Two Recurring Issues in Sexual Abuse Coverage Disputes: The Annualization of "Per Occurrence" Limits, and The Number of Occurrences[1]

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I. Introduction

In many jurisdictions across the United States and beyond, legislatures are passing statutes that reopen the statute of limitations for previously time-barred claims by survivors of sexual abuse. In several instances, the statutes apply to survivors of childhood sexual abuse, but in others the statutes also allow sexual abuse survivors who were 18 years old or older when the abuse took place to assert claims even if the statute of limitations is otherwise long expired. States that have passed reviver statutes, sometimes called "window" statutes, include California, Delaware, Hawaii, Louisiana, Minnesota, Montana, New Jersey, and New York, and many others are currently considering such legislation. The passage of these statutes inevitably leads to a spate of claims and lawsuits, alleging sexual abuse that happened years ago, against schools, universities, religious entities, medical institutions, athletic organizations, and other entities, which may be ill-prepared financially to absorb the enormous potential liability and costs to defend them.

Insurance coverage can play a crucial role in addressing sexual abuse claims in a manner that benefits both the survivors and the insured entities. To realize the full benefit of insurance, however, entities seeking coverage for sexual abuse claims frequently face a multitude of insurance coverage issues. This paper address two reoccurring coverage issue in the sexual abuse context: (1) multi-year insurance policies and whether the "per occurrence" limit of liability applies once for the entire span of the policy, or separately in each annual period of the policy; and (2) the applicable number of occurrences.

II. Why Are These Issues Relevant

Entities and organizations facing potential liability from historic sexual abuse claims frequently face allegations that they negligently hired, supervised, trained, or retained the alleged perpetrator of sexual abuse. 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 against an entity or organization, perhaps the most valuable coverage available to entities and organizations facing sexual abuse claims and, as a result, potentially valuable to abuse survivors, is the comprehensive general liability ("CGL") policies 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 decades ago, a preliminary task for an organization is attempting to locate evidence of its old insurance policies and reconstructing its historic liability insurance program. The process may involve combing through old files, contacting former insurance brokers and insurers, and, sometimes retaining an insurance archeologist. Recognizing that documents may be misplaced over time, every state's law permits policyholders to prove the existence of their historical insurance coverage through secondary evidence such as letters describing the coverage, certificate of insurance, the terms and conditions of insurance policies issued before or after the "missing" coverage (sometimes referred to as "bookends"), 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 the organization to remain solvent and continue to serve its community, while providing meaningful relief to abuse survivors.

A. The Annualization Issue and Why it Matters

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, multi-year policies share identical attributes as single-year CGL policies. Notwithstanding, multi-year CGL policies give rise to a unique coverage question: 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?

The annualization issue in the sexual abuse context can have a significant monetary impact on the overall insurance coverage available to compensate the abuse survivors. The reason relates to the manner in which occurrences are calculated in sexual abuse coverage matters involving old CGL polices. The number of occurrences, addressed below, determines the number of "per occurrence" limits that are available to pay survivors' claims. Although the face of a CGL insurance policy may state an aggregate limit, it applies only to occurrences within the "products hazard" or the "completed operations hazard." Because these hazards do not apply to sexual abuse, insurers cannot rely on the aggregate limit to cap the number of "per occurrence" limits that they may have to pay.

The annualization issue is closely related to the number of occurrences. Policyholders frequently assert that each annual period within a multi-year policy operates as separate insurance policy, each with its own "per occurrence" limit. In a jurisdiction holding, for example, that the number of occurrences for sexual abuse claims are calculated by the number of occurrences per survivor, per perpetrator, per policy period, annualization becomes important. In this hypothetical scenario, if a survivor is abused by the same perpetrator one time in each annual period of a three-year policy, the result would be that the survivor's claim implicates three separate "per occurrence" limits. The result is no different than if the policyholder purchased three consecutive, but separate, CGL policies.

Insurers, on the other hand, often contend that multi-year policies have a single, undifferentiated policy period and provide a single "per occurrence" limit of liability for the entire span of the multi-year policy. Under this view, considering the same hypothetical scenario 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.

B. The Number of Occurrences Issue

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, without an aggregate limit of liability applicable to sexual abuse-related

bodily injury claims. This issue as it applies in the sexual abuse coverage context is dispositively unique from how it applies in other contexts, such as in the product liability coverage context.

CGL insurance policies from that era may provide per occurrence limits of liability that 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. Frequently, the greater the number of occurrences, the greater the amount of coverage. For example, if presented with insurance policies devoid of deductibles and self-insured retentions, as many were during that time, to secure the full benefit of coverage, policyholders often contend that each instance of abuse constitutes a separate occurrence that triggers a "per occurrence" limit.[2] Some courts calculate the number of occurrences per victim, per perpetrator, per policy period.[3] However, if the insurance policies include a sizable deductible or self-insured retention, just the opposite may be true and fewer occurrences may result in a greater the amount of coverage to compensate abuse survivors.

Considering the same factual predicate posed in the immediately preceding paragraph, that the CGL policies at issue include no deductibles or self-insured retentions, to limit the number of occurrences, insurers (primary insurers, especially) contend that the overall supervision of, or decision to hire, or method of training of all perpetrators is the relevant occurrence. This approach tends to generate only a handful of occurrences and thus limit the number of "per occurrence" limits that insurers must pay. Of course, if the insurance policies at issue include a sizable deductible or self-insured retention, primary insurer are likely to take the opposite position in an effort to limit their financial exposure; that is, the insurers may assert that each instance of abuse is a separate occurrence.

While, as noted above, revived sexual abuse claims often allege causes of action against insured organizations and entities for negligently hiring, training, supervising and retaining alleged perpetrators. But the allegations of sexual abuse underlying these causes of action frequently involve a variety of circumstances. The allegations may implicate many different perpetrators who abused many different victims during various time periods and at a multitude of locations. A perpetrator may have abused a survivor one time or perpetually. The issue, therefore, is how to quantify the number of occurrences in the sexual abuse context, beginning with the fundamental question of what constitutes the relevant "occurrence."

III. How These Issues Play Out

A. The "Per-Occurrence" Limits of Multi-Year CGL Policies Annualize

[2] *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).

[3] *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").

Although insurers frequently convince courts to reject annualization, policyholders are right to argue that multi-year policies were intended to function as three separate policies. Indeed, insurers' hostility today toward the annualization of "per occurrence" limits would leave the underwriters who underwrote multi-year policies in the 1960s and 1970s shaking their heads in dismay. A declaration filed in a coverage litigation involving sexual abuse alleged against former priests explains why.

John T. Bogart was an underwriter who worked in the insurance industry from the 1960s to the mid-1990s and regularly underwrote multi-year CGL insurance policies. Mr. Bogart began working in the insurance industry in 1962 when employed by the Insurance Company of North America ("INA"), which is now part of ACE. During his ten 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 that multi-year 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 Mr. Bogart, multi-year, 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]

Mr. Bogart explained that multiple-year 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 multi-year CGL policies would be *identical to annual CGL insurance policies*, other than the premiums charged to the insured.[8]

Mr. Bogart further explained that insurers could not have sold multi-year 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] Mr. Bogart said that the insurance industry devised three-year policies to hold the risk easier, and it never meant to eliminate two-thirds of the coverage in the way that insurers now suggests.[10]

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

[5] *See id*. at ¶¶ 1-4.

[6] *See id.* ¶ 5.

[7] *See id.* ¶ 6.

[8] *See id.* ¶ 7; *see also* Bogart Declaration, Ex. B, Deposition of John T. Bogart (Doc. No. 194-2) at 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.

In addition to the historical perspective of underwriters, multi-year policies often contain policy wording that confirms that the "per occurrence" limit were intended to apply on an annual basis. Insurers often compare the annualization wording applicable to the "aggregate" limit to the lack thereof applicable to the "per occurrence" limit, but the annualization of the aggregate limit supports the annualization of the "per occurrence" limit. The "aggregate" limit is the total amount of coverage that the policy will pay for occurrences within the products and completed operations hazards per annual period. The "aggregate" limits thus implies that the "per occurrence" limits are annualized. Treating the "per occurrence" limit as non-annualized and the "aggregate" limit as annualized effectively creates 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 imperative that insurers include wording in the policies making this unusual arrangement clear at the time of sale and purchase. Yet nothing on the face of multi-year policies indicates that was the intent.

This, then, begs the question why multi-year CGL policies typically state that the "aggregate" limit applies on an annual basis while remaining silent as to the per-occurrence limit. The most likely and reasonable answer is that insurers at the time sought to assure policyholders that a single aggregate limit would not be spread over three years. In contrast, Mr. Bogart explained, insurers in that era 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 aggregate limits, if applicable to the specific type of loss at issue.[11]

Bolstering policyholders' and Mr. Bogart's contemporaneous view of the issue are other policy features indicating that "per occurrence" limits are annualized. For example, the policy's "Conditions" may contain an audit provision, which permits the insurer to review the insured's business records to evaluate exposure and adjust 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 that multi-year policies were not intended to have a single policy period. Some policies may go further by expressly stating that the audit basis is annual.[13] Insurers did not want to bind themselves to a three-year insurance relationship over the course of which the insured may become a more serious risk any more than policyholders wanted to buy a multi-year policy whose limits did not renew annually yet the insurer could increase the premium annually. Neither makes sense.

Multi-year policies may also contain provisions regarding the payment of premiums in annual installments or that other coverage sections are rated annually. Such provisions further highlight that the three-year policies provide three separate annual periods.[14]

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[11] *See id.*, Ex. A. at ¶ 14.

[12] *See id.* at ¶ 12.

[13] *See id.*

[14] *See id.* at ¶ 13.

B. Number of Occurrences Approaches

As noted, the starting point in determining the number of occurrences is determining what is the 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."[15] Again, courts address and decide the number of occurrences issue in the sexual abuse coverage context dispositively different than they do in other contexts, such as in the product liability coverage context.

1. Multiple Occurrences Approaches

Courts developed several approaches in the sexual abuse context for determining the relevant occurrence for the purpose of determining the applicable 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.

In *Roman Catholic Diocese of Brooklyn*,[16] 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."[17]

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.

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

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

[16] *Roman Catholic Diocese of Brooklyn v. National Union Fire Insurance Co. of Pittsburgh, Pa*., 991 N.E.2d 808 (N.Y. 201).

[17] *Id*. at 815. *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).

same policy period. In *H.E. Butt Grocery* 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."[18]

2. 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 or entity involve multiple occurrences. Instead, primary insurers without deductibles or self-insured retentions contend that the relevant occurrence for purposes of determining the number of occurrences is the supervision, training, retention, 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 in response to claims asserted by many survivors. This single occurrence approach can severely limit the coverage available to compensate survivors. Revived sexual abuse claims often drive insured organizations and entities into bankruptcy and liability insurance is frequently the most significant asset available to pay claims. Courts applying a multiple occurrence position in the sexual abuse coverage context often reject attempts by insurers to define the occurrence as the hiring, retention, employment, or supervision of perpetrators, reasoning that such an approach ignores each survivor's highly unique circumstance. One court, for example, explained that each survivor would not have sustained bodily injury in the absence of the perpetrator's intentionally criminal conduct.[19]

In certain circumstances, however, insurers may argue that sexual abuse results in multiple occurrences. This often happens when the primary policy has substantial deductible or self-insured retentions that a policyholder must pay to access coverage. By arguing for multiple occurrences, the primary insurer takes the position that it 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 in which the primary policy had substantial retentions and the insurer took a multiple occurrence position to reduce its potential exposure. 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 a portion of the claim.

IV. Conclusion

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

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

Regarding annualization of per occurrence limits, despite what insurers may contend today, the insurance industry intended for multi-year policies to be the equivalent of three separate annual policies, each with its own "per occurrence" limit. With respect to the number of occurrences, the context in which the claims arise and the primary policy language, including whether or not they provide for deductibles or self-insured retentions, frequently influence the parties' positions. Regarding both issues, which are closely related, given the significant impact they can have on the coverage available in sexual abuse matters, the issues deserve careful consideration from policyholders, insurers, and the courts.