UNITED STATES BANKRUPTCY COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

In re:	Chapter 11
ROMAN CATHOLIC DIOCESE OF HARRISBURG,	Case No. 1:20-bk-00599 (HWV)
Debtor.	

CONSOLIDATED RESPONSE OF THE OFFICIAL COMMITTEE OF TORT CLAIMANTS TO CLAIM OBJECTIONS FILED BY MULTIPLE INSURERS

INTRODUCTION

The Debtor filed this chapter 11 case primarily to address its liability for clergy sexual abuse. (Informational Brief of the Roman Catholic Diocese of Harrisburg at p. 27/29, ¶ 158 [ECF No. 2]). The Debtor filed schedules further acknowledging that it carries substantial liability for such claims. (Amended Schedule A/B and E/F, at p. 30-35 [ECF No. 297]). In addition to the claims acknowledged by the Debtor on its schedules, several additional claims based on clergy sexual abuse were filed in this case after the Debtor's schedules were submitted.

Now, nearly two years into the Debtor's bankruptcy, and after millions in administrative costs have been invested, three of the Debtor's insurance companies have objected to a majority of the claims (the "Claims[1]") that the Debtor filed bankruptcy to address. The following insurance companies (the "Insurers") have collectively objected to the thirty-five (35) Claims at issue: Certain Underwriters at Lloyd's, London, Catalina Worthing Insurance Ltd., RiverStone Insurance (UK) Limited, and Sompo Japan Nipponkoa Insurance Company of Europe Limited (collectively

[1] LMI objected to Claim Nos. 46, 56, 91, 52, 58, 60, 83, 89, 76, 64, 71, 72, 10023, 78, 234, 66, 48, 49, 237, 57, 51, 242, 241, 10010, and 244. Zurich objected to Claim Nos. 79, 10013, 44, 87, 93, 73, and 82. Interstate objected Claim Nos. 23, 50, 78, 83, 72, 76, 46, 234, 48, 49, 75, and 71.

"LMI"), Zurich American Insurance Company as successor by merger to Maryland Casualty Company ("Zurich"), and Interstate Fire & Casualty Company ("Interstate").

The Insurers have not satisfied, and cannot satisfy, their burden to show that allowance of the Claims will affect their legally-protected interests. The Insurers therefore lack standing to pursue their claim objections (the "Objections") and their Objections should be overruled. Nothing currently on the record suggests that the Insurers have admitted their duty to defend the Debtor, they have not been adjudged to have such a duty, and the Insurers have also failed to define clearly the source and extent of their indemnification obligations to the Debtor.

Further, the only plan of reorganization currently on the docket in this case provides for either (i) a voluntary settlement by the Insurers, or (ii) a complete and total preservation of the Insurers' interests and defenses. Thus, even assuming for the sake of argument that the Insurers could demonstrate that they have an interest affected by allowance of the Claims, their Objections would nevertheless lack ripeness and must be overruled for that independent reason. The Insurers should be restrained from attacking collaterally the rights of survivors of sexual abuse, and from inserting themselves belatedly and aggressively into the Debtor's reorganization process. The obstinacy of these very Insurers has been the most formidable obstacle to global resolution in the case and their Objections are a glaringly-obvious attempt to cultivate leverage to secure an outcome that is not justified by any applicable standard or precedent.[2] The Objections should be overruled or adjourned indefinitely until such time as the Insurers can demonstrate the ripeness of their Objections and clarify definitively a legitimate basis for their assertion of standing.

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[2] The Insurers are aware, as is the Diocese, that the State of Pennsylvania is very likely to pass a "window" to revive time-barred civil claims based on child sexual abuse sometime in the near future. *See* Jan Murphy, *Gov. Tom Wolf implores Senate to act on 'window' bill for child sex abuse survivors to file civil lawsuits*, Penn Live, Dec. 22, 2021, *available at* https://www.pennlive.com/news/2021/12/gov-tom-wolf-implores-senate-to-act-on-window-bill-for-child-sex-abuse-survivors-to-file-civil-lawsuits.html. In the unlikely event that the Insurers are allowed to proceed on their Objections, and their Objections are sustained, the Court should make clear that the Claims are disallowed *without prejudice* to be reasserted upon the passage of any "window" statute.

I. The Insurers Lack Standing to Object to the Claims

For purposes of bankruptcy standing, a "party in interest" is any party with a legally-protected interest affected by the bankruptcy proceeding. *In re Glob. Indus. Techs., Inc.*, 645 F.3d 201, 212 (3d Cir. 2011); *In re Black, Davis & Shue Agency, Inc.*, 460 B.R. 407, 414 (Bankr. M.D. Pa. 2011). The burden of proof rests with an objecting party to demonstrate that it holds a legally-protected interest sufficient to justify its standing to lodge objections. *Black, Davis & Shue Agency, Inc.*, 460 B.R. at 413.

Insurance companies have frequently been deemed to lack standing to interpose objections in bankruptcy cases filed by their insureds. *See, e.g., In re Combustion Eng'g, Inc.*, 391 F.3d 190, 218 (3d Cir. 2004); *Mt. McKinley Ins. Co. v. Pittsburg Corning Corp.*, 518 B.R. 307, 329 (W.D. Pa. 2014); *In re Fuller-Austin Insulation*, Case No. 98-2038-JJF, 1998 WL 812388, at *3 (D. Del. Nov. 10, 1998). Insurance companies have been deemed to lack standing in instances where they failed to demonstrate that their identifiable, pecuniary interests are directly and adversely affected by the filing(s) to which they object. *Id*.

Some instances have arisen in which insurers have demonstrated that they hold a legally-protected interest that is affected by filings in a bankruptcy filed by their insured. For example, in *Glob. Indus. Techs., Inc.*, the Third Circuit ruled that insurance companies had standing to object to a plan that assigned insurance rights into a § 524(g) trust where trust creation had actually resulted in a staggering increase in silica-related claims and, thus, could materially increase the companies' liability despite the plan's preservation of the insurers' coverage defenses. *In re Glob. Indus. Techs., Inc.,* 645 F.3d at 205–06, 209, 212, 214.[3] The bankruptcy court for the Middle

[3] Here, the Insurers are not objecting to a plan of reorganization that has been determined to have potentially prejudiced their rights or materially altered their potential exposures. *In re Glob. Indus.* therefore does not support Insurer standing to object to individual proofs of claim.

District of Pennsylvania held that a debtor's insurer had standing to object to proofs of claim where the objecting insurer was already adjudged to have a duty to defend the debtor with respect to the objected-to claims, and allowance of the objected-to claims could materially increase the insurer's potential liability. *Black, Davis & Shue Agency, Inc.*, 460 B.R. at 412, 415.

This case is not analogous to *In re Black, Davis & Shue Agency, Inc.* in any meaningful way. Here, none of the Insurers has yet been deemed to owe a duty of defense to the Diocese in connection with any of the Claims or a duty to indemnify the Diocese for costs incurred in defending the Claims. On the contrary, the objecting Insurers are either reserving rights to deny coverage for the Claims or, as to some policies and Claims, have flatly denied coverage and refused to defend and/or indemnify the Debtor. (*See, e.g.*, Amended Complaint at ¶ 54 ("Zurich has denied that it has a duty to indemnify RCDH for the Abuse Claims") [Adv. Pro. No. 1:20-ap-00018-HWV ECF No. 3]; *id*. at ¶ 53 (LMI and Interstate "have failed to acknowledge that they have a duty to indemnify RCDH for the Abuse Claims, and have, in some cases, denied coverage outright"); Response of Zurich American Insurance Company to Diocese's Request for Mediation and Brief in Support at ¶ 21 ("Prepetition, Zurich informed the Diocese in writing that . . . Zurich declined any obligation to defend or indemnify the Diocese . . . ."] [Adv. Pro. No. 1:20-ap-00018-HWV ECF No. 21]).

The Insurers have not established, per their burden, that allowance of the Claims would increase their indemnification liability or otherwise affect their legally-protected interests. To show that they hold legally-protected interests, the Insurers need only acknowledge and describe the parameters of their duty to indemnify the Debtor for payments that the Debtor might make to resolve the Claims. In so doing, the Insurers could demonstrate to what extent allowance of the Claims would increase their exposure (i.e., affect their interests). The Insurers are thoroughly silent

on the issue of their exposure in their Objections, however. Further, Interstate, in its Claims objections, makes clear that it is *not* acknowledging any agreement or obligation to indemnify the Debtor for the Claims. (*See, e.g.,* Interstate Fire and & Casualty Company's Objection to Proof of Claim Number 23 at ¶ 19 [ECF No. 811-3]).

Thus, the Insurers may well refuse to indemnify the Debtor *in any amount* for payments made on the Claims, regardless of whether or not the Claims are allowed. This would be consistent with their past practice. The Insurers refused to pay the Debtor anything for the dozens of claims of clergy sexual abuse that the Debtor settled prior to filing this chapter 11 case. (*See* Amended Complaint at ¶¶ 20, 44, 62 [Adv. Pro. No. 1:20-ap-00018-HWV ECF No. 3]). In any event, the Insurers have not shown, as they must, that allowance of the Claims will have any impact on their liability.

Despite the fact that the Insurers are in the best position to educate the Court about their duties and obligations to indemnify the Debtor, and despite the fact that the Insurers bear the burden to demonstrate that they hold a legally-protectable interest affected by the Claims to which they object, the Insurers have failed to provide sufficient information to show that they are a bona fide party in interest. The Insurers thus lack standing to object to the Claims and their Objections should be overruled.

II. The Insurers Cannot Manufacture Standing by Asserting the Debtor's Affirmative Defenses

Unlike objecting insurers in the *In re Glob. Indus. Techs., Inc.*, and *In re Black, Davis & Shue Agency, Inc.* cases, the Insurers do not object to the Claims based on any diminishment, or failure of neutrality with respect to their own rights. Instead, the Insurers object exclusively on the basis of affirmative defenses that belong to the Debtor. (*See e.g.,* London Market Insurers' Objection to Proof of Claim Number 46 at ¶¶ 14-18 [ECF No. 752-3]; Interstate Fire and &

Casualty Company's Objection to Proof of Claim Number 23 at ¶¶ 14-18 [ECF No. 811-3]; and Objection of Zurich American Insurance Company to Proof of Claim Number 79 at ¶¶ 15-26 [ECF No. 789-3]).

Under Pennsylvania law, a debt barred by a statute of limitations is not extinguished. It is merely subject to an affirmative defense that can be waived. *Keeler v. PRA Receivables Mgmt., LLC (In re Keeler)*, 440 B.R. 354, 365 (Bankr. E.D. Pa. 2009). The Debtor has repeatedly acknowledged its exposure for sexual abuse claims in this case. (*See, e.g.*, Informational Brief of the Roman Catholic Diocese of Harrisburg at p. 2/29, ¶ 7, p. 25/29, ¶ 151, and p. 27/29, ¶ 158 [ECF No. 2]; and Amended Schedule A/B and E/F, at p. 30-35 [ECF No. 297]). Further, the right to take advantage of an affirmative defense is "a personal one belonging solely to the defendant, which he may take advantage of or waive, as he may desire." *Dszugan v. Little Russian Union of Am.*, 1916 WL 3493, at *1 (Pa. Com. Pl. 1916) (quoting and adopting Bowers, LAW OF WAIVER, 1914 ed., at 224).

The Debtor's affirmative defenses are not legally-protected rights that belong to the Insurers. Affirmative defenses to claims of clergy sexual abuse based on the expiration of statutes of limitations or an alleged failure to state a claim under Rule 12(b)(6) belong solely to the Debtor. The Insurers thus cannot stand in the shoes of the Debtor with respect to its personal, affirmative defenses in order to establish standing that the Insurers otherwise do not have. The Insurers Objections should be overruled for lack of standing.

III. The Objections Are Not Ripe Because Allowance of the Claims Poses No Threat to the Insurers' Interests at this Time

Courts apply more than one justiciability doctrine to ensure that a "case or controversy" exists. The doctrines of standing and ripeness are sometimes confused. While the standing doctrine analyzes *who* may bring an action, ripeness addresses *when* an otherwise-proper

party may pursue a course of action in a case. *Const. Party of, Penn. v. Cortes*, 712 F. Supp. 2d 387, 395 (E.D. Pa. 2010) (citations omitted). Ripeness "counsels abstention until such time as a dispute is sufficiently concrete to satisfy the constitutional and prudential requirements of the doctrine." *Peachlum v. City of York,* 333 F.3d 429, 433 (3d Cir.2003). When analyzing ripeness, courts consider, among other things, whether a party "is genuinely aggrieved" so as to avoid "expenditure of judicial resources on matters which have caused harm to no one." *Id*. (citing *Erwin Chemerinsky, Federal Jurisdiction* § 2.3.1 (1989)).

Even assuming the Insurers can establish that they have standing, their Objections lack ripeness. The Committee recently filed a plan of reorganization (the "Plan") [ECF No. 906]. It is the only plan on file in the case. The Plan provides for just two potential outcomes with respect to the Insurers; they may either (i) elect to settle voluntarily and receive releases in exchange, or (ii) if they elect not to settle, the Insurers will have their prepetition rights and defenses preserved in their entirety when the case is dismissed. (Plan at Section 4.2.3 and Section 5.1). To be clear, under the terms of the proposed plan, the allowance or disallowance of the Claims will have absolutely no impact on the Insurers' rights and defenses. For this reason, even assuming the Insurers can establish that they have standing, the Objections lack ripeness and should be overruled or, at very least, adjourned.

CONCLUSION

The Insurers should not be permitted to commandeer these chapter 11 proceedings at this late stage, particularly when they cannot show a legitimate basis for doing so. The Insurers cannot meet their burden to show that allowance of the Claims will affect their legally-protected rights. As a result, and for the reasons set forth above, the Committee respectfully asks that the Objections be overruled or, at very least, adjourned until such time as they are ripe.

Respectfully submitted,

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