

Byline

June 5, 2015

Cos. In FIFA-Related Investigations Should Check Insurance

by Walter J. Andrews, Sergio F. Oehninger and Patrick M. McDermott

Published in Law360



Bribes of \$40,000 stuffed in envelopes, a flight to Europe solely to retrieve a briefcase full of cash, and a \$10 million payoff to secure votes for choosing the World Cup host country are among the allegations in the recent indictment against FIFA representatives and related business associates. The indictment contains charges of racketeering, wire fraud and money laundering arising out of alleged kickbacks and bribes that the defendants gave or received. The charging document includes allegations about the involvement, whether knowingly or unknowingly, of a variety of businesses, including athletic clothing companies, sports-marketing companies, banks and other financial companies. Likewise, a variety of corporate sponsors that collectively pay tens of millions of dollars to FIFA have issued statements regarding the allegations in the charges. Some of these companies are sure to be, if they have not already been, subject to informal and formal investigations and inquiries related to the indictment.

In fact, Reuters reported that the U.S. attorney for the Eastern District of New York said that “part of our investigation will look at the conduct of the financial institutions to see whether they were cognizant of the fact they were helping launder these bribe payments.”¹ And, according to a Wall Street Journal report, Nike Inc. stated that it had been “cooperating, and will continue to cooperate, with the authorities.”² Undoubtedly, these companies will incur costs in responding to the government’s informal and formal inquiries.

Costs for responding to governmental inquiries can be substantial. The response and related internal investigation can involve collecting, reviewing and providing large amounts of documents. It can involve gathering necessary facts from employees and third parties. And it can involve legal fees incurred in those endeavors. For example, one company incurred \$273 million in 2013 and 2014 in costs in connection with “inquiries and investigations,” including with respect to U.S. Department of Justice and U.S. Securities and Exchange Commission investigations into potential Foreign Corrupt Practices Act violations.³

Given the potentially staggering costs associated with such investigations, businesses should carefully examine their insurance policies to identify potentially applicable coverage, including coverage under directors and officers policies, fiduciary liability policies and similar coverages. Even if costs associated with a particular government investigation were not specifically contemplated by a company when purchasing insurance, coverage may nevertheless be available.

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For instance, in 2011 and 2012, Syracuse University received six state and federal subpoenas in connection with investigations into allegations of misconduct by a Syracuse assistant basketball coach. Syracuse successfully obtained insurance coverage for the costs for responding to those subpoenas.⁴ The disputed issue between Syracuse and its insurance company, National Union, was whether the subpoenas constituted a “claim” within the relevant policy. The policy defined “claim” as, among other things, “a written demand for monetary, non-monetary, or injunctive relief.” The court found that the subpoenas constituted a written demand for non-monetary relief and therefore qualified as a claim under the policy.

MBIA Inc., a Connecticut bond insurer, obtained coverage in similar circumstances.⁵ Faced with investigations from the SEC and the New York attorney general, MBIA recovered costs associated with responding to subpoenas and MBIA’s voluntary compliance with the SEC’s requests for documents. The court found that MBIA incurred those costs as a result of investigations commenced by a “formal or informal investigative order or similar document,” which qualified as a “securities claim” as defined in MBIA’s D&O insurance policy.

As these decisions highlight, coverage for investigative costs can turn on specific policy provisions like a policy’s definition of the word “claim.”⁶ Coverage may also depend on whether any exclusions apply.⁷ Therefore, as always, policyholders should scrutinize their policies when identifying potential sources of insurance recoveries.

Coverage may also depend on other factors such as the policyholder providing timely notice of the claim to the insurance company. Accordingly, companies should quickly identify potentially applicable policies so that they can notify the appropriate insurers about the relevant investigations or other claims. Likewise, policyholders should carefully document all costs incurred in responding to government inquiries and investigations so that they may later support any recoveries under the applicable policies.

Another significant issue to consider is how the cross-border nature of the government investigations will impact insurance coverage. The FIFA allegations involve actions and actors throughout North America, South America, Europe, Asia and Africa. Accordingly, whether coverage applies may very well depend on policy provisions regarding the “coverage territory” and related determinations of where the “damages,” “injury” or “wrongful act” occurred, as well as other issues such as who is an “insured” or “insured person” under the policy, and choice of law. With regulators increasingly targeting businesses engaged in cross-border transactions in corruption probes, companies with foreign operations or subsidiaries will want to consider whether costs for responding to such investigations are covered under both locally or globally issued policies.

In sum, businesses that find themselves facing government inquiries and investigations, including those associated with criminal indictments like the one against FIFA representatives, should carefully examine their insurance policies. Doing so allows policyholders to determine whether coverage may be available for their costs in responding to those inquiries and investigations and provides policyholders with the opportunity to take appropriate steps to secure that coverage.

Notes

¹ Douwe Miedema & Karen Freifeld, Questions arise about banks’ role in FIFA bribery case, (May 28, 2015), <http://reuters.com/article/idUSL1N0YI2JU20150528?irpc=932>.

² Sara Germano, Nike: Cooperating With Authorities on FIFA Allegations, (May 27, 2015), <http://www.wsj.com/articles/nike-cooperating-with-authorities-on-fifa-allegations-1432752855>

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³ Wal-Mart's 2014 Annual Report, available at
<http://www.sec.gov/Archives/edgar/data/104169/000010416914000019/wmtform10-kx13114.htm>.

⁴ See *Syracuse Univ. v. Nat'l Union Fire Ins. Co.*, 975 N.Y.S.2d 370 (Sup. Ct. Mar. 7, 2013), *aff'd* 112 A.D.3d 1379 (N.Y. App. Div. 2013).

⁵ See *MBIA Inc. v. Fed. Ins. Co.*, 652 F.3d 152 (2d Cir. 2011).

⁶ For an example of a decision finding that costs incurred in response to a government inquiry did not fall within an insurance policy's definition of "claim," see *Office Depot, INC. v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa.*, 453 F. App'x 871 (11th Cir. 2011). There, Office Depot incurred expenses in response to an inquiry from the SEC. Office Depot's policy defined "Securities Claim" as "a claim, other than an administrative or regulatory proceeding against, or investigation of an Organization, made against any Insured . . ." The court found that the SEC inquiry constituted an "investigation" and therefore was not a "Securities Claim" under the policy since "Security Claim" specifically did not include investigations. Thus, the court concluded that the policy did not cover the costs incurred in response to the SEC inquiry.

⁷ For an example of whether an exclusion applies, see *PSI Strategies, Inc. v. Starr Indem. & Liab. Co.*, No. 1:13-cv-763, 2014 WL 1655370 (Apr. 23, 2014 E.D. Va.), *aff'd* No. 14-1972, 2015 WL 3396812 (4th Cir. May 27, 2015). In PSI, the court had found that the policy covered PSI's costs incurred in responding to a subpoena and related search warrant. *PSI Strategies, Inc. v. Starr Indem. & Liab. Co.*, No. 1:13-cv-763 (Sept. 10, 2013 E.D. Va.). However, after PSI officers later pled guilty to fraud and bribery charges, the court found that the policy ultimately did not provide coverage for those costs. An exclusion barred coverage for claims arising out of "any deliberate fraudulent act or any willful violation of law by an Insured if a final judgment or adjudication establishes that such act or violation occurred." The court found that the PSI officers' guilty plea triggered this fraud exclusion, rendering coverage unavailable for PSI's costs incurred in connection with the subpoena and warrant. The court thus required PSI to reimburse the insurer's payments for PSI's costs in responding to the subpoena and warrant. If the PSI officers had not pled guilty, presumably the insurance analysis would have been different.