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Sexual Assault: Is There Coverage for That?

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I. Introduction

1. 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: 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; allowing victims to seek civil relief against their abusers and the institutions that enabled them until they turn age 55; and opening a one-year, one-time-only, window to allow victims to seek monetary compensation regardless of how long ago the abuse occurred.[2] 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 costs may ultimately determine whether it survives. In December 2018, for

1 Florina Altshiler is a Partner and Lead Trial Counsel with Russo & Gould LLP, admitted to practice in NY, NJ, PA and AK. A special thank you to Joshua Kardish for his contributions to this article.

2 Anthony Augusta, *New York passes Child Victims Act, allowing child sex abuse survivors to sue their abusers*, CNN (January 28, 2019).

example, USA Gymnastics filed for bankruptcy protection in response to litigation which emanated from Larry Nassar's sexual abuse of the young ladies charged to his care.[3]

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.

3. 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)[4] 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.[5] 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.

II. Duty to Defend

4. It is well-settled that an insurance carrier "owes a broad duty to defend its insured against claims that create a potential for indemnity."[6] In order 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."[7] "If the alleged injuries are within the terms of the policy, then the duty to defend

3 Holly Yan, *USA Gymnastics files for bankruptcy after hefty lawsuits over Larry Nassar*, CNN (December, 5, 2018).

4 CIVIL RIGHTS ACT OF 1964, 42 U.S.C. § 2000e et seq. (1964).

5 Lora Kolodny, *Uber's biggest shareholder, Benchmark, is suing ex-CEO Travis Kalanick*, CNBC (August 10, 2017).

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

7 *La Jolla Beach & Tennis Club, Inc. v. Indus. Indem. Co.*, 9 Cal. 4th 27, 44 (Cal. 1994).

attaches regardless of the insurer's determination that the suit is without merit."[8] A duty to defend does not exist, however, when there is "no possibility of coverage."[9] So to decide this issue, courts must determine whether the underlying complaint potentially sought damages covered by the policy.[10]

III. Resolving the Question of Who Is The "Insured"?

5. 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.

6. 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 shareholders in a corporation or children of individual insureds.

7. In order 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.

IV. What Qualifies as an "Occurrence"?

8. 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 same general harmful

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

9 *Waller v. Truck Ins. Exch.*, 11 Cal. 4th 1, 18 (Cal. 1995).

10 *Montrose Chemical Corp. v. Superior Court*, 6 Cal. 4th 287, 295 (Cal. 2020).

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 purely subjective.

V. Exclusions and Exclusionary Language Applied

9. 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 acts 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.

10. 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.

11. The New York Court of Appeals held in *RJC Realty Holding Corp. v. Republic Franklin Ins. Co.*,[11] that where 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

11 *RJC Realty Holding Corp. v. Republic Franklin Ins. Co.*, 808 N.E.2d 1263, 1265 (N.Y. 2004).

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.

12. Further, the separation of insurance condition requires the insurer to view the policy exclusions for the employer and the employee separately.

13. 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 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.

14. In many states, including California, insurers generally have the burden of proving that an otherwise covered claim is barred by a specific policy exclusion.[12] "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."[13] As such, "clauses setting forth specific exclusions from coverage are interpreted narrowly against the insurer."[14]

15. 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."[15] 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."[16]

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12 *Travelers Cas. & Sur. Co. v. Superior Court*, 63 Cal. App. 4th 1440, 1453 (Cal. Ct. App. 1998).

13 *Minkler v. Safeco Ins. Co. of America*, 49 Cal. 4th 315, 321 (Cal. 2010).

14 *Minkler v. Safeco Ins. Co. of America*,49 Cal. 4th 315, 322 (Cal. 2010).

15 *Floyd v. Northern Neck Ins. Co.*, 427 S.E.2d 193, 196 (Va. 1993).

16 *Central Surety & Ins. Corp. v. Elder*, 204 Va. 192, 192 (Va. 1963).

16. Policies generally do not define every term and "undefined contract terms are given 'their ordinary meaning' in light of 'the contract as a whole.'"[17] 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.

17. In determining coverage, exclusions are narrowly tailored to the conduct itself. It is therefore crucial to address plaintiff's specific allegations to understand whether or not 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.

18. In order 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 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.

17 *Bartolomucci v. Fed. Ins. Co.*, 770 S.E.2d 451, 456 (Va. 2015).

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

19. In 2013, New York State's highest court, the Court of Appeals, 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.*[18] 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.

20. 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.[19]

21. 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

18 *Roman Catholic Diocese of Brooklyn v. Nat'l Union Fire Ins. Co. of Pittsburgh, PA.*, 991 N.E.2d 666 (N.Y. 2013); see also *Nat'l Union Fire Ins. Co. of Pittsburgh, PA. v. Roman Catholic Diocese of Brooklyn*, 2017 N.Y. Slip Op. 30368 (N.Y. Sup. Ct. 2017).

19 *Roman Catholic Diocese of Brooklyn v. Nat'l Union Fire Ins. Co. of Pittsburgh, PA.*, 991 N.E.2d 666, 668 (N.Y. 2013).

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.

22. 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.

23. 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 "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 occurrence covered under a policy from which the Diocese sought coverage.

24. 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.

25. 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. [20] The court granted the Diocese leave to appeal, 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.[21]

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

1. The pro rata allocation methodology which the Court of Appeals approved in *Consolidated Edison Co. of New York, Inc. v Allstate Ins. Co*. was consistent with the allegations of "bodily injury," and with the clear and unambiguous language of the CGL policies.[22] 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 in order 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;
2. 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
3. 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.

27. The Court of Appeals affirmed the Second Department's decision, ruling that National Union had not waived its "multiple occurrence" argument, that the Dio-

20 Roman Catholic Diocese of Brooklyn v. National Union Fire Insurance Company of Pittsburgh, PA. 930 N.Y.S.2d 215 (2011).

21 Roman Catholic Diocese of Brooklyn v. National Union Fire Insurance Company of Pittsburgh, PA. 2012 N.Y. Slip Op. 64632 (2012).

22 *Consolidated Edison Co. of N.Y., Inc. v Allstate Ins. Co.*, 98 N.Y.2d 208 (N.Y. 2002).

cese 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.

28. 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."[23] 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.'"[24]

29. The Court adopted the "unfortunate event" test, specifically rejecting other approaches that would equate the number of occurrences with either "the sole proximate cause" or by the "number of persons damaged." Generally, the issue of what constitutes an occurrence has been a legal question for courts to resolve.[25]

30. 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. The Court stated "[c]learly, 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.[26] 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."

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23 *Consolidated Edison Co. of N.Y., Inc. v Allstate Ins. Co.*, 98 N.Y.2d 208, 222 (N.Y. 2002) (citing *Breed v. Ins. Co. of N. Am.*, 385 N.E.2d 1280(1978).

24 *Consolidated Edison Co. of N.Y., Inc. v. Allstate Ins. Co.*, 98 N.Y.2d 208, 222 (2002), citing *Breed v. Ins. Co. of N. Am.*, 46 N.Y.2d 351, 354 (1978) (quoting *Hooper Assoc. v. AGS Computers*,74 N.Y.2d 487, 493 (1989)).

25 See *Hartford Acc. & Indem. Co. v. Wesolowski*, 33 N.Y.2d 169 (1973); *Arthur A. Johnson Corp. v. Indem. Ins. Co. of N. Am.*,7 N.Y.2d 222, 227(1959).

26 See *Arthur A. Johnson Corp. v. Indemnity Ins. Co. of N. Am.*,7 N.Y.2d 222, 230 (1959).

31. 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*.[27] In that case, the 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."[28] 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."[29] 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."[30]As stated in *Appalachian*, "cause should not be conflated with the incident."[31] Accordingly, 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.

32. 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."[32] 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.

33. The Diocese analogized this case to *State Farm Fire & Cas. Co. v Elizabeth N.* where two children who attended a day care center "had been sexually molested over a period of a month or more."[33] There, the Court of Appeals for the First

27 *Hartford Accident & Indemnity Co. v. Wesolowski, et al.*, 33 N.Y.2d 169 (1973).

28 *Hartford Accident & Indemnity Co. v. Wesolowski, et al.*, 33 N.Y.2d 169, 170 (1973) (emphasis added).

29 *Hartford Accident & Indemnity Co. v. Wesolowski, et al.*, 33 N.Y.2d 169, 174 (1973) (emphasis added).

30 Appalachian Insurance Co. v. General Electric Co., et al., 8 N.Y.3d 162, 171 (2007); 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 1329–30 (9th Cir. 1994).

31 Appalachian Insurance Co. v. General Electric Co., et al., 8 N.Y.3d 162, 172 (2007).

32 *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); *ExxonMobil v. Certain Underwriters at Lloyd's, London*, 2007 N.Y. Slip Op. 51138 (2007).

33 *State Farm Fire & Cas. Co. v Elizabeth N.*,9 Cal. App. 4th 1232, 1235 (1992).

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."[34] 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."[35] 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.[36] New York, however, typically applied the unfortunate event test, an inquiry primarily focused on "the nature of the incident[s] giving rise to damages."[37]

34. 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 rejected this attempt by the insured to escape the consequences of its bargained for insurance policy provisions.

35. Finally, with respect to allocation of liability, relying on its earlier decision in Consolidated Edison,[38] 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,[39]Whereas a pro rata allocation "limits an insurer's liability to all sums incurred by the insured during the policy period."[40] 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."[41] Plainly, the policy's coverage is limited only to injury that occurs within

34 *State Farm Fire & Cas. Co. v Elizabeth N.*, 9 Cal. App. 4th 1232, 1236 (1992).

35 *State Farm Fire & Cas. Co. v Elizabeth N.*, 9 Cal. App. 4th 1232, 1236–37 (1992).

36 *State Farm Fire & Cas. Co. v Elizabeth N.*, 9 Cal. App. 4th 1232, 1238 (1992).

37 *Hartford Accident & Indemnity Co. v. Edward Wesolowski*, 33 N.Y.2d 169, 170(1973).

38 *Consol. Edison Co. of N.Y. v. Allstate Ins. Co.*, 98 N.Y.2d 208 (2002).

39 *Consol. Edison Co. of N.Y. v. Allstate Ins. Co.*, 98 N.Y.2d 208, 222(2002).

40 *Consol. Edison Co. of N.Y. v. Allstate Ins. Co*., 98 N.Y. 2d 208, 223(2002).

41 *Consol. Edison Co. of N.Y. v. Allstate Ins. Co*., 98 N.Y.2d 208, 222 (2002).

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.

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

36. The above decision could have a significant impact on future insurance coverage disputes. This is 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.

37. This decision is 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.

38. 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.[42] Unlike New York, 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.

42 See *Roman Catholic Diocese of Brooklyn v. Nat'l Union Fire Ins. Co. of Pittsburgh, PA.*, 991 N.E.2d 666, 674 (N.Y. 2013).

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.

VIII. The Take Away

39. Over the past decade, it has become routine for liability insurance companies to deny coverage for sexual assault claims, on the theory that the act alleged is intentional in nature and not an "occurrence" which can trigger coverage.[43] Many policies adopt the definition of "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.

40. 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.[44] Thus, it is possible that coverage may exist for sexual abuse and other intentional torts even when a policy's definition of "occurrence" requires an "accident."

43 See e.g., *Green Chimneys School for Little Folk v. Nat'l Union Fire Ins. Co. of Pittsburgh, PA.*, 664 N.Y.S.2d 320 (N.Y. App. Div. 1997); *Pub. Mut. Ins. Co. v. Camp Raleigh, Inc.*, 650 N.Y.S.2d 136, 137 (N.Y. App. Div. 1996) ("[T]he inclusion of causes of action sounding in negligent hiring and supervision does not alter the fact that 'the operative act[s] giving rise to any recovery [are] the [intentional sexual] assault[s]'"); but see *Pub. Serv. Mut. Ins. Co. v. Goldfarb*, 53 N.Y.2d 392, 399 (N.Y. 1981).

44 See *RJC Realty Holding Corp. v. Republic Franklin Ins. Co.*, 808 N.E.2d 1263 (N.Y. 2004).