Coverage Issues Arising from Sexual Tort Claims

By R. Brandon McCullough and Jason H. Peck

The coverage issues arising from sexual tort claims vary greatly depending on the policy language at issue, the nature of the insured, and the specific facts surrounding the claims of abuse.

Sexual tort lawsuits arising from acts of sexual abuse or molestation have been filed at exponentially increasing numbers in recent years. The #MeToo movement, along with other high-profile cases of sexual abuse, have sparked many victims to turn to litigation to seek redress for their injuries. This spark has been fueled by state legislatures enacting reviver statutes which allow previously time-barred abuse claims to be pursued within statutorily created periods of time.

Plaintiffs in sexual tort lawsuits include children, employees, and patients–just to name a few. Defendants in these suits often include not only the individual perpetrator of the abuse, but also persons and entities that did not directly commit the abuse but failed to stop it, such as employers and affiliated institutions. These suits frequently result in defendants seeking a defense and indemnity coverage from their liability insurers, including, among others, homeowners' insurers, commercial liability insurers, and professional liability insurers.

This article will explore key coverage issues arising from sexual tort claims. These issues include whether the insuring agreement of the policy is satisfied, application of policy exclusions such as intentional act and molestation exclusions, and the timing and number of "occurrences." Analysis of these issues vary widely depending on the type of policy at issue, the jurisdictional law that applies, whether the insured is the perpetrator of the sexual tort or a non-participant such as an employer of the perpetrator, and the distinct factual circumstances surrounding the abuse.

Insuring Clauses

As the King so aptly counseled in Alice in Wonderland, "begin at the beginning." While the King's advice related to the White Rabbit's proffer of evidence at Alice's trial, it is equally applicable to the construction of insurance policies. Any claim for coverage must fall within the policy's scope of coverage, which is typically set forth in the insuring clause. Practitioners who are evaluating coverage for claims of sexual abuse, therefore, should begin at the beginning with an analysis of the applicable insuring clause.

Homeowners Policies and CGL Policies

Homeowners policies and CGL policies typically afford coverage for the insured's liability for bodily injury caused by an "occurrence." "Occurrence" is often defined as "an accident," which most courts have held means something that is unexpected, unforeseen, or fortuitous. *See Blackenship v. Shelter Mut. Ins. Co.*, 2023 WL 6799581 at 3 (6th Cir. Oct. 16, 2023) ("Inherent in the plain meaning of 'accident' is the doctrine of fortuity, which requires courts to analyze the insured's intent and control"); *Liberty Surplus Ins. Corp. v. Ledesma & Meyer Constr. Co.*, 418 P.3d 400, 403 (Cal. 2018) ("[A]n accident is 'an unexpected, unforeseen, or undesigned happening or consequence from either a known or unknown cause'").

R. Brandon McCullough is a Director at Houston Harbaugh, P.C. in Pittsburgh, Pennsylvania, where he focuses his practice on insurance coverage and bad faith litigation and business litigation. Mr. McCullough is a member of the Insurance Law Committee of DRI, where he serves as Compendium Chair and Vice Chair of the CGL Subcommittee. Mr. McCullough was Program Chair for the 2023 DRI Insurance Bad Faith and Extra-Contractual Liability Seminar. **Jason H. Peck** is a Senior Attorney at Houston Harbaugh, P.C. in Pittsburgh, Pennsylvania. He focuses his practice on insurance coverage and bad faith litigation. He is a member of DRI, the Allegheny County Bar Association, and the Pennsylvania Bar Association.

Ascertaining the existence of an "occurrence" is typically a straightforward exercise where the insured seeking coverage is alleged to have sexually abused another, as the insured is usually alleged to have acted with intent. Under such circumstances, the majority of courts have held that an insured's sexual abuse of another does not qualify as an "occurrence" because it was not accidental. *See State Farm Fire & Cas. Co. v. Hansen*, 584 F.Supp.3d 730, 737-38 (D. Minn. 2022) (holding that allegations that the insured sexually assaulted an individual did not allege an "occurrence" because the insured's conduct was alleged to have been intentional, even if, in fact, the alleged contact was consensual); *Old Republic Ins. Co. v. Comprehensive Health Care Assocs.,* 786 F.Supp. 629, 632 33 (N.D. Tex. 1992) (holding that the insurer had no duty to defend an insured against claims of sexual harassment because intentional acts are not "occurrences"); *Greenman v. Michigan Mut. Ins. Co*., 433 N.W. 346, 349 (Ct. App. Mich. 1988) (holding that the insured's sexual harassment of a coworker was not covered because his intentional acts could not be deemed an accidental "occurrence"). Moreover, where an adult insured sexually abuses a minor, the vast majority of courts have inferred the insured's intent as a matter of law, thereby removing all allegations of such sexual abuse from the definition of "occurrence." *See Westfield Nat'l Ins. Co. v. Cont'l Comm. Bank & Trust Co.,* 804 N.E.2d 601 (Ct. App. Ill. 2004) (holding that an insured's intent will be inferred as a matter of law from the sexual abuse of a child, and that, therefore, the insurer had no duty to defend or indemnify an adult insured who sexually molested a child); *Mfgs. & Merchants Mut. Ins. Co. v. Harvey*, 330 S.C. 152, 160 (1998) ("We hold today that the sexual abuse of a child is so inherently injurious to the victim that the perpetrator's intent to harm the child will be inferred as a matter of law," and holding that, therefore, the insured's sexual abuse of a minor did not qualify as an "occurrence").

Courts, however, have taken different approaches in deciding whether claims that a non-perpetrator insured, such as an employer of the perpetrator, negligently supervised the perpetrator or otherwise failed to prevent the abuse or protect the victim allege "occurrences." Some courts focus on the insured's perspective, questioning whether the victim's alleged injuries were accidental from that point of view. On the rationale that the insureds did not intend the alleged sexual abuse or resultant injuries, courts employing this approach have found "occurrences" where, although the insured is not alleged to have engaged in the sexual abuse, the insured's negligence is alleged to have caused the sexual abuse, e.g., claims that the insured negligently supervised the perpetrator. *See Liberty Mut. Ins. Co. v. Lange*, 2023 WL 4704712 at 8 (W.D. Wash. July 24, 2023) (holding that the negligent failure to protect another from abuse can be a covered "occurrence" or accident); *ProAssurance Spec. Ins. Co., Inc. v. Familyworks, Inc.,* 599 F.Supp.3d 1082, 1094 96 (D. N.M. 2022) (holding that claims that a foster care agency negligently placed children with families who sexually abused them alleged "occurrences," as the agency's state of mind was relevant only to the asserted harm); *Ledesma*, 418 P.3d at 402 09 (holding that claims of negligent supervision, retention, and hiring against an employer alleged an "occurrence" because, from the employer's perspective, the employee's sexual abuse of a student was accidental).

The focus upon the insured's perspective, however, does not inextricably lead to a finding of coverage for claims of negligent supervision and similar claims. Practitioners must, therefore, pay close attention to the claims against insureds, and conduct a careful analysis thereof in light of the law of the jurisdiction in which they practice. For example, in *Safeco Ins. Co. of Am. v. Wolk*, the court acknowledged that there may be coverage for claims of negligent supervision where it is alleged that the insured should have known that sexual abuse would occur in the future. 342 F.Supp.3d 1104, 1109 10 (W.D. Wash. 2018). It concluded, however, that the Complaint against the insured did not allege bodily injury caused by an "occurrence" because, rather than pleading that the insured should have known of the potential for future sexual abuse, the Complaint alleged that the insured knew or should have known of the abuse for which the victim was making a claim. *Id*. Accordingly, it was impossible that the insured's knowledge of ongoing sexual abuse was a cause of that sexual abuse, and the Complaint, therefore, failed to allege bodily injury caused by an "occurrence." *Id*.

Practitioners should also be careful to examine the insured's knowledge of a perpetrator's prior acts of sexual abuse, which may remove negligence claims against the insured from coverage by establishing that injury from sexual abuse was not caused by an accident from the insured's perspective. For example, in *Diocese of Winona v. Interstate Fire & Cas. Co*., a priest sexually abused several minors while assigned to the Diocese of Winona and, later, during his assignment at the Archdiocese of St. Paul and Minneapolis. 89 F.3d 1386, 1389 96 (8th Cir. 1996). Evidence at trial established that the Diocese knew of at least eight instances of sexual abuse by the priest that happened prior to the sexual abuse of the claimant, and that, no later than December 1980, the Archdiocese learned of the priest's pedophilia through several complaints, warnings, and reports. *Id*. at 1390 96. The Eighth Circuit held that, at the time the priest abused the claimant, the Diocese should have known that there was a substantial probability that the priest would continue to abuse children. Id. Accordingly, it held that the priest's abuse of the claimant was expected by the Diocese, and not an accident or an "occurrence." As to the Archdiocese, the court held that, as of December 1980, it should have known that there was a substantial probability that the priest would continue to abuse children. *Id*. All sexual abuse of the claimant after December 1980, therefore, was expected by the Archdiocese and not an accident or an "occurrence." *Id*.

Other courts have looked to the cause of the injury and have, therefore, concluded that negligence claims springing from another's sexual abuse do not qualify as "occurrences." These courts have reasoned that bodily injury must have been caused by an "occurrence," and that, therefore, the proper focus remained on the "injury and its immediate attendant causative circumstances." *See Mountain States Mut. Cas. Co. v. Hauser*, 221 P.3d 56, 59 61 (Ct. App. Colo. 2009); *Farmers Alliance Mut. Ins. Co. v. Salazar*, 77 F.3d 1291, 1296 (10th Cir. 1996). Because intentional sexual abuse constitutes the immediate cause of

injury in such cases, courts employing this approach have concluded that attendant negligence claims, such as negligent supervision, do not qualify as "occurrences." *See Hauser*, 221 P.3d at 59 61; *Centennial Ins. Co. v. Bailey*, 2000 WL 1515158 (Ct. App. Tex. 2000) (holding that the alleged negligent failure to supervise a pastor who sexually abused women was not an "occurrence" because the underlying conduct was intentional).

Homeowners policies and CGL policies typically provide that all related acts or failures to act, and series of related acts or failures to act, qualify as a single "occurrence."

Practitioners, therefore, must pay close attention to the approach adopted by the jurisdiction in which they practice when evaluating coverage for claims that an insured negligently failed to supervise one who engaged in sexual abuse, or who otherwise negligently failed to prevent such abuse. While the majority of courts have adopted the approach of evaluating the abuse from the perspective of the insured, thereby establishing the potential of finding an "occurrence," this approach is not universal. Even then, the specific allegations against the insured may establish that, even from the insured's perspective, no accident, and therefore no "occurrence," happened.

Professional Liability Policies

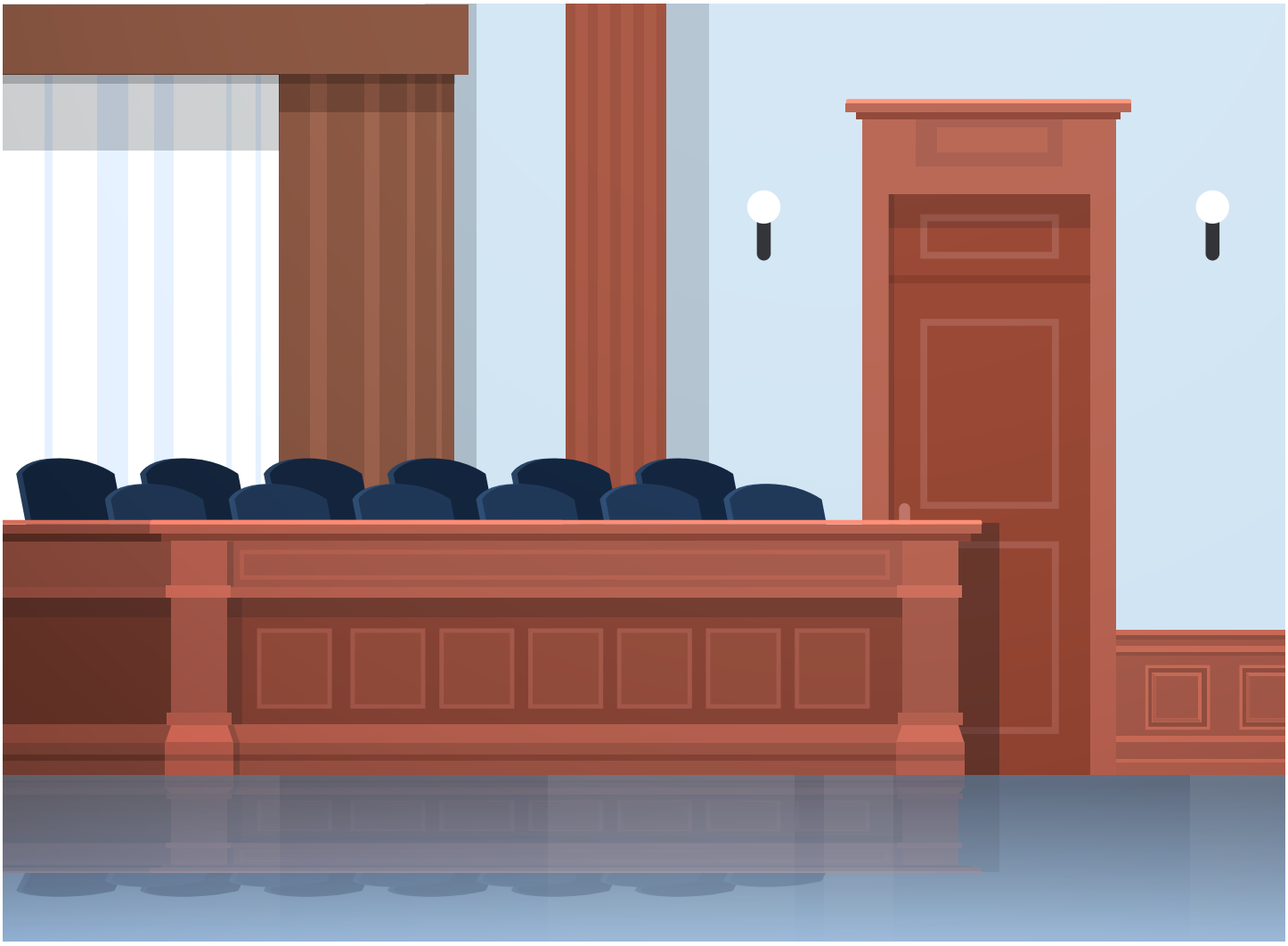
Professional liability policies typically cover an insured's liability arising or resulting from the rendering of, or failure to render, professional services. Some policies specifically define "professional services," and, in such cases, practitioners should pay close attention to the definition provided by the policy. Often times, however, professional liability policies do not define the term, leaving courts to define "professional services" through ordinary canons of policy construction. Complications arise, as professionals are often alleged to have used the provision of legitimate "professional services" as a means to access victims and as cover for subsequent sexual abuse.

Courts throughout the country have generally adopted three approaches to defining "professional services." The majority rule– the-nature-of the acts test– looks to the alleged injury causing acts to determine whether they fall within the scope of rendering, or failure to render, "professional services." These jurisdictions examine the nature of the alleged injury causing acts to determine if they require the application of a professional skill that is associated with specialized training, or the application of professional skills. *See Physicians Ins. Co. v. Pistone*, 555 Pa. 616 (1999); *Roe v. Federal Ins. Co.*, 412 Mass. 42 (1992); *Niedzielski v. St. Paul Fire & Marine Ins. Co.*, 134 N.H. 141 (1991); *New Mexico Phys. Mut. Liab. Co. v. LaMure*, 116 N.M. 92 (1999); *Standard Fire Ins. Co. v. Blakeslee*, 771 P.2d 1172 (Wash. App. Ct. 1989). Because these jurisdictions look to the nature of the injury causing acts, *i.e.*, the sexual abuse, and not the surrounding legitimate "professional services," they typically conclude that the insured did not render, or fail to render, "professional services" because the acts of sexual abuse do not require the requisite professional skill.

The second approach adopted by courts is the nature-of the services test, which looks more broadly to the services the professional was providing at the time of the alleged sexual abuse. *See St. Paul Fire & Marine Ins. Co. v. Shernow,* 222 Conn. 823 (1992) (holding that claims that a gynecologist improperly manipulated the patient's genitals during an exam qualified for coverage under a professional liability policy because the alleged sexual abuse and the provision of legitimate medical services were inextricably intertwined); *St. Paul Fire & Marine Ins. Co. v. Asbury*, 149 Ariz. 565 (1986) (holding that claims that a physician sexually abused a patient while the patient was sedated with nitrous oxide qualified for coverage under a professional liability policy, as there was a clear connection between the administration of nitrous oxide–a legitimate medical service and indisputably a "professional service"–and the sexual abuse). Though adopted by a minority of courts, the nature-of the services test is more likely to lead to a finding of coverage, particularly where the insured engages in sexual abuse during the course of the provision of legitimate "professional services."

The third and final approach is the substantial nexus test, which the New Jersey Supreme Court employed in *Princeton Ins. Co. v. Chunmuang*, 151 N.J. 80 (1997). There, the professional liability policy covered damages as the result of injury caused by a "medical incident," which the policy defined as "any act or failure to act … in the furnishing of the professional medical … services by you …." *Id*. at 85. The New Jersey Supreme Court held that this language did not restrict the scope of coverage to only those injuries resulting from acts that are characterized as professional in nature, but instead encompassed injuries caused by any act or failure to act occurring during the course of furnishing "professional services." *Id*. at 82 101. Thus, the appropriate inquiry is "whether a substantial nexus exists between the context in which the acts complained of occurred and the professional services sought." *Id*. at 97. The New Jersey Supreme Court concluded that this standard was satisfied by allegations that a gynecologist covertly watched his patient undress prior to an examination, and then, during the examination, touched the patient in a way that she perceived to be wrong. *Id*. at 82 101. *Chunmuang* demonstrates the importance of a close and detailed analysis of policy language, as its result was predicated upon the specific language of the professional liability policy at issue – the court concluded that coverage was not limited only to injury caused by acts that are professional in nature based upon the policy language defining "medical incident" as "any act or failure to act … in the furnishing of the professional medical … services by [the physician]." *Id*. at 97.

The analysis of whether allegations against an insured allege the rendering of, or failure to render, "professional services" will, as in all cases of policy interpre-



tation, begin with the specific language of the policy at hand. Thus, where the policy defines "professional services," any analysis of whether claims against an insured allege the rendering of, or failure to render, "professional services" should begin with that definition. Where the term remains undefined, however, it will be important to know the approach adopted by the jurisdiction that may resolve any disputes regarding coverage.

Exclusions

Intentional Act Exclusions

Many liability policies exclude coverage for expected or intended injuries. The application of these exclusions is typically clear where the insured engages in sexual abuse, especially where the inferred intent rule, discussed above, applies. Their application, however, is not as straightforward when the insured is accused of negligence in failing to prevent sexual abuse. Some exclusions will explicitly state that they apply to negligent acts from which sexual abuse arises, in which case that language will govern. Others, however, do not contain this level of specificity. Practitioners, therefore, will have to pay close attention to the policy language and the details of the claims against the insured to determine the policy's application to insureds accused of negligence in failing to prevent sexual abuse.

The primary question when applying intentional act exclusions is who must expect or intend the injury? Policies typically answer this question by providing that the injury must be expected or intended by "any insured," "an insured," or "the insured." While these differences in phraseology may appear to be distinctions without a difference, they have important consequences as to the application of these exclusions to insureds claimed to have negligently permitted sexual abuse.

When a policy excludes coverage for injury that is expected or intended by "any insured" or "an insured," courts have typically held that the exclusion equally applies to insureds who negligently fail to prevent sexual abuse by another insured. *See Doe 1 v. Liberty Mut. Fire Ins. Co.*, 2019 WL 4412437 at 12 14 (M.D. Pa. Sept. 13, 2019) ("Pennsylvania courts have consistently concluded that the use of the phrase 'an insured' or 'any insured' in an exclusion clause bars coverage for the person who acted intentionally or criminally and for the person charged with related acts of negligence"); *State Farm Fire & Cas. Co. v. Davis*, 612 So.2d 458, 460, 46566 (Ala. 1993) (holding that an exclusion of bodily injury which is expected or intended by "an insured" barred coverage for a wife alleged to have negligently permitted her husband

to sexually abuse children). Accordingly, these intentional act exclusions have broad application, excluding coverage not only for insureds who engage in sexual abuse, but also for those insureds against whom associated negligence claims are made.

Policies that exclude injury that is expected or intended by "the insured," however, are given a more restrictive interpretation. *See Lange,* 2023 WL 4704712 at 8 10 (holding that an exclusion of bodily injury that is expected or intended by "the insured" did not bar coverage for an insured alleged to have negligently failed to prevent sexual abuse by her husband); *Gen. Acc. Ins. Co. of Am. v. Allen*, 708 A.2d 828, 831 33 (Pa. Super. Ct. 1998) (holding that an exclusion of bodily injury which is expected or intended by "the insured" did not bar coverage for a wife alleged to have negligently failed to prevent her husband from sexually abusing minors). These courts have held that the phrase "the insured" refers only to the insured alleged to have engaged in the excluded conduct, i.e., the sexual abuse, and therefore does not exclude coverage for the "innocent insured."

Practitioners, however, must also pay close attention to the application of joint obligation and severability clauses that may exist, as they have the potential to alter the calculus in applying intentional act exclusions. Severability clauses generally provide that the insurance applies separately to each insured, whereas joint obligation clauses generally provide that the acts of one insured bind another insured. Depending on the jurisdiction in which one practices, these clauses may alter the application of intentional act exclusions.

For example, in *Minkler v. Safeco Ins. Co. of Am.*, the policy excluded bodily injury which is expected or intended by "an insured," which ordinarily would have excluded claims that the insured negligently failed to prevent another insured's sexual abuse. 232 P.3d 612 (Cal. 2010). The policy, however, contained a severability clause, which the court concluded rendered the policy ambiguous. *Id*. Accordingly, *Minkler* held that, despite the intentional act exclusion's use of "an insured," the severability clause operated to preclude its application to an insured alleged to have negligently failed to prevent her son from engaging in sexual abuse. *Id*.; *see also Shapiro v. Am. Home Assur. Co.*, 616 F.Supp. 900, 904 (D. Mass. 1984); *Premier Ins. Co. v. Adams*, 632 So.2d 1054, 1055 (Fla. Dist. Ct. App. 1994); *Catholic Diocese of Dodge Ridge City v. Raymer*, 840 P.2d 456, 459 62 (Kan. 1992).

Some courts have held that joint obligation clauses have the opposite effect where the policy contains an intentional act exclusion referring to "the insured," finding that the joint obligation clause nonetheless binds an insured alleged to have negligently failed to prevent another insured's sexual abuse. *See Metro. Prop. & Cas. Ins. Co. v. Rodick*, 2023 WL 6122849 (N.D. N.Y. Sept. 19, 2023). A majority of courts, however, have concluded that severability clauses do not alter the collective application of an exclusion, as they were intended only to extend policy limits separately to each insured. *See Safeco Ins. Co. v. White*, 913 N.E.2d 426, 441 44 (Ohio 2009); *SECURA Supreme Ins. Co. v. M.S.M.*, 755 N.W.2d 320, 328 29 (Ct. App. Minn. 2008); *Villa v. Short*, 947 A.2d 1217, 1225 (N.J. 2008); *J.G. v. Wangard*, 753 N.W.2d 475, 486 (Wis. 2008).

Regardless of the particular phrasing of an intentional act exclusion, practitioners must pay close attention to the allegations against the insured. Even where a policy excludes bodily injury expected or intended by "the insured" the specific allegations against a non participating insured may trigger the exclusion. Courts have found that injury caused by sexual abuse is expected by a non participating insured where the insured knew or should have known of prior sexual abuse by the perpetrator. *See Diocese of Winona*, 89 F.3d at 1389 96; *Jessica M.F. v. Liberty Mut. Fire Ins. Co.*, 209 Wis.2d 42 (Ct. App. Wis. 1997).

There are numerous permutations of policy language and allegations against the insured that may or may not trigger the application of intentional act exclusions. Practitioners must be careful, therefore, in analyzing allegations against an insured to determine whether they fall within the scope of an intentional acts exclusion, keeping in mind that other provisions of the policy may alter the general application of the exclusion.

Sexual Molestation Exclusions

More recently, policies contain sexual molestation or abuse exclusions that exclude coverage for injury arising out of sexual molestation or sexual abuse. As is the case with intentional act exclusions, it is usually clear that these exclusions encompass claims that an insured engaged in sexual abuse. The majority of courts have, likewise, applied these exclusions to claims that an insured negligently failed to prevent sexual abuse, although this is not universal.

The majority of courts, however, have not applied such a restrictive rule when addressing claims of sexual abuse, particularly with respect to the sexual abuse of children.

Courts have typically concluded that the "arising out of" requirement demands only a nexus between the sexual abuse and the negligence claims against the insured, which is something less than a proximate cause requirement. *See, e.g., Gen. Ins. Co. of Am. v. Hall*, 2023 WL 2202511 at 3 (C.D. Cal. Feb. 22, 2023) ("The term '[a]rising out of' is a broad concept requiring only a slight connection or an incidental relationship between the injury and the excluded risk"); *Madison Square Boys & Girls Club, Inc. v. Atl. Spec. Ins. Co.*, 140 N.Y.S.3d 357, 369 (Sup. Ct. N.Y. 2020) ("To determine the applicability of an 'arising out of' exclusion, the Court of Appeals has adopted a 'but for' test). Given the broad application of "arising out of" language, courts have held exclusions of bodily injury arising from sexual molestation or sexual abuse

applicable to claims that an insured negligently failed to prevent sexual abuse on the basis that the claims against the insured would not exist but for the underlying sexual molestation or sexual abuse. *See A.K. v. Fidelity & Guar. Ins. Underwriters, Inc.*, 2023 WL 6231147 (D. N.J. Aug. 14, 2023); *Am. Family Mut. Ins. Co. v. S.C.*, 602 F.Supp.3d 1098, 1107 10 (S.D. Ind. 2022); *Boulanger v. Hartford Ins. Co. of Southeast,* 2022 WL 1239203 (Super. Ct. Conn. 2022).

A minority of courts, however, have not employed this approach, and have concluded that exclusions of bodily injury arising from sexual molestation or sexual abuse do not bar coverage of claims that an insured negligently failed to prevent sexual abuse. *See Doe 1*, 2019 WL 4412437 at 14 16; *see also Bd. of Pub. Educ. of Sch. Dist. of Pittsburgh v. Nat'l Union Fire Ins. Co. of Pittsburgh*, 709 A.2d 910 (Pa. Super. Ct. 1998). Although this rationale has subsequently been questioned, these courts have reasoned that the associated negligence claims against the insured did not arise out of the sexual abuse, but out of the insured's own negligent acts. *See Doe 1,* 2019 WL 4412437 at 14 16. As the claims against the insured did not arise from the excluded sexual abuse, the sexual molestation exclusion did not apply.

As is the case with the intentional act exclusion, practitioners must also be cognizant as to whether the policy contains a severability clause. Courts have divided on the issue of whether exclusions of bodily injury arising from sexual molestation or sexual abuse apply to negligence claims against an insured where the policy contains a severability clause. *See Dueno v. Modern USA Ins. Co.*, 152 So.3d 60 (Fla. Dist. Ct. App. 2014) (holding that sexual molestation exclusion applied despite a severability clause); *Am. Family Mut. Ins. Co. v. Bower*, 752 F.Supp.2d 957, 96571 (N.D. Ind. 2010) (holding that a sexual molestation exclusion did not apply in light of a severability clause).

Number And Timing of Occurrences

Homeowners policies and CGL policies typically provide that all related acts or failures to act, and series of related acts or failures to act, qualify as a single "occurrence." They may also provide that all loss arising out of continuous or repeated exposure to substantially the same conditions shall be considered as arising out of one "occurrence." Although professional liability policies are generally written on a claims made basis, some are written on an occurrence basis. Those professional liability policies written on the latter basis generally contain comparable language.

The application of this language is relatively straightforward with respect to negligence claims against an insured where there is only a single instance of sexual abuse–there is one "occurrence" that happens on the date of the abuse. But, what if there are multiple instances of abuse of multiple individuals within a policy period, or abuse of multiple individuals that spans over multiple policy periods? How many "occurrences" are there, and when did they happen? The answers to these questions can have significant consequences on an insurer's liability to its insured.

Courts generally employ one of two approaches in determining the number of "occurrences." Those employing the "cause approach" equate the number of "occurrences" with the number of causes of injury, and conclude that, where there is only one cause of injury, there is one "occurrence" regardless of the number of injuries. *See Donegal Mut. Ins. Co. v. Baumhammers*, 595 Pa. 147 (2007); *Washoe Cnty. v. Transcontinental Ins. Co.*, 110 Nev. 798, 800 01 (1994) ("The causal approach focuses on whether there was one, or more than one, cause which resulted in all of the injuries or damages"); *State Farm Fire & Cas. Co. v. Elizabeth N.*, 9 Cal.App.4th 1232, 1236 37 (Ct. App. Cal. 1992) ("[T]he number of occurrences depends on the cause of injury rather than the number of injurious effects"). A minority of courts apply the "effects approach," which defines the number of "occurrences" by reference to the number of injuries. *See Nicor, Inc. v. Associated Elec. & Gas Ins. Servs., Ltd.*, 223 Ill.2d 407, 418 (2006).

The "cause approach" has appeal to insurers, as it offers the potential to limit the number of "occurrences" and, therefore, the insurer's potential liability, by finding a relatively few number of causes for what may be numerous incidents of sexual abuse. While this approach may significantly limit an insurer's exposure by minimizing the number of "occurrences," particularly where one is alleged to have engaged in sexual abuse over a long period of time, few courts appear to have employed it to this end. *Washoe Cnty.* is one such case. There, the court held that the insured's negligence in licensing and monitoring a daycare center, which permitted an employee thereof to molest numerous children over a three-year period, constituted a single "occurrence." *Washoe Cnty.*, 110 Nev. at 799 805. Even though there were multiple instances of abuse of multiple children, the insured's negligence was the sole cause thereof. *Id.* The court likewise noted that this result was consistent with the policy's provision that "all damage arising out of continuous or repeated exposure to substantially the same general conditions shall be considered as arising out of one occurrence." *Id. Washoe Cnty.* is, therefore, a prime example of how the "cause approach" may operate to limit an insurer's liability.

The majority of courts, however, have not applied such a restrictive rule when addressing claims of sexual abuse, particularly with respect to the sexual abuse of children. Rather, courts are more likely to conclude that the repeated abuse of multiple individuals qualifies as an "occurrence" per individual – something more akin to, though not identical with, the "effects approach." *See Westport Ins. Co. v. California Cas. Mgmt. Co.*, 249 F.Supp.3d 1164 (N.D. Cal. 2017); *Brotherhood Mut. Ins. Co. v. Bible Baptist Church*, 2017 WL 6061979 (S.D. W.Va. 2017); *H.E. Butt Grocery Co. v. Nat'l Union Fire Ins. Co. of Pittsburgh, PA*, 150 F.3d 526 (5th Cir. 1998); *Interstate Fire & Cas. Co. v. Archdiocese of Portland*, 35 F.3d 1325 (9th Cir. 1994). They have typically done so under reasoning that it is the exposure of a child to a negligently supervised entity that results in injury, and not the negligent supervision alone. *See H.E. Butt Grocery Co., 150 F.3d at 534; Archdiocese of Portland*, 35 F.3d at 1329. Because each victim is separately exposed to the perpetrator, there are separate "occurrences" for each victim. This approach, therefore, expands the potential number of "occurrences" to, at least, the number of individuals alleged to have been sexually abused, and, therefore, significantly increases the insurer's potential liability.

Further complications arise where one sexually abuses multiple individuals over the course of multiple policy periods. Even if there are separate "occurrences" with respect to each individual who was abused, are there separate "occurrences" related to that individual across different policy periods, as well? The traditional approach to this issue was the application of the first encounter rule, which held that the failure to prevent multiple instances of sexual abuse of an individual occurring over multiple policy periods qualifies as a single "occurrence" that happens on the date of the first instance of sexual abuse. *See May v. Maryland Cas. Corp.*, 792 F.Supp. 63 (E.D. Mo. 1992); *Interstate Fire & Cas. Co. v. Archdiocese of Portland,* 747 F.Supp. 618 (D. Or. 1990). Courts that employed this approach typically relied on policy language providing that injury arising out of continuous or repeated exposure to substantially the same conditions qualifies as one "occurrence." The first encounter rule limits an insurer's potential liability by considering all instances of sexual abuse of an individual to have occurred on a single date, and, therefore, within a single policy period. It may also relieve an insurer of potential liability for claims related to sexual abuse of an individual occurring within a policy period where at least one instance of sexual abuse of that individual took place before the insurer's policy became effective.

More recently, however, courts have moved away from the first encounter rule. Rather, these courts have concluded that, where individuals are sexually abused over multiple policy periods, there is one "occurrence" per individual per policy period. *See California Cas. Mgmt. Co.*, 249 F.Supp.3d at 1178 80; *Archdiocese of Portland*, 35 F.3d at 1326 31. This approach finds that all instances of abuse of an individual within a particular policy period qualify as one "occurrence," giving effect to policy language providing that all loss arising out of continuous or repeated exposure to substantially the same conditions shall be considered as arising out of one "occurrence." Courts have recognized, however, that multiple acts of sexual abuse cause distinct damages, and account for this by holding that there is an "occurrence" for each individual in every policy period in which that individual is sexually abused. This approach has the potential to greatly expand an insurer's potential liability, particularly where abuse extends over a long period of time, as it allows for the possibility that multiple policy periods, and a fresh set of limits, are implicated for multiple claims. *See, e.g., California Cas. Mgmt. Co.*, 249 F.Supp.3d at 1166 82 (finding a total of six "occurrences" where Doe 1 was sexually abused over the course of three policy periods, Doe 2 was sexually abused over the course of two policy periods, and Doe 3 was sexually abused over the course of one policy period).

Courts have taken vastly disparate approaches to determining the number and timing of "occurrences," so practitioners must pay close attention to the law in their particular jurisdiction. The present-day trend is to conclude that there is one "occurrence" per child per policy period, which will expose insurers to greater potential liability. Avenues still may exist, however, for practitioners to argue that courts should adopt the "first encounter" rule, or, less likely, adopt a "cause approach" that would encompass all instances of sexual abuse within a single "occurrence," either of which would limit insurers' potential exposure.

Conclusion

The coverage issues arising from sexual tort claims vary greatly depending on the policy language at issue, the nature of the insured, and the specific facts surrounding the claims of abuse. Practitioners should be particularly mindful of the law of the jurisdiction that will apply given the widely diverging views of courts on these coverage issues. Given the increasing number of sexual tort lawsuits, as well as the ever-changing policy language implemented by insurers, coverage issues arising from sexual tort claims will only continue to evolve.