

Court Defers Ruling Concerning Whether an Insurer Is Required To Defend Insured Accused of Sexual Abuse But Holds That Public Policy Bars Indemnification for Such Acts

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The United States District Court for the Middle District of Pennsylvania, applying Pennsylvania law, has held that Pennsylvania public policy bars enforcement of an insurance policy that would provide indemnity coverage to an insured accused of intentional sexual abuse of children. *Fed. Ins. Co. v. Sandusky*, 2012 WL 1988971 (M.D. Pa. Jun. 4, 2012). The court, however, deferred ruling on the insurer's duty to defend and held that a factual record is needed prior to addressing whether Pennsylvania public policy precludes a defense.

An officer of a charity was charged with at least forty criminal counts of sexual molestation, child abuse and related charges. The officer, the charity and others were also named as defendants in a civil action alleging hundreds of counts of sexual molestation. The insurer issued a policy to the charity, which afforded directors and officers and employment practices liability coverage. The policy provided coverage for Loss, which included the costs of defending civil actions and criminal prosecutions. The officer accused of sexual molestation sought coverage for the criminal and civil actions, including the costs of the defense of those actions. The insurer agreed to provide a defense under a reservation of rights and filed a declaratory judgment seeking, in part, a declaration that Pennsylvania public policy barred defense or indemnity coverage for the underlying actions.

The court first addressed Pennsylvania law concerning a court's ability to bar enforcement of an insurance policy based on public policy considerations. The court held that indemnity coverage under a policy cannot be enforced with respect to conduct that "is so obviously . . . against the public health, safety, morals or welfare that there is a virtual unanimity of opinion in regard to it." See *Mamlin v. Genoe*, 17 A.2d 407, 409 (Pa. 1941). The court also recognized that Pennsylvania public policy "bars enforcement of insurance contracts that indemnify insured persons for damages arising from certain reprehensible conduct." Based on this reasoning, the court held that "[i]t is entirely clear . . . that the public policy of Pennsylvania as announced by its courts prohibits the reimbursement of [the insured officer] for any damage award that he may ultimately be found to

owe arising from the allegations that he molested and sexually abused children.” The court did not address, however, whether public policy also bars coverage for the insured charity itself or any other principal of the charity concerning potential civil liability arising out of the alleged sexual abuse.

The court next addressed the insurer's defense obligations under the policy, stating that the court is “writ[ing] upon a blank slate” because no Pennsylvania court had previously addressed the issue. The court noted that “[a]lthough D&O policies that provide for defense costs in criminal cases are rare, it is possible to imagine valid public interest considerations that would favor the issuance of these policies.” The court also commented that because discovery has not yet commenced in the coverage action, there are no facts upon which to base a public policy determination. For instance, the court noted that whether public policy would preclude enforcement of the policy as to defense costs could be impacted by evidence concerning whether the insured officer procured the policy or knew of imminent criminal charges at the time the policy was procured. Accordingly, the court held that it “must defer issuance of a ruling on the public policy question as it relates to [the insurer's] obligation to provide for [the insured officer's] legal costs to defend the civil action and criminal prosecution.”