



Are We Covered For This?

John Mitchell
Thompson Hine (Cleveland, OH)

john.mitchell@thompsonhine.com | 216.566.5847
<http://www.thompsonhine.com/professionals/Mitchell-John>



Critical Policy Definitions



Claim

- A formal government lawsuit or administrative action typically constitutes a “claim” that should give rise to potential insurance coverage. However, as with informal and formal investigations, the policy may define the term “claim” to cover only civil claims, excluding criminal actions.

Claim—Broad Definition

- “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” that “in whole or in part, is based upon, arises from or is in consequence of the purchase or sale of, or over to purchase or sell any securities issued by [insured].”

Claim—Narrow Definition

- A written demand for monetary, non-monetary or injunctive relief;
- A civil, criminal, administrative, regulatory or arbitration proceeding for monetary, non-monetary or injunctive relief which is commenced by: (1) service of a complaint or similar pleading; (2) return of an indictment, information or similar document (in the case of a criminal proceeding), or (3) receipt or filing of a notice of charges; or
- A civil, criminal, administrative or regulatory investigation of an Insured Person:
 - Once such Insured Person is identified in writing by such investigating authority as a person against whom a proceeding described in Definition (b)(2) may be commenced; or
- In the case of an investigation by the SEC or a similar state or foreign government authority, after the service of a subpoena upon such Insured Person.
- The term “Claim” shall include any Securities Claim...

Critical Policy Definitions

- “Investigation”
 - Broad—Any internal investigation based upon a governmental inquiry
 - Narrow—Only if presided over by panel counsel

Investigation-Broad Definition

- Investigation means any investigation by any Enforcement Authority after any of the following has occurred:
- the Issuer has retained a Panel Law Firm to represent it in response to a formal or informal ...communication from such Enforcement ...concerning a Securities Violation; or
- The Issuer has, after retaining a Panel Law Firm to represent it in connection with a Securities Violation, self-reported the Securities Violation to such Enforcement Authority.
- An Investigation shall be deemed to have commenced after the earlier to occur of (a) or (b) above. An Investigation shall cease to be an Investigation after, among other events, any Enforcement Authority brings a civil, criminal, administrative, regulatory or arbitration proceeding against the Issuer, unless any such proceeding is brought as a procedural element of a previously negotiated settlement between the Issuer and the Enforcement Authority and the settlement results in no further action by the Enforcement Authority.

Investigation—Narrow Definition

- Once the Insured Person is identified in writing by an Enforcement Body as a target of an investigation that may lead to a criminal, civil, administrative, regulatory or other enforcement proceeding;
- In the case of an investigation by the SEC or any state, local or foreign body with similar regulation or enforcement authority, after the service of a subpoena (or in a Foreign Jurisdiction, the equivalent legal process) upon the Insured Person; or
- Commenced by the arrest and detainment or incarceration for more than 24 hours of an Insured Person by any law enforcement authority in a Foreign Jurisdiction

Critical Policy Definitions

- “Loss”
 - Broad—All costs incurred, including penalties and attorneys’ fees
 - Narrow—Limited to specific categories of loss

Loss-Broad Definition

- Means damages, settlements, judgments (including pre/post-judgment interest on a covered judgment), Defense Costs, Crisis Loss, Derivative Investigation Costs, Liberty Protection Costs and Pre-Claim Inquiry Costs; however, "Loss" (other than Defense Costs) shall not include: (1) civil or criminal fines or penalties; (2) taxes; (3) punitive or exemplary damages; (4) the multiplied portion of multiplied damages; (5) cleanup costs relating to hazardous materials, pollution or product defects; (6) any amounts for which an Insured is not financially liable or which are without legal recourse to an Insured; and (7) matters which may be deemed uninsurable under the law pursuant to which this policy shall be construed. Notwithstanding the foregoing subparagraph (7), the Insurer shall not assert that, in a Securities Claim alleging violations of Section 11, 12 or 15 of the Securities Act of 1933, as amended, the portion of any amounts incurred by Insureds which is attributable to such violations constitutes uninsurable loss, and, unless precluded from doing so in a court order, shall treat that portion of all such settlements, judgments and Defense Costs as constituting Loss under this policy.
- Notwithstanding the foregoing paragraph, Loss shall specifically include (subject to this policy's other terms, conditions and limitations, including but not limited to the Conduct Exclusion): (1) civil penalties assessed against any Insured Person pursuant to Section 2(g)(2)(B) of the Foreign Corrupt Practices Act, 15 U.S.C. § 78dd-2(g)(2)(B); and (2) solely with respect to Claims other than Employment Practices Claims, punitive, exemplary and multiplied damages. Enforceability of this paragraph shall be governed by such applicable law that most favors coverage for such penalties and punitive, exemplary and multiple damages.

Loss-Narrow

- Loss means any amount which the Insured is legally obligated to pay for any Claim first made against the Insured during the Policy Period or the Extended Reporting Period, if any, for a Wrongful Act, and includes compensatory monetary damages, judgments, pre and post judgment interest, settlements, and Claim Expenses.
- Loss shall not include: 1. Punitive or exemplary damages or the multiplied portion of any damage award; 2. Civil or criminal fines or penalties; 3. Taxes; 4. Any liability or costs, other than Claim Expenses, incurred by the Insured arising out of a request, order, judgment, or settlement agreement involving non-monetary relief; 5. Any matter deemed uninsurable under the law pursuant to which this Policy shall be construed; or 6. Any amount incurred by the Insured Organization (including its board of directors, board of managers, or any committee thereof) in connection with the investigation or evaluation of any Claim or potential Claim by or on behalf of the Insured Organization, except, solely with respect to the Investigative Costs.

Representative Cases Allowing Coverage



Representative Cases Allowing Coverage

- *Agilis Benefit Servs., LLC v. Travelers Cas. and Sur. Co. of America*, 2010 U.S. Dist. LEXIS 144499, No. 5:08CV213 (E.D. Tex. 2010).
 - D&O Policy; covered Agilis and its officers
 - IRS issued search warrants/subpoenas to investigate potential tax-evasion schemes
 - Subpart (1)—a “claim” as a “written demand for monetary or non-monetary relief”
 - Subpart (3)—a “claim” is a “criminal proceeding commenced by return of an indictment”

Representative Cases Allowing Coverage

- *Agilis Benefit Servs., LLC v. Travelers Cas. and Sur. Co. of America*, cont'd
 - Agilis's position: warrants/subpoenas = "written demand"; therefore there is coverage
 - Travelers' position: this was "criminal"; there was no "indictment" therefore, no coverage

Representative Cases Allowing Coverage

- *Agilis Benefit Servs., LLC v. Travelers Cas. and Sur. Co. of America*, cont'd
 - Court adopts Agilis's position; Why?
 - In similar cases, a warrant/subpoena was sufficient to constitute a "claim" under Subpart (1);
 - If there are two plausible interpretations, err on the side of coverage
 - Ambiguity cuts against the insurer
 - A subpoena/warrant can be a "demand for relief," as relief is very broad
 - The court found the "professional services" exclusion to be inapplicable; finding this exclusion only covered professional negligence claims, not the matter at issue in this case

Representative Cases Allowing Coverage

- *Richardson Elecs., Ltd. v. Fed. Ins. Co.*, 120 F. Supp. 2d 698 (N.D. Ill. 2000).
 - Executive risk insurance policy; DOJ served Civil Investigative Demand on Richardson’s executives related to criminal-antitrust allegations
 - The policy did not have a definition of “claim,” Illinois law defines it as “a demand for something due or believed to be due”;
 - Insurer refused to cover defense costs for the investigation because there was no “claim”—because a claim must involve a demand for money
 - The Court disagreed, finding that if documents or information are “due,” there is a “claim.”

Representative Cases Allowing Coverage

- *Fed. Ins. Co. v. Koslowski*, 792 N.Y.S. 397 (N.Y. App. Div. 2005).
 - “Executive Protection” policy; DOJ sued Tyco’s CEO (Koslowski) for mismanagement of assets;
 - Policy included an exclusion if the covered executive secured a personal profit
 - Insurer sought to avoid coverage based upon Koslowski’s alleged personal profits
 - The Court held that the insurer had a duty to defend; however, it could recoup from Koslowski expenses incurred defending claims that Koslowski secured a personal profit.

Representative Cases Denying Coverage

- *Diamond Glass Cos., Inc. v. Twin City Fire Ins. Co.*, 2008 U.S. Dist. LEXIS 86752, No. 06-CV-13105 (S.D.N.Y. 2008).
 - Diamond sought coverage related to an ongoing grand jury investigation and series of subpoenas
 - The Policy provided that a “claim” arising from a criminal proceeding required an “indictment, filing of notice of charge, or similar document.”
 - Because Diamond had not received a required document, the Court found the absence of a claim under the policy definition.

Representative Cases Denying Coverage

- *Diamond Glass Cos., Inc. v. Twin City Fire Ins. Co.*, cont’d
 - Diamond next argued that, even if not covered under the “criminal” provision, it was covered under a civil provision covering “non-monetary relief,” but the court found that subpoenas/grand jury testimony did not qualify as seeking “relief”
 - Diamond finally failed to qualify as a “target” because none of its executives received notice that they were the “target” of any investigation;

Representative Cases Denying Coverage

- *Great American Ins. Co. v. Chang*, 2013 U.S. Dist. LEXIS 86413, No. 12-00833-SC (N.D. Cal. 2013).
 - Mr. Chang owned a drycleaning business on property that later became part of a government investigation
 - After the investigation, the government ordered some costly pollution cleanup
 - The Changs argued that the insurer should be forced to pay the cleanup-related costs.
 - The Court disagreed, finding that this investigation was not a “suit,” as required by the policy, and therefore refused to order coverage.

Representative Cases Denying Coverage

- *Ctr. for Blood Research, Inc. v. Coregis Ins. Co.*, 305 F.3d 38 (1st Cir. 2002).
 - The government was investigating potential healthcare offenses and issued a subpoena to the Center for Blood Research;
 - To qualify for coverage, an investigation had to have the potential for an adjudication against the Center for Blood Research
 - No adjudication could have resulted from the investigation, which just sought information; as such, the Court denied coverage.

Representative Cases Denying Coverage

- *Silver v. Am. Safety Indem. Co.*, No. 13-611 (EGS), 2014 U.S. Dist. LEXIS 39828 (D.D.C. 2014)
 - Policy contained an “administrative and criminal legal defense expense coverage.”
 - Plaintiff, who sought coverage when he was investigated by the government, was no longer an “Insured Member,” and was denied coverage.
 - Insurer moved for judgment on the pleadings, arguing that the terms of the contract were unambiguous and, as applied to the facts, did not warrant coverage. The court agreed.

Best Practices—Insurance Coverage for Governmental Investigations

1. Tailoring Policies to Fit Unique Needs
2. Annual Review of Policies
3. Early Analysis of Insurance Options
4. Communication with Insurer
5. Account for All Potential Policies

Faculty Biography: John Mitchell

Partner | Thompson Hine | Cleveland, OH

216.566.5847 | john.mitchell@thompsonhine.com
<http://www.thompsonhine.com/professionals/Mitchell-John>

John is a partner in the firm's Product Liability Litigation, White-Collar Crime and Business Litigation practice groups. As an experienced first-chair trial lawyer, he has defended companies and individuals in criminal, administrative and civil trials in state and federal courts throughout the United States. John has tried approximately 50 jury trials and dozens of bench trials in his career.

Because of his trial abilities, firm clients have retained John to handle a wide variety of civil matters, including those involving product liability matters, real estate and construction litigation, workplace intentional tort matters, intellectual property disputes, breach of contract actions and other civil actions. He has served as first-chair trial counsel in industry-wide chemical and toxic tort litigation involving maritime asbestos, vinyl chloride, welding rod, lead paint, and other chemicals and products.

John also has extensive first-chair trial experience defending individuals facing significant criminal exposure from alleged violations of federal and state law. His criminal practice consists of traditional white-collar criminal matters, internal corporate investigations, environmental crimes, grand jury investigations and related administrative proceedings. With a comprehensive understanding of federal and state criminal laws, he also counsels public and privately held corporations and individuals facing unwelcome governmental scrutiny. Many of his greatest successes are also the least publicized, especially those that resolved highly sensitive matters without criminal charges or adverse publicity.

Prior to joining Thompson Hine, John served as an assistant prosecuting attorney for Cuyahoga County, Ohio in the elite Major Trials Unit, first-chairing homicide, rape and public corruption cases. He also directed complex grand jury investigations of large institutions and individuals allegedly involved in criminal activity. Additionally, John's experience and track record led to his appointment as a special prosecutor in multiple high-profile homicide, public corruption and organized-crime cases.

John has extensive appellate experience, having successfully argued more than 30 appeals in the Sixth, Eighth and Ninth District Appellate Courts of Ohio.

Practice Areas

- Product Liability Litigation
- White Collar Criminal Practice, Internal Investigations & Government Enforcement
- Business Litigation
- Securities & Shareholder Litigation

Education

- Capital University Law School, J.D., 1996, Capital University Law Review
- The Ohio State University, B.A., 1992