BLOGS
Policyholder

Sexual Misconduct Liability: Insurance Coverage and Considerations for Public Entities

Sexual misconduct, abuse, and harassment claims have become exceedingly common in public and private institutions alike. These claims affect any business or organization that employs adults, or is responsible for the safety of children, like churches and schools.

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Sexual misconduct, abuse, and harassment claims have become exceedingly common in public and private institutions alike. These claims affect any business or organization that employs adults, or is responsible for the safety of children, like churches and schools. Today, many jurisdictions have removed procedural obstacles for victims who delay coming forward with claims of sexual abuse, which may increase the frequency of these claims as well as the difficulty of defending or investigating them. As a result, it is imperative that businesses, organizations, and any other entity where a claim of sexual misconduct may arise, understand whether they may have insurance coverage to help offset the costs of defending these types of claims.

Generally defined as an intentional, individual act, sexual misconduct or abuse is typically excluded from today's general commercial liability insurance policies. Such an exclusion may resemble the following provision:

We do not provide coverage for bodily injury, property damage, or medical expense arising out of or resulting from the actual, alleged or threatened sexual molestation of a person by any insured, any employee of any insured, or any other person actually or apparently acting on behalf of any insured.

There are, however, many claims or allegations which may be raised by a plaintiff in a sexual misconduct lawsuit that are not barred under the above exclusion, such as supervisory negligence, failure to train, invasion of privacy, and defamation. Depending on the specific language of the insurance policy at issue, these claims may provide a route to coverage under the personal injury coverage provision of a general commercial liability ("CGL") policy. So, although obtaining specific coverage for sexual misconduct claims is ideal, even if an insured lacks separate Sexual Misconduct Liability insurance, defense of a lawsuit and even partial indemnity for certain claims may potentially exist in Public Officials Liability, CGL, Directors & Officers, Employment practices liability, or other insurance policies.

Accordingly, insureds should not assume a lack of coverage, as nuances in facts or policy language may provide an unexpected result when it comes to sexual misconduct claims. In fact, some older insurance policies – potentially triggered by

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allegations of abuse dating back years or even decades – may lack a sexual misconduct exclusion altogether. Insureds should closely examine all potentially relevant policies and all facts alleged by a claimant. Particular attention should be paid to the insurance policies in effect at the time of the first alleged misconduct or abuse and at the time the claim was made.

After determining that an insurance policy may afford coverage for a claim, an insured must give timely and sufficient notice to all potentially applicable insurers. Once this occurs, insurers must provide a coverage decision or position to their insured. In this situation, insurers have three potential options: (1) accept the defense of the case outright and admit the claims are covered, (2) accept the defense under a reservation of rights, or (3) deny coverage outright. In the sexual misconduct context, insurers typically defend under a reservation of rights, many times due to the inclusion of potentially covered claims as mentioned above. Insureds should scrutinize the asserted reservations, exclusions, or limitations to coverage in each reservation of rights letter to determine if they are supported by the law or applicable policies, and whether, due to the facts of the underlying claim, the allegations may fit within another provision of coverage not mentioned by the insurer, or within an exception to an exclusion.

Another reason to carefully review and respond to reservations of rights letters is the purported right to recoup defense costs. Through this reservation insurers seek to recover the cost of defending a claim if it is later determined that no coverage exists under the policy. Although this right to recoup is almost never found in the policy language itself, some courts have held that when an insured fails to object upon receipt of the reservation of rights letter, a right to recoup is created by consent of the parties. Thus, as a general rule, insureds should not accept an insurer's asserted reservations, limitations, or exclusions at face value.

Lastly, some strategic considerations may be relevant for an insured to maximize their potential coverage, especially in the sexual misconduct context. First, insureds should utilize any differences in the facts alleged (i.e., multiple instances of misconduct, multiple alleged abusers, or multiple alleged victims) and the timing of any alleged misconduct to argue for the maximum number of occurrences. This could result in the applicability of multiple policy or endorsement limits, which can be leveraged by the insured during settlement discussions. Tolling and standstill agreements should also be considered as they provide flexibility and utility in the negotiation and pre-litigation stages. Lastly, issues of confidentiality in sexual misconduct cases should be given serious thought, especially when the organization or entity relies on public confidence or transparency, and because the reputational damage to the alleged abuser, as well as the perceived treatment of victims, can be particularly noteworthy to the public.

In summary, all institutions, but particularly public entities, could benefit from obtaining specific Sexual Misconduct Liability insurance. However, coverage may be found in other insurance policies depending on the specific language and the facts alleged. Consulting an insurance recovery attorney may be beneficial when providing notice to multiple insurers, responding to a reservation of rights letter, analyzing whether coverage may exist, and determining creative routes to maximize recovery.

Alana McMullin recently spoke at the PRIMA (Public Risk Management Association) 2022 Annual Conference with Chad Blomberg of Nussbaum Speir Gleason PLLC about sexual misconduct liability for public entities. Please contact Alana McMullin if you have any questions.