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O OPENING STATEMENT

Recently, the news has been filled with reports of claims alleging sexual misconduct by priests and suits against, and settlements with, Roman Catholic Dioceses stemming from Church officials' alleged knowledge of prior sexual misconduct by clergymen and their failure to take action to prevent future occurrences.

In fact, the June 9, 2002 New York Times reported that since January 2002, alone, at least 300 civil suits contending sexual abuse have been filed in 16 states. One lawyer who defends such suits against Dioceses has been quoted as saying that the rate of recent filings is "off the charts".

While the magnitude of this problem has come to public attention only recently, the problem itself, as well as damage lawsuits against religious organizations as a result of acts of clergy, are not new.

This issue's lead story will discuss the liability insurance coverage implications for claims arising from sexual misconduct by clergymen.

LIABILITY INSURANCE COVERAGE ISSUES FOR CLAIMS INVOLVING CLERICAL MISCONDUCT

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The deeply troubling recent disclosures concerning the extent of sexual misconduct by clergymen and the prior knowledge of, and failure to act by, churches, will, undoubtedly give rise to a growing category of coverage litigation: coverage suits between insurers and religious organizations under various forms of liability insurance policies.

Although this form of litigation is not new, it is expected that the widespread news media coverage concerning the prior knowledge by church officials of acts of sexual misconduct by Catholic priests has given rise to a tremendous increase in the frequency of civil actions for damages and, is likely to have the same result upon the number of coverage disputes arising from those claims.

The coverage issues which can be expected to arise will, in many ways, mirror those which have arisen in other contexts including, for example: the trigger and scope of coverage; allocation of coverage between various policy periods; application of the policies' deductible provisions and/or self-insured retentions to claims spanning more than one policy period; the applicability of exclusions for intentional acts and/or expected or intended results; and the construction and application of notice of loss provisions.

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It should go without saying that the ultimate determination of an insurer's obligation to defend or indemnify its insureds depends upon the specific policy provisions. However, as a general proposition, absent a specific provision to the contrary, most courts will infer the abuser's intent and, thus, will generally deny a duty to defend or indemnify claims directly against the alleged abuser.

In New York, for example, claims against an alleged abuser are not entitled to defense or indemnification under a standard form of CGL policy. (*Allstate v. Mugavero*, 79 N.Y.2d 153 [1992]). However, policies can be specifically worded in a way in which a defense would be owed to the abuser. For example, in *Maryland Casualty v. Vonnahmen*, the Seventh Circuit found that a policy provision which provided coverage for claims alleging sexual behavior "unless a judgment or a final adjudication adverse to the insured shall establish that such behavior occurred as an essential element of the cause of action so adjudicated" required the insurer to provide a defense to the underlying action against the abuser. 102 F.3d 277 (7th Cir. 1997).

Claims against the church or diocese seeking damages based upon the doctrines of *respondeat superior* or vicarious liability under standard CGL policy provisions, are likely to be excluded by the intentional acts exclusion. However, where the plaintiff's theory of liability is based upon negligent hiring and supervision, a professional liability insurer may be found to have an obligation to defend the insured (*Watkins Glen Central School District v. National Union Fire Ins. Co.*, 286 A.D.2d 48, 732 N.Y.S.2d 70 [2nd Dept. 2001]).

Some professional liability policies expressly exclude claims "arising out of abuse or molestation." Such a policy provision will preclude any coverage for clergy committing

misconduct under such provisions. Claims against the church phrased in terms of negligent hiring, supervision or retention of the abuser are also likely to also be excluded as "arising from" the acts of abuse.

When coverage is found to exist for a pattern of abuse spanning more than one policy period, the question of which policy or policies should apply, and the number of occurrences presented by the claim, are likely to arise.

In those situations, some jurisdictions apply the "first encounter rule". Under this approach the policy in effect at the time of the first act of abuse provides coverage for all damages resulting from the abuse.

The "first encounter rule" was originally applied in the Fifth and Ninth Circuit. However, it has been specifically rejected recently by the Ninth Circuit.

In the Second Circuit (in which New York is included), it is conceivable that the Courts will analogize the claims to the toxic tort situation and find the abuse to constitute a "continuing occurrence", triggering coverage under each policy in effect during the period of exposure to the abuse (*Safeguard Insurance Co. v. Angel Guardian Home* 946 F. Supp. 221 [EDNY, 1996]).

Obviously, one of the coverage issues most likely to be involved in such claims is the issue of late notice. Most liability policies provide that written notice of occurrences, claims, suits must be given to the insurer promptly. Many of the claims now being brought into suit were reported to the Church and Diocese long ago. Other claims, although not specifically reported, involve clergymen known by the Diocese to have had prior sexual misconduct claims made against them. Many of these claims may not have been previously reported to insurers.

In cases of an insured's failure to provide prompt notice to the insurer, New York is a "non-prejudice" state. Thus, the insurer need not prove that it has been prejudiced by the insured's lack of timely notice in order to avoid coverage. (*Security Mutual v. Acker Fitzsimons*, 31 N.Y.2d 426 [1972]).

In such situations, a reasonable belief by the Church or Diocese that no claim would be made could be sufficient to overcome the exclusion. The reasonableness of the insured's belief is generally a question of fact. However, in many cases, the unreasonableness of such a belief could be found, as a matter of law.

Conclusion

The number of claims against clergymen which have been reported appears to be just the "tip of the iceberg". As additional victims of abuse come forward, it is likely that the number of coverage disputes between insurers and religious organizations is likely to increase. It is hoped that those claims, as well as the coverage issues they give rise to, will be quickly resolved.

Summary of Recent Decisions

- **New York's Court of Appeals Declines to Become Involved in the Interpretation or Application of Religious Doctrine in a Claim for Violation of the Clergy-Confidant Privilege.**

In *Lightman v. Flaum*, 97 N.Y.2d 128, 736 N.Y.2d 300 (November 2001) plaintiff brought an action for damages against two rabbis for revealing confidential communications. The plaintiff argued that the disclosure of these communications constituted a violation the clergy-confidant privilege of New York's CPLR 4505.

In declining to find civil liability against two rabbis for their disclosure of the communications, the Court

noted that the disclosures which had been made by the rabbis were made in affirmations submitted by them in the course of a divorce proceeding brought by the plaintiff/wife against her husband and in which the wife was seeking custody of her children. Apparently, the affidavits submitted by the rabbis were intended to show that the plaintiff/wife was jeopardizing the children's Orthodox Jewish upbringing because she had confided to the rabbis that she had stopped "religious bathing" which would free her from having sex her husband under religious rules, that she was dating other men, and that she no longer wanted to adhere to "Jewish Law".

In rendering her decision, which declined to find civil liability against the rabbis, Judge Graffeo (writing for the entire Court) noted that the clergy privilege of CPLR 4505 applied only to communications with members of the clergy who were enjoined from disclosing the communications under the rules or practices of their religion. Thus, she concluded that if the religion's own rules barred revelation of the communications, the CPLR's clergy-confider privilege would apply. However, since the disclosure was not precluded by religious rules and was, in fact, arguably mandated to advance the faith, privilege would not apply and the Court would not interpose itself into the secular/ecclesiastical dispute.

• **Workers' Compensation Law Section 11 Precludes a Third Party Action against a Plaintiff's Employer for Loss of a Thumb.**

In 1996, New York's Workers' Compensation Law Section 11 was amended so that only a showing that a plaintiff/employee had suffered a "grave injury" as defined by the statute will permit the employer tortfeasor whom the employee has sued in a tort action to bring a third party

action seeking contribution or common law indemnification from the plaintiff's employer.

In reversing the First Department's decision in *Meis v. ELO Organization LLC*, 97 N.Y.2d. 714 (February 2002) New York's highest court took a more restrictive view of what constitutes a "grave injury" pursuant to Section 11 of the statute. In doing so, the court found that although loss of use of a hand and complete loss of an index finger are on the grave injury list, loss of a thumb is not.

In *Meis*, the Appellate Division had found that the thumb is so fundamental to the function of the hand that as a practical matter the loss of a thumb equates to the loss of use of the hand. In reversing the Appellate Division's decision and finding that loss of a thumb is not a "grave injury", the Court reiterated a prior holding by declaring that:

"injuries qualifying as grave are narrowly defined [the words] in the statute are to be given plain meaning without resort to forced or unnatural interpretations."

• **Negligence: The "Emergency Doctrine" May Apply Even Where the Police Department Did Not Consider the Mission to be an Emergency**

In *Criscione v. City of New York*, 97 N.Y.2d 152 (December 2001) New York's Court of Appeals was called upon to determine whether a police car answering a 911 call involving a family brawl is on an "emergency" mission which would bring into play the "emergency doctrine", even though the dispute was categorized by the Police Department itself as a "non-crime incident".

Under the Emergency Doctrine, the driver of an emergency vehicle is permitted to speed, pass red lights and stop signs and take other actions which would not be otherwise permitted in the operation of his

vehicle when responding to an emergency.

In *Criscione*, the police car responding to the family dispute was involved in a collision with another vehicle at an intersection. Plaintiff was the police officer sitting in the passenger seat of the vehicle. He sustained injuries in the collision and commenced an action seeking damages of 1 million dollars against his fellow officer (the driver) and the City of New York. A verdict in his favor was returned by the jury based upon a jury instruction of ordinary negligence.

The Court of Appeals held that the jury instruction was erroneous because the vehicle was, in fact, on an "emergency" mission as a matter of law. Thus, "reckless disregard" was the standard which was required to have been charged to the jury as opposed to one of "ordinary negligence". Because of the Emergency Doctrine the ordinary standard of care was found to be inapplicable.

In the Court's opinion, Judge Graffeo stated that although the Police Department, itself, may not have categorized the call as an emergency, the Emergency Doctrine did apply, as a matter of law, to the operation of any authorized vehicle responding to a "police call". Thus, the case was remanded for a re-trial under the appropriate standard of care.

• **Suits Involving Injuries As A Result Of Paint Fumes Are Not Excluded By The Absolute Pollution Exclusion**

The Appellate Division, Second Department, has recently held that the Absolute Pollution Exclusion in a CGL Policy will not bar a claim based upon indoor dissemination of paint fumes.

In *Belt Painting Corp. v. TIG Insurance Company*, the Appellate Division reversed the decision of the

Supreme Court, Kings County, which had declared that the insurer was not obligated to defend or indemnify its insured in an underlying personal injury action brought by a person who claimed he inhaled paint fumes produced by the insured's workers who were stripping paint and painting offices in a building where the plaintiff worked.

In writing the decision of the Court, Justice Gail Prudenti noted that, although the Second Department and other Appellate Divisions had previously held that indoor air contamination could constitute environmental pollution, in view of the Court of Appeals' decision in *Westview Associates v. Guaranty National Insurance Co.*, 95 N.Y.2d 334 (2000) which interpreted a similar pollution exclusion, the Second Department would not take a literal approach to determine whether insurance coverage should be excluded.

In her decision, Justice Prudenti opined that the *Westview* decision represents a "signal" that New York will not adhere to a completely literal approach in connection with the application of Absolute Pollution Exclusions, an approach which has been persuasively criticized in several other jurisdictions. . .in favor of the view that such exclusions should apply only in cases of 'environmental pollution' and "

Instead, the Court found that the CGL pollution exclusions (whether the Absolute Exclusion or the traditional one) should be applied to cases involving alleged damages that were "truly environmental in nature", such as those stemming from the dumping of waste or discharges from a sewer system. 2002 WL 985534 (2nd Dept., May 13, 2002)

It is likely that this case will be appealed to the Court of Appeals in view of its wide ranging implications.

• **Follow-Up – Coverage Implications for Claims Involving Acts of Terrorism**

The lead article of our last issue of Cases and Points discussed the coverage implications of terrorist attacks.

Ironically, the first reported decision arising from September 11 attacks involves the coverage implications involved in the destruction of the World Trade Center, itself.

The landlord of the World Trade Center, Larry Silverstein, has contended that he is entitled to recover 7.1 billion dollars under his various property insurance policies because the two hijackings and terror attacks constituted two separate occurrences. Thus, he seeks to recover the per occurrence limit of 3.55 billion dollars for each of the Towers which were destroyed. His insurers, on the other hand, have taken the position that the two attacks constitute one occurrence, limiting their liability at most to the one occurrence limit of the policies.

In the coverage litigation now pending between the parties in the United States District Court, Southern District of New York, the insured had hoped for a quick determination of the issue by moving for Summary Judgment under the policy issued by one of the insurers (Travelers). Mr. Silverstein sought a declaration from the court that the policy's definition of "occurrence" was unambiguous and that, under settled New York case law, the court should declare that the attacks constituted two separate occurrences, as a matter of law.

However, the Court did not agree. In his June 3 ruling, U.S. Judge John S. Martin determined that "none of the relevant cases compels a finding that the term 'occurrence' has such an unambiguous meaning that, in its search for the truth, justice should blind itself to the wealth of extrinsic evidence concerning the parties'

intentions that is available in this case."

In reaching his decision that extrinsic evidence was required in order to determine the parties intentions, Judge Martin noted that, with only minor exceptions, the parties were still negotiating the terms of coverage when the planes hit the World Trade Center. Thus, they had not yet defined the meaning of the term "occurrence". Consequently, he could not say that the term used in insurers' policies, was unambiguous, as a matter of law.

In denying the landlord's motion for Summary Judgment, the court noted that, although New York was a State which adhered to the strict rule that the courts will not look beyond the plain meaning of the words in a contract, the rule was applicable only if the parties' intent could be clearly determined from the words they used. However, if the contract language is ambiguous, the courts should then look to extrinsic evidence to determine the true intent of the parties.

Judge Martin's ruling from the summary judgment motion ensures that the resolution of the coverage claim for the destruction of the World Trade Center will not be a quick or easy matter.

AGFJ DEVELOPMENTS

In March, 2002 Michael Gorelick presented a paper at the PLRB/LIRB Claims Conference in Anaheim, California on Jewelers Block Coverage case law. The paper was presented as part of a program of continuing education for insurance company claims representatives and independent adjusters (on the adjustment of jewelers block claims), by William Herrbold (Senior Vice President of Claims of Jewelers Mutual Insurance Company) and Michael Gorelick

For further information on jewelers block case law or coverage issues,

please feel free to contact Michael Gorelick or Daniel Friedman.

- Tina Fugazzi and Gail McNally have been inducted as members of the National Association of Insurance Women.

- Michael Gorelick and Jay Gunsher have recently conducted a insurance company training seminar on Uninsured Motorist, Supplemental Uninsured and Underinsured Motorist claims handling and coverage issues for a major automobile carrier. If you are interested in the program, please feel free to contact Michael Gorelick.

PUBLIC EDUCATION SERVICE

It is our policy to appear as speakers at seminars, business and professional meetings, as well as before industry groups. In addition, whenever possible we attempt to fulfill requests for articles from industry publications. We will also make presentations on a variety of legal issues to claim and risk management departments. For further information, please contact Michael Gorelick at (212) 422-1200.

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