CALIFORNIA
EMPLOYMENT LAW LETTER
Part of your California Employment Law Service

Vol. 28, No. 18
June 25, 2018

INSURANCE COVERAGE

When is sexual abuse an 'accident'?

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A student alleged that she was sexually abused by a construction worker at her school and sued the construction company for negligently hiring, retaining, and supervising the worker. The company submitted the claim to its insurance company under a commercial general liability policy. The carrier successfully challenged the company's request for coverage in federal court. When the case reached it on appeal, the 9th Circuit Court of Appeals (whose rulings apply to all California employers) requested guidance from the California Supreme Court, which broke from the district court and deemed the student's lawsuit a covered "occurrence" under the insurance policy.

Middle school student claims sexual abuse

Ledesma & Meyer Construction Company, Inc. (L&M), contracted with the San Bernardino Unified School District to manage construction at a middle school. In 2003, L&M hired Darold Hecht as an assistant superintendent on the project. In 2010, a student at the school alleged that Hecht sexually abused her and sued L&M in state court for negligently hiring, retaining, and supervising him.

L&M requested that its insurers, Liberty Surplus Insurance Corporation and Liberty Insurance Underwriters, Inc., defend it against the claims. The commercial general liability policy at issue provided coverage for bodily injury "caused by an 'occurrence' that takes place in the 'coverage territory.'" The policy defined "occurrence" as an "accident, including continuous or repeated exposure to substantially the same general harmful conditions." Liberty defended L&M under a reservation of rights but sought declaratory relief in federal court, contending it had no obligation to defend or indemnify L&M.

The district court granted summary judgment to Liberty (i.e., issued a ruling in its favor without a trial), and L&M appealed. When a federal court has a novel question of California law, it can ask the California Supreme Court for guidance. Using that procedure, the 9th Circuit posed the following question to the California Supreme Court: When a third party sues an employer for the negligent hiring, retention, and supervision of an employee who intentionally injured the third party, does the suit allege an "occurrence" under the employer's commercial general liability policy? The California Supreme Court answered "yes," siding with the insured.

Incident qualified as an 'occurrence'

A duty to defend will exist if an insurance carrier becomes aware, through

a lawsuit or otherwise, of facts giving rise to the potential for coverage under the insured's policy. For purposes of California liability insurance coverage, an accident is "an unexpected, unforeseen, or undesigned happening or consequence from either a known or an unknown cause" arising out of the insured's conduct. The term "accident" is comprehensive, encompassing coverage for liability resulting from the insured's negligence. L&M sought to show, and the California Supreme Court agreed, that the student's claim constituted an accident and was therefore an "occurrence" under its policy.

First, a claim for negligent hiring, retention, or supervision seeks to impose liability on an employer for allegedly negligent conduct, which is determined independently of the employee's conduct. Thus, the coverage decision was not based on Hecht's alleged sexual misconduct, which may have been a willful act beyond the scope of coverage. Rather, the coverage determination was based on the student's allegations that L&M had acted negligently when it decided hire Hecht. That constituted an independent tortious, or wrongful, act that formed the basis of L&M's demand to Liberty for defense and indemnity.

Furthermore, the alleged occurrence resulting in injury began with L&M's purported negligent hiring, retention, and supervision of Hecht and ended with his act of molestation, which was neither intended nor expected from L&M's perspective. As a result, the student's injuries could still be considered an "additional, unexpected, independent, and unforeseen happening or consequence" of L&M's actions.

Negligent hire indirectly caused student's injuries

Personal injury liability coverage necessarily depends on whether the alleged injury resulted from covered causes. Generally, if the insured's conduct is a "substantial factor" in bringing about the injury, causation will be established. The district court ruled that L&M's alleged negligent hiring, retention, or supervision of Hecht was "too attenuated" from his alleged molestation of the student to trigger policy coverage. It reasoned that L&M's actions set the chain of events in motion but did not legally cause the student's injury. The California Supreme Court disagreed.

An injury may be the result of more than one cause. California courts have recognized that negligent hiring, retention, or supervision may be a substantial factor in sexual molestation by an employee, even if it is not the primary cause of injury. Here, Hecht's alleged molestation of the student directly caused the claimed injury, and L&M's alleged negligence in hiring, retaining, and supervising him may have been an indirect cause. The causal connection between L&M's alleged negligence and the injury was close enough to justify the imposition of liability on the employer and trigger coverage.

The California Supreme Court recognized society's interest in incentivizing employers to take precautions to prevent sexual abuse in the workplace. The threat of liability for negligent hiring, retention, and supervision serves as a significant deterrent, even assuming the availability of insurance coverage. However, the public policy against insurance for one's own intentional sexual misconduct should not bar liability coverage for others whose mere negligence contributed in some way to the abuse. A finding in Liberty's favor would leave employers without coverage for claims of negligent hiring, retention, or supervision arising out of employees' intentional conduct, which is inconsistent with California law.

Absent an applicable exclusion, employers may legitimately expect their comprehensive general liability insurance policies to cover negligent hiring, retention, and supervision claims, just as they cover other claims of negligence.

Liberty Surplus Insurance Corporation, et al. v. Ledesma & Meyer Construction Company, Inc. (California Supreme Court), 6/4/18 (Majority Opinion: Corrigan, J.; Concurring Opinion: Liu, J.).

Bottom line

First, this case is a reminder to be careful in your hiring decisions because a bad hire can have dangerous implications down the road. But it also provides some relief to employers that rely on commercial general liability policies as their primary source of coverage for business-related claims and lawsuits. It is also a good reminder that after receiving notice of a potential dispute, you should ask whether the claim might be covered by insurance and, if there is any potential for coverage, submit the claim under your policies.

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