

# Civil Investigative Demand Constitutes ‘Claim’ Under Professional Liability Policy

Mealey's (June 27, 2019, 1:52 PM EDT) -- WILMINGTON, Del. — A Delaware judge on June 24 found that a civil investigative demand issued by the Texas attorney general against an insured constitutes a claim for nonmonetary relief that alleged a wrongful act under a professional liability insurance policy, triggering primary and excess insurers' duty defend and indemnify and denying their partial motion to dismiss (*Conduent State Healthcare, LLC, et al. v. AIG Specialty Insurance Company, No. N18C-12-074, Del. Super.*).

(Opinion available. Document #13-190703-024Z.)

Conduent State Healthcare LLC, formerly known as Xerox State Healthcare LLC, formerly known as ACS State Healthcare LLC, sued its professional liability insurer AIG Specialty Insurance Co., formerly known as Chartis Specialty Insurance Co., and its excess insurer Lexington Insurance Co. for breach of contract in the Delaware Superior Court, seeking coverage for three "Medicaid-Related Claims."

## Medicaid Investigation

One of the underlying claims (the Medicaid investigation) was allegedly prompted by a Dallas local news investigation. On June 8, 2012, the Texas attorney general issued Conduent a civil investigative demand (CID) that stated that the AG was "investigating the possibility of Medicaid fraud involving the prior authorization for orthodontia services."

Conduent sought coverage. The insurers argued that the CID does not constitute a claim under the policies.

In the present lawsuit, the insurers moved to dismiss the part of complaint that seeks coverage for the insured's costs in response to the CID.

## 'Distinction Without A Difference'

Judge Mary M. Johnston found that although case law is split on this issue, she finds more persuasive the authority that supports the finding that the CID constitutes a "claim."

"The Texas CID to Conduent is a 'Claim' as defined in the insurance policy because it is a 'demand for . . . non-monetary relief' specifically targeted at the insured. Additionally, the opinions finding that such requests are not claims do not distinguish information requested by adjudicative bodies or law enforcement, as opposed to information requests issued by other entities. The 'no claim' opinions do not address the ability of the issuer to compel compliance without judicial intervention."

The judge further determined that she is "not persuaded that investigating an alleged unlawful act by the insured, is different from actually alleging an unlawful act."

"This is a distinction without a difference."

The judge denied the insurers' motion to dismiss.

"The Policy language controls. The Court finds that the CID was a request for information in connection with an investigation. The investigation was initiated by law enforcement, and clearly was focused on the insured. The stated purpose of the CID was to investigate the possibility of wrongful acts that may violate the law. The CID is a Claim for non-monetary relief, alleging a Wrongful Act under the Policy terms. This finding is consistent with the view that the duty to pay defense costs should be construed broadly, and in favor of coverage whenever factual allegations raise the possibility of liability covered by the policy."

## Counsel

Robin L. Cohen and Keith McKenna of McKool Smith in New York and Jennifer C. Wasson and Carla M. Jones of Potter, Anderson & Corroon in Wilmington represent Conduent.

John L. Reed, Matthew Denn and Harrison S. Carpenter of DLA Piper in Wilmington and Robert S. Harrell of Mayer Brown in Houston represent the insurers.

(Additional documents available: Opening brief of AIG and Lexington in support of their partial motion to dismiss. Document #13-190703-025B. Conduent's answering brief. Document #13-190703-026B. AIG and Lexington's reply brief. Document #13-190703-027B.)