Client Alert

January 2014

Insurer Must Pay for Policyholder's Cost to Comply With Subpoenas Issued as Part of Criminal Investigation

A New York appellate court affirmed in *Syracuse Univ. v. National Union Fire Ins. Co.*, CA 13-01056, (N.Y. Sup. Ct. App. Div. Dec. 27, 2013), that an insurer must pay the costs incurred by its policyholder to comply with subpoenas issued to the policyholder as part of a criminal investigation, even where formal charges are not filed.

FACTUAL BACKGROUND

In 2011, Syracuse University (the "University") learned from news reports that Associate Basketball Coach Bernie Fine had, in his capacity as coach and over a period of years, allegedly sexually abused minor boys who were involved as "ball boys" in the University's basketball program. Following the news reports, the University was served with six grand jury subpoenas duces tecum, seeking documents relating to Coach Fine. The University was subsequently sued in a civil suit for damages.

The University was insured under a not-for-profit individual and organization insurance policy issued by National Union Fire Insurance Company of Pittsburgh, PA ("National Union"). The University tendered the subpoenas and the civil complaint to National Union for a defense and indemnity. National Union responded by advising that the cost of responding to the subpoenas would not be covered under the policy. The University filed suit against National Union, asserting breach of contract and seeking a declaration that the cost of investigating and responding to the subpoenas was covered. The parties cross-moved for summary judgment and judgment was entered in favor of the University. When National Union appealed, the intermediate appellate court affirmed the opinion "unanimously … for reasons stated in the decision [sic] of Supreme Court."

BASIS FOR THE TRIAL COURT'S DECISION

The trial court found that coverage extended to the University for "loss arising from a claim" involving "any actual or alleged wrongful act of the organization." Central to the court's inquiry, therefore, was whether the grand jury investigations and subpoenas amounted to a "claim."

The court concluded that for multiple reasons, the investigations and subpoenas constituted "claims" as that term was defined in the policy. First, the policy defined a claim as a "written demand for non-monetary relief." The court observed that the investigations and subpoenas required "production of documents or testimony" and, therefore, plainly constituted "demand[s] for non-monetary relief." Furthermore, the court found that the investigation and subpoenas were claims seeking "relief," since the term "relief" (not defined in the policy) is defined in ordinary usage to include, among other things, means of "redress" or "remedy." According to the court, because the district attorneys who issued the subpoenas had means of "redress" or "remedies" through the production of documents or, in the event of noncompliance, the imposition of penalties, their demands for compliance amounted to a demand for non-monetary relief under the policy.

Second, the policy defined "claim" to mean "criminal proceedings for monetary or non-monetary relief which are commenced by … (ii) return of an indictment, information or similar document (in the case of a

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criminal proceeding)." The court found the investigations to meet this definition insofar as they amounted to "criminal proceedings for … non-monetary relief." For that reason as well, the court concluded that the policyholder had tendered a "claim" for coverage.

In addition to the plain language of the policy, the trial court found support in the Second Circuit's recent opinion in *MBIA Inc. v. Federal Ins. Co.*, 652 F.3d 152 (2d Cir. 2011). There, the Court of Appeals for the Second Circuit found that a subpoena issued by the New York Attorney General constituted a "claim" (rather than a "mere discovery device" as urged by the insurer) under a policy that defined "claim" in a manner similar to the National Union policy.

Finally, the court rejected National Union's argument that the policyholder should have to "prove that it was a named target of an investigation." To the contrary, it is axiomatic in the context of liability insurance coverage that the duty to defend is broader than the duty to indemnify. In other words, even if the insurer is not ultimately liable to indemnify the policyholder, it nevertheless owes the policyholder a duty to defend as long as there is a "potential" for coverage based on the facts or allegations underlying the claim(s) against the policyholder. Thus, where the University's liability was predicated on Coach Fine's liability, the allegations against Coach Fine potentially implicated the University's liability (civil and criminal — depending on what the investigations uncovered).

Likewise, although the subpoenas did not themselves allege "wrongful acts," coverage was triggered because the subpoenas sought information concerning Coach Fine's actions *and* the University's communications and responses regarding those actions — in other words, the subpoenas sought "facts of a wrongful act" with regard to the University (even if not primarily).

IMPLICATIONS

The *Syracuse University* decision solidifies the notion that subpoenas in criminal investigations — even if not directed at the policyholder — amount to "claims" for purposes of triggering coverage under liability insurance policies. The decision also underscores the breadth of the duty to defend where allegations even potentially implicate the liability of the policyholder.

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