

School administrators' insurer on hook for part of sex abuse settlement

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Judy Greenwald

A federal appeals court has agreed with a Swiss Re Ltd. unit that another insurer should contribute \$2.6 million to a \$15.8 million settlement the unit reached with a school district in a sexual abuse case.



Three former students of the Moraga School District in Moraga, California, filed suit against the district and three of its school administrators in 2013, contending they had been sexually molested in the mid-1990s by a middle school teacher, according to Wednesday's ruling by the 9th U.S. Circuit Court of Appeals in San Francisco in *Westport Insurance Corp. v. California Casualty Management Co., DBA California Casualty*. The teacher had committed suicide after the students first came forward in 1996.

Swiss Re unit Westport, which had issued primary general liability insurance policies to the district through a predecessor company, settled the case for \$15.8 million, according to the ruling. It then sought \$2.6 million from the administrators' insurer, San Mateo, California-based California Casualty Co.

Both insurers filed for summary judgment in U.S. District Court in San Francisco, which ruled California Casualty owed Westport \$2.6 million plus \$755,637 in prejudgment interest.

A three-judge appeals court panel unanimously upheld the ruling on appeal. California Casualty asserts that a section of the California government code, which prohibits public entities from seeking indemnification from its employees, bars Westport's lawsuit, said the ruling.

But the section does "does not preclude Westport's claim because (the code) does not contain a blanket ban on an employee's insurer contributing to the employee's defense and settlement costs," said the ruling.

"There is no evidence in the record, and neither party claims, that any of the Administrators personally contributed to the settlement. That their insurer, California Casualty, is now being called upon to provide its excess coverage to cover the employees' settlements does not violate the intent behind (the code's) indemnification," said the ruling, in upholding the lower court's decision.

Mark B. Bonino, a partner with Hayes Scott Bonino Ellingson & McLay LLP, who represented California Casualty, said he was disappointed in the ruling. "Unfortunately, I think the decision is contrary to public policy with regard to the application of insurance available to public entities, but the court decided what it decided. That's it."

Adam Fleischer, a partner with BatesCarey LLP in Chicago, who argued the case on Westport's behalf before the 9th Circuit, said in a statement, "The resolution of child molestation claims present extremely difficult challenges for both insureds and insurers.

"We were very disappointed that California Casualty refused to help Westport in settling these claims years

ago, but we are pleased with the creation of a precedent that will encourage such collaborative resolution efforts in the future.”

School Insurer Owes \$2.6M For Abuse Settlements: 9th Circ.

By **Jeff Sistrunk**

Law360 (February 20, 2019, 10:21 PM EST) -- The Ninth Circuit on Wednesday affirmed that an excess insurer for a California school district's administrators must cover \$2.6 million of the \$15.8 million that the district's insurer paid to settle three former students' sexual abuse claims, saying a lower court properly divided the settlement between the two insurance companies.

A three-judge appellate panel found no fault with U.S. District Judge William Horsley Orrick's April 2017 decision that Moraga School District's insurer, Westport Insurance Corp., is entitled to partial reimbursement of its settlement payments from California Casualty Management Co., which provided excess liability coverage for the district's administrators. The payments resolved three former students' claims that the district and several of its administrators failed to prevent a middle school science teacher from molesting them in the 1990s.

California Casualty had appealed the district judge's ruling on multiple grounds, including that Westport's suit seeking reimbursement was barred by a California statute, Government Code 825.4, which prohibits public organizations like the school district from pursuing indemnification for certain settlement or judgment payments from their employees — in this case, the administrators.

The Ninth Circuit panel, however, agreed with the lower court that the law doesn't foreclose Westport's suit, noting that the statutory language doesn't impose "a blanket ban on an employee's insurer contributing to the employee's defense and settlement costs."

"Here, policy concerns regarding the proper placement of the burden of settlement costs are assuaged. The district furnished primary and excess insurance to its administrators through Westport," Circuit Judge Milan D. Smith Jr. wrote for the panel in Wednesday's published opinion. "There is no evidence in the record, and neither party claims, that any of the administrators personally contributed to the settlement. That their insurer, California Casualty, is now being called upon to provide its excess coverage to cover the employees' settlements does not violate the intent behind 825.4 indemnification."

According to the opinion, Westport had issued a series of primary liability policies to the Moraga School District for periods spanning 1991 through 1997, and also issued the district several excess policies between 1994 and 1997. California Casualty, meanwhile, had provided excess liability coverage to the Association of California School Administrators — which counts Moraga School District's administrators as members — between 1986 and 2000, the opinion stated.

In January 2013, three former students sued the Moraga School District and a trio of its administrators, claiming they had been repeatedly molested by Joaquin Moraga Intermediate School science teacher Daniel Witters between 1993 and 1997 after school officials failed to heed warnings about his alleged pattern of sexual misconduct. Witters committed suicide in 1996, shortly after the first accusations of molestation against him surfaced, according to court papers.

Westport ultimately agreed to settle the suits brought by two plaintiffs for \$7 million apiece, and a suit from another plaintiff for \$1.8 million, according to court documents. When California Casualty refused Westport's requests to contribute to the settlements, Westport filed the current suit in California federal court in March 2016.

In April 2017, Judge Orrick ruled that Westport is entitled to partial reimbursement from California Casualty, holding that Westport's suit was not barred under Government Code 825.4 and determined that California Casualty was responsible for \$2.6 million of the total \$15.8 million settlement sum. Judge Orrick then tacked on more than \$755,600 in prejudgment interest, calculated at 10 percent per annum from the dates Westport paid the settlements.

On appeal, California Casualty reasserted its argument that Westport's suit is impermissible under Government Code 825.4, while also challenging Judge Orrick's allocation of the settlement payments on several fronts.

After finding that Westport's action isn't barred by statute, the appellate panel also rejected California Casualty's other arguments disputing the district judge's allocation method, saying they are unsupported by relevant language in the two insurers' policies. Finally, the panel found that Judge Orrick didn't abuse his discretion by awarding Westport prejudgment interest at the 10 percent rate.

In a statement, Westport counsel Adam H. Fleischer of Bates Carey LLP told Law360 that "the resolution of child molestation claims present extremely difficult challenges for both insureds and insurers."

"We were very disappointed that California Casualty refused to help Westport in settling these tragic claims years ago, but we are pleased with the creation of a precedent that will encourage such collaborative resolution efforts in the future," he said.

Mark G. Bonino, who represents California Casualty, said in a phone interview that he was disappointed by the ruling.

"This result is contrary to California public policy and will ultimately increase the costs of litigating these types of cases," he said.

Circuit Judges Raymond C. Fisher and Milan D. Smith Jr. and District Judge Lawrence L. Piersol, by designation, sat on the Ninth Circuit panel.

California Casualty is represented by Mark G. Bonino and Charles E. Tillage of Hayes Scott Bonino Ellingson Guslani Simonson & Clause LLP.

Westport is represented by Adam H. Fleischer, Michael H. Passman and Mark G. Sheridan of BatesCarey LLP, and Michael K. Johnson of Lewis Brisbois Bisgaard & Smith LLP.

The case is Westport Insurance Corp. v. California Casualty Management Co., case number 17-15924, in the U.S. Court of Appeals for the Ninth Circuit.

--Editing by Adam LoBelia.