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INSURANCE

Will Your Insurance Provide Coverage for Search Warrants or Subpoenas?

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The term "search warrant" often conjures clichéd images of law enforcement officers arriving unannounced at an office or residence in hope of finding incriminating evidence. Search warrants and other governmental investigative tools, however, can differ greatly in scope, are used in a wide variety of contexts, and can impose onerous obligations on the responding party. They can also be very costly if not covered by insurance.

In this article, we examine the diverse sources of subpoena power, suggest the best ways to respond to different types of subpoenas and provide six tips for ensuring that responding to government investigatory requests is covered by insurance.

See "Five Questions to Ask to Maximize D&O Insurance Coverage of FCPA Claims" (Jun. 21, 2017).

Nearly Limitless Subpoena Power

The scope of subpoenas is extremely broad. They can issue from any of the three branches of government and may target practically any person or business.

Congress

Congress has incredibly broad oversight and investigatory power that includes the ability to subpoena the attendance and testimony of witnesses at public hearings and the production of documents.[1] The Supreme Court has held that "the scope of the power of [congressional] inquiry, in short, is as penetrating and far-reaching as the potential power to enact and appropriate under the Constitution." The precise scope of any particular congressional subpoena will vary depending on which chamber, committee, or commission issued it.

Congress might exercise its subpoena power in either a focused and highly structured context, like its year-long investigation of the causes of the 2008 financial crisis; or pursuant to sweeping but brief *ad hoc* inquiries into issues of national interest, like the Senate hearings on allegations that Facebook, Google, and Twitter were censoring certain political views.

See our three-part series introducing FARA: "Definitions, Exemptions and Increased Risk" (Mar. 3, 2021); "The New Environment" (Mar. 17, 2021); and "Enforcement and Compliance" (Apr. 14, 2021).

Judiciary

As the D.C. Circuit Court stated in *Houston Business Journal, Inc. v. Office of Comptroller of Currency, U.S. Dep't of Treasury*, federal courts, unlike Congress, "are not free-standing investigative bodies whose coercive power may be brought to bear at will in demanding documents from others." Article III of the Constitution limits the federal courts' subpoena power to cases where the court has subject-matter jurisdiction over the underlying action, or in certain circumstances where the subpoena is necessary for the court to determine its own jurisdiction.

That said, the federal rules of civil and criminal procedure grant civil litigants, criminal defendants, and federal prosecutors substantial leeway to compel third parties to produce documents or attend and testify at a deposition or hearing.[2] These judicial subpoenas to non-parties can arise in practically any context, including fraud cases where key documents are held by a third-party, such as a bank, accounting firm, or construction company; a criminal investigation where the government seeks records of the defendant's telephone or internet history; or a personal injury claim where the parties require municipal traffic camera footage of an intersection.

Grand Juries

A federal grand jury can subpoena documents and witnesses relevant to determining whether there is probable cause to support a criminal indictment.

The grand jury subpoena power is extraordinarily broad and virtually unrestrained. For instance, as stated in *United States v. R. Enterprises, Inc.*, 498 U.S. 292, 300 (1991), grand jury subpoenas are presumed legitimate "absent a strong showing to the contrary," and, where a grand jury subpoena is challenged on relevancy grounds, "the motion to quash must be denied unless the district court determines that there is *no reasonable possibility* that the category of materials the Government seeks will produce information relevant to the general subject of the grand jury's investigation." (emphasis added.)

And, as a practical matter, a grand jury almost always returns an indictment presented to it by the prosecutor. Federal prosecutors frequently have the opportunity to abuse these investigative tools, without proper judicial oversight, to reach practically any entity and embroil it in costly and complex investigations.

Law Enforcement and Agencies

Law enforcement officers can obtain a warrant authorizing the search and seizure of certain persons or property.

Many federal agencies likewise have substantial authority to investigate possible violations of law and to compel testimony or the production of documents in pursuit of those investigations and enforcement actions.

And many agencies, like the Drug Enforcement Administration, Environmental Protection Agency, and various agencies within the Department of Homeland Security, among others, have the power to issue administrative subpoenas and "civil investigative demands" in furtherance of their respective functions.[3] Given the large number of federal agencies that have such power, these subpoenas naturally reach a wide variety of industries, sectors, and legal issues.

State legislatures, courts, and agencies possess similar investigative tools. For practically every federal mechanism for compelling the production of documents and testimony there are state law analogs. There are a near-limitless number of contexts in which a person may be subject to a subpoena, search warrant, or other compulsory investigative tool.

See "A Rare Jury Conviction for a Bribe-Taker Proves the Worth of FBI Foreign Corruption Units" (May 24, 2017).

Responding to Subpoenas

Because the proceedings and investigations from which subpoenas issue operate with varying degrees of formality, it is crucial to have counsel that understands not only the applicable law but also when and to what extent the recipient's obligations are negotiable.

There are many contexts in which an individual or company can be compelled to produce documents and testimony, and each presents unique legal, practical and business-related challenges that require seasoned counsel to successfully overcome. Effectively responding requires significant time to analyze the document request, review client records and data, coordinate with company officers and employees (and occasionally government agents), and prepare the client for in-person testimony.

Grand Jury Subpoena Responses

Upon receiving a grand jury subpoena, for instance, counsel will often want to contact the Assistant U.S. Attorney (AUSA) responsible for managing the grand jury to determine the nature of the investigation and whether the DOJ considers the recipient a witness, subject or target.

Experienced counsel will be able to determine from this initial contact whether the client can safely cooperate or whether a more adversarial posture is prudent. Counsel may also need to investigate to assess potential risks facing the client in what is typically an opaque and fluid process. The subpoena itself must be analyzed to determine the scope of documents or testimony sought.

Depending on the scope of documents requested, counsel may need to work with the client (and perhaps negotiate with the lead AUSA) to create strategic search terms that minimize the client's administrative burden and exposure to risk.

Even though a subpoena might request oral testimony, counsel may be able to negotiate holding a proffer (an interview with the AUSA and, often, law enforcement agents) in hope of obviating the need for formal testimony. Yet even proffer sessions, despite their informal nature, require substantial time and preparation. Counsel usually must negotiate a written proffer agreement that limits the government's use of information obtained during the interview; prepare the client for the interview, including reviewing documents and discussing potential lines of questioning; and ultimately attend the interview with client.

Search Warrant Responses

The process of responding to a search warrant stands in stark contrast to that of grand jury subpoenas. When law enforcement agents execute a search warrant, the target has

relatively little control over the scope of documents sought and manner of collection. Even so, sophisticated counsel can provide invaluable guidance during the first minutes, hours, and days of a search and seizure.

Counsel should monitor and make a record of the search, including keeping track of where the agents search, what they seize, and whom they interview or ask to speak with. Counsel should also act quickly to identify and segregate any privileged files, and to make copies of all essential business records and electronically stored information.

Following a search, counsel typically will issue a letter advising the company to retain all documents and suspend automatic destruction mechanisms so to avoid allegations of spoliation or obstruction of justice. Often counsel will also need to investigate further, such as interviewing employees who spoke with the government agents. Depending on the circumstances, a full-scale internal investigation may be necessary.

See the ACR's Guide to Mastering Internal Investigation Interviews: "Logistics" (Feb. 5, 2020); "Warming Up" (Sep. 30, 2020); and "Getting to the Truth and Adapting to the Pandemic" (Oct. 14, 2020).

Congressional Subpoena Responses

Navigating a congressional investigation presents its own unique challenges and opportunities. A congressional document demand typically begins with private correspondence and requests for voluntary cooperation. This correspondence may include requests for private, informal interviews; the production of documents; or written answers to interrogatories.

Normally, counsel should cooperate with the committee staff at this early juncture and thereby retain some control over the scope and tone of the investigation. The Federal Rules of Evidence do not apply to congressional hearings, only constitutional and common-law privileges may be asserted, and the law is not settled on their availability in every context. This legal uncertainty is further reason to cooperate early in an investigation. Typically, when a target asserts a privilege, the committee will decide on a case-by-case basis if that privilege applies. The target has an opportunity to negotiate the scope of documents withheld and/or lines of questioning prohibited under the privilege. Refusing to comply is rarely an option.

Getting It Covered

Whether the subpoena recipient is a company or an individual, the cost of responding to, or defending against, document requests and search warrants in support of criminal investigations can be significant. Fortunately, insurance policies can be a source for recovering fees in responding to search warrants and subpoenas. Here are six tips to help increase the likelihood that insurance will pick up the tab.

1) Ensure Coverage for Non-Monetary Relief

It is important to get the best language in your policies at renewal. The most favorable definition of claim includes coverage for a "demand for non-monetary relief." This language is in many policies and should be a minimum requirement.

2) Review the Coverage and Give Notice

Upon receipt of a search warrant or subpoena, the Insured should review the potentially applicable coverages and give prompt notice to any potentially applicable insurer of a subpoena or search warrant. The notice should seek the full benefits of the coverage. The case law relating to coverage for fees relating to a warrant or subpoena is mixed but driven in good measure by the specific policy language and the specific facts presented.

Most insurance companies will not agree to pay for defense costs incurred prior to notice. This underscores the importance of giving notice as soon as the Insured becomes aware of the subpoena or search warrant. Everyone should be aware subpoenas and warrants may result in significant fees and coverage should be reviewed and noted early.

The best place to start a search for applicable insurance is to examine your Directors and Officers (D&O) or Errors and Omissions (E&O) policies. These policies may cover both the corporate entity and individuals. The policies typically cover broadly defined "Wrongful Acts" and are triggered once a "Claim" is made. The key to insurance coverage often is whether there is a "Claim."

3) Review What a "Claim" Is

The definition of "Claim" varies and the precise definition used often determines coverage.[4]

The definition of Claim is often a multi-part definition. The language that most frequently has been favored to cover subpoenas and warrants is "a written demand for monetary or non-monetary relief" or "any proceeding brought or initiated by a federal, state of local governmental agency."[5]

Courts have reached opposite conclusions about whether an investigative subpoena or search warrant constitutes "written demand for monetary or non-monetary relief." The contrast of *Diamond Glass Cos., Inc. v. Twin City Fire Ins. Co.*, 2008 WL 4613170 (S.D.N.Y. Aug. 18, 2008) with *Agilis Benefit Services, LLC v. Travelers Cas. & Sur. Co. of Am.*, 2010 WL 8573372 (E.D. Tex. Apr. 30, 2010) is an example.

For some courts, such as in *Ace Am. Ins. Co. v. Ascend One Corp.*, 570 F. Supp. 2d 789 (D. Md. 2008), it has been important to determine if the Insured is a target or potential target.

The highest likelihood for coverage is where subpoenas and investigative demands are issued by governmental investigative agencies related to an investigation of the Insured.

4) Pay Attention to State Law

All insurance law is state law. It is imperative that an insured analyze coverage under the potentially applicable laws and, in the event of a subpoena, make a forum selection mindful of the importance of which law will be applied to the insurance contract.

5) Benchmark the Insurer's Language

Often, it is helpful to demonstrate the scope of language in an insurance policy by examining the language an insurer had available but chose not to use. The best evidence is an insurer's own forms, but the same point could be made through demonstration of what language was being used in the market.

6) Don't Be Dissuaded by a "No"

Most claims representatives do not have extensive experience with respect to evaluating coverage for search warrants or subpoenas. An insurer's claim representative's denial should be reviewed carefully. Too many insureds will simply accept a denial without an analysis.

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[1] *See, e.g.*, House Rule XI, clause 2(m)(1) and (3); Senate Rule XXVI, para. 1.

[2] *See* Fed. R. Civ. P. 45; Fed. Rs. Crim. P. 17, 41.

[3] *See* 18 U.S.C. §§ 1968, 3486; 21 U.S.C. § 876; 22 U.S.C. § 4833.

[4] *See, e.g.*, BioChemics, Inc. v. AXIS Reinsurance Cov., 924 F.3d 633, 640-41 (1st Cir. 2019) (holding that, under the specific terms of the policy, a subpoena served by the Securities and Exchange Commission during the policy period was not a "Claim" in its own right, but rather a component of a "Claim" that had been made before the policy period).

[5] Onvoy, Inc. v. Carolina Cas. Ins. Co., 2006 WL 1966757 (D. Minn. July 11, 2006) (grand jury subpoena).Even so, sophisticated counsel can provide invaluable guidance during the first minutes, hours, and days of a search and seizure.