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Epstein Bank Settlements Present Coverage Quagmire

By **Shane Dilworth**

Law360 (July 21, 2023, 12:06 PM EDT) -- JPMorgan Chase and Deutsche Bank may face a quagmire when trying to secure insurance coverage following the preliminary approvals of settlements resolving allegations that they improperly kept Jeffrey Epstein as a client despite knowledge of his sex trafficking scheme, experts say.

While the lenders could attempt to tap into coverage under a variety of likely available policies, including banker's professional liability and commercial general liability, or CGL, insurance, experts say questions loom on whether allegations lodged by victims of Epstein in two lawsuits can securely fit within the insuring agreements.

In June, U.S. District Judge Jed S. Rakoff of the Southern District of New York preliminarily approved JPMorgan Chase's **\$290 million settlement** with a putative class of Epstein victims and Deutsche Bank's **\$75 million settlement** of a similar suit.

The victims contend in their New York federal court class actions that JPMorgan Chase, which had Epstein as a client from 1998 until 2013, and Deutsche Bank, which did business with Epstein from 2013 to 2018, knew that he was using his accounts to fund a global sex trafficking scheme but did nothing.

Here, Law360 looks at the banks' prospects for coverage under different policies.

'Glimmer of Hope'

Lilit Asadourian, an insurance recovery partner at Barnes & Thornburg LLP, told Law360 that there could be a "glimmer of hope" for coverage under a banker's professional liability policy, which provides "soup to nuts" protection for lending institutions. She noted, however, that the language of the policy is paramount since some policies only provide coverage for suits if they are brought by bank customers.

Even if the policy could provide coverage for a suit brought by a third party, Asadourian said it is likely that carriers would put up a fight.

"I think the insurance companies would say this is not the anticipated risk that our policies are meant to protect you for," she said. "They'll make every argument I suspect to try and avoid coverage."

She also pointed out that some banker's professional liability policies contain exclusions that would bar the victims' allegations that JPMorgan Chase and Deutsche Bank violated statutes such as Trafficking Victims Protection Act and Racketeer Influenced and Corrupt Organizations Act. However, Asadourian said those provisions may not come into play since the claims were dismissed and since the settlements do not involve a final judgment on liability.

"Those exclusions often only come into play if there's a final nonappealable judgment against the organization, which finds that they violated law," she explained. "Here, because you have a settlement with presumably no admission of guilt or liability, it's a way to get around that exclusion because the insurer will not be able to say that it applies because there has been no final nonappealable judgment."

Potential Coverage For Negligence

Experts say a potential avenue for coverage depends on whether the banks were negligent for doing business with Epstein, who died of apparent suicide in August 2019 while in a New York correctional facility. Insurance policies typically require a carrier to provide a defense against allegations of negligence, but allegations of intentional misconduct are usually excluded.

Spencer T. Kuvin of Goldlaw in West Palm Beach, Florida, who has represented Epstein victims since 2008, including the first Jane Doe who went to the police in Palm Beach, told Law360 that the banks played a fundamental role in Epstein's ability to start and maintain his scheme.

Kuvin said that one of the main reasons Epstein was able to continue his scheme and pattern of abuse was his money and wealth.

"Epstein did this over a lengthy period of time over many, many years, and the only reason he was able to do that was his power," he said. "His power was really purchased by his wealth. He really had no independent business model. He had no independent background and wealth that he had built on his own. It was all money that he had used from others that had given it to him, including the bank."

Kuvin went on to say, however, that coverage for the settlements could be possible based on the lenders' alleged negligence.

"In this case, nobody was alleging that JPMorgan Chase or Deutsche Bank committed any intentional acts, that they were the ones abusing these women," he said. "We have seen it was their negligence that allowed that abuser to continue doing what he did. It was their failures on an institutional level in continuing to do business with this particular guy that basically allowed him to continue his heinous acts."

Question of Bodily Injuries

One of the largest coverage issues surrounding the class actions against the lenders centers on whether the suits are seeking damages for bodily injuries, experts say. Neither complaint specifically contains allegations against the banks for bodily injury damages.

But Kuvin said the so-called impact rule could be used as a way to create enough of a link between the class actions and bodily injury to trigger coverage under a CGL policy. He explained that the argument is one of proximate causation and one step removed from a direct association between the banks and the victims.

"Clearly, there was an impact, there was an impasse between Epstein and the women," he said. "So, what you're saying is that basically as fiduciaries, their negligence led to this impact ultimately by the abuser."

Carrier-side attorney Dan Kohane of Hurwitz Fine PC in Buffalo, New York, told Law360 that the class actions against JPMorgan Chase and Deutsche Bank present "odd claims" against the lenders.

"Only the most creative plaintiffs lawyer can begin to imagine a legal theory that suggests that a bank can be liable for what a customer did with its money," he posited.

He went on to say that there is a chance that coverage could very well fall between the cracks of a CGL policy and a professional services liability policy. CGL policies, he explained, provide coverage for occurrences, or accidents, resulting in bodily injuries. Professional services liability policies, on the other hand, do not provide coverage for bodily injuries, but also exclude coverage for malicious intent.

Barnes & Thornburg's Asadourian agreed that the banks could find themselves in a bind given the distinct prerequisites for coverage and exclusions contained in CGL policies on one hand, and professional liability policies on the other.

"I can see a way of weaving this into a CGL policy, but then you would have to contend with a potential exclusion for professional services," she said. "On the other hand, if you take the position, this is purely professional negligence, then you have to contend with the bodily injury and false imprisonment types of exclusions that exist within a professional services liability policy."

"This may be one of those situations where coverage falls through the cracks of all the policies because there are exclusions and the allegations are not clean enough to be able to avoid them," she concluded.

Hearings on the final approval of the settlements are scheduled for later this year.

The plaintiffs are represented by David Boies, Alexander Law, Andrew Villacastin, Daniel Crispino, Sabina Mariella and Sigrid S. McCawley of Boies Schiller Flexner LLP and by Brittany Henderson, Dean Kaire and Bradley J. Edwards of Edwards Henderson Lehrman PLLC.

JPMorgan Chase is represented by Alan Schoenfeld, Andy O'Laughlin, Christopher Jean Bouchoux, Felicia H. Ellsworth and John Butts of WilmerHale and Bruce Doughty, Leonard Gail and Rachel S. Morse of Massey & Gail LLP.

Deutsche Bank is represented by David B. Hennes, Lisa H. Bebchick, James P. Dowden, Kathryn E. Caldwell, Andrew Simon Todres, Andrew Buckley Cashmore and Michael Ardeljan of Ropes & Gray LLP.

The cases are is Doe 1 v. JPMorgan Chase & Co., case number 1:22-cv-10019, and Doe 1 v. Deutsche Bank Aktiengesellschaft et al., case number 1:22-cv-10018, in the U.S. District Court for the Southern District of New York.

--Editing by Abbie Sarfo.