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Insurance coverage issues in sexual-abuse cases

MAKING THE CASE FOR SEPARABILITY TO UNLOCK INSURANCE COVERAGE

Cases involving sexual abuse can be particularly challenging and emotional for clients and attorneys. Certainly, one of the more significant issues facing attorneys in evaluating and prosecuting these cases is determining collectability and the prospect of recovery. Will the litigation journey provide any hope of monetary recovery for the victims and will the investment of time and expenses on behalf of the client be compensated? Answering these questions will often turn on the availability of insurance coverage for the defendants.

In many cases involving sexual abuse, alleged abusers or enablers lack the personal resources necessary to make a client victim whole. The defendant may be a smaller company or an individual with limited means, and in many cases, the businesses or employers that once harbored the abuser, have folded. In those cases, insurance policies may be the only resource available to help make the client whole.

In our experience in these non-institutional abuse cases, mediation and settlement discussions will often devolve into debates over the applicability of insurance to cover claims. The insurance companies may use aggressive strategies, including intervening in the action or bringing a declaratory relief action to disclaim coverage in an effort to heighten the risk of litigation against their insured and cut off their exposure.

The purpose of this article is to examine some practical approaches and considerations when evaluating sexual-abuse cases, with an eye towards unlocking potentially available insurance coverage. A key concept for triggering coverage in these difficult cases, is the concept of "separability" – sufficiently separating the potentially covered offenses and the tortfeasors from the actual uninsurable act of sexual abuse, will afford stronger arguments for coverage against recalcitrant carriers bent on denial and low-balling of claims.

The relative sophistication of the defendants and the legal or business relationships between and among multiple defendants will also influence the nature and type of potential insurance coverage available in any given case and there are many types of insurance policies that may apply to cover tortious acts arising in this difficult setting. This article is intended to help practitioners anticipate issues and prepare in advance for the inevitable coverage fight by examining their clients' fact patterns and defendants' insurance policies with an eye towards maximizing the pot of insurance.

"Personal injury" offenses may be covered even if the offense is not accidental

Depending on the available fact pattern of your client's case against the abuser and others, you will want to explore certain allegations and theories that stand a better chance to trigger an insurer's duty to defend and settle. Since we do not typically know the type or extent of insurance policies in force at the pre-lawsuit phase, formulating a complaint around facts and theories more likely to trigger coverage always helps to increase the odds for bringing a carrier to the table. If supported, claims for false imprisonment, slander, and invasion of the right of privacy may provide an avenue to get carrier involvement.

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In abuse cases, the defense will inevitably allege intentional tort claims. Indeed, the nature of the wrongdoing can lend itself to powerful allegations of *criminal* wrongdoing. The abuser may be under criminal investigation or may have been charged and is facing criminal prosecution. However, for purposes of insurance coverage, criminal liability and intentional torts are not covered by insurance as a matter of public policy. (*J.C. Penney Cas. Ins. Co. v. M.K.* (1991) 52 Cal.3d 1009, 1019-1020, n.8.) "An insurer is not liable for a loss caused by the willful act of the insured …" (Ins. Code, § 533.) Insurance Code section 533 serves to act as "an implied exclusionary clause which by statute is to be read into all insurance policies." (*J.C. Penney Cas. Ins. Co.*, *supra*, 52 Cal.3d at 1019 (internal quotes omitted).) However, even with criminal and intentional conduct at issue, there are a number of theories and claims that can potentially trigger insurer participation.

General liability policies often contain the promise of coverage for "personal injury" under the "Advertising and Personal Injury" portion of the policy. Not to be confused with "bodily injury" caused by an "occurrence," "personal injury" coverage is a promise to provide coverage for certain enumerated "offenses" listed in the policy. Frequently, there is no requirement that "personal injury" must be caused by an "accident," which serves to broaden the scope of personal injury coverage to non-accidental offenses. Common types of enumerated offenses included within the policy definition of "personal injury" are claims for false imprisonment, invasion of the right of private occupancy, violation of the right of privacy, and slander.

A key takeaway from cases examining the nature and scope of "personal injury" coverage involving allegations of abuse is the effort to allege separation among the alleged wrongful acts from each other to the greatest extent possible so that each alleged offense stands on its own, apart from an actual temporal or physical incident of sexual abuse or molestation. Insurance coverage cases will often focus analysis on whether various alleged torts are "inseparably intertwined" with the alleged sexual assault. (*Coit Drapery Cleaners, Inc. v. Sequoia Ins. Co.* (1993) 14 Cal.App.4th 1595, 1608; *Gonzalez v. Fire Ins. Exchange* (2015) 234 Cal.App.4th 1220, 1242.)

In *Gonzalez*, the plaintiff alleged that she was sexually assaulted by ten members of a college baseball team. One of the defendants tendered to his parents' homeowners and personal umbrella policies. The carrier denied a defense under both policies and the defendant settled and assigned his rights to the plaintiff. The carrier argued that there was no coverage under the insurance policies because the allegations were not accidental and that the sexual assault was inextricably intertwined with other claims against the defendant, thereby barring coverage.

Reversing the trial court order granting summary judgment, the Court of Appeal held that while there was no potential for coverage under the homeowners' insurance policy because the allegations against the defendant insured did not allege accidental bodily injury, there was a potential for coverage and a duty to defend under the umbrella policy.

The definition of personal injury under the umbrella policy was much broader in the sense that the policy enumerated various covered offenses, without requiring that the enumerated offenses were accidental. The complaint alleged the men in the room jeered, cheered, and took pictures of the assault and alleged that the defendants later slandered her in the days and months following the incident. According to the court, this conduct would not be an accidental occurrence. However, these allegations did trigger coverage under the umbrella policy because they fit within the definition of non-accidental enumerated offenses covered by that policy. Gonzalez's complaint alleged causes of action for false imprisonment, slander per se, and invasion of privacy, which raised the potential for coverage under the umbrella policy's provision providing "personal injury" coverage.

In factually intensive cases such as those involving sexual abuse, the drafting of the complaint becomes important to the issue of determining any breach of the insurer's duty to defend. The *Gonzalez* court reiterated the principle noted by the California Supreme Court in *Horace Mann* that "[i]f the parties to a declaratory relief action dispute whether the insured's alleged misconduct should be viewed as essentially a part of a proven sexual molestation, or instead as independent of it and so potentially within the policy coverage, ... then factual issues exist precluding summary judgment in the insurer's favor. Indeed, the duty to defend is then established." (*Gonzalez v. Fire Ins. Exch.* (2015) 234 Cal.App.4th 1220, 1244, citing *Horace Mann Ins. Co. v. Barbara B.* (1993) 4 Cal.4th 1076, 1085.)

Accordingly, alleging separable tortious acts among separate tortfeasors or the existence of physical or temporal separation between the sexual assault and other tortious acts of a single tortfeasor, can increase the chances that "personal injury" coverage will be triggered for other enumerated cases.

By way of example, in a case we handled alleging unwanted sexual touching, there were other allegations that the abuser separately took photographs and maintained those photographs of his victim separately along with photos of other victims. We alleged a violation of privacy and separated the acts, apart from the incident of sexual molestation, which raised the insurer's potential for coverage. In another case, the abuser was alleged to have falsely imprisoned women against their will in remote locations without engaging in sexual assault. On other occasions, the abuser administered drugs and sexually assaulted these, and other, women. The insurer was required to assume a duty to defend and eventually intervened in, and settled, that action based in substantial part on the false imprisonment causes of action alleged in the complaint. Where supported by the facts in the case, a well-drafted

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complaint alleging different offenses committed by the target defendants will increase the potential for carrier engagement under the "personal injury" portion of the insurance policy.

Incorporating negligence concepts when pleading abuse cases

Under general-liability insurance policies for "bodily injury" claims, intentional torts such as assault, battery and intentional infliction of emotional distress will ordinarily not qualify as an "occurrence." These torts and the resulting harms are not the result of negligent acts. Moreover, simply pleading the same facts and switching the word "negligent" in place of "intentional" will not accomplish triggering coverage. Negligence-based causes of action, like "personal injury" offenses need their own stand-alone facts, apart from the abuser's criminal and/or non-accidental sexual abuse, to raise a prospect for coverage under a standard general liability policy.

Homeowners policies and commercial general liability (CGL) policies will typically contain language that provides coverage for unintentional, or accidental, conduct. The meaning of the term "accident" in a liability insurance policy is well settled in California. "[A]n accident is an unexpected, unforeseen, or undesigned happening or consequence from either a known or an unknown cause." (*Delgado v. Interinsurance Exchange of Automobile Club of Southern California* (2009) 47 Cal.4th 302, 308.) "[T]he term 'accident' is more comprehensive than the term 'negligence' and thus includes negligence." (*Safeco Ins. Co. v. Robert S.* (2001) 26 Cal.4th 758, 765.) "Accordingly, a policy providing a defense and indemnification for bodily injury caused by an accident promise[s] coverage for liability resulting from the insured's negligent acts." (*Liberty Surplus Ins. Corp. v. Ledesma & Meyer Constr. Co.* (2018) 5 Cal.5th 216, 221–22.)

Ledesma and pleading negligence in sex-abuse cases

The *Ledesma* case, argued by CAALA's own Jeffrey Ehrlich, the editor of this magazine, provided a much clearer picture for us when pleading negligence in the context of sexual-abuse cases. The California Supreme Court certified the following question for determination from a case pending in the Ninth Circuit Court of Appeal: "When a third party sues an employer for the negligent hiring, retention, and supervision of an employee who intentionally injured that third party, does the suit allege an 'occurrence' under the employer's commercial general liability policy?" (*Id.* at 220.) The California Supreme Court answered this question in the affirmative. (*Ibid.*)

The *Ledesma* case received detailed discussion in the September 2018 issue of Advocate. (https://www.advocatemagazine.com/article/2018-september/we-meant-it-when-we-said-it) The import of *Ledesma* in cases involving sexual abuse was immediately evident from the Ninth Circuit's own reconsideration of the case in front of it after *Ledesma* was published. The Ninth Circuit's analysis following the California Supreme Court's decision, although unpublished, offers an instructive perspective for plaintiff counsel drafting a complaint involving sexual abuse with several potential tortfeasors:

> In light of the California Supreme Court's decision, reversal of the district court's summary judgment ruling in favor of Liberty is warranted. Doe accused L&M of negligence. The relevant perspective is that of the insured – here, L&M. As explained by the California Supreme Court, "[a]t the time Doe was molested, from L&M's point of view the event could have been 'an unexpected, unforeseen, or undesigned happening or consequence' of its hiring, retention, or supervision of Hecht." [Citations omitted.] This was true despite the fact that Hecht's conduct in perpetrating the assault was willful. In addition, we have no difficulty concluding that L&M's conduct was a substantial factor in Doe's injury. As even the district court observed, L&M's negligence "set in motion and created the potential for injury[.]" [Citation omitted.] Accordingly, we are satisfied that L&M's negligent hiring, retention, and supervision of Hecht was an "occurrence" under the General Policy, and L&M is entitled to judgment in its favor on the coverage question.

(*Liberty Surplus Ins. Corp. v. Ledesma & Meyer Constr. Co., Inc.* (9th Cir. 2018) 752 F. App'x 412, 414-15.)

When drafting a complaint with multiple tortfeasor defendants, plaintiff's counsel will be well advised to scrutinize issues and questions of negligence from each tortfeasor's vantage point at and before the incident of abuse. Are there colorable theories regarding what certain tortfeasors should have known, but failed to notice? Were there some incidents that may have raised suspicions but did not trigger actual knowledge of intentional acts? Did the employer or organization have policies, practices or procedures in place which should have protected the victim, but which were not adhered to in a manner that was a substantial factor in the victim's injury?

Theories of negligent supervision, negligent retention and negligent hiring of an abuser, as in *Ledesma*, can lead to the conclusion that an employer, supervisor or principal did not foresee a willful event of abuse.

Additionally, when persons or organizations stand in a special relationship or owe duties of custodial or fiduciary care to a vulnerable person, such as a child or a dependent adult, neglect and the failure to follow policies or adequately monitor or protect that person from unforeseen events of abuse can also serve to meet the definition of an "accident" or "occurrence" from the standpoint of insurance. "An insurer is not liable for a loss caused by the willful

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act of the insured, but he is not exonerated by the negligence of the insured, or of the insured's agents or others." (Ins. Code, § 533.)

Interviewing clients and witnesses to build facts around the negligence of others, will not only grow the potential number of tortfeasors surrounding the abuser, but it will also grow the potential pot of insurance money available for your client.

Separating "who is an insured" from the uncovered incident of abuse under insurance policies

When you obtain your defendants' insurance policies in a sexual-abuse case, focus on analyzing coverage separately for each named defendant in your lawsuit. As much as we want to treat all defendants as part of a single, common enterprise for purposes of vicarious liability, you should be aware that you may be blasting yourself out of coverage if you allege and argue that the actual sexual abuse, itself, was in the course and scope of employment or part of an agent's delegated authority.

There certainly may be cases where the pockets are so deep on the defendants' end, for instance, publicly traded corporations and the like, that pleading that the company, itself, is engaged in a common enterprise of sexual abuse with its corporate managers/employees will be justified. However, keep in mind that if insurance coverage is part of the risk/benefit assessment of your case, you will want to take care in how you construct each defendant's role in your pleading according to the facts you learn so you avoid turning the abuse by the abuser into an excuse to deny coverage for every insured defendant.

As with the notion discussed above about finding levels of separateness among various wrongful acts and offenses, consider that you may not want to *assume* that all the defendants in your action are 'the same' for purposes of determining insurance coverage under applicable insurance policies.

For example, the policy language defining the named insured and those who may qualify as additional insureds could create important distinctions, especially if the sexual abuser is *not* the actual "named insured" when engaging in acts that are not part of his "duties." The entity defendant on the policy who is the "first named insured," on the other hand, will always be the insured for all purposes. This fact becomes important because a number of policy exclusions will not apply to the entity defendant for incidents committed by the sexual abuser who was *not* acting in the "course and scope" of employment at the time of the abuse in order to qualify as an additional insured under the policy, even if the sexual abuser is an executive, owner, operator, agent, or employee of the entity defendant.

In a case we handled where abuse and molestation occurred when victims were *removed* and taken away from the premises and away from the "care, custody or control" of the defendant "named insured" entity, we were able to argue that the off-site incidents of abuse by the sexual abuser was outside of his "duties" during the sexual assault. The arguments then turned on the negligence of the named insured entity defendant and others in their failure to supervise, report, investigate the removal of women from the entity's care, custody and control.

Even though the corporate employee was accused of intentional abuse, the fact that abuse occurred outside the ordinary course and scope of employment better supports the arguments for negligence against the entity who was neglectful in its care toward the victims. Like the issues above for separating out different offenses, look for facts that isolate the abuse incident itself to the abuser separate from the "named insured" in the policy.

Cases hold that when an individual employee who is not the first "named insured" on the policy is accused of sexually molesting or abusing a client, he does not qualify as an "insured" under the policy for purposes of the sexual abuse or molestation claim because the sexual abuse or molestation is not within the "duties" or "course and scope" of employment. (*Baek v. Continental Casualty Co.* (2014) 230 Cal.App.4th 356, 365-367.) On the other hand, coverage will exist for the first "named insured" even though its employee is accused of engaging in sexual abuse or molestation of a victim – the "named insured" never loses its separate rights or protections as an "insured" under the policy. (*Minkler v. Safeco Ins. Co. of America* (2010) 49 Cal.4th 315.)

Minkler and homeowners policy coverage

In *Minkler*, a mother was insured under a series of homeowners policies and her adult son was an additional insured. After the adult son molested a minor in the mother's home, the mother was sued for negligent supervision and sought coverage for her conduct. Coverage was denied because the policy excluded coverage for bodily injury expected or intended by an insured or which was the foreseeable result of an act or omission intended by an insured. The court noted that "[a]bsent contrary evidence, in a policy with multiple insureds, exclusions from coverage described with reference to the acts of 'an' or 'any,' as opposed to 'the' insured are deemed under California law to apply collectively, so that if one insured has committed acts for which coverage is excluded, the exclusion applies to all insureds with respect to the same occurrence. [Citations.]" (*Id.* at 318.)

In that case, however, the policy declared that the insurance applied separately to each insured. The court held:

> "Applying California principles of insurance policy interpretation, we now conclude that an exclusion of coverage for the intentional acts of 'an insured,' read in conjunction with a severability or 'separate insurance' clause like the one at issue here, creates an ambiguity which must be construed in favor of coverage that a lay policyholder would reasonably expect. Given the language

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> of the 'separate insurance' clause, a lay insured would reasonably anticipate that, under a policy containing such a clause, each insured's coverage would be analyzed separately, so that the intentional act of one insured would not, in and of itself, bar liability coverage of another insured for the latter's independent act that did not come within the terms of the exclusion. We thus determine that [the mother] was not precluded from coverage for any personal role she played in [the adult son's] molestation of [the minor] merely because [the adult son's] conduct fell within the exclusion for intentional acts."

(*Id.* at 319.)

When evaluating coverage in sexual-assault cases, you should look for a "severability" clause like the one found in *Minkler*. Some policies expressly state that the entity defendant must be treated and considered *separately* from its individual employees. Keep in mind that an insurance policy's coverage provisions must be interpreted broadly to afford the insured the greatest possible protection, while a policy's exclusions must be interpreted narrowly against the insurer. (*MacKinnon v. Truck Ins. Exchange* (2003) 31 Cal.4th 635, 648.) The exclusionary clause must be "'conspicuous, plain and clear.'" (*State Farm Mut. Auto. Ins. Co. v. Jacober* (1973) 10 Cal.3d 193, 202.) "This rule applies with particular force when the coverage portion of the insurance policy would lead an insured to reasonably expect coverage for the claim purportedly excluded." (*MacKinnon, supra*, 31 Cal.4th at 648.)

While the insured has the burden of establishing the claim comes within the scope of coverage, the insurer has the burden of establishing the claim comes within an exclusion. (*Ibid.*) To prevail, the insurer must establish its interpretation of the policy is the only reasonable one. (*Id.* at 655.) Even if the insurer's interpretation is reasonable, the court must interpret the policy in the insured's favor if any other reasonable interpretation would permit coverage for the claim. (*Ibid.*)

The negligent acts of an employer defendant

Carriers have a duty to defend and indemnify their insured for cases involving sexual assault where the injuries can be attributed to the negligent acts of the employer defendant. We have seen a number of sexual-molestation cases where the insurer has tendered full policy limit for settlement purposes. The common feature is that the named insured organization failed to take reasonable steps to investigate, supervise, or prevent the molestation from occurring. In considering whether an insurer has an obligation to cover an insured-employer whose employee engaged in sexual abuse, the California Supreme Court has explained: "It is important to keep in mind that a cause of action for negligent hiring, retention, or supervision seeks to impose liability on the employer, not the employee. The district court appeared to recognize that in analyzing the potential for coverage, the focus is properly on the alleged negligence of… the insured employer. It is undisputed that [the employee's] sexual misconduct was a "wilful act" beyond the scope of insurance coverage under Insurance Code section 533. (*J. C. Penney Casualty Ins. Co. v. M. K.* (1991) 52 Cal.3d 1009, 1025.) However, [the employee's] intentional conduct does not preclude potential coverage for [the insured employer]." (*Liberty Surplus Ins. Corp. v. Ledesma & Meyer Construction Co., Inc.* (2018) 5 Cal.5th 216, 222.)

In *Gonzalez v. Fire Ins. Exch.* (2015) 234 Cal.App.4th 1220, the umbrella policy included an exclusion which excluded damages arising out of molestation or abuse of any person. The umbrella insurer relied upon the molestation or abuse exclusion to deny coverage. The Court found that the molestation or abuse exclusion did not terminate the insurer's defense duty, stating that "it is up to the insurer to conclusively show an exclusion to the policy applies barring coverage." (*Ibid.*)

Be aware of the cases that have excluded coverage for sexual abuse or molestation and identify ways to distinguish your case by drawing stronger connections between the injuries and the negligent conduct committed by the entity defendant. For instance, in *Coit Drapery Cleaners, Inc. v. Sequoia Ins. Co.* (1993) 14 Cal.App.4th 1595, the carrier asserted the argument that indemnification would not apply to the employer- company if the sexual misconduct was engaged in by the company CEO. However, the court in *Coit* had no basis to consider a tort theory against the employer based on claims akin to negligent supervision since no such cause of action was alleged in the complaint and the employee's counsel had conceded at an earlier point that negligent supervision was not the issue. (*Id.* at 1605; See *David Kleis, Inc. v. Superior Court* (1995) 37 Cal.App.4th 1035, 1049 [finding *Coit* distinguishable].)

Another case, *Jane D,* found that a priest accused of both sexual and non-sexual conduct was not the "named insured" and the Diocese was not sued as party in the action. Thus, in looking at the complaint, only the priest's conduct was at issue: the non-sexual and sexual conduct of the priest was considered "inseparably intertwined" and was part of the priest's intended effort to sexually abuse the victims. (*Jane D. v. Ordinary Mutual* (1995) 32 Cal.App.4th 643, 653.) None of the allegations or facts before the court in *Jane D*, afforded that court with the ability to consider the separable negligent conduct *of the Diocese* as a basis for determining coverage and a duty to indemnify the victims under the insurer's policy.

The takeaway from these cases is to build language into the complaint around the employer's or principal's negligence, separate from the incident of abuse itself, including its failure to supervise or care for the vulnerable victim or its failure to follow a reasonable standard of care related to the company's own policies, which

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eventually led to the abuser's actions and the victim's harm. A running theme in many of these cases that successfully achieved an outcome for coverage, is that the operative complaint contained allegations on their face that created separation from the sexual abuse, between and among the tortfeasors and/or the various offenses alleged. Because of the importance ascribed to the complaint when determining an insurer's duty to defend and settle a case, care should be taken to consider greater details surrounding the separate roles of each potential defendant, in order to maximize the potential for coverage.

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