

INSURANCE COVERAGE FOR GOVERNMENT INVESTIGATIONS

May 21, 2015

MILLER | FRIEL
PLLC

1200 New Hampshire Avenue, NW, Suite 800, Washington, DC 20036
373 Park Avenue South, 6th Floor, New York, New York 20016

WHO WE ARE

- ❖ Miller Friel, PLLC www.millerfriel.com is a specialized insurance coverage law firm whose sole purpose is to help corporate clients better their insurance coverage
- ❖ Our [focus](#) of exclusively representing policyholders, combined with our extensive experience in insurance law, leads to greater efficiency, lower costs, and better [results](#)
- ❖ Additional information can be found on our blog (www.millerfriel.com/blog), and on our 7 Tips for Maximizing Coverage series (<http://www.millerfriel.com/7-tips.html>)

BRIAN G. FRIEL

- ❖ Founding Partner at Miller Friel
(frielb@millerfriel.com or 202-760-3162)
- ❖ More than 20 years experience litigating and resolving insurance claims on behalf of corporate policyholders
- ❖ Won trials and arbitrations for corporate policyholders, including bad faith award for oil/gas company of nearly three times policy limits
- ❖ Settled insurance coverage disputes for financial institutions, oil and gas companies, electric utilities, and retailers
- ❖ Represented financial institutions, financial service companies, and construction companies in obtaining insurance for government investigations



MURRAY D. SACKS

- ❖ Of Counsel at Miller Friel (sacksm@millerfriel.com or 202-760-3164)
- ❖ 30 years experience litigating and resolving insurance claims, both as advocate for corporate policyholders and in-house counsel for major insurance company
- ❖ Successfully resolved issues involving nearly every type of insurance policy through trials, motion practice, and settlement
- ❖ Represents corporate policyholders in obtaining coverage for government investigations
- ❖ Author of numerous articles on insurance coverage for government investigations



What's at Stake—The Cost of Responding to Government Investigations

GROWING GOVERNMENT INVESTIGATIONS AND ENFORCEMENT ACTIONS

- ❖ Many federal government agencies have the authority and the mandate to conduct extensive investigations and bring enforcement actions, including DOJ, SEC, CFPB, OCC, and FinCEN
- ❖ State agencies and attorneys general also may conduct extensive investigations



GROWING GOVERNMENT INVESTIGATIONS AND ENFORCEMENT ACTIONS



Portfolio Media, Inc. | 860 Broadway, 6th Floor | New York, NY 10003 | www.law360.com
Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

GCs Rightly Fear The Regulators

By Jacob Fischler

Law360, Washington (May 14, 2015, 5:53 PM ET) -- More than any other issue, corporate attorneys in companies across the globe fear the high-cost and time-consuming ordeal of regulatory litigation and government investigations over the next year — especially in

Law360, Washington (May 14, 2015, 5:53 PM ET) -- More than any other issue, corporate attorneys in companies across the globe fear the high-cost and time-consuming ordeal of regulatory litigation and government investigations over the next year — especially in much-regulated fields like finance, health care and energy, according to a survey released Thursday.

associated with regulatory violations," said Richard Smith, Norton Rose's U.S. head of regulatory and governmental investigations, in a telephone interview Thursday, adding that the regulatory problems can spiral into litigation and other problems. "Once you have an issue like that it really can grow very quickly and be very time consuming."

Regulations in the health care and financial sectors — two of the most heavily legislated industries in the U.S. and internationally — are subject to frequent changes in statutes, Smith said.

Of the six industry sectors represented in the survey, 47 percent of respondents from life sciences and health care companies, 46 percent from financial institutions and 44 percent from energy companies said they were more concerned with regulation and government investigations than their peers in other industries.

The percentage of survey respondents listing regulatory proceedings as a top concern actually decreased slightly from 41 percent last year. But it jumped in rank: In 2013 government regulations were the second-most concerning area behind labor and employment. Both years were significant increases over 2012, when only 24 percent said regulations concerned them, the fourth-highest ranking concern that year.

"It's a trend in that it's grown every year," Smith said. "Every year it jumps up a couple of points. As the world becomes more complex and more countries pass laws," litigation based on regulation increases as well.

Attorneys for transportation companies reported the least concern with the area at only 21 percent. Norton Rose officials said unlike in finance and health care, transport regulations have remained relatively unchanged in recent years.

"Most of the regulations facing transport have been in place for a long time and there is a

GROWING GOVERNMENT INVESTIGATIONS AND ENFORCEMENT ACTIONS

- ❖ These investigations can last many years
 - ❖ The average time to conclude a FCPA claim is now more than 7 years
- ❖ These investigations can result in enforcement actions, especially if the target does not cooperate and settle
 - ❖ DOJ recovered \$5.69 billion in FCA claims in FY2014
 - ❖ More than 700 whistleblower suits are filed each year



GROWING GOVERNMENT INVESTIGATIONS AND ENFORCEMENT ACTIONS

THE WALL STREET JOURNAL

Tuesday, April 21, 2015 | A17

OPINION

The Foreign-Bribery Sinkhole at Justice

By Paul Pelletier

Following the Enron scandal,

President Obama's Justice Department that fraud progressed with thoroughness Justice's in-

Unfortunate such investigations Foreign Co have been bly, legal spectacular to root out spread hav

Consider tember 2 months af act—federal five execut munication the most el frauds" in ary 2006, w

last criminal act, six executives of General Reinsurance and AIG were charged in a complicated, \$500-million sham reinsurance scheme. None of these cases was perfect. But Justice Department prosecutors were trained to responsibly and swiftly bring charges against criminally culpable organizations and executives regardless of the complexity of the facts or the evidence-gather-

ing process. Violations of the FCPA, which bars bribery of foreign officials, were routinely re-

rate actions took between 7% and 10% years to resolve; Alcoa, approximately 8% years, and Avon,

lines provide significantly reduced monetary penalties for corporations that genuinely cooperate

The average time to conclude a case: more than seven years. The cost to companies: huge.

From late 2013 through 2014, seven corporate FCPA resolutions with criminal penalties, each exceeding \$25 million, were reached with the Justice Department: Weatherford, Bilfinger, Maurebeni, Alcoa, Hewlett-Packard, Avon and Alstom. But the time between the last criminal act and resolution continues to drag out, now averaging more than seven years. Alstom's three sepa-

methods designed to swiftly identify, investigate and prosecute meritorious complex financial-fraud cases. Today there is little, if any, similar government training. Private-sector courses on FCPA issues, though ubiquitous, rarely discuss or lecture on methods to streamline government investigations.

This is a missed opportunity. Prosecution and sentencing guide-

have a dramatic impact on the insidious and corrosive effect of corruption overseas and provide the restorative justice the Corporate Fraud Task Force sought to achieve.

Mr. Pelletier, an attorney with Mintz Levin Cohn Ferris Glovsky and Popeo PC, served as a prosecutor in the Justice Department for more than 25 years.

at investi- and costly ver, may assess the violations ent. stigations n a timely esses can ongoing ing within gion and ti-bribery adequately schemes. ost when ag out for eterrence size of the

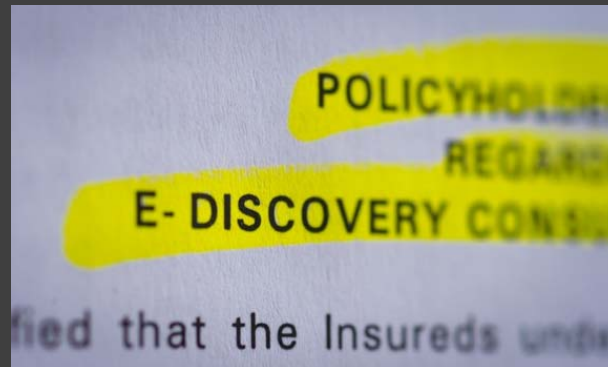
ent needs out resolu- ery cases r record- orous and ment can

COSTS OF RESPONDING

- ❖ The costs of responding to government investigations can be astronomical and are increasing
 - ❖ Last decade, Allergan spent “only” \$7.4 million responding to a DOJ investigation
 - ❖ More recently
 - ❖ Avon spent \$344 million responding to FCPA claim over 6 plus years
 - ❖ Walmart spent more than \$600 million responding to FCPA claim over 4 years
 - ❖ Siemens spent more than \$1 billion in connection with a FCPA investigation
- ❖ Even smaller investigations can reach 7 figures

E-DISCOVERY COSTS

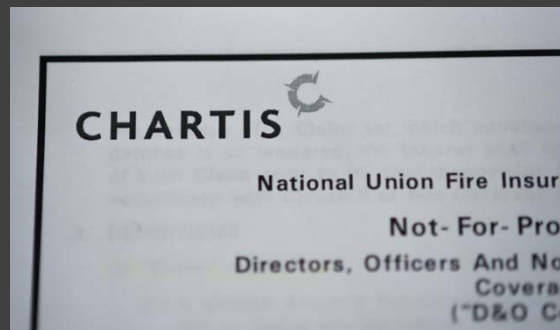
- ❖ For e-discovery alone, costs range from about \$250,000 to several million dollars
- ❖ Companies need to find, search, review for privilege, produce, and store electronic documents
- ❖ Costs of preservation of electronic documents also can be significant, especially if investigation takes years



Insurance Is Often Overlooked as a Resource for Paying for the Cost of Government Investigations

INSURANCE IS OFTEN OVERLOOKED

- ❖ Many companies are not aware they may have coverage
- ❖ When you receive anything from a government agency regarding an investigation or potential investigation, you should always ask “do we have insurance to cover this?”
- ❖ Once you ask the “do we have” question, the next step is to follow up with person responsible for insurance: Risk Manager, CFO, Treasurer, General Counsel, outside coverage counsel



Policies That Can Provide Coverage

DIRECTORS AND OFFICERS LIABILITY POLICIES



- ❖ Claims-made coverage
- ❖ What D&O policies cover
 - ❖ Side A—Covers individual liability of directors and officers when not indemnified
 - ❖ Side B—Covers company's liability when company indemnifies individual insureds
 - ❖ Side C—Covers company's direct liability as defendant

PROFESSIONAL LIABILITY POLICIES

- ❖ Also known as Errors and Omissions (E&O) policies
- ❖ Claims-made coverage
- ❖ Covers wrongful acts of company and employees
 - ❖ Limited to professional services provided to customers or clients

EMPLOYMENT PRACTICES LIABILITY POLICIES

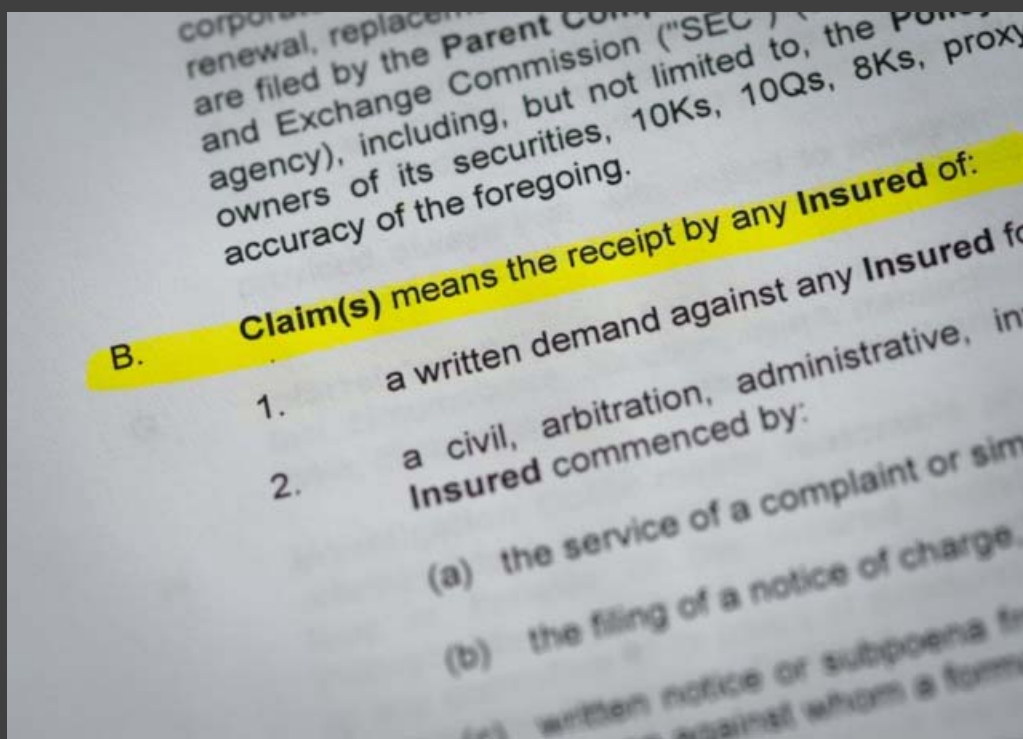
- ❖ Also claims-made coverage
- ❖ Covers wrongful acts related to treatment of employees, regardless of whether specific cause of action alleged
- ❖ Usually covers claims of termination for retaliation
- ❖ Can cover whistleblower actions in connection with False Claim Act (FCA) investigations

Ways Investigation Start

WAYS INVESTIGATION CAN START

- ❖ Informal request by government agency
- ❖ Request for witness interview
- ❖ Formal document request
- ❖ Civil Investigative Demand (CID)
- ❖ Subpoena
- ❖ Grand jury subpoena
- ❖ Search warrant
- ❖ Administrative order
- ❖ Your company may not be the target

Key Issue—Policy Definition of Claim



CLAIM DEFINITION

- ❖ “Claim” is what triggers coverage in claims-made policies for defense costs and indemnity
- ❖ Sometimes “claim” is not defined
- ❖ When defined, many different possibilities

DEFINITION OF CLAIM—EXAMPLE 1

- ❖ “Formal or informal administrative or regulatory proceeding or inquiry commenced by the filing of a notice of charges, formal or informal investigative order or similar document”
 - ❖ Formal or informal
 - ❖ Proceeding or inquiry
 - ❖ Or similar document

DEFINITION OF CLAIM—EXAMPLE 2

- ❖ “Regulatory . . . proceeding for monetary, non-monetary or injunctive relief commenced by . . . the filing of a notice of charges, formal investigative order or similar document”
 - ❖ Adds non-monetary or injunctive
 - ❖ No informal language
 - ❖ No inquiry language

DEFINITION OF CLAIM—EXAMPLE 3

- ❖ “Any written notice received by an Insured that any person or entity intends to hold any Insured responsible for a Wrongful Act”
 - ❖ Notice must state that government intends to hold insured responsible
 - ❖ Would cover formal or informal

SPECIFIC COVERAGE FOR SUBPOENAS

- ❖ Example: Coverage for “expenses incurred while assisting the Insured in responding to a subpoena which the Insured first receives and reports in writing to the Company during the policy period resulting from the performance of professional services by the Insured”
- ❖ Coverage may have low sublimit



NEWER POLICY LANGUAGE

- ❖ Coverage for certain “pre-claim” inquiries from governmental enforcement agency
- ❖ Coverage for requests to appear for interview or meeting with government enforcement agency

CLAIM DEFINITION SUMMARY

Summary -- What To Look For in Claim Definition and Related Policy Language:

- ❖ Administrative or regulatory proceeding commenced by formal or informal investigation order or request
- ❖ Coverage for subpoenas from government enforcement agency
- ❖ Coverage for governmental investigation commencing with demand for documents or other information

Case Law Supporting Coverage for Government Investigations

CASE LAW SUPPORTING COVERAGE FOR GOVERNMENT INVESTIGATIONS

MBIA Inc. v. Federal Insurance Co., 652 F.3d 152 (2d Cir. 2011)

- ❖ MBIA sought coverage under its D&O policy for both NY Attorney General investigation, commenced with subpoena, and SEC's investigation, including oral requests for documents
- ❖ Policy covered securities claims, which included "a formal or informal administrative or regulatory proceeding or inquiry commenced by the filing of a notice of charges, formal or informal investigative order or similar document" (Example 1)

CASE LAW SUPPORTING COVERAGE FOR GOVERNMENT INVESTIGATIONS

MBIA v. Federal (continued)

- ❖ Court found coverage for NYAG subpoena because:
 - ❖ At least a “similar document” to a formal or informal investigative order
 - ❖ A sensible businessperson would view a subpoena as an investigative order
 - ❖ Rejected insurers’ “crabbed view of the nature of a subpoena as a ‘mere discovery device’ that is not even ‘similar’ to an investigative order”

CASE LAW SUPPORTING COVERAGE FOR GOVERNMENT INVESTIGATIONS

MBIA v. Federal (continued)

- ❖ Court found coverage for SEC investigation and oral request for documents because:
 - ❖ MBIA had asked SEC if it could comply voluntarily to avoid adverse publicity of a subpoena
 - ❖ Requests were part of SEC investigation
 - ❖ Insurers cannot require insured to suffer extra public relations damage in order to obtain coverage

CASE LAW SUPPORTING COVERAGE FOR GOVERNMENT INVESTIGATIONS

Polychron v. Crum & Forster Ins. Cos., 916 F.2d 461 (8th Cir. 1990)

- ❖ President of Polychron sought coverage under D&O policy for grand jury subpoena
- ❖ Claim not defined in policy
- ❖ Court held “the function of a subpoena is to command a party to produce certain documents and therefore constitutes a ‘claim’ against a party”

CASE LAW SUPPORTING COVERAGE FOR GOVERNMENT INVESTIGATIONS

Dan Nelson Automotive Group, Inc. v. Universal Underwriters Group, 2008 WL 170084 (D.S.D. Jan. 15, 2008)

- ❖ Auto dealer sought coverage under E&O policy for Iowa AG CID under Iowa Consumer Fraud Act
- ❖ Claim not defined in policy
- ❖ Court held “the CIDs functioned to command the Plaintiffs to produce documents and provide information relevant to the alleged violations of statutes, and therefore constitutes a claim”

CASE LAW SUPPORTING COVERAGE FOR GOVERNMENT INVESTIGATIONS

- ❖ Even insurance companies agree that the issuance of subpoenas is a “claim”—at least when it means that they can deny coverage
- ❖ Employers’ Fire Ins. Co. v. ProMedica Health Systems, Inc., 524 Fed. Appx. 241, 2013 WL 1798978 (6th Cir. Apr. 30, 2013)
 - ❖ Insurer tried to avoid coverage under D&O policy by arguing that “claim” was made against Pro Medica in earlier policy period, before ProMedica had given notice under claims-made and reported policy
 - ❖ To do so, insurer argued that beginning of FTC investigation was a “claim”
 - ❖ “Claim” defined to include written demand for relief and administrative proceeding for relief commenced by the filing of a formal investigative order or similar document
 - ❖ Court held early investigation was not “claim” because no “wrongful acts” alleged and FTC did not make written demand for or seek relief

CASE LAW SUPPORTING COVERAGE FOR GOVERNMENT INVESTIGATIONS

- ❖ BioChemics, Inc. v. Axis Reinsurance Co., 2015 WL 71493 (D. Mass. Jan. 6, 2015)
 - ❖ Insurer tried to avoid coverage under D&O policy by arguing that “claim” was made against BioChemics in earlier policy period, before BioChemics had given notice under claims-made and reported policy
 - ❖ To do so, insurer argued that service of SEC document subpoenas that indicated existence of SEC Formal Order was a “claim”
 - ❖ “Claim” defined to include any “administrative or regulatory proceeding . . . commenced by . . . The filing of a notice of charge, investigative order, or like document”
 - ❖ Court agreed with insurer and held subpoenas constituted a “claim” because they were issued under a SEC Formal Order

CASE LAW SUPPORTING COVERAGE FOR GOVERNMENT INVESTIGATIONS

- ❖ Eisai Inc. v. Zurich American Ins. Co., No. 2:12-cv-07208 (D.N.J. June 30, 2014)
 - ❖ Eisai sought coverage under EPL policy for qui tam whistleblower claims in connection with alleged FCA violations—causing health care providers to submit false claims for reimbursement
 - ❖ Insurer denied coverage claiming that qui tam suit alleged only FCA violations
 - ❖ Court found coverage because allegations arose from same circumstances as retaliation claim by employee, which was covered under EPL policy, and as a result, insurer had duty to defend the entire suit

LESSONS LEARNED FROM CASE LAW SUPPORTING COVERAGE FOR GOVERNMENT INVESTIGATIONS

- ❖ Insurers will contend for a restrictive interpretation of “claim,” unless the policyholder gave notice late, and then the insurer will argue for a broad definition of “claim”
- ❖ Insurers’ inconsistent positions should be used against them
- ❖ Early stages of government investigations have been construed as a claim that triggers insurance coverage, so a policyholder needs to identify and obtain expert advice on the pursuit of insurance coverage immediately
 - ❖ <http://millerfriel.com/blog/insurance-coverage-for-government-investigations-the-trend-for-coverage-continues/>
 - ❖ http://millerfriel.com/images/MF_New_Federal_Agency.pdf
 - ❖ <http://millerfriel.com/blog/miller-friel-american-bar-association-presentation-on-insurance-coverage-for-governmental-investigations/>

Coverage Miller Friel Clients Have Obtained

COVERAGE OUR CLIENTS HAVE OBTAINED

Client A – Consumer Debt Collection Agency

- ❖ Sued in private lawsuit for alleged improper debt collection practices
- ❖ After lawsuit initiated, CFPB served CID on client
- ❖ Client obtained coverage for defense costs for both actions under E&O policy
- ❖ Insurer agreed to pay limited defense costs for CFPB investigation under specific subpoena coverage

COVERAGE OUR CLIENTS HAVE OBTAINED

Client B – International Engineering/Construction Company

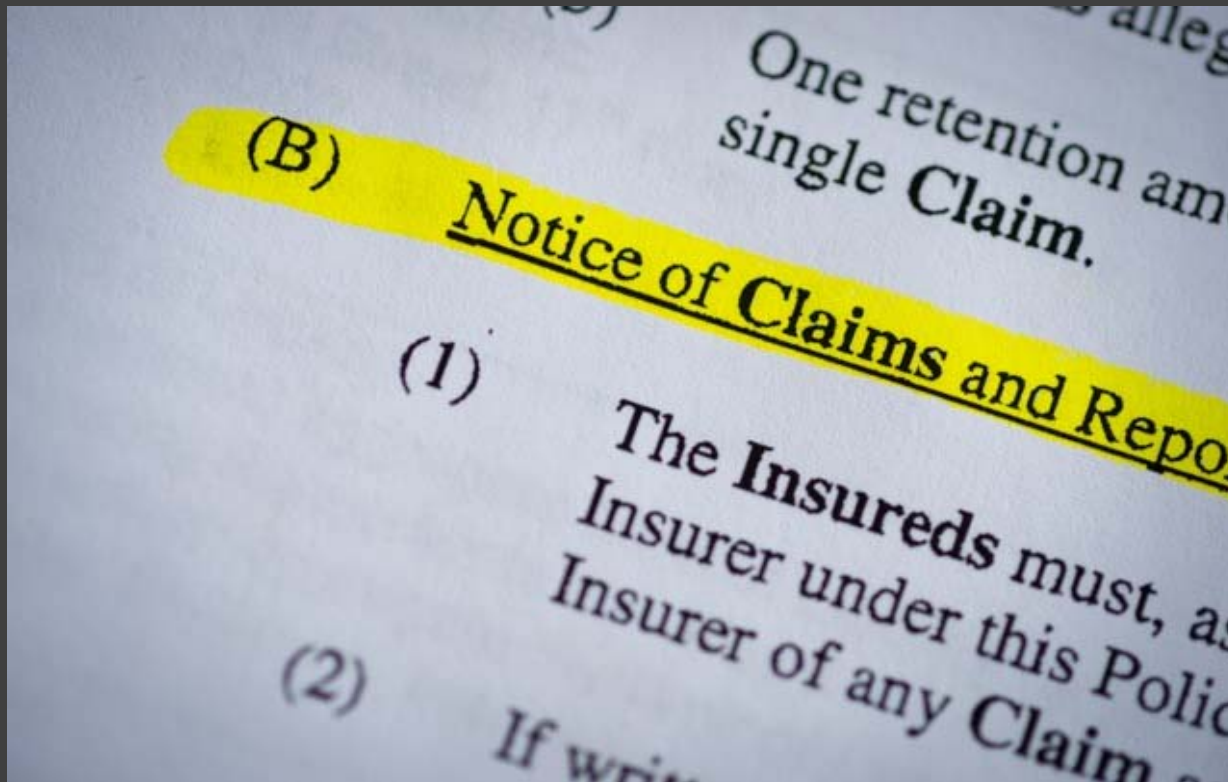
- ❖ Initially subject of investigation by DOJ and World Bank for alleged violations in United States and abroad of False Claims Act and Foreign Corrupt Practices Act
- ❖ Beginning with investigation, D&O insurer paid full limits of policy (\$10 million) for defense costs under Sides B and C

COVERAGE OUR CLIENTS HAVE OBTAINED

Client C – Private equity company

- ❖ Served with SEC subpoena and a related set of DOJ information requests as part of FCPA investigation of third party
- ❖ Company incurred more than \$6 million to respond to investigation
- ❖ Insurer denied coverage, contending that the subpoena and information requests were not a “claim” for a “wrongful act” because company was not the target
- ❖ Company filed DJ and breach of contract action against insurer
- ❖ Case settled during early mediation, when insurer agreed to pay past and continuing defense costs

Notice Requirements



NOTICE REQUIREMENTS

Requirements under claims-made policies

- ❖ Provide notice promptly
- ❖ Some policies also require that the insured report the claim during policy period
- ❖ Policies may provide for optional notice of facts or circumstances that may lead to a claim
- ❖ In real estate, it's location, location, location. In insurance, it's timing, timing, timing – especially near renewal dates.

CONSEQUENCES OF LATE NOTICE

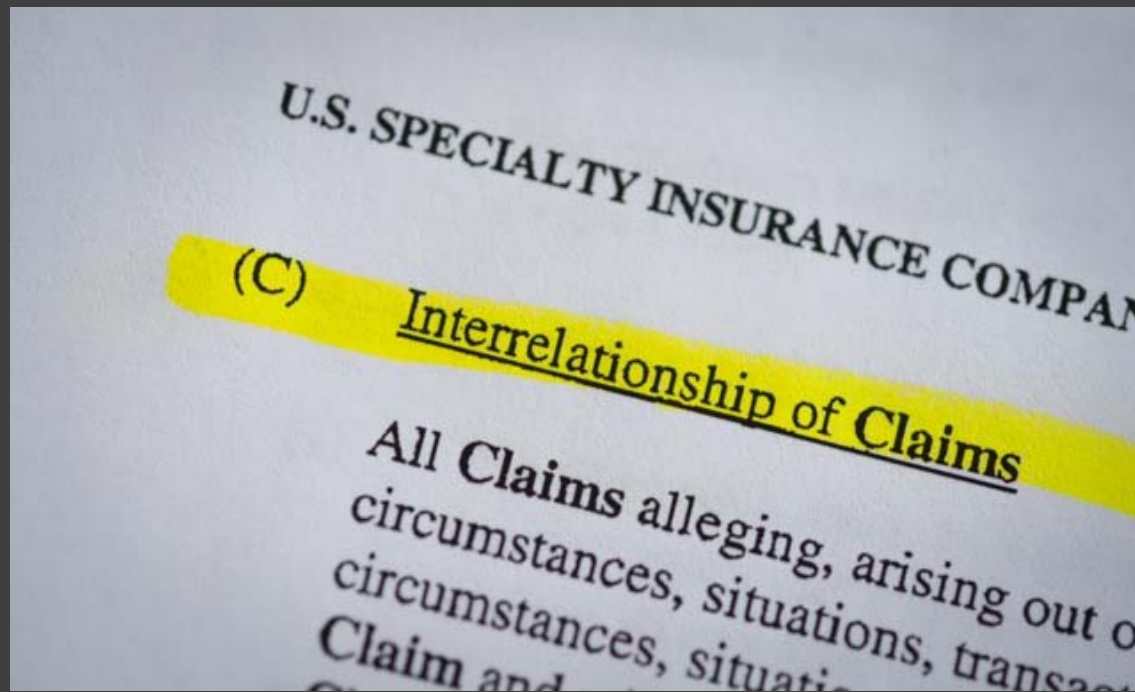
- ❖ Potentially fatal
 - ❖ Courts consider whether insurer is prejudiced in deciding whether late notice bars coverage in occurrence-based policies
 - ❖ Prejudice usually not a factor with respect to claims-made policies
 - ❖ If notice is late, policyholder may lose coverage for the claim

CONSEQUENCES OF LATE NOTICE

- ❖ For example, one case held that the policyholder was obligated to give notice of a FCA suit over alleged false statements related to a ship building project once the policyholder entered into a tolling agreement with the government. XL Specialty Ins. Co. v. Bollinger Shipyards, Inc., No. 12-2071, 2014 WL 5524407 (E.D. La. Oct. 31, 2014).

CONSEQUENCES OF LATE NOTICE

- ❖ Can lose coverage for future claims because of “Related Claims” and Prior/Pending Exclusion



CONSEQUENCES OF LATE NOTICE

- ❖ “Related Claims” language
 - ❖ Claims involving same or related wrongful acts are considered a single claim made at the time the first claim is made against the insured
 - ❖ Allows companies to pull later filed claims back into earlier policy

CONSEQUENCES OF LATE NOTICE

❖ Prior/Pending Exclusion

- ❖ No coverage if any insured knew or had reason to know of wrongful act before beginning of policy period or earlier date
- ❖ Some exclusions are broader and preclude coverage for any “claim . . . or investigation filed or commenced on or before the . . . effective date of this policy” and can bar coverage for even a sealed qui tam FCA action of which the policyholder was not aware. AmerisourceBergen Corp. v. Ace American Ins. Co., 100 A.3d 283 (Pa. Super. 2014)

NOTICE SUMMARY

Notice -- Effect of Provisions

- ❖ Typically, must give notice during the policy period, or risk losing coverage
 - ❖ <http://millerfriel.com/blog/fatal-traps-in-do-insurance-policies-underscored-by-10-million-late-notice-insurance-claim-dismissal-2/>
- ❖ Failure to give notice may bar coverage for first claim, as well as later related claims
- ❖ Potentially no coverage under later policies for later claims because of prior/pending exclusion

Defense Issues

(C) **Defense Costs** means reasonable costs paid by the Insurer (including premiums for bond) resulting from the investigation against an Insured, but excluding of any Insured Person.

DEFENSE ISSUES

❖ Duty To Defend

- ❖ Most often found in general liability policies
- ❖ Very broad standard
 - ❖ Insurer must defend claim if even potentially covered
 - ❖ Insurer must defend entire claim if at least one of the claims is potentially covered
- ❖ Insurer usually selects counsel and controls defense
- ❖ Insurer pays defense counsel directly

DEFENSE ISSUES

- ❖ Duty To Pay or Reimburse Defense Costs
 - ❖ Often found in claims-made policies
 - ❖ Not as broad a standard as duty to defend
 - ❖ Policyholder often selects or has greater control over defense counsel and defense of claim
 - ❖ Insurer may not pay defense counsel directly but instead reimburse policyholder for defense costs later



DEFENSE ISSUES

❖ Duty to Advance Defense Costs

- ❖ Insurers typically argue that there is a difference between duty to defend and duty to advance
- ❖ From a coverage standpoint, broad duty to defend standards should apply

❖ Insurer's Recoupment of Defense Costs Already Paid

- ❖ Insurers may argue that they are entitled to recoup defense costs if claim is later determined not to be covered
- ❖ Recoupment should not be permitted. Courts have taken differing views on the subject. See Buss v. Superior Court, 16 Cal. 4th 35, 57 (1997) (recoupment could be limited to defense costs attributable to uncovered claims).
- ❖ Insurer may not be entitled to recoupment unless it specifically reserved the right to do so—and policyholder may waive right to contest right of recoupment unless it promptly disagrees with insurer's reservation

DEFENSE ISSUES

❖ Panel Counsel and Billing Guidelines

- ❖ If insurer agrees to defend, may try to do it on the cheap by selecting “panel counsel” instead of counsel that insured wants or paying drastically reduced rates according to its billing guidelines
- ❖ Lower priced counsel simply are not appropriate when dealing with governmental investigations
- ❖ Need to negotiate to get what you deserve
 - ❖ <http://millerfriel.com/blog/insurer-litigation-guidelines-the-hidden-landmine-in-the-duty-to-defend/>
 - ❖ <http://millerfriel.com/blog/insurer-must-pay-counsel-rates-excess-700-per-hour/>

Common Exclusions Do Not Bar Coverage

DISHONESTY/FRAUD EXCLUSION

- ❖ Most policies exclude coverage for claims arising out of dishonest or fraudulent conduct
- ❖ That type of exclusion usually does not apply to defense costs unless and until there has been a factual determination of that conduct by a judge or jury or unless the policyholder has admitted that conduct

PERSONAL PROFIT EXCLUSION

- ❖ Most policies exclude coverage for claims arising out of a personal profit for which that person is not legally entitled
- ❖ That type of exclusion usually does not apply to defense costs unless and until there has been a factual determination of that conduct by a judge or jury or unless the policyholder has admitted that conduct
 - ❖ http://millerfriel.com/images/MF_7-tips_PersonalProfit.pdf



Tips For Maximizing Coverage

TIPS

- ❖ This is a complex, ever changing area of law that is often misunderstood by brokers and risk managers. Bad advice is, unfortunately, more common than good advice.
- ❖ Insurance often covers the costs of responding to governmental investigations, but coverage is easily lost if a policyholder does not recognize potential traps

TIPS

- ❖ Evaluate all demands and claims for coverage
- ❖ CIDs and subpoenas are likely covered “claims”
- ❖ Gather and review all policies immediately once learning of an investigation
- ❖ Should audit policies before claim to make sure your company has the best possible coverage

TIPS

- ❖ Recognize when notice should be provided immediately
- ❖ In FCA situations, give notice when suspect or know FCA complaint has been filed under seal, after asking DOJ to ask court to partially lift seal for sole purpose of allowing notice to insurer
- ❖ Demand immediate defense and obtain consent for incurring defense costs if required

TIPS

- ❖ Never accept an insurer's characterization of coverage
- ❖ Consider whether investigation is related to the defense of other covered liabilities
- ❖ Even allegations of intentional wrongdoing should be covered, at least for defense
 - ❖ Exclusions relating to intentional or dishonest conduct usually don't apply until there has been a judicial determination

TIPS

- ❖ Keep insurer apprised of all significant developments in investigation
- ❖ Get insurer's written consent to settle or at least a waiver of consent

TIPS

- ❖ Be careful of your broker's role, particularly if claim develops
 - ❖ An ever-changing legal landscape often makes broker opinions on claims inaccurate
 - ❖ Brokers have mixed loyalties
 - ❖ Communications with brokers are not likely privileged
 - ❖ Consider the use of outside counsel to handle insurance issues

TIPS

- ❖ A denial of coverage or reservation of rights is the beginning of the process, not the end
 - ❖ Need to present sound analysis why claim is covered
 - ❖ Need to avoid landmines
 - ❖ Don't characterize claim in a way that limits coverage
 - ❖ Provide proper notice
 - ❖ Minimize restrictions on defense counsel
- ❖ Best to take an aggressive and active approach from the start

TIPS



PAID

CONTACT INFORMATION

Murray D. Sacks

Direct: (202) 760-3164

sacksm@millerfriel.com

Brian G. Friel

Direct: (202) 760-3162

frielb@millerfriel.com