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ALERT

War Breaks Out Over Insurance Coverage for Sex Abuse Claims

By Robert D. Chesler

For decades, insurance companies have defended and indemnified their policyholders against claims of institutional liability in cases involving alleged sexual abuse and molestation — because such claims are clearly covered by standard general liability and potentially other policies as well. However, this may now be changing. Three cases filed this summer indicate that denials of such claims are becoming more common, and coverage litigation may now be inevitable when a policyholder makes a claim for sex abuse coverage against its insurance companies.

This upsurge in coverage litigation appears to be triggered in part by sex abuse claims permitted by new state laws enlarging and even temporarily eliminating the statute of limitations for such claims. Two of the coverage complaints were filed in New York, and both concern coverage for claims asserted pursuant to the one-year window to file otherwise untimely claims contained in the Child Victims Act signed by Gov. Andrew Cuomo this past February.

Notwithstanding recent insurance company attempts to avoid coverage for abuse claims, policyholders should not hesitate to notify their insurance companies of those claims, nor should they be afraid to demand coverage that is owed to them.

Policyholders faced with hostile coverage positions should prepare in advance for suits filed by their insurance companies seeking a declaratory judgment regarding coverage. Preparation entails working with trusted counsel to analyze coverage, gathering all known insurance policies, and working to locate potentially lost insurance policies. In fact, once faced with coverage denial, policyholders need not wait for the insurance companies to file a suit seeking declaratory judgment; instead, they can seize the initiative and file a suit seeking a declaration that the insurance companies owe coverage.

Policyholders did just that in two of the three recent coverage actions already mentioned — both of them in New York. In a third case, filed in California, the insurance company struck first, seeking a declaratory judgment of no coverage.

Archdiocese of New York: Covered and Uncovered Claims

The first and most typical case is *The Archdiocese of New York vs. Insurance Company of North America et al.*, filed in New York Supreme Court on July

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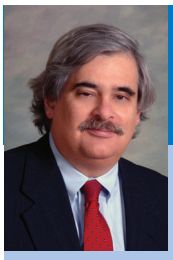

who's who

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1 by the Archdiocese of New York against numerous of its general liability insurance companies from 1954 to the present. The lead insurance company denied a duty to defend and indemnify on grounds that the complaint against the archdiocese solely alleged intentional or expected injury. According to the archdiocese's complaint, however, the underlying sex abuse complaint against the archdiocese alleged a mix of intentional and negligent conduct. For example, the underlying complaint alleged "willful, wanton, grossly negligent and or negligent acts" by the archdiocese, along with negligent hiring and negligent infliction of emotional distress. While the underlying complaint alleged the archdiocese knew and/or reasonably should have known, knowingly condoned, or covered up the inappropriate behavior of two clergy members, the inclusion of negligence claims still triggers a duty to defend.

Rockefeller University: Bad Faith Allegations

Rockefeller University v. Aetna Casualty & Surety also concerns a problem policyholders frequently encounter: a strategy of delay by insurance companies. On August 6, The Rockefeller University sued its historical general liability insurance companies in New York Supreme Court. Rockefeller is seeking declaratory relief finding coverage of hundreds of claims filed under the Child Victims Act alleging acts of abuse committed by deceased faculty member Dr. Reginald Archibald from the 1940s through the 1980s.

Rockefeller alleges that Travelers did not even acknowledge its notice of claim for six months, and that Chubb waited eight months to make a coverage decision. Travelers and Aetna, which Travelers had acquired, had insured the university from 1948 to 1954, 1955 to 1956, and then from 1958 to 1972, while Chubb provided coverage from 1972 to 1974. The complaint alleges that "Travelers and Chubb effectively conceded that coverage was triggered under their policies and agreed, in Travelers' words, to 'participate in and contribute on a pre-suit basis to the settlement of Archibald claims,'" but "the insurers still have paid nothing toward the defense or settlement of the underlying claims." However, both insurance companies also denied coverage based upon the professional services exclusion, apparently because the abuse allegedly was committed by a doctor. Rockefeller asserts bad faith against both insurance companies.

Policyholders are often bedeviled by the difficulty of communicating with their insurance companies and by the insurance companies' constant delays. At a certain point, further delay becomes intolerable, and coverage litigation results.

USC: An Error in Application

In the most recent case, *Arch Specialty Insurance Company v. University of Southern California*, filed on August 12 in the U.S. District Court of Central California, Arch Specialty Insurance sued its policyholder, seeking a declaration of no coverage for a class action suit alleging that a USC gynecologist abused "hundreds, if not thousands of women." The case concerns a healthcare professional liability

policy that contained an abuse or molestation exclusion. The complaint recounts that USC alleged the exclusion was included in the policy in error and should be removed as the product of mutual mistake — an assertion Arch vigorously contested.

Alternatively, Arch sought to have the policy rescinded, alleging that USC had substantial knowledge of the probability of sex abuse claims against it arising from its investigation of the gynecologist and failed to disclose it on its application. While mistakes on the policy application should not preclude coverage under historical general liability policies, alleged mistakes or omissions constitute a major premise for denial of coverage under recent claims-made policies, such as directors' and officers', employment liability, and professional services policies.

Policyholders, Be Proactive

Institutions presenting sex abuse claims to their insurance company must be on guard against the possibility (if not probability) that the insurance company will either delay interminably or deny coverage wrongly. Institutions must not tolerate delay, but rather create a record of their insurance company's failure to live up to its obligations under the policy. Institutions should bring in coverage counsel early in the process, to analyze the insurance company's positions, develop the best coverage strategy, and advise on when a suit is appropriate given the totality of the circumstances.

ENDNOTES

* *Pamela Hans and Marshall Gilinsky, who are also members of the firm's Sexual Harassment and Abuse Insurance Recovery Group, contributed to this article.*