LIABILITY INSURANCE COVERAGE FOR CLAIMS RELATED TO SEXUAL ASSAULT: WHAT HAPPENS WHEN THE INSURED IS NOT THE ALLEGED ASSAILANT?

Erica M. Baumgras Flaherty Sensabaugh Bonasso PLLC

Sexual assault claims have become increasingly common, and in recent years, a number of jurisdictions have removed procedural obstacles for victims to come forward with these claims, even years later. High-profile cases alleging sexual assault have been covered extensively in the media, and insurance coverage claims involving those cases have been litigated extensively as well.

But what about sexual assault claims when the insured is not the assailant but is alleged to have facilitated the assault in some manner, for example, owning or operating the vehicle or the residence in which the assault occurred, failing to prevent or intervene in the assault, failing to contact law enforcement about the assault, or failing to obtain medical care for the victim as a result of the assault? Will the tortfeasor's policy afford a defense or indemnification? While the answers to these questions vary depending upon the particular allegations against the insured, the policy provisions, and the jurisdiction, this article addresses some of the reasons claims arising out of or related to sexual assault may not be covered under a homeowner's policy, an auto policy, or a commercial general liability ("CGL") policy.

One reason is that a claim arising out of a sexual assault may not constitute an "occurrence," defined by a liability insurance policy as an accident, including continuous or repeated exposure to substantially the same general harmful conditions. Courts have held that an accident is a chance event or event arising from an unknown cause, and to be an accident, both the means and the result must be unforeseen, involuntary,

unexpected, and unusual. *See State Bancorp, Inc. v. U.S. Fidelity and Guar.,* 199 W.Va. 99, 103, 483 S.E.2d 228 (1997); *Harrison Plumbing & Heating, Inc. v. N.H. Ins. Grp.,* 681 P.2d 875, 878 (Wash. App. 1984). In a liability insurance policy, a claim based on sexual misconduct does not come within the definition of occurrence, and even the inclusion of a negligence allegation or theory of recovery against the insured does not alter the essence of the claim for the purpose of insurance coverage. *See Smith v. Animal Urgent Care, Inc.,* 208 W.Va. 664, 542 S.E.2d 827 (2000); *GATX Leasing Corp. v. National Union Fire Ins. Co.,* 64 F.3d 1112, 1118 (7th Circ. 1995). Courts reason that the insured's failure to prevent the intentional act does not constitute an occurrence because the volitional act does not become an accident simply because the insured's negligence prompted the act.

Another reason is that liability insurance policies often contain an exclusion for bodily injury, which is expected or intended by an insured. The majority rule rejects the duty to defend an insured or to pay for damages allegedly caused by the sexual misconduct of the insured when the liability insurance policy contains this exclusion. *Allstate Ins. Co. v. Thomas*, 684 F.Supp. 1056, 1059-60 (W.D.Okla. 1988). Some courts have held that in such cases, the intent of the insured to cause some injury will be inferred as a matter of law. *Horace Mann Ins. Co. v. Leeber*, 180 W.Va. 375, 376 S.E.2d 581 (1988).

In addition, allegations of negligence in a complaint for sexual assault may not trigger insurance coverage. *Harpy v. Nationwide Mut. Fire Ins. Co.,* 76 Md.App. 474, 487, 545 A.2d 718, 725 (1988). *See West Virginia Fire & Cas. Co. v. Stanley*, 216 W.Va. 40, 54, 602 S.E.2d 483 (2004) (although the word negligent was used in the allegations against the parents of a young man accused of assault, the exclusion applied because the parents would have at least expected harm to result to the victim as a result of their conduct); *Westfield Ins. Co. v. Matulis,* 421 F.Supp.3d 331, 347-49 (S.D.W.Va. 2019) (pleading negligent supervision claims against the insured - the employer of a physician accused of assaulting his patients - was insufficient to invoke coverage under a policy with this exclusion when the claimants alleged the insured knew of the misconduct and did nothing about it, because the insured would have at least expected harm to befall the claimants); *Allstate Ins. Co. v. S.F.,* 518 N.W.2d 37, 38 (Minn. 1994) (although the complaint alleged the insured negligently abandoned the plaintiff when he left her alone with two other men who assaulted her, the insurer did not have a duty to defend or indemnify the insured for a negligence claim arising out of an alleged assault because the exclusion applied); *Perkins v. King*, 358 So.3d 538 (La. Ct. App. 2023) (coverage for the assault of a wedding guest by other guests was excluded by an intentional acts exclusion in the homeowners policy, even though the complaint alleged the homeowners were negligent in allowing others to foreseeably assault the plaintiff); *Hawaiian Ins. and Guaranty Co., Ltd. v. Brooks*, 686 P.2d 23 (Haw. 1984), overruled on other grounds by *Dairy Road Partner v. Island Ins. Co., Ltd.,* 992 P.2d 93 (Haw. 2000) (auto policy extending coverage for injury neither expected nor intended from the standpoint of the insured did not impose a duty to defend the driver for injuries to a female passenger assaulted in the vehicle, and it was unreasonable for the driver who witnessed the assault but did nothing to prevent or mitigate the harm to expect the liability insurer to defend him).

Moreover, coverage may be precluded by a criminal acts exclusion. If the conduct alleged against the insured is criminal in nature and was either allegedly committed by the insured, or aided and assisted by the insured, this exclusion could apply. The exclusion may be applicable even if the insured has not been charged with or convicted of a crime in connection with their conduct. Also, if the claim does not assert any injury to the plaintiff caused by or resulting from an action independent of criminal conduct, this exclusion may apply. *Canutillo Independent School Dist. v. National Union Fire Ins. Co. of Pittsburgh, Pa.*, 99 F.3d 695 (5th Cir. 1996) (exclusion for criminal acts precluded coverage for the school district and other insureds for claims that would not have existed but for the conduct of a teacher who sexually abused students, even though the insureds themselves did not engage in the excluded acts).

Further, a liability insurance policy may contain an exclusion for bodily injury arising out of sexual molestation, physical or mental abuse, or harassment. If all the injuries alleged arise out of the sexual assault or the physical or mental abuse of the complainant, coverage may be excluded. *See Westfield Ins. Co. v. Merrifield*, No. 2:07-cv-00034, 2008 WL 336789 (S.D.W.Va. Feb. 5, 2008), quoting *Allstate Ins. Co. v. Bates*, 185 F.Supp.2d 607, 613 (E.D.N.C. 2000) (in case alleging negligence and civil conspiracy against woman arising out of death of her grandchild from injuries caused by physical and sexual abuse of her son, court rejected argument that injury and death of child arose not from abuse but from her alleged negligence and held that policy language specifically tied exclusion to nature of injury, and without molestation there would be no injury and no basis for negligence claim); *Westfield Ins. Co. v. Hill*, 790 F.Supp.2d 855 (N.D.Ill. 2011) (claims that insureds negligently failed to supervise social functions at their lake house, to inspect and maintain the house, or to warn guests, which resulted in the minor being assaulted by another invitee, were subject to exclusion in homeowners policy for bodily injury arising out of sexual molestation, corporal punishment, or physical or mental abuse); *Auto Club Group Ins. Co. v. Worthey*, No. 315715, 2014 WL 3844083 (Mich. Ct. App. Aug. 5, 2014) (abuse or molestation exclusion barred coverage for action against homeowner for sexual assault committed by house guest).

Additionally, if an insured vehicle was used in the commission of an assault, the claim may not be covered under the auto policy because the assault was not an act arising out of the ownership, maintenance, operation, or use of the vehicle. Courts have almost unanimously found no causal relation between the use of a vehicle and injuries caused by an assault of any kind. *See Baber v. Fortner*, 186 W.Va. 413, 412 S.E.2d 814 (1991); *Nationwide Mut. Ins. Co. v. Brown*, 779 F.2d 984, 988 (4th Cir. 1985); *Detroit Auto. Inter-Insurance Exchange v. Higginbotham*, 95 Mich.App. 213, 290 N.W.2d 414, 419 (1980); *SCR Medical Transp. Services, Inc. v. Browne*, 335 Ill. App.3d 585, 781 N.E.2d 564 (Ill. Ct. App. 2002) (sexual assault did not constitute an accident arising from the use of the insured vehicle, so the insurer had no duty to defend).

Courts throughout the country have found liability insurance coverage for sexual assault claims concerning the same or similar policy language. Courts have also denied coverage on different or additional policy provisions. However, this article is intended to address some of the grounds on which coverage may be denied, even when the insured is not alleged to have committed the actual assault.

Erica Baumgras is a member with Flaherty Sensabaugh Bonasso PLLC in Charleston, West Virginia. In practice for more than 20 years, she focuses on insurance and business law. She is an AV Preeminent® Peer-Review Rated attorney by Martindale-Hubble® and is named in The Best Lawyers in America©. She may be reached at 304.347.4241 or ebaumgras@flahertylegal.com.