultimately indicated that the DOJ investigation and the civil suit arose from the same facts and events, that conclusion was not evident in 2011, when the hospital notified its D&O insurer of the subpoena. The court stated:

[H]indsight is 20/20. And looking at this case from the perspective of 2022, the DOJ inarguably was investigating facts, matters, and circumstances shared by the Cardiac Litigation. But in this instances, hindsight is obscuring the reasonable interpretation of the language by a lay reader which sensibly supports the interpretation that the policy contemplates a great deal of specificity to constitute notice of circumstances giving rise to a claim that is absent from the subpoena.

The court acknowledged that in some instances, notification might require supplementary communications within a reasonable period of time, but rejected “the proposition that notice could be gathered over multiple years.” As the court emphasized, Allied itself took the position that that the 2011 subpoena did not constitute notice of circumstances that might give rise to a claim.

In addition, the court reasoned that Allied created an expectation of coverage by issuing consecutive policies in subsequent years even after learning of the ongoing DOJ investigation without informing the hospital of its position that Exclusion 15 would bar coverage under those policies.

Authors and Contacts

[Bryce Friedman](#)

Partner

bfriedman@stblaw.com

+1-212-455-2235

[Chet Kronenberg](#)

Partner

ckronenberg@stblaw.com

+1-310-407-7557

