Coverage May Exist For Companies Facing Allegations Related To Sexual Abuse

November 19, 2019 | Policyholder Protection,Occurrence,Policy

On August 14, 2019, a provision of New York's new Child Victim Act went into effect that lifted the statute of limitations on childhood sexual abuse claims for a one-year period (until August 14, 2020). After the one-year period ends, victims in New York will have until age 55 to file lawsuits. California has enacted similar legislation, Assembly Bill No. 218, that allows victims to file suit until age 40 or five years after discovery of the resulting psychological injury or illness, whichever is later. These statutes are already resulting in a flood of new lawsuits for sexual abuse and related claims, and legislatures in other states have enacted, or are actively considering, similar laws.

As claims against companies related to sexual abuse, such as negligent hiring, negligent supervision, negligent retention and negligent failure to warn, are becoming more frequent, companies should consider taking the time now to understand how their insurance policies (including legacy policies) may respond to such claims, and they should be prepared to notify their carriers immediately of any claims or potential claims that they become aware of, pursuant to the notice provisions in those policies.

When a company receives a demand or complaint alleging that one of its employees has committed sexual abuse, it may mistakenly believe that due to the intentional and abhorrent nature of the alleged act, no coverage exists for the victim's claims against the company. While it is generally true that no coverage exists for the abuser because public policy bars coverage for intentional infliction of an injury, companies often have coverage for claims related to sexual abuse that allege negligent – rather than intentional – conduct. Companies should consider it a best practice not to leave policy benefits on the table that could pay defense expenses and be used to pay settlements or judgments (money that can protect innocent shareholders and compensate victims).

RELATED PRACTICE AREAS

Asbestos Liability

RELATED TOPICS

Occurrence
Insurance Coverage
Sexual Abuse

Different types of businesses may have different insurance policies that are applicable (including directors and officers and errors and omissions liability policies), but for most companies, coverage for negligence claims related to sexual abuse will most likely be covered under commercial general liability policies. Claims related to sexual abuse most often fall within the bodily injury and/or personal injury coverage grants of those policies.

Commercial general liability policies are typically “occurrence-based” policies, meaning that the policy in effect during the policy period in which the occurrence giving rise to the claim took place – rather than the policy in effect when the claim was made or suit was filed – will be the policy that applies. Many of the lawsuits brought under the recently enacted child victim laws will pertain to conduct that occurred many years ago. Companies will likely need to locate legacy policies so that they can determine which carriers may respond to these claims and notify those carriers appropriately.

To the extent that a legacy policy cannot be located, courts generally permit insureds to use secondary evidence of an insurance policy (i.e., documents referring to the policy) to prove the existence of coverage. Indeed, the California Supreme Court held in Dart Indus., Inc. v. Commercial Union Ins. Co., 28 Cal. 4th 1059, 1074 (2002):

"When . . . it is undisputed that there was an insurance policy covering the relevant time period and that the policy was lost in good faith and not recovered after diligent search, there is no reason either in the law of contract or of evidence why secondary evidence that attests to the substance but not the precise language of an insurance policy should be insufficient as a matter of law to establish the insurer’s contractual obligations."

However, every effort should be made to locate applicable policies or obtain them from the carrier to maximize the likelihood of coverage. Companies should consider inventorying their policies and ensuring they are securely stored in case a claim is ever alleged to have occurred during the policy period of a legacy policy.

What’s in a Number…of Occurrences?

In cases involving multiple instances of abuse or multiple victims, the carrier and the insured may dispute the number of “occurrences” that took place. The number of occurrences is important because it determines how many per occurrence policy limits may be available to the insured to pay a settlement or judgment – but it also determines how many deductibles or self-insured retentions the insured must pay. Additionally, occurrences taking place over multiple policy years may trigger coverage under multiple policies, such as in *Interstate Fire & Cas. Co. v. Archdiocese of Portland in Oregon*, 35 F.3d 1325, 1331 (9th Cir. 1994), where the court held that “because the parties do not contest that [the victim] was exposed to the negligently supervised priest in each of the four policy periods, we conclude that [the victim’s] claim implicates four occurrences.”

Courts are split on how the number of occurrences should be determined in sexual abuse cases. While different policies have different definitions of “occurrence,” the term “occurrence” is often defined with language similar to the following: “an accident neither expected nor intended, including continuous or repeated exposure to substantially the same general harmful conditions.”

In *Roman Catholic Diocese of Brooklyn v. National Union Fire Insurance Co.*

of Pittsburgh, Pa., 991 N.E. 2d 666 (2013), the diocese argued that it should not have to pay multiple self-insured retentions because the "continuous or repeated exposure" language in the definition of "occurrence" required that the separate instances of abuse (which occurred at different times and in different locations) be aggregated into a single claim. In rejecting the diocese's argument, the New York Court of Appeals stated, "In our view, sexual abuse does not fit neatly into the policies' definition of 'continuous or repeated exposure' to 'conditions.' This sounds like language designed to deal with asbestos fibers in the air, or lead-based paint on the walls, rather than with priests and choirboys." Instead, the court determined the number of occurrences by applying the "unfortunate event test": it considered "whether there is a close temporal and spatial relationship between the incidents giving rise to injury or loss, and whether the incidents can be viewed as part of the same causal continuum, without intervening agents or factors." The court found a lack of temporal and spatial closeness (based on the different times and locations) and that the instances of abuse lacked a singular causal continuum. Therefore, it found that each instance of abuse constituted a separate occurrence.

In contrast, courts in other jurisdictions have applied a "causal approach" to determining the number of occurrences and have held that separate instances of molestation – even involving separate victims – may be considered one "occurrence" when premised on an entity's negligence. In a Nevada case, *Washoe Cty. v. Transcon. Ins. Co.*, 110 Nev. 110 Nev. 798, 801 (1994), the court found "each of the separate instances of molestation arises from the same proximate cause vis-a-vis the County: namely, the County's alleged negligence in the process of licensing Papoose. We conclude that the County's negligence...constitutes a single occurrence for purposes of liability." Thus, how the number of "occurrences" is determined differs from jurisdiction to jurisdiction.

Insurance carriers have also sought to use the definition of "occurrence" to avoid coverage for claims related to sexual abuse by arguing that abuse cannot be an "occurrence" because it cannot be "neither expected nor intended" or "an unexpected, unforeseen, or undesigned happening or consequence from either a known or an unknown cause," as policy definitions of "occurrence" typically require. That argument was made in *Liberty Surplus Ins. Corp. v. Ledesma & Meyer Constr. Co.*, 5 Cal. 5th 216, 221–22 (2018). However, a number of courts have held that whether the occurrence or accident is expected, intended, foreseen or designed must be evaluated from the standpoint of the insured, including in a California case, *Minkler v. Safeco Ins. Co. of America*, 49 Cal. 4th 315 (2010). That court ruled that insureds that have not committed intentional acts have a reasonable expectation of coverage, even when another insured has committed intentional acts. The court in *Liberty Surplus* also held that "a policy providing a defense and indemnification for bodily injury caused by an accident promises coverage for liability resulting from the *insured's* negligent acts."

Policy Language Revisions

Not surprisingly, a number of insurance carriers have revised their policies to attempt to preclude coverage for all insureds when any of the insureds commits an intentional act. For example, they have revised language precluding coverage for injuries "expected or intended by the insured" to say "expected or intended by an insured" and changed exclusions for claims arising from illegal acts committed by "the insured" to claims arising from

illegal acts committed by “an insured.” A split of authority exists among courts as to the effectiveness of such revisions, particularly when a policy also contains a “severability provision” or “separate insurance” provision. Such provisions, which are common in liability policies, require that the insurance apply separately to each insured. Thus, coverage for one insured may be preserved by the severability provision despite an exclusion for intentional acts that precludes coverage for another insured.

For example, in *Minkler*, a plaintiff sued his baseball coach for sexual abuse and the coach’s mother for negligent supervision. Some of the abuse had occurred in the mother’s home, and the coach was listed as an additional insured on his mother’s homeowners insurance policies. The policies contained an exclusion for bodily injury “expected or intended by *an insured* or which is the forseeable result of an act or omission intended by *an insured*.” However, the policies also included severability provisions that stated, “This insurance applies separately to each insured.” After obtaining a $5 million default judgment against the mother, the plaintiff sued the carrier, alleging that it had wrongfully denied coverage for the mother based on the exclusion.
The carrier removed the case to federal court, where it prevailed on a motion to dismiss. On appeal, the U.S. Court of Appeals for the Ninth Circuit directed the following question to the California Supreme Court:

"Where a contract of liability insurance covering multiple insureds contains a severability clause, does an exclusion barring coverage for injuries arising out of the intentional acts of ‘an insured’ bar coverage for claims that one insured negligently failed to prevent the intentional acts of another insured?"

The California Supreme Court answered that it did not and held that because of the severability provision, the mother’s coverage must be analyzed “on the basis of whether she herself committed an act or acts that fell within the intentional act exclusion.” Thus, coverage may exist for a negligence claim related to sexual abuse regardless of the “an insured” language and the intentional acts of another insured.

Courts have reached a conflicting result in some other jurisdictions. For example, in *Am. Family Mut. Ins. Co. v. Wheeler*, 287 Neb. 250, 259 (2014), the Supreme Court of Nebraska declined to follow *Minkler* and affirmed summary judgment in favor of the carrier when an insured was sued for negligence in connection with a sexual assault committed by his son, who was also an insured under his policies. While the policies contained severability provisions, the court held that “applying the insurance separately to each insured, as the severability clause requires, does not change that the exclusions reference ‘an insured’ or ‘any insured.’” Further, a growing number of policies now contain broad exclusions for claims arising out of sexual abuse regardless of who committed the abuse. The extent to which such exclusions apply to preclude coverage will depend on how they are worded and how broadly courts interpret them.

Claims related to sexual abuse raise complex issues, the outcomes of which may differ by jurisdiction and policy language. The general rule remains, however, that “an insurer must provide coverage and a legal defense to an insured where a complaint alleges that an employer was negligent in hiring and supervision of an employee who subsequently committed an intentional tort,” such as sexual abuse, as stated in *Silverball Amusement, Inc. v. Utah Home Fire Ins. Co.*, 842 F. Supp. 1151, 1165 (W.D. Ark.), *aff’d*, 33 F.3d 1476 (8th Cir. 1994). The court in *Liberty Surplus*, 5 Cal. 5th at 222 held that the

intentional act of molestation is distinct from mere negligent supervision. In addition, in *Jane D. v. Ordinary Mut.*, 32 Cal. App. 4th 643, 652, (1995), the court said “An allegation of sexual misconduct does not preclude coverage if there are other allegations of conduct that is covered.” As the court in *Liberty Surplus* stated, “Absent an applicable exclusion, employers may legitimately expect coverage for such claims under comprehensive general liability insurance policies, just as they do for other claims of negligence.”

Despite the egregious and destructive nature of sexual abuse and, as acknowledged by the court in *Liberty Surplus*, “society’s interest in providing an incentive for employers to take precautions against sexual abuse by their employees,” insurance coverage is generally available to companies for claims related to sexual abuse because “the threat of liability for negligent hiring, retention, and supervision is a significant deterrent even when insurance coverage is available.” Therefore, companies facing claims related to sexual abuse should immediately provide notice to their carriers under all potentially applicable policies and pursue coverage.

This article was originally published in the Fall 2019 edition of Corporate Policyholder Magazine.