Standard Insurance Policy Coverage for Sexual Abuse, Harassment and Assault Claims

by Marshall Gilinsky and Pamela D. Hans

Recent social and legal developments have increased the risk of claims alleging institutional liability for child sex abuse or adult sexual harassment. For example, the #MeToo movement has led to an uptick in harassment and abuse claims. Additionally, certain states, including New York and New Jersey, have passed laws that significantly expand the statute of limitations for claims of child sex abuse and more states are considering such bills. In Pennsylvania, at least one court has issued rulings which, claimants may argue, have effectively enlarged the statute of limitations for certain claims based on common law, even though the legislature has not done so. Organizations faced with these claims should understand that there are many types of standard form insurance policies that cover them—and so, also provide vital protection to tort victims. Over the decades, insurance companies have paid billions to defend and settle abuse and molestation claims. That seems to be changing, however, in the face of recent high-stakes claims and uncertainty over the impact of the recent changes in statutes of limitations laws. Organizations faced with harassment and abuse claims need to be prepared not only to file notice promptly but to fight for the coverage they are owed.

APPLICABLE POLICIES

Insurance is a key component to responding to sexual abuse and harassment claims. When such claims surface, it is important to promptly identify and notify all insurance companies whose policies might cover the claim.

Policyholders should cast a broad net when assessing which polices might respond. More than one type of policy, and often many different polices, may cover the defense costs and potential liabilities stemming from the claim. Liability policies that may respond include:

- **Commercial general liability (CGL) policies** cover allegations based on injury alleged during the year such coverage was in effect. Thus, even where allegations of abuse occurred decades ago, CGL policies in effect when the abuse allegedly occurred will respond today. Importantly, most CGL policies cover defense costs outside of limits, making them especially valuable in defending against serious and often hotly disputed claims. Equally important for policyholders faced with numerous claims by a large number of alleged victims, there can be coverage under multiple CGL policies for a given claim.
- **Employment practices liability (EPL) policies** specifically are designed to cover allegations of workplace harassment. These policies apply on a "claims made" basis, meaning that the policy in effect when the claim is made generally is the one that responds to the claim. Although EPL policies cover defense costs, that coverage usually erodes the policy's limits.
- **Directors and officers (D&O) policies** cover claims alleging "wrongful acts"—a term that is defined broadly and encompasses the allegations commonly directed against directors and officers and, potentially, the company or institution when those individuals or entities are named as defendants in sexual harassment, abuse and molesta-

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tion cases (e.g., for claims of negligent hiring or supervision). These are also "claims made" policies under which defense costs typically count against policy limits.

SETTLEMENT FUNDING OBLIGATIONS

Even though several types of insurance policies cover sexual abuse and harassment claims, insurance companies all too often adopt a claims handling approach that is less than helpful. Sensing that many policyholders want to maintain tight control over these types of matters and avoid publicity, insurance companies have been known to drag their feet in adjusting claims in an improper attempt to gain leverage over their policyholders. For example, even though it is an act of bad faith under almost every state's law for an insurance company to put its interests ahead of its policyholder's by refusing to authorize payment of reasonable settlements within policy limits, such refusals are not uncommon; insurance companies have been known to improperly force their policyholders to pay large percentages of reasonable settlements based on straw man "allocation" arguments suggesting that part of the settlement is to protect "reputational harm" that is not covered under the policy (even though no such exclusion exists).

Notwithstanding such improper tactics, insurance companies have a duty to work with the policyholder to negotiate and pay reasonable settlements in full. In considering the reasonableness of a proposed settlement amount, an insurance company must take into "consideration all the factors bearing upon the advisability of a settlement for the insured," as the federal Third Circuit ruled in Haugh v. All State Insurance Co. in 2003. Those considerations include, among other factors, the reputational harm and potential loss of goodwill that can result from a failure to settle. When an insurance company's failure to settle damages the policyholder's reputation, bad faith damages may be awarded, as California courts did in Tan Jay International v. Canadian Indemnity Co. (1988) and, more recently, in United States Fire Insurance Co. v. Button Transportation, Inc. (2006).

Thus, an insurance company must consider how even a claim to which the policyholder has a robust defense may nevertheless still be one that ought to be settled, given the totality of the circumstances. By considering these hard-to-quantify but critical factors, defense teams can make informed assessments as to the reasonable settlement value of a claim and protect the interests of the policyholder, as promised under the terms of the insurance policy and the covenant of good faith that is implied in every insurance contract.

While no organization will be at ease when faced with a claim of sexual abuse or harassment, policyholders should look to their insurance companies for assistance in defending against such claims and, where appropriate, negotiating a reasonable settlement. ■

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