UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF NEW YORK

In re:

The Diocese of Rochester,

Debtor.

Case No. 2-19-20905-PRW
Chapter 11 Case

CNA'S REPLY TO OFFICIAL COMMITTEE OF UNSECURED CREDITORS' OBJECTION TO DEBTOR'S MOTION TO APPROVE PROPOSED INSURANCE SETTLEMENTS TO FUND SURVIVOR COMPENSATION TRUST

The Continental Insurance Company, successor by merger to Commercial Insurance Company of Newark, New Jersey, Commercial Casualty Insurance Company, and Firemen's Insurance Company of Newark, New Jersey ("CNA"), by and through their undersigned attorneys, and for their Reply to the Official Committee of Unsecured Creditors' ("UCC") Objection ("Objection") to Debtor's Motion to Approve Proposed Insurance Settlements To Fund Survivor Compensation Trust ("9019 Motion"), state the following:

I. THE SETTLEMENTS ARE REASONABLE.

A. The UCC Overstates The Diocese's Insurance Assets.

The UCC appears to significantly overstate the Diocese's insurance assets in several ways. First, they overstate the number of claims that could even plausibly present an exposure for CNA by including claims that allege abuse that ended before March 1, 1952, claims that allege abuse beginning after June 1, 1977, and untimely claims. Dkt. # 1542 at 2, 11. Second, the UCC ignores that it bears the burden or proving not only the existence of the alleged pre-1969 CNA Policies, but also the terms, the nature and scope of coverage, and who qualifies as an insured. *Id.* at 11. Third, the UCC's observation that CNA's primary limits are between $50,000 and $500,000 per occurrence ignores that nearly all CNA Policies also include per person limits. The secondary evidence identifies per person limits of $25,000 for the 1952-55 period and $100,000 for the 1955-

69 period; the 1969-72 CNA Policy and the 1972-75 CNA Policy are also subject to a $100,000 "per person" limit. See Dkt. 8-1 in Case 2-22-02075. Fourth, contrary to the UCC's argument the Diocese purchased excess coverage for "many of these years," even the Diocese has alleged CNA excess policies in only five years. *Id.* Fifth, while the UCC asserts that each act of abuse is a separate "occurrence," relying on *Roman Catholic Diocese of Brooklyn v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa.,* 991 N.E.2d 666 (N.Y. 2013), the UCC fails to address the fact that all CNA Policies that have been located to date include a "deemer" provision, which the court in *Diocese of Brooklyn* recognized should compel a "single occurrence" conclusion. Dkt. # 1542 at 11-12. The UCC ignores this critical policy language in its computation of the Diocese's insurance assets.

Moreover, the value of the Diocese's insurance assets cannot be viewed in a vacuum, but rather must be considered in light of the actual claims. By way of illustration, numerous claims allege only three or fewer instances of abuse occurring during years where the Diocese has not alleged the existence of excess insurance.[1] Even if the UCC's position as to number of occurrences was accepted, the per claimant recovery in the proposed settlement exceeds the maximum potential recovery for each such claim under the CNA Policies, even before considering coverage and liability defenses. Moreover, there are many other claims that allege abuse that either ended before June 1, 1969 or occurred exclusively during one 1972-75 policy period, which will be subject to $100,000 per person limits if the UCC's position as to number of occurrences is rightly rejected.[2]

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[1] *See, e.g.,* Proofs of Claim 022, 025, 036, 050, 051, 058, 059, 064, 075, 077/469, 085, 092, 103, 106, 107, 108, 115/136, 119, 150, 155, 164, 183, 190, 196, 201, 205, 220, 232, 240, 241, 244, 248, 254, 255, 257, 262, 271, 285, 288, 302, 303, 325, 326, 337, 350, 361, 363, 365, 367, 369, 372, 376, 385, 395, 400, 401, 413, 422, 449, 451, 456, 460, 479, 480, 481, 497, 501, 503.

[2] Perhaps recognizing the distinction between this case and *Diocese of Brooklyn*, the UCC asserts a separate occurrence should apply for each policy period, but even if this is true, it must be considered that some of the CNA Policies are multi-year policies. For instance, the 1972-75 CNA Policy is a three-year policy. Any claim alleging abuse exclusively between June 1, 1972 and June 1, 1975 should be subject to one $100,000 per person limit.

B. CNA Is Confident That The Diocese's Late Notice Will Bar Coverage For Many Claims.

The UCC asserts the Diocese provided timely notice because it had a "reasonable belief of nonliability." While it is true that a "reasonable belief of nonliability" *may* be a valid excuse for failure to provide timely notice of an *occurrence* that may give rise to a claim, the Second Circuit has held that it is not a valid excuse for failure to give timely notice of a *claim*. *American Ins. Co. v. Fairchild Industries, Inc*., 56 F.3d 435, 439 (2d Cir. 1995) (New York law) ("a notice of claim provision [ ] focuses on the actions of third parties and may be triggered by an unreasonable — even sanctionable — assertion of liability…. An assertion of possible liability, no matter how baseless, is therefore all that is needed to trigger a notice of claim provision") (*citing Empire City Subway Co. (Ltd.) v. Greater N.Y. Mut. Ins. Co.*, 315 N.E.2d 755 (N.Y. 1974)). For many claims, the Diocese failed to provide timely notice of a monetary demand, an attorney demand letter, and/or an actual lawsuit.[3] As to those claims, under *Fairchild*,[4] the Diocese's late notice has no even arguable excuse, and CNA will clearly owe no coverage.

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[3] See Dkt. 1542-2 ¶ 15; Dkt. # 1542-11.

[4] While one New York appellate court found untimely notice of a claim could be excused based on a reasonable belief of non-liability, *Reynolds Metal Co. v. Aetna Cas. & Sur. Co*., 259 A.D.2d 195 (1999), *Reynolds* is not binding law, *see Stern v. Cosby*, 645 F. Supp. 2d 258, 275 (S.D.N.Y. 2009) ("[t]he rulings of intermediate appellate courts are 'helpful indicators of how the state's highest court would rule,' but they are not binding on me") (quoting *DiBella v. Hopkins*, 403 F.3d 102, 112 (2d Cir. 2005) (New York law) (finding federal courts are "not strictly bound by state intermediate appellate courts")), and *Fairchild* should be followed. *See Musah v. Houslanger & Assocs., PLLC*, No. 12 CIV. 3207, 2012 WL 5835293, at *3 (S.D.N.Y. Nov. 16, 2012) ("absent a contrary holding by the New York Court of Appeals, the Second Circuit's holding in Law Research-which unequivocally states that an assignment of judgment is effective even without a 5019(c) filing, see supra-is binding authority on the issue for federal district courts within the Circuit"). New York federal district courts have continued to apply *Fairchild*, *Rockland Exposition, Inc. v. Great Am. Assur. Co.*, 746 F. Supp. 2d 528, 541–43 (S.D.N.Y. 2010), aff'd, 445 Fed. Appx. 387 (2d Cir. 2011); *Travelers Indem. Co. v. Northrop Grumman Corp.*, 413 F. Supp. 3d 263 (S.D.N.Y. 2019) ("the absence of formal legal action does not make a belief of nonliability reasonable. Courts generally require an insured to receive affirmative assurances that it is not a responsible party for a triable issue to arise over a belief of nonliability"), because its reasoning is inescapable; the rule that a reasonable belief of nonliability may excuse untimely notice is intended to protect an insured that could not have foreseen a potential claim. *Gardner v. Phoenix Ins. Co.*, 21 Misc. 3d 1135(A) (Sup. Ct. 2008) (*quoting Avery & Avery, P.C. v. Amer. Ins. Co.*, 51 A.D.3d 695 (2008) ("the salient issue 'is not whether the [insured] reasonably believed that any claim brought by [the injured party] or on his behalf would lack merit. Rather, the issue is whether the [insured] reasonably believed that no claim would be asserted against it'").

The UCC cites only cases holding an insured's reasonable belief that a claim would never be made may excuse untimely notice of an *occurrence*, but none of those courts held that an insured's late notice of an actual *claim* was excused.[5] At best, then, the UCC's position that the Diocese may have had a reasonable belief of nonliability, while inconsistent with its view of the value of the claims, would present an issue of fact only with respect to the Diocese's late notice of historical reports of abuse received by the Diocese that were not accompanied by a monetary demand, formal claim, or lawsuit. But even for those matters, CNA has good reason to conclude that this purported excuse will ultimately be unavailing in the vast majority of cases because the historical record suggests the Diocese recognized the very real potential for a claim coming from reported instances of abuse and sought to quietly resolve each matter.

The UCC and the Diocese have suggested that the Diocese had a reasonable belief of nonliability for claims that were received by the Diocese after they were already time-barred. While this sounds realistic, it is undercut by the historical record. When the Diocese received facially time-barred claims, CNA is confident that discovery will show the Diocese recognized those claims presented an exposure because of the potential for a statute similar to the CVA, and thus evaluated and settled many of them. Further, the Diocese received scores of attorney demand

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[5] *Indian Harbor Ins. Co. v. City of San Diego*, 972 F.Supp.2d 634 (S.D.N.Y. 2013) (holding requirement that insured give notice accrued when insured received claim and two-month delay was unreasonable); *Sparacino v. Pawtucket Mut. Ins. Co*., 50 F.3d 141 (2d Cir. 1995) (New York law) (accepting insured's excuse for late notice of 'occurrence" or "offense"); *Safeguard Ins. Co. v. Angel Guardian Home*, 946 F. Supp. 221, 228 (E.D.N.Y. 1996) (same, holding insured's receipt of angry call from foster parent in which child abuse committed by another foster parent was mentioned was excused because the call was primarily about custody issues); *Merchants Mut. Ins. Co. v. Hoffman*, 437 N.E.2d 1155 (N.Y. 1982) (same, holding insured Department of Social Services' failure to give notice of incident in which plaintiff 15 year old broke arm was reasonable where insured paid for his medical expenses and did not foresee any liability beyond medical expenses); *Greater New York Mut. Ins. Co. v. I. Kalfus Co.*, 45 A.D.2d 574 (1974) (same, finding failure to provide notice of accident involving insured's product was excused where insured's notice of accident was a request for inspection of the customer's reassembly of the machine and did not involve any allegations the machine was defective); *compare Pub. Serv. Mut. Ins. Co. v. Goldfarb*, 425 N.E.2d 810 (N.Y. 1981) (same, interpreting distinguishable policy language requiring "notice upon the happening of an unusual occurrence 'or upon receiving notice of claim or suit," and finding language ambiguous as to whether the insured was required to provide notice of an occurrence if it met the requirement of timely notice of a claim) *with* Dkt. # 1542-2 (setting forth distinct obligations to provide notice of an accident and to provide notice of a claim or suit).

letters in 2018 and 2019, when passage of the CVA was imminent or, in some cases, after the CVA was actually passed.[6] While the Diocese undertook an IRCP program, made efforts to settle these claims, and actually did settle numerous claims, it failed to provide timely notice to CNA of many of those claims.[7] And as an equitable and legal matter, an insured should not be relieved of its duty to provide its insurer with notice of claims which it believes are time-barred; rather, the insured should provide its insurer with timely notice and allow the insurer to exercise its contractual right to defend the claim, including by assertion of a limitations defense.

It is not surprising that, in the first case to address the late notice issue in the CVA context, a court rejected the UCC's argument and granted an insurer's motion to amend its complaint to raise a late notice defense. *Roman Catholic Diocese of Rockville Centre, N.Y. v. Arrowood Indem. Co.*, 2022 WL 558182 (S.D.N.Y. Feb. 23, 2022) ("the Diocese may have been required to give notice of occurrences well prior to the enactment of the CVA") (citing and quoting *Travelers Indem. Co. v. Northrop Grumman Corp.*, 413 F. Supp. 3d 263 (S.D.N.Y. 2019)) ("the absence of formal legal action does not make a belief of nonliability reasonable. Courts generally require an insured to receive affirmative assurances that it is not a responsible party for a triable issue to arise over a belief of nonliability").

C. CNA Is Confident That Discovery Will Establish The Diocese "Expected" The Injuries Of Claimants.

The UCC's argument that the mere existence of *allegations* of negligence against the Diocese precludes a *factual* determination that the Diocese expected the claimant's injury conflates the standard for an insurer's duty to defend and duty to indemnify. While the duty to defend is based upon allegations in the pleadings, the duty to indemnify is based on the actual facts

[6] See Dkt. 1542-2 ¶ 15; Dkt. # 1542-11.
[7] *Id.*

established at trial. *Euchner-USA, Inc. v. Hartford Cas. Ins. Co.*, 754 F.3d 136, 140 (2d Cir. 2014) (New York law) ("[t]he duty to defend is measured against the allegations of pleadings," "[t]he duty to [indemnify] is determined by the actual basis for the insured's liability to a third person" (*quoting Servidone Constr. Corp*., 64 N.Y.2d at 424, 488 N.Y.S.2d 139, 477 N.E.2d 441). In a declaratory judgment action arising out of CVA lawsuits against a diocese, the Southern District of New York recently directly rejected precisely the same argument made by the UCC here, finding "the mere presence of a cause of action sounding in negligence does not, *per se*, preclude applicability of the intended or expected exclusion." *Diocese of Rockville Centre*, 2022 WL 558182, * 5.

To support its apparent argument that a Diocese's responsibility for its priest's sexual abuse is necessarily accidental no matter how egregious, UCC relies primarily on *RJC Realty Holding Corp. v. Republic Franklin Insurance Co.*, 2 N.Y.3d 158, 164-65 (2004). However, in *Diocese of Rockville Centre*, the court rejected the UCC's flawed interpretation of *RJC Realty Holding* and explained that the proper analysis is more nuanced and fact-driven:

> The Diocese's implied argument that any allegation of negligence precludes an insurer from disclaiming its duty to defend based on an expected or intended exclusion goes too far. To support that contention, the Diocese cites *RJC Realty Holding Corp. v. Republic Franklin Ins. Co.*, 2 N.Y.3d 158, 777 N.Y.S.2d 4, 808 N.E.2d 1263 (2004). See Mem. of Law, Dkt. 56 at 14. But far from supporting such a categorical premise, that case simply suggests that in instances where an employer had no prior knowledge of an employee's past behavior, it was inappropriate to find that that there was no conclusion other than that the employer intended or expected the employee to injure his clients. *RJC Realty Holding Corp.*, at 164–65, 777 N.Y.S.2d 4, 808 N.E.2d 1263. Because the four lawsuits at issue here all allege that the Diocese had prior knowledge of the priest's sexual misconduct, the holding in *RJC Realty Holding Corp.* is inapposite. See also Resp., Dkt. 58 at 21–22.

2022 WL 558182, * 5 n.12. While the UCC asserts in its Objection that there is no basis to conclude the Diocese expected parishioners to be abused, this is not what the evidence is expected to show. The claimants will not argue that the Diocese had a mere "generalized knowledge of the

risk that pedophiles could abuse children." Dkt. # 1155 ¶ 38. Rather, where the facts show that the Diocese was aware that a priest committed abuse, the claimants will argue that the Diocese absolutely expected that its reassignment of that known abuser would result in the sexual abuse of additional parishioners. The UCC is correct that this defense must be evaluated on a case-by-case basis (*id.* ¶ 36), but incorrect in its contradictory and unsupported assertion that no claim will be subject to the defense (*id.* ¶¶ 36-40). As recognized by the court in *Rockville Centre*, if a court concludes that the Diocese knew about a priest's propensity for sexual abuse based on past instances of abuse, coverage will likely be barred. 2022 WL 558182, * 6 ("Given those allegations, which involve conduct and knowledge that occurred either prior to or concurrently with the abuse alleged in the four complaints, the Diocese of Rockville Center may have 'expected' additional sexual abuse, including of plaintiffs G.C., Kelly, B.R., and F.C").

D. The UCC Underestimates The Challenges Claimants Will Face In Establishing Liability.

The UCC's Objection argues that the Settlement should not take into account the strength of the Diocese's liability defenses, making specific arguments with respect to claims filed after the bar date, order claims, and off-premises claims. While CNA will address its disagreement with UCC's interpretation of New York law in greater detail in claim objections, CNA wishes to address here two specific issues. First, the Diocese argues that, with respect to claims filed after the bar date, the claimants will simply pursue recovery from the non-debtor defendants. In making this argument, the UCC incorrectly assumes that non-debtors are insureds under all CNA Policies. In fact, neither the UCC nor the non-debtor defendants will be able to meet the burden of proving that non-debtor entities are insureds under the pre-1969 CNA Policies.[8]

[8] Dkt # 1542 at 4; see Proofs of Claim 508, 512, 520, 521, 527, 537, 541, 551, 553.

Second, none of the law cited by the UCC supports the argument that the Diocese could be liable for abuse committed by non-Diocesan employees at institutions staffed and operated by independent religious orders. Rather, the court in *Kenneth R. v. Roman Catholic Diocese of Brooklyn*, 229 A.D.2d 159, 654 N.Y.S.2d 791 (2d Dept. 1991))[9] found that a Diocese has no duty to institute specific procedures for hiring, even for *its own employees,* unless it knew of facts that would lead a reasonably prudent person to investigate the prospective employee. This is a reminder that the applicable standard is not strict liability; thus, liability is uncertain even for claims of abuse by Diocesan priests, not just for the "low value" or "no value" claims referenced in the 9019 Motion.

Also, with respect to claims alleging abuse committed by non-Diocesan employees at institutions independently staffed and operated by religious orders, *Kenneth R.* is in accord with law cited in CNA's brief (Dkt. # 1542 at 7-8) for the premise that the Diocese did not breach any duty. The only appropriate defendants for these claims are the perpetrator and the religious order, not the Diocese, and objections to these claims should be sustained.

II. THE 9019 MOTION IS NOT A SUB ROSA PLAN, AND THE SETTLEMENTS ARE NOT PREMATURE.

The settlements are not a sub rosa plan, but rather the settlements are akin to the debtor selling a plot of land or some other asset. In a conventional case, there could be no serious argument that the court had to wait for a plan or a creditor vote to approve such a transaction. Similarly, approval of the settlements is not premature. While the settlements do contemplate later

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[9] The other cases cited by the Diocese also involve claims against the City of New York premised on the "special duty" applicable to municipalities and involve claims for the assault of children in the City of New York's care, not in the care of independent third parties. *Garcia v. City of New York*, 222 A.D.2d 192, 194-95 (1996) (holding defendant liable for children *in defendant's custody* where teacher failed to follow school policy intended to protect children); *Logan v. City of New York*, 148 A.D.2d 167 (1989) (finding questions of fact as to whether school had actual or constructive knowledge of risk to student based on school policy to post two security guards on every floor and the fact that teacher removed student from the classroom left student unattended on another floor).

plan confirmation proceedings, and that plan is required to contain certain non-debtor releases, those issues are squarely reserved for a confirmation hearing under 11 U.S.C. § 1129. Dkt. # 1538 ¶ 89. Unlike the *Purdue Pharma* case (however the Second Circuit resolves it), Dkt. # 1555 ¶¶ 13-14, in this case the insurers are not seeking protection for their own primary liability without filing their own bankruptcy cases, but rather buying back an asset of the estate and obtaining protection from the debtor's liability, which falls squarely within this Court's core jurisdiction. To the extent the conditions to funding implicate plan-related issues, they are not pertinent to the pending motion. The only issue is whether the Diocese reasonably exercised its business judgment to reach a settlement that falls above the lowest end of the range of reasonableness considering possible litigation outcomes, not whether the committee approves. Dkt. # 1538 ¶¶ 69-72.

WHEREFORE, CNA requests the Court grant the Diocese's Motion and grant such other and further relief as it deems just and proper.

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