

FUNDAMENTAL INSURANCE COVERAGE ISSUES PRESENTED BY CLERGY SEX-ABUSE CLAIMS

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I. INTRODUCTION

Bob Meyers is an AV-rated member at Cozen O'Connor, who has extensive experience handling insurance coverage matters relating to clergy sex-abuse cases. Bob is currently handling large and complex coverage cases involving the Seattle Archdiocese, Portland Archdiocese, and Spokane Diocese. Bob has also defended policyholders against allegations of sexual misconduct.

This outline and the accompanying presentation serve to address some of the fundamental insurance coverage issues that arise in clergy sex-abuse cases. Notably, as a general proposition, a liability policy does not cover an alleged perpetrator for allegations of sexual misconduct. However, a victim of clergy sex abuse also typically alleges that a Catholic diocese negligently hired or supervised the priest. The diocese then tenders that claim or suit to its insurers. So, more specifically, this outline and the accompanying presentation serve to address some of the fundamental insurance coverage issues that arise when a Catholic diocese tenders such negligence claims to its insurers. Naturally, if litigated, the outcome of these issues will depend on the specific language of the insurance policy and the specific factual circumstances.

II. LOST POLICY ISSUES

A. Changes in Statutes of Limitations Relating to Child Sex-Abuse Claims

During the last few years, several states have extended their statutes of limitations for civil actions involving allegations of child sex abuse. Most notably, Washington State now allows a victim of child sex abuse to file a civil action within three years of the date on which the victim discovers the "causal connection" between the sex abuse and the victim's injury. RCW 4.16.340(1)(c).

Such changes to the statutes of limitations necessarily resurrected sex-abuse claims that had previously been time barred. In turn, Catholic dioceses tendered those claims to their insurers. Moreover, if the allegations were particularly remote in time, the

dioceses often had difficulty finding insurance policies relating to the period of the alleged misconduct.

B. Burden and Standard of Proof to Establish the Existence and Material Terms of the Insurance Policy

1. Washington Case Law.

In Washington, the person or entity that is seeking insurance coverage has the burden of proving the existence of the policy, the material terms of the policy, and that the policy covers the loss. See e.g., City of Tacoma v. Great American Ins. Co., 897 F. Supp. 486 (W.D. Wash. 1995)(insured must prove all elements of coverage, and in lost-policy cases, insured must prove policy limit).

No Washington court has published a decision that specifically addresses a policyholder's standard of proof for establishing the existence of a lost insurance policy. However, when addressing the standard of proof for establishing the existence of other types of lost instruments, Washington appellate courts have held that the proponent of the lost instrument must prove the instrument's existence and material terms with clear, cogent, and convincing evidence. See e.g., Deglow v. Smith, 77 Wn.2d 128, 129, 459 P.2d 786 (1969)(addressing a deed); Johnson v. Wheeler, 41 Wn.2d 246, 248, 248 P.2d 558, 150 (1952)(addressing a deed); Lutz v. Gatlin, 22 Wn. App. 424, 428, 590 P.2d 359 (1979)(addressing a promissory note). Citing this line of Washington case law, other courts have specifically held that a policyholder must prove the existence and material terms of an insurance policy with clear, cogent, and convincing evidence. See e.g., Maryland Cas. Co. v. W.R. Grace & Co., 1995 WL 562179 at *2 (S.D.N.Y.)("A party seeking to recover under a lost insurance policy 'must prove its former existence, execution, delivery and contents by clear, satisfactory and convincing evidence.' [Citations omitted.] '[T]he State of Washington follows [this standard] in considering lost instruments such as deeds.' [Citations omitted.]"). Likewise, in 1994, a Washington Superior Court judge instructed a jury that the policyholder must prove the material terms of an insurance policy with clear, cogent, and convincing evidence. Olds-Olympic, Inc. v. Commercial Union Ins. Co., No. 92-2-16329-2, Court's Instructions to the Jury, Instr. No. 12 (Wash. Super. Ct. King Cy. May 26, 1994)(Jordan, J.), reported in Mealey's Litig. Rpts. — Ins., v. 8, no. 30, p.10 & § H (June 7, 1994), rev'd on other grounds, 129 Wn.2d 464, 918 P.2d 923 (1996).

Nationally, authorities are split about whether a policyholder must establish the existence and material terms of a lost policy by a preponderance of the evidence or with clear, cogent, and convincing evidence. See e.g., 17A Couch on Insurance § 254:28 (2005).

2. Washington Administrative Code Provision re: Environmental Claims

In the context of environmental insurance claims, the Washington Insurance Commissioner has prescribed certain procedures to follow if a person or entity alleges a

lost policy. WAC 284-30-290. In short, the Code requires the alleged policyholder to provide the insurer with sufficient information about the lost policy to enable the insurer to search for that policy. The Code then requires the insurer to investigate its records "thoroughly and promptly" for evidence of the alleged lost policy. The insurer and alleged policyholder must then exchange all evidence that they locate (if any) about the alleged lost policy. Notably, the Code apparently applies a preponderance-of-the-evidence standard to establish the existence and terms of the lost policy. WAC 284-30-290(2)(c).

By its terms, this provision expressly applies to environmental claims. However, in the Spokane Diocese insurance coverage litigation, the District Court prescribed a similar procedure to address the Diocese's lost-policy allegations: It ordered the insurers and the Diocese to conduct an exhaustive search of their respective records, and then file a declaration detailing the scope and results of their searches.

C. Secondary Evidence and Specimen Policies

A policyholder may offer "secondary evidence" of the existence and material terms of a lost policy if the policyholder can establish that: (1) it has made a diligent effort to locate the policy, (2) the policy has been lost or destroyed, and (3) the policy was not lost or destroyed in bad faith. ER 1004. Policyholders often attempt to offer specimen policies as secondary evidence of a lost policy's terms. To use a specimen policy, however, the policyholder must also offer evidence establishing that the proffered specimen policy is the same as the lost policy. See e.g., 17A Couch on Insurance § 253:25 (2005).

III. "BODILY INJURY"

In pertinent part, subject to other terms, conditions, exclusions, and limitations, a liability policy typically provides that an insurer will indemnify the policyholder for sums that the policyholder becomes legally obligated to pay as damages because of "bodily injury" caused by an occurrence during the policy period.

A. Sexual Contact as "Bodily Injury" Triggering Duties to Defend and Indemnify

As a general proposition, insurers have not contested that sexual contact with a minor constitutes "bodily injury." So, in a typical sex-abuse claim against a Catholic diocese, subject to a policy's other terms, conditions, exclusions, and limitations: (1) an insurer will typically agree to defend the diocese subject to a reservation of rights against a complaint that alleges sexual contact during the policy period, and (2) an insurer will typically agree to indemnify the diocese if it becomes legally obligated to pay monetary damages as a result of sexual contact that was proven to occur during the policy period.

B. Sexual Conduct without Sexual Contact

Occasionally, a victim will allege sexual misconduct that did not involve sexual contact. For instance, a victim might allege that a priest had made sexually inappropriate

comments or had displayed pornography. Such allegations might not constitute "bodily injury," depending on (1) the policy's specific definition of "bodily injury," and/or (2) whether the victim can prove that he or she experienced physical manifestations of emotional distress as a proximate result of the priest's misconduct.

IV. "OCCURRENCE" ISSUES

In pertinent part, subject to other terms, conditions, exclusions, and limitations, a liability policy typically provides that an insurer will indemnify the policyholder for sums that the policyholder becomes legally obligated to pay as damages because of bodily injury caused by an "occurrence." The definition of "occurrence" can differ materially from one insurance policy to another. However, one common definition is:

[A]n accident, including injurious exposure to conditions, which results, during the policy period, in bodily injury or property damage neither expected nor intended from the standpoint of the insured.

As discussed below, occurrence-related issues are common in insurance coverage disputes relating to clergy sex-abuse allegations.

A. Was there an occurrence?

In a negligent supervision claim against a Catholic diocese, in part, an alleged victim must establish that the diocese "knew or should have known" about the priest's sexual misconduct or pedophilic tendencies. See e.g., *Betty Y. v. Al-Hellou*, 98 Wn. App. 146, 988 P.2d 1031 (1999). Such allegations, if proven, could directly affect whether the diocese can establish an "occurrence" under the insurance policy. So, in insurance coverage disputes relating to clergy sex-abuse allegations, a diocese's insurers typically investigate whether there was an "occurrence."

1. Was there an "accident"?

As addressed above, in one common definition of "occurrence," the policyholder must establish that there was an "accident." An "accident" is an "unusual, unexpected, and unforeseen happening." *Grange Ins. Co. v. Brosseau*, 113 Wn.2d 91, 95, 776 P.2d 123 (1989). Deliberate acts are not accidents. *Detweiler v. J.C. Penney Cas. Ins. Co.*, 110 Wn.2d 99, 104, 751 P.2d 282 (1988). The Washington Supreme Court arguably applies an objective standard to determine whether there was an accident. See e.g., *Safeco Ins. Co. v. Butler*, 118 Wn.2d 383, 403, 823 P.2d 499 (1992)("[E]ither an accident is an accident or it is not").

In 2006, in the Spokane Diocese insurance coverage litigation, one insurer moved for summary judgment, arguing that the Diocese's causes of action must fail as a matter of law, because (1) the Diocese's alleged liability arose from priests' alleged deliberate acts of sexual misconduct, (2) the priests' deliberate acts cannot constitute "accidents," so (3) the Diocese could not establish an "occurrence" under the insurance policies. In short, the District Court rejected the insurer's argument, holding that the Diocese's al-

leged negligent supervision could constitute an "accident," and could therefore constitute an "occurrence."

2. Was the bodily injury either expected or intended from the insured's standpoint?

As addressed above, in one common definition of "occurrence," a policyholder must establish that there was "bodily injury . . . neither expected nor intended from the standpoint of the insured." Washington courts apply a subjective standard to determine whether the bodily injury was "neither expected nor intended." *Queen City Farms, Inc. v. Central Nat'l Ins. Co.*, 126 Wn.2d 50, 65-67, 882 P.2d 703 (1994).

In a negligent supervision claim against a Catholic diocese, an alleged victim must establish that the diocese knew or should have known about a priest's sexual misconduct or pedophilic tendencies. To support that element of the claim, an alleged victim sometimes offers evidence or testimony that someone had previously reported a priest's sexual misconduct to the diocese. From that evidence, insurers often argue that the diocese cannot establish that the alleged victim's bodily injury was "neither expected nor intended."

B. Number of Occurrences

A liability policy typically has a per-occurrence policy limit, but sometimes does not have an applicable general aggregate limit. Therefore, the manner in which a court calculates the number of occurrences can materially affect an insurer's exposure.

The manner in which a court calculates the number of occurrences will necessarily depend on the policy's specific definition of "occurrence" and the specific factual circumstances. Washington courts typically calculate the number of occurrences by evaluating the cause or causes of the alleged injury. See e.g., *Transcontinental Ins. Co. v. Washington Pub. Utils. Dists.' Util. Sys.*, 111 Wn.2d 452, 760 P.2d 337 (1988); *Pemco Mut. Ins. Co. v. Utterback*, 91 Wn. App. 764, 960 P.2d 453 (1998), review denied, 137 Wn.2d 1009 (1999). However, no Washington court has addressed this issue in the context of a dispute relating to sex-abuse allegations. That said, a few courts in other jurisdictions have addressed the issue in this context. Moreover, a majority of those courts has held that there is one occurrence per victim per policy period. A minority of those courts has held that there is a separate occurrence for each alleged perpetrator. One court has held that there is one occurrence per employer.

The table below provides a basic summary of certain courts' holdings.

Case	Facts	Holding
<u>Interstate v. Archdiocese of Portland</u> , 35 F.3d 1325 (9 th Cir. 1994)	1 abuser, 1 victim multiple acts over multiple policy periods	1 occurrence per policy period

Case	Facts	Holding
<u>Society of the Roman Catholic Church v. Interstate</u> , 26 F.3d 1359 (5 th Cir. 1994)	2 abusers, 31 victims multiple acts over seven years	1 occurrence per victim per policy period
<u>Washoe Co. v. Transcontinental</u> , 110 Nev. 798 (1994)	1 abuser, 40 victims	1 occurrence re all victims
<u>General Accident Insurance Co. v. Allen</u> , 709 A.2d 828, 1998 Pa. Super. LEXIS 148	1 abuser, 3 victims	1 occurrence, unclear if per child or for all 3 vic- tims
<u>State Farm v. Elizabeth N.</u> , 9 Cal.App. 1232 (1992)	1 abuser, 3 victims	Perhaps 1 occurrence per victim
<u>H.E. Butt Grocery Co. v. National Union</u> , 150 F.3d 526 (5 th Cir. 1998).	1 abuser, 2 victims	2 occurrences
<u>Safeguard Ins. Co. v. Angel Guardian Home</u> , 946 F.Supp. 221 (ED NY 1996)	1 abuser, 5 victims over 6- year period	1 occurrence per policy period re all victims
<u>Worcester Ins. Co. v. Fells Acres Day School</u> , 408 Mass. 393 (1990)	3 abusers, many victims	More than 1 occurrence
<u>Lee v. Interstate</u> , 86 F.3d 101 (7 th Cir. 1996)	2 abusers, 1 victim 2 policy periods	2 occurrences
<u>S.F. v. West American Ins. Co.</u> , 250 Va. 461 (1995)	1 abuser, many victims	1 occurrence per victim

C. Timely Notice of an Occurrence

As a condition precedent to coverage, a liability policy typically requires a policyholder to notify the insurer about an occurrence "as soon as practicable" or "within a reasonable time." If a policyholder fails to notify the insurer about an occurrence in a timely manner, and if the insurer can demonstrate that it was prejudiced by the policyholder's untimely notice, the insurer may deny coverage. *See e.g., Oregon Auto. Ins. Co. v. Salzberg*, 85 Wn.2d 372, 535 P.2d 816 (1975).

As discussed above, to support a negligent supervision claim against a diocese, an alleged victim sometimes offers evidence or testimony that someone had previously reported a priest's sexual misconduct to a priest or employee of the diocese. No Washington court has specifically addressed what constitutes official notice to a Catholic diocese.

However, in an unpublished decision in 2004, a California court held that a diocese is on notice if "any agent or employee with an employment responsibility to report suspicions of unlawful sexual conduct to the organization was on notice of unlawful sexual conduct." Furthermore, the Court held that it would presume that "all priests are managing agents or persons in authority."

Applying the California court's analysis, if someone reported alleged sexual misconduct to a priest of the diocese, an insurer could argue that the diocese was on notice of an occurrence as of the date of the report.¹ Furthermore, if the diocese did not notify the insurer about that occurrence as prescribed by the policy, the insurer could argue that the diocese breached the policy. The insurer would also need to demonstrate that it was prejudiced by the breach. However, the insurer might have persuasive arguments that it was prejudiced, particularly if the diocese lost the insurance policy after the date of notice or if material witnesses died after the date of notice.

V. EXCLUSIONS

Certain exclusions might be relevant to insurance coverage claims involving clergy sex-abuse allegations.

A. Sexual Molestation Exclusion

Beginning in the late 1980s, insurers began to issue endorsements that broadly exclude coverage for claims arising out of sexual molestation. Courts nationally have enforced these exclusions, and the Catholic dioceses in Washington have not challenged these exclusions. See e.g., McAuliffe v. Northern Ins. Co. of N.Y. v. Lahr, 69 F.3d 277 (1995).

B. Intentional Act Exclusion

If an insurance policy has an intentional act exclusion that precludes coverage for the act of "an" or "any" insured, that exclusion might provide the insurer with a good faith basis to deny a Catholic diocese's insurance claim relating to a priest's alleged sexual misconduct.

VI. CONCLUSION

Clergy sex-abuse claims can give rise to any number of different insurance coverage issues. This outline and the accompanying presentation simply serve to address a few of the most common and fundamental issues. If you have any questions about any other issues, or if you would like to discuss any of the issues above in greater detail, please feel free to contact Bob Meyers at Cozen O'Connor.

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¹ This argument would necessarily assume *arguendo* that there was, in fact, an "occurrence."