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Insurers Misuse Proof of Claim Forms in Mass Tort Bankruptcy Cases

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In recent years, a growing number of entities, such as the Boy Scouts of America and Catholic dioceses, have sought bankruptcy protection to address liabilities arising from mass torts, the most egregious of which relate to sexual misconduct involving children. Debtors facing these claims have used the bankruptcy system to bring all the key stakeholders to the table in order to reach a global resolution.

Insurers play a critical role in these cases, as debtors look to insurance companies to fulfill their obligations and contribute meaningful amounts to survivor trusts. Insurers, however, have used (or misused) the bankruptcy system to avoid or substantially reduce the contribution needed to buy back their policy.

Questions Designed to Deter Claimants

One tactic commonly used by insurers is the attempted manipulation of proof of claim forms to reduce the number of claims filed.

While detailed proof of claim forms have become increasingly common in mass tort bankruptcy cases, insurers have sought to add invasive questions that go beyond the simple information necessary to establish the basis for the claim. Insurers have done so under the guise of obtaining more information on the claims to evaluate them for liability and coverage, and ultimately to achieve a global settlement.

In practice, however, these questions are designed to deter claimants—who may already be experiencing trauma from having to recall distressing events—from filing claims, and ultimately, to reduce the insurers' potential exposure.

An analysis of over a dozen diocesan bankruptcy cases has revealed common strategies used by insurers. A question that insurers frequently seek to add to proof of claim forms in diocesan cases is whether the claimant told anyone about the abuse, and the details of that disclosure. (See insurer filings in *In re Roman Catholic Diocese of Syracuse* and *In re Diocese of Rochester*.) In some cases, insurers have even requested written documentation or correspondence that demonstrates whether the survivor contacted anyone about the abuse, and if so, whom.

While relevant to the insurers' analysis of coverage issues, such as whether a diocese had notice of a perpetrator's prior abuse or evidence supporting a defense that the abuse was "expected and intended," the proof of claim form is not the proper vehicle to fish for such evidence.

Further, such questions may give survivors the impression that having told someone about the abuse or having documented such notice is necessary to assert a claim. While questions about whether the abuse was disclosed to anyone have been allowed, courts have rejected questions seeking documentation of that disclosure.

More Questionable Queries

Another common proposed addition from insurers is a question asking whether the diocese knew or should have known about the abuse (to the claimant or to others). (See insurer filings in *In re Diocese of Camden, New Jersey* and *In re the Roman Catholic Diocese of Rockville Centre, New York*.)

Questions about the diocese's knowledge are better directed to the diocese, and there is no reason to seek this information from the claimant. This is particularly so where the claimants often were children at the time of the abuse and may lack memory or actual knowledge of what was done on their behalf with respect to the diocese.

The question also implies that the survivor should have told the diocese about the abuse and that by failing to do so, the survivor was somehow complicit in the cover-up. These questions were rejected by the *Camden* and *Rockville* courts.

Insurers, including those in the *Rockville* and *Rochester* diocese cases, have also sought to ask claimants about other instances of sexual abuse unrelated to the diocese. Such a question is irrelevant for purposes of whether the claimant has a prima facie claim against the debtor, and instead is more

of an interrogatory aimed at gathering defenses regarding a survivor's claim.

This question is also invasive, and requiring the survivor to disclose multiple, unrelated experiences of sexual abuse could have a chilling effect on a survivor's willingness to assert a claim. Courts have similarly rejected the inclusion of this question on proof of claim forms.

Who Signs the Form?

Finally, an issue in a number of bankruptcy cases involving sexual abuse claims has been whether the proof of claim form can be signed by an attorney or must be signed by the claimant.

Insurers have argued that allowing an attorney signature opens the door to false claims. Decisions on this have been mixed, with some courts requiring claimant signatures and others allowing attorney signatures. (See *Boy Scouts*, *Camden*, and *Rochester* bar date orders.)

Specialized proof of claim forms used in sexual abuse and other mass tort cases should be simple and streamlined, taking into consideration that many forms are submitted by pro se claimants. The forms should not be used as an opportunity for parties to take intrusive discovery.

Given the horrific nature of the childhood sexual abuse that survivors may be disclosing for the first time, the questions should not be designed to deter survivors from filing claims or worse, to contribute to the harm already suffered. Courts, committees, and attorneys representing survivors should be mindful of the insurers' playbook and steadfastly guard against misuse of the survivor claim form by insurers seeking to avoid honoring their contractual obligations.

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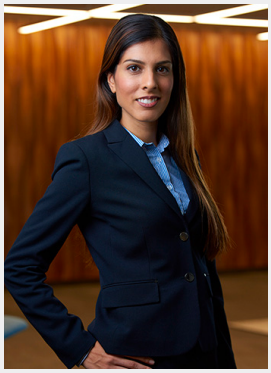

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