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# INSURANCE COVERAGE FOR SEXUAL MISCONDUCT CLAIMS

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## I. INTRODUCTION

### A. A Growing Problem in Society and for Policyholders and Insurers

Tragically, sexual molestation is an increasing problem in society, affecting a wide range of institutions. When confronted with liability for sexual abuse, policyholders have claimed they are entitled to insurance coverage, whereas liability insurers frequently have denied coverage for such claims under standard liability insurance policies.

While insurers long have contended that the standard general liability policy was not intended to cover intentional acts, including sexual abuse, over the last decade a number of policyholders facing sexual abuse claims have contended that, even if a sexual offender's acts arguably were "expected or intended" and therefore excluded from coverage, claims against the sexual offender's employer or supervisor for negligent supervision, hiring, or retention still might come within a policy's coverage since the employer or supervisor did not expect or intend the injury.

These materials address issues that arise when policyholders seeks insurance coverage for sexual abuse claims under their insurance policies. The authors explore and analyze the case law and various legal theories supporting and rejecting liability insurance coverage claims involving sexual abuse allegations.

### B. The Increase in Sexual Molestation Litigation

Historically, civil actions for sexual abuse were uncommon, although examples can be found that date back more than fifty years.<sup>3</sup> However, by the late 1970s, reports of sexual abuse of children, and claims seeking financial compensation for such abuse, had sharply increased.<sup>4</sup> For nearly thirty years, sexual abuse claims have been brought against an increasing number of Roman Catholic dioceses and priests,<sup>5</sup> and against members of other religious denominations as well.<sup>6</sup>

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<sup>3</sup> See Peter N. Swisher & Richard C. Mason, *Liability Insurance Coverage for Clergy Sexual Abuse Claims*, 17 CONN. L.J. 356 (Spring 2011); *McLeod v. Grant County School Dist. No. 128*, 255 P.2d 360 (Wash. 1953) (involving student who allegedly was raped at school and claimed school was negligent in leaving students unsupervised and allowing access to darkened area).

<sup>4</sup> See The National Review Board for the Protection of Children and Young People, *A Report on the Crisis in the Catholic Church in the United States*, 22-25 (Feb. 27, 2004).

<sup>5</sup> See, e.g., *Cardinal Mahony under federal investigation over abusive priests, sources say*, LOS ANGELES TIMES (Jan. 29, 2009) (reporting that Cardinal Mahony "was accused of transferring priests who molested children to other parishes, rather than removing them from the priesthood and alerting authorities.") <http://www.latimes.com/news/local/la-me-mahoney29-2009jan29,0,5605217>; David L. Gregory, *Symposium: Fifteenth Annual Society of Catholic Social Scientists Meeting: Some Reflections on Labor and Employment Ramifications of Diocesan Bankruptcy Filings*, 47 J. CATH. LEG. STUD. 97 (2008) (discussing the significance of Roman Catholic dioceses filing for bankruptcy in the wake of clergy sexual abuse scandals, and making significant mention of liability insurers proactively filing declaratory judgment actions to avoid coverage in clergy sexual abuse claims).

<sup>6</sup> See, e.g., *Jewish coalition wants abuse victims to speak out*, BALTIMORE EXAMINER (Jan. 25, 2009) (reporting on Orthodox Jewish cantor who had previously participated in an international child pornography ring. "It's like the Catholic Church all over, but not as large," one coalition member stated) <http://www.baltimoreexaminer.com>; see also *Mormon church sued on charges of sexual abuse by youth leader*, NEW JERSEY L.J. (Aug. 7, 2006) (reporting that Mormon bishop from Provo, Utah notified the child abuser's new ward, or congregation, about his previous criminal sexual offenses in Utah and Wisconsin, but ward still put him in positions working with children in Dallas, Texas, and later working with children in New Jersey) <http://find.galegroup.com/itx>.

The perceived institutional character of the sexual abuse problem (particularly pedophilia) in religious organizations may explain why civil complaints frequently allege facts indicating such organizations possessed a high degree of knowledge that minor laity were in jeopardy of abuse by priests. For example, complaints often allege the failure of the religious organization to report prior known instances of child abuse.<sup>7</sup>

Recently, an increasing number of sexual abuse claims have been asserted against colleges, universities, and other institutions where minors are present. Colleges and universities also have been sued at increasing rates, as reports of sexual abuse on college campuses have been on the rise. In 2011, the most heavily reported scandal involving sexual abuse on a college campus occurred, when it was publicly reported that former Pennsylvania State University football coach, Jerry Sandusky, had engaged in multiple instances of sexual abuse of minors both on and off-campus. After a detailed investigation and criminal proceedings, Sandusky was found guilty of 45 counts of sexual abuse against ten boys, much of which occurred on University property.

Sexual abuse scandals at other educational institutions also have received significant media attention. In just the last two years, there have been allegations of sexual abuse by multiple victims against an assistant coach of the Syracuse Men's Basketball team, a social work professor at the University of Oklahoma, and a summer camp counselor at The Citadel. The rising number of sexual abuse allegations may correlate to increased sensitivity to such matters as well as to minors' increased access to college campuses for various reasons, including overnight sport and academic camps, and community outreach programs designed to spur youth's interest in secondary education.

### **C. Statutes of Limitations**

Unfortunately, sexual abuse claims against educational institutions have not been limited to college campuses. Primary educational institutions, including day care centers, also have faced increased allegations of sexual abuse. State legislatures have responded to such increased reports of sexual abuse by implementing measures to provide victims of abuse with enhanced legal recourse. After considering the psychological and social barriers that may cause victims of sexual abuse to delay reporting an assault for years, or even decades, many states have extended or even eliminated the statutes of limitations for bringing both criminal and civil sexual abuse claims.<sup>8</sup> These adjustments to standard statutes of limitations allow perpetrators to be prosecuted and victims to be compensated when the victims are prepared to come forward.

Most states have implemented a "discovery rule" which tolls the statute of limitation until a plaintiff has reached the age of majority; however, state laws vary significantly with respect to the number of years a victim has to report an injury after reaching the age of majority. For example, West Virginia requires a claim to be made within two years of the victim reaching the age of majority, Georgia allows five years, Louisiana allows ten years, and Connecticut allows thirty years.<sup>9</sup>

### **D. Pending Reviver Legislation**

Some states currently are considering "window legislation," which would allow a one- or two-year period for victims to bring civil action claims of sexual abuse that otherwise would be barred

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<sup>7</sup> See, e.g., *Nunnery v. Salesian Missions*, 2008 WL 1743436, at \*6 (D.N.J. 2008).

<sup>8</sup> See COVERAGE AND LIABILITY ISSUES IN SEXUAL MISCONDUCT CLAIMS (Munich RE, 5th ed. 2010).

<sup>9</sup> *Id.*

by the current statute of limitations.<sup>10</sup> New York House Bill A5488 would provide a one-year window for all such lawsuits, regardless of passage of time; however, the bill remains stuck in committee.<sup>11</sup>

In June 2012, the House Judiciary Committee of the Pennsylvania legislature passed Pennsylvania House Bill 2488, which strengthens the rights of victims of sexual abuse.<sup>12</sup> The bill excluded a heavily debated provision that would have allowed a two-year window in which victims who had aged out of the statute of limitations could file civil suits.<sup>13</sup> As currently proposed, the bill would lift the statute of limitations on the criminal prosecution of child sexual abuse cases. Additionally, it would extend the statute of limitations for civil proceedings until a victim reaches age 50.<sup>14</sup>

Lastly, the New Jersey “Vitale-Scutari Bill,” S-1651, would eliminate completely any statute of limitations on civil child abuse cases. The bill was approved by the N.J. Senate Judiciary Committee in June 2012, and now it awaits a vote by the full senate.

## II. COVERAGE

From a historical perspective, every institution that has contact with minors, or with persons who are physically or emotionally impaired, is exposed to potential liability for sexual misconduct. The media tend to focus on the sexual abuse of children in daycare centers, foster homes, schools, youth groups, and religious institutions, while allegations of sexual abuse of adults by medical and mental health professionals do not make the headlines frequently. Regardless of publicity or context, sexual misconduct claims often raise questions regarding insurance coverage. Answers to these coverage questions necessarily turn on the facts of the underlying case, the specific language of the policies at issue, and choice of law.

Generally speaking, commercial insurance policies written prior to the mid-1980s did not specifically reference coverage for, or exclusions regarding, sexual misconduct. While sexual abuse and exploitation (of minors especially) was not unheard of at the time, such matters tended to be resolved quietly. Some commentators have opined that the media cooperated with the Catholic Church to avoid scandal.<sup>15</sup> Thus, the liability of policyholders and their employees generally was not a consideration in underwriting for institutions with access to minors prior to the mid-1980s.

In 1984, the scale and reality of the problem of sexual abuse in the Catholic Church made national headlines when civil suits and criminal charges were filed against Fr. Gilbert Gauthe and

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<sup>10</sup> For example, Pennsylvania House Bill 878 would provide a one-time, two-year window for victims to bring civil action in cases barred by the current law. House Bill A5488 would provide a one-year window for all lawsuits regardless of passage of time and would toll the statute of limitations for child sexual abuse suits until victims reach age 23.

<sup>11</sup> H.B. A05488, (N.Y. 2011) [http://assembly.state.ny.us/leg/?default\\_fld=%0D%0A&bn=A05488&term=&Summary=Y&Actions=Y](http://assembly.state.ny.us/leg/?default_fld=%0D%0A&bn=A05488&term=&Summary=Y&Actions=Y).

<sup>12</sup> Jan Murphey, *House Judiciary Committee passes legislation to strengthen laws for child abuse victims*, THE PATRIOT NEWS, [http://www.pennlive.com/midstate/index.ssf/2012/06/house\\_judiciary\\_committee\\_pass.html](http://www.pennlive.com/midstate/index.ssf/2012/06/house_judiciary_committee_pass.html)

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> See Barry M. Coldrey, *Religious Life Without Integrity: The Sexual Abuse Crisis in the Catholic Church* (2000) [http://www.bishop-accountability.org/reports/2000\\_Coldrey\\_Integrity/index.html#toc](http://www.bishop-accountability.org/reports/2000_Coldrey_Integrity/index.html#toc) (visited Dec. 17, 2012).

the Diocese of Lafayette, Louisiana.<sup>16</sup> Through the media coverage, the world learned of Gauthé's extensive abuse of approximately one hundred boys over the course of twenty years, and of the Diocese of Lafayette's alleged cover-up of Gauthé's and others' past crimes, which sparked charges to be filed against roughly forty American priests.<sup>17</sup> In the wake of the allegations of abuse by Catholic priests, insurance companies providing coverage to such institutions made drastic changes to the coverage being offered, as discussed below.

Insurance policies written prior to the mid-1980s, as well as those currently being written, continue to be the source of insurance coverage litigation. The language of insurance policies varies widely, with coverage for claims of sexual abuse been found in Commercial General Liability ("CGL"), Professional Liability, Directors & Officers ("D&O"), and Employment Practices Liability ("EPL") policies, as well as specialized Sexual Misconduct Coverage policies.

### **A. Coverage Under Early CGL Policies, Sexual Misconduct Exclusions**

Insurance policies issued prior to the mid-1980s usually were silent as to coverage for, or the exclusion of, injuries related to sexual abuse. As such, occurrence-based CGL policies issued to religious institutions during this time period often have been found to provide coverage for claims of sexual misconduct against the employers of alleged perpetrators, despite the fact that the parties may not have considered whether such claims would be covered by insurance. Insurance companies that issued these older policies generally agreed to:

indemnify the Insured for all sums which the Insured shall be obligated to pay by reason of the liability imposed upon the Insured by law . . . for damages . . . on account of personal injuries . . . arising out of any occurrence happening during the period of the Insurance.<sup>18</sup>

Such language has raised many coverage questions, including: (1) Who is considered to be an Insured, and does coverage extend to an alleged perpetrator?; (2) Can purely emotional injuries be considered "personal injuries" or does there need to be a physical injury and, in the context of sexual abuse claims involving allegations of non-consensual touching, can a physical injury be inferred?; (3) What constitutes an "occurrence"?; and (4) What is the effect of the "all sums" language on the available limits and the allocation of a covered loss, where the alleged abuse spanned multiple years of coverage and thus potentially triggers multiple policies?

The question of what constitutes an occurrence under policies issued prior to the mid-1980s has been heavily litigated in the last 20 years and will be discussed in more detail below. The term "occurrence" was frequently defined as:

. . . an accident or a happening or event or a continuous or repeated exposure to conditions which unexpectedly and unintentionally result in personal injury, or damage to property during the policy period. All such

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<sup>16</sup> *Id.*

<sup>17</sup> *Id.*; see also Jason Berry, *Anatomy of a Cover-Up: The Diocese of Lafayette and its Moral Responsibility for the Pedophilia Scandal* (Jan. 30, 1986), [http://www.bishop-accountability.org/news/1986\\_01\\_30\\_Berry\\_AnatomyOf.htm](http://www.bishop-accountability.org/news/1986_01_30_Berry_AnatomyOf.htm) (visited Dec. 17, 2012).

<sup>18</sup> See, e.g., *Society of Roman Cath. Church of the Diocese of Lafayette & Lake Charles, Inc. v. Interstate Fire & Cas. Co.*, 26 F.3d 1359, 1363 (5th Cir. 1994).

exposure to substantially the same general conditions existing at or emanating from one location shall be deemed one occurrence.<sup>19</sup>

Where a policy's limits apply on a "per occurrence" basis, the number of occurrences triggered by allegations of sexual abuse is crucial in determining the coverage limits available and also the amount of loss that must be borne by the policyholder through its deductible(s) or self-insured retention(s) (SIRs). Coverage decisions addressing the definition of occurrence hinge on the definition's "accidental" language, the "unexpected and unintended" clause or a similar exclusion, and/or the "continuous or repeated exposure to conditions" clause.

After public awareness of sexual abuse by clergy was heightened in the mid-1980s, insurance companies began including sexual misconduct exclusions in policies issued to policyholders with potential exposure for childhood sexual misconduct claims. Courts across the country generally have found these exclusions to be effective in barring coverage for claims arising out of or related to sexual misconduct in a variety of settings.<sup>20</sup>

## **B. Coverage for Sexual Misconduct in the Current Era**

After having had the opportunity to consider and evaluate the risks inherent in providing sexual misconduct coverage to institutions with access to minors, insurance companies began offering specific Sexual Misconduct coverage in stand-alone policies, or separate coverage as part of a multi-line policy or as an endorsement to a CGL Policy. Coverage also sometimes was available in Professional Liability, D&O, or Employment Practices Liability policies.

Currently, coverage for sexual misconduct often is provided on a claims-made, or claims-made and reported, basis.<sup>21</sup> Insurance companies limit coverage in time through the application of retroactive dates and exclusions for acts of misconduct that occurred prior to the inception of coverage. They also limit the scope of sexual misconduct coverage by excluding coverage for sexual harassment, the acts of alleged perpetrators, acts of known perpetrators, and punitive damages. They apply aggregation of claims provisions, specific sub-limits or aggregate limits, and include sexual misconduct-specific definitions. Coverage decisions addressing some of these coverage features are described below.

## **C. Policy Trigger and Allocation**

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<sup>19</sup> See, e.g., *id.* at 1363-64.

<sup>20</sup> See, e.g., *Farmer v. Allstate Ins. Co.*, 311 F.Supp.2d 884 (C.D. Cal. 2004)(holding sexual molestation exclusion barred coverage under Home Day Care Coverage endorsement); *Western World Ins. Co. v. Resurrection Cath. Mission of the South, Inc.*, No. 2:05cv327-ID, 2006 WL 2079990 (M.D. Ala. July 25, 2006)(holding sexual molestation exclusion barred coverage for rape of nursing home resident); *Church Mut. Ins. Co. v. Klein*, 940 P.2d 1001 (Colo. App. 1996)(holding sexual misconduct exclusion barred coverage for minister accused of sexual abuse). Some exceptions have been found to exist where, for example, the sexual activity was consensual or where some, but not all, of the allegations were non-sexual in nature. See, e.g., *Guideone Elite Ins. Co. v. Old Cutler Presby. Church, Inc.*, 420 F.3d 1319 (11th Cir. 2005)(holding sexual misconduct exclusion barred coverage for injuries resulting from rape, but not from false imprisonment, kidnapping, assault, robbery and battery); *Newby v. Jefferson Parish Sch. Bd.*, 738 So. 2d 93 (La. App. 1999)(holding consensual sex did not constitute sexual molestation for purposes of exclusion).

<sup>21</sup> Claims-made coverage requires that a claim be made against the insured during the policy period, whereas claims-made and reported policies require that a claim both be made against the policyholder and reported to the insurance company during the policy period. See, e.g., *Janjer Enterprises, Inc. v. Executive Risk Indem., Inc.*, 97 Fed. Appx. 410 (4th Cir. 2004).

Commonly, claimants allege abuse spanning multiple policy periods. Some claimants also wait several years after the alleged abuse before coming forward and making claim. Under these circumstances, the policyholder may have several liability policies, all of which potentially provide coverage for the claim(s). As with other kinds of long-tail liability claims, determining which policies should respond to the claims requires understanding your jurisdiction's rules regarding trigger and allocation.

i. Occurrence-Based Policies

a. Trigger of Coverage: Exposure or First Encounter

Determining whether coverage exists for an abuse claim often starts with pinpointing which policy or policies are “triggered” by the claim. The trigger of coverage is the event that must occur for a liability policy to respond.<sup>22</sup> Under occurrence-based policies, an “occurrence” (as defined by the particular policy) triggers coverage. Depending on the policies’ language, a multi-year claim can trigger several policies.

Establishing what triggers an occurrence-based policy’s coverage begins with the policy language. Under the standard ISO<sup>23</sup> forms, injury or damage must occur during the policy period to trigger coverage. For example, current (post-1986) ISO forms define “occurrence” as “an accident, including continuous or repeated exposure to conditions.” Next, a jurisdiction’s particular trigger-of-coverage theory will determine which policy or policies apply.

1. Exposure Theory

Under the exposure theory, followed by a majority of jurisdictions, all occurrence-based policies in effect during the period of actual alleged abuse are triggered. The exposure theory can benefit a policyholder because coverage is not limited to policy in effect in the year in which abuse allegedly began. Rather, a policyholder facing claims of ongoing abuse potentially can access successive years of coverage. For example, in *Diocese of Winona v. Interstate Fire & Casualty Co.*,<sup>24</sup> the District Court for the District of Minnesota determined that sexual molestation by a priest triggered coverage under every policy in place during each year in which the molestation occurred.

2. First Encounter Theory

The first encounter theory is a less-commonly used trigger theory for abuse claims.<sup>25</sup> Courts applying the first encounter theory interpret the victim’s “injury” to occur with the very first instance of abuse. Thus, the insurer covering that single policy period is responsible for all injuries arising out of the abuse, even if the abuse continued into later policy periods. Such was the case in *May v. Maryland Casualty Corp.*, where a basketball coach was accused of molesting

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<sup>22</sup> *IRMI Glossary of Insurance and Risk Management Terms*, INT’L RISK MGMT. INSTITUTE, (“coverage trigger”) <http://www.irmi.com/online/insurance-glossary/terms/c/coverage-trigger.aspx>.

<sup>23</sup> Insurance Services Office, Inc.

<sup>24</sup> 841 F. Supp. 894, 898 (D. Minn. 1992) (“Damage in a sex abuse case can . . . be caused by the continuous nature of the abuse,” and “[i]n such instances it becomes difficult to determine when the damage to the sex abuse victim occurs.”).

<sup>25</sup> Jurisdictions applying some form of the first encounter theory include Hawaii, Missouri, and Pennsylvania. See Catalina J. Sugayan & Leah Spivey, *Coverage and Liability Issues in Sexual Misconduct Claims*, vi-vii (4th ed. 2005), [http://www.ficurma.org/misc/sexual\\_misconduct\\_claims.pdf](http://www.ficurma.org/misc/sexual_misconduct_claims.pdf) (visited Dec. 19, 2012).

underage players on several occasions.<sup>26</sup> The court determined that only one policy was triggered for each claimant: the policy in place when the first sexual encounter took place.<sup>27</sup> But the court provided little analysis to justify its decision to apply the first encounter theory; in fact, neither party contested the issue.<sup>28</sup>

The first encounter theory is widely criticized for unreasonably disadvantaging abuse victims and policyholders. For example, an Illinois appellate court wrote, “in the event of ongoing sexual abuse spanning multiple policy periods, application of the first encounter rule is both inappropriate and inequitable. At its worst, such a rule could deny coverage for a child who was molested a day before the Diocese procured coverage even though separate molestations continued through the policy year and beyond.”<sup>29</sup> The Fifth Circuit Court of Appeals has joined the criticism, noting that the first encounter theory also might affect an insurer unfairly, by forcing it to cover damages resulting from molestation during subsequent policy periods that might be covered by other insurance companies.<sup>30</sup>

For these reasons, the exposure theory prevails as the trigger theory of choice in most jurisdictions.

## ii. Allocation Methods: “All Sums” or Pro-Rata

The issue of allocating damages fits hand-in-glove with trigger of coverage—so much so that one concept is often confused for the other.<sup>31</sup> Although they are closely related, trigger and allocation serve different purposes. While trigger determines which of a number of policies might respond to a multi-year molestation claim, allocation determines the amount of defense and indemnity costs that a triggered policy or policies must pay.<sup>32</sup> Thus, although some bodily injury during multiple policy periods is often sufficient to *trigger* several successive liability policies, one or more of these triggered policies still might be required to pay for bodily injury that occurred outside its policy period.

The determination of how much a triggered policy must pay depends on which of two competing allocation theories a court applies. As described below, courts following each approach believe that standard CGL policy language supports their decisions.

### a. “All Sums” Allocation

Under the “all sums” theory of allocation, a policyholder may direct all losses caused by a multi-year molestation claim to a single policy, up to that policy’s limits. This approach favors

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<sup>26</sup> 792 F. Supp. 63 (E.D. Mo. 1992).

<sup>27</sup> *Id.* at 65.

<sup>28</sup> *Id.* (“The parties seem to agree that the so-called ‘first encounter’ theory of coverage applies.”); *see also Interstate Fire & Cas. Ins. Co. v. Archdiocese of Portland*, 747 F. Supp. 618 (D. Or. 1990) (being the first decision to adopt the first encounter theory in a molestation coverage case).

<sup>29</sup> *Roman Cath. Diocese of Joliet v. Interstate Fire Ins. Co.*, 685 N.E.2d 932 (Ill. App. Ct. 1997).

<sup>30</sup> *Society of the Roman Cath. Church of the Diocese of Lafayette & Lake Charles, Inc. v. Interstate Fire & Cas. Co.*, 26 F.3d 1359, 1366 (5th Cir. 1994).

<sup>31</sup> *See, e.g., Paul Walker-Bright & James M. Davis, Putting to Rest the Confusion Concerning Pro Rata Allocation for Long-Term Continuous Damage Claims in Illinois*, MEALEY’S LITIGATION REPORT: INSURANCE, 4 (Jan. 28, 2003).

<sup>32</sup> *See IRMI Glossary of Insurance and Risk Management Terms*, “allocation,” INT’L RISK MGMT. INSTITUTE, <http://www.irmi.com/online/insurance-glossary/terms/a/allocation.aspx>.



policyholders and is the majority allocation rule in the United States.<sup>33</sup> Using all sums allocation, each triggered policy is jointly and severally liable for the entire amount of the claim (up to the policy limits). Thus, this approach is sometimes known as “joint and several allocation.” Once an insurer pays its policy limits, it may pursue other triggered policies for contribution and the burden to pursue an even allocation of coverage is placed on that insurance company, rather than the policyholder.

All sums allocation benefits the policyholder in several ways. First, unlike the pro-rata allocation method (described below), all sums allocation eliminates the need to allocate loss in non-covered policy years to the insured. So long as one policy is triggered by a multi-year claim and that policy has sufficient limits, the insured bears none of the coverage burden. Second, a policyholder may face a claim that is covered by successive liability policies with varying deductibles or SIRs that the policyholder must meet before coverage becomes available. Under a variation of all-sums allocation known as “pick and choose,” the policyholder can choose to charge the policy with the lowest (or no) SIR with the entire loss.<sup>34</sup>

Courts applying all sums allocation find its underpinnings in the insuring agreement of standard CGL policies, which require the carrier to

pay on behalf of the Insured *all sums* which the Insured shall become legally obligated to pay as damages because of bodily injury or property damage to which this insurance applies caused by an occurrence.<sup>35</sup>

Several courts, including D.C. Circuit Court of Appeals in *Keene Corp. v. Insurance Company of North America*<sup>36</sup> (which first recognized the all sums approach with respect to asbestos exposure), find this policy language significant. This “all sums” language, along with an absence of language that would reduce the insurer’s liability if only part of an injury occurs during a policy period, convinced the court in *Keene*, and numerous other courts, that standard CGL policies should be allocated on an all-sums basis.<sup>37</sup>

While “all sums” allocation perhaps is most often applied to long-term environmental and property damage claims, the theory also applies to sexual abuse claims spanning multiple policy years.

#### b. Pro-Rata Allocation

Other courts apply a pro-rata approach to allocation, meaning that a multi-year loss is divided among all insurance companies whose policies are triggered. If the policyholder decided not to

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<sup>33</sup> See *Goodyear Tire & Rubber Co. v. Aetna Cas. & Sur. Co.*, 769 N.E.2d 835, 841 (Ohio 2002).

<sup>34</sup> See, e.g., *Keene Corp. v. Insurance Co. of N. Am.*, 667 F.2d 1034 (D.C. Cir. 1981). Under a pure all-sums allocation, the loss is allocated among all triggered policies, and the insured has no say in the allocation scheme. See Rich Scislowski, *Allocating Losses under a 1973 CGL*, INT’L RISK MGMT. INSTITUTE (Sept. 2007) <http://www.irmi.com/expert/articles/2007/scislowski09.aspx>.

<sup>35</sup> 1973 ISO Form (emphasis added). Although the 1983 ISO form changed the “all sums” language to “those sums,” the analysis has not changed greatly. Eugene R. Anderson, et al., *INSURANCE COVERAGE LITIGATION*, 4-119 (2nd ed. 2006 Supp.).

<sup>36</sup> 667 F.2d 1034.

<sup>37</sup> *Id.* at 1047-48; accord *Allstate Ins. Co. v. Dana Corp.*, 759 N.E.2d 1049, 1057-58 (Ind. 2001). For a partial list of jurisdictions that follow *Keene*, see Ginamarie Alvino, et al., *Not Your Father’s Allocations: Practical Solutions for Modern Long-Tail Insurance Claims*, at 11 n.10, 2009 Insurance Coverage Litigation Committee CLE Seminar (March 4-7, 2009).

purchase insurance for any portion of the loss period, pro-rata allocation requires that policyholder to pay its proportionate share of the loss. The prevailing method of pro-rata allocation is based on an insurance company's "time on the risk," as formulated in *Insurance Company of North America v. Forty-Eight Insulations, Inc.*<sup>38</sup> Under this theory, each insurance company's liability is proportional to the amount of time its triggered policies were in effect. Insurance companies favor "time on the risk," pro-rata allocation because it never makes a carrier pay more than its proportional share, does not make any carrier jointly liable for another carrier's share, and holds the policyholder responsible for any uninsured periods.<sup>39</sup>

Several jurisdictions apply pro-rata allocation to molestation claims. These courts, like those applying all sums allocation, find support for their position in the policy language. For example, in *Roman Catholic Diocese of Brooklyn v. National Union Fire Insurance Company of Pittsburgh, Pennsylvania*,<sup>40</sup> the underlying claimant alleged sexual abuse over a number of successive years. The policyholder had liability coverage for each of those years, but the policies had large SIRs.<sup>41</sup> Thus, rather than distributing the coverage among all triggered policies (which would necessitate the satisfaction of each policy's SIR), the policyholder urged the court to apply an "all sums" allocation scheme to allow the insured to allocate the full amount of its \$2 million settlement to only two policies.<sup>42</sup> The appellate court rejected this request, as had previous New York courts,<sup>43</sup> based on the CGL language at issue:

Significantly, the policies provide indemnification for liability as a result of bodily injury occurring during the policy period. Thus, "[p]ro rata allocation under these facts, while not explicitly mandated by the policies, is consistent with the language of the policies."<sup>44</sup>

The court in *Brooklyn Diocese* therefore allocated the insured's loss pro-rata and found that each policy was responsible only for those occurrences (and resulting injuries) taking place during the applicable coverage period; as a result, the insured was required to pay multiple SIRs.<sup>45</sup>

### iii. Number of Occurrences

Determining the number of occurrences arising out of a single claim, suit or loss under an occurrence-based policy is important to a policyholder for several reasons.

First, to the extent the policy requires that policyholder to pay a deductible or SIR, the number of occurrences determines how much the insured must pay before insurance funds kick in. For most claims, policyholders are best served by paying only one deductible or SIR. Second, most

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<sup>38</sup> 633 F.2d 1212 (6th Cir. 1980), *clarified at*, 657 F.2d 814 (1981).

<sup>39</sup> *See* 633 F.2d at 1225.

<sup>40</sup> 87 A.D.3d 1057, 1058 (N.Y. App. Div. 2011).

<sup>41</sup> *Id.* at 1059.

<sup>42</sup> *Id.*

<sup>43</sup> *See Consolidated Edison Co. of N.Y. v. Allstate Ins. Co.*, 746 N.Y.S.2d 622 (N.Y. 2002).

<sup>44</sup> *Diocese of Brooklyn*, 87 A.D.3d at 1059 (citation omitted).

<sup>45</sup> *Id.* at 1060; *see also Diocese of Winona v. Interstate Fire & Cas. Co.*, 89 F.3d 1386, 1423-24 (8th Cir. 1996) (allocating sexual molestation claims on a "time on the risk" basis). But pro rata allocation seems to have more detractors than supporters, both among courts and commentators. As one author concluded, "[t]ime-on-the-risk allocation has the advantage of being the easiest method for a court to understand and apply. But it was invented out of whole cloth by the federal courts as a mere judicial convenience that has utterly no support in the actual text of the 1973 CGL policy." Rich Scislowski, *Allocating Losses under a 1973 CGL*, INT'L RISK MGMT. INSTITUTE (Sept. 2007), <http://www.irmi.com/expert/articles/2007/scislowski09.aspx>.

policies contain a limit of liability for each “occurrence,” but a higher aggregate limit may apply when multiple occurrences exist. If a policyholder’s loss exceeds its policy’s per-occurrence limit, the policyholder may prefer that multiple occurrences be found so as to access the aggregate limit.<sup>46</sup> Third, some jurisdictions allow policyholders that own multiple policies covering a multi-year occurrence to select the policy or policies the policyholder wants to respond to the occurrence.<sup>47</sup> The right to select the policy or policies that will respond to a loss has the potential to minimize the insured’s required contribution and greatly increase a policyholder’s available coverage—but only if the loss resulted from a single occurrence.

Any number-of-occurrences analysis must begin with the policy language. Whether a loss arises from one or multiple occurrences depends, in part, on the subject policy’s definition of “occurrence.” A common CGL policy form defines “occurrence” as “an accident, including continuous and repeated exposure to substantially the same general harmful conditions.”<sup>48</sup> Although specialized abuse and molestation policies often contain a more definite definition of “occurrence,”<sup>49</sup> this section will focus on sexual abuse coverage under a standard CGL policy.<sup>50</sup>

#### a. “Cause” or “Effects”

Policy language often does not conclusively determine how many “occurrences” a particular situation presents, and the law of a particular jurisdiction must guide the inquiry. The majority of jurisdictions apply a “cause” analysis to determine whether a set of facts involves one or more occurrences.<sup>51</sup> The “cause” analysis determines the number of occurrences by referring to the policy’s definition of “occurrence,” then asking what *caused* the policyholder’s loss or liability, rather than asking what effect the particular acts had: “[T]he proper focus in interpreting ‘occurrence’ is on the events that cause the injuries and give rise to the insured’s liability, rather than on the number of injurious effects.”<sup>52</sup> A minority of jurisdictions follows the “effects” test, meaning that a court “determines the number of accidents or occurrences by looking at the effect an event had, *i.e.*, how many individual claims or injuries resulted from it.”<sup>53</sup>

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<sup>46</sup> See *Don’s Bldg. Supply, Inc. v. OneBeacon Ins. Co.*, 267 S.W.3d 20, 24 (Tex. 2008) (“This limitation is sometimes important because the dollar limits of the policy include an aggregate limit and also a lower dollar limit per occurrence.”).

<sup>47</sup> See *American Physician’s Ins. Exch. v. Garcia*, 876 S.W.2d 842, 855 (Tex. 1994) (“If a single occurrence triggers more than one policy, covering different policy periods, then different limits may have applied at different times. In such a case, the insured’s indemnity limit should be whatever limit applied at the single point in time during the coverage periods of the triggered policies when the insured’s limit was highest. The insured is generally in the best position to identify the policy or policies that would maximize coverage.”).

<sup>48</sup> ISO Form CG 00 01 12 07.

<sup>49</sup> For example, one occurrence-based sexual abuse policy covers “sexual abuse occurrences,” defined as “[a] single act, or multiple, continuous, sporadic, or related acts of sexual abuse or molestation caused by one perpetrator, or by two or more perpetrators acting together. ‘Sexual abuse occurrence’ includes ‘negligent employment’ of any person accused of or involved in such sexual abuse or molestation.”

<sup>50</sup> See discussion of *Coverage for Sexual Misconduct in the Current Era*, *supra* Part Section II.B.

<sup>51</sup> See R. Steven Rawls & Rebecca C. Appelbaum, *Variations on a Theme: When the Cause Theory Determines the Number of Occurrences*, INT’L RISK MGMT. INSTITUTE 2008. For a discussion of New York’s similar “unfortunate event” test, see Michael H. Ginsberg & Jerome J. Kalina, *Number of Occurrences and Multi-Year Policies in the “All-Sums” Environment*, at 7 (2011), <http://litigationconferences.com/wp-content/uploads/2011/05/Kalina.pdf>; *Roman Catholic Diocese of Brooklyn v. National Union Fire Ins. Co. of Pittsburgh, Pa.*, 87 A.D.3d 1057, 1060-61 (N.Y. App. Div. 2011)(applying the “unfortunate events” test to find multiple occurrences where a claimant alleged molestation at different locations over a seven-year period).

<sup>52</sup> *H.E. Butt Grocery Co. v. National Union Fire Ins. Co.*, 150 F.3d 526, 530 (5th Cir. 1998).

<sup>53</sup> *Nicor, Inc. v. Associated Elec. & Gas Ins. Servs. Ltd.*, 860 N.E.2d 280, 287 (Ill. 2006).

## b. Application

While the “effects” test is more likely to result in a finding of multiple occurrences, the “cause” test leaves much room for interpretation and the cases applying it are not always consistent. Determining the number of occurrences in sexual abuse litigation can be particularly challenging since claims often involve multiple victims, multiple perpetrators, multiple instances of alleged abuse, and/or abuse over multiple policy periods. Although this paper cannot provide a comprehensive review of the law in each jurisdiction, the following coverage decisions illustrate the ways that different courts have analyzed the issue.

- Where one perpetrator assaulted two victims once each on separate occasions, the court found one occurrence for each victim.<sup>54</sup>
- Where two of the insured’s employees assaulted 31 different children over the course of seven years, the court found a separate occurrence for each child in each policy year where abuse occurred: “When a priest molested a child during a policy year, there was both bodily injury and an occurrence . . . 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.”<sup>55</sup>
- Where a victim’s parents asserted claims for damages related to their child’s alleged abuse, the court found that the parents’ claims constituted the same occurrence as the victims’ claims.<sup>56</sup>
- Although one court declined to decide “the number of ‘occurrences’ that would arise if an employee molested two children at the same time in the same incident,”<sup>57</sup> another court held that a homeowner who shot two people in the same room constituted separate “occurrences” because the injuries resulted from two separate acts, each independently giving rise to liability.<sup>58</sup>

## iv. Claims-Made Policies

A claims-made policy’s coverage is triggered when the underlying claimant makes a “claim” as defined by the policy.<sup>59</sup> Unlike an occurrence policy, which requires that the injury *happen* (or occur) during the policy period, claims-made policies may provide coverage for claims *asserted* (or made) during the policy period regardless of when the acts giving rise to those claims

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<sup>54</sup> *H.E. Butt Grocery Co.*, 150 F.3d at 532 (applying Texas law); accord *TIG Ins. Co. v. San Antonio YMCA*, 172 S.W.3d 652 (Tex. App. 2005) (holding, when camp counselor molested six children, resulting in three separate lawsuits, “we conclude that under TIG’s policy, each instance of sexual abuse of a different child would be a different ‘occurrence.’”).

<sup>55</sup> *Society of the Roman Cath. Church of the Diocese of Lafayette and Lake Charles, Inc. v. Interstate Fire & Cas. Co.*, 26 F.3d 1359, 1365 (5th Cir. 1994) (applying Louisiana law); accord *Roman Catholic Diocese of Joliet, Inc. v. Lee*, 292 Ill. App. 3d 447, 455 (1997) (“the minor’s exposure to the negligently supervised priest in each of the policy periods constituted a separate occurrence”).

<sup>56</sup> *Id.*

<sup>57</sup> *H.E. Butt Grocery Co.*, 150 F.3d at 535 n.6.

<sup>58</sup> *State Farm Lloyds, Inc. v. Williams*, 960 S.W.2d 781, 785 (Tex. App. 1997)(pet. dismissed by agreement).

<sup>59</sup> See, e.g., *Appalachian Ins. Co. v. Liberty Mut. Ins. Co.*, 676 F.2d 56 (3d Cir. 1982).

occurred.<sup>60</sup> This distinction is important, among other reasons, because many policies providing specialized abuse or molestation coverage are written on a claims-made basis.<sup>61</sup>

For example, suppose a daycare center purchased two consecutive years of claims-made abuse and molestation coverage. The center received a claim in year one and reported that claim to its insurer, then received a related claim in year two. Which policy (if any) will provide coverage? Depending on the nature of the claim and policy language, the first policy may cover subsequent, related claims even if they are asserted outside the policy period. Indeed, most claims-made policies provide that two related claims are treated as a single claim, and will be deemed made and reported at the time of the first claim. Such a provision may read as follows:

Related acts, errors or omissions shall be treated as a single claim. All such claims, whenever made, shall be considered first made during the policy period . . . in which the earliest claim arising out of such act, error or omission was first made . . . .<sup>62</sup>

Whether provisions like this one apply often depends on the facts—just how similar are the two claims? In *Pantropic Power Products, Inc. v. Fireman’s Fund Insurance Co.*,<sup>63</sup> the policyholder was covered by a series of claims-made-and-reported<sup>64</sup> Employment Practice Liability policies that covered, among other things, claims of sexual harassment. An employee of the policyholder filed an administrative claim of sexual harassment during the first policy period, then filed a lawsuit alleging sexual harassment and retaliation in the second policy period. The policyholder/employer did not report the first claim within the first policy period, but reported the lawsuit in the second period. The carrier denied coverage after determining that the initial claim and subsequent lawsuit were “related” such that the policy deemed them to be one claim that should have been reported in the first policy period.<sup>65</sup>

The policyholder sued, and in the ensuing litigation the primary issue was whether the two claims were “related.” The court held that “relatedness is broadly construed, such that claims that are causally connected, or which arise from similar factual circumstances, are ‘related’ for purposes of the provision of notice.”<sup>66</sup> The court determined that the earlier claim and subsequent lawsuit were “related” for purposes of the policy because (a) the facts giving rise to both claims happened closely in time and involved the same people, and (b) the retaliation claim in the subsequent suit was a consequence of, and thus related to, the sexual harassment complained of in the first policy period.<sup>67</sup>

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<sup>60</sup> *See id.*

<sup>61</sup> A claims-made policy provides a point in time after which no future covered claims can be made, thus it exposes the insurer to less risk than an occurrence-based policy covering the same risks. As a result, claims-made carriers charge lower premiums. *See Pantropic Power Prods., Inc. v. Fireman’s Fund Ins. Co.*, 141 F. Supp. 2d 1366, 1369 (S.D. Fla. 2001).

<sup>62</sup> *Home Ins. Co. v. St. Paul Fire & Marine Ins. Co.*, 229 F.3d 56, 59 n.3 (1st Cir. 2000).

<sup>63</sup> 141 F. Supp. 2d at 1368.

<sup>64</sup> A type of claims-made policy, known as claims-made-and-reported, requires the claim to be made *and* requires the policyholder to report the claim within a specified period, often the policy period. Giving prompt notice of claims is crucial to preserving coverage of all types, but especially so under this type of policy.

<sup>65</sup> 141 F. Supp. 2d at 1368.

<sup>66</sup> *Id.* at 1371.

<sup>67</sup> *Id.* at 1371-72.

Because the policyholder in *Pantropic* failed to report the first claim within the time required by its policy, it lost coverage for all future related claims. This demonstrates how the “related acts” provision in a claims-made policy can either help or hurt a policyholder, depending on the facts, and why fastidious adherence to a policy’s notice and reporting requirements is essential.

#### D. Aggregation of Claims

Some insurance companies have attempted to limit their liability for sexual misconduct claims by including language that aggregates claims made by multiple victims, or multiple claims by a single victim, into a single claim. Such aggregation provisions often result in the availability of only a single limit. A recent case, *Church Mutual Insurance Company v. First United Pentecostal Church of Parma*,<sup>68</sup> is illustrative. In that case, Church Mutual had issued multi-peril policies to First United that contained Bodily Injury, Personal Injury, and Sexual Misconduct Coverage parts. Only the Sexual Misconduct Coverage part was at issue in the lawsuit, due to exclusions contained in the other coverage parts.<sup>69</sup> The policy provided a \$100,000 Each Claim Limit and a \$300,000 aggregate limit, which applied “regardless of the number of: (a) Insureds; (b) Claims made or ‘suits’ brought; or (c) Persons or organizations making claims or bringing ‘suits’ . . . .”<sup>70</sup> The Aggregate Limit was the most Church Mutual stated it would pay “for the sum of all damages under the Sexual Misconduct or Sexual Molestation Liability Coverage because of all injuries arising out of each claim.”<sup>71</sup> The phrase “Each Claim” meant:

Regardless of the number of acts of “sexual misconduct” . . . , period of time over which such acts occur, or number of persons acted upon, all injury arising out of all acts of “sexual misconduct” . . . by the same person or by two or more persons acting together, will be considered one claim, subject to the “each claim” Limit of Insurance in force at the time of the first acted covered by this or any other policy issued by us occurred.<sup>72</sup>

The Court considered coverage for the claims asserted in separate lawsuits by two individuals who alleged abuse by one of First United’s volunteers. At issue was whether one \$100,000 Limit of Insurance applied to both claims, or whether a separate \$100,000 Limit of Insurance applied to each claim. The Court found that one \$100,000 Limit applied because the claims in the two lawsuits all related to alleged sexual misconduct by the same volunteer worker.<sup>73</sup>

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<sup>68</sup> See No. 1:11CV2201, 2012 U.S. Dist. LEXIS 117607 (N.D. Ohio Aug. 21, 2012).

<sup>69</sup> *Id.* at 6-9.

<sup>70</sup> *Id.* at 9.

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> *Id.* at 18; see also *TIG Ins. Co. v. Smart Sch.*, 401 F. Supp.2d 1334, 1344-45 (S.D. Fla. 2005)(refusing to apply the majority cause-of-injury test, since “sexual abuse occurrence” as specifically defined in the policy collapsed the sexual abuse of multiple students by one perpetrator into one “sexual abuse occurrence”; also holding that a “deemer clause” stating the date of occurrence would be the first date of a series of events supported trigger of coverage under the first of two policies); *TIG Ins. Co. v. San Antonio YMCA*, 172 S.W.3d 652 (Tex. App. 2005)(holding YMCA counselor’s abuse of six children constituted a single Sexual Abuse Occurrence under Sexual Abuse Occurrence Coverage Endorsement; insurer had a continuing duty to defend claims of physical abuse under the CGL Coverage); *Preferred Risk Mut. Ins. Co. v. Watson*, 937 S.W.2d 148 (Tex. App. 1997)(opinion on reh’g)(holding abuse of three children was a single occurrence under the definition provided in a sexual misconduct endorsement); but see *Beaufort County Sch. Dist. v. United Nat’l Ins. Co.*, 709 S.E.2d 85 (S.C. Ct. App. 2011)(holding, despite aggregation clause in sexual abuse coverage endorsement, that

## E. Applicability of Sub-Limits in Professional Liability Policies

Professional Liability policies issued to medical care providers generally contain language whereby the insurance company agrees to pay sums the policyholder becomes legally obligated to pay as damages “resulting from a medical incident arising out of professional services provided by any insured.” There are numerous cases that discuss whether sexual misconduct can ever constitute a “professional service,” since it would be unprofessional to engage in sexual misconduct while serving as a physician, counselor, or other medical professional. These cases typically consider whether the sexual acts were “inextricably intertwined” with or an “inseparable part of” medical treatment.<sup>74</sup>

In an effort to minimize the liability associated with claims of sexual misconduct, but still offer a marketable product to professionals, insurance companies have included sexual misconduct sub-limits in professional liability policies. The policy language is often similar to the following: “the total limit of . . . liability hereunder shall not exceed \$[x] in the aggregate for all damages with respect to the total of all claims against any Insured[s] involving any actual or alleged erotic physical contact, or attempt thereat or proposal thereof . . . .”<sup>75</sup> Policies containing such language generally further provide:

In the event any of the foregoing are alleged at any time... any and all causes of action alleged and arising out of the same or related wrongful acts and/or occurrences and/or relationships shall be subject to the aforesaid \$[x] aggregate limit of liability and to all other provisions of this clause.<sup>76</sup>

In seeking higher limits of coverage, policyholders have sought declarations that such provisions are against public policy, asserting that they: are ambiguous; restrict coverage for nonsexual misconduct; have a chilling effect on patients reporting sexual misconduct; and have a disparate

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a separate limit of coverage applied to each of seven sexual abuse claims, relying on the definition of sexual abuse which referred to a “person” instead of “person or persons”).

<sup>74</sup> See David S. Florig, *Insurance Coverage for Sexual Abuse or Molestation*, 30 TORT & INS. L.J. 699, 721-726 (1995)(citing, among other cases, *St. Paul Fire & Marine Ins. Co. v. Asbury*, 720 P.2d 540 (Ariz. Ct. App. 1986)(holding gynecologist’s clitoral manipulation was done in the context of providing professional services); *St. Paul Fire & Marine Ins. Co. v. Torpoco*, 879 S.W.2d 831 (Tenn. 1994)(holding alleged molestation during a medical examination triggered a defense obligation); *Lindheimer v. St. Paul Fire & Marine Ins. Co.*, 643 So.3d 636 (Fla. Dist. Ct. App. 1994)(holding assault of patient who was under influence of unnecessarily administered anesthesia was not covered under professional liability policy because it did not result from medical diagnosis, treatment or care)); see also *Lexington Ins. Co. v. Kidspeace Corp.*, No. 05-0652, 2006 WL 2456468 (E.D. Pa. Aug. 22, 2006)(holding counselor’s sexual abuse of minor patient fell within definition of professional services, which included supervising or monitoring others); *Pacific Employers Ins. Co. v. Travelers Cas. & Sur. Co.*, No. 3:11cv924(MRK), 2012 WL 3132960, at \*7, 10 (D. Conn. Apr. 19, 2012)(finding a duty to defend under general liability coverage where policy provided both hospital professional liability and general liability coverage, a non-concurrency clause precluded coverage under the GL coverage part if there was coverage under the HPL coverage part, and it was shown that underlying claims possibly implicated *only* GL coverage); *Marie Y. v. General Star Indem. Co.*, 110 Cal. App.4th 928 (2003)(holding dentist’s sexual misconduct could not be construed reasonably as “rendering . . . services in the profession of dentistry” and his acts could not be considered a dental incident); *Charleston Area Med. Ctr., Inc. v. National Union Fire Ins. Co.*, No. 2:09-cv-00573, 2011 WL 2161534, at \*1-2 (S.D. W. Va. June 1, 2011)(holding professional services exclusion in D&O policy did not apply where abuse was independent of any treatment or medical service being provided).

<sup>75</sup> *American Home Assur. Co v. McDonald*, 274 A.D.2d 70 (N.Y. App. Div. 2000).

<sup>76</sup> *Id.*

impact on women, who are often the victims of sexual misconduct.<sup>77</sup> Some courts have found these sub-limits to apply to all malpractice claims (including those that are not sexual in nature) as long as sexual misconduct is alleged, whereas others have found them to be void as against public policy.<sup>78</sup>

## F. Public Policy Concerns – D&O and EPL Insurance

Coverage for Directors and Officers generally is not designed to indemnify such policyholders for their intentional or criminal acts, although sometimes insurance companies offer coverage for defense costs in order to attract or retain as policyholders those directors and officers who might be at risk of being falsely accused. The recent allegations of abuse involving Penn State University coach and founder/director of The Second Mile charity, Jerry Sandusky, have raised questions regarding coverage under Directors & Officers and Employment Practices Liability Coverage.

In that case, Federal Insurance Company (“Federal”) issued a policy providing both D&O and EPL coverage to The Second Mile.<sup>79</sup> The D&O section’s Insuring Clause required Federal to “indemnify any ‘Loss’ which an Insured Person becomes obligated to pay for a wrongful act committed, attempted, or allegedly committed by an Insured Person.”<sup>80</sup> The Policy contained an exclusion for bodily injury and emotional distress, willful statutory violations, and sexual harassment of persons that were not insured.<sup>81</sup> The Insuring Clause of the EPL section, however, required Federal to “pay ‘Loss on account of any Third Party Claim,’ which includes amounts that an insured becomes obligated to pay for civil proceedings arising from ‘sexual harassment,’ including unwelcome sexual advances, requests for sexual favors or other conduct of a sexual nature against a Third Party.”<sup>82</sup> The term “Loss” was defined to include the costs of defense.<sup>83</sup>

During the policy period, Sandusky was charged with forty criminal counts related to the alleged sexual abuse of eight minor children. He also was named as a defendant, along with The Second Mile and Penn State, in a civil suit. Sandusky denied the allegations and sought coverage under Federal’s Policy.<sup>84</sup> Federal agreed to provide a defense subject to a reservation of rights, and then sought a declaration from the court that it was not required to provide coverage to Sandusky with respect to the criminal charges or the civil suit.<sup>85</sup> In the Declaratory Judgment Action, Federal asserted that: (1) Sandusky was not acting in an insured capacity as an employee or executive of The Second Mile when he committed the alleged acts, and (2) the D&O policy’s exclusions limited or excluded coverage.<sup>86</sup> The Court declined to rule on the fact questions, but agreed to consider whether public policy would bar recovery under the policy.

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<sup>77</sup> See *McDonald*, 274 A.D. 2d at 75; *American Home Assur. Co. v. Cohen*, 881 P.2d 1001, 1006 (Wash. 1994); *American Home Assur. Co. v. Stone*, 61 F.3d 1321 (7th Cir. (Ill.) 1995).

<sup>78</sup> See e.g. *Stone*, 61 F.3d at 1330-1331 (rejecting argument that sublimit was against public policy); *Cohen*, 881 P.2d at 1005-1110 (holding it is not against public policy to provide lesser coverage for sexual misconduct than for nonsexual misconduct; however, also holding it is against public policy to provide lesser coverage for nonsexual misconduct when claimant also alleges sexual misconduct in a related course of action); *McDonald*, 274 A.D. 2d at 75 (holding provision did not violate public policy and applied to all claims).

<sup>79</sup> See *Federal Ins. Co. v. Sandusky*, No. 4:11-cv-02375, 2012 U.S. Dist. LEXIS 76880 (M.D. Pa. June 4, 2012).

<sup>80</sup> *Id.* at 1.

<sup>81</sup> *Id.* at 2.

<sup>82</sup> *Id.* at 1.

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> *Id.* at 2.

<sup>86</sup> *Id.*



Ultimately, the Court found that public policy barred reimbursement of Sandusky for any damage award arising out of allegations of child abuse.<sup>87</sup> The Court deferred issuance of a ruling on whether public policy prohibited Federal from providing Sandusky with a defense. It also did not consider coverage for The Second Mile.

While indemnification of a perpetrator under a D&O policy may be void against public policy, as in *Sandusky*, entity coverage sometimes remains available. In *Charleston Area Medical Center, Inc. v. National Union Fire Insurance Company*,<sup>88</sup> the Court considered whether a D&O policy providing entity coverage to CAMC was required to respond to a claim alleging sexual abuse by a CAMC nursing assistant.<sup>89</sup> Covered wrongful acts included “any breach of duty, neglect, error, misstatement, misleading statement, omission or act by or on behalf of the Organization.”<sup>90</sup> The Court found “by the plain language of the D&O Section” that CAMC’s negligent supervision of the assistant constituted neglect or breach of duty and, therefore, was considered a wrongful act.<sup>91</sup> National Union failed to show that exclusions for Bodily Injury or that related to the provision of Medical and Professional Services applied, and the Court therefore denied its motions for summary judgment.<sup>92</sup>

## II. MISCONDUCT-SPECIFIC DEFENSES IN INSURANCE COVERAGE DISPUTES

Increased sexual abuse incidents and claims for civil compensation, along with extended statute of limitations, has led to a ramp-up in insurance coverage claims. In response, insurance companies typically have contended their standard liability insurance policies were not intended to cover intentional acts, including sexual abuse.

As a threshold matter, insurance companies generally have denied coverage on two separate, but related, grounds. First, the companies posit that sexual abuse is not an “accident” and therefore is not an “occurrence,” which is a prerequisite to coverage under the insuring agreement. Next, the companies argue that coverage for liability arising from sexual abuse is precluded by provisions barring coverage for damages that are “expected or intended.”

For their part, policyholders have responded to such negligence claims by asserting that, even if a sexual offender’s actions were not an “accident” or the perpetrator “expected or intended” the injury, the perpetrator’s employer (generally being sued for negligent hiring, supervision, or retention) did not expect or intend the injury and thus should be afforded coverage.

### A. The “Accident” Requirement

Modern standard general liability policies condition insurance coverage on whether there was an “occurrence.” These policies typically define “occurrence” as:

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<sup>87</sup> *Id.* at 6.

<sup>88</sup> No. 2:09-cv-00573, 2011 WL 2161534, at \*1-2 (S.D. W.Va. June 1, 2011).

<sup>89</sup> 2011 WL 2161534, at \*1-2.

<sup>90</sup> *Id.*

<sup>91</sup> *Id.* at 6.

<sup>92</sup> *Id.* at 8-10.

An accident, including continuous or repeated exposure to general conditions, resulting in bodily injury or property damages neither expected nor intended from the standpoint of the insured.

Thus, an “occurrence” under a liability insurance policy must be an accidental event. It has been said that an “accident” is an unintended and unanticipated event, and that it occurs without design, coordination, or expectation.<sup>93</sup> In deciding whether an accidental event occurred, courts often consider the question from the viewpoint of the insured, and will conclude that an event was accidental if the insured did not intend the result, although he or she may have engaged in an intentional act.<sup>94</sup>

When considering coverage for the employer of an alleged abuser that has been sued for its alleged negligent hiring, supervision or retention of the abuser, many courts have distinguished the knowledge or intent of the perpetrator and employer. For example, in *United States Fidelity & Guaranty Co. v. Open Sesame Child Care Center*,<sup>95</sup> the insurance company brought a declaratory judgment action seeking to determine whether, under a special multi-peril policy, it owed a duty to defend the policyholder daycare center in an action brought by the mother of a child allegedly abused by the daycare's employee. The insurance company had promised to "pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of bodily injury or property damage to which this insurance applies."<sup>96</sup> The court acknowledged those cases from other jurisdictions in which the courts refused to separate the employer's alleged negligence from the abuser's intentional conduct.<sup>97</sup> However, the court believed that refusing to separate the employer's alleged negligence from the employee's intentional conduct would disregard the clear language of the insurance policy. "The policy excludes bodily injury or property damage expected or intended from the standpoint of the insured. In other words, only the insured's intentional conduct falls outside the ambit of the policy."<sup>98</sup> The court believed that the other opinions also discounted the employer's independent acts that gave rise to the underlying alleged tort. The court reasoned that, in holding that the employee's intentional conduct places the insured's negligence outside the definition of "occurrence," the exclusion is read too broadly. Because the predominant purpose of an insurance contract is to provide coverage to the insured, the court concluded that the allegation of negligent hiring in the underlying complaint supported an "occurrence" despite the employee's intentional conduct.<sup>99</sup>

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<sup>93</sup> See, e.g., *High Country Assocs. v. New Hampshire Ins. Co.*, 648 A.2d 474, 478 (N.H. 1994) (“we interpret ‘accident’ in the definition of ‘occurrence’ to mean circumstances . . . that were unexpected and unintended from the viewpoint of the insured”); *Allstate Ins. Co. v. Steele*, 74 F.3d 878, 880 (8<sup>th</sup> Cir. 1996) (applying Minn. law) (“an ‘accident’ is ‘an unexpected happening without intention or design’”); *St. Paul Fire & Marine Ins. Co. v. McCormick & Baxter Creosoting Co.*, 923 P.2d 1200, 1203 (Ore. 1996) (an “accident” is “an incident or occurrence that happens by chance, without design, and contrary to intention and expectation”).

<sup>94</sup> See, e.g., *Agoado Realty Corp. v. United Internat’l Ins. Co.*, 733 N.E.2d 213, 216 (N.Y. 2000); *Capitol Indem. Corp. v. Blazer*, 51 F. Supp.2d 1080, 1085 (D. Nev. 1999).

<sup>95</sup> 819 F. Supp. 756 (N.D. Ill. 1993)

<sup>96</sup> *Id.* at 757.

<sup>97</sup> *Id.* at 759.

<sup>98</sup> *Id.* at 760 (emphasis omitted).

<sup>99</sup> *Id.*; see also *Montgomery v. Petty Mgt. Corp.*, 323 Ill. App. 3d 514, 519 (2001)(holding, where plaintiff asserted a claim of negligent hiring, the proximate cause of plaintiff's injuries was the employer's negligence in hiring employee rather than the employee's wrongful act); *Doe v. Shaffer*, 90 Ohio St. 3d 388 (2000)(finding intentions of molester were immaterial to determining coverage for employer's alleged negligent hiring); *Silverball Amusement, Inc. v. Utah Home Fire Ins. Co.*, 842 F. Supp. 1151 (W.D. Ark. 1994) (explaining

In contrast, the Colorado Court of Appeals, in *Mountain States Mutual Casualty Co. v. Hauser*, recently observed that, even if the policyholder's negligence in hiring the perpetrator is alleged as a cause of the victim's injuries, "it was not a risk covered by the policy since it was not an 'accident.'"<sup>100</sup> Citing decisions from California and New York, the court held: "Negligent hiring/supervision [of a sexual molester] is not an 'accident.'"<sup>101</sup> The court explained further:

[The insured] cites no case where an intentional act of sexual assault constituted an "accident" or "occurrence" within the meaning of a comprehensive general liability policy. Rather than resort to "head-spinning judicial efforts at definition," we conclude that the common understanding of an "accident" does not include the [sexual] assault that occurred here.<sup>102</sup>

The court reasoned that an accident is never present when a deliberate act is performed unless some additional, unexpected, independent and unforeseen happening occurs which produces the damage.<sup>103</sup> As an Iowa court observed: "There are two components that must be shown to establish an 'occurrence' under the policy: (1) an accident; and (2) personal injury or property damage neither expected nor intended from the standpoint of the insured."<sup>104</sup> From this perspective, it may be argued that judicial decisions that conflate the two prongs of the "occurrence" definition fail to apply the interpretative rule, emphasized in some jurisdictions, that insurance contract provisions must be read as a whole, giving meaning to the entire document.<sup>105</sup>

This line of analysis assumes particular importance in negligent hiring and supervision cases (as in *Hauser* and *Open Sesame*), where the policyholder usually asserts the injuries were neither expected nor intended from its standpoint (as distinguished from the molester's standpoint). Courts that give independent meaning to the term "accident" are likely to uphold a denial of coverage for claims arising from sexual abuse and molestation, while those courts that conflate the two prongs of the "occurrence" definition continue the inquiry to determine whether the insured "expected or intended" the sexual abuse.<sup>106</sup>

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allegations against policyholder determine duty to defend claim of negligent hiring of employee who sexually molested a minor; otherwise, the distinction between intentional and negligent conduct would dissolve).

<sup>100</sup> 221 P.3d 56, 60 (Colo. Ct. App. 2009) (citing *American Empire Surplus Lines Ins. Co. v. Bay Area Cab Lease, Inc.*, 756 F. Supp. 1287, 1290 (N.D. Cal. 1991) ("Bay Area") (involving case where cab company employee sexually molested a passenger)).

<sup>101</sup> *Hauser*, 221 P.3d at 60 (citing *Bay Area*, 756 F. Supp. 1287; *Mattress Discounters of New York, Inc. v. U.S. Fire Ins. Co.*, 674 N.Y.S.2d 106, 106-07 (1998)).

<sup>102</sup> In *Hauser*, the court indicated that, absent an "accident," the standpoint of the insured-employer was irrelevant. However, because the insured-employer allegedly expected the injury, the court did not need to decide whether a non-expectation of injury is relevant when the underlying event is not an "accident." See *Hauser*, 221 P.3d at 60.

<sup>103</sup> See *id.*

<sup>104</sup> See *Norwalk Ready Mixed Concrete, Inc. v. Travelers Ins. Co.*, 246 F.3d 1132, 1137 (8<sup>th</sup> Cir. 2001) (quoting *West Bend Mut. Ins. Co. v. Iowa Iron Works, Inc.*, 503 N.W.2d 596, 600 (Iowa 1993)).

<sup>105</sup> See *Viking Pump, Inc. v. Century Indem. Co.*, 2 A.3d 76, 114 (Del. Ch. 2009); *Wooley v. Lucksinger*, 14 So. 3d 311, 474 (La. Ct. App. 2008).

<sup>106</sup> In environmental and toxic tort cases, courts often have assumed that even gradually accruing injuries are "accidents." See, e.g., *Mass. Bonding & Ins. Co. v. Orkin Exterminating Co.*, 416 S.W.2d 396, 400-01 (Tex. 1967) (holding that negligent application of pesticide that had a cumulative toxic effect was an "accident").

## B. Provisions Barring Coverage for “Expected or Intended” Damage

The most common point of contention in insurance coverage disputes involving underlying sexual abuse claims is whether the injury was “expected or intended” by the insured who is seeking coverage. Many standard general liability policies contain the following exclusion:

We will not provide insurance:

2. For personal injury or property damage:
  - a. which is either expected or intended by you;

As previously discussed, insurers argue that the rationale of the “intentional act exclusion” is to prevent the “moral hazard” which would result if the insured could be compensated for losses that were intentionally caused.

There currently are three major judicial approaches for analyzing whether an injury resulting from sexual abuse was “expected or intended”: (1) the “objective” standard for determining if the acts were intended or expected from the viewpoint of the insured; (2) the “subjective” standard for determining if acts were intended or expected from the viewpoint of the insured; and (3) the “inferred intent” standard as applied to child sexual abuse cases.<sup>107</sup>

Under an “objective” standard, a court will look at the natural and probable consequences of the policyholder’s deliberate act(s) in order to determine the policyholder’s intent. If an intentional act by the policyholder results in injuries that are, in an objective sense, the natural, foreseeable, and probable result of the policyholder’s intentional act(s), such loss is excluded from coverage under the liability insurance policy’s intentional acts exclusion.<sup>108</sup> Under a “subjective” standard, the court must find not only that the policyholder intended a specific act, but also that the policyholder intended a specific harm.<sup>109</sup> This “subjective” standard—that the policyholder must have intended both the conduct in question and some type of injury,<sup>110</sup> or a particular type of injury,<sup>111</sup> —is the majority approach used today in analyzing liability issues raised in insurance coverage litigation involving claims other than child sexual abuse claims.

In contrast, with respect to child sexual abuse cases, a substantial number of courts have applied an “inferred intent” standard to bar coverage for the perpetrator in cases involving an adult sexual predator and a sexually abused child, even when the policyholder sexual molester asserts the absence of any subjective intent to harm the child.<sup>112</sup>

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<sup>107</sup> See, e.g., *Western Nat’l Assur. Co. v. Hecker*, 719 P.2d 954, 959-960 (Wash. Ct. App. 1986).

<sup>108</sup> See, e.g., *CNA Ins. Co. v. McGinnis*, 666 S.W.2d 689, 691 (Ark. 1984) (involving sexual assault of a minor).

<sup>109</sup> See *MacKinnon v. Hanover Ins. Co.*, 471 A.2d 1166, 1167 (N.H. 1984) (involving battery and negligent infliction of emotional distress claims arising out of the alleged sexual abuse of a minor).

<sup>110</sup> See, e.g., *American Family Mut. Ins. Co. v. Johnson*, 816 P.2d 952 (Colo. 1991) (involving assault and battery claims); *Amco Ins. Co. v. Haht*, 490 N.W.2d 843 (Iowa, 1992) (involving alleged battery and wrongful death claim arising from thrown baseball)

<sup>111</sup> See, e.g., *Providence Mut. Ins. Co. v. Scanlon*, 638 A.2d 1246 (N.H. 1994) (involving personal injury from a BB gun); *Columbia Cas. Co. v. Westfield Ins. Co.*, 617 S.E.2d 797 (W.Va. 2005) (involving suicide deaths of inmates); but see Emeric Fischer, Peter N. Swisher & Jeffrey W. Stempel, PRINCIPLES OF INSURANCE LAW, 57-68, 62 (3rd rev. ed. 2006) (stating, “The specific intent view errs too greatly in favor of the policyholder by insulating him or her from the financial consequences of antisocial conduct.”).

<sup>112</sup> See, e.g., *State Farm Fire & Cas. Co. v. Abraio*, 874 F.2d 619, 623 (9<sup>th</sup> Cir. 1989) (applying California law) (ruling as a matter of law that an irrebuttable presumption of intent to harm results from child molestation); *Allstate Ins. Co. v. Mugavero*, 581 N.Y.S. 142, 146, 589 N.E.2d 365, 369 (N.Y. 1992) (“in the exceptional case of an act of child molestation, cause and effect cannot be separated; that to do the act is necessarily to do the

### C. Issues Raised by Claims of Negligent Hiring and Supervision

Often courts also must decide the more difficult question of whether claims of negligent supervision hiring, or retention against the employer of the perpetrator should be compensated under the insurance policy. The crucial legal requirement necessary to impose liability in most negligent hiring, retention, and supervision cases is whether the employer of the abuser knew or should have known of the offender's sexual abuse or proclivity to abuse.

A few cases across the country have comprehensively analyzed whether liability insurers can defeat coverage by asserting that, based upon their knowledge of the circumstances, an employer or supervisor "expected or intended" injury to a sexual molestation victim.<sup>113</sup> One commentator notes that some courts have applied an objective standard of what a reasonable supervisor-insured "knew or should have known," involving the "substantial probability" that certain consequences would result; while other courts have applied a subjective standard involving what a particular supervisor-insured actually "knew or believed."<sup>114</sup>

A prime example of a court implementing the objective standard is the case of *Diocese of Winona v. Interstate Fire & Casualty Co.*<sup>115</sup> There, a pedophilic priest, Father Adamson, subjected several children to prolonged periods of sexual molestation.<sup>116</sup> The plaintiff, Mrozka, sued the Diocese and Archdiocese, alleging they negligently and recklessly supervised Adamson, allowing Adamson to sexually abuse Mrozka when he was a minor. Both the Diocese and the Archdiocese conceded negligence, but disputed their recklessness.<sup>117</sup> The Minnesota Court of Appeals previously had found sufficient evidence "from which the jury could conclude that Church officials repeatedly and knowingly placed Adamson in situations where he could sexually abuse boys and then failed to properly supervise him and disclose his sexual problem."<sup>118</sup>

The Eighth Circuit Court of Appeals stated that, although "an insured has a reasonable expectation in securing a CGL policy that the policy will cover some negligent acts, it does not necessarily follow that all negligent acts are covered."<sup>119</sup> Accordingly:

[t]he issue then is whether a reasonably prudent person in the position of the Diocese and the Archdiocese knew or should have known that Adamson's abuse of Mrozka was substantially probable as a result of the continuing exposure caused by their willful indifference. In defining substantial probability, this court has stated "[t]he indications must be strong enough to alert a reasonably prudent man not only to the possibility

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harm which is its consequence; and that since unquestionably the act is intended, so also is the harm"); *J.C. Penney Cas. Ins. Co. v. M.K.*, 278 Cal. Rptr. 64, 70, 804 P.2d 689, 695 (Cal. 1991) ("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.").

<sup>113</sup> Barron L. Weinstein, *Sexual Misconduct Claims: A Policyholder's Perspective of Key Coverage Issues*, 38 THE BRIEF 49, 50 (Winter, 2009).

<sup>114</sup> *Id.*

<sup>115</sup> 89 F.3d 1386 (8th Cir. 1996)

<sup>116</sup> The detailed facts of this case are set forth in the district court's opinion in *Diocese of Winona v. Interstate Fire & Casualty Co.*, 858 F. Supp. 1407 (D. Minn. 1994) and *Mrozka v. Archdiocese of St. Paul & Minneapolis*, 482 N.W.2d 806 (Minn. Ct. App. 1992).

<sup>117</sup> 89 F.3d at 1389.

<sup>118</sup> *Mrozka*, 482 N.W.2d at 813; *Diocese of Winona*, 89 F.3d at 1389 (emphasis in the original).

<sup>119</sup> *Id.* at 1392 (emphasis added).

of the results occurring, but the indications also must be sufficient to forewarn him that the results are highly likely to occur.”<sup>120</sup>

The case therefore was remanded to the federal district court to enter judgment in accordance with this objective “reasonable person” standard.<sup>121</sup> In a liability insurance context, if the negligent hiring, supervision, or retention of a sexually abusive employee was so inextricably intertwined with, interdependent, and not independent of, the employee’s sexual misconduct—which was excluded under the liability insurance policy’s intentional act exclusion, and which was the “efficient or predominant cause” of the plaintiff’s sexual abuse claim—then the supervising employer or organization should not be covered by its liability insurer under generally accepted tort and insurance law cause-in-fact and proximate cause causation principles.<sup>122</sup>

Where, in contrast, an insured that had supervisory responsibility for the perpetrator was “not alleged to have actively encouraged or facilitated” the perpetrator’s physical contact with children, the perpetrator’s acts were not deemed “expected or intended” from the insured’s standpoint.<sup>123</sup> Importantly, coverage may be upheld if the insured never ignored a criminal record or suspicious event involving the perpetrator.<sup>124</sup> Some decisions, favoring policyholders, implicitly conclude that the “expected or intended” clause does not narrow the meaning of “accident,” but instead subsumes the term “accident.” A number of decisions have followed this analysis in sexual abuse cases, concluding that damage was not “expected or intended,” without considering further whether what occurred would be regarded by anyone as an “accident.” In a decision highly favorable to policyholders, the New York Court of Appeals has ruled that, when a perpetrator’s offense falls outside the scope of his or her duties to the insured, the offense may well be “unexpected, unusual and unforeseen” from the insured’s standpoint.<sup>125</sup>

#### **D. The Public Policy Defense**

Nearly all courts deciding the issue have concluded that public policy bars affording coverage to the offender for damages. However, coverage may not be barred for the offender’s defense costs. Recently, in connection with the Penn State/Jerry Sandusky sexual molestation scandal, a federal court determined that a liability policy may afford such coverage.<sup>126</sup> In that case, Federal Insurance Company sought the right to disclaim any obligation to indemnify for damages or defend Jerry Sandusky, then an accused (now, a convicted) pedophile. Federal contended that Pennsylvania’s public policy precluded the insurance policy from affording any coverage for sexual molestation, a criminal act.

The court agreed that Pennsylvania courts had “expressed their strong disapproval of sexual contact between an adult and a child by adopting the inferred intent rule for liability cases . . . .”

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<sup>120</sup> *Id* at 1391 (emphasis added, citations omitted).

<sup>121</sup> *Id* at 1399.

<sup>122</sup> *See, e.g., Diocese of Winona v. Interstate Fire & Cas. Co.*, 89 F.3d 1386 (8th Cir. 1996) (applying Minn. law); *see also American Commerce Ins. Co. v. Porto*, 811 A.2d 1185 (R.I. 2002) (holding that a negligent supervision claim was *not* covered since it was causally connected to the sexual molestation of a child, which was excluded from coverage under the parties’ homeowners insurance policy). This same result would apply if a particular jurisdiction applies a more traditional “cause nearest the loss” interpretive analysis, rather than applying the modern and majority “efficient or predominant cause” interpretive analysis.

<sup>123</sup> *State Auto Property & Cas. Ins. Co. v. Kincaid*, 2011 WL 344086 (C.D. Ill. 2011).

<sup>124</sup> *Id.*

<sup>125</sup> *RJC Realty Holding Corp. v. Republic Franklin Ins. Co.*, 808 N.E. 2d 1263, 1266 (N.Y. 2004).

<sup>126</sup> *Federal Ins. Co. v. Sandusky*, 2012 WL 1988971 (M.D. Pa. 2012).

<sup>127</sup> More broadly, the court stated, “it would be against public policy of this Commonwealth to permit the carrier to offer insurance for damages assessed as a result of evil or illegal conduct.” In light of this precedent, the court readily agreed that “[i]t is entirely clear . . . that the public policy of Pennsylvania . . . prohibits the reimbursement of Sandusky for any damage award that he may ultimately be found to owe arising from the allegations that he molested and sexually abused children.”<sup>128</sup>

However, the court did not grant judgment to Federal on the separate question of whether it was obligated to fund Sandusky’s defense of the civil claims. (Bear in mind he had not yet been convicted). The court held that public policy did not bar such coverage. The court observed that one could argue that “the presumption of innocence that remains a bedrock principle of our Constitution makes insurance to cover defense costs in the public interest.”<sup>129</sup> The Court deferred any ruling on whether Sandusky was entitled to an insurer-funded defense, pending discovery into, among other things, whether he had been involved with securing the insurance policy.

Subsequent to this decision, Sandusky was convicted of 45 counts of child molestation, and Federal renewed its motion for summary judgment. A decision is expected in the near future.

### **E. Sexual Molestation Exclusions**

There is a wide range of exclusions for coverage of sexual molestation claims. Exclusions run the gamut from (i) broadly excluding any claim related to sexual molestation, to (ii) excluding only those claims pertaining to abuse committed by the policyholder, to (iii), even narrower exclusions, that apply only if an executive of the insured knew of and had an obligation to report the abuse.

While most states will enforce a clearly-drawn exclusion,<sup>130</sup> a number of states have endorsed a particularly narrow construction of sexual molestation exclusions. The decisions noted below are illustrative of cases in which courts have not enforced molestation exclusions.

- **Maine**- Exclusion deemed inapplicable when there was no “physical contact” between the sexual abuser and the minors he photographed nude.<sup>131</sup>
- **Missouri**- Exclusion deemed inapplicable to a claim of negligent supervision of children leading to the sexual abuse by a third party.<sup>132</sup>
- **Georgia**- Exclusion deemed “ambiguous” regarding a claim against a group home for the sexual abuse of a child by other child residents of the home.<sup>133</sup>
- **District of Columbia**- Trial court found that a “sexual action exclusion” did not bar coverage for negligent hiring and supervisions claims where allegations of unauthorized trips to restaurants and bars were not necessarily sexual in connotation and purpose.<sup>134</sup>

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<sup>127</sup> *Id.* at \*3.

<sup>128</sup> *Id.*

<sup>129</sup> *Id.* at \*5.

<sup>130</sup> See, e.g., *CNA Internat’l v. CPB Enters., Inc.*, 982 F. Supp. 831 (S.D. Ala. 1997).

<sup>131</sup> See *Thomas v. Maine Bonding & Cas. Co.*, 2003 Me. Super. LEXIS 48 (Me. Super. Ct. Feb. 28, 2003).

<sup>132</sup> See *St. Paul Fire & Marine Ins. Co. v. Schrum*, 149 F.3d 878 (8th Cir. 1998).

<sup>133</sup> See *Georgia Baptist Children’s Homes & Family Ministries v. Essex Ins. Co.*, 207 Ga. App. 346 (Ga. Ct. App. 1993).

- **Connecticut-** Exclusion deemed inapplicable to claims arising from policyholder's negligent provision of alcohol to a minor who subsequently was sexually assaulted in the policyholder's home by an unknown third person, because the exclusion did not specify whose actions were excluded from coverage.<sup>135</sup>

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<sup>134</sup> *Potomac Residence Club v. Western World Ins. Co.*, 711 A.2d 1228 (D.C. 1998).

<sup>135</sup> *See New London County Mut. Ins. Co. v. Lyon*, 2011 Conn. Super. LEXIS 783 (Conn. Super. Ct. 2011).