



**ARIZONA SUPREME COURT
ORAL ARGUMENT CASE SUMMARY**



*Apollo Education Group v. National Union Fire Insurance Company of
Pittsburgh, Pa.*
No. CV-19-0229-CQ

PARTIES:

Petitioner: Apollo Education Group

Respondent: National Union Fire Insurance Company of Pittsburgh, Pa.

FACTS:

In 2005, Apollo purchased a \$15 million directors and officers insurance policy from National Union. In March 2006, the Wall Street Journal published an article on the practice of backdating stock options for corporate executives, which can result in companies under-reporting executive compensation to their shareholders. The article did not identify Apollo as one of the companies involved.

In June 2006, the New York U.S. Attorney issued a grand jury subpoena to Apollo. The Securities and Exchange Commission (“SEC”) notified Apollo that it intended to investigate the company for backdating. The SEC investigation ultimately did not lead to prosecution. However, on October 18, 2006, Apollo issued a statement admitting “various deficiencies in the process of granting and documenting stock options.”

In November 2006, Teamsters Local 617 Pension & Welfare Funds, who were shareholders in Apollo, filed a securities class action against Apollo in the U.S. District Court for the District of Arizona, alleging that Apollo had made fraudulent misrepresentations and had backdated stock options in violation of the Securities Exchange Act of 1934.

In March 2009, the District Court initially denied Apollo’s motion to dismiss, finding that the Teamsters had sufficiently pled their allegations of backdating. The Teamsters filed an amended complaint in April 2009, adding Apollo’s alleged false statements. In March 2011, the District Court found that the Teamsters had failed to plead falsity with particularity; and that, with the element of falsity missing, the Teamsters’ claim failed. The District Court subsequently dismissed the Teamsters’ complaint with prejudice and entered final judgment in favor of Apollo.

The Teamsters appealed to the U.S. Court of Appeals for the Ninth Circuit. In January 2013, while the appeal was pending, Apollo and Apollo’s insurance carriers agreed to mediate the case with the Teamsters. In April 2014, Apollo agreed to a settlement amount of \$13,125,000. National Union subsequently refused to fund the settlement amount based upon a provision of Apollo’s Policy that stated:

. . . . Only those settlements, stipulated judgments and Defense Costs which have been consented to by the Insurer shall be recoverable as Loss under the terms of this policy. The Insurer's consent shall not be unreasonably withheld, provided that the Insurer shall be entitled to effectively associate in the defense, the prosecution and the negotiation of any settlement of any Claim that involves or appears reasonably likely to involve the Insurer.

(Emphasis supplied).

After paying the settlement with its own funds, Apollo filed the present action against National Union, asking for recovery of the \$13,125,000 settlement amount and alleging that National Union had breached the Policy contract by unreasonably refusing to pay in bad faith. National Union moved for summary judgment, arguing that it did not unreasonably withhold consent to the settlement. The U.S. District Court ruled in favor of National Union on the grounds National Union had reasonable concluded that the settlement was premature—and likely unnecessary—because of the probability that Apollo would prevail on appeal. Moreover, even if Apollo did not prevail on appeal, there were a variety of other hurdles the Teamsters would have to overcome in order to recover a substantial judgment against Apollo. Apollo appealed. The Ninth Circuit Court of Appeals certified the question below to the Arizona Supreme Court on the grounds it was “governed by Arizona law but not clearly addressed by relevant Arizona Authorities.”

QUESTION FOR CERTIFICATION:

“What is the standard for determining whether National Union unreasonably withheld consent to Apollo’s settlement with shareholders in breach of contract under a policy where the insurer has no duty to defend?”

DEFINITION:

Certified question: An inquiry from a federal court to the Arizona Supreme Court (or any other state supreme court) seeking a state court ruling on a point of state law that is essential to the federal court deciding a case pending before it.

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