HUNTON& WILLIAMS

INSURANCE LITIGATION ALERT

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U.S. Court of Appeals for the District of Columbia Circuit Finds that Student Who Was Abused Multiple Times by Fellow Students Was Entitled to Multiple Per-Claim Limits Because Each Assault Was a Separate "Claim"

In *Essex Insurance Co. v. Doe*, No. 06-7163, *2008 U.S. App. LEXIS 94* (D.C. Cir. Jan. 4, 2008), the Court of Appeals for the District of Columbia Circuit reversed the district court's holding that an abused student was only entitled to the single-claim limit for sexual abuse under the liability policy of the residential facility where the student was living. The appeals court found that the term "claim," which was not defined in the policy, was related to the term "occurrence" and found that because there were four separate incidents of abuse, each was a separate occurrence, and thus also a separate "claim." The appeals court awarded the full aggregate limit to the student, less the amount the insurer spent on investigation and defense. *Id.* at *8-9.

Background and Procedural History

A seven-year-old student was sexually assaulted four times by four different older students while living at a children's residential facility operated by Associates for Renewal in Education, Inc. ("A.R.E."). Through his father, the abused student filed suit against A.R.E., alleging A.R.E. had not properly supervised the facility. *Id.* at *1. The student settled with A.R.E. and, as part of the settlement, A.R.E. assigned its rights under a liability policy to the student. *Id.* The insurer then filed a declaratory judgment action in the U.S. District Court for the District of District of Columbia for a determination of the student's rights under the policy. *Id.* at *1-2.

In the district court, the insurer argued that the student was only entitled to $100,000, the policy's per claim sublimit for sexual abuse. *Id.* at *2. The policy contained an endorsement that governed the sublimit, which provided coverage for sexual abuse claims alleging negligent supervision subject to an aggregate limit of $300,000 per year and an "each claim limit" of $100,000. The endorsement provided that "[t]he sublimit of liability shown in this endorsement is the most [the insurer] will pay for all damages including investigation and defense because of injury arising out of any one claim for sexual abuse and/or misconduct. The aggregate limit stated

in this endorsement is the most [the insurer] will pay for all claims, including investigation and defense, arising out of sexual abuse and/or misconduct in any 'policy year.'" *Id.*

The insurer contended that the student had only one "claim," even though it admitted that there were four separate "occurrences,"[1] because the student made only one demand for compensation. *Id.* at *3. The student, as the subrogee of A.R.E.'s rights under the policy, argued that the four occurrences resulted in four separate claims, thus he was entitled to $300,000, the policy's aggregate annual limit for sexual abuse claims against A.R.E. *Id.* The insurer also contended that the limit, whether $100,000 or $300,000, must be reduced by the amount the insurer spent on investigation and defense of the student's case against A.R.E. The District Court agreed with the insurer on both issues. *Id.*

The Circuit Court's Opinion

The appellate court began its opinion by noting that the student's position that each occurrence resulted in a separate claim was supported by case law, while the insurer had not cited a single case to the contrary for the proposition that a single claim could result from multiple torts committed by separate individuals over a period of time. *Id.* at * 4 (citing *Zhou v. Jennifer Mall Rest., Inc.*, 699 A.2d 348, 353 (D.C. 1997)). The court further observed that the dictionary definition of "a cause of action" is a "group of operative facts giving rise to one or more bases for suing" and that this definition favored the student's interpretation because there has been four separate tortious incidents. *Id.* (citing *Black's Law Dictionary* 214 (7th ed. 1999)).

The court further explained that the student's argument was supported by the language of the policy. The court found that the policy "tethers" the term "claim" to the term "occurrence." *Id.* at *5. The court explained that this established a "one-to-one relationship between (i) an occurrence causing injury to a third party and (ii) that third party's ensuing claim against A.R.E." *Id.* As an example, the court noted that the policy's sublimit endorsement appeared to use the phrase "each claim limit" interchangeably with the phrase "each occurrence limit." The court thus concluded that the policy "appear[ed] to establish a direct relationship between an occurrence and a claim when there is a single injured victim: A sexual abuse claimant has multiple claims when he or she suffered injuries caused by multiple occurrences, and has one claim when he or she suffered injury caused by one occurrence." *Id.*

The court deemed the insurer's position that the term "claim" means an actual demand for money against A.R.E., regardless of how many occurrences the claimant alleges in the demand, "illogical." *Id.* at *6. The court found it "highly unlikely" that, in a situation where a single claimant suffers injuries from multiple occurrences, the insurer would allow the amount of limits to vary based only on whether the claimant happens to make one demand or multiple demands against the insured. *Id.* Further, the court noted, it was clear that in a case with one sexual assault occurrence and one victim, the insured could not seek coverage for multiple claims simply because the victim sent multiple demand letters, but this was the logical implication of the insurer's argument. *Id.* at *6-7. Finally, the court also noted that the insurer could have drafted language that clearly limited its liability for multiple instances of sexual abuse made against a single insured. "[F]or example, [the insurer]'s argument would be persuasive if its contract with A.R.E. established a $100,000 'each-injured-party limit' for coverage of sexual abuse claims. But the contract here contains no such limiting language." *Id.* at *7.

The court then concluded that the policy "unambiguously" supported the student's position that the number of claims for an individual sexual abuse victim depended on the number of occurrences. *Id.* at *8. The court further noted that even if the contract was ambiguous, the student would prevail because D.C. law required that any ambiguity be construed against the insurer. *Id.* (citing *Revere Copper & Brass Inc. v. Overseas Private Inv. Corp.*, 628 F.2d 81, 82-83 (D.C. Cir. 1980); *Chase v. State Farm Fire & Cas. Co.,* 780 A.2d 1123, 1127 (D.C. 2001);

[1] The policy defined the term "occurrence" to mean "an accident." The policy did not define the term "claim" for purposes of the $100,000 "each claim" limit in the sublimit endorsement. Id. at *2-3.

Travelers Indem. Co. of Ill. v. United Food & Commercial Workers Int'l Union, 770 A.2d 978, 986 (D.C. 2001)). The court then held that the student was entitled to $300,000 - the aggregate annual limit for sexual abuse claims. *Id.* at *8-9.

With regard to the insurer's claim that it should be able to reduce the awarded $300,000 by the amount it spent on investigating and defending the student's suit against A.R.E., the court found for the insurer. *Id.* at *9-11. The relevant policy language stated that "[t]he sublimit of liability shown in this endorsement is the most we will pay *for all damages including investigation and defense* because of injury arising out of any one claim for sexual abuse and/or misconduct" and that the "aggregate limit stated in this endorsement is the most we will pay for *all claims, including investigation and defense,* arising out of sexual abuse and/or misconduct." *Id.* at *9.

The insurer contended that this language allowed it to subtract the costs of investigating and defending the student's claim from its coverage limits. *Id.* The student relied on the phrase "pay for all damages including investigation and defense" to argue that the investigation and defense costs referenced were the claimant's investigation and defense costs (which the student contended could be included in the claimant's "damages"), not the insured's investigation and defense costs. *Id.* at *10. The court rejected the student's argument noting that it made little sense that a claimant would have "defense" costs. *Id.* The court concluded that although the language could have been drafted in a way that made its meaning clearer, they could not read the phrase "including investigation and defense costs" out of the contract, which is what the student's interpretation required. Thus, the appellate court upheld the district court's finding that the "defense-within-limits provision" meant that the insurer could reduce its coverage by the amount it spent on investigation and defense.

Implications

The *Essex* case highlights the importance of policy language. The insurer lost the per claim argument, in large part, because it failed to define the term "claim" in the policy, allowing the claimant to put forth a definition equating "claim" with "occurrence." Similarly, the insurer won its argument regarding the defense within limits provision because it was not reasonable to interpret the language as providing limits in addition to defense costs.