

Sandusky Coverage Battle Hinges On Penn State's Knowledge

Law360, New York (July 30, 2012, 9:59 PM ET) -- Pennsylvania State University's president said Sunday that insurance will cover lawsuits over the child molestation scandal involving former assistant football coach Jerry Sandusky, but experts say that will largely depend on whether the college can deflect insurers' claims that it knowingly harmed the alleged victims by keeping the problem under wraps.

Penn State President Rodney Erickson said in an interview with CBS ([/companies/cbs-corporation](#))' "Face The Nation" that the college has directors and officers and general liability policies that it believes will provide enough coverage for suits brought by Sandusky's alleged victims.

The former coach was convicted on 45 counts last month for sexually assaulting 10 boys who participated in The Second Mile charity, a program for children with absent or dysfunctional families. On top of criminal proceedings, one alleged victim has bought a civil suit against Sandusky, The Second Mile and Penn State.

Insurers for Penn State, The Second Mile and Sandusky have been quick to launch their own suits to avoid covering litigation arising from the sex abuse scandal. Their main argument against coverage will likely be that their policies don't cover harm that is expected or intended, according to Seth Tucker, a Covington & Burling LLP ([/firms/covington-burling](#)) attorney who represents policyholders.

Though a recent report by Freeh Sporkin & Sullivan LLP into the controversy found that top officials at Penn State had a "callous and shocking" disregard for the safety and welfare of Sandusky's victims, Tucker said insurers would still have to meet a high burden to knock out coverage through an exclusion for expected or intended harm.

"Right now, we have the Freeh report, which is interesting, but it's obviously not the last word on the facts," Tucker said, pointing out that the report also indicated that officials thought the abuse would stop once they talked to Sandusky. "That makes it hard for an insurer to say that they expected it to continue, that they expected future instances of abuse."

But Kevin Mattessich, a managing partner at Kaufman Dolowich Voluck & Gonzo LLP (/firms/kaufman-dolowich) who represents insurers, says insurance companies will have the upper hand anyway if it's found that Penn State was aware of the sex abuse allegations but didn't disclose them in applications for insurance policies.

"If it's established that the university knew of the abuses, they'd be hard-pressed to say that an exclusion for prior known acts, or prior claims or however it's worded, doesn't apply," Mattesich said. "If they knew they had an issue, they can't sort of wash their hands of the matter and go get insurance coverage. They've got to disclose that."

Whether the prior knowledge exclusion bars coverage will turn on the actual wording of the insurance policy application and which groups of people needed to know about the allegations when the application was submitted, said R. Hugh Lumpkin, a policyholder attorney and managing shareholder of Ver Ploeg & Lumpkin PA (/firms/ver-ploeg).

"I don't view [the insurers' argument] as a terribly strong argument," Lumpkin said. "I think people suspected that something might be awry, but didn't capital-K know it."

According to Lumpkin, it's far more likely that courts will find coverage for insureds accused of not adequately supervising Sandusky, but there's little hope for Sandusky himself to win insurance coverage. Most states are averse to allowing coverage for moral hazards, and public policy can trump even arguable coverage under an insurance policy, he said.

State Farm Fire (/companies/state-farm) and Casualty Co. is likely counting on that. The insurer recently filed a suit in Pennsylvania to dodge covering the former coach in criminal and civil proceedings under a homeowners' policy that provided limited personal liability coverage, citing in part an exclusion for intentional harm.

"The intentional acts of a pedophile are never going to be covered, regardless of what the policy says," Mattesich said.

Other than State Farm, Federal Insurance Co. has brought a declaratory judgment suit to avoid covering Sandusky under a directors and officers policy issued to Second Mile, while Pennsylvania Manufacturers' Association Insurance Co. has filed suit to escape covering Penn State under multiple general liability policies.

According to Tucker, the fact that the insurers have already kicked off coverage suits suggests they will want to push through these cases quickly, but whether courts will allow the insurance cases to get ahead of the underlying tort issues remains to be seen.

"It'll be interesting to see if the courts allow those same issues to be litigated on a faster track in the insurance case, which would be unusual," Tucker said.

It's too early to tell how many other alleged victims will bring suit and what the value of their claims will be, as well as whether liability will be found, Tucker said.

Still, the sex abuse scandal at Penn State already stands to have long-term impacts on how colleges across the country manage the risks of child molestation, experts say. Most people have until now ignored the interaction that universities have with children, whether it's through campus use, outreach programs or child care, according to Tucker.

"It raises awareness among educators and underwriters that this is something everyone needs to have on the radar screen," Tucker said. "If insurers have not been paying attention to it before, there's a chance that they will start."

According to Mattesich, the scandal could also send a message to boards of directors that they should pay closer attention to their risk managers. Universities might also begin checking out their own policies to see if they have adequate coverage for these types of suits, he said.

However, Lumpkin said the scandal is unlikely to prompt insurers to exclude or limit coverage to universities.

"They have to balance the unusual nature of this case against the fact of likely losing market share if they restrict benefits afforded," Lumpkin said. "This is the type of coverage that a university wants because the damages could be catastrophic."