

Liability Policy Considerations: Understanding How Abuse and Molestation Exclusions Impact Insurance Coverage

If you have clients—individuals or organizations—who have exposure with vulnerable classes of people such as children, you have no doubt seen abuse and molestation exclusions in liability insurance policies. For decades, it has been common practice for insurers to preclude coverage for claims alleging abuse for these insureds.

It can, however, surprise insureds who don't have exposures with vulnerable populations to see these exclusions in their liability policies—and that's just what's happening. It's becoming increasingly more common to find abuse and molestation exclusions in most personal and commercial liability policies.

The reason is simple—abuse or molestation can happen anywhere to anyone and the insured doesn't need to be the alleged perpetrator to be included in a claim. Allegations can be made against the insured based on theories related to negligence.

This article will discuss the risks that such allegations pose and how the exclusions have been applied in court decisions. Interpretations of these exclusions may differ by jurisdiction and are fact sensitive.

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The Risk of Allegations

Allegations made by the victim(s) or their families may include:

- negligent employment, supervision, investigation, hiring, or training
- failure to protect the victim, maintain a safe premise
- bodily injury
- intentional infliction of severe emotional distress
- reckless indifference
- assault and/or battery
- vicarious liability and others

When such allegations are made, organizations and/or individuals can incur significant legal fees and litigation expenses defending against the claims. Even if the court finds in favor of the defendants, they can face damage to reputation, loss of revenue and potential bankruptcy.

What is Abuse?

We cannot assume because “molestation” might be in the title of an endorsement that the entire endorsement applies only to sexual abuse. “Abuse” can come in many forms such as physical or verbal, or acts of aggression and injury, among others. Abuse and molestation exclusions often apply to all forms of abuse, but insurance policies don’t always define the term. Thus, courts will define it when needed.

Concept of Ambiguity and the Reasonable Insured

A term like “abuse” is not considered ambiguous merely because parties reading it (or even dictionary definitions) disagree on its meaning.

Dorchester Mutual Ins. Co. v. Krusell 150 N.E. 3d 731 (Sup. Jud. Ct. Mass. 2020)

A term may be considered ambiguous if “it is susceptible of more than one meaning and reasonably intelligent persons would differ as to which meaning is the proper one.” The court analyzed the term “physical abuse” in an exclusion to determine if it was ambiguous and ruled it was.

The court considered “what an objectively reasonable insured, reading the relevant policy language, would expect to be covered.” The court reviewed the history of how abuse and molestation exclusions have been applied, and how the state’s regulations and laws referred to the terms, to help determine intent.

After much analysis, the court stated a reasonable insured would not interpret “physical abuse” in the same manner as the insurer and the specific exclusion would not be enforced.

Riley v. Maison Orleans II, Inc. 2001-0498 (La. App. 4 Cir. 9/25/02); 829 So.2d 479

Similarly, in this case, one nursing home patient assaulted another nursing home patient and the home was accused of negligence. The nursing home’s policy included an abuse exclusion but also a separate endorsement granting limited abuse coverage with a sub-limit of \$25,000.

The court stated “physical abuse, as opposed to simple assault, is generally the act of a person in control, dominance, or authority who misuses his position to harm or mistreat a person over whom he exercises control. The act of one nursing home resident attacking a fellow resident is not abuse because the element of control is lacking.”

The court explained that abuse and assault did not have the same meaning. The insurer was required to support the claim and not apply the \$25,000 sub-limit.

Term Definition Takeaway

Courts will decide cases based on the specifics of the situation, and contract terms, in part, are defined by other words in the policy. Insurance policies must be read as a whole. Understanding precedent gives you an advantage when helping insureds consider how exclusions are likely to apply.

Key Points in Abuse or Molestation Exclusion Example—CG 2146 (7/98)

While contract language will vary, and all claims are considered on a case-by-case basis, it's useful to examine some key points commonly included in endorsements.

This ISO form has a common robust exclusion that has been used as a framework for other exclusions in the industry. The exclusion does not define “abuse” and it would be an error to assume the exclusion pertains only to sexual acts.

Coverage is excluded for injury arising out of *actual or threatened* abuse or molestation *by anyone of any person while in the care, custody or control of any insured*. The endorsement also excludes injury arising out of negligent employment; investigation; supervision; reporting to the proper authorities, or failure to report; or retention of a person for whom *any insured is or ever was legally responsible* and whose conduct would be excluded by provisions in the endorsement.

Consider that the exclusion:

- Does **not** specifically require the perpetrator to be an insured under the policy.
- **Does** require an insured to have care, custody OR control of the alleged victim. The conjunction word is very important. If “or” is used, then only one of the terms must be satisfied to impose the exclusion. If “and” is used, then all three words must be satisfied.
- **Does** require the insured to be diligent in their hiring practices.
- **Does** require the insured to be diligent in investigating and reporting an abuse or molestation event.
- **Does** require the insured to be mindful to avoid retaining anyone (ex. independent contractor, volunteer, employee) if the relationship is defined by legal liability and the person has exhibited abuse or molestation behavior.



Related Policy Considerations, Exclusions and Statutes of Limitations

To understand how Abuse and Molestation exclusions apply it can be helpful to first understand the relationship between other relevant insurance provisions and exclusions.

Occurrences

Liability insurance policies will include a definition or roadmap for how an occurrence is defined and applied. Sometimes the insurer will aggregate separate but related incidents into a single occurrence, and the number of occurrences will impact the application of limits and deductibles.

For example, assume a liability insurance policy has a non-aggregated occurrence limit of \$250,000 applicable to abuse claims with a per occurrence deductible of \$10,000. If the victim is abused three times how will the occurrence limit and deductible apply? The answer depends on policy wording and court precedence.

Courts resolve the legal question of what constitutes the number of occurrences and have numerous tests to determine how many occurrences may exist. So, while policy language plays a role in determining coverage, so does court precedence and the two may not be exactly the same.

Intentional Acts Exclusion

Even if a liability policy doesn't have a specific abuse or molestation exclusion, all liability policies exclude



intentional acts of an insured that result in bodily injury or property damage. Whether the exclusion will apply to legal liability on the part of the insured will depend on the facts of the allegation, wording of a policy and court precedence.

Severability of Interests

Generally, these clauses will state the policy applies separately to each insured. Courts across the country have wrestled with how this clause should be interpreted and there is a split in authority in the courts. The following cases are examples of how courts may interpret this provision.

Am. Family Mut. Ins. Co. v. Wheeler 842 N.W.2d 100 (Sup. Ct. Neb. 2014)

In this case, the court explained the minority and majority interpretations of the severability of interests' provision. "The majority conclude that severability clauses do not nullify plainly worded exclusions and therefore have no effect on exclusions ..." "A minority conclude that severability clauses require 'insurance coverage and any exclusion of coverage... be judged [solely] on the basis of [each insured's] particular conduct and acts within [the insured's] control."

Ristine v. Hartford Ins. Co. 97 P.3d 1206 (Or. Ct. App. 2004)

In a 2004 Oregon case, the court ruled the severability of interest provision in a homeowner's policy did not change the intent and wording of exclusions. In this case a wife

permitted a child to stay overnight at the house with her granddaughter. The child was molested by her husband, a sex offender. The child's parents were not warned about him and sued the wife. The insurer denied coverage and the court upheld the denial.

Statutes of Limitations and Reviver Statutes

The social media and news coverage of significant abuse and molestation allegations (like those against the Catholic Church, Boy Scouts of America, Larry Nassar, Harvey Weinstein, Jeffrey Epstein, Ghislaine Maxwell and others) has put a spotlight on such events and created long-lasting public awareness of abuse.

This increased public awareness has fueled lawmakers to provide victims with a legal voice years after their experiences, altering some long-standing sexual abuse statutes of limitations (SOL) across the country.

Historically, specific abuse and molestation crimes have carried an SOL that time-barred civil claims allegations. This essentially created a sort of expiration date for an organization's and/or individual's need to defend against claims.

This built-in deadline, however, continues to erode as more states enact reviver statutes to permit certain sexual abuse allegations that are otherwise time-barred to be made against organizations and/or individuals.





A Few Examples of How Exclusion Terms Have Been Interpreted in Court

One Court Interprets “Any Person”

Doe v. Camp Dream Found, Inc.

2017 U.S. Dist. LEXIS 150477 (No. D. Ga. 2017)

In 2013 a minor volunteered at a camp for people with physical and mental disabilities. She was assigned to assist another counselor with a male camper (age 28) who had significant cognitive and mental disabilities and the mental capacity of a 3-year-old.

On occasion, the camper would forcefully shove the minor and grab her inappropriately. At one point he exposed himself to her. He did not physically hurt her, force himself on her or leave any marks.

The minor alleged that, as a result of the camp experience, she developed difficulty sleeping, stomach pain and headaches. The allegations against the camp were based on negligence and the perceived breach of duty in multiple areas. The carrier denied coverage for defense under the abuse exclusion.

The court determined the exclusion applied because it precluded coverage when the abuse was caused by any person which included the male camper. An insured associated with the camp did not have to be the actor or perpetrator.

Two Courts Differ in Interpreting Care, Custody or Control Requirements

Millers Capital Ins. Co. v. Vasant

2018 U.S. Dist. LEXIS 182956 (D. Md. 2018)

In 2014 a group of females were kidnapped, held in multiple Maryland hotels, drugged and suffered various forms of abuse by a human trafficking and prostitution ring. One of the hotels was raided by multiple law enforcement agencies and the victims were rescued. The victims filed lawsuits against the hotel and franchisor of the hotel alleging negligence.

The insurer denied defense and indemnity based on the abuse and molestation exclusion on the policy (CG 2146 07 98). The endorsement excluded injury “arising out of the actual or threatened abuse or molestation by anyone of any person while in the care, custody or control of any insured.” It also excluded various negligent acts.

The policy didn’t define care, custody or control. After analyzing the common use definitions of each word with the facts of the case, the court stated the unknown guests (victims) were not in the care, custody or control of the hotel and therefore the abuse or molestation exclusion did not apply.

A slight change of facts, however, could have resulted in a different decision. Take, for example, the following case.

Holiday Hospitality Franchising, Inc. v. AMCO Ins. Co.

983 N.E.2d 574 (Sup. Ct. Ind. 2013)

In 2007, a minor was a guest in a motel when he was molested by a hotel employee who entered the minor’s locked room at night with an electronic key.

The insurer’s exclusion required the victim be in the “care, custody or control” of the insured but didn’t define it. Since the word “or” was in the phrase instead of “and” the terms are linked in a disjunctive manner and didn’t require all three terms be met.

The court determined the minor was in the “care” of the hotel because he was molested by a hotel employee while staying in a rented guest room behind a door locked by an electronic key provided by the hotel and the hotel owed him a duty of care by law. Therefore, the exclusion was upheld.

The court *did not*, however, set a rule that all guests in hotels are in a hotel’s care. These decisions are made on a case-by-case basis.



Takeaway

Abuse is often considered an ambiguous term and can come in many forms such as physical or verbal abuse or acts of aggression and injury. Because the term is open to interpretation, alleged acts of abuse can happen to anyone, anywhere—creating risk exposures for all types of insureds.

Insureds need to understand their particular risk exposures for abuse and how the exclusions to their liability policies may significantly limit their coverage in the event allegations are made against them.

By understanding how abuse and molestation exclusions are typically applied in court, agents and brokers are better equipped to offer risk-management guidance to the insured to help protect their interests in the event of a claim.

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