Actual-Injury Rule Dictates Multiple Occurrences in Minnesota for Sexual Abuse Claims

By: Rosemary A. Juster and Shayne W. Spencer

May 12, 2017

In a recent decision, Diocese of Duluth v. Liberty Mutual Group, ADV 16-5012 (Mar 30, 2017), the United States Bankruptcy Court for the District of Minnesota applied the "actual-injury" or "injury-in-fact" test when it determined that every instance of sexual abuse constituted an occurrence under commercial general liability insurance policies issued to the Diocese of Duluth. Recognizing that Minnesota courts have adopted the "actual-injury" rule for determining the number of occurrences, the bankruptcy court noted that, under the actual-injury rule, the occurrence is when the injury occurs, not the time of the wrongful act. In determining that each instance of abuse constituted an occurrence, the bankruptcy court rejected the insurers' argument that the negligent supervision of the priests who committed the abuse was the occurrence such that there would be only one occurrence for all instances of abuse committed by all priests against all victims.

The bankruptcy court next differentiated between cases in which there is sufficient evidence from which it can be determined that damage arose from a discrete event, even if it is one event of many, and cases in which it is impossible to determine which individual event caused damage or how much damage each event caused. In matters in which it can be determined that there were discrete events, Minnesota courts hold there are multiple occurrences. In matters in which it is impossible to identify discrete events or the damage that flows from each discrete event, Minnesota Courts hold there was one continuing occurrence during the policy period of each policy.

Turning to the number of occurrences under the policies issued to the Diocese, the bankruptcy court stated that:

There are specific occurrences that are discrete and identifiable events; the priests' sexual abuse of the victims. Each victim suffered an injury and has readily identifiable damage on each separate occasion of sexual abuse.

The court stated that the occurrence was each time the victim was abused.

After determining that each abusive touching constituted an occurrence, the court addressed the policies' "deemer" clauses, which stated "[f]or the purposes of determining the limit of the company's liability, all bodily injury…arising out of continuous or repeated exposure to substantially the same general conditions shall be considered as arising out of one occurrence." Based on this provision, the Diocese conceded that there could only be one occurrence in each policy year for each victim related to abuse by one priest. However, the court stated that because the injury is from the perspective of the victim, if a victim was abused/injured by two priests within a policy year, there would be two occurrences in that policy year even though there may be repeated injury in that policy year. On the other hand, if the victim is abused repeatedly by the same priest during one policy period, there would be only one occurrence.

The bankruptcy court's holding that each instance of sexual abuse is an occurrence is in line with other jurisdictions that apply an actual-injury/injury-in-fact test. The court's assumptions, however, that a

victim of sexual abuse will be able to recall accurately each instance of sexual abuse, and that the damage related to each instance of abuse will be "readily identifiable," is troubling. These assumptions are suspect in cases of historical sexual abuse, which the Duluth court was addressing, where victims are being asked to recall painful and often repressed memories from when they were children decades ago. Factual accuracy and clarity are more the exception than the norm in such cases. Thus, although the bankruptcy court's opinion sets forth a simple test for the number of occurrences in sexual abuse cases, its application will be difficult and will leave insureds and insurers wanting for more guidance on the issue.