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How Many Occurrences?

With recent sexual abuse allegations, key coverage questions arise

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In the wake of the sexual abuse allegations against Harvey Weinstein, and with the growth of the #MeToo movement, more victims of sexual harassment and assault are coming forward.

Cases involving sexual abuse of multiple victims, or multiple instances of abuse of a single victim, give rise to issues that need to be addressed early. For example, how many occurrences have been triggered by the insured's negligent supervision, retention, or hiring of a perpetrator of sexual abuse? The answer to that question determines the number of limits of liability available as well as the number of deductibles (or self-insured retentions) that apply, which, in turn, impacts the insurer's strategy, discovery, negotiations, and ultimate exposure.

Most courts that have confronted this issue conclude that there is one occurrence per plaintiff, per policy period. This result tends to lead to the application of multiple limits of liability and, when applicable, multiple deductibles or retentions.

Policy Language

The general liability policies that respond to negligent supervision claims generally provide a limit of liability for each occurrence and a separate deductible or self-insured retention that also applies for each occurrence. The standard definition of “occurrence” is “an accident, including continuous or repeated exposure to substantially the same general harmful conditions.”

This means that if the insured wishes to access multiple policy limits within a coverage period, the insured may be required to pay multiple retentions. This issue creates a delicate balance—an insured seeking to maximize its own coverage may be faced with its own out-of-pocket exposure that it cannot afford.

The Majority Rule

The majority rule is that, in cases involving the negligent supervision of a sexual predator, there is one occurrence per plaintiff, per policy period. One of the leading cases on this issue was *Society of the Roman Catholic Church of the Diocese of Lafayette v. Interstate Fire & Cas. Co.* The claims in the case arose out of the molestation of 31 children by two perpetrators over a period of seven years. The insured and its insurers agreed to settle the underlying abuse claims and then litigate between themselves the allocation of the settlement between insurance policies, and, more specifically, the number of occurrences involved.

In the coverage action, certain insurers argued that the injury to each child was a single occurrence that began during the first year of molestation, leaving the insurer on the risk on the date of the first molestation responsible for all resulting damage (including damage from molestation occurring after the policy period). This approach had the effect of putting most of the damages into the early policy periods.

Other insurers argued that the injury to each child was a single occurrence in each policy period. This approach had the effect of potentially triggering more total limits of liability, but it spread the damages resulting from the molestation of each child over more policy periods. The Lafayette court accepted the latter approach and concluded that each child’s molestation constituted a separate occurrence for each policy period in which he was molested. The impact of the Lafayette court’s decision was to maximize coverage by providing a separate insurance limit for each victim in each of numerous policy periods.

However, the majority rule will not always maximize coverage. For example, in *State Farm Fire and Cas. Co. v. Elizabeth N.*, a case involving the molestation of three children, a California court held that the molestation of each child was a separate occurrence during the policy period. But the court rejected the argument that there was a separate occurrence each time the injured children were left in the perpetrator’s care. The court instead found that even if each injury

inflicted on a child resulted from a new negligent act by the insured, each act of negligence was substantially the same, namely the failure to care for and supervise the child adequately.

The Minority Rule

The minority rule is that negligent supervision of a sexual predator that results in the abuse of multiple victims is one occurrence per policy period. An example of the minority rule is *Washoe County v. Transcontinental Ins. Co.*, a case in which the insured settled the sexual abuse claims of over 40 children who had been abused over several years. In *Washoe*, the insured was responsible for a retained limit that applied per occurrence. The insurer argued that the retained limit applied per child per policy period, so insurers owed no coverage because the retained limit was never exceeded with respect to the settlement amounts paid to any individual child in any period.

The Nevada court rejected that argument, holding that the abuse of multiple claimants in a single policy period constitutes only one occurrence. The impact of this ruling was that the retained limit applied once per policy period, rather than once per child, per policy period, which meant the retentions were more easily exhausted and the insurers had to contribute to the settlements.

The *Washoe* court reached its conclusion because it regarded the insured's ongoing act of negligent supervision, rather than the abuse itself, as the true cause of the insured's liability. By contrast, the courts following the majority rule generally recognize that the true cause of the injuries resulting from sexual abuse is the abuse itself, to which each individual claimant was separately exposed (see, e.g., *H.E. Butt Grocery Company v. National Union Fire Ins. Co.* ("We find, however, that the Nevada court's approach [in *Washoe*] conflicts with the greater weight of authority and attempt[s] to avoid the inescapable fact that the sexual molestation caused the injuries."))

Determining the number of occurrences early is important in handling a sexual abuse claim. It determines the potential exposure of insured and insurer(s) and determines who controls the defense given that the insured controls the defense within the retention. Additionally, the number of occurrences sets the stage for settlement negotiation, as this will determine the limits of liability available, how much the insured should expect to contribute to that amount in deductibles and retentions, and whether there is only a single limit of liability available for all victims versus a separate limit of liability available for each victim.

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