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Journal of Consumer Attorneys Associations for Southern California
ADVOCATE
September 2018 Issue

Insurance coverage in a "me too" world

FINDING COVERAGE FOR SEXUAL MOLESTATION OR ASSAULT OFTEN DEPENDS ON AMBIGUITY IN THE INSURANCE POLICY

Over the course of the last year or so, there has been an avalanche of claims and lawsuits alleging sexual assault, battery, and rape against a wide range of individuals and entities. The allegations range from people claiming that they were made uncomfortable to all-out physical attacks and rapes.

While such claims unfortunately are not new, because of the sheer quantity of claims and the charges against alleged perpetrators and those who allegedly enabled the misconduct, public attention has never been higher. This inevitably has led to the question of what insurance coverage might be available to pay for the defense of and settlement and judgments in such claims.

This is not simply a question of whether alleged perpetrators get insurance coverage to protect them financially. Rather, as the sex-abuse litigation against various Catholic dioceses and archdioceses and other entities has shown, insurance may be the most viable and valuable source of compensation for victims of sexual abuse. Indeed, insurance policies have paid out hundreds of millions of dollars to individuals claiming that they were abused by priests and other members of churches. Thus, insurance does provide one of the protections that it was intended to perform – providing financial recompense for those injured by the wrongful acts of insureds when insureds otherwise might not be able to pay.

The insurers' interpretation

Many insurers disagree with the notions that their policies should afford coverage for claims of sexual assault. In fact, many insurance policies now contain express exclusions for sexual assault. Many insurers also argue public policy or statutory schemes bar coverage. For example, the insurers often point to California Insurance Code section 533, which states:

> An insurer is not liable for a loss caused by the wilful act of the insured; but he is not exonerated by the negligence of the insured, or the insured's agents or others.

See Pasich, Next Page

Journal of Consumer Attorneys Associations for Southern California
ADVOCATE
September 2018 Issue

Likewise, most general liability and other forms of liability insurance policies contain exclusions that purport to bar coverage for injury that is "expected or intended" by the insured. But the statute and such exclusions do not automatically apply to bar coverage simply because an insured engaged in a volitional act. More than that is required. This issue was addressed in *J.C. Penney Cas. Ins. Co. v. M.K.* (1991) 52 Cal.3d 1009, 1021, one of the California Supreme Court's landmark decisions. In it, the court stated:

> It is settled that "wilful act" in section 533 means "something more than the mere intentional doing of an act constituting [ordinary] negligence.". . . A contrary rule would allow an insurer to deny coverage for a negligent act. That result is specifically prohibited by section 533.

In *J.C. Penney*, a man was accused of sexually molesting a girl on 20 to 25 separate occasions over a nine-month period. He admitted that he intended to molest her and that none of his acts were accidents. He was ordered to pay $500,000 in a subsequent civil action to the child and her mother. The insurer denied coverage. The court held that insurers "are not required to indemnify their insureds for damages caused by an insured's sexual molestation of a child." (*Id.*, 52 Cal.3d at 1014.) It unequivocally rejected the notion that the insurer would have to indemnify the insured for the award, pointing out that "[n]o rational person can reasonably believe that sexual fondlings, penetration, and oral copulation of a five-year-old child are nothing more than acts of tender mercy." (*Id.* at 1019.) The court distinguished that circumstance from "driving an automobile without the exercise of ordinary care or an intentional violation of a statute (speed in excess of the maximum speed limit)," in which someone else is injured. The court noted, "'Certainly no one would contend that an injury occasioned by negligent or even reckless driving was not accidental within the meaning of a policy of accident insurance . . . .'" (*Id.* at 1020.)

No such thing as "negligent or reckless" sexual molestation

But, as the court explained, "There is no such thing as negligent or even reckless sexual molestation. The very essence of child molestation is the gratification of sexual desire. The act is the harm. There cannot be one without the other. Thus, the intent to molest is, by itself, the same as the intent to harm." (*Id.* at 1021.) Therefore, the court concluded that while an insurer might need to show the insured's subjective intent to harm in most situations, that is not true "when the insured seeks coverage for an intentional and wrongful act if the harm is inherent in the act itself." As the court emphasized, "child molestation is *always* intentional, it is *always* wrongful, and it is *always* harmful." (*Id*. at 1025.)

This interpretation is consistent with the intent of those involved in drafting standard insurance policy language. The definition of "occurrence," including the word "accident," was adopted by the insurance industry in 1966. As one of those involved in assessing the appropriate standard policy language stated, the word "accident" was adopted to exclude from coverage only "the intentional results of intentional act[s], such as murder. We did not want to cover that. That is an intentional act with an intentional result." (Testimony of Herbert Schone, *In re Asbestos Insurance Coverage Cases*, Cal. Judicial Council Coord. Proceed. No. 1072, known on appeal as *Armstrong World Industries v. Aetna Casualty & Surety Co.* (1996) 45 Cal.App.4th 1.)

As another insurance executive testified:

> [I]nstances arise when the injury is an unintended result of an intentional act. The two situations, an absence of intent or an unexpected result, would be covered under either the "accident" or "occurrence" definition.

(*Id.*, testimony of Willard Obrist, Assistant Manager, General Accident Group).

The court seeks any potential for liability under the policy

Of course, it must be noted that the limitations on coverage on an insurer's duty to indemnify may not apply to an insurer's duty to defend. That is simply because the standard governing the duty to defend is broader than the standard governing the duty to indemnify. As the California Supreme Court has stated, "the rule [is] that the insurer must defend in some lawsuits where liability under the policy ultimately fails to materialize; this is one reason why it is often said that the duty to defend is broader than the duty to indemnify." (*Montrose Chem. Corp. v. Superior Court* (1993) 6 Cal.4th 287, 299.) Therefore, all that is necessary to trigger an insurer's defense duty is "a bare 'potential' or 'possibility' of coverage . . . ." (*Id.* at 300.)

This means that an insurer may have a duty to defend in cases alleging sexual molestation. For example, in *Horace Mann Insurance Co. v. Barbara B.* (1993) 4 Cal.4th 1076, an insured teacher sought coverage for a lawsuit alleging that he had sexually molested and otherwise harassed a student. The court reiterated the principle that "a liability insurer owes a broad duty to defend its insured against claims that create a potential for indemnity." (*Id.* at 1081.) It emphasized that once a defense duty attaches, "the insurer is obligated to defend against all of the claims involved in the action, both covered and noncovered, until the insurer produces undeniable evidence supporting an allocation of a specific portion of the defense costs to a noncovered claim." (*Ibid.*)

The court also noted that the fact that the teacher had been convicted of sexual misconduct did not necessarily eliminate the duty to defend because of "other allegations of misconduct, not amounting to criminal molestation." (*Id.* at 1083.) It explained: "A teacher's educational role requires constant, close interaction with students; it is not always easy for a court to draw the line between

See Pasich, Next Page

Journal of Consumer Attorneys Associations for Southern California
ADVOCATE
September 2018 Issue

appropriate and inappropriate interaction. Neither precedent nor logic dictate that a molester cannot also be liable for torts of negligence against the victim which are apart from, and not integral to, the molestation." (*Ibid.*) The court emphasized that it does not matter whether sexual molestation is the "dominant factor" in the litigation. As it held, "We look not to whether noncovered acts predominate in the third party's action, but rather to whether there is *any* potential for liability under the policy." (*Id.* at 1084; See, *National Union Fire Insurance Co. v. Lynette C.* (1991) 228 Cal.App.3d 1073, 1085 ["Nor does public policy flatly prohibit insurance coverage for negligent liability arising necessarily out of criminal behavior"].)

As these decisions suggest, it is important to examine both the potential scope of coverage afforded under an insurance policy and the factual premises of a claim or lawsuit against an insured. Indeed recent decisions demonstrate this point.

Liberty Surplus and "occurrence" in liability policies

On June 4, 2018, the California Supreme Court rendered its decision in *Liberty Surplus Insurance Corp. v. Ledesma & Meyer Construction Co.* (2018) 5 Cal.5th 216. The court addressed the following question: "When a third party sues an employer for the negligent hiring, retention, and supervision of an employee who intentionally injured that third party, does the suit allege an "occurrence" under the employer's commercial general liability policy?" The underlying lawsuit involved a claim by a 13-year old student that an employee of the construction company had sexually abused her. She sued the construction company for negligently hiring, retaining, and supervising the employee. The insurer filed suit, contending that it had no duty to defend or indemnify the construction company, arguing that the insured's intentional acts of hiring, supervising, and retaining were not "accidents."

The court rejected the insurer's argument. It pointed out that an "accident" is "an unexpected, unforeseen, or undersigned happening or consequence from either a known or an unknown cause." (*Id.* at 221.) The court accepted the premise the employee's sexual misconduct was a "'wilful act' beyond the scope of insurance coverage . . . ." (*Id.* at 222.) However, much as it did in *Horace Mann*, the court held that the employee's intentional conduct "does not preclude potential coverage" for the construction company. As it emphasized, "It is important to keep in mind that a cause of action for negligent hiring, retention, or supervision seeks to impose liability on the employer, not the employee." (*Ibid.*)

The court then turned to the question of how an "accident" is judged. It explained that "[b]ecause liability insurance is a contract between insurer and insured, and the policy is read in light of the parties' expectations, the relevant viewpoint is that of the insured rather than the injured party." (*Id.* at 224.) It accepted the construction company's arguments that the employee's "acts were neither expected nor intended from its perspective." It then rejected the notion that "negligent hiring cannot be an 'accident,'" finding earlier decisions to the contrary to be "erroneous." (*Id.* at 227.)

The court then discussed the chain of causation. It acknowledged that the employee's molestation "was the act directly responsible for the injury, while [the construction company's] negligence in hiring, retaining, and supervising him was an indirect cause." (*Id.* at 225.) But, this sufficed to trigger coverage. As the court reasoned, the construction company's acts "must be considered the starting point of the series of events leading to [the girl's] molestation. [The construction company] does not rely event preceding its own negligence to establish potential coverage. As alleged by [the victim], the 'occurrence resulting in injury' began with [the construction company's negligence and ended with [the employee's] act of molestation." (*Ibid.*)

In this respect, the court's decision certainly was consistent with prior decisions, such as *Horace Mann*, and *Minkler v. Safeco Ins. Co.* (2010) 49 Cal.4th 315, 333 [policy covers mother's suit for negligent supervision of son who allegedly molested a boy; her "coverage must be analyzed on the basis of whether *she herself* committed an act or acts that fell within the intentional act exclusion"].

AIG v. Cosby

Even more recently, a court turned to the question of insurance coverage for various lawsuits against actor and comedian Bill Cosby. As is well known, Mr. Cosby was sued in a series of lawsuits by women who alleged, in most lawsuits, that he or his agents had defamed them by denying that he had engaged in sexual misconduct, or by calling them liars. There were also other lawsuits seeking recovery for alleged sexual assaults. Mr. Cosby's homeowner's insurer, AIG Property Casualty Company, filed multiple lawsuits against Mr. Cosby, seeking a determination that it was not obligated to defend or indemnify Mr. Cosby (although it had assumed his defense in at least certain of the underlying lawsuits subject to a reservation of rights).

AIG's arguments were first addressed by the Central District of California, in *AIG Prop. Cas. Co. v. Cosby*, 2015 WL 9700994 (C.D. Cal. Nov. 13, 2015). There, the court addressed whether a policy exclusion for "personal injury arising out of any actual, alleged, or threatened by any person . . . sexual molestation, misconduct, or harassment" applied to bar coverage in the defamation lawsuits. The court held that AIG had a duty to defend Mr. Cosby because [AIG's] broad interpretation and [Mr. Cosby's] narrow interpretation of 'arising out of ' [in the exclusion] are reasonable." (*Id.* at *5.)

Because ambiguities are resolved in favor of coverage, the court accepted Mr. Cosby's interpretation that the exclusion for sexual misconduct did not apply to excuse AIG from its duty to defend the defamation lawsuits against Mr. Cosby. The court also found, as did the California Supreme Court in *Horace Mann*, that some of the allegations in the underlying lawsuit "are independent of sexual misconduct and therefore [AIG] has a duty to defend." (*Id.* at *6.)

See Pasich, Next Page

Journal of Consumer Attorneys Associations for Southern California
ADVOCATE
September 2018 Issue

Because AIG sued Mr. Cosby in multiple forums, the question of its duty to defend Mr. Cosby was addressed by another court. This time, it was former United States Supreme Court Justice David Souter writing for the U.S. First Circuit Court of Appeals, who addressed AIG's arguments. (*AIG Prop. Cas. Co. v. Cosby* (1st Cir. 2018) 892 F.3d 25.) Once again, AIG was arguing that it had no duty to defend Mr. Cosby in certain defamation lawsuits because of its sexual misconduct exclusion. This time, it argued that Massachusetts law, rather than California law, applied. As Justice Souter noted, "It is no surprise that AIG would prefer to avoid the application of California law," stating: "Interpreting the same policy provisions at issue here, the California court applied California law and held that AIG had a duty to defend Cosby, given the ambiguity of the sexual-misconduct exclusions." (*Id.* at 27 n.2.)

Justice Souter focused on the difference in language between two exclusions in the AIG policies. While the primary policy's sexual misconduct exclusion applied to claims "arising out of any actual, alleged[,] or threatened . . . [s]exual molestation, misconduct or harassment," the umbrella policy had a more broadly worded exclusion for claims "[a]rising out of, *or in any way involving, directly or indirectly,* any alleged sexual misconduct." (*Id.* at 26-27.) As Justice Souter explained, "[T]his provision has a place in the analysis here under the rule that '[e]very word in an insurance contract must be presumed to have been employed with a purpose and must be given meaning and effect whenever practicable.'" (*Id.* at 28.)

Therefore, Justice Souter concluded, writing for the court, that "the presence of another, more broadly worded sexual-misconduct exclusion in the umbrella policy tips the scales in favor of finding ambiguity." (*Ibid.*) In doing so, he noted that application of California law would result in the same conclusion, stating, "Notably, the same result would obtain under California law." (*Id.* at 29 n3.)

Conclusion

Heinous as sexual assault, molestation, and abuse may be, the heinous nature of the acts does not mandate that insurance is unavailable regardless of the circumstances, who is the insured, or without regard to the theory of liability asserted. While an insurer might not have a duty to indemnify or to pay an award against a proven molester for pure sexual misconduct, coverage may be available, and thus some compensation provided for the victim of sexual misconduct, when the insured engaged in non-sexual conduct. Likewise, coverage may be available for those who did not directly engage in the molestation but were negligent in some fashion or are otherwise held vicariously liable. As demonstrated above, such a result is consistent with California public policy, insurance industry intent, and the language used in many insurance policies. Therefore, this coverage possibility should not be overlooked.

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