

Chubb-Archdiocese Suit Raises Coverage Burden Issue

By **Eli Flesch**

Law360 (April 11, 2024, 8:41 PM EDT) -- A Chubb lawsuit against the Archdiocese of New York over indemnity for sexual abuse claims is implicating questions over which party has the burden to show if a liability might be covered or not, a dispute inextricably tied to justice for the church's many alleged victims.



Chubb has repeatedly accused the Archdiocese of New York of stonewalling the insurer's efforts to gather information that might indicate whether the church's conduct with respect to the abuse claims would be a covered accident. (Sergi Reboredo / VWPics via AP Images)

Chubb is trying to revive the suit, on appeal before the First Judicial Department of the New York Supreme Court, following a trial court decision against it that attorneys representing carriers and policyholders found by turns lacking and appropriate given what Chubb had alleged. The dispute comes as insurance litigation **over child sexual abuse** remains a **highly contentious issue**, following the passage of laws that allow such victims to bring once-time barred claims to court.

"The order was quite short, and I don't know that it was as well-reasoned as it could have been, which is probably why it's been appealed," said Seslee S. Smith, a partner with Morris Manning & Martin LLP who has represented a carrier in sex trafficking suit.

Ryan Burke, another attorney at Morris Manning, who also represents insurers, said it was notable that Chubb's counsel indicated the carrier was filing the suit to obtain information about the church's potential knowledge or expectation of the alleged abuse.

"As a standard reason, you would typically not want to file litigation just for the purpose of gathering information, because it could air dirty laundry of your insured," he said, acknowledging that the particular circumstances could have warranted the strategy.

Without an agreed-upon settlement to resolve the underlying litigation, some attorneys questioned why Chubb filed the suit in the first place. For its part, Chubb has repeatedly accused the archdiocese of stonewalling the insurer's efforts to gather information that might indicate whether the church's conduct with respect to the abuse claims would be a covered accident.

In its June 2023 complaint, the insurer sought a declaratory judgment that it didn't have any indemnification obligations to the archdiocese, one of the largest in the country, serving around 300 parishes and 2.5 million Catholics. It said based on specific review of each case, the insurer was defending the archdiocese in 1,593 lawsuits under the New York Child Victims Act of 2019, which extended the time that victims of sexual abuse could file suits against their abusers or organizations connected to their abuse.

But the insurer has been accused of filing the suit to delay its indemnification responsibilities, to the detriment of survivors of child sexual abuse who could be left in the lurch while lengthy court proceedings play out over issues of restitution.

"Chubb's efforts to get a ruling on the duty to indemnify before there's a settlement or judgment to indemnify is just plain silliness," said Timothy W. Burns, a Burns Bair LLP insurance recovery attorney. "It's a strategy designed to delay, create massive extra expense, and ultimately to discourage survivors from bringing their cases."

He described Chubb's action as a strategy the insurer is using across the country in sexual abuse cases connected to schools and other Catholic dioceses. Burns, who has represented sexual abuse survivors in lawsuits against insurers, said the trial court saw Chubb's complaint for what it was — "an effort to gum up the works in numerous serious sexual abuse cases by an insurer that had no reason to seek relief from the court."

Matthew B. O'Hanlon, a policyholder attorney with Barnes & Thornburg LLP, told Law360 that it would be highly detrimental to insureds if carriers could try to litigate issues that could prejudice pending claims.

"What the insurer was doing was trying to basically rush to court and try to get a determination that it didn't have a duty to pay settlements for these cases," he said. "They were trying to litigate the intentionality issue, but as you might imagine, the intentionality issue is also something that's presumably being litigated in the underlying lawsuits against the archdiocese."

Chubb relied heavily on a 2002 ruling in [Consolidated Edison Co. of New York v. Allstate Insurance](#), from the New York Court of Appeals, to argue that it's the policyholder's burden to show that a liability arises from accidental conduct, which would typically be covered, rather than intentional or expected misconduct, which wouldn't.

But James R. Murray of Blank Rome LLP, arguing for the archdiocese, said in **last week's oral arguments** that an accurate reading of ConEd showed that the case did not hold that the burden was always on the policyholder. Rather, Murray said, ConEd didn't include any expected or intended language, and that exclusionary effect generally puts the burden on the carrier.

Murray pointed out that one policy at issue in the dispute — issued by the Chubb unit Great Northern Insurance Co. in 1983 — contained the expected or intended language in its exclusion section. According to the policy language, the coverage afforded to the archdiocese does not apply to "bodily injury or property damage arising out of an event, the result of which was expected or intended from the standpoint of the insured."

Jonathan Hacker, an O'Melveny & Myers LLP attorney counseling Chubb, said the insurer was putting forth a dispute that invoked the court's jurisdiction over a declaratory judgment issue, to the extent that facts still needed to be further developed.

"To the extent there are gaps in the allegations or the record, that all gets played out during discovery and factual development," Hacker said during oral arguments, echoing Chubb's January appellate brief that whether Chubb could establish entitlement to relief would be a question for another day.

Hacker also noted that the archdiocese was trying to settle a number of cases. He maintained that Chubb cannot pay now under the policy language or its corporate duties.

"We will pay, in every single case, barring other coverage issues, where they did not know or expect the abuse," he said. "They have to give us the information they are not giving us."

Dan Kohane, an insurer-side attorney with Hurwitz Fine PC who litigates sexual misconduct suits, said the trial court's dismissal of the suit impeded the ability of Chubb to resolve issues of indemnity. He described dismissing the complaint as rather abrupt.

Kohane also suggested, to the question of burden, that it was somewhat shared.

"What's an accident? That burden is on the insured to prove. Whether it's expected or intended from the standpoint of the insured — that's placed on the insurance company to prove," Kohane told Law360. "And you can imagine, there's an overlap there."

His colleague, coverage attorney Lee S. Siegel, said the challenge Chubb's attorneys faced was writing a complaint that addressed thousands of underlying actions that doesn't come out to be that many pages long. He said courts don't usually view cases like Chubb's as mass tort actions with a common set of facts.

Siegel suggested that if Chubb had broken the complaint into component parts, the insurer could have alleged more facts, and that might have resolved the issue for the court, which had generally faulted Chubb for a lack of specificity.

"The complaint puts forth only non-specific, common knowledge-type allegations against the Catholic Church," wrote Judge Suzanne J. Adams in the December 2023 ruling. "The complaint does not allege facts to determine prima facie that the underlying CVA actions definitively fall outside of the policies' intended coverage."

Chubb's accusations that the archdiocese has been stonewalling the insurer's efforts to gather information and facts was emphasized in a recent letter exchange between the insurance company and the Coalition for Just and Compassionate Compensation — a group that focuses on recovering funds for survivors of child sexual abuse.

Chubb strongly objected to the assertion that it and not the archdiocese was responsible for restitution to the church's alleged victims. Copies of the letters, obtained by Law360, demonstrate the sensitive legal and moral issues at play in the suit.

"Chubb's current practices and legal practices betray the justice and healing that survivors have been seeking for decades," the CJCC wrote in a January letter to Robert Scully, a Chubb board member and retired Morgan Stanley co-president. "The litigious actions of the insurance company fly in the face of the values we suspect are shared by both you and the various organizations you have represented over the course of your professional life."

The letter drew a scathing response from Chubb's executive vice president and general counsel, Joseph Wayland.

"The fact that the ADNY paid insurance premiums to cover accidents doesn't change this reality — you can't buy insurance for what the ADNY has admitted: concealing, tolerating and abetting the acts of criminal pedophiles," Wayland wrote, saying the ADNY could pay out damages to victims now.

In a statement after Chubb's response to the CJCC, the archdiocese maintained that it was fully cooperating with its defense counsel and Chubb in providing the insurer all the information it requested.

"The archdiocese has repeatedly made clear its desire to compensate victims to make amends and the archdiocese stands united with survivors on this issue no matter how hard Chubb tries to walk away from its obligations," the church said. "Chubb is the obstacle standing between survivors and the compensation they seek."

Attorneys for Chubb and the archdiocese declined to comment on the suit.

A representative of the CJCC did not immediately respond to a request for comment.

--Additional reporting by Emlyn Cameron. Editing by Nick Petruncio.

Update: This article has been updated with comment by the archdiocese.

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