McDermott Will & Emery

Insurance Coverage Issues Raised by Child Sexual Abuse Claims

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Recent child sexual abuse scandals will produce difficult civil litigation against employers and other entities associated with alleged perpetrators of abuse and fuel legislative efforts to relax states' statutes of limitations for abuse claims. This newsletter highlights insurance coverage issues defendants and their insurers should consider.

Recent, highly publicized child sexual abuse scandals have begun to spur civil litigation against entities charged with protecting children. The scandals also are likely to re-energize efforts to amend state statutes of limitation making it easier for victims of decades-old abuse to commence litigation, as clergy abuse cases did over the past decade. Due to the extensive publicity and public outcry these scandals generate, revelations of more abuse, legislative initiatives and civil litigation likely will continue.

Child sexual abuse cases present liability and public relations challenges. For example, it is often difficult to defend to a jury the alleged failure of leadership that is the crux of an employer's or other organization's alleged liability. Even where the basis of an employer's or other entity's civil liability is unclear, the defense can be compromised by changed societal norms, the death or infirmity of witnesses and a lack of documentation establishing the degree of knowledge of the abuse and how the employer or other entity responded, if at all.

These cases also present thorny insurance issues. Although the alleged perpetrator almost certainly will not be covered by insurance if the allegations prove true, the insurance issues will determine whether affected employers and other organizations shoulder the cost of their alleged failings or whether their insurers must share that burden. Some of the insurance coverage issues that employers, similarly situated organizations and their insurers facing these claims typically confront under general and professional liability policies and specialty abuse and molestation coverage are highlighted below.

Abuse and Molestation Exclusion

The starting point for analyzing coverage for any sexual abuse claim is whether the insured's policies expressly exclude claims arising out of sexual abuse. Many current general liability and professional liability policies contain such an exclusion. Insurers began adding these exclusions as far back as the mid-1980s, after the highly publicized conviction of a priest in Lafayette, Louisiana, illustrated the potential for significant exposure under contemporaneous policy forms. While the exclusionary language has evolved over time, a common "Abuse or Molestation Exclusion" reads as follows:

This insurance does not apply to "bodily injury," "property damage" or "personal and advertising injury" arising out of:

1. The actual or threatened abuse or molestation by anyone of any persons, or

2. The negligent: hiring, employment, placement, training, supervision, investigation, reporting to the proper authorities, or failure to so report, retention of a person for whom any insured is or ever was legally responsible and whose conduct would be excluded by Paragraph 1, above.

Abuse and molestation includes, but is not limited to, any verbal or nonverbal communication, behavior or conduct with sexual connotations, infliction of physical, emotional or psychological injury or harm whether for gratification, discrimination, intimidation, coercion or other purposes, regardless of whether such action or resulting injury is alleged to be intentionally or negligently caused.

Courts have enforced broadly such abuse and molestation exclusions to bar coverage for claims against employers and/or other entities charged with supervising an alleged perpetrator. For example, courts have barred coverage for the following claims:

- An employee at a mental health facility who negligently allowed a patient to travel alone with a coworker perpetrator
- A church that failed to supervise properly a pastor who allegedly abused multiple parishioners
- A charitable organization that allegedly failed to train and supervise its teenage volunteers, two of whom allegedly abused a special needs child whose parents had sought assistance from the organization

Accordingly, if the policy at issue contains an exclusion of this type, claims against an employer or other person or entity allegedly responsible likely are not insured. As a result, states' statutes of limitations and legislative efforts to revive previously time-barred civil claims are important from an insurance perspective. If a suit alleging abuse many years ago is allowed to proceed, the relevant policies may not contain an abuse and molestation exclusion.

Occurrence and "Expected or Intended" Injury

Most general liability policies issued before abuse and molestation exclusions became commonplace were written on an "occurrence" basis. Such policies typically define "occurrence" as "an accident, event or continuous or repeated exposure to conditions which result in bodily injury … which is neither expected nor intended from the standpoint of the insured." In most states, a policyholder must prove that the claims arise out of an "occurrence" for coverage potentially to exist.

This "occurrence" language underscores the fundamental insurance concept of fortuity. Because insurance is designed to protect against contingent or unknown risks of future harm—and not against harm that is certain or expected—in child sexual abuse cases the question is whether the insured had sufficient knowledge of abuse by the perpetrator such that its liability did not arise out of an "accident" or such that it "expected" the bodily injury that resulted from the perpetrator's misconduct. Where some of the alleged sexual abuse at issue post-dates an insured's actual knowledge of prior abuse, the insured's ability to satisfy the "occurrence" definition can present a close question.

Number of Occurrences

Unfortunately, child sexual abuse litigation often involves allegations of multiple incidents of abuse perpetrated upon more than one plaintiff. In certain contexts, such as clergy abuse litigation, conduct by multiple perpetrators may be at issue. Furthermore, an employer's or other entity's alleged knowledge of sexual misconduct may have evolved over time.

In each of these scenarios, policyholders and insurers must grapple with the number of occurrences. Depending upon the facts, policy language and state law at issue, occurrence-based policies may respond on the basis of one occurrence per plaintiff, one occurrence per perpetrator or one occurrence per incident of alleged abuse. Alternatively, the number of occurrences may turn on evolving facts establishing the insured's knowledge of the abuse and its failure to act (*i.e.*, one or more "accident[s], event[s] or continuous or repeated exposure[s] to conditions" on which the insured's liability is premised). Because the number of occurrences can affect the amount of insurance potentially available to defend and indemnify the insured and how any covered loss is apportioned among insurers, the issue is often hotly disputed.

Trigger of Coverage and Allocation

"Trigger of coverage" encapsulates what must happen during the period of an insurance policy for it to respond, subject to its limits, terms and conditions. Courts in most states have concluded that bodily injury during the policy period triggers coverage, and the timing of the insured's alleged negligence is irrelevant.

In the child sexual abuse context, the "trigger" issue presents a number of complex questions. Although the policy or policies in effect during the period of abuse generally are triggered, child sexual abuse claims often involve ongoing psychological effects of abuse that continue after the abuse ends. Depending upon the policy language at issue and state law, such alleged psychological injury may trigger policies incepting after the alleged sexual abuse ended. Likewise, the perpetrator's alleged conduct predating the abuse, such as "grooming" alleged victims by engaging in

touching that may not be sexual if considered in isolation, may constitute "bodily injury" or "personal injury" triggering earlier policies.

The question of which policy or policies are triggered will, in most commercial insurance programs, give rise to a host of other considerations affecting how those policies share in the costs of defense, indemnity or both. These issues involve the interplay between primary and excess layers of insurance and related policy provisions, such as "other insurance" and "anti-stacking" provisions, that affect how covered loss is allocated among triggered policies and, when deductibles or self insured retentions are at play, to the insured.

Abuse and Molestation Insurance

With the advent of the abuse and molestation exclusion, some insurers also offer express abuse and molestation coverage, subject to stringent underwriting and increased premiums. This coverage may be added as an endorsement to a general liability or professional liability policy or underwritten as a stand-alone product. Although abuse and molestation coverage typically does not protect the perpetrator, it covers other individuals for related acts, such as the alleged failure to supervise and/or report the perpetrator.

The nature and amount of such coverage are defined further by the policy's treatment of several key issues, including:

- *Occurrence versus claims made coverage*: Many abuse and molestation policies are written on the more restrictive "claims made" basis, which requires that the claim be asserted against the insured and reported to the insurer during the policy period. A minority of policies offer coverage on an occurrence basis, meaning that the coverage exists potentially if bodily injury takes place during the policy period, regardless of when the resulting claim is made.
- *Limitations on the amount of coverage*: Abuse and molestation coverage often is subject to a lower "sub-limit" of coverage than afforded for non-abuse claims. Such policies also typically require the insured to bear some portion of any loss, such as through deductibles, self-insured retentions or co-insurance.
- *Aggregating language*: Policies typically combine all claims arising out of the same course of conduct into one loss, thereby limiting coverage to one limit. An example of such language is: "regardless of the number of acts of abuse or molestation, the period of time over which such acts occur, or number of persons acted upon, all injury arising out of all acts of abuse or molestation by the same person, or by two or more persons acting together, will be considered one claim … ."

In conclusion, employers and other entities confronting civil child sexual abuse claims face significant financial exposure in a hostile litigation and public relations environment. These cases present complex insurance questions

that affect who bears the financial cost attributable to alleged child sexual abuse. Defendants and their insurers should carefully evaluate all potentially applicable insurance policies, including historical liability policies and any available abuse and molestation coverage.

The McDermott Difference

Ryan S. Smethurst and Mark A. Collins are partners in McDermott Will & Emery LLP's Insurance Markets Group. They have litigated and arbitrated insurance coverage and re-insurance issues relating to child sexual abuse and worked to resolve nearly 700 such cases, including 517 cases against the Roman Catholic Archdiocese of Los Angeles, 90 cases against the Roman Catholic Diocese of Orange [County, California] and approximately 60 cases brought by alumni of a prestigious prep school. In the Archdiocese of Los Angeles matter, Mr. Smethurst served as liaison counsel to the Archdiocese's 12 insurers. .