

Coverage for Investigations and Conflicting Endorsements: Syracuse University Decision is Great for Policyholders

Insurance Recovery, Litigation & Counseling Alert

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Just before the New Year the New York Appellate Division affirmed in about a dozen words the trial court decision in *Syracuse University v. National Union Fire Insurance Co. of Pittsburgh, Pa.*, No. 2012EF63, slip op. at 2 (N.Y. Sup. Ct. Mar. 7, 2013), finding that attorney general investigations and grand jury subpoenas potentially implicating an insured trigger the duty to defend and the duty to advance defense costs. The court's decision also affirms that conflicting endorsements simultaneously issued at inception are ambiguous and to be construed in favor of the policyholder. See *Syracuse University v. National Union Insurance Co. of Pittsburgh, Pa.*, 2013 WL 6823101 (App. Div. Dec. 27, 2013).

Syracuse University's assistant basketball coach was alleged to have sexually abused ball boys, and criminal investigations ensued during which Syracuse was compelled to respond to grand jury subpoenas from the United States Attorney's Office and County District Attorney's Office. The broad subpoenas sought electronic equipment issued to the coach, information on the coach's hotel accommodations while traveling with the team, records relating to complaints about the coach and the university's response, the coach's telephone records, internal communications after the coach was suspended, internal communications referring to Jerry Sandusky, and "records relating to the Syracuse Men's Basketball road games, meet and greet sessions and video footage of the games."

Syracuse put liability insurer National Union on "notice of circumstances" likely to lead to a claim upon the first media report of the coach's alleged abuse. Syracuse advised National Union, upon receipt of the grand jury subpoenas, of the formal claim under its policy. National Union, however, asserted there was no claim as that term was defined in the policy, and when Syracuse filed suit, followed by dueling motions for summary judgment, the court agreed with Syracuse.

It observed that "claim" is defined in the policy as:

(1) A written demand for monetary, non-monetary or injunctive relief; or

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(2) A civil, criminal, administrative, regulatory or arbitration proceeding for monetary or non-monetary relief which is commenced by: (i) service of a complaint or similar pleading; or (ii) return of an indictment, information or similar document (in the case of criminal proceeding); or (iii) receipt or filing of a notice of charges. Slip op. at 3.

Wrongful act was additionally defined as “any breach of duty, neglect, error, misstatement, misleading statement, omission or act by or on behalf of the organization.” *Id.* The trial court noted that each subpoena stated “YOU ARE HEREBY COMMANDED” to appear and to produce documents and that under state and federal law “failure to comply with a grand jury subpoena is punishable by fine or imprisonment as contempt of court.” *Id.* Under a plain meaning of the term, these constituted demands for non-monetary relief and thus claims. *Id.* at 4.

The court found further support in an unreported decision from the *Eastern District of Texas, Agilis Benefit Services, LLC v. Travelers Cas. and Sur. Co.*, NO. 5:08-CV-213, 2010 US Dist. Lexis, 144499, 30-31 (E.D. Tex. Feb. 24, 2010), and a decision from the Second Circuit interpreting New York law. *Id.* at 4, citing and quoting *MBIA, Inc. v. Federal Insurance Co.*, 652 F3d 152 (2d Cir. 2011). The court repeated the Second Circuit’s ruling:

We reject the insurers’ crabbed view of the nature of a subpoena as a “mere discovery device” that is not even “similar” to an investigative order. The New York case law makes it crystalline that a subpoena is the primary investigative implement in the NYAG’s tool shed. We also reject the insurers’ argument that because the definition does not include a proceeding commenced by service of a subpoena, a subpoena is not included. This reading puts form over substance; the fact that the definition does not say “service of a subpoena” is not dispositive. *Id.* quoting *MBIA*, 652 F.3d at 160.

The court rejected National Union’s assertion that Syracuse was not a formal target at the time of the subpoenas. First, the U.S. Attorney Manual, on which the insurer relied, did not constrain the U.S. Attorney’s Office from bringing criminal charges. *Id.* at 5. Second, the information sought, particularly questions concerning the university after the coach was suspended, “was for the prosecutor to determine whether the plaintiff was engaged in an institutional coverup of [the coach’s] alleged misdeeds, similar to that of Penn State, and was thus engaged in a breach of duty.” *Id.* at 6. “But whether a formal target or not, it is clear that the subpoenas sought “facts ... of a wrongful act” concerning plaintiff’s conduct, defined as “any breach of duty, neglect, error, misstatement, misleading statement, omission or act by or on behalf of the organization,” subsequent to [the coach’s] departure.” *Id.* at 6. Since a duty to defend is triggered by a potential claim implicating the policy’s coverage, it could not “be said that there is no possible or factual legal basis upon which the defendant may eventually be obligated to indemnify the plaintiff.” *Id.*

One of the key rulings by the court related to allegedly conflicting endorsements. The endorsements had been issued simultaneously at inception, and the court noted that “[a]ll other terms, conditions and exclusions remain unchanged.” *Id.* There was no express statement that one endorsement superseded the other; instead, “the policy contains two policy provisions, both adopted at the same time, which are in conflict. The ambiguity thus created by the conflict must be resolved in favor of coverage if such a reading is reasonable.” *Id.*

The New York Appellate Division’s affirmance of the trial court ruling, therefore, is important because it affirmatively expands coverage both with respect to government investigations and the interplay of conflicting policy endorsements.