dri™ The Voice of the Defense Bar

Covered Events

The newsletter of the Insurance Law Committee

3/7/2019 2019 Issue 2

Committee Leadership

In This Issue

Leadership Notes

From the Editor

By Shanda Pearson

I hope your 2019 is off to a fabulous start! Given I live in the land of the "polar vortex" I am hoping to fast-forward a couple of months to spring. I am taking solace in the fact that my favorite groundhog, Punxsutawney Phil, did not see his own shadow, predicting an early spring this year.

There is no better way to get ready for spring than to start making plans to attend DRI's Insurance Coverage and Claims Institute, April 3–5, 2019, at the Loews Hotel in Chicago. The seminar will feature a Wednesday afternoon session for in-house attorneys and claims professionals, a full day of programming on Thursday, and two breakout tracks on Friday that are sure to deliver something for everyone. With an all-star faculty, top-quality education programming, and prime networking opportunities all in the heart of Chicago, this seminar is not to be missed.

Until then, stay up-to-date on relevant issues with *Covered Events*. In addition to summaries on recent case law across the nation, this issue contains articles contributed by two of the Insurance Law Committee's Substantive Law Groups. Andrew Deutsch's article addresses "The $57 Million Dollar Question: Are GDPR Fines Insurable?" Florina Altshiler and Josh Kardisch's article discusses coverage issues related to sexual assault claims, a timely topic in light of the #MeToo movement.

Enjoy the issue!

Shanda Pearson is staff counsel for Federated Mutual Insurance Company in Owatonna, Minnesota.

From the Publications Chair

By Rina Carmel

Our Committee has so much going for it! At least two excellent seminars every year, online education, a vibrant Community page, unparalleled networking opportunities—and our top-quality publications.

New this year, many DRI publications are available online through LegalPoint, or through the DRI app. DRI members can easily search and read articles online. For authors, online content means more opportunity to get our names out there.

Contributing to publications is just as much a DRI and ILC membership benefit as receiving and reading them. We encourage you to join one of the ILC's many substantive law groups so that you learn of opportunities to write, and to let the ILC publications chairs and editors know of your interest.

Each year, we produce twelve issues of *Covered Events*, two dedicated issues of *For The Defense*, two dedicated issues of *In-House Defense Quarterly*, three columns for *The Voice*, and one to two 50-state surveys of key issues in coverage and bad faith law.

Covered Events

The ILC's flagship publication, *Covered Events*, contains articles discussing key trends in insurance law and practical tips. Articles are between 3,000 to 5,000 words and feature national research. We also publish short summaries of recent cases and new statutes of importance. For questions about publications standards and formatting, contact Tiffany Brown, the *Covered Events* editor in chief, at tbrown@meagher.com, or the *Covered Events* editors, Suzanne Whitehead at swhitehead@coughlinduffy.com, Patrick Omilian at pomilian@gerberciano.com, or Shanda Pearson at skpearson@fedins.com. To be considered to contribute, please join a substantive law group (ILC subcommittee) so that you are on the list of people solicited for content, or contact one of the *Covered Events* associate editors, Mike Pursell at mpursell@grsm.com, Lindsay Rollins at lrollins@

hancockdaniel.com, Albert Alikin at aalikin@goldbergse-galla.com, or Rob Friedman at rfriedman@hccw.com.

For The Defense

FTD is DRI's monthly magazine. The ILC's dedicated issues appear in May and October each year. The content consists of longer articles with a practical focus. These are excellent works that go out to DRI's entire membership. We solicit article proposals each spring and December. Contact Kelly Lippincott, the ILC's editor for *FTD*, at kml@carrmaloney.com, or the ILC's associate editors for *FTD*, Courtney Britt at cbritt@teaguecampbell.com, or Tanya Austin at taustin@bsctrialattorneys.com.

In-House Defense Quarterly

IDQ is DRI's magazine geared to in-house counsel, including insurance company professionals. The ILC's dedicated issues appear in Spring and Fall each year. We solicit article proposals each spring and December. Contact Rosa Tumialán, the ILC's editor for *IDQ*, at rtumialan@dykema.com, or the ILC's associate editor for *IDQ*, Meghan Ruesch at mruesch@lewiswagner.com.

The Voice

The Voice is DRI's weekly e-magazine, and it reaches the entire DRI membership. The ILC contributes three articles each year. To submit a proposal, contact the ILC's editors for The Voice, Bryana Blessinger at bryana.blessinger@bullivant.com, or Diane Davis at ddavis@ffllp.com.

Compendia

Our compendia, part of DRI's Defense Library Series, address the current state of the law on selected topics in insurance and bad faith law in each of the 50 states and other jurisdictions, written in either survey or essay format. They are indispensable resources for insurance attorneys. Recent compendia are available in LegalPoint. Elaine Pohl is our compendium chair and Brandon McCullough is our compendium vice chair. They maintain a current list of ILC members who are interested in contributing, either by serving as editors or researching and authoring chapters. If you have an idea for a compendium topic and/or would like to be considered to contribute, please provide your information to Elaine and Brandon so that we can contact you regarding opportunities. Their emails are epohl@plunkettcooney.com and mcculloughb@hh-law.com.

Publications Marketing

We want everyone to know about our outstanding publications, and for our authors to promote their contributions as well as DRI and the ILC! Mike Mills works with all of our editors, chairs and authors to ensure that we get the word out to our members, friends, colleagues and industry personnel. Contact Mike at mmills@blwmlawfirm.com if you have any questions about our publications marketing initiatives.

Please contact Rina Carmel, the ILC's publications chair, or Tim Wright, the ILC's publications vice chair, if you have a topic idea but are not sure what the best forum for publication is, or if you have any questions or suggestions about the ILC's publications program. Our emails are rc@amclaw.com and twright@hinshawlaw.com.

Last but not least, don't forget to register for the Insurance Coverage and Claims Institute, which will take place in Chicago, April 3–5, 2019. The brochure and registration information is available here or via at www.dri.org/education-cle.

Rina Carmel defends insurers against bad faith actions, and analyzes complex claims under all types of liability policies, including CGL, professional liability, excess and personal lines, as well as first-party property policies, and counsels insurers on claims handling and regulatory compliance. Ms. Carmel sits on DRI's Publications Board, and serves as publications chair for the Insurance Law Committee.

From the Excess, Umbrella and Surplus Substantive Law Group

By Andrew Deutsch

It seems hard to believe—especially writing this note just after many of us have endured some of the coldest weather in 20 years—but spring is just around the corner. The Excess, Umbrella, and Surplus Substantive Law Group is looking forward to excellent programming, networking opportunities, and meeting with friends new and old at the Insurance Coverage & Claims Institute in April. If you'll be at ICCI, I'd love to tell you more about our SLG, or one of the many other SLGs, and how being an SLG member can strengthen your practice, broaden your knowledge, and expand your network.

Our SLG's article this month looks at how insurance offerings in the excess and surplus markets could provide coverage for fines under the General Data Protection Regulation. If you're sick of hearing about GDPR (and honestly, aren't we all?), then remember that *Covered Events* presents an opportunity to submit articles on other insurance related topics. Having an opportunity to be published in *Covered Events* is one of the many benefits of membership in DRI's Insurance Law Committee. If you have an idea for a topic, or if you've recently dealt with an insurance issue that others are or will be facing, contact the individuals listed in Rina Carmel's note above about submitting an article. And what better way to participate in the Insurance Law Committee than to share your insights with your colleagues? Of course your article will also ensure that you don't have to hear more about GDPR.

See you in Chicago!

Andrew Deutsch is the Privacy Program Manager at nVent in Minneapolis, Minnesota. He is a co-chair of the Insurance Law Committee's Excess, Umbrella, and Surplus SLG. He has over a decade of insurance coverage experience, in private practice and in-house.

Featured Articles

The $57 Million Dollar Question: Are GDPR Fines Insurable?

By Andrew Deutsch

At the end of January, the French data protection authority, CNIL (la Commission Nationale de l'Informatique et des Libertés), fined Google € 50 million ($57 million) for violating the General Data Protection Regulation (GDPR). Perhaps not surprisingly, Google plans to appeal the decision. The fine against Google is notable because it's the first truly significant measure taken by a European data protection authority after GDPR became effective. But it's also significant for other reasons, including as a reminder that insurance coverage might play an important role in payment of any such fines.

This article looks at the recent decision against Google involving substantial fines and the lessons it offers for insurability of GDPR fines. There has been a lot of discussion and expert commentary about insurance policies not providing coverage for fines under GDPR in the European Union (EU). Coverage could be difficult to find for companies operating solely within the EU, especially in jurisdictions that do not allow such coverage. But there are ways that GDPR fines could be insured through offshore markets. Fines also may not be a concern for companies that have operations or subsidiaries outside the EU. And most favorable venue wording is also being used to address potential coverage gaps.

A Quick Refreshers on GDPR

By way of brief background, GDPR has been called "sweeping" and the "biggest ever change to data privacy laws." Aarti Shahani, NPR News: All Tech Considered, Three Things You Should Know About Europe's Sweeping New Data Privacy Law (May 24, 2018). The many different requirements in the multitudinous recitals and 99 articles are beyond the scope of this article.

For purposes of this discussion, what matters is that as of late May 2018, the regulation applies in all EU member states to (1) any entity established in the EU or (2) the

processing of personal data anywhere in the world related to (a) goods or services offered to persons in the EU or (b) monitoring the behavior of persons in the EU. *See* GDPR, Art. 3. Personal data is defined broadly to include any information relating to a natural person who is identified or who can be directly or indirectly identified by that information. GDPR, Art. 4(1). GDPR requires data controllers—an entity that decides how and why personal data is processed—and data processors, who process personal data on behalf of a controller, to take steps to protect the rights of data subjects in the EU. For example, controllers must provide information in a privacy policy or privacy notice to explain how personal data is collected, stored, and used. And GDPR prohibits processing of personal data without a specific lawful bases, one of which is consent from the data subject. GDPR, Art. 6.

The GDPR also has some serious consequences for those who do not comply with its requirements. Data protection authorities in each EU member state have the right to enforce violations of GDPR, as well as member states' related laws. Under GDPR, the potential fines are significant: up to € 20 million (about $23 million) or 4 percent of global revenue, whichever is higher. GDPR, Art. 83.

Just Google It

Google was the subject of two complaints made soon after GDPR became effective. The allegations involved claims that Android mobile device users were required to accept Google's privacy policy or risk not being able to use their device, and that Google did not have valid consent as a lawful basis for processing personal data for behavioral analysis and ad targeting. *See* CNIL Deliberation No. SAN-2019-001 (Jan. 21, 2019). But before getting to the substance of the decision, some of the procedural arguments are worth noting.

Google argued that CNIL lacked jurisdiction because Google's Irish subsidiary was the principle place of business in the EU. CNIL rejected that argument, finding that Google, LLC, a United States limited liability company in California, was the entity that dictated the terms of the privacy policy and made decisions about what to do with personal data in the EU. CNIL also noted that Google France, SARL had data on more than 27 million users and € 325 million in revenue. And because Google, LLC did not have a principle place of business in the EU, CNIL determined that it could validly exercise jurisdiction over Google.

Ultimately, CNIL found that Google had violated GDPR because its privacy policy and terms of use did not adequately explain how personal data was collected and used. CNIL also found that Google did not properly obtain consent from users to collect and use their personal data. Considering the scope of processing and the millions of users affected, CNIL found a fine of € 50 million appropriate. Although CNIL directed the decision to Google France, SARL, it ordered execution against Google, LLC.

The Trouble with Insuring GDPR Fines in the EU

The initial, near consensus view was that GDPR fines are not insurable in most EU member states. A paper written by authors from DLA Piper and Aon provides a good overview of the law in the EU on insurability of civil fines. Onno Janssen, Vanessa Leemans, Prakash Paran, Patrick Van Eecke, The Price of Data Security: A guide to the insurability of fines across Europe (May 2018). The authors conclude that only two countries, Finland and Norway, allow insurance for fines. Twenty of 30 countries reviewed, including the United Kingdom, France, Italy, and Spain, generally prohibit insurance for fines. In the remaining eight countries, the law was not clear or specific facts could influence a determination on insurability.

Other insurance brokers have also weighed in. Lockton published commentary stating that it's unlikely that GDPR fines are insurable. *See* Brett Warburton-Smith, General Data Protection Regulation Fines: Are They Insurable? (Accessed Jan. 31, 2019). Marsh was less certain but noted that there could be obstacles to obtaining coverage for GDPR fines. GDPR Fines and Penalties: Insurability Will Vary by Location, Policy, and Law (Sept. 2018). Additional commentary on insurability, and GPDR fines more generally, summarizes the view that insurance is probably not available under most circumstances. *See* Kevin LaCroix, Are GDPR Fines and Penalties Insurable? (Nov. 11, 2018). *See also* Bill Boeck, Guest Post: What Can the First GDPR Fines Tell Us? (Dec. 4, 2018).

For the time, regulators seem to have shied away from a direct response on insuring fines. The data protection authority for the United Kingdom, the Information Commissioner's Office, has declined to address the issue directly, stating only that education and remediation are preferred to levying fines. *See* William Shaw, Are GDPR Fines Insurable? UK Watchdog Won't Say, Law360 (Sept. 19, 2018). With the more stringent regulatory environment in EU coupled with the extensive public policy behind GDPR, it seems at least possible that regulators could actively oppose coverage for fines under the GDPR.

Potential Factors in Favor of Coverage for GDPR Fines

So there could be, at the least, potential issues for any company seeking insurance coverage for payment of fines in the EU. In particular, a company with operations exclusively inside the EU and within a jurisdiction that precludes insurance for fines would seem to be out of luck.

But even those companies might still be able to obtain coverage through offshore markets. Some companies have decided to seek excess cyber insurance in the Bermuda market where coverage for fines, penalties, and punitive damages is not prohibited. GDPR Already Influencing Cyber Insurance Buying (July 4, 2017). Underwriters at some insurers have also said that creative brokers have looked to Singapore and Latin America jurisdictions such as Mexico and Columbia to provide coverage for GDPR fines. Brokers Suggest Bermuda for Insuring GDPR Fines, Strategic Risk (June 13, 2018).

For multinational companies operating within the EU, however, the CNIL decision against Google suggests that European law might not play a role. Although Google operated a subsidiary in France, CNIL sought to punish Google, LLC, which is a United States company with its headquarters in California. And Google, LLC could, presumably, have a policy in California that provides coverage for regulatory fines.

At least some insurers have also been willing to provide "most favorable venue" wording for GDPR fines under insurance policies. *See* Daniel J. Struck, Is Your Cyber-Insurance Ready for GDPR? (May 29, 2018). Most favorable venue wording—often seen in cyber, errors and omissions, and directors and officers polices for punitive damages coverage—could be used to apply the law in the jurisdiction that has some connection to the insured, insurer, the risk, or damages and is most favorable for coverage. In a situation involving an insured with multinational operations, including some outside the EU, most favorable venue wording could be used to avoid application of law in the EU that would preclude coverage for GDPR fines.

Conclusion

The debate on insurability of fines under GDPR will likely continue. But the early analysis that coverage would not be available seems less certain. Companies that seek affirmative coverage for fines can likely find it in offshore markets. And with the first significant regulatory decision under GDPR against a multinational organization, the focus on EU jurisdictions may be misplaced. Most favorable venue wording will likely also expand to fill any potential gaps in coverage.

Andrew Deutsch is the Privacy Program Manager at nVent in Minneapolis, Minnesota. He is a co-chair of the Insurance Law Committee's Excess, Umbrella, and Surplus SLG. He has over a decade of insurance coverage experience, in private practice and in-house.

Sexual Assault: Is There Coverage for That?

By Florina Altshiler and Josh H. Kardisch


The #MeToo movement has brought greater attention to and support for victims of sexual abuse. As media outlets focus on allegations of pervasive misconduct, the public pushes state legislatures to lift or suspend time restrictions on criminal and civil actions. Recently, both chambers of the New York State Legislature responded to mounting pressure by unanimously: a) extending the statute of limitations to allow criminal charges against sexual abusers of children until their victims turn 28 for felony cases, up from the current 23; b) allowing victims to seek civil relief against their abusers and the institutions that enabled them until they turn age 55; and c) opening a one-year, one-time-only, window to allow victims to seek monetary compensation regardless of how long ago the abuse occurred[1]. As a result of this and similar legislation in other states, civil suits alleging sexual harassment will undoubtedly flourish. And while any litigation can adversely impact a company's and its insurance carrier's financial well-being, sex-based accusations create a particularly significant exposure, and the defending entity's ability to mitigate the associated

[1] https://www.cnn.com/2019/01/28/us/new-york-child-victims-act/index.html

costs may ultimately determine whether it survives. In December 2018, for example, USA Gymnastics filed for bankruptcy protection in response to litigation which emanated from Larry Nassar's sexual abuse of the young women charged to his care.[2]

In existence for many decades, general liability insurance has undergone numerous iterations. Commercial general liability ("CGL") insurance—previously known as comprehensive general liability—was designed to protect against losses arising from business operations. In the area of sexual misconduct, the determination of what qualifies as an insurable or insured event is usually not straightforward and requires a more nuanced approach. This article will discuss policy definitions and provisions, exclusionary language, and recent court rulings interpreting CGL insurance in the context of this burgeoning area of the law.

Sexually-based offenses can result in a variety of legal claims. When the accuser is an employee, a supervisor's or superior's unwanted advance, touching, or "joking" can yield a harassment action against the employer under the Civil Rights Act (Title VII)[3] and/or individual state and local laws which govern workplace conduct. If the victim is not an employee, an offender's conduct may still subject the company (whose governing personnel knew or should have known of the bad act(s)), to liability under a theory of negligent hiring and/or negligent supervision. For example, Benchmark Capital, an investor and shareholder in Uber, sued Uber's co-founder and ex-CEO Travis Kalanick.[4] The lawsuit asserted "fraud, breach of fiduciary duty, and breach of contract" for Kalanick's sexually-based offenses and failure to disclose same prior to Benchmark's investiture.

Duty to Defend

It is well-settled that an insurance carrier "owes a broad duty to defend its insured against claims that create a potential for indemnity."[5] To determine whether a duty to defend is present, courts compare the allegations of the complaint with the terms of the policy and look at "whether the underlying action for which defense . . . is sought potentially seeks relief within the coverage of the policy."[6] "If the alleged injuries are within the terms of the policy, then the duty to defend attaches regardless of the insurer's determination that the suit is without merit."[7] A duty to defend does not exist, however, when there is "no possibility of coverage."[8] So to decide this issue, courts must determine whether the underlying complaint potentially sought damages covered by the policy.[9]

Resolving the Question of Who Is The "Insured"?

The analysis of policy language focuses primarily on whether the defendant is an "insured," whether an "accident" constitutes an "occurrence," and whether the occurrence itself falls within the scope of the coverage and within the policy period. If these questions are answered in the affirmative, the inquiry turns to whether a valid exclusion operates—either explicitly or by interpretation—to vitiate coverage.

Deciding whether a policyholder qualifies as an "insured" is not always as easy as it seems. In fact, the Insurances Services Office, Inc. ("ISO") dedicated an entire section of the standard commercial general liability to answering that very question: "Section II – Who is an Insured?" Obviously, the person or entity identified on the declarations page as such is an insured, as well as the named insured's spouse, employees and volunteer workers. The term, however, does not typically include children of individual insureds.

To be considered an insured under an employer's policy, a person must have been acting within the scope of his/her employment and/or business at the time of the alleged occurrence. "Business conduct" includes acts arising from a trade, profession, or other occupation, as well as risks incidentally related to such conduct. Conduct is in the "scope of employment" only if: 1) it is of the kind the employee is hired to perform; 2) it occurs substantially within the time and space limits authorized or required by the work to be performed; and 3) it is activated at least in part by a purpose to serve the employer.

What Qualifies as an "Occurrence"?

The next step is to determine whether the claim qualifies as an "occurrence" which is covered by the CGL policy. An "occurrence" is typically defined as an "accident or continuous or repeated exposure to substantially the

2 https://www.cnn.com/2018/12/05/us/usa-gymnastics-files-for-bankruptcy/index.html

3 https://www.eeoc.gov/laws/statutes/titlevii.cfm

4 https://www.cnbc.com/2017/08/10/benchmark-sues-travis-kalanick.html

5 Cort v. St. Paul Fire and Marine Ins. Companies, Inc., 311 F.3d 979, 983 (9th Cir. 2002).

6 La Jolla Beach & Tennis Club, Inc. v. Indus. Indem. Co., 9 Cal. 4th 27, 44, 36 Cal. Rptr. 2d 100, 884 P.2d 1048 (Cal. 1994).

7 Farmer ex rel. Hansen v. Allstate Ins. Co., 311 F. Supp. 2d 884, 890-91 (C.D. Cal. 2004).

8 Waller v. Truck Ins. Exch., 11 Cal. 4th 1, 18, 44 Cal. Rptr. 2d 370, 900 P.2d 619 (Cal. 1995).

9 Montrose Chemical Corp. v. Superior Court, 6 Cal. 4th 291, 295 (Cal. App. 4th 1993).

same general harmful conditions" and an "accident" is "an unexpected happening without an intention or design." Thus, to answer the inquiry, one must determine whether the insured intended or expected the damage resulting from the event, and no coverage will exist where there is a scheme or plan, an expectation of damage, recklessness or an intentional act. The legal standard applied to decide whether the injury was "expected" or "intended" is generally subjective.

Exclusions and Exclusionary Language Applied

The "intentional act" exclusion is widely known but its scope varies with the relevant facts and circumstances and the jurisdiction interpreting the subject policy. Some states require that the insured subjectively intended to harm others for the exclusion to apply. Others consider whether the insured subjectively knew that the injury or damage was substantially certain to result from his acts. Still others look at whether the injury or damage was the natural and probable consequence of the insured's actions. Most importantly, sexual abuse or molestation is often presumed to be an act of intentional harm, subjective intent notwithstanding. While personal umbrella policies may grant broader coverage, most simply follow form, such that an intentional act exclusion in the underlying policy will apply to the umbrella policy as well.

Whether an intentional act can be attributed to the employer is incident-specific. If the employer, for example, instructs nightclub security guards to use force in performing their duties, the employer may be liable for a patron's injuries which result from the intentional use of such force. However, if the facts demonstrate that an employee was not furthering the purpose of the entity's business, the employer will not be liable for the intentional harm caused by the employee[10]. Further, the separation of insureds clause requires the insurer to view the policy exclusions for the employer and the employee separately.

In an attempt to circumvent the intentional act exclusion and find coverage, plaintiffs' attorneys frequently blame employers, parents or others in control or in a supervisory capacity for negligently hiring, maintaining or handling the offender. As a result, policies drafted more recently contain specific exclusions for claims of sexual "molestation," "physical abuse," and/or "sexual harassment." While older policies exclude acts based upon the status of the actor (*i.e.*, as an insured or employee of the insured), newer ones focus on the acts themselves, regardless of who the actor is.

The following language—which looks at the act, rather than the actor—is more common:

> EXCLUSION – SEXUAL ABUSE AND/OR MOLESTATION
>
> This endorsement modifies insurance provided under the following:
>
> COMMERCIAL GENERAL LIABILITY COVERAGE PART
>
> The following is added to SECTION I-COVERAGES, COVERAGE A BODILY INJURY AND PROPERTY DAMAGE LIABILITY, subsection 2. Exclusions; and COVERAGE B PERSONAL AND ADVERTISING INJURY LIABILITY, subsection 2.
>
> Exclusions:
>
> In consideration of the premium charged, this insurance does not apply to, and there is no duty on us to defend you for, "bodily injury," "property damage," "personal injury," "advertising injury," medical payments or any injury, loss or damages, including consequential injury, disease or illness, alleged disease or illness, "suit," expense or any other damages, for past, present or future claims arising out of:
>
> (1) the actual or threatened "abuse" or molestation or licentious, immoral or sexual behavior whether or not intended to lead to, or culminating in any sexual act, of any person, whether caused by, or at the instigation of, or at

[10] The New York Appeals Court held in RJC Realty Holding Corp. v. Republic Franklin Ins. Co., 2 N.Y. 3d 158 (N.Y. 2004), that where a spa employee was alleged to have committed a sexual assault against a customer, "... the alleged perpetrator of the assault was the insured's employee. If, as we must assume for the present purposes, the assault occurred at all, it was obviously expected or intended by the masseur, and not an accident from his point of view. Thus, the critical question is whether the masseur's expectation should be attributed to his employers, RJC. The parties here have agreed that the policy would cover only an 'accident' and would not apply to certain acts 'expected or intended' by RJC. When they did so, they could reasonably have anticipated that the rules of respondeat superior would govern the question of when a corporate entity is deemed to expect or intend its employee's actions. Since the masseur's actions here were not RJC's actions for the purposes of the respondeat superior doctrine (the masseur departed from his duties for solely personal motives unrelated to the furtherance of RJC's business), they were 'unexpected, unusual and unforeseen' from RJC's point of view, and were not 'expected or intended' by RJC. Accordingly, they were an 'accident', within the coverage for the policy, and were not excluded by the "expected or intended" clause." Of note, the court determined that the masseur "departed from his duties for solely personal motives unrelated to the furtherance of RJC's business"; had the Court found that RJC condoned or allowed the actions, the decision may have then attributed the intentional act to the employer.

the direction of, or omission by, any insured, his "employees," or any other person; or,

(2) the actual or alleged transmission of any communicable disease; or,

(3) charges or allegations of negligent hiring, employment, investigation, supervision, reporting to the proper authorities, or failure to so report; or retention of a person for whom any insured is or ever was legally responsible and whose conduct would be excluded by paragraph (1) above.

"Abuse" includes, but is not limited to, negligent or intentional infliction of physical, emotional or psychological injury/harm. For the sake of clarity, where this insurance does not apply and there is no duty on us to defend you, there is also no coverage and no duty on us to defend any additional insured.

In many states, including California, insurers generally have the burden of proving that an otherwise covered claim is barred by a specific policy exclusion[11]. "If the contractual language is clear and explicit, it governs," but "if the terms are ambiguous . . . [California courts] interpret them to protect the objectively reasonable expectations of the insured."[12] As such, "clauses setting forth specific exclusions from coverage are interpreted narrowly against the insurer."[13]

In examining the exclusions, one must keep in mind that "reasonable policy exclusions not in conflict with statute will be enforced; to be effective, the exclusionary language must clearly and unambiguously bring the particular act or omission within its scope."[14] Moreover, "insurance policies are to be construed according to their terms and provisions and are to be considered as a whole. Where there is doubt or uncertainty and where the language of a policy is susceptible of two constructions, it is to be construed liberally in favor of the insured and strictly against the insurer. Where two interpretations equally fair may be made, the one that permits a greater indemnity will prevail because indemnity is the ultimate object of insurance."[15]

Policies generally do not define every term and "undefined contract terms are given 'their ordinary meaning' in light of 'the contract as a whole.'"[16] While the occurrence of "sexual molestation" may be obvious, a coverage question may arise if the conduct is termed "harassment." To address this issue, policies may use the following exclusion:

EXCLUSIONS: We do not cover: Sexual molestation, sexual harassment, corporal punishment, or physical or mental abuse by any insured.

This exclusion limits conduct to an "insured," and potentially excludes coverage for failing to supervise a child that an "insured" babysits or an adult's misconduct while visiting the home. However, the specific wording of this exclusion suggests that "molestation" and "harassment" are different conduct and need to be addressed by different policy language.

In determining coverage, exclusions are narrowly tailored to the conduct itself. It is therefore crucial to address plaintiff's specific allegations to understand whether an exclusion may apply. Thorough questioning in the investigation stage and via depositions is critical to ascertaining the status of the actor ("insured" vs. non-insured), and the classification of conduct.

To address potential coverage issues and minimize disputes over unique language, many policies follow the standard ISO form. While some policies cover a broad spectrum of scenarios, there is also more specific coverage which excludes certain situations. Professional liability coverage, for example, does not apply to anything other than the profession identified in the policy (*i.e.*, medical malpractice insurance, for example, only covers negligence in the provision of medical care and treatment). These policies do not cover the refusal to hire or the termination of the complainant or employment-related practices, policies, acts and/or omissions (such as coercion, demotion, evaluation, reassignment, discipline, defamation, sexual harassment, humiliation or discrimination). This type of exclusionary policy only applies to the professional's liability and his/her obligation to share damages with or repay someone else who must pay damages. A professional liability policy also does not cover acts arising in the course of sexual therapy, even where sexual contact is a form of treatment. Further, a professional liability policy does not cover anything arising from allegations of physical and/or sexual abuse. However, if the allegation is claimed to be unfounded and the insured does not admit guilt, the insurance carrier may in some situations elect to provide a defense subject to a reservation of rights as to indemnification. Similarly, while no insurance policy covers an illegal act, the carrier may

[11] Travelers Cas. & Sur. Co. v. Superior Court, 63 Cal. App. 4th 1440, 1453, 75 Cal. Rptr. 2d 54 (Cal. Ct. App. 1998).

[12] Minkler v. Safeco Ins. Co. of America, 49 Cal. 4th 315, 321, 110 Cal. Rptr. 3d 612, 232 P.3d 612 (2010).

[13] Id. at 322.

[14] Floyd v. Northern Neck Ins. Co., 427 S.E.2d 193, 196, 245 Va. 153, 158 (1993).

[15] Central Surety & Ins. Corp. v. Elder, 204 Va. 192, 192, 129 S.E.2d 651 (1963).

[16] Bartolomucci v. Fed. Ins. Co., 289 Va. 361, 371, 770 S.E.2d 451, 456 (2015).

decide to defend while reserving rights to deny coverage if an individual is ultimately found guilty or there is sufficient indication that an illegal act occurred.

The *Diocese* Case as an Example: New York Court of Appeals

New York State's highest court, the Court of Appeals, in 2013 addressed the availability of insurance coverage for sexual abuse claims in *Roman Catholic Diocese of Brooklyn v. National Union Fire Ins. Co. of Pittsburgh, PA*.[17] In the underlying case, the diocese sued the respondent insurer, seeking a declaration that the insurer was required to indemnify the diocese for a $2 million settlement with a minor plaintiff of a claim alleging acts of sexual abuse by a priest. The trial court denied the insurer's motion for partial summary judgment and granted the diocese's cross-motion. The Supreme Court of New York, Appellate Division, Second Department, reversed. The specific allegations involved sexual abuse of the minor plaintiff multiple times during a six-year period, at a number of locations. Plaintiffs asserted theories of liability against the diocese based in negligence.

The policies at issue provided coverage for each occurrence in the policy period after the first $250,000 (self-insured retention), with a liability cap. The appellate court held initially that the policies' SIR was not subject to the notice requirements of Insurance Law §3420(d) because they did not bar coverage or implicate policy exclusions. Further, nothing in the language of the policies, nor the definition of "occurrence," evinced an intent to aggregate the incidents of sexual abuse into a single occurrence. Applying the unfortunate event test, the incidents within the underlying action constituted multiple occurrences. Incidents of sexual abuse that spanned a six-year period and transpired in multiple locations lacked the requisite temporal and spatial closeness to join the incidents. Moreover, the incidents were not part of a singular causal continuum. The diocese was required to exhaust the SIR for each occurrence that transpired within each policy from which it sought coverage[18].

National Union provided primary insurance to the diocese and issued three consecutive one-year commercial general liability policies for August 31, 1995 to August 31, 1996; August 31, 1996 to August 31, 1997; and August 31, 1997 to August 31, 1998. Non-party Illinois National Insurance Company provided primary coverage for the next three years from August 31, 1998 to August 31, 2001. Defendant Westchester Fire Insurance Company, who settled with the diocese and was not a party on this appeal, provided excess umbrella coverage for all seven years under consecutive annual policies. The National Union policies provide coverage for damages resulting in bodily injury during the policy period and include a liability limitation of $750,000 and a $250,000 self-insured retention (SIR) applicable to each occurrence. The parties, thus, agreed that for each occurrence resulting in bodily injury within the policy period, National Union would be liable for covered damages after the first $250,000 (in excess of the SIR), and its liability would cap at $750,000.

When the diocese sought coverage under the 1996–1997 and 1997–1998 National Union policies, National Union responded by letter dated July 15, 2004, disclaiming coverage based on two exclusionary provisions referring to sexual abuse and also asserted that the "policies have $750,000 policy limits over a $250,000 self-insured retention," and coverage is applicable only if the "bodily injury" occurred during the policy period. In response to a subsequent request for coverage under the 1995–1996 policy, National Union again disclaimed coverage in a December 1, 2004 letter, based on the previously cited exclusionary provisions.

In January 2009, the diocese sought a declaratory judgment that National Union was required to indemnify the diocese for the $2 million settlement and certain defense fees and costs, up to the liability limits of the 1995–1996 and 1996–1997 policies. National Union then asserted two affirmative defenses relevant to the appeal. First, it claimed that "to the extent coverage exists for plaintiffs' claim, it is subject to multiple self-insured retentions under the Policies." Second, it asserted that its "coverage obligation is limited by the availability of other 'valid and collectible' insurance for which plaintiffs may be entitled to coverage."

National Union moved for partial summary judgment, seeking an order that the incidents of sexual abuse in the underlying action constituted a separate occurrence in each of the seven implicated policy periods, and required the exhaustion of a separate $250,000 SIR for each

---

[17] Roman Catholic Diocese of Brooklyn v. National Union Fire Ins. Co. of Pittsburgh, PA., 21 N.Y.3d 139, 991 N.E.2d 666, 969 N.Y.S.2d 808, 2013 N.Y. LEXIS 1186, 2013 NY Slip Op 3264, 2013 WL 1875302. See also the subsequent 2017 State Court decision, National Union Fire Ins. Co. of Pittsburgh, PA v. Roman Catholic Diocese of Brooklyn, 2017 N.Y. Misc. LEXIS 687, 2017 NY Slip Op 30368(U).

[18] Roman Catholic Diocese of Brooklyn v. National Union Fire Ins. Co. of Pittsburgh, PA., 21 N.Y.3d 139, 143, 991 N.E.2d 666, 668, 969 N.Y.S.2d 808, 810, 2013 N.Y. LEXIS 1186, *2, 2013 NY Slip Op 3264, 1, 2013 WL 1875302

occurrence covered under a policy from which the diocese sought coverage. National Union also sought a ruling requiring that the $2 million settlement be paid on a pro rata basis across each of the seven policies. In opposition, the diocese argued that the sexual abuse constituted a single occurrence requiring the exhaustion of only one SIR, and that allocation of liability should be pursuant to a joint and several allocation method under which the entire settlement amount could be paid for with National Union's 1995–1996 and 1996–1997 policies. The diocese also cross-moved for partial summary judgment, seeking a declaration that National Union waived the two affirmative defenses by failing to timely include those bases in their notices of disclaimer of coverage.

The Appellate Division reversed the order of Supreme Court (which had denied summary judgment), declaring that the alleged acts of sexual abuse constituted multiple occurrences, and that the settlement amount should be allocated on a pro rata basis over the seven policy periods, requiring the concomitant satisfaction of the SIR attendant to each implicated policy (87 AD3d 1057, 930 NYS2d 215 [2011]). The court granted the diocese leave to appeal (2012 N.Y. App. Div. LEXIS 9880, 2012 NY Slip Op 64632[U] [2012]), and certified the following question to the Court of Appeals: "Was the decision and order of this court dated September 20, 2011, properly made?" The Court of Appeals answered in the affirmative.

The Appellate Division, Second Department, held unanimously in National Union's favor and reversed the trial court, stating:

- the pro rata allocation methodology which the Court of Appeals approved in *Consolidated Edison Co. of New York, Inc. v Allstate Insurance Co.*, 774 N.E.2d 687 (2002) was consistent with the allegations of "bodily injury," and with the clear and unambiguous language of the CGL policies. Further, the Second Department noted that the allocation method advocated by the Diocese, the "joint and several" method, conflicted with both New York law and the CGL policies' requirement that any "bodily injury" take place during the applicable policy period to be covered (but not before or after that period). Thus, because victim allegedly sustained "bodily injury" during several different policy periods in a six-year span, the Appellate Court held that the Diocese's settlement must be allocated on a *pro rata* basis across all of the periods;
- the subject acts of sexual abuse constituted multiple occurrences under New York's "unfortunate events" test because they occurred over many years, at different times, and at various locations. Accordingly, the Appeals Court held that the Diocese was required to exhaust a separate $250,000 SIR for each CGL policy, and it rejected the Diocese's argument that the policies' definition of "occurrence" should be construed as permitting it to aggregate the multiple acts of sexual abuse as a single occurrence; and
- the requirement that a carrier timely disclaim coverage under §3420(d) did not apply to National Union's SIR-based defense. The Appellate Court relied upon the statute's plain language and two Appellate Division, First Department, decisions on the issue. The court further found that National Union did not waive its right to assert an affirmative defense related to the CGL policies' "Other Insurance" clause, or its argument that the Diocese's settlement be allocated on a pro rata basis across all seven policy periods.

The Court of Appeals affirmed the Second Department's decision, ruling that National Union had not waived its "multiple occurrence" argument, that the diocese was required to exhaust a separate $250,000 SIR per occurrence for each CGL policy, and that the diocese's settlement must be allocated across each of the seven policy periods. The court noted that while §3420(d) precludes an insurer from denying coverage where the bases are not timely asserted, the statute does not apply to defenses that simply limit the insurer's ultimate liability.

Turning to the merits, the court addressed whether the several acts of sexual abuse constitute multiple occurrences. This is the first time the court addressed the meaning of "occurrence" in the context of claims based on numerous incidents of sexual abuse of a minor by a priest, which spanned several years and several policy periods. It is well established that "[i]n determining a dispute over insurance coverage, [the court] first look to the language of the policy"[19]. In doing so, a court must "construe the policy in a way that 'affords a fair meaning to all of the language employed by the parties in the contract and leaves no provision without force and effect'"[20].

The court adopted the "unfortunate event" test, specifically rejecting other approaches that would equate

[19] Consolidated Edison Co. of N.Y., Inc. v Allstate Ins. Co., 98 NY2d 208, 222, 774 N.E.2d 687, 746 NYS2d 622 (2002), citing Breed v Insurance Co. of N. Am., 46 NY2d 351, 354, 385 N.E.2d 1280, 413 NYS2d 352 (1978)

[20] Id. (quoting Hooper Assoc. v AGS Computers, 74 NY2d 487, 493, 548 N.E.2d 903, 549 NYS2d 365 (1989)).

the number of occurrences with either "the sole proximate cause" or by the "number of persons damaged"[21].

In looking at the language of the policies and the definition of "occurrence," the court determined that nothing evinces an intent to aggregate the incidents of sexual abuse into a single occurrence. Applying the unfortunate event test the court concluded that the incidents of sexual abuse within the underlying action constituted multiple occurrences[22]. The court explained that while the incidents shared an identity of actors, "it cannot be said that an instance of sexual abuse that took place in the rectory of the church in 1996 shares the same temporal and spatial characteristics as one that occurred in 2002 in, for example, the priest's automobile"[23].

In the court's view, sexual abuse does not fit neatly into the policies' definition of "continuous or repeated exposure" to "conditions." This "sounds like language designed to deal with asbestos fibers in the air, or lead-based paint on the walls, rather than with priests and choirboys. A priest is not a 'condition' but a sentient being."[24] The settlement in the underlying claim addresses harms for acts by a person employed by the diocese. The diocese's argument that the parties intended to treat numerous, discrete sexual assaults as an accident constituting a single occurrence involving "conditions" is simply untenable.

The diocese analogized this case to *State Farm Fire & Cas. Co. v Elizabeth N.*, 9 CalApp4th 1232, 12 Cal Rptr 2d 327 (1992), in which two children attending a day care center "had been sexually molested over a period of a month or more." 9 Cal App 4th at 1235, 12 Cal Rptr 2d at 328. There, the Court of Appeals for the First District, Division 3, of California held that the multiple instances of sexual molestation constituted a single occurrence for insurance coverage purposes. The New York Court of Appeals declined to follow that holding because of what they believed to be "materially distinguishable differences." The policy in *Elizabeth N.* expressly provided that "[a]ll bodily injury and property damage resulting from any one accident or from continuous or repeated exposure to substantially the same general conditions shall be considered to be the result of one occurrence." 9 Cal App 4th at 1236, 12 Cal Rptr 2d at 329. There is no language within National Union's policies indicating an intent to aggregate the sexual abuse into a single occurrence. Second, and more significantly, the parties in *Elizabeth N.* "agree[d] that the number of occurrences depends on the cause of injury rather than the number of injurious effects." Id. at 1236-1237. The California Court of Appeal reasoned that the negligent failure of the day care owner to adequately care for, and supervise the children, subjected them to repeated molestation by the perpetrator. See 9 Cal App 4th at 1238, 12 Cal Rptr 2d at 330. New York, however, typically applied the unfortunate event test, an

---

[21] Generally, the issue of what constitutes an occurrence has been a legal question for courts to resolve. See Hartford Acc. & Indem. Co. v Wesolowski, 33 NY2d 169, 305 N.E.2d 907, 350 NYS2d 895 (1973); Arthur A. Johnson Corp. v Indemnity Ins. Co. of N. Am., 7 NY2d 222, 227, 164 N.E.2d 704, 196 NYS2d 678 (1959).

[22] The Court stated "Clearly, incidents of sexual abuse that spanned a six-year period and transpired in multiple locations lack the requisite temporal and spatial closeness to join the incidents." See Johnson, 7 NY2d at 230 ("(W)e conclude that the collapses of separate walls, of separate buildings at separate times, were in fact separate disastrous events, and, thus, two different accidents within the meaning of the policy").

[23] Moreover, the Court opined that the incidents are not part of a singular causal continuum. The causal continuum factor is best illustrated by the facts of Wesolowski, 33 NY2d 169, 305 N.E.2d 907, 350 NYS2d 895 (1973). In that case, this Court held that a three-car collision amounted to a single occurrence "[w]here the insured's automobile struck one oncoming vehicle, ricocheted off and struck a second more than 100 feet away." 33 NY2d at 170. Under those facts, "the two collisions here occurred but an instant apart" and "[t]he continuum between the two impacts was unbroken, with no intervening agent or operative factor." Id. at 174 (emphasis added). Thus, contrary to the Diocese's and dissent's view that the negligent supervision was the sole causal factor, and thus requires a finding of a single occurrence, the unfortunate event test requires us to focus on "the nature of the incident[s] giving rise to damages." Appalachian, 8 NY3d at 171; see also H.E. Butt Grocery Co. v National Union Fire Ins. Co. of Pittsburgh, 150 F.3d 526, 531 (5th Cir. 1998); Interstate Fire & Cas. Co. v Archdiocese of Portland in Oregon, 35 F.3d 1325, 1329-1330 (9th Cir. 1994). As stated in Appalachian, "cause should not be conflated with the incident." 8 NY3d at 172. Accordingly, where, as here, each incident involved a distinct act of sexual abuse perpetrated in unique locations and interspersed over an extended period of time, it cannot be said, like the uninterrupted, instantaneous collisions in Wesolowski, that these incidents were precipitated by a single causal continuum and should be grouped into one occurrence.

[24] Lee v. Interstate Fire & Cas. Co., 86 F.3d 101, 104 (7th Cir. 1996); see also Champion Intl. Corp. v Continental Cas. Co., 546 F.2d 502, 507-508 (2d Cir. 1976) (Newman, J., dissenting) (noting that an "exposure to conditions" involves physical exposure to "phenomenon such as heat, moisture, or radiation"); ExxonMobil, 15 Misc 3d 144[A], 2007 NY Slip Op 51138[U] ("the purpose of a continuous exposure clause is to combine claims that occur 'when people or property are physically exposed to some injurious phenomenon such as heat, moisture, or radiation'").

inquiry primarily focused on "the nature of the incident[s] giving rise to damages." *Wesolowski*, 33 NY2d at 170.

Consequently, the court determined that the diocese must exhaust the SIR for each occurrence that transpires within an implicated policy from which it sought coverage. To permit the diocese to exhaust a single SIR and then receive coverage from up to seven different policies would conflict with the plain language of the policies, and produce an outcome not intended by the parties. The court rejected this attempt by the insured to escape the consequences of its bargained for insurance policy provisions.

Finally, with respect to allocation of liability, relying on its earlier decision in *Consolidated Edison*[25], the court addressed the distinction between the joint and several allocation and pro rata allocation methods. A joint and several allocation permits the insured to "collect its total liability . . . under any policy in effect during" the periods that the damage occurred (98 NY2d at 222), whereas a pro rata allocation "limits an insurer's liability to all sums incurred by the insured during the policy period." A pro rata allocation is consistent with the language of the policies at issue here. By example, National Union's 1995-1996 policy provides coverage for bodily injury only if the bodily injury "occurs during the policy period" and is caused by an "occurrence." Plainly, the policy's coverage is limited only to injury that occurs within the finite one-year coverage period of the policy. To that end, assuming that the minor plaintiff suffered "bodily injury" in each policy year, it would be consistent to allocate liability across all implicated policies, rather than holding a single insurer liable for harm suffered in years covered by other successive policies. There is no indication that the parties intended that the diocese's total liability for bodily injuries sustained from 1996 to 2002 would be assumed by a single insurer. Furthermore, like *Consolidated Edison*, a joint and several allocation is not applicable in this case as the diocese cannot precisely identify the sexual abuse incidents to particular policy periods.

The Impact of the *Diocese* Decision in New York and Beyond

The above decision could have a significant impact on future insurance coverage disputes. This was the first time that New York's highest court addressed whether an insurer can waive its right to assert an argument based upon the number of occurrences or whether a particular allocation method should be employed. Because these issues often arise in coverage disputes, this prong of the court's decision has implications beyond the CGL context. Had the court of appeals adopted the diocese's waiver argument, carriers could have faced enormous pressure to assert their positions on this defense in the initial coverage positions they communicate to their insureds or risk waiving them.

This decision was also the first in which the New York Court of Appeals addressed the number of occurrences and allocation issues in the context of conduct-based offenses such as sexual assault and misconduct. Accordingly, the court's holding will likely have implications to similar coverage disputes arising under New York law. Nationwide, case law is less developed and courts in other jurisdictions may look to these New York court holdings for guidance on policy interpretation and application.

Most significantly, for other jurisdictions, is the finding that the "continuous or repeated exposure" language in the CGL policies' definition of "occurrence" did not allow the diocese to aggregate multiple acts of sexual abuse into a single occurrence, something that the Court held to be more appropriate in asbestos exposure and lead poisoning cases. Unlike New York State, many state courts do hold that claims involving multiple injuries or acts nonetheless constitute a single occurrence under CGL policy wording if the injuries/acts can be traced back to a single cause. In reaching that conclusion, these courts sometimes rely upon the same definition of "occurrence" contained in the *Diocese* CGL policies, which includes "continuous or repeated exposure to the same general harmful conditions." Thus, the court of appeals ruling on the "number-of-occurrences" issue may influence how other jurisdictions which employ the "sole cause" test determine the issue.

The Takeaway

Over the past decade, it has become routine for liability insurance companies to deny coverage for sexual assault claims, often on the theory that the act alleged is intentional in nature and not an "occurrence" which can trigger coverage.[26] Many policies adopt the definition of

[25] 98 NY2d 208, 774 N.E.2d 687, 746 NYS2d 622 (2002)

[26] See e.g., Green Chimneys School for Little Folk v. Nat'l Union Fire Ins. Co. of Pittsburgh, PA, 244 A.D.2d 386, 664 N.Y.S.2d 320 (1st Dep't 1997); Public Mutual Ins. Co. v. Camp Raleigh, Inc., 233 A.D.2d 273, 650 N.Y.S.2d 136 (1st Dept. 1996) ("the inclusion in the underlying complaint of causes of action sounding in negligent hiring and supervision does not alter the fact that "the operative acts giving rise to any recover are the intentional sexual assaults'."). But see Public Service Mut. Ins. Co. v. Goldfarb, 53 N.Y.2d 392, 399, 425 N.E.2d 810, 442 N.Y.S.2d 422 (N.Y. 1981) (holding that "[w]hether [coverage for underlying sexual abuse] is permissible depends upon

"occurrence" which requires that a claim arise from an "accident." Whether allegations of sexually-based offenses are encompassed by the term "accident" under these policies, then, will determine whether there is coverage. The answer is not a simple "no"; an in-depth analysis of the policy language and facts and circumstances, as alleged, must take place to make a determination.

Until recently, the law in New York and elsewhere seemed settled that sexual assault can never be an "accident." The New York Court of Appeals, however, has called the holdings in those cases into question.[27] Thus, it is possible that arguments in favor of coverage may exist for sexual abuse and other intentional torts even when a policy's definition of "occurrence" requires an "accident."

Florina Altshiler is the Lead Attorney for the Buffalo, NY office of Russo & Toner LLP, specializing in litigation. She handles the defense of medical malpractice, labor law, premise and general negligence matters. She is the exclusive Legal Analyst for WKBW ABC News and an instructor of trial advocacy, torts, and legal research and writing at schools including Columbia University in the City of New York, Buffalo State College and Daemen College. She has been quoted and published throughout the country, including the Chicago Tribune, the Buffalo News, the Daily Beast, the New York Law Journal and BBC. She frequently presents for Lawline, ClearLaw Institute, NITA and various Bar Associations. Florina is a member of the Buffalo Claims Association, a Board Member of the Defense Trial Lawyers Association and a Local Director of the Western NY Chapter of the Women's Bar Association of NY.

Josh H. Kardisch, Esq., is Of-Counsel to Russo & Toner, LLP, and is located in the New York City office. For the past 30 years, Mr. Kardisch has been defending claims of workplace discrimination, retaliation, and sexual harassment, and has been litigating the related insurance coverage issues. Mr. Kardisch also advises businesses on proper workplace practices and programs designed to curtail litigation, and he prepares employment handbooks, severance agreements and non-compete clauses/restrictive covenants.

whether the insured, in committing his criminal act, intended to cause injury").

[27] See RJC Realty Holding Corp. v. Republic Franklin Ins. Co., 2 N.Y.3d 158, 777 N.Y.S.2d 4 (2004) ("RJC"). In RJC, the insurer of a health spa was denied coverage for an action in which a customer of the spa alleged a sexual assault by a masseur. The policyholder in RJC sought insurance coverage for claims by the customer against the spa including, among others, negligent hiring, supervision and retention of the masseuse.

Case Summaries

Fifth Circuit

Tripartite Relationship (TX)

The Fifth Circuit ruled that an insured's personal counsel was immune from a lawsuit brought by an excess insurer alleging that the firm was liable for negligent misrepresentations in withholding information concerning the value of a case that went to trial and resulted in a large excess verdict. In *Ironshore Europe DAC v. Schiff Hardin, LLP*, No. 18 40101 (5th Cir. Jan. 2, 2019), the court ruled that the "attorney immunity doctrine" under Texas law shields an attorney against claims by a non-client based on negligent misrepresentations made in the course of an attorney's representation of a client. Whereas the Texas District Court had ruled that Schiff Hardin could not be liable for statements actually made in reports that were provided to the excess insurer but might be liable for omissions in its reporting, the Fifth Circuit ruled that both types of conduct were within the scope of client representation and therefore immune from suit under the theory of negligent misrepresentation set forth in Section 552 of the Restatement (2nd) of Torts.

Michael Aylward
Morrison Mahoney

Tenth Circuit

Bad Faith / Fees / Experts (OK)

The Tenth Circuit ruled in *Hamilton v. Northfield Ins. Co.*, No. 17 7049 (10th Cir. Dec. 18, 2018), that an Oklahoma trial court did not err in granting summary judgment to a property insurer on the insured's bad faith claim as Northfield had an objectively reasonable basis for its decision to deny coverage. Further, the court declined to find that the insured was the "prevailing party" and thus entitled to recover its costs and fees. The court distinguished between the offer of settlement that Northfield had communicated

in this case and "offers of judgment," declaring that offers of settlement need not include costs and fees. On the other hand, the Tenth Circuit rejected Northfield's cross-appeal that the insured's bad faith expert should have been precluded from testifying.

Michael Aylward
Morrison Mahoney

"Business Risk" Exclusions (OK)

The U.S. Court of Appeals for the Tenth Circuit ruled in *MTI, Inc. v. Employers Ins. Co.*, No. 17-6206 (10th Cir. Jan. 25, 2019), that the reference to "that particular part of property" in Exclusions J(5) and J(6) is ambiguous. In overturning an Oklahoma District Court's ruling that the insured was not entitled to coverage for the cost of restoring a tower that collapsed due to the corrosion of anchor bolts that the insured had installed, the Court of Appeals declared that "that particular part" was ambiguous because it could be read to refer solely to the direct object on which the insured was operating, as Employers had argued or, alternatively, could apply only to those parts of the project directly impacted by the insured's work. As a result, the court declared that only the damage to the anchor bolts was excluded and that the insured was entitled to coverage for the collapse of the tower itself.

Michael Aylward
Morrison Mahoney

California

Deductibles / Long-Tail / Stacking

The California Court of Appeal held in *Lexington Ins. Co. v. Timber Ridge Framing, Inc.*, D073412 (Cal. App. Jan. 31, 2019), that a trial court did not err in ruling that a building contractor was obliged to reimburse its liability insurer for two separate "per claim" deductibles, notwithstanding the insured's argument that California forbids stacking deductibles in long tail cases. In a lengthy but unpublished opinion, the Fourth Appellate District declared that the Lexington policy language required the insured to pay separate deductibles, despite the insured's argument that stacking is not permitted where multiple insurers cover a loss.

Michael Aylward
Morrison Mahoney

Idaho

Prior Publication Exclusion

Scout, LLC v. Truck Ins. Exch., --- P.3d ---, 2019 WL 347471 (Idaho Jan. 29, 2019).

The Idaho Supreme Court ruled that an insurer does not have to cover a pub's costs to defend a lawsuit alleging that the pub infringed a brewery's trademarks. In the underlying complaint, Oregon Brewing Company (OBC) accused the Boise-based pub owner, Scout, LLC (Scout), of infringing on OBC's federally registered trademarks. Scout posted an image of the allegedly infringing logo on Facebook in October 2012, approximately one month prior to acquiring its liability policy from Truck Insurance Exchange (Truck Insurance). Truck Insurance invoked its policy's prior publication exclusion, and refused to defend Scout in the OBC lawsuit.

Scout ultimately resolved the OBC lawsuit by agreeing to stop using the allegedly infringing material and re-branding its restaurant. Scout subsequently sued Truck Insurance, claiming that the coverage denial amounted to breach of contract and bad faith. However, the Idaho Supreme Court agreed with Truck Insurance and found that Scout's October 2012 Facebook post constituted a prior publication within the meaning of the exclusion. The Supreme Court found that the prior publication exclusion is unambiguous and "clearly indicates that if an injury arises after coverage is purchased, it will not be covered if the material was published prior to coverage." Therefore, the Supreme Court held that Truck Insurance's denial of coverage was not improper.

Charles W. Browning
Elaine M. Pohl
Patrick E. Winters
Plunkett Cooney

Iowa

First Party / "Efficient Proximate Cause"

The Iowa Supreme Court ruled in *City of West Liberty v. Employers Mut. Cas. Co.*, No. 16-1972 (Iowa Feb. 1, 2019), that a loss in which a gray squirrel climbed onto lines at electrical substation, causing electric arcing that substantially damaged municipal property, was excluded from coverage pursuant to the policy's "electrical current" exclusion. The court rejected the City's argument that even though arcing itself was excluded from coverage, coverage was required by the "efficient proximate cause"

doctrine. The court ruled that the efficient cause doctrine required two independent causes, one covered and one not, whereas in this case, the squirrel did not cause any damage, except through the electrical arcing.

Michael Aylward
Morrison Mahoney

Kansas

Notice / Consent Judgments

The Kansas Supreme Court has refused to forbid the insurer of an accident victim to pursue a garnishment action against the tortfeasor's auto insurer, holding in *Geer v. Eby* (Kan. Jan. 19, 2019), that even though the insurer received notice of the original accident, the failure to alert it to the subsequent suit established prejudice as a matter of law. Even though the original claims correspondence had contained a threat to file suit, the supreme court declined to find that such assertion gave rise to a duty on the part of the insurer to monitor court dockets for a subsequent case filing.

Michael Aylward
Morrison Mahoney

Montana

Consent Judgments

The Montana Supreme Court ruled in *Abbey/Land LLC v. Glacier Construction Partners LLC*, 2019 MT 19 (Mont. Jan. 29, 2019), that a $12 million consent judgment was collusive and thus unenforceable. Further, the supreme court declared that, because the trial court found collusion, it should have dismissed the claims against James River outright and, thus, erred in refashioning a remedy for the claimants and allowing them to pursue a demand for $2.4 million. In light of its finding that the underlying parties had "impermissibly colluded to expose Glacier to new liability by amending the parties' contract to expand the recoverable damages, stipulated to a confessed judgment for damages that attorneys for both parties had at different times criticized as lacking evidentiary basis, and terminated and 'shut up' anyone involved in the case who expressed contrary views," the court ruled that the trial court had abused its discretion in failing to dismiss the case outright. The supreme court affirmed the lower court's award of attorney's fees to James River, declaring that the equitable exception to the American Rule applied in this case.

Michael Aylward
Morrison Mahoney

New Hampshire

Auto / UM

The New Hampshire Supreme Court ruled in *Santos v. Metropolitan Property and Casualty Insurance Company*, 2017-0717 (N.H. Jan. 17, 2019), that a trial court did not err in holding that an insured's failure to purchase the requisite limits of underlying insurance for his motorcycle did not preclude recovery for excess UIM benefits from his umbrella carrier. Further, the court ruled that interpreting the excess policy to eliminate the UIM coverage would conflict with the insurance requirements set forth in RSA 264:15, As a result, the court ruled that, while Metropolitan could take a set off equal to the amount of coverage that should have been purchased, the insured's breach did not void coverage altogether.

Michael Aylward
Morrison Mahoney

New Jersey

First-party / Flood / Surface Water

Villamil v. Sentinel Ins. Co., No. 17-1566 (FLW) (D.N.J. Dec. 21, 2018)

New Jersey Federal Court Rules Damage to Salon from 200- to 500-Year Storm Not Covered.

Sentinel issued an insurance policy ("the Policy") to La Jolie Salon and Spa ("La Jolie"), a beauty salon in Princeton, New Jersey. La Jolie occupies two floors in the Hulfish Building. A descending stairwell, enclosed by three concrete walls, leads to La Jolie's lower floor, which is below the street level and accessible through a glass door entrance. A landing area with a drain inlet is located at the bottom of the stairwell; the stairwell, however, is not protected by a roof and is subject to direct entry of rains, snow and all elements.

The Policy provides coverage for the "physical loss or physical damage to Covered Property" "caused by or resulting from a covered Cause of Loss." However, the Policy does not provide coverage for damage or loss arising from "[f]lood, including the accumulation of surface water" or "[w]ater that backs up from a sewer or drain."

The Policy provides that "[s]uch loss or damage is excluded regardless of [whether] any other [covered] cause or event . . . contributes concurrently or in any sequence to the loss." Notwithstanding that exclusion, the Parties entered into a separate "Stretch" agreement, which provided a limited giveback for Sewer and Drain Back Up:

> 17. Sewer and Drain Back Up
>
> The following Additional Coverage is added:
>
> We will pay for direct loss of or physical damage to Covered Property solely caused by water that backs up from a sewer or drain. This coverage is included within the Covered Property Limits of Insurance.
>
> THIS IS NOT FLOOD INSURANCE
>
> We will not pay for water or other materials that back up from any sewer or drain when it is caused by any flood. This applies regardless of the proximity of the flood to Covered Property. Flood includes the accumulation of surface water, waves, tides, tidal waves, overflow of steams or other bodies of water, or their spray, all whether driven by wind or not that enters the sewer drain system.

On July 30, 2016, a severe thunderstorm, estimated to constitute a two hundred to five hundred year storm, resulted in five to seven inches of rain in two hours. Water pooled at the bottom of the stairwell next to La Jolie's lower floor entrance, and subsequently, leaked through the building's glass door entrance, damaging the building.

The following day, Plaintiffs reported to Sentinel that the building had "flooded," stating that extreme rain over the course of two hours flooded the entire lower level of the building.

Sentinel ultimately denied Plaintiffs' insurance claim on the basis "that the cause of loss was a flood." Plaintiffs sued Sentinel asserting breach of contract and bad faith. Sentinel moved for summary judgment asserting that Plaintiffs failed to demonstrate a genuine dispute of a material fact as to whether surface water contributed to the damage the building sustained.

The parties agreed a pool of water ultimately accumulated at the bottom of the stairwell that provides access to La Jolie's lower level entrance, and subsequently entered the premises through the glass door of the salon. However, the parties disputed whether the pooled water constitutes surface water, and in turn, how water accumulated at the bottom of the stairwell.

Sentinel contended the water that entered the salon resulted from an accumulation of "flood water." In support, Sentinel argued that Princeton's storm sewer system was overwhelmed by severe rain, which ultimately caused the street immediately outside of the Hulfish Building to flood. According to Sentinel, the flood water subsequently flowed over the curb of the street and down the stairwell, where it ultimately pooled prior to entering the premises through La Jolie's glass door. More importantly, Sentinel contended that rain water was able to form at the bottom of the stairwell as a result of the severe storm, because the "stairwell where the water collected" does not have a "roof above it and is subject to direct entry of rains, snow and all elements."

Plaintiffs argued that the water which ultimately entered the lower floor of the salon did not constitute surface water, because it originated from the roof of the building notwithstanding the fact it was rain water. According to Plaintiffs, the roof water subsequently entered the building's drain system, the volume of which caused "over pressurization" and, in turn, water flowed back out of the sink drains, toilets, and building's drains, including the drain which is located at the bottom of the stairwell.

Plaintiffs contended that no flood water entered the building. Plaintiffs argued that the building's pumps were equipped with backflow preventers, and, therefore, "none of the water that entered the building originated in the city's sewer system." While Plaintiffs acknowledged that the street directly outside of the building flooded, that water, as Plaintiffs argue, could not have accumulated at the bottom of the salon's stairwell. Plaintiffs averred that the street's eight-inch curb prevented the flood water from "flow[ing] over." Accordingly, because the only water which could have entered the building was non-flood water, Plaintiffs maintain that coverage was improperly denied.

For coverage to exist, the sewer and drain back up provision required Plaintiffs to show that the salon sustained damages "solely" from water that backed up from a sewer or drain. Stated differently, Plaintiffs bore the initial burden of demonstrating that flood water did not, in any way, contribute to the damages which the building sustained. Plaintiffs relied upon three experts to carry such a burden.

The court found that flood, as defined under the policy "include[d] the accumulation of surface water." In the Third Circuit, "surface water" means "waters on the surface of the ground, usually created by rain or snow, which are of a casual or vagrant character, following no definite course and having no substantial or permanent existence." Two of Plaintiffs' expert admitted that the water which accumulated in that area included flood water. Thus, even if the court presumed that non-flood water backed up from the lower level drain, the water which ultimately entered the

building also included an accumulation of flood water. As such, the expert reports did not support the fact that the damages which the salon sustained were solely the result of an accumulation of non-flood water.

In addition, the Policy contained anti-concurrent and anti-sequential provisions, which the court held applied. Moreover, the sewer back up and drain provisions explicitly stated "THIS IS NOT FLOOD INSURANCE" and that Sentinel "will not pay for water or other materials that back up from any sewer or drain when it is caused by any flood." Summary judgment was granted to Sentinel.

John R. Ewell
Hurwitz & Fine, PC

New York

Consequential Damages

D.K. Prop., Inc. v. National Union Fire Ins. Co. of Pittsburgh, PA., --- N.Y.S.3d ---, 2019 WL 237454 (N.Y. App. Div. Jan. 17, 2019).

A New York appellate court rejected the notion that there is a heightened pleading requirement for consequential damages claims arising out of an insurer's alleged failure to pay a property damage claim. Instead, the appellate court held that a consequential damages claim is properly plead when the claimant specifies the types of consequential damages claimed and that such damages were reasonably contemplated by the parties prior to contracting.

D.K. Property Inc. (D.K. Property) sought coverage under a National Union Fire Insurance Co. of Pittsburgh, PA.'s (National Union) commercial property policy for structural damage to its building allegedly resulting from construction work in an adjoining building. National Union neither paid the claim nor denied coverage and failed to provide a coverage determination, despite making allegedly unreasonable and burdensome requests to D.K. Property for information. D.K. Property filed suit against National Union for breach of contract and breach of implied covenant of good faith and fair dealing, which included claims for consequential damages for building repairs, lost rent and legal fees incurred to sue both the insurer and the company allegedly responsible for the property damage.

National Union moved to dismiss the consequential damages claims on the basis that the factual allegations underpinning them were insufficiently detailed. The trial court granted summary judgment in favor of National Union, dismissing all consequential damages claims except for those relating to legal fees. But the appellate court reversed the lower court's ruling, noting that D.K. Property was not required to explain the basis for those claims at a granular level of detail at the pleading stage. According to the appellate court, D.K. Property met New York's pleading requirement by laying out the types of consequential damages sought and stating why National Union should have foreseen that such damages could possibly result if it failed to provide coverage.

Charles W. Browning
Elaine M. Pohl
Patrick E. Winters
Plunkett Cooney

Pennsylvania

Auto / "Household Vehicle" Exclusion

A divided Pennsylvania Supreme Court has ruled that a "household vehicle exclusion" contained in an auto policy violated Section 1738 of the Motor Vehicle Financial Responsibility Law ("MVFRL"), 75 Pa.C.S. §1738, because the exclusion impermissibly acts as a de facto waiver of stacked uninsured and underinsured motorist coverages. In *Gallagher v. GEICO Ind. Co.*, J-18-2018 (Pa. Jan. 23, 2019), the majority declared that "there simply is no reason that insurers cannot comply with the Legislature's explicit directive to offer stacked UM/UIM coverage on multiple insurance policies absent a knowing Section 1738 waiver and still be fairly compensated for coverages offered and purchased." Justices Saylor and Wecht dissented, asserting that the majority's analysis conflates the rejection of stacking (which requires a written waiver) with the exclusion of certain acts or occurrences from the defined scope of coverage itself (which requires no waiver), whereas nothing in the text of the MVFRL prohibits household vehicle exclusions

Michael Aylward
Morrison Mahoney

Texas

Deepwater Horizon / Ultimate Net Loss / "Liability"

The Texas Supreme Court ruled that a joint venture clause in an excess liability policy that made the policy's limits proportional to the insured's percentage interest in the company only applied to indemnity payments, whereas the policy's full "ultimate net loss" limit applied to defense costs. In *Andarko Petroleum Corp. v. Houston Cas. Co.*, No. 16-1013 (Tex. Jan. 24, 2019), the supreme court declared

that the insured could recover the entire $150 million limit for defense fees even though Andarko only had a 25 percent interest in the Deepwater Horizon well. In rejecting Lloyd's argument that the joint venture clause in its policy capped coverage for fees and losses arising out of the Deepwater Horizon crisis at $37.5 million, the Supreme Court ruled that the reference to "liability" in the joint venture clause meant obligations that might be imposed on the insured by law to pay damages as distinguished from legal fees and other costs of defense.

Michael Aylward
Morrison Mahoney

Virginia

Newly Acquired Property Extension

Erie Ins. Exch. v. EPC MD 15, LLC, --- S.E.2d ---, 2019 WL 238168 (Va. Jan. 17, 2019).

The Virginia Supreme Court ruled that an endorsement in a commercial property policy which extended coverage to newly-acquired property did not apply where a named insured acquired a subsidiary that owned certain real property. The Supreme Court's ruling overturned the lower court's ruling that the acquisition of the subsidiary satisfied the endorsement.

EPC MD 15 (EPC) purchased an insurance policy from Erie Insurance Exchange (Erie) with an effective date in June 2013. EPC was the only named insured and the policy did not define "named insured" to include subsidiaries of EPC. The declaration page of the policy listed only one property owned by EPC as a covered property. The policy contained an extension of coverage for buildings newly acquired after the policy was issued, as well as other coverages connected to newly-acquired buildings. Several months after the effective date of the policy, EPC acquired Cyrus Square, LLC (Cyrus Square), which owned a building in Virginia. When the Virginia building sustained fire damage, EPC made a claim for coverage under the policy, which Erie denied. The circuit court held that the newly-acquired property extension applied to the Virginia building because the term "acquired" was ambiguous.

The Virginia Supreme Court rejected the circuit court's ruling, finding that the newly-acquired property extension was not ambiguous. The supreme court found that the circuit court stretched the definition of the term "acquired" to include control by EPC of the subsidiary. Instead, the supreme court held that the acquisition of Cyrus Square did not equal acquisition of real property because an LLC is a legal entity unto itself and title to any property held by the LLC is held only by the LLC, not its members or parent companies. The supreme court noted that "[i]f control of a mere membership interest were enough, every named insured owning a controlling interest in an LLC could be said to have acquired the controlee's property for purposes of a similar coverage-extension provision—even though the insurer had no underwriting information necessary to make a risk assessment and established no premium rating on the de facto insured that actually owned the newly acquired property."

Charles W. Browning
Elaine M. Pohl
Patrick E. Winters
Plunkett Cooney

Washington

Bad Faith / Independent Counsel

Having previously ruled that Travelers only owed coverage for a portion of claims involving the insured's defective piping but was nonetheless responsible for paying 100 percent of the insured's defense costs, the federal district court has now ruled in *Travelers Property Cas. Co. of America v. Northwest Pipe Co.*, No. 17-5098 (W.D. Wash. Jan. 3, 2019), that Travelers did not act in bad faith in delaying payment with respect to Oregon counsel that the insured had hired to defend this Canadian litigation. Judge Settle questioned the quality of the insured's notice as well as why Oregon counsel was necessary in a Canadian case but found that there were reasonable bases for Travelers' actions and that it ultimately paid the fees once proper documentation was provided to it.

Michael Aylward
Morrison Mahoney

Wisconsin

Allocation of Defense Costs

Steadfast Ins. Co. v. Greenwich Ins. Co., --- N.W.2d ---, 2019 WL 323702 (Wis. Jan. 25, 2019).

The Wisconsin Supreme Court ruled that an insurer that breached its duty to defend did not have to repay the full $1,550,000 that another insurer expended in defending the insured. In June 2008, a torrential rain in Milwaukee caused hundreds of plumbing back-ups, which ultimately resulted in several lawsuits being filed against the Milwaukee Metropolitan Sewerage District (MMSD). MMSD tendered

the lawsuits to its two insurers, Greenwich Insurance Co. (Greenwich) and Steadfast Insurance Co. (Steadfast). Steadfast agreed to defend MMSD, but Greenwich refused on the grounds that its policy was excess over Steadfast's. Steadfast paid $1,550,000 in defense costs to MMSD and subsequently filed suit against Greenwich for that amount.

The trial court held that Greenwich breached its duty to defend MMSD and ordered Greenwich to repay the full amount of defense costs to Steadfast, and the intermediate appellate court affirmed. The Wisconsin Supreme Court agreed with the lower courts that Greenwich had breached its duty to defend MMSD because Greenwich's unilateral determination that its policy was excess over Steadfast's policy was erroneous. However, the supreme court held that awarding Steadfast the full amount of defense costs improperly "relieved Steadfast of its contractual obligation for defense costs, without recognition of the windfall that Steadfast received from what amounted to a judicial forgiveness of Steadfast's duty to defend MMSD." Thus, the supreme court allocated a proportional share of defense costs to each insurer based on the limits of liability of each policy. Ultimately, Greenwich was ordered to pay Steadfast $620,000 of the total defense costs, plus interest.

Charles W. Browning
Elaine M. Pohl
Patrick E. Winters
Plunkett Cooney