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The Key Issue In Revived Sex Abuse Claim Insurance Disputes

By **James Murray, Jared Zola, Natasha Romagnoli and James Carter**
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James Murray

Jared Zola

Natasha Romagnoli

James Carter

In January of this year, New York passed the Child Victims Act. Previously, the state required that childhood sexual abuse suits be filed before a plaintiff's 23rd birthday. The CVA includes a one-year period, known as a "window," which went into effect on Wednesday and revives cases that had expired under previous statutes of limitations. The window opening for such claims gives rise to potential liability against defendants for the first time.

In a **previous article** addressing key insurance coverage issues raised in revived sexual abuse claims, we discussed 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. In this follow-up piece, we address a separate issue that is one of the most hotly contested in coverage disputes regarding historical sexual abuse claims: the applicable number of occurrences.

Number of Occurrences

The number of occurrences bears directly on how many "per occurrence" policy limits of liability are available to pay sexual abuse survivors' claims. Revived claims frequently allege abuse that took place in the 1950s, 1960s, 1970s and 1980s. Liability insurance policies from decades ago often have per occurrence limits that define the maximum amount of coverage for any one occurrence.

The per occurrence limits of liability may appear low by today's standards, but these historical insurance policies can provide substantial coverage. Depending how the number of occurrences is determined, these limits can be multiplied many times over, resulting in a substantial amount of insurance coverage. The greater the number of occurrences, the greater the amount of coverage.

Revived sexual abuse claims frequently allege causes of action against insured organizations for negligently hiring, training, supervising and retaining alleged perpetrators. But the allegations of sexual abuse underlying these causes of action often involve a variety of circumstances. The allegations may implicate many perpetrators who abused many victims during different time periods and at different locations. A perpetrator may have abused a victim one time or repeatedly. The abuse

may have been frequent or intermittent or taken place at one place or various places.

Not surprisingly, courts have struggled with how to quantify the number of occurrences in the sexual abuse context, beginning with the fundamental question of what constitutes the relevant "occurrence." A general liability insurance policy may define "occurrence" as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions."

Courts, however, have not found such definitions particularly helpful when it comes to determining the relevant occurrence for sexual abuse claims alleged against an organization that employed or oversaw a perpetrator. As one court quipped, this wording "sounds like language designed to deal with asbestos fibers in the air, or lead-based paint on the walls, rather than with priests and choirboys."[1]

Multiple Occurrences Approaches

Courts have developed several approaches in the sexual abuse context for determining the relevant occurrence for quantifying the number of occurrences. Some courts look to the cause of injury to define the relevant occurrence. Applying the "cause test," some courts conclude that each act of abuse is a separate occurrence on the basis that each act of abuse causes a separate injury. Treating each act of abuse as a separate occurrence results in the greatest number of occurrences and, thus, the greatest number of per occurrence limits of liability.

Most recently in In re Diocese of Duluth,[2] for instance, the court held that "[t]here are separate occurrences for each separate sexual abuse for each victim and each priest."[3] The court explained that the "injury is from the perspective of the victim" and a victim is injured each time he or she was abused.[4][5]

Similarly, in Roman Catholic Diocese of Brooklyn v. National Union Fire Insurance Co. of Pittsburgh, Pa.,[6] New York's highest appellate court determined that each instance of abuse is a separate occurrence. "[W]here, as here, each incident involved a distinct act of sexual abuse perpetrated in unique locations and interspersed over an extended period of time, it cannot be said ... that these incidents were precipitated by a single causal continuum and should be grouped into one occurrence."[7]

Other courts applying the "cause test" determine the number of occurrences per policy period, per priest, per victim. These courts view the abuse as the cause of the injury, but they deem that the repeated abuse of the same child by the same perpetrator as an ongoing occurrence during each policy period in which the abuse occurred. Under this approach, the repeated abuse of one child during one policy period constitutes one occurrence.

But this approach results in multiple occurrences where (1) the victim is abused by the same perpetrator during more than one policy period, (2) the victim is abused by more than one perpetrator in the same policy period, or (3) the perpetrator abuses more than one victim in the same policy period. In H.E. Butt Grocery Co. v. Nat'l Union Fire Ins. Co.,[8] for instance, the court applied this approach to find that "two independent acts of sexual abuse injuring two children [perpetrated by one of the policyholder's employees] are two occurrences."[9]

Single Occurrence Approach

Insurers, particularly primary insurers with no deductible or self-insured retentions, frequently reject the

position that sexual abuse claims against an organization constitute multiple occurrences. Instead, primary insurers contend that the relevant occurrence for purposes of determining the number of occurrences is the supervision, training or hiring of the perpetrators.

This approach tends to result in a small number of occurrences — usually far less than the number of claimants — thus limiting the number of "per occurrence" limits that the primary insurer must pay. Although liability insurance policies may state an "aggregate" limit, the aggregate limits typically do not help insurers in sexual abuse coverage matters because the aggregate limits apply solely to occurrences within the "products hazard" or the "completed operations hazard," which do not include sexual abuse.

This single occurrence approach can severely limit the coverage available to compensate claimants. Revived sexual abuse claims often drive insured organizations into bankruptcy and liability insurance is often the most significant asset available to pay claims. Courts applying a multiple occurrence position often reject attempts by insurers to define the occurrence as the employment or supervision of perpetrators, reasoning that it ignores that the victim would not have been injured in the absence of the perpetrator's intentionally criminal conduct and that each claimant exposes the insured to additional liability.[10]

In certain circumstances, however, insurers may argue that sexual abuse constitutes multiple occurrences. This often happens when the primary policy has substantial deductible or retentions that a policyholder must pay to access coverage. By arguing for multiple occurrences, the primary insurer can multiply the number of deductibles or retentions that the policyholder must pay, thereby reducing the primary insurer's liability.

Diocese of Brooklyn is an example of a case where the primary policy had substantial retentions and the insurer took a multiple occurrence position. In other instances, excess insurers may argue for multiple occurrences. The objective of this strategy is to require the primary insurer to pay multiple per occurrence limits, thereby reducing the need for the excess policy to pay part of the claim.

Conclusion

In states that have passed window statutes, an inevitable byproduct of the revived liability claims is litigation between policyholders and insurers regarding the insurance coverage available to compensate survivors. The overriding question in many of these insurance coverage disputes is how to quantify the number of occurrences, as this issue directly impacts the number of per occurrence limits an insurer must pay.

To minimize liability, insurers will no doubt contend that the allegations of abuse should be grouped into a single occurrence, regardless of the number of victims or perpetrators. Fortunately for policyholders seeking to advance a multiple occurrence position, most courts that have considered the number of occurrences for revived sexual abuse claims have rejected the single occurrence approach.

James R. Murray, Jared Zola and Natasha Romagnoli are partners and James S. Carter is of counsel at Blank Rome LLP.

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[1] Lee v. Interstate Fire & Cas., 86 F.3d 101, 104 (7th Cir. 1996).

[2] In re Diocese of Duluth, 565 B.R. 914 (Bankr. D. Minn. 2017)

[3] Id. at 924.

[4] In the Diocese of Duluth case the insurance policies defined "occurrence" as "[a]ll damage arising out of such exposure to substantially the same general conditions shall be considered as arising out of one occurrence." The court properly held that this language, the so-called "deemer clause," does not limit the number of occurrences. Several courts recognize that the wording — the "continuous or repeated exposure" clause — was added to broaden coverage, not limit it.

[5] 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).

[6] Roman Catholic Diocese of Brooklyn v. National Union Fire Insurance Co. of Pittsburgh, Pa., 991 N.E.2d 666 (N.Y. 2013)

[7] Id. at 815.

[8] H.E. Butt Grocery Co. v. Nat'l Union Fire Ins. Co., 150 F.3d 526, 535 (5th Cir. 1998)

[9] See also Soc'y of the Roman Catholic Church v. Interstate Fire & Cas. Co., 26 F.3d 1359 (5th Cir. 1994) ("When the priest molested the same child during the succeeding policy year, again there was both bodily injury and an occurrence. Thus, each child suffered an 'occurrence' in each policy period in which he was molested"); Interstate Fire & Cas. Co. v. Archdiocese of Portland, 35 F.3d 1325, 1329-30 (9th Cir. 1994) ("the [claimant's] exposure to the negligently supervised priest in each of the four different policy periods constituted a separate occurrence"); Roman Catholic Diocese of Joliet, Inc. v. Interstate Fire Ins. Co., 685 N.E.2d 932, 938 (Ill. App. 1st Dist. 1997) ("A plain reading [shows] that [it is not] negligent supervision alone [but rather] repeated 'exposure' of the minor to the negligently supervised priest that could constitute an occurrence . . . . in each of the policy periods.").

[10] See H.E. Butts Grocery, 150 F.3d at 531, 533.