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Expert Analysis

The Broad Impact on New York Insurance Law of the New York Court of Appeals' Recent Ruling in *Roman Catholic Diocese of Brooklyn v. National Union Fire Insurance Co.*

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The New York Court of Appeals recently issued what may come to be viewed as a landmark opinion on multiple issues of insurance coverage. While the case *Roman Catholic Diocese of Brooklyn v. National Union Fire Insurance Co.* involved claims of pastoral molestation, the Court of Appeals' ruling in that case addresses issues of the highest importance to toxic tort coverage and any other long-tail coverage claims under New York law.[1]

In *Roman Catholic Diocese of Brooklyn*, the Diocese of Brooklyn sought coverage for a suit alleging ongoing acts of molestation by a particular priest of an underage girl over the course of seven years.[2] The Diocese of Brooklyn settled the case in August 2007 for $2 million and then sought reimbursement for the settlement from certain AIG insurers (hereinafter "AIG") which had issued a series of annual policies across the seven years in question, each of which sat above a $250,000 per occurrence "self-insured retention," or SIR, (which was raised to $1 million/occurrence for the last year).[3] When the Diocese of Brooklyn sought coverage under the AIG policies, AIG disclaimed coverage based on two exclusionary provisions concerning sexual abuse.[4] AIG also asserted that the policy limits apply over a $250,000 SIR and that coverage is applicable only if the bodily injury occurred during the policy periods of the policies at issue.[5] Thereafter, the Diocese of Brooklyn brought a declaratory judgment action against AIG.[6]

Certain aspects of the Court of Appeals' opinion are likely to be generally favorable to insurers, while others could be unfavorable. The favorable aspects of the ruling are outlined as follows:

New York's mandatory disclaimer statute, N.Y. Ins. Law § 3420[d][2], under which an insurer forfeits coverage defenses for certain kinds of claims for taking more than a month or so to disclaim once it has the facts to disclaim, is more limited than policyholders have been arguing.[7]

Here, AIG denied coverage based on certain exclusions. AIG did not specifically raise allocation or that the Diocese of Brooklyn would need to satisfy the SIRs. Three years later, after the underlying case had settled, AIG advised that, aside from the exclusions, any coverage would be limited (in fact it would likely be nonexistent) because:

- The loss had to be allocated across seven years of coverage.
- Under each of those seven years, the policyholder had to separately satisfy the SIRs.
- Each act of abuse (which was untold in number) was a separate occurrence, requiring satisfaction of a separate SIR, under each separate policy.[8]

AIG moved for summary judgment in the declaratory judgment action but did not raise the policy exclusions. Instead, AIG sought rulings on allocation and the SIRs, the effect of which would be to limit and probably eliminate coverage.

The Diocese responded that coverage defenses are routinely forfeited when an insurer takes more than a month or so to disclaim in cases in which Section 3420(d) of New York's Insurance Law applies. Here, the Diocese argued, AIG had said nothing about allocation or SIRs for three years, and so AIG clearly had forfeited those defenses.

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The Court of Appeals nevertheless accepted the argument that we have advocated on behalf of insurers in this situation. That is, Section 3420(d) of New York's Insurance Law only applies to coverage defenses based on exclusions or failed conditions. Therefore, because allocation and SIRs are not set forth in exclusions or conditions, the statute does not apply to those defenses, and so they are not forfeited.

The Court of Appeals stated as follows:

> Here, the defenses at issue do not relate to an argument of exclusion or disclaimer, but rather, focus on the extent of alleged liability under the various policies. Put simply, they are not subject to the notice requirements of Section 3420(d) because they 'do [] not bar coverage or implicate policy exclusions.' Thus, [AIG] did not have to give notice of the SIR requirement because the SIR is not a basis for disclaimer or denial of coverage."[9]

The Court of Appeals' ruling in *Roman Catholic Diocese of Brooklyn* could be crucial in preventing lower courts from misapplying the statute to defeat coverage defenses.

Pro rata allocation is indeed the law of New York for long-tail claims. The Court of Appeals established this in *Consolidated Edison v. Allstate Insurance Co.* ("*Con Ed*") more than 10 years ago.[10] However, policyholders have been trying on many fronts to limit *Con Ed* to its particular facts, or to the particular policy language that existed there. The Court of Appeals' decision in *Roman Catholic Diocese of Brooklyn* rejects those efforts.

When multiple sequential policies contain SIRs or deductibles that are triggered by a claim, the policyholder must separately and fully satisfy each of those SIRs or deductibles under each of those policies.[11]

On the other hand, there are aspects of the ruling that are potentially unfavorable to insurers, or that at the very least may lead to uncertainty in New York law on these issues. Notably:

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The New York Court of Appeals in *Roman Catholic Diocese of Brooklyn* held that each of the separate acts of molestation constitutes a separate occurrence.[12] This could become an extremely significant ruling, affecting many important insurance issues.

The same court previously held in *Appalachian Insurance Co. v. General Electric Co*. that each of the 100,000-plus separate asbestos claims asserted against General Electric arose from a separate occurrence.[13] But one might argue that, under *Roman Catholic Diocese of Brooklyn*, rather than every claim being a separate occurrence, every instance of toxic exposure could be a separate occurrence. Under those circumstances, rather than 100,000 claims arising from 100,000 occurrences as in *General Electric*, might 100,000 claims arise from millions of occurrences? If the claim of one single abuse claimant could involve untold numbers of separate occurrences, could that also be true for one single toxic tort claimant? If so, it could arguably become impossible in a mass tort case for a policyholder to ever satisfy a per occurrence deductible or SIR. On the other hand, that could also make it impossible for an insurer ever to exhaust a per occurrence limit.

However, there are at least two reasons to believe that the ruling will not turn out to change the law to that extreme. First, the Court of Appeals in *Roman Catholic Diocese of Brooklyn* said, in the context of this issue, that molestation cases, unlike asbestos and lead paint cases, do not "fit neatly into the policies' definition of 'continuous or repeated exposure' to 'conditions'."[14] Thus, sexual abuse claims may simply be treated differently from toxic torts, and only in the former might there be a great number of occurrences per claimant. Second, as Justice Victoria A. Graffeo noted in her dissent on this issue, even though the majority found a single claim to involve an untold number of occurrences, "the [majority] decision is somewhat unclear as to whether" the court would actually require the policyholder to satisfy untold numbers of SIRs per policy.[15]

The Court of Appeals' ruling in* Roman Catholic Diocese of Brooklyn *could be crucial in preventing lower courts from misapplying New York's mandatory disclaimer statute to defeat coverage defenses.

In short, the Court of Appeals' decision in *Roman Catholic Diocese of Brooklyn* will impact multiple issues of New York law on insurance. It clarifies very important issues involving mandatory disclaimers under N.Y. Ins. Law § 3420(d)(2). It should also curtail efforts to undermine the New York Court of Appeals' 10-year-old allocation ruling in *Con Ed*. And, depending on how the *Roman Catholic Diocese of Brooklyn* decision is addressed in the mass-tort context, its greatest impact may be on "number of occurrences" and all the questions of limits and deductibles that are impacted by that issue.

NOTES

1 *Roman Catholic Diocese of Brooklyn v. Nat'l Union Fire Ins. Co.*, 2013 N.Y. Slip Op. 3264, 2013 WL 1875302 (N.Y. May 7, 2013).

2 *Id*. at *4.

3 *Id*.

4 *Id*.

5 *Id*.

6 *Id*.

7 Section 3420(d)(2) of New York's Insurance Law states in pertinent part as follows: "If under a liability policy issued or delivered in this state, an insurer shall disclaim liability or deny coverage for death or bodily injury arising out of a motor vehicle accident or any other type of accident occurring within this state, it shall give written notice as soon as is reasonably possible of such disclaimer of liability or denial of coverage to the insured and the injured person or any other claimant." Although the statute does not specify how much time an insurer may allow to elapse before denying or disclaiming coverage, courts have held that an unexcused delay of

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just 30 days or so is untimely and that the insurer was therefore barred from asserting coverage defenses. *See, e.g., W. 16th St. Tenants Corp. v. Pub. Serv. Mut. Ins. Co.*, 290 A.D.2d 278, 279 (N.Y. App. Div., 1st Dep't 2002) (insurer's 30-day delay in disclaiming coverage was unreasonable as a matter of law).

[8] *Roman Catholic Diocese of Brooklyn,* 2013 WL 1875302, at *4.

[9] *Id.* at *5 (citation omitted).

[10] *ConEd v. Allstate Ins. Co.*, 746 N.Y.S. 2d 622, 628-31 (N.Y. 2002).

[11] SIRs and deductibles are similar in that they are both amounts that the policyholder must pay toward claims. One court has explained the difference between SIRs and deductibles as follows (though of course the language of the policy provisions ultimately govern how they apply): "A SIR differs from a deductible in that a SIR is an amount that an insured retains and covers before insurance coverage begins to apply. Once a SIR is satisfied, the insurer is then liable for amounts exceeding the retention, less any agreed deductible. In contrast, a deductible is an amount that an insurer subtracts from a policy amount, reducing the amount of insurance. With a deductible, the insurer has the liability and defense risk from the beginning and then deducts the deductible amount from the insured coverage." *In re Sept. 11 Liab. Ins. Coverage Cases*, 333 F. Supp. 2d 111, 124 n.7 (S.D.N.Y. 2004).

[12] *Roman Catholic Diocese of Brooklyn,* 2013 WL 1875302, at *5-7.

[13] *Appalachian Ins. Co. v. Gen. Elec. Co.*, 831 N.Y.S.2d 742, 746-48 (N.Y. 2007).

[14] Roman Catholic Diocese of Brooklyn, 2013 WL 1875302, at *7.

[15] *Id.* at *11.

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