Applying *Mighty Midgets,* NY Court Awards Legal Expenses to Insureds Which Defeated Insurer's Coverage Claims

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Is an insured (or putative insured) entitled to recover its legal expenses if it is successful in coverage litigation? In some states, no. In many other states, yes – based on either a statute or the common law. In New York, an insured *may* recover such expenses if it was "cast in a defensive posture by the legal steps an insurer takes in an effort to free itself from its policy obligations," and, while forced into that posture, the insured defeats the insurer's claim. *Mighty Midgets, Inc. v. Centennial Ins. Co.*, 389 N.E.2d 1080, 1085 (N.Y. 1979). As a corollary to that rule, the insured is *not* entitled to its expenses "in an affirmative action brought by [the insured] to settle its rights. . . ." *Id.* at 1085. Earlier this week, the New York federal court in *United Specialty Ins. Co. v. Lux Maint. & Ren. Corp.*, 2019 U.S. Dist. LEXIS 201805 (S.D.N.Y. Nov. 20, 2019) became the latest to apply the *Mighty Midgets* rule, awarding several insureds their legal expenses after defeating the insurer's declaratory judgment action.

In *Lux*, the CGL insurer of a façade-renovation contractor sued the contractor (its named insured) and several owners of a hospital (putative additional insureds) at which the façade-renovation work took place, claiming that the insurer did not owe a defense or indemnity to any of those companies in connection with an underlying bodily injury action brought by an employee of the contractor who was injured while performing the work. The insurer and the putative additional insureds filed cross-motions for summary judgment on the coverage issues, with the putative additional insureds also seeking to recover their legal expenses for defending against the insurer's action. The U.S. District Court for the Southern District of New York concluded that, based on the contractor's agreement to provide coverage for the hospital owners, and a comparison between the underlying allegations and the policy, the insurer owed the hospital owners coverage as additional insureds to the contractor's policy; the court also concluded that the insurer owed coverage for the contractor's contractual defense and indemnity obligations to the hospital owners. After concluding that the insurer's claim that it did not owe coverage lacked merit, the court turned to the additional insureds' request for their legal expenses.

The court examined the "well settled" rule under New York law "that an insured cannot recover his legal expenditure in a dispute with an insurer over coverage, even if the insurer loses and is obligated to provide coverage," but also New York's "limited exception" to that rule, "under which an insured who is 'cast in a defensive posture by the legal steps an insurer takes in an effort to free itself from its policy obligations, and who prevails on the merits, may recover attorneys' fees incurred in defending against the insurer's action.' " *Lux*, 2019 U.S. Dist. LEXIS 201805, at *18 (quoting Mighty Midgets, 389 N.E.2d at 1085).

Applying the *Mighty Midgets* exception to the general rule, the court concluded that, in *Lux*, "it is undisputed that [the insurer] initiated the instant declaratory action against the [hospital owners], seeking to deny its duty to defend and indemnify," and those owners "have successfully defended against [the insurer's] motion for summary judgment and prevailed on their cross motion, thereby prevailing on the merits." Id. at *19. Thus, the court held, the hospital owners/additional insureds were entitled to an award of their legal expenses.

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