

First Circuit Holds No Coverage for Complying with Subpoena

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A federal appellate court, applying Massachusetts law, has held that a nonprofit organization liability policy does not cover costs incurred by an insured to comply with an investigative subpoena. *Center for Blood Research, Inc. v. Coregis Ins. Co.*, 305 F.3d 38 (1st Cir. Sept. 30, 2002).

The U.S. Attorney for the District of Massachusetts served an investigative subpoena on the Center for Blood Research, Inc. (Center). The Center sought a defense from its insurer to comply with the subpoena under a nonprofit organization liability policy, but the insurer denied coverage. After complying with the subpoena, the Center sued the insurer, seeking recovery of its expenses, statutory damages and attorneys fees under the policy's nonmonetary claims endorsement. That endorsement provided that the insurer "shall have the right and duty to defend, including the selection of counsel, any Claim against the Insured(s) alleging, based upon or arising out of claims, demands or actions solely for relief or redress in any form other than monetary damages." "Claim" was further defined as "any judicial or administrative proceeding in which any Insured(s) may be subjected to a binding adjudication of liability for damages or other relief."

The First Circuit held that the policy did not provide coverage for the Center's costs of complying with the subpoena because the subpoena was not a "Claim" under the policy. The court reasoned that the subpoena allowed the government to gather information and investigate; it did not subject the insured to "a binding adjudication of liability." While the court recognized that a civil or criminal proceeding could have resulted from the investigation, it pointed out that "there could not have been a binding adjudication of liability for damages or any other relief" as part of the investigation. That binding adjudication would have to be pursued in a different forum.

The court also considered whether the enforcement provisions in the subpoena justified considering the subpoena a "Claim" under the policy. That provision in the subpoena referenced the statutory authority of the government to institute court proceedings to ensure compliance with the subpoena and to punish those failing to comply. The court concluded that the enforcement provision in the subpoena did not create a "Claim" under the policy because an enforcement proceeding is instituted separately from the attorney general's investigation and is held before a judge. The court did not, however, foreclose the argument that an enforcement proceeding might constitute a "Claim" under the policy, but it noted that there had been no enforcement proceeding in this case.

For more information, please contact one of WRF's Professional Liability Attorneys at 202.719.7130