

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

COURT OF APPEALS

STATE OF NEW YORK

ROMAN CATHOLIC DIOCESE OF BROOKLYN,

Appellant,

-against-

No. 69

NATIONAL UNION FIRE INSURANCE COMPANY
OF PITTSBURGH, PA,

Respondent.

20 Eagle Street
Albany, New York 12207
March 19, 2013

Before:

CHIEF JUDGE JONATHAN LIPPMAN
ASSOCIATE JUDGE VICTORIA A. GRAFFEO
ASSOCIATE JUDGE SUSAN PHILLIPS READ
ASSOCIATE JUDGE ROBERT S. SMITH
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.
ASSOCIATE JUDGE JENNY RIVERA

Appearances:

DAVID B. HAMM, ESQ.
HERZFELD & RUBIN, P.C.
Attorneys for Appellant
125 Broad Street
New York, NY 10004

BARBARA I. MICHAELIDES, ESQ.
BATES CAREY NICOLAIDES LLP
Attorneys for Respondent
191 North Wacker
Suite 2400
Chicago, IL 60606

Karen Schiffmiller
Official Court Transcriber

1 JUDGE GRAFFEO: Number 69, Roman Catholic
2 Diocese of Brooklyn against National Union Fire
3 Insurance Company.

4 Counsel, do you wish to reserve time for
5 rebuttal?

6 MR. HAMM: Yes, Your Honor, if I may, three
7 minutes.

8 JUDGE GRAFFEO: Three minutes.

9 MR. HAMM: May it please the court, my name
10 is David Hamm. I'm with Herzfeld & Rubin here on
11 behalf of the Roman Catholic Diocese of Brooklyn. We
12 bring to the court three issues today, all of which,
13 I feel, can be determined by getting back to basics.
14 Here's what I mean by that. Let's talk about the
15 waiver issue.

16 Getting back to basics means getting back
17 to 3420(d), General Accident against Cirucci, and
18 Zappone, and, specifically, the narrow exception
19 which was set forth in Zappone. In Zappone, the
20 court looked to the statute, and on its face, the
21 statute has no exceptions - - -

22 JUDGE SMITH: But wait, before you get to
23 Zappone, the statute says "If an insurer shall
24 disclaim liability or deny coverage." Saying - - -
25 you're just saying you aren't beyond your deductible.

1 That's the easy - - - you've got to use up your
2 retention isn't disclaiming liability or denying
3 coverage.

4 MR. HAMM: Respectfully, Your Honor, that
5 isn't the new issue that was raised at the time in
6 2007, when they put in their second - - - actually,
7 third disclaimer. What was new about it was the
8 assertion that there was here more than one
9 occurrence.

10 JUDGE SMITH: Okay, but that - - - but that
11 is not - - -

12 MR. HAMM: That's the new thing.

13 JUDGE SMITH: But I suggest to you that's
14 not a disclaimer of liability or a denial of
15 coverage.

16 MR. HAMM: I don't know how the court can
17 really find that. This was certainly a partial
18 disclaimer of coverage in that they were requiring
19 us, instead of looking at this as one occurrence and
20 therefore subject to one per-occurrence SIR, they're
21 now saying that it's multiple occurrences - - -

22 JUDGE SMITH: So - - -

23 JUDGE GRAFFEO: Why - - -

24 MR. HAMM: - - - and it requires many SIRs.

25 JUDGE GRAFFEO: Why was it only one

1 occurrence? Why don't we look at that issue?

2 MR. HAMM: I'd be happy to address that,
3 though I think the waiver issue would make that
4 inquiry unnecessary. But I will look at that right
5 now.

6 JUDGE GRAFFEO: Well, just be - - - just
7 presume we disagree with you on the waiver issue.

8 MR. HAMM: I'll - - - I hate to presume
9 that, but I will under the circumstances. Okay,
10 let's take a look at the one occurrence or - - -

11 JUDGE GRAFFEO: This was - - -

12 MR. HAMM: - - - multiple occurrences.

13 JUDGE GRAFFEO: This was conduct that
14 spanned more than one policy period, correct?

15 MR. HAMM: Yes, it was. And we all look, I
16 think, when we're dealing with the one occurrence or
17 multiple occurrence, we turn back to Appalachian.
18 The Appalachian decision first said let's look at the
19 policy and see if the policy gives us indication of
20 whether or not there was an intention to have one or
21 multiple occurrences under those circumstances.

22 Here, we believe the policy does give that
23 indication, not by what it says, but by what it
24 purposely omitted. In our brief, and in the record,
25 it shows that, originally, the self-insured retention

1 provision included a statement that it was going to
2 apply - - - SIRs would apply - - - to each occurrence
3 - - - I'm sorry - - - to each claim under each
4 occurrence.

5 Our broker said, no, no, no, you got that
6 wrong; that's incorrect. Sent it back to National
7 Union, and said, no, we want all losses under a - - -
8 I'm sorry - - - that all losses arising from an
9 occurrence should be within the self-insured
10 retention.

11 JUDGE PIGOTT: Is Appalachian the closest
12 you can get? Is that the most - - - the closet you
13 can get in terms of this type of single occurrence?

14 MR. HAMM: I'm sorry; I don't understand.

15 JUDGE PIGOTT: Well, let's assume for a
16 minute, instead of discussing sexual abuse, that
17 little Johnny got whacked by Sister Mary every, you
18 know, every weekend on Friday, when he forgot to
19 bring his homework. And that happens ten times and
20 he sues for ten assaults. Is that one occurrence?

21 MR. HAMM: It may well be. That may well
22 be one occurrence. If it's at - - -

23 JUDGE PIGOTT: How?

24 MR. HAMM: If we are looking at the - - -
25 if we are - - - what we are looking at is a condition

1 - - - and again, I don't know how that - - - how that
2 plays out. If you're dealing with a - - -

3 JUDGE PIGOTT: Sister Mary said I wasn't
4 even there that Friday. Then all of a sudden it's
5 down to nine. And that's - - - that's what I'm
6 thinking, though. I mean, I don't know how you - - -
7 we can just say well, Sister Mary was a dangerous
8 condition that existed.

9 MR. HAMM: Well - - -

10 JUDGE PIGOTT: - - - throughout her tenure.

11 MR. HAMM: The term "condition" is used in
12 many different ways.

13 JUDGE GRAFFEO: Is it relevant at all that
14 there's just one - - - one party here that was
15 subjected to the harm - - -

16 MR. HAMM: Certainly.

17 JUDGE GRAFFEO: - - - versus multiple
18 plaintiffs - - -

19 MR. HAMM: Absolutely.

20 JUDGE GRAFFEO: - - - in some of the other
21 cases?

22 MR. HAMM: That's getting past the - - -

23 JUDGE GRAFFEO: Does that - - - does that
24 have any bearing on the one occurrence?

25 MR. HAMM: Certainly. Take a look at the

1 Appalachian decision and even if we do not look at
2 our policy as providing a hint or an explanation as
3 to what was intended, we go into the temporal and
4 spatial relationship test, which was set forth in
5 Appalachian, and here, Appalachian was dealing with
6 400,000 people injured over, you know, based on
7 22,000 different - - - different items, which were
8 put into the stream of comments - - -

9 JUDGE PIGOTT: No one - - - no one knew how
10 to handle asbestos. I mean, I think we can concede
11 that. I mean, that was just a mess - - - continues
12 to be, I think.

13 MR. HAMM: Conceded.

14 JUDGE PIGOTT: That's why I'm wondering if
15 you can get closer, you know - - - if there's another
16 case that's closer to this type of thing other than,
17 you know, the 22,000 cases that - - -

18 MR. HAMM: There are some, but the point is
19 this is the polar extreme, the opposite of
20 Appalachian. Here we have - - -

21 JUDGE SMITH: Suppose - - - suppose you're
22 right on Appalachian, isn't there another issue as to
23 whether - - - I mean, so you don't have - - - suppose
24 we reject the idea that there are as many occurrences
25 as there were instances of molestation. Don't you

1 still have to run the deductible - - - when the
2 policy expires, don't you have to start all over
3 again with the retention?

4 MR. HAMM: No.

5 JUDGE SMITH: Why not?

6 MR. HAMM: Why should there be? Let's take
7 a look at - - - let's take a look at the
8 circumstances - - -

9 JUDGE SMITH: Well, the policy does say
10 recovering only bodily injury that occurs during the
11 policy period.

12 MR. HAMM: Your Honor, if that is the way
13 in which - - - the way in which we're going to apply
14 this rule, then it's going to be contrary to every
15 manner - - -

16 JUDGE SMITH: Well - - -

17 MR. HAMM: - - - in which insurance is
18 applied in this state - - -

19 JUDGE SMITH: Well, suppose - - - suppose -
20 - -

21 MR. HAMM: - - - throughout the state.

22 JUDGE SMITH: Suppose after, you know,
23 after the first - - - I forget whatever the first
24 year was that this abuse was going on, and suppose
25 the - - - at that - - - at the end of that year, and

1 obviously not knowing the problem existed, the
2 Diocese had decided we're going to self-insure.
3 We're dropping our policy. Then years later this
4 comes out, is the insurance company on the hook for
5 the whole thing?

6 MR. HAMM: Yeah, here's why. The - - - if
7 - - - if - - - and if a - - - if somebody falls down
8 a flight of steps in 2007, breaks a leg. In 2008,
9 the person has an infection and has an operation. In
10 2009, another infection, another operation. In 2010,
11 there's a blood clot, and there's an amputation. Who
12 covers it? Who covers that?

13 JUDGE SMITH: I'm sorry; what's the
14 original cause in all this in your hypothetical?

15 MR. HAMM: He fell down the floor - - - he
16 fell down a flight of stairs.

17 JUDGE SMITH: Uh-huh. But you - - -

18 MR. HAMM: The occurrence occurred there.

19 JUDGE SMITH: - - - you don't see - - - you
20 don't see of difference of where they were repeated
21 acts? I mean, the - - - obviously, there's a sense
22 in which each act contributed causally to the others,
23 but there's also a sense in which they didn't.

24 MR. HAMM: Well, my point is, Your Honor,
25 that if what we're looking at is a trigger of

1 coverage under a policy, if there's an accident that
2 occurs in one year, that insurer that's there at the
3 inception cannot avoid responsibility for all
4 subsequent bodily injuries.

5 JUDGE PIGOTT: Yeah, but go the other way.

6 MR. HAMM: Here - - -

7 JUDGE PIGOTT: I'm sorry.

8 MR. HAMM: I'm sorry; I don't want to
9 interrupt.

10 JUDGE PIGOTT: I was - - - was going to
11 say, if you're going back to my assault case, you
12 know, where's the nun's whacking the kid. If she
13 breaks his arm in year '09, all right, I don't think
14 the fact that she hit him in year '01 means that that
15 policy's going to pay for the broken arm in '09. I
16 mean, and isn't that what you have here? If you can
17 prove that all of her psychological and damages were
18 a result of the initial one, that would fall under
19 that policy, but if it goes into the other policies,
20 why wouldn't they pay?

21 MR. HAMM: Well, if that's - - - if what
22 Your Honor is suggesting is correct, then I don't
23 know what test the court set up in Appalachian,
24 because it doesn't matter how close or distant the
25 temporal - - -

1 JUDGE PIGOTT: Well, that's what I mean.

2 That's why Appalachian - - -

3 MR. HAMM: - - - or spatial conditions are.

4 But - - -

5 JUDGE PIGOTT: Appalachian is such a mess.

6 I mean, no one knew how to handle asbestos.

7 MR. HAMM: Yeah, well, the - - -

8 JUDGE PIGOTT: So, if we take that out, is
9 there another case that we can look at that would be
10 similar to this?

11 MR. HAMM: Well, if you're going to take
12 Appalachian - - - if you're going to overturn
13 Appalachian - - -

14 JUDGE PIGOTT: No, no, no.

15 MR. HAMM: - - - that's going to come as -
16 - -

17 JUDGE PIGOTT: I'm moving it aside. I'm
18 only one judge, so - - -

19 MR. HAMM: - - - a big surprise to
20 everybody.

21 JUDGE PIGOTT: I'm just - - -

22 MR. HAMM: That test was there.

23 JUDGE PIGOTT: I'm just trying to get out
24 of the 22,000 asbestos cases and get into something
25 closer to this. And I - - - and maybe - - -

1 JUDGE READ: A better analogy.

2 MR. HAMM: A better analogy? I don't know,
3 Your Honor, but I can suggest that whatever this
4 might be - - - whatever closer there can be, this is
5 at the far extreme. This is a circum - - -

6 JUDGE GRAFFEO: Can I ask what the rule is
7 that you'd like us to adopt here? Are you saying if
8 - - - if we were agree with you that there's just one
9 occurrence, does that necessarily mean there can only
10 be one self-insured retention - - -

11 MR. HAMM: Yes.

12 JUDGE GRAFFEO: - - - or could you have one
13 occurrence and multiple SIRs?

14 MR. HAMM: No, Your Honor. If there is a
15 per-occurrence - - - if there is per-occurrence - - -
16 a per-occurrence self-insured retention, then if
17 there was one occurrence - - -

18 JUDGE GRAFFEO: So they go together?

19 MR. HAMM: - - - there should be one retent
20 - - -

21 JUDGE GRAFFEO: They go together?

22 MR. HAMM: Yes. I believe that's
23 absolutely correct, and in fact, if there was going
24 to be a - - -

25 JUDGE SMITH: It's impossible, in your

1 view, to have one occurrence but several different
2 instances of bodily injury?

3 MR. HAMM: Of course, there can be. Of
4 course, there can be. And in fact, that's what - - -

5 JUDGE SMITH: But it does say bodily injury
6 - - - I mean, in your falling-down-the-stairs case, I
7 guess I'd be inclined to say it's only one injury.
8 It had a lot of consequences, but he - - - she was -
9 - - the plaintiff was only injured once. Here, the
10 plaintiff is injured again, and again, and again.

11 MR. HAMM: I - - - you're right, except
12 that here what we're dealing with - - - and that was
13 an analogy, the falling-down-the-steps case - - -
14 because here what we're dealing with is occurrence,
15 but what we have here is the statement by the
16 insurer, which explains that an occurrence includes
17 continuous or repeated exposures to the same general
18 - - - substantially, the same general conditions. So
19 the insurer, by his language, has spread that out.

20 JUDGE PIGOTT: If you had - - - if you have
21 ten members of the clergy doing this, is that one
22 occurrence?

23 MR. HAMM: That gets into the question of
24 whether what we're talking about is a - - - is the -
25 - - the ultimate event, for example, the question of

1 whether we failed to supervise our clergy.

2 JUDGE PIGOTT: That's closer to
3 Appalachian, though, isn't it?

4 MR. HAMM: That's - - - that's the other
5 side of Appalachian. But here we don't have that
6 issue, and I'm not trying to establish an absolute
7 rule, which would be applied in all instances. I
8 don't know if you can have that.

9 JUDGE SMITH: Well, what about - - -

10 MR. HAMM: Appalachian came close.

11 JUDGE SMITH: What - - - there are a couple
12 of case - - - there are several cases that look a lot
13 like this one. I'm thinking in particular of the one
14 in the Ninth Circuit and one in the Fifth Circuit.
15 Are you just - - - you're saying that those were
16 wrongly decided?

17 MR. HAMM: Some of them were wrongly
18 decided, yes, Your Honor. And some - - -

19 JUDGE SMITH: And need to go your way?

20 MR. HAMM: And some of them were - - - no,
21 some of them were based upon a different concept,
22 which is that the occurrence had to happen during the
23 policy period, which is, in fact, what happened in a
24 couple of these cases, that where the occurrence had
25 to happen during the policy period. Reasonably,

1 then, I suppose, one can say, that if an occurrence
2 had to happen in this policy, it only covers the
3 occurrence in this policy, and if an occurrence has
4 to happen in this policy, it only happens in this
5 policy.

6 Here, the occurrence is the continuous and
7 repeated exposure to the same general conditions.
8 The result, however, is that bodily injury triggers
9 the policies later on. So the policies can be
10 triggered, in the sense that their responsibility can
11 be brought - - -

12 JUDGE SMITH: One - - - so, one - - -

13 JUDGE GRAFFEO: Thank you.

14 JUDGE SMITH: Sorry. One question I meant
15 - - - I'm sorry - - - I meant to ask you if I can.
16 The - - - completely unrelated. There is a rule that
17 in cases of ambiguity, we construe a policy against
18 the insurance company. Here, it seems to me, that
19 there'll be cases where your side - - - where the
20 sides will flip, where it will be better for the
21 insured to have multiple occurrences rather than one.

22 MR. HAMM: But - - -

23 JUDGE SMITH: If I'm correct on that,
24 doesn't this - - - doesn't the whole interpreted-
25 against-the-insurer maxim fall out of the case?

1 MR. HAMM: Not at all, to the contrary. In
2 fact, that's exactly what happened in Safeguard,
3 which was one of the cases which was cited. That's
4 exactly what happened. It was to the insured's
5 benefit to have multiple occurrences, because there
6 it was - - - the insurer was trying to reach
7 additional limits of liability. But the point is,
8 the insured is entitled to rely upon the clear
9 language of the policy and to say that if there's an
10 ambiguity - - -

11 JUDGE SMITH: But let me - - - let me just
12 be clear what you're saying.

13 MR. HAMM: - - - it is to my benefit.

14 JUDGE SMITH: Suppose we had a case where
15 you wanted - - - you wanted to have ten occurrences,
16 because you wanted ten policy limits. You can
17 imagine such a case.

18 MR. HAMM: Right.

19 JUDGE SMITH: In that case, do we - - -
20 does that - - - do we read the policy differently, or
21 do we read it the same way?

22 MR. HAMM: We read it for the benefit of
23 the insured - - -

24 JUDGE SMITH: So it's on the same policy -
25 - -

1 MR. HAMM: - - - because if that's an
2 ambiguity - - -

3 JUDGE SMITH: So the same policy can have
4 opposite meanings depending on which sides of the
5 case the insured is on.

6 MR. HAMM: Yeah, an insured receives a
7 policy, and can rely upon the idea that explicit
8 language is going to be followed - - -

9 JUDGE SMITH: So, say - - - you can have -
10 - -

11 MR. HAMM: - - - and ambiguities will be
12 ruled in its favor.

13 JUDGE SMITH: You can have two case - - -
14 you can have two plaintiffs suing in the same
15 courthouse, the same day, under the same policy, or -
16 - - yeah, and one - - - and the policy in both cases
17 is read in a contradictory way, just so long as the
18 insurance company loses?

19 MR. HAMM: What we really need is for the
20 insurer to get exact language in this policy. As, in
21 fact, in Con Ed, one of - - - one of the cases which
22 was cited throughout the briefs, Con Ed had language
23 in its policy which expressly stated that all damages
24 flowing from continuous and repeated exposure to the
25 same conditions in the policy year shall be deemed

1 one occurrence.

2 JUDGE GRAFFEO: Counsel, you'll have more
3 time in your rebuttal.

4 MR. HAMM: I thank you, Your Honor.

5 JUDGE GRAFFEO: Thank you.

6 MS. MICHAELIDES: Thank you. May it please
7 the court, Barbara Michaelides, on behalf of National
8 Union.

9 JUDGE GRAFFEO: Can I ask you to clarify
10 just once for me on the record?

11 MS. MICHAELIDES: Yeah.

12 JUDGE GRAFFEO: Was the party harmed here -
13 - - she's received all her damages?

14 MS. MICHAELIDES: Yes. There was a
15 settlement; she's been paid. The question, now, is
16 who's responsible for paying the settlement amount
17 and how you approach - - -

18 JUDGE GRAFFEO: How to allocate; okay.

19 MS. MICHAELIDES: - - - the insurance
20 coverage in the context of a settlement. I'd like to
21 start with, I think, where the Second Department
22 started. I think it's the right place to start in
23 every coverage case, and obviously, here, we are
24 looking at the clear language of the policy and
25 applying it to different fact patterns.

1 Obviously, the sexual molestation cases do
2 present a unique fact pattern that are difficult to
3 apply some of the standard rules, but nevertheless,
4 there is a framework and a rubric that works here.
5 And I think what you do is you start with the plain
6 language of the policy, and here, the policies cover
7 injury occurring in the policy period.

8 My opponent makes a big deal about the
9 other molestation cases, because they require the
10 occurrence in the policy period. I submit there's no
11 difference. The analysis is the same.

12 JUDGE GRAFFEO: You're arguing there's - -
13 - you don't - - - that you have the same temporal
14 limitation as policies that have - - -

15 MS. MICHAELIDES: Of course we do.

16 JUDGE GRAFFEO: - - - a more explicit term?

17 MS. MICHAELIDES: Of - - - it's not a more
18 explicit term; it's a different term. There is a
19 trigger of coverage. We're talking about trigger.
20 What event triggers the policy? That's where the
21 Second Department started and that's where you should
22 start in every coverage case.

23 In this case, it's the bodily injury that
24 is suffered during the policy period. That is what
25 National Union agreed to provide insurance coverage

1 for. The injury, which is not to be confused with
2 damage - - - and I think that's where we were going a
3 little bit with my opponent's argument - - - the
4 injury is the molestation. It's the physical act;
5 it's the infliction of the injury in the policy
6 period. That is the event that potentially triggers
7 the policy's coverage. It is not that if you are
8 injured in one policy and you suffer damages
9 continuing but not a separate injury, that's a
10 different circumstance, and I think that's what - - -

11 JUDGE SMITH: Do you say that there - - -

12 MS. MICHAELIDES: - - - counsel was
13 implying.

14 JUDGE SMITH: - - - were as many injuries
15 as there were - - - well, injuries is the wrong - - -
16 that there were as many occurrences as there were
17 acts of molestation, or just as many occurrences as
18 there were policy years?

19 MS. MICHAELIDES: Well, I think if you have
20 the right facts, and I think if you had the
21 circumstance where you have a whack over the head by
22 a nun, and you can exactly quantify that, you could
23 say there are that many occurrences. That's what an
24 occurrence should look at. It should look at the
25 injury-causing event.

1 JUDGE SMITH: But so in this case - - -

2 MS. MICHAELIDES: How you can quantify that

3 - - -

4 JUDGE SMITH: In this case, suppose the
5 victim says, I - - - my best recollection, he
6 molested me fifteen times in four years. Are there
7 fifteen mole - - - fifteen occurrences or four?

8 MS. MICHAELIDES: Well, I think the problem
9 is, there should be fifteen, but here we don't even
10 have that. We have a minor who doesn't have an exact
11 recollection of the exact number of events, when they
12 occurred, and that is typical in the sexual
13 molestation case.

14 JUDGE SMITH: Well, but certainly you would
15 expect her to at least say there were more than three
16 and less than twenty, or something like that.

17 MS. MICHAELIDES: Right, but if you can't
18 actually identify the exact number of occurrences,
19 and you can't pinpoint which policy they fell in,
20 which is what we have here, then - - - I mean, our
21 position is there has to be at least one occurrence
22 per policy period. And I think that's a fair
23 approach - - -

24 JUDGE SMITH: You - - - it's not - - - in
25 my - - - but there's - - - you're saying it's not

1 necessary for argue that there are more than four,
2 and you're not arguing that there are more than four.

3 MS. MICHAELIDES: No, we are not. I'm just
4 saying, analytically, the correct analytical approach
5 should be that in a case where you can quantify the
6 exact events, the insurable events, and the damages
7 flowing therefrom, it should be - - - it should
8 equate to an occurrence per molestation.

9 But here, we can't do that and we don't
10 need to do that, because when you look at the amount
11 of the settlement and you allocate it over the
12 potentially triggered years, which are seven policy
13 periods in this case, you get to an amount per policy
14 period. And then you have to figure out how do you
15 allocate the responsibility for paying the exposure
16 in the years that are applicable. So - - -

17 JUDGE PIGOTT: But isn't this - - -

18 JUDGE GRAFFEO: Why should we view this the
19 same way as Appalachian? It's - - - this is so
20 different.

21 MS. MICHAELIDES: Well, I think - - -

22 JUDGE GRAFFEO: I mean, that was such an
23 extreme fact pattern.

24 MS. MICHAELIDES: That's an extreme fact
25 pattern. This is a - - -

1 JUDGE GRAFFEO: This is one - - -

2 MS. MICHAELIDES: - - - recurring fact
3 pattern.

4 JUDGE GRAFFEO: This is one indi - - - one
5 child, subjected to similar type harm.

6 MS. MICHAELIDES: Right, and I think here
7 what we're looking now at, she's been subjected to
8 this harm. There's been injury over seven policy
9 periods. So the facts suggest, and they're not
10 disputed, that she was injured over seven policy
11 periods. So there was actual injury - - - injury, in
12 fact - - - in each policy period. That potentially
13 triggers the coverage for those years.

14 JUDGE PIGOTT: Is that - - - is that the
15 way the complaint came? In other words, is there a
16 cause of action for each year? In other words, in my
17 nun case, I mean, you're going to have nine causes of
18 action or ten for each time that the child got
19 whacked.

20 In this case, if the allegation is that she
21 was sexually abused for a continuous period from
22 these two dates, and you can't sort that out, why
23 wouldn't be a, you know, one retention, and then the
24 rest to you?

25 MS. MICHAELIDES: Well, I think they're

1 different questions. Obviously, the claimant did not
2 plead a cause of action for each year. She pled a
3 cause of action and alleged clearly that the injury
4 occurred in each policy period. So there were
5 instances of molestation in each policy period for
6 seven years.

7 JUDGE PIGOTT: Specific dates in the bill
8 of particulars?

9 MS. MICHAELIDES: Well, she has a specific
10 range of dates, starting from August of '95 through
11 2002. So we know for a fact the coverage for those
12 policy periods are now potentially implicated,
13 because there's allegation of injury and that is what
14 triggers possible insurance coverage in those
15 policies.

16 So then what you look is - - - you have to
17 look at the policy language here. The SIR
18 endorsement that we're all talking about speaks to
19 the premium charged for that policy. If I could
20 direct the court to - - - it's at Appendix 154 - - -
21 this is the SIR endorsement.

22 And it states clearly, "In consideration of
23 the premium charged, it is agreed that the limits of
24 insurance for each of the coverages provided by this
25 policy will apply an excess of 250,000 dollar self-

1 insured retention. The retained amount shall apply
2 only to occurrences covered under this policy and
3 shall apply separately to each occurrence."

4 So what we have here is - - - so assume we
5 have injury over all seven policy periods. We're
6 looking at the two National Union policies at the
7 beginning of the molestation. What you have is,
8 regardless of whether you say you have multiple
9 occurrences or even a single occurrence, if the
10 Diocese wants the policy to respond to the loss in
11 that policy period, they have to pay the SIR.

12 The SIR is the amount of insurance the
13 Diocese agreed to retain. Meaning, they agreed that
14 if there's an insurable loss in that period, they
15 will pay the first 250,000-dollar exposure for that
16 loss and then National Union will respond above that
17 amount.

18 JUDGE GRAFFEO: To make sure we understand
19 you, so if we disagree with you and find one
20 occurrence, you're arguing that you can still have
21 multiple SIRs?

22 MS. MICHAELIDES: Absolutely. And we cited
23 the Ranger case. And I think that's clearly what the
24 policy anticipates, because this policy does not say
25 that we're going to pay for an occurrence happening

1 in another policy period or that we're going to pay
2 regardless of - - - in absence of the self-insured
3 retention. The retention is just the amount of
4 insurance, so you have a million dollars. That's
5 what this policy was, 250 retained, 750 in limits.
6 That's the insurance available to cover a loss in
7 that policy period.

8 And so, if you want to get to the amount
9 above the 250, you have to pay that first. I mean,
10 that's just the way the policy is structured. That's
11 what the parties - - -

12 JUDGE GRAFFEO: Why - - - why - - -

13 MS. MICHAELIDES: - - - intended.

14 JUDGE GRAFFEO: I'm not saying that - - -
15 whether we think it's multiple or one, but if we were
16 to find it's one occurrence, why is - - - why is the
17 better rule to say you have to pay multiple
18 retentions?

19 MS. MICHAELIDES: Well, I disagree that
20 it's one occurrence. I'm just saying, if - - -

21 JUDGE GRAFFEO: I understand that. I'm
22 saying - - -

23 MS. MICHAELIDES: Okay, so - - -

24 JUDGE GRAFFEO: - - - let's consider - - -

25 MS. MICHAELIDES: Because each policy - - -

1 JUDGE GRAFFEO: Presume if we were to find
2 there's one occurrence - - -

3 MS. MICHAELIDES: Right.

4 JUDGE GRAFFEO: - - - why do multiple SIRs
5 have to be paid?

6 MS. MICHAELIDES: Well, if you want - - -
7 if the Diocese wants the proceeds to respond in that
8 second policy period - - - so everyone agrees in the
9 first policy, the SIR applies there. Well, if you
10 want coverage in the next policy period, the policy
11 clearly states that to the extent you want this
12 policy to respond in this year, we've based our
13 premiums, the parties have agreed then, for coverage
14 to apply in the second policy period, you have
15 retained - - -

16 JUDGE GRAFFEO: So we'd have to find - - -

17 MS. MICHAELIDES: - - - the exposure for
18 the first 250,000.

19 JUDGE GRAFFEO: We'd have to find a
20 temporal limitation in the policy.

21 MS. MICHAELIDES: Well, there is, of
22 course. It's a policy period of one year. Policies
23 are issued in successive one-year periods, and in
24 this case - - - I mean, certainly you can get multi-
25 year policies; these are not that. These are

1 individual, one-year policies that come upon each
2 other. One ends - - - one begins, and the next one
3 ends. They're stand-alone policies.

4 JUDGE SMITH: You're relying on the
5 language that says this insurance applies to bodily
6 injury if the bod - - - only if the bodily injury
7 occurs during the policy period?

8 MS. MICHAELIDES: Correct. That's what
9 triggers the event. That's what triggers the
10 coverage.

11 JUDGE GRAFFEO: The Interstate - - -

12 MS. MICHAELIDES: There has to be injury.

13 JUDGE GRAFFEO: The Interstate Fire case in
14 the Ninth Circuit, they seemed to focus on a
15 particular clause that was in the contract - - -

16 MS. MICHAELIDES: But the problem - - - but
17 we have the same - - -

18 JUDGE GRAFFEO: - - - during the policy
19 period. We don't have anything that explicit here.

20 MS. MICHAELIDES: We do. Our policy
21 requires bodily injury, but only if the bodily injury
22 occurs during the policy period. We have the exact
23 same phrase. It's injury occurring in the policy
24 period, because we're not agreeing to cover bodily
25 injury that pre-dates the policy or comes after the

1 policy period ends. This is coverage for this
2 particular policy period. We have the identical - -
3 -

4 JUDGE SMITH: If this were - - -

5 MS. MICHAELIDES: - - - temporal
6 limitation.

7 JUDGE SMITH: If this were an environmental
8 or asbestos case, suppose you had a leak of
9 pollutants into ground water. It went on for years
10 and years. Would you - - - would one - - - would you
11 be able to get all the damages under one policy?

12 MS. MICHAELIDES: No, you wouldn't. The
13 same analysis applies, because what you do is, once
14 again, you look at what triggers coverage. In a
15 contamination case, a pollution case, you've got
16 exposure; that I agree would be a true condition.
17 You have a harmful condition, which I disagree that a
18 priest - - -

19 JUDGE SMITH: I mean, you agree - - -

20 MS. MICHAELIDES: - - - sexually molesting
21 could be a condition.

22 JUDGE SMITH: In the case I quote, you'd
23 have only one occurrence, but you say you'd still get
24 a half-dozen or whatever - - -

25 MS. MICHAELIDES: Right, because - - -

1 JUDGE SMITH: - - - retentions.

2 MS. MICHAELIDES: What you're going to get
3 is you're going - - - what's going to trigger the
4 policy will be property damage in the policy period.
5 But then once again, you have to look at the policy.
6 The policy covers only the damage occurring in that
7 policy period. That's what also supports allocating
8 the loss over all potential - - -

9 JUDGE SMITH: But aren't there - - -

10 MS. MICHAELIDES: - - - - intervening
11 policies.

12 JUDGE SMITH: Aren't there cases - - -
13 aren't there cases that hold - - - maybe it depends
14 on the policy - - - but aren't there cases that hold
15 that if you've got a pol - - - that if you wrote a
16 policy during any year while this stuff is leaking
17 into the ground water, you're on the hook for the
18 whole thing, however long it leaks?

19 MS. MICHAELIDES: Well, that's the all
20 sums. A lot of courts rely upon the all sums
21 language. We don't have all sums language in our
22 policy. We have "those sums"; we pay "those sums",
23 meaning that - - - the specific exposure in our
24 policy period, another way to temporally limit. But
25 I - - - honestly, I disagree with those decisions

1 that relied upon the all sums language, because the
2 insurers clearly there also had the "during the
3 policy period" language in their policies, and that
4 also supports the temporal limitation.

5 So I think here, it would defy logic to
6 have successive policies. I don't think any of the
7 parties anticipated that one insurer would pick up an
8 entire loss that spans multiple policy periods.
9 That's the point of getting successive policies of
10 insurance.

11 JUDGE GRAFFEO: Counsel, before your light
12 goes on, do you want to address the waiver issue?

13 MS. MICHAELIDES: Sure, a few things on
14 waiver. I think 3420 clearly states that it's got to
15 be a disclaimer of liability or a denial of coverage.
16 The SIR allocation operates by law. These are not
17 denials; they are not disclaimers.

18 I think here we have to also keep in mind,
19 at the time the lawsuit was filed, the plaintiffs' ad
20 damnum at that time was for thirty million dollars,
21 and so to ensure that an SIR to - - - to ask the SIR
22 be paid doesn't even come close to be a disclaimer or
23 a denial. It's still not a disclaimer or a denial.
24 I just don't think an SIR comes within the rubric of
25 3420.

1 It's also a condition precedent to
2 coverage, so it's something the insured has the - - -
3 carries the burden on. They have to come in and
4 establish that they have exposure that exceeds the
5 amount that they agreed to retain, and so I don't
6 think that would ever be subject to waiver, because
7 it isn't something - - - it's not an exclusion; it's
8 not something that the insurer is relying upon to
9 deny coverage. It just has no application here.

10 Quickly, I don't know if we want to talk
11 about allocation, but I do think allocation is
12 supported by New York law. It's required. It's
13 supported by the policy language, because once again
14 we're only covering - - -

15 JUDGE GRAFFEO: Quickly.

16 MS. MICHAELIDES: - - - damage in the
17 policy, injury in the policy. And if the court has
18 no further - - -

19 JUDGE SMITH: Is the allocation issue
20 different from the issue we're talking about a few
21 minutes ago of separating the retention - - - the
22 retention renewing every year?

23 MS. MICHAELIDES: It's different in the
24 sense that it's the policy - - - it's New York law
25 that basically says it's fair and equitable. Where

1 you have a case here where you cannot pinpoint the
2 damages in any given policy period, and that's the
3 predicate for allocation. Certainly if you can
4 pinpoint the damages, if you can pinpoint the injury,
5 damages flowing therefrom, you don't need to
6 allocate; you would then just literally assign each
7 insurer their burden. But where you can't do that in
8 a case like this, it's fair to do it equally.

9 JUDGE GRAFFEO: Thank you.

10 MS. MICHAELIDES: And we would request that
11 you affirm the Second Department. Thank you.

12 JUDGE GRAFFEO: Mr. Hamm?

13 MR. HAMM: Your Honor, please, let me - - -
14 let me just tackle a couple of things that my
15 adversary mentioned then. I think it's important to
16 recognize that this provision - - - the definition of
17 occurrence included the statement "repeated exposure
18 to conditions".

19 Now, the term "conditions" I've addressed
20 in my reply brief. There are - - - the term
21 conditions may easily apply to the condition of
22 sexual predation, which occurred here. I think it's
23 very clear that that could be included, and if they -
24 - - if the insurer wanted a different definition,
25 they should have put it in.

1 The fact is, though, that this includes
2 repeated exposures to conditions, not just
3 continuous. It does not have to be continuous.
4 There can be a space between them, as long as it's
5 not too great, based upon this court's spatial and
6 temporal proximity approach in Appalachian.

7 So I think that by accepting the argument
8 made by my adversary, you're reading the "repeated
9 exposure to conditions" language right out of the
10 policy, because that would not be considered - - -
11 every single - - - every single separate incident, as
12 my adversary responded to Judge Smith, would be a
13 separate occurrence, and that's simply not what the
14 policy says.

15 Again, we go back to contra proferentem; we
16 go back to the concept that if you want to make it
17 explicit, make it explicit; otherwise we read it in
18 favor of the insured.

19 JUDGE GRAFFEO: What would they have had to
20 say to make it explicit?

21 MR. HAMM: I'm sorry?

22 JUDGE GRAFFEO: What would they - - -

23 MR. HAMM: They could have said exact - - -

24 JUDGE GRAFFEO: - - - have had to say?

25 MR. HAMM: They could have said exactly

1 what Con Edison - - - what the insurer said in Con
2 Edison, which is all damages arising out of
3 continuous or repeated exposure to conditions during
4 the policy period constitutes one occurrence. That's
5 what the insurer said in Con Ed. They didn't say
6 that here. And that, I think, is what makes a
7 difference.

8 Now, if Your Honor please, let's - - - I
9 will talk to waiver if it's okay. What we're dealing
10 with here is not the question of what the policy says
11 in respect to the existence of an SIR. Yes, we know
12 there's an SIR in the second policy, in the third
13 policy.

14 What we are dealing with here is the new
15 argument, raised in 2007, that this is multiple
16 occurrences, instead of one occurrence. That is a
17 new argument. That's an interpretation of their
18 policy provisions which did not exist in the 2004
19 disclaimers.

20 JUDGE SMITH: But do you have to - - -

21 MR. HAMM: It came up in 2007.

22 JUDGE SMITH: Do you have to - - - do you
23 have to put in your disclaimer letter every argument
24 you're going to make to reduce your liability in a
25 lawsuit?

1 MR. HAMM: You bet. Yes, Your Honor.

2 JUDGE SMITH: So you say - - - you say - -

3 -

4 MR. HAMM: There are a number of cases - -

5 -

6 JUDGE SMITH: You say you would read denial
7 or disclaimer broadly enough to include anything that
8 lessens your exposure?

9 MR. HAMM: Your Honor, that's what this
10 court did in Fair Price and in Central General
11 against Chubb. Those were instances in which there
12 was a partial disclaimer. A particular claim was
13 said to be inappropriate, fraudulent, later on,
14 right. So it wasn't the whole claim that was
15 disclaimed; it was one piece of it. And the court
16 said that that is a delayed disclaimer, and
17 therefore, the concept of waiver applies.

18 So absolutely, if it's going to reduce - -
19 - and I don't know - - - we paid this thing in 2008.
20 We haven't seen penny one out of this insurance, so I
21 don't know if you want to call it a - - - I don't
22 know what kind of sugar coating you want to put on
23 it, this is a disclaimer of coverage.

24 The other point that I would - - -

25 JUDGE GRAFFEO: Thanks.

1 MR. HAMM: - - - waive - - - raise - - -
2 I'm sorry.

3 JUDGE GRAFFEO: Could you wrap up fairly
4 quickly, please?

5 MR. HAMM: All right. I was going to hit
6 on allocation, but I guess we're going to - - - we'll
7 have to rely on our brief on that. And I thank the
8 court for its indulgence.

9 JUDGE GRAFFEO: Thank you very much, both
10 of you.

11 (Court is adjourned)

12

13

14

15

16

17

18

19

20

21

22

23

24

25

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

C E R T I F I C A T I O N

I, Karen Schiffmiller, certify that the foregoing transcript of proceedings in the Court of Appeals of Roman Catholic Diocese of Brooklyn v. National Union Fire Insurance Company of Pittsburgh, PA, No. 69, was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



Signature: _____

Agency Name: eScribers

Address of Agency: 700 West 192nd Street
Suite # 607
New York, NY 10040

Date: March 24, 2013