

Defining An Occurrence For Sexual Abuse Cases

By **Katharine Thompson, Gordon Rees Scully Mansukhani LLP** April 27, 2017, 2:15 PM EDT

In *Diocese of Duluth v. [Liberty Mutual Group](#)* et al., case no. 16-05012 (Mar. 30, 2017), the Bankruptcy Court for the District Court for Minnesota was asked to determine the trigger of coverage and the number of “occurrences” related to negligence claims asserted against the Diocese of Duluth by victims of priest sexual abuse. Such claims drove the Diocese to file for bankruptcy. As part of that bankruptcy proceeding, the Diocese filed an adversary proceeding seeking coverage from several of its insurers which had issued multiple “occurrence”-based policies spanning several decades.



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Ruling in favor of the Diocese, the court found that multiple years of coverage could be triggered and that multiple “occurrences” could be found in each policy year because each victim was a separate “occurrence.”

The Diocese successfully argued that each alleged act of abuse constituted a separate “occurrence” under all insurer’s policies, although it conceded that under the policies’ “occurrence” definition (“arising out of continuous or repeated exposure to substantially the same general conditions shall be considered as arising out of one occurrence”) multiple instances of abuse of the same victim by the same priest in the same year constituted a single “occurrence” for that year.

Most of the insurers argued for the interpretation that there was only one “occurrence” — the ongoing negligent supervision of priests by the Diocese allowing the continuous and repeated exposure of the victims to the abusive priests — regardless of the number of victims or perpetrators involved, or the number of instances of abuse of a victim. The Continental Insurance Company also argued for one occurrence, or at most, one occurrence per priest or per bishop abuser because all the injuries arose from the Diocese’s decision to allow the abusers access to the children.

While several of the insurers argued that the Diocese was conflating the analytically distinct issues of trigger of coverage and number of occurrences, it is apparent from the court’s

decision that the court's number-of-occurrence determination was intertwined, for better or worse, with its consideration of the applicable trigger. The decision focused on Minnesota's use of the actual injury or injury-in-fact trigger rule, which provides that a coverage-triggering injury takes place at the time the complaining party is actually injured, not when the wrongful act was committed. Minnesota courts have also held that "an injury can occur even though the injury is not 'diagnosable,' 'compensable' or manifest during the policy period as long as it can be determined, even retroactively, that some injury did occur during the policy period."

Considering these precedents, the court noted that the underlying facts of the cases were not in dispute — numerous victims were abused by several different priests. As the sexual abuse was what caused the victims' damage, "under the actual-injury rule, the occurrence is the time when the victims were sexually abused by the priests." The court further determined that the number of occurrences could be both per victim and per priest — "There are separate occurrences for each separate sexual abuse for each victim and each priest. The victims each suffered separate abuse and it is this occurrence that triggers an insurance policy that is at risk at that time." The court also clarified that if a victim was injured by two priests during one policy period, that would be two occurrences, although if injured repeatedly by the same priest during one policy period, that would be one occurrence. Essentially, the court gave the Diocese even more than it was seeking with this additional holding. The court did not discuss the cause test or the effect test and their impact on the number of occurrences, but apparently came to its conclusions about the number of occurrences based upon the actual-injury rule which concerns triggers.

It's not evident from the decision what impact the court's decision had on each insurer's coverage obligations, but certainly the decision was a far cry from the single occurrence result advocated by most of the insurers. In determining that multiple policies might be triggered, and that there might be multiple occurrences in each year, the court significantly broadened the insurers' potential coverage obligations. Indeed, four of the insurers are challenging the court's decision and have filed a motion for leave to appeal which is pending in District Court of Minnesota, case no. 17-1167. The insurer's motion specifically takes issue with the court's combining its review of the trigger of coverage and the number of occurrences.

Sadly, abuse cases, and resulting coverage litigation, are becoming more common. A Pennsylvania court also recently faced these same issues in connection with the Sandusky

scandal at Penn State University, but came to the opposite conclusion while discussing many of the same concerns. Pennsylvania utilizes the “manifestation” trigger outside of the asbestos context, and while this trigger led to a similar conclusion as to when the bodily injury first occurred, the court did not permit Penn State to trigger multiple policy periods for subsequent acts of abuse against the same victim. In *Pa. State Univ. v. Pa. Manufacturers’ Ass’n Insurance Co.*, 2016 Phila. Ct. Com. Pl. LEXIS 158 (Pa. Ct. Com. Pl. May 4, 2016), the court noted that:

Unlike environmental pollution or asbestos damage, which can remain hidden for many years before it manifests, the physical violation (bodily injury) arising from child sexual abuse is experienced immediately by the victim, although the harm often continues to be felt long thereafter. To the extent that PSU’s negligence enabled Sandusky to abuse his victims, such bodily injury manifested when the first abuse of each victim occurred. The court also followed prior Pennsylvania Superior Court authority which held that each victim constitutes only one occurrence, no matter how many separate instances of sexual abuse took place. *General Accident Insurance Co. v. Allen*, 708 A.2d 828, 834-835 (Pa. Super. 1998) (one occurrence for each child where three children were sexually abused from 1986 to 1988). Pennsylvania does not appear to have addressed a situation with multiple abusers.

It remains to be seen whether the Minnesota District Court will hear the insurer’s appeal, and if so, what impact that will have on the number of occurrences. These two cases highlight the fact that although sexual molestation claims are in some ways unique and judges who hear these cases are presumably moved by the suffering of the victims of the abuse, in the end, the coverage issues must still be addressed within the context of each state’s tests for trigger and number of occurrences. In Pennsylvania that meant, despite acknowledging that a victim’s suffering may last long after the abuse has ceased, applying a manifestation trigger and the cause test to determine only a single occurrence per victim. In Minnesota, at least according to one federal bankruptcy judge, it meant applying the actual-injury trigger and allowing multiple occurrences per victim and per priest. At this point, in jurisdictions where there is not yet any case law on these issues, it may be wisest to work under the assumption that, although such cases as these may provoke a strong reaction and concern for the victims, in coverage actions, the state’s trigger and number of occurrence rules will continue to apply. This will likely continue to be an area to watch as courts around the country continue to grapple with trigger and number of occurrences in

these sexual abuse cases.

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