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Insurer Duty to Defend Against Sexual Misconduct Allegations Broadly Construed by SDNY

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PRACTICAL POLICYHOLDER ADVICE

In a recent opinion, *Brotherhood Mutual Insurance Company v. Kurt Ludwigsen*, the US District Court for the Southern District of New York considered whether a higher education institution's insurance policy provides coverage for a former employee's defense against allegations that the former employee engaged in sexual misconduct while employed by the policyholder. In carefully analyzing various coverage provisions in a general liability insurance policy, the court found that while certain affirmative coverage provisions did not apply, the door to coverage was nonetheless not entirely closed. Relying upon a unique defense provision in the policy and pro-policyholder standards of interpretation under New York Law, the court held that the insurer may not foreclose its duty to defend the former employee—even though that employee admitted to engaging in certain improper conduct and was fired from his position with the educational institution as a result. Accordingly, policyholders facing similar claims should engage in thorough examination of all potentially applicable policy provisions and give careful consideration to favorable standards of interpretation that may be leveraged in the relevant jurisdiction.

During the 2014-2015 academic year, Nyack College (the College) hired Mr. Kurt Ludwigsen as the head coach of the College's softball team. During his short stint as the College's softball coach, and before he was fired in March 2015, Mr. Ludwigsen allegedly engaged in a variety of inappropriate and egregious behavior towards members of the softball team. Mr. Ludwigsen's alleged conduct resulted in various civil actions being filed against him by several of the softball team's members (the Underlying Actions). As pled in the Underlying Actions, Mr. Ludwigsen acted through a "pattern and practice of intimidation," "perpetuated a sexually-charged atmosphere through multiple inappropriate and offensive actions and/or comments" and "made unwanted verbal and/or physical advances towards" various team members. The plaintiffs in the Underlying Actions brought claims for intentional infliction of emotional distress, negligent infliction of emotional distress and battery.

In addition to these Underlying Actions, Mr. Ludwigsen was also prosecuted in a separate criminal action for the alleged sexual misconduct he engaged in as the College's softball coach. The prosecutors collected a variety of statements from Mr. Ludwigsen and certain plaintiffs in the Underlying Actions. In these statements, Mr. Ludwigsen admitted to engaging in "inexcusable conduct," exercising "terrible judgment that went far beyond the parameters of [his] job description," engaging in conversations about sex with team members and kissing another team member. Ultimately, Mr. Ludwigsen pled guilty to seven counts of first-degree felony coercion as part of the criminal action. And, at his sentencing, he

admitted to subjecting team members to “unwanted sexual contact for the purpose of degrading and abusing [them] . . . and for the purpose of gratifying [his] own sexual desires.”

The College had purchased a general liability insurance policy from Brotherhood Mutual Insurance Company (Brotherhood Mutual) covering the policy period September 1, 2014, through September 1, 2015, and corresponding to the academic year (the Policy). Notice of the Underlying Actions brought against Mr. Ludwigsen, as an employee of the College, was tendered to Brotherhood Mutual under the Policy. Brotherhood Mutual investigated the allegations in the Underlying Action, and for a time, agreed to defend Mr. Ludwigsen in the Underlying Actions. But, after Mr. Ludwigsen pled guilty in the criminal proceeding, Brotherhood Mutual issued a reservation of rights letter, preserving its right to deny coverage for the Underlying Actions. Brotherhood Mutual later filed an insurance action in the US District Court for the Southern District of New York, seeking a declaration that it is not obligated to defend or indemnify Mr. Ludwigsen under the Policy in connection with the Underlying Actions. See Verified Compl., *Brotherhood Mut. Ins. Co. v. Kurt Ludwigsen*, No. 16-CV-6369 (S.D.N.Y. 2016), ECF No. 1.

In deciding the parties’ cross motions for summary judgment in the insurance action, the court grappled with the proper interpretation of two endorsements to the Policy: (1) the College/University (C/U) Additional Coverages Endorsement that provided additional coverage for certain emotional injuries suffered by students; and (2) the Sexual Acts Liability Coverage Endorsement that contained various, additional coverage provisions addressing liability for sexual acts and sexual harassment and the defense of alleged perpetrators.

The C/U Additional Coverages Endorsement contained a “Student Emotional Injury Coverage” provision that obligated Brotherhood Mutual to “pay all sums that a covered person becomes legally obligated to pay as damages due to emotional injury to which th[e] coverage applies.” “Covered person” for the purpose of this provision included College employees, but only when those employees were “acting on [the College’s] behalf and within the scope of their delegated authority.” In addition, the provision limited coverage to emotional injury that results from the College’s “evaluation, discipline or graduation practices,” and expressly did *not* apply if the emotional injury arises out of any “sexual act.” The C/U Additional Coverages Endorsement’s definition of “Sexual Act” includes, among other things, acts considered to be criminal sexual acts, any acts, including actual or attempted touching, taken for the purpose of obtaining sexual arousal or gratification, sexual harassment, and any other conduct interpreted as sexual harassment or being sexual in nature. The endorsement also defined “Sexual Harassment” as “only those sexual acts involving conduct that is characterized or intimidated as sexual intimidation or sexual harassment or as intimidation or harassment based on a person’s gender.”

The Sexual Acts Liability Coverage Endorsement extended coverage under separate Sexual Acts Liability Coverage and Sexual Harassment Liability Coverage provisions to “covered persons,” defined as the College’s “employees . . . but only while acting on [the College’s] behalf, for [the College’s] benefit, and within the scope of their delegated authority.” Under these provisions, Brotherhood Mutual was to “pay all sums that a covered person becomes legally obligated to pay as damages due to bodily injury, personal injury or emotional injury” caused by “sexual acts” or “sexual harassment” that “ar[o]s[e] out of the operation of [the College’s] organization” and “took place in the coverage territory during the policy period.” The Sexual Acts Liability Coverage Endorsement defined “Sexual Act” and “Sexual Harassment” the same way as the C/U Additional Coverage Endorsement.”

The Sexual Acts Liability Coverage Endorsement also contained a separate Defense Coverage for Alleged Perpetrators provision requiring Brotherhood Mutual to provide limited defense coverage to an alleged perpetrator who “denies involvement in the sexual act,” and at the time the coverage is sought has not been found by any government or civil court to have committed the sexual act, admitted to the sexual act or been implicated by clear and convincing physical evidence. Notably, this provision

expressly provides that the “commission of a sexual act will *not* be considered to have occurred within the scope of anyone’s delegated authority.” (emphasis added.)

In analyzing whether Mr. Ludwigsen was entitled to defense coverage, as a matter of law, under the aforementioned endorsements, the court considered two principal issues: (1) was Mr. Ludwigsen’s alleged misconduct (both sexual and non-sexual) within the scope of his authority or employment; and (2) were Mr. Ludwigsen’s statements “admissions” that would preclude coverage under the Defense Coverage for Alleged Perpetrators provision. The court prefaced its analysis against the backdrop of the insurers’ “exceedingly broad” duty to defend under New York law.

As to the first issue, the court noted the relevance of the analysis as to the scope of Mr. Ludwigsen’s authority or employment to the aforementioned Student Emotional Injury Coverage, Sexual Acts Liability Coverage and Sexual Harassment Liability Coverage provisions in the Policy, because each of those provisions provided coverage only to those individuals that were “covered persons.” If the court concluded that Mr. Ludwigsen’s alleged sexual and non-sexual acts were not performed within the scope of his authority or employment, he would accordingly not be entitled to coverage under any of those provisions.

The court bifurcated its subsequent lengthy analyses into two parts: alleged sexual acts and non-sexual acts. With respect to sexual acts, the court found that while Mr. Ludwigsen’s alleged misconduct did occur during his short tenure as the College’s softball coach, the alleged sexual acts were not within the scope of his employment because the conduct was not done in furtherance of his job duties or in the interest of the College. In addition, the court referred to case law holding that behavior that violates Title IX is not performed within an individual’s scope of employment. Accordingly, the court held that the alleged sexual acts were not subject to coverage under either the Sexual Acts Liability Coverage provision or the Sexual Harassment Liability Coverage provisions in the Sexual Acts Liability Coverage Endorsement in the Policy. With respect to non-sexual acts, the court found the Student Emotional Injury Coverage provision in the Policy’s C/U Additional Coverages Endorsement inapplicable, to the extent it requires that the alleged emotional injury arise out of three types of actions: evaluation, discipline or graduation. Applying the common interpretations of those terms, the court found that there was no basis under which Mr. Ludwigsen’s alleged non-sexual acts fell within the limited scope of those terms. As a result, the court held that the alleged non-sexual acts were not subject to coverage under the Student Emotional Injury Coverage provision in the C/U Additional Coverages Endorsement in the Policy.

As to the second issue, the court noted that the Defense Coverage for Alleged Perpetrators provision in the Sexual Acts Liability Coverage Endorsement in the Policy provides coverage for a “person otherwise covered” if that person “denies involvement in the sexual act.” While “person otherwise covered” and “covered person” are undeniably similar phrases, the court found the “person otherwise covered” phrase to be ambiguous and thus, construed the phrase to provide coverage to more than just a “covered person” as defined under the Policy’s other provisions.

Because the Defense Coverage for Alleged Perpetrators provision also contained exclusionary language stating that coverage would *not* be provided if Mr. Ludwigsen “admitted” to the sexual acts alleged in the Underlying Actions, the court analyzed the various statements made by Mr. Ludwigsen in the criminal action. The court found the statements to be “vague” and “unclear” as to what *specific* acts Mr. Ludwigsen had admitted to. The court also *sua sponte* raised the Defense Coverage for Alleged Perpetrators provision’s language that multiple sexual acts are construed as a “single sexual act” if undertaken by the same perpetrator, even if such acts are directed towards “more than one person” or “happen over time.” The court declined to interpret Mr. Ludwigsen’s admissions to certain sexual misconduct in the criminal action as a broad admission as to all sexual acts because it found the relevant language ambiguous such that it “must be construed against the insurer.” Accordingly, the court refused

to find that the statements in the criminal action were admissions to the conduct alleged in the Underlying Actions and held that Brotherhood Mutual did not meet its burden to demonstrate the application of the exclusionary language in the Defense Coverage for Alleged Perpetrators provision.

It is worth noting that the court entirely ignored Brotherhood Mutual's policy-based arguments seeking to narrow the coverage afforded under the policy—in which the insurer argued that because it provides coverage to churches and related ministries, it would not have agreed to provide coverage for individuals who plead guilty to criminal sexual misconduct under a Christian college's insurance policy. Instead, the court's technical application of the Policy's language to the facts and recognition of certain standards of interpretation under New York Law that favor the policyholder demonstrates just how broadly courts may construe the coverage afforded under insurance policies, even in the face of significant alleged misconduct.

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