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Revived Sex Abuse Claims Raise Insurance Coverage Issues

By **James Murray, Jared Zola and James Carter** (June 3, 2019, 4:52 PM EDT)

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In a growing number of jurisdictions, legislatures are passing statutes that reopen the statute of limitations for previously time-barred claims by survivors of childhood sexual abuse. States that have passed reviver statutes, sometimes called "window" statutes, include California, Minnesota, Montana and, recently, New York. Many other states are currently considering such legislation.

The passage of such a statute in a jurisdiction inevitably leads to an avalanche of claims and lawsuits against schools, religious entities, medical institutions and other organizations, which may be ill-prepared financially to absorb the enormous potential liability and costs that such matters can entail.

Insurance coverage can play a crucial role in addressing the financial exposure associated with sexual abuse claims in a manner that benefits both the survivors and the organizations. To realize the full benefit of insurance, however, organizations seeking coverage for sexual abuse claims must confront a host of insurance coverage issues. A reoccurring coverage issue in the sexual abuse context concerns multiyear insurance policies and whether the "per occurrence" limit of liability applies once for the entire term of the policy, or separately in each annual period of the policy.

How the Issue Arises

Entities and organizations facing potential liability from historic sexual abuse claims frequently face allegations that they negligently hired, supervised or trained the perpetrator(s). In addition to certain present-day claims-made coverage (such as D&O insurance, for example) available in the year that the survivor makes a claim, perhaps the most valuable coverage available to entities and organizations facing sexual abuse claims can be found in comprehensive general liability, or CGL, policies that they purchased during the time when the sexual abuse is alleged to have occurred — sometimes many decades in the past.

Because the alleged abuse may have occurred long ago, a preliminary task for an organization facing sexual abuse claims is locating evidence of its old CGL insurance policies and reconstructing its historic liability insurance program. The process may involve combing through

archived files, contacting former insurance brokers and insurers, and, sometimes employing an insurance archaeologist.

Recognizing that documents may be misplaced over time, every state's law permits a policyholder to prove the existence of their historical insurance coverage through secondary evidence such as letters describing the coverage, certificates of insurance, the terms and conditions of insurance policies issued before or after the "missing" coverage, specimen insurance policy forms used during the relevant time and many other forms of evidence. If these old policies can be found, or proved through secondary evidence, they can help an organization to remain solvent and to continue its operations, while providing meaningful relief to abuse survivors.

It is not uncommon for liability insurance programs from the 1960s and 1970s to feature primary and excess CGL policies whose policy periods span more than one annual period, frequently three years. Apart from the length of the policy period, multiyear CGL policies are like single-year CGL policies. But multiyear CGL policies give rise to a unique coverage question owing to their extended policy periods: Whether the "per occurrence" or "per accident" limit applies to each annual period separately or to the entire period as a whole? In other words, is the "per occurrence" limit annualized?

Why Annualization Matters

The annualization issue in the sexual abuse context can have a major impact on the amount of available insurance coverage. The reason relates to the way occurrences are calculated in sexual abuse coverage matters involving old CGL polices. The number of occurrences determines the number of "per occurrence" limits that are available to pay claims.

To secure the full benefit of coverage, policyholders in sexual abuse coverage matters often contend that each instance of abuse constitutes a separate occurrence that triggers a "per occurrence" limit. Some courts follow this approach, as did the court recently in In re Diocese of Duluth.[1] Other courts calculate the number of occurrences per victim, per perpetrator, per policy period.[2]

Either approach can trigger many "per occurrence" limits. Notably, although the face of a CGL insurance policy may state an "aggregate" limit, the aggregate limit applies only to occurrences within the "products hazard" or the "completed operations hazard." Because these hazards do not apply to sexual abuse, the "aggregate" limit does not cap the number of "per occurrence" limits.

In jurisdictions holding that the number of occurrences for sexual abuse claims is calculated per victim, per perpetrator, per policy period, annualization becomes important. Policyholders frequently assert that each annual period within a multiyear policy operates as separate insurance policy, each with its own "per occurrence" limit. If, for example, a victim is abused by the same perpetrator one time in each annual period of a three-year policy, the result would be that the victim's claim implicates three separate "per occurrence" limits. It is no different than if the policyholder purchased three consecutive, but separate, CGL policies.

Insurers, on the other hand, often contend that multiyear policies have a single, undifferentiated policy period and provide a single "per occurrence" limit of liability for the entire span of the multiyear policy. Under this view, considering the same example posed in the immediately prior paragraph, the abuse of a victim one time in each of the three annual policy periods yields only one occurrence.

In other words, coverage available for the same abuse is reduced to one-third of what it would

otherwise have been under three separate annual policies. Annualization of "per occurrence" limits of liability is irrelevant, of course, in jurisdictions adopting the court's holding in the Diocese of Duluth that each instance of abuse is a separate occurrence.[3] Each instance of abuse triggers a separate per occurrence limit, regardless of whether the policy period is annualized.

The "Per Occurrence" Limits of Multiyear CGL Policies Annualize

Although insurers frequently reject annualization, policyholders are right to contend that multiyear policies were intended to operate as three separate policies. Indeed, insurers' hostility to the annualization of "per occurrence" limits would have baffled the underwriters who underwrote multiyear policies in the 1960s and 1970s. A declaration submitted recently in a coverage litigation involving sexual abuse alleged against former priests explains why.

John Bogart was an underwriter who worked in the insurance industry from the 1960s to the mid-1990s and regularly underwrote multiyear CGL insurance policies. Bogart began working in the insurance industry in 1962 when employed by the Insurance Company of North America, or INA, which is now part of ACE. During his 10 years working at INA from 1962 to 1972, he attended a four-month, full-time casualty underwriting school. At the underwriting school, he learned techniques that insurers used to retain accounts, including selling insurance policies that spanned multiple years. Later in his career, he was promoted and taught at the underwriting school.[4]

Bogart stated to the court in his declaration that multiyear insurance policies were not unusual, but rather were commonplace and, in his expert opinion as an insurance company underwriter, more preferable to insurance companies than single-year policies.[5] According to Bogart, multiyear, as opposed to single-year, CGL insurance policies were strictly a marketing tool used to secure an insured's business for a longer period of time, in exchange for a discounted premium.[6]

Bogart explained that multiyear CGL policies benefited the insurer in two ways: (1) securing the insured's business for a longer period of time; and (2) reducing the amount of clerical work for the insurer by extending the time between renewals.[7] He elaborated that it was the intent of the insurance industry that multiyear CGL policies would be identical to annual CGL insurance policies, other than the premiums charged to the insured.[8]

Bogart further explained that insurers could not have sold multiyear CGL policies if the "per occurrence" limit of liability did not renew on an annual basis because the insured would have purchased single-year policies instead.[9] Bogart said that the insurance industry devised three-year policies to hold the risk more easily and it never meant to eliminate two-thirds of the coverage in the way that insurers now suggest.[10]

In addition to the historical perspective of underwriters, multiyear policies often contain policy wording that confirms that the "per occurrence" limit was intended to apply on an annual basis. For example, the policy may indicate that the "aggregate" limit is annualized. Although insurers may contend that the annualization of the "aggregate" limit evidences an intent to treat the "per occurrence" limit differently, the annualization of the "aggregate" limit supports the annualization of the "per occurrence" limit.

The "aggregate" limit is the ceiling on the number of "per occurrence" limits that the policy will pay for occurrences within the products and completed operations hazards per annual period. The annualization of the "aggregate" limit thus implies that the "per occurrence" limit is likewise annualized. Treating the "per occurrence" limit as nonannualized and the "aggregate" limit as annualized would

effectively create two different policy periods within the same policy — one with three separate annual periods and one with an undifferentiated policy period.

If this incongruity were the intent of the policy, it was surely incumbent upon insurers to include wording in the multiyear policies explaining this unusual arrangement. Yet nothing on the face of multiyear policies indicates that was the intent.

Why then might a multiyear policy state that the "aggregate" limit applies on an annual basis, without saying the same thing about "per occurrence" limit? The most likely and reasonable explanation was to assure policyholders that a single "aggregate" limit would not be stretched over three years. In contrast, Bogart explained, insurers at the time did not need to state that the "per occurrence" limit applied separately to each annual period because the insurer agreed to pay that limit with respect to each and every occurrence, without further limitation, irrespective of the length of the policy term — subject only to the "aggregate" limit, if applicable to the specific type of loss at issue.[11]

Policies may have other features indicating that the "per occurrence" limit is annualized. For example, the policy conditions may contain an audit provision, which permits the insurer to review the insured's business records for evaluating the insured's exposure and adjusting the premium.[12] The right to review the insured's books at any time and to adjust the premium over the course of the policy period suggests by itself that multiyear policies were not intended to have a single policy period.

Some policies may even state that the audit basis is annual.[13] Such provisions show that insurers did not want to lock themselves into a multiyear insurance relationship over the course of which the insured could become a more serious risk any more than insureds wanted to buy a multiyear policies whose limits did not renew annually yet permitted insurers to increase the premium annually.

Multiyear policies may also contain provisions concerning the payment of premiums in annual installments or that other CGL coverage parts are rated annually. Such provisions again highlight that multiyear policies were intended to provide separate annual periods.[14]

Conclusion

Despite what insurers may contend today, the insurance industry historically intended for multiyear policies to be the equivalent of consecutive annual policies, each with its own "per occurrence" limit. Insurers' efforts to dispute the annualization of the "per occurrence" limit in multiyear policies is nothing short of an attempt to disavow the bargain they originally struck with their policyholders. Given the significant impact that the annualization of "per occurrence" limits can have on the coverage available in sexual abuse matters, the issue deserves careful consideration from policyholders, insurers and the courts.

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[1] See, e.g., In re Diocese of Duluth, 565 B.R. 914, 925 (Bankr. D. Minn. 2017) ("There are separate occurrences for each separate sexual abuse for each victim and each priest."); see also Order and

Decision, Sorg v. Safeco Ins. Co., No. DV 12-342 (Mont. Dist. Ct. July 5, 2012) (finding that each of seven sexual assaults by two assailants of the same victim on the same day constituted seven separate injuries).

[2] See, e.g., H.E. Butt Grocery Co. v. Nat'l Union Fire Ins. Co., 150 F.3d 526, 535 (5th Cir. 1998) ("two independent acts of sexual abuse injuring two children [perpetrated by one of the policyholder's employees] are two occurrences").

[3] Diocese of Duluth, 565 B.R. at 925 (Bankr. D. Minn. 2017).

[4] See Declaration of John T. Bogart ("Bogart Decl."), Ex. A., Expert Report (Doc. No. 194-2), ¶¶ 1-4, Diocese of Duluth v. Liberty Mutual Ins. Co., Civil Action No.: 0:17-cv-03254-DWF-LIB (D. Minn.).

[5] See id., Ex. A ¶¶ 1-4.

[6] See id., Ex A ¶ 5.

[7] See id., Ex. A ¶6.

[8] See id., Ex. A ¶7; id., Ex. B, Deposition of John T. Bogart (Doc. No. 194-2), 159:25-160:14 ("would be treated like three regular insurance policies, three primary policies").

[9] See id., Ex. A ¶ 9.

[10] Id., Ex. B at 25:21-26:3.

[11] See id., Ex. A. ¶ 14.

[12] See id., Ex. A ¶ 12.

[13] Id.

[14] See id., Ex. A ¶ 13.