



**Lowenstein Sandler's Insurance Recovery Podcast:
Don't Take No For An Answer**

**Episode 47
D&O Insurance: Better to Have it And Not
Need it Than Need it And Not Have it**

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Michael Lichtenstein: Hi everyone. It's Michael Lichtenstein welcoming you to another edition of "Don't Take No for an Answer," an Insurance Recovery podcast. Today, I'm here with three of my colleagues, and we're going to talk about the issue of claims under directors and officers insurance policies. Two of my partners are here, Andrew Reidy and Mark Schamel and one of our associates, Chris Schafbuch. Did I get it right?

Chris Schafbuch: Nailed it. Yeah.

Michael Lichtenstein: Nailed it. Awesome. And Chris is here. So these three insurance recovery lawyers are going to take you through this topic. And I'm going to turn the questioning over to my partner, Andrew. So Andrew, welcome.

Andrew Reidy: Thank you, Michael. As we know, the D&O policy is triggered by a claim. You need a claim to access the coverage. So the first question, of course, is what is the claim? Chris, what's a claim?

Chris Schafbuch: Well, Andrew, I'll give you a clue. It tends to be a lot broader than people initially think. Under a standard D&O policy, we often think of claims as covering the fundamental piece of litigation. In one policy, it might be defined as "a written demand against any insured person for monetary or non-monetary relief." And usually, we think of a civil lawsuit, or in the policy that I was recently reviewing and it had a criminal proceeding section, where it specifically referenced an indictment or information, formal documents like this. But the term "claim" is often far broader than that, and can encompass subpoenas, investigative demands, and other less formal demands for, as the policy said, non-monetary relief.

Andrew Reidy: Are there any overlooked areas in the D&O claims arena?

Chris Schafbuch: I think one area that receives a little less attention than it should is investigations by law enforcement, by legislatures, and by even judicial investigations. But I think the key one's by law enforcement. And for example, if you have a search warrant served on your company, that could potentially be a claim under your D&O policy.

Andrew Reidy: Have the courts come to any consensus on whether these types of things are covered?

Chris Schafbuch: Not yet. The law is still developing. There seems to be a spectrum, from the judge's point of view. The turning point appears to be whether the recipient of the demand is in jeopardy of being found of violating some law or statute or something like that. There were two recent cases, one out of the Southern District of New York and one out of the Eastern District of Texas, that reached opposite results about whether a subpoena was a demand for non-monetary relief.

And the analysis generally turned on the court's view of whether the recipient, who received the subpoena, was actually in jeopardy of being prosecuted or found liable. In one case, the subpoena indicated that the recipient was just part of an investigation, that they weren't actually the target. And so in that case, the Court ruled that it was not a demand for monetary relief triggering the policy. In the other case, however, there was also a search warrant, and the Court found that failure to comply could lead to a criminal prosecution, which got the Court to think that this was a claim under the D&O policy.

But to answer your question, there's no clear consensus right now. It seems to be sort of a sliding scale, and you really need to consult with experienced counsel to figure out where you fall on the spectrum.

Andrew Reidy: Let's bring Mark into the conversation. Mark, of course, is in our White Collar group. Mark, what do you see as key considerations for insureds who are brought into government investigations?

Mark Schamel: Well, I mean, the reality is that these investigations are exorbitantly expensive, right? We're talking easily tens, if not hundreds, of thousands, sometimes millions, of dollars. And the difference between coverage and not coverage can often be whether or not you properly identify that there's a claim and make that claim to folks like you and Chris. I mean, if I get somebody who calls me with a subpoena, I'm immediately picking up the phone or even sometimes skipping down the hall to your office, to ask you, "Okay, what do we do here? Is this a claim? Do we have to put the insurance on notice?" And failing to do that could cost you, as I say, hundreds of thousands or millions of dollars in coverage for the life of the litigation that would arise. So my view is always it's better to be overly careful, overly cautious, and go forward, obviously, with somebody like you or Chris with experience, insurance counsel, to make sure that we're not missing that notice requirement.

Andrew Reidy: Mark, can you highlight for us some of the things that would be the first paper that an insured might receive from the government that would put them on notice that they would be involved with an investigation?

Mark Schamel:

So government with the big G, right? Because there's a couple ways, right? There's a state government and all that sort of underlings: county government, city governments, local governments. And then there's the federal government. The federal government comes in, typically, the alphabet soup: FBI, Department of Homeland Security, the Inspector General, the IG of any one of the government agencies. And people don't often realize every government agency has its own IG, right? Department of Agriculture, Department of Labor, Department of Health and Human Services. They all have the ability to go civilly or criminally.

So sometimes, you'll get what we call a CID, civil investigative demand. You might get a subpoena. Chris and I are handling one right now. We've got a call this afternoon and we've done the same thing, which is reached out about whether or not there's insurance that's going to cover everything that's involved in the tens of thousands of dollars, just in the collection costs for the emails that are requested for grand jury subpoena and it doesn't even involve our client's alleged criminal culpability. Our client's just a witness, and they're going to have a claim that they're now going to have to put in to get that covered.

So it can come in the form of a letter, to your question, a civil investigative demand. Sometimes you can come by a visit with a subpoena, with a grand jury subpoena or a search warrant. That's obviously a little bit more intrusive and scary when these agents show up in their jackets that say whatever agency they represent on the back. But you'll know it. You'll know it when you see it. They don't come through in the evening and a handwritten Post-It note. It's something formal.

Sometimes, it can be as simple as finding out that another person in your space, another entity, another agency, another competitor, has received a subpoena for something that you are involved in. You're on one side of a deal and the other side gets a raid, right? You get a raid from a search warrant, and you were involved in a big deal with the other company. I would go to my insurance counsel. I'd call you immediately if I was that client. I'd say, "Andrew, am I covered here? What do I need to do? What do I need to trigger this? Is this a claim? Am I on notice?"

Chris Schafbuch:

Andrew, can you tell us, are there any tips related to providing notice of these types of claims?

Andrew Reidy:

A couple of things. First of all, I think you have to know the definition of "claim" in your policy. Sounds silly, but virtually every major insurer has a different definition of "claim." They're similar, but they're not the same. So know your definition of "claim." Know that failure to give timely notice may result in a forfeiture of coverage. You may have heard about a prejudice standard that applies in the general liability context. It may not apply in the D&O context. So it's very important to give timely notice.

Follow the requirements of the policy also. It sounds silly, but there are oftentimes very particular requirements in the policy of where to address the notice to and perhaps what has to be contained in the notice.

And of course, one of the big things, and Mark alluded to this about kind of the informal understanding you have when you may get drawn into an investigation, it's really important to give notice of circumstances that may give rise to the claim. So D&O policies allow an insured to give notice of circumstances that might give rise to a claim. So what that means, if an event happens or some information comes to your knowledge, you should evaluate whether to give notice under the notice of circumstances provision. That could be very helpful because your next policy may not apply, right? So when you have that opportunity, you have to evaluate whether to give coverage under that provision.

Let's wrap this up with a couple of key concepts from our different perspectives. What steps can a policyholder take to make sure that they are getting broad coverage for a claim? Chris, want to take that one?

Chris Schafbuch: I think one important consideration occurs at the front end when you are purchasing the policy. Given what I said in the beginning about how courts are a little unsettled, they're starting to view whether these demands, the CIDs that Mark mentioned, the subpoenas, a congressional inquiry, they're not really certain yet and they're sort of figuring out where those fall. It's important, I think, on the front end to have experienced coverage counsel to help clients understand those judicial opinions and then purchase policies that cover what they're concerned about.

Andrew Reidy: Mark, what are your thoughts about ways to protect your clients from making sure that they don't make mistakes on access to their coverage?

Mark Schamel: Well, since I don't have a flux capacitor and the ability for time travel, you want to be overly cautious. And I tell people all the time, it's the old adage that my grandfather taught me, it's better to have it and not need it than need it and not have it. And insurance, we all know how much we need it and how important it is and how much we pay for it over the years to make sure that we're covered. The idea that people miss opportunities because they don't know, they don't know their coverages, they don't know what a claim means, and there's sort of, and again, I'll mix my metaphors a little bit, but a little penny wise and pound foolish, right? Don't pick up the phone and call Andrew Reidy over at Lowenstein to find out exactly what this means and sort of unwrap this for yourself and risk missing hundreds of thousands or millions of dollars in coverage for defense that you may need, right? Bet the company litigation, and you're paying for it out of your own pocket.

And I think, candidly, that's sort of prima facie negligence by some sort of leadership or folks that are in the position to make those decisions at companies when they don't take those steps. It's just one of those things where I immediately go to somebody with your expertise. I mean, how many times am I bothering you on a weekly basis for a client? Is this covered? Is this a claim? What should we be doing? What do we have to do to make sure that we have funds available to defend when the time comes?

Michael Lichtenstein: Hey, Andrew. We'll give you the last word on the topic. So what's your last big tip for our listeners?

Andrew Reidy: The last word is "claim" is incredibly broad. So think about an arbitration demand, a tolling agreement demand, a request to mediate. Almost any outside inquiry that could be adverse may be a claim. So be guided by the same thing Mark just said. Be guided by being broad in your understanding and being protective of your asset.

Michael Lichtenstein: Beautiful. So let me thank the three of you for this interesting conversation about claims under D&O policies, and thank our listeners. And look forward to our next podcast. Thanks everyone.

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