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A Polite Request Is Still a Demand in The 2nd Circuit

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Applying New York law, the United States Court of Appeals for the Second Circuit recently affirmed a ruling that a letter asserting that a state government "may" bring an enforcement action against the insured if the insured did not "voluntarily" comply with a particular request, is a "demand" within the meaning of an insurance policy. *Weaver v. Axis Surplus Ins. Co.*, No. 14-4180-cv (2d Cir. Mar. 7, 2016). *Weaver* demonstrates that written requests lacking certain details or couched in somewhat polite language may qualify as written demands constituting "claims" under claims-made insurance policies, although outcomes could differ because a careful examination of policy language is required in each and every case.

In the action underlying *Weaver*, an executive at an insured vending machine sales company was indicted in Florida federal court for conspiracy and fraud. According to the indictment, the executive made fraudulent statements regarding the company. The executive sought coverage for the criminal proceeding under a claims-made D&O policy that incepted in 2010.

The insurer denied coverage on multiple grounds, including pursuant to the policy's prior and pending litigation exclusion, which precluded coverage for any claim involving "any demand, suit or other proceeding pending" against an insured brought prior to February 20, 2008, "or any Wrongful Act, fact, circumstance or situation underlying or alleged therein." The insurer asserted that the criminal proceeding involved a demand that was made in a 2007 letter sent from the Maryland attorney general to the insured entity. In the 2007 letter, the Maryland attorney general asserted that the insured made false earning representations to customers and failed to provide

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investor disclosures as required by Maryland law, and the attorney general stated that an enforcement action "may" result if the entity did not cease its activities.

In the coverage litigation that followed, the district court ruled in favor of the insurer, and the insured appealed. On appeal, the policyholder conceded that the 2007 letter asserted a fact, circumstance or situation also alleged in the indictment, but argued that the 2007 letter was not a "demand" sufficient to trigger the prior and pending litigation exclusion. The Second Circuit disagreed and affirmed the district court's holding that the prior litigation exclusion barred coverage for the criminal indictment. According to the court, "a demand requires an imperative solicitation for that which is legally owed." The 2007 letter requested that the insured entity "voluntarily" provide certain documents and cease and desist from vending machine sales in Maryland. The letter explained that the attorney general was acting pursuant to his "authority to investigate and take action against any person who violates" a consumer protection law, and stated that the failure of the insured entity to respond "may result in more formal legal action." Because the court concluded that the letter underscored the authority of the attorney general to seek specific forms of monetary and nonmonetary relief, and stated that "more formal legal action" was a possibility in the event that the insured entity did not respond, the letter constituted a "demand."

Most professional liability policies today are written on a claims-made basis, meaning that an insurance policy provides specified coverage for "claims" during a given policy period. Given that most such policies define the term "claim" to include certain written "demands," the *Weaver* decision is potentially relevant to illustrate what does or does not constitute a "claim" under those policies. In *Weaver*, the 2007 letter at issue used what may at first glance appear to be softer language than one might expect to see in a demand letter: it asked the insured to "voluntarily" comply with a request, and it only specified that consequences "may" result if the insured did not do so. However, as various courts have held both inside and outside the insurance context, a writing phrased as a softer "request" nevertheless may constitute a "demand" where it is a request to do a particular thing under a claim of right. For instance, in *Gershman v. Barted Realty Corp.*, 22 Misc. 2d 461, 462, 198 N.Y.S.2d 664 (Sup. Ct. 1960), a party to a contract had the right to obtain receipts of a homeowner's applicable taxes upon "demand." The party sent a letter quoted the relevant contractual provision, asking the homeowner to "please deliver to me all receipts of all [such taxes]." The homeowner argued that the politely worded letter could not constitute a demand. The *Gershman* court disagreed, holding that a demand may well "be couched in the customarily-used polite language of the day."

Next, in *Tennessee Life Ins. Co. v. Nelson*, 459 S.W.2d 450, 453-54 (Tex. Civ. App. 1970), an attorney for a plaintiff wrote a polite letter to a defendant in a case, stating that he was "interested in determining whether or not there are any possibilities of settlement," and that he would "appreciate" and "would like" to hear back from the defendant's counsel. If he did not, the plaintiff's attorney stated, he "might inform [his] client and take whatever other steps are necessary to prepare this case for future disposition." The *Nelson* court held that although the letter was polite and not "firm and commanding," it was nonetheless a "demand" because it asserted a request under a claim of right.

Finally, in *FINRA v. Axis Insurance Co.*, 951 F. Supp. 2d 826 (D. Md. June 12, 2013), an attorney for an employee of the Financial Industry Regulatory Authority (FINRA) orally discussed a possible resolution of an age discrimination employment dispute with FINRA over the phone. After the phone call, the employee's lawyer sent an email to FINRA's attorney stating that, "just so we are clear, I did not ask for five years of 'severance pay' ... I added that Mr. Reich would settle [his] claim for a sum equal to five years' pay." In ensuing coverage litigation, the policyholder contended that the email was an informal email recounting a conversation, made no threat of legal action, set no deadline, and therefore could not be a demand. The court strongly disagreed, noting that "[i]t is of no moment that the email clarifies a prior oral demand, as it still states the demand, and it manifests the demand in written format." The *FINRA* court's view was that a "reasonably prudent person" could not conclude that the email at issue was anything other than a demand, because it "stated an amount for which an individual would settle" an asserted claim.

While the *Weaver* case illustrates an interpretation of the term "demand," claims-made insurance policies often use additional policy language to qualify the type of demand that constitutes a "claim." For instance, policies require the demand to be in writing, and often require that a written demand be "for relief" or "for monetary or nonmonetary relief." *Employers' Fire Ins. Co. v. ProMedica Health Sys., Inc.*, 524 F. App'x 241, 243 (6th Cir. 2013) demonstrates another frequent requirement. In the policy at issue in *ProMedica*, a "claim" was defined to include "a written demand for monetary, non-monetary or injunctive relief ... against an Insured for a Wrongful Act." "Wrongful Act" was a defined term in the policy at issue, which included "any actual or alleged violation" of specified antitrust laws. In *ProMedica*, the court held that a civil investigative demand issued by the Federal Trade Commission was not a "claim" in part because no "Wrongful Act" was alleged in the civil investigative demand. In contrast, the *Weaver* trial court rejected *ProMedica* in part because the language in the *Weaver* policy at issue did not require a demand to be for a specified "Wrongful Act." Thus, while correspondence that uses polite language, is couched as a mere "request," or is otherwise lacking certain formalities may constitute a "demand" as that term is used in insurance policies, policyholders and insurers should carefully examine additional policy language before concluding that every "demand" constitutes a "claim."