

Service of Subpoenas on Syracuse University Seeking Evidence of Sexual Molestation is a “Claim” Giving Rise to Covered Defense Costs According to New York State Court

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In *Syracuse University v. National Union Fire Insurance of Pittsburgh, PA*, No. 2012EF 63 (Sup. Ct., Onondaga County, January 29, 2013), the New York Supreme Court, County of Onondaga, held that an insured’s costs incurred in responding to subpoenas issued by state and federal agencies, were covered (as defense costs) as “Claims” made under a not-for-profit individual and organization insurance policy issued by National Union. The case arose out of allegations that a Syracuse assistant basketball coach, Bernie Fine, had sexually abused two former participants in Syracuse University’s basketball program over a period of years while serving in his capacity as the University’s assistant basketball coach.¹ The court held that issuance of the subpoenas constituted a “Claim” as defined in the policy.

Service of Multiple Subpoenas

According to the declaratory judgment complaint, in late 2011 and early 2012, Syracuse University received multiple subpoenas in connection with state and federal investigations relating to the allegations against Fine. The federal subpoenas required production of, among other things, computer equipment possessed by Fine, a list of all secretaries who had worked for him, a list of his hotel accommodations while traveling with the basketball team in 2001 and 2002, and bus services known by plaintiff to provide transportation to away games during that period. Further, the federal subpoenas sought records relating to any complaints made

about Fine, internal documents relating to how Syracuse responded to such complaints, and documents concerning communications occurring after November 17, 2011, when Fine was suspended by Syracuse. Also, significantly, a subpoena sought documentation that post-dated Fine’s departure, which referenced communications relating to the topics of Joe Paterno, Jerry Sandusky or the scandal related to the Penn State University football team and allegations of child molestation by Sandusky. In addition, one subpoena sought any and all complaints regarding Fine, telephone logs for any telephone calls made or received by Fine, as well as documents and records relating to Syracuse men’s road games, meet and greet sessions, and any videos for the games.

Court Holds That Service of a Subpoena May Be a Claim

After Syracuse sent National Union copies of the subpoenas, National Union advised Syracuse that its costs in responding to the investigation subpoenas were not covered under the policy, which defined “Claim” as:

1. A written demand for monetary, non-monetary, or injunctive relief; or
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 pleadings; 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 ...

¹ Fine denied any wrongdoing, and ultimately, the investigations were concluded without bringing any charges.

National Union denied that the circumstances relating to the subpoenas constituted a “Claim” under the policy. After an exchange of letters, Syracuse filed suit on August 22, 2012.

The court concluded that the grand jury’s investigations and the subpoenas met the first prong of the “claim definition,” constituting a “written demand ... for non-monetary relief,” and the investigations also satisfied subparagraph 2 of the claim definition, as “criminal proceedings for monetary or non-monetary relief which [are] commenced by: ... (ii) return of an indictment, information or similar document”

The court supported its conclusion that the subpoenas were a “demand” with the observation that, under New York and federal law, failure to comply with a grand jury subpoena is punished by fine or imprisonment as contempt of court. Relatedly, *Black’s Law Dictionary* defines “relief” as the “redress, or benefit, esp. equitable in nature (such as injunction or a specific performance) that a party asks of a court — also termed remedy.” Deeming the term “remedy” to be defined broadly as the “means of enforcing a right or preventing or redressing a wrong,” the court concluded that a subpoena is a grand jury’s means of preventing or redressing a wrong. “The relief sought by a subpoena is the production of documents or testimony,” which the court considered non-monetary relief. The court emphasized that when a district attorney issues and serves a subpoena, a proceeding “is instituted in the grand jury, just as in an analogous situation a civil action is commenced by the service of a summons.”

A Subpoena May Refer to a “Wrongful Act” Even if the Insured Is Not a “Target”

The court rejected National Union’s argument that for a “Claim” to arise, an insured is required to prove that it was a “named target” of an investigation. The court observed that the duty to defend arises when there are any allegations bringing the claim even potentially within the protection that was purchased. While the bulk of the inquiries in the subpoenas dealt with Fine, and not directly with Syracuse University, *any liability on the part of Syracuse necessarily depended upon Fine’s culpability*. The allegations against Fine related closely to the operation of Syracuse’s basketball program and Fine’s actions. Accordingly,

although Syracuse might not have been the target of the grand jury investigation at the time the subpoenas were issued, that fact would not prevent prosecutors from bringing charges against Syracuse based upon information obtained through the subpoenas.

Liberal Interpretation of the “Wrongful Act” Requirement

In addition, the court rejected National Union’s argument that the subpoenas did not reference a “wrongful act” by the university. The court reasoned that even if the subpoenas contained no facts or allegations of a wrongful act on Syracuse’s part, their inquiries could still “potentially” fall within “the protections purchased in the insurance policy” so the court could not find that “there may be no possible factual or legal basis upon which [the insurer] would be required to indemnify the [insured].” In this regard, the court thought that the most significant aspect was that *a single question* in the U.S. attorney’s subpoena sought information about events and transactions between Syracuse employees and the police, as well as “internal documentation occurring after Fine’s departure regarding the scandal related to the Penn State University football team and allegations of child molestation by former assistant coach Jerry Sandusky.” The court regarded this question as aimed at determining whether Syracuse was engaged “in an institutional cover-up of Fine’s alleged misdeeds, similar to that of Penn State, and was thus engaged in a breach of duty.” Therefore, even if Syracuse was not a formal target of the subpoena, the subpoena sought facts within the meaning of a policy’s definition of wrongful acts, *i.e.*, “any breach of duty, neglect, error, misstatement, misleading statement, omission or act by or on behalf of the organization.” Accordingly, the information sought met the standard of a “potential claim,” which implicated coverage, given that it could not be said there was no possible factual basis upon which National Union would eventually be obligated to indemnify Syracuse.

The court concluded that National Union owed Syracuse a duty to defend with regard to its defense of and responses to the subpoenas. It followed from this that National Union was obligated to indemnify Syracuse for its defense costs, which allegedly totaled several million dollars.

Conclusions and Observations

The *Syracuse University* decision is important for several reasons. *First*, the court conferred a broad meaning upon the “Claim” definition, holding that a subpoena was a “demand for relief.” *Second*, the court held that a subpoena was not a mere discovery device, but rather was the legal equivalent of an indictment or a notice of charges, thus constituting the commencement of criminal proceedings within the meaning of the “Claim” definition. *Third*, the court held that a subpoena relating primarily to an employee of the insured constituted a “Claim”, whether or not the insured was the target of the investigation. *Fourth*, the court gave a broad reading to the question of whether the subpoenas referenced a wrongful act, finding that a single question within one of the subpoenas that could relate to a wrongful act by Syracuse triggered the “Claim” provisions under the policy.

The decision, however, may have some utility for insurers. The court’s understanding of prosecutorial investigation methods may support an insurer’s view that a “Claim”, based upon the issuance of a subpoena, was made prior to the policy period. Insurers to whom a claim is first reported during the policy period, relating to a subpoena issued prior to the policy

period, may cite the *Syracuse University* decision to support a position, in appropriate cases, that the claim was made prior to the policy period.

Claims personnel to whom a claim is submitted following issuance of a subpoena will need to obtain a thorough grasp of the applicable state or federal prosecutorial regimes governing the subpoenas in question. In the *Syracuse University* decision, the court undertook a granular inquiry into the circumstances under which New York state attorneys general and federal attorneys general issue and employ subpoenas and investigate suspected criminal offenses. Determining whether issuance of a subpoena constitutes a “Claim”, therefore, may in many cases require an informed analysis of the statutory liability to which the insured may be subject, and the procedural authority under which the subpoenas were issued.

To discuss any questions you may have regarding the opinion discussed in this Alert, or how it may apply to your particular circumstances, please contact Richard C. Mason at rmason@cozen.com or 215.665.2717.