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Refuting Insurer Denials Linked To Employee Misconduct

By: Greg Van Houten

Because of the long-overdue spotlight placed on sexual harassment and abuse in the United States, a growing number of corporate and nonprofit entities face significant legal costs associated with their employees' misconduct. To mitigate their legal costs, such entities often turn to their liability insurers and the insurance coverage they purchased for significant premiums. Many policyholders have found, however, that instead of receiving the coverage they bargained for, they receive a denial letter from their insurer citing a sexual abuse exclusion. When faced with a denial, policyholders should never assume that their insurer's interpretation is correct; and in fact, some policyholders are well-positioned to refute such denials, especially when the cited exclusion fails to define "abuse" or is otherwise vague.

Coverage can be an uphill battle when "abuse" is specifically defined and the alleged misconduct fits squarely within the definition. For example, in *Tolson v. The Hartford Financial Services Group*, the court found that an underlying alleged sexual battery triggered a sexual abuse exclusion that broadly defined "sexual abuse" and listed seven specific examples of sexual abuse including sexual molestation, voyeurism and the use of sexually suggestive language.[1] The exclusion also provided that it applied to bodily injury claims based on the failure to investigate or report sexual abuse, or the failure to supervise or protect others from sexual abuse.[2] Considering the broad and clearly defined exclusion in *Tolson*, the underlying allegations could have been far less reprehensible — for example, the use of sexually suggestive language — and they still may have triggered the exclusion.

But, broad and robust abuse exclusions, like that in *Tolson*, are not found in every policy. For example, the policy at issue in *Quigley v. Travelers Property Casualty Insurance* excluded coverage of bodily injury arising out of "sexual molestation, corporal punishment or physical or mental abuse," but the policy did not define those terms.[3] The court, in considering whether the underlying allegation of "negligent provision of first aid" was excluded, noted that "Travelers could have, but did not, define its policy terms more broadly to encompass the allegations in this case."[4] The court went on to hold that Travelers had a duty to defend.[5]

A decade before Quigley, the Eighth Circuit considered in *St. Paul Fire & Marine Insurance Co. v. Schrum* whether an exclusion barring coverage of "bodily injury [claims] arising out of any sexual act" applied to a negligent supervision claim.[6] The defendant-policyholders in *Schrum* were sued for negligent supervision after two minor children were allegedly abused by a man residing in their home.[7] In a relatively short opinion, the Eighth Circuit held that because the alleged sexual abuse was "merely incidental to the ... negligence claim," the exclusion did not apply.[8] If presented with the exclusion found in *Tolson*, which specifically barred coverage of injuries arising out of sexual abuse and the "failure to supervise" or the "[f]ailure to protect others from the conduct of any person," the Eighth Circuit likely would have denied the policyholder's claim for coverage.

More recently, the U.S. District Court in Kansas considered whether a fairly broad sexual abuse exclusion applied to a defamation claim that was brought alongside claims for sexual battery, negligent supervision, negligent infliction of emotional distress, and false imprisonment related to a pastor's abuse of two minors.[9] The relevant exclusion in Brotherhood Mutual barred coverage of any personal injury claim that "arises out of any ... sexual act."[10] Citing that exclusion, the insurers argued that the defamation claim — which spawned out of the pastor's remarks from the pulpit that the victims were lying about being sexually abused — was excluded.[11] The court held that "[b]arring a claim for personal injury that arises out of ... a sexual act suggests

that there must be some casual connection between the two, but the exclusion does not explain what the connection must be."[12] And, that if the insurer "intended to exclude such [a claim], it was obligated to do so more clearly than by ambiguously excluding claims arising out of ... a sexual act."[13] Based on that reasoning, the court held that the insurers had to cover the defamation claim.[14]

The reasoning advanced in *Quigley, Schrum* and *Brotherhood Mutual* is not too detached from the insurance law doctrine that provides that exclusions are "strictly construed against the insurer" and that coverage should not be denied unless the policy conveys "an intent to exclude coverage [that is] expressed in clear and unambiguous language."[15] It follows generally that when an exclusion relies on an undefined term or is silent or vague as to scope, the exclusion is ambiguous and should be interpreted in favor of coverage.[16]

In conclusion, and taking a page from *Quigley, Schrum* and *Brotherhood Mutual*, policyholders should take a close look at whether an insurer's denial of a sexual misconduct claim rests on an undefined, vague or otherwise narrow abuse exclusion. If it does, policyholders should examine whether there is any colorable argument that the alleged misconduct does not trigger the exclusion. If such an argument exists, policyholders should push back and, in some instances, retain insurance coverage counsel.

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[1] No. 16-440, 2017 WL 4354685, at *4 (D.D.C. Sept. 29, 2017).

[2] Id.

[3] 630 F. Supp. 2d 1204, 1220 (E.D. Cal. 2009).

[4] Id. at 1221.

[5] Id. at 1222.

[6] 149 F.3d 878, 879–880 (8th Cir. 1998).

[7] Id. at 879.

[8] Id. at 881.

[9] *Ins. Co. v. M.M.*, No. 16-1362, 2017 WL 5270403, at *1 (D. Kan. Nov. 13, 2017).

[10] Id. at *4.

[11] Id. at *9.

[12] Id.

[13] Id.

[14] Id. at *9–10.

[15] *Prime Nat. Res.Inc. v. Certain Underwriters at Lloyd's*, London, No. 01-11-00995-CV, 2015 WL 1457534, at *5 (Tex. App. March 26, 2015).

[16] *Veno v. Peerless Ins*. Co., No. CV106004836S, 2011 WL 5531327, at *6 (Conn. Super. Ct. Oct. 26, 2011).