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2nd Circ. Gives Church, Insurer Partial Wins In Abuse Row

By **Jack Newsham**

Law360 (September 19, 2018, 6:45 PM EDT) -- A fight between the Catholic Archdiocese of Hartford and an insurance company that refused to cover four sex abuse settlements ended in a draw before the Second Circuit on Wednesday, with the appeals court upholding a decision against the insurer that didn't go as far as the church wanted.

Interstate Fire & Casualty Co., which was sued by the Connecticut archdiocese in 2012, said it had no obligation to cover more than \$700,000 in settlements to the families of the children allegedly abused by priests, but a trial judge ruled that the insurer breached its contract. Both sides appealed, with the archdiocese saying Interstate had also violated the Connecticut Unfair Insurance Practices Act, but a three-judge appellate panel said both rulings were correct.

The longest part of the decision focused on whether one of the payouts was an "occurrence" under the policy. A "Matthew Doe" said he was abused by Father Ivan Ferguson after the archdiocese had been informed about similar allegations against him, and Interstate argued that the archdiocese had been reckless. But even though the Connecticut Supreme Court had found recklessness in a case involving the same priest's abuse of Doe's friend Jacob, the panel said state law didn't call for such an objective, "reasonable person" analysis here.

"We do not question the conclusion in Jacob Doe that the archdiocese was reckless in allowing [Father] Ferguson to reenter a school for boys," the court said. "Nevertheless, a subjective standard applies to the Matthew Doe claim, the only claim in this case in which the archdiocese had prior notice of the assailant priest's proclivities. Under that standard, the archdiocese did not intend or expect the injury" because a medical professional had said [Father] Ferguson was cured."

The insurance company said an assault-and-battery exclusion in its policy meant it didn't owe the archdiocese anything because its priests had violated those terms, but the panel said the policy wasn't even ambiguous and only excluded the actual person who commits the assault. Even though courts applying other state laws in very similar cases have found otherwise, the Second Circuit said, those cases were sufficiently different or wrongly decided.

The panel similarly affirmed the lower court's decision to reject the archdiocese's request that it find Interstate had violated CUIPA because of its long delays in making a decision on the claims. The district judge found that 9 to 11 percent of a sample of 57 claims submitted to Interstate reflected misconduct, and correctly concluded that those numbers didn't add up to a "general business practice" banned by the law, the appeals panel said.

According to records from the lower court, Interstate insured the archdiocese for a period in the 1970s and 1980s for liabilities more than \$200,000 but lesser than \$5 million. The four abuse claims against the Hartford diocese were not part of the lawsuit.

In the underlying case, which was filed in 2012 and litigated to judgment in 2016 and an amended judgment in 2017, the district court ruled against the church on each of its claims except for breach of contract. It awarded more than \$945,000 to the archdiocese on that basis.

If the CUIPA claim had been revived, that could have meant exemplary damages for the archdiocese, according to David Friedman, who argued for the church. Without such claims, he told Law360, damages are limited to his client's actual losses, plus some fees and interest.

Richard Neumeier of Morrison Mahoney LLP, who argued for the insurance company, said the result of the case would likely have an impact on other claims that are not subject of the litigation. He said he was surprised the Second Circuit did not ask the Connecticut Supreme Court to weigh in on any of the questions of state law that were a key part of the suit, but said no further appeal was likely.

"The [U.S.] Supreme Court is not going to be interested in this," he said.

Circuit Judges Dennis Jacobs and Denny Chin and U.S. District Judge William Kuntz sat on the panel for the Second Circuit.

The Hartford Roman Catholic Diocesan Corp. was represented by David P. Friedman and Marilyn B. Fagelson of Murtha Cullina LLP.

Interstate Fire & Casualty Co. was represented by Richard L. Neumeier of Morrison Mahoney LLP.

The case is Hartford Roman Catholic Diocesan Corp. v. Interstate Fire & Casualty Co., case number 16-2999-cv, in the U.S. Court of Appeals for the Second Circuit.

--Editing by Dipti Coorg.

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