

SEXUAL MISCONDUCT CLAIMS



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Current Climate

- Recent rise of sexual harassment claims against employers, educational institutions, and celebrities
- Translates into significant litigation risk:
 - 1996: female employees sued Smith Barney
 - Settled for \$150M
 - 2001: former sales associate sued UBS Financial Services
 - Jury award of \$10.6M
 - 2012: physician's assistant sued group of doctors
 - Jury awarded \$168M

Current Climate

- ⦿ Classic Sexual Harassment at the water cooler
- ⦿ Sexual assault in a bathroom/private office
- ⦿ Reporting discrimination following an incident
- ⦿ Retaliatory conduct
- ⦿ Institutional acceptance of hostile environment
- ⦿ Pedophilia/Minor sexual misconduct

Coverage for Sexual Misconduct Claims

1. Employment Practices Liability Insurance

- Most likely source of coverage
- Claims made by employees based on employment-related misconduct of superiors or co-workers
- Exclusions are noteworthy

Coverage for Sexual Misconduct Claims

Employment Practices Liability Insurance: Agreement

I. INSURING AGREEMENT

- A.** The Company will pay on behalf of the Insured, Loss for any Employment Claim first made during the Policy Period, or if exercised, during the Extended Reporting Period or Run-Off Extended Reporting Period, for a Wrongful Employment Practice.
- B.** If ITEM 5 of the Declarations indicates that Third Party Claim Coverage is applicable, the Company will pay on behalf of the Insured, Loss for any Third Party Claim first made during the Policy Period, or if exercised, during the Extended Reporting Period or Run-Off Extended Reporting Period, for a Wrongful Act.
- Y.** Wrongful Employment Practice means any actual or alleged:

1. Discrimination;
2. Retaliation;
3. Sexual Harassment;
4. Workplace Harassment;
5. Wrongful Termination;
6. breach of Employment Agreement;
7. violation of the Family Medical Leave Act;
8. employment-related misrepresentation;
9. employment-related defamation, including libel or slander, or invasion of privacy;
10. failure or refusal to create or enforce adequate workplace or employment policies and procedures, employ or promote, including wrongful failure to grant bonuses or perquisites, or grant tenure;
11. wrongful discipline, wrongful demotion, denial of training, deprivation of career opportunity, denial or deprivation of seniority, or evaluation;
12. employment-related wrongful infliction of emotional distress; or
13. negligent hiring, supervision of others, training, or retention committed or allegedly committed by any Insured, but only if such act is alleged in connection with a Wrongful Employment Practice set forth in 1. through 12. above, provided that the Claim alleging the negligent hiring, supervision of others, training, or retention is brought by or on behalf of any Claimant or Outside Claimant.

Coverage for Sexual Misconduct Claims

Employment Practices Liability Insurance: Definitions

- R. **Sexual Harassment** means any actual or alleged unwelcome sexual advances, requests for sexual favors or any other conduct of a sexual nature:
1. which is made a term or condition of a Claimant's or Outside Claimant's employment or advancement;
 2. which the submission to or rejection of is used as a basis for decisions affecting the Claimant or Outside Claimant; or
 3. which has the purpose or effect of creating an intimidating, hostile or offensive work environment.

I. **Insured** means the Insured Persons and the Insured Organization.

J. **Insured Organization** means the Named Insured, any Subsidiary, and any such entity as a debtor in possession, as such term is used in Chapter 11 of the United States of America Bankruptcy Code, as amended, or the equivalent of a debtor in possession under any applicable foreign law.

K. **Insured Person** means any natural person who was, is or becomes an Employee, duly elected or appointed member of the board of directors, officer, member of the board of trustees, member of the board of regents, member of the board of governors, natural person partner, LLC Manager or a functional equivalent thereof of the Insured Organization for Wrongful Acts committed in the discharge of his or her duties as such, or while serving in an Outside Position.

Coverage for Sexual Misconduct Claims

Employment Practices Liability Insurance: Exclusions

III. EXCLUSIONS

A. EXCLUSIONS APPLICABLE TO ALL LOSS

2. The Company will not be liable for Loss for any Claim for any **bodily injury, sickness, disease, death, or loss of consortium**; provided that this exclusion will not apply to that portion of a Claim seeking Loss for emotional distress, mental anguish, humiliation, or loss of reputation.

4. The Company will not be liable for Loss for any Claim based upon or arising out of, any fact, circumstance, situation, event or **Wrongful Act underlying or alleged in any prior or pending civil, criminal, administrative or regulatory proceeding, including audits initiated by the Office of Federal Contract Compliance Programs, against any Insured as of or prior to the applicable Prior and Pending Proceeding Date set forth in ITEM 5 of the Declarations for this Liability Coverage.**

Coverage for Sexual Misconduct Claims

Employment Practices Liability Insurance: Definitions

X. **Wrongful Act** means:

1. a **Wrongful Employment Practice** occurring in the course of or arising out of a **Claimant's** employment, application for employment or performance of services with the **Insured Organization**;
2. a **Wrongful Employment Practice** by an **Insured Person** in his or her **Outside Position** occurring in the course of or arising out of an **Outside Claimant's** employment, application for employment or performance of services with an **Outside Entity**; or
3. a **Third Party Wrongful Act**, if ITEM 5 of the Declarations indicates that Third Party Claim Coverage has been purchased.

All **Related Wrongful Acts** are a single **Wrongful Act** for purposes of this **Liability Coverage**, and all **Related Wrongful Acts** will be deemed to have occurred at the time the first of such **Related Wrongful Acts** occurred whether prior to or during the **Policy Period**.

Coverage for Sexual Misconduct Claims

2. Commercial General Liability Insurance

- Coverage for bodily injury
- Almost every entity has CGL coverage
- Number of “occurrences”
- Exclusions

Coverage for Sexual Misconduct Claims

Commercial General Liability: Insuring Agreement

COVERAGE A. BODILY INJURY AND PROPERTY DAMAGE LIABILITY

1. Insuring Agreement

a. We will pay those sums that the insured becomes legally obligated to pay as damages because of "bodily injury" or "property damage" to which this insurance applies. We will have the right and duty to defend the insured against any "suit" seeking those damages. However, we will have no duty to defend the insured against any "suit" seeking damages because of "bodily injury" or "property damage" to which this insurance does not apply. We may, at our discretion, investigate any "occurrence" and settle any claim or "suit" that may result. But:

(1) The amount we will pay for damages is limited as described in SECTION III - LIMITS OF INSURANCE; and

(2) Our right and duty to defend ends when we have used up the applicable limit of insurance in the payment of judgments or settlements under Coverages A, B, or C.

No other obligation or liability to pay sums or perform acts or services is covered unless explicitly provided for under SUPPLEMENTARY PAYMENTS COVERAGES A, B, AND C.

b. This insurance applies to "bodily injury" and "property damage" only if:

(1) The "bodily injury" or "property damage" is caused by an "occurrence" that takes place in the "coverage territory";

COVERAGE B. PERSONAL AND ADVERTISING INJURY LIABILITY

1. Insuring Agreement

a. We will pay those sums that the insured becomes legally obligated to pay as damages because of "personal and advertising injury" to which this insurance applies. We will have the right and duty to defend the insured against any "suit" seeking those damages. However, we will have no duty to defend the insured against any "suit" seeking damages for "personal and advertising injury" to which this insurance does not apply. We may, at our discretion, investigate any offense and settle any claim or "suit" that may result. But:

(1) The amount we will pay for damages is limited as described in SECTION III - LIMITS OF INSURANCE and

Coverage for Sexual Misconduct Claims

Commercial General Liability

Who is an Insured?

- The named insured entity
- Employees
- Board of Trustees
- What about students?

Coverage for Sexual Misconduct Claims

Commercial General Liability

“Occurrence”

16. "Occurrence" means an accident, including continuous or repeated exposure to substantially the same general harmful conditions.

In the event of continuing or progressively deteriorating damage over any length of time, such damage shall be deemed to be one "occurrence", and shall be deemed to occur only when such damage first commences.

Coverage for Sexual Misconduct Claims

Commercial General Liability: Definition

“Occurrence”

“The definition of “occurrence” affords little assistance because “a continuous or repeated exposure to conditions” and “substantially the same general conditions” are malleable. An “occurrence” could be the church's continuous negligent supervision of a priest, the negligent supervision of a priest with respect to each child, the negligent supervision of a priest with respect to each molestation, or each time the Diocese became aware of a fact which should have led it to intervene, just to name a few possibilities.”

Society of Roman Catholic Church of Diocese of Lafayette and Lake Charles v. Interstate Fire & Casualty Co., 26 F.3d 1359 (5th Cir. 1994)

Coverage for Sexual Misconduct Claims

Commercial General Liability: Exclusions

2. Exclusions

This insurance does not apply to:

- a. **Expected or Intended Injury with Exceptions** for (1) Corporal Punishment and (2) Use of Reasonable Force

"Bodily injury" or "property damage" **expected or intended from the standpoint of the insured**. However, this exclusion does not apply to:

- r. **Employment Related Practices**

Any claim or "suit" alleging or asserting in any respect loss, injury, or damage (including consequential bodily injury) in connection with "wrongful termination", and/or "discrimination", and/or **"sexual harassment"**.

The following definitions apply to this exclusion:

"Wrongful termination" means termination of an employment relationship in a manner which is against the law, wrongful, or in breach of an implied or written agreement to continue employment.

"Discrimination" means termination of an employment relationship or a demotion, or a failure or refusal to hire or promote an individual because of race, color, religion, age, sex, disability, pregnancy, national origin, sexual orientation or other protected category or characteristic established pursuant to any applicable United States federal, state, or local law, regulation or ordinance.

"Sexual harassment" means unwelcome sexual advances and/or requests for sexual favors and/or other verbal or physical conduct of a sexual nature that (1) are made a condition of employment and/or (2) are used as a basis for employment decisions and/or (3) create a work environment that interferes with performance.

Coverage for Sexual Misconduct Claims: CGL Endorsement: Big Picture

ENDORSEMENT # 013

This endorsement, effective 12:01 AM 07/01/2012

Forms a part of policy no.: 031428153

Issued to: [REDACTED]

By: LEXINGTON INSURANCE COMPANY

**COVERAGE D - SEXUAL MISCONDUCT LIABILITY COVERAGE
(OCCURRENCE - DEDUCTIBLE VERSION FOR HIGHER EDUCATION)**

NOTICE: THE LIMITS OF INSURANCE AVAILABLE TO PAY JUDGMENTS OR SETTLEMENTS SHALL BE REDUCED BY AMOUNTS INCURRED FOR DEFENSE EXPENSES.

This endorsement modifies insurance provided by the policy:

SCHEDULE

Coverage D	Limits Of Insurance		Deductible	
Sexual Misconduct Coverage	\$1,000,000	Each "Insured Event"	\$5,000	Each "Insured Event"
	\$1,000,000	Aggregate Sexual Misconduct Limit		

A. The following is added to SECTION I - COVERAGES:

COVERAGE D - SEXUAL MISCONDUCT LIABILITY

1. Insuring Agreement

a. We will pay those sums that the insured becomes legally obligated to pay as damages because of an "insured event" to which this insurance applies. We will have the right and duty to defend the insured against any claim or "suit" seeking those damages. However, we will have no duty to defend the insured against any claim or "suit" seeking damages for an "insured event" to which this insurance does not apply. We may, at our discretion, investigate any alleged "sexual misconduct" and settle any claim or "suit" that may result. But:

(1) The amount we will pay for damages and "defense expenses" is limited as described in Section III - Limits of Insurance;

(2) Our right and duty to defend ends when we have used up the applicable limit of insurance in the payment of judgments and/or settlements under Coverages A, B, or C and/or judgments, settlements, and/or "defense expenses" under Coverage D.

With respect to Coverage D, no other obligation or liability to pay sums or perform acts or services is covered unless explicitly provided for under the definition of "defense expenses".

b. For this coverage to apply, all of the following conditions must be satisfied:

(1) The "insured event" must take place in the "coverage territory";

(2) The "insured event" must commence to occur during the policy period; and

Coverage for Sexual Misconduct Claims: CGL Endorsement: Insuring Agreement

COVERAGE D - SEXUAL MISCONDUCT LIABILITY

1. Insuring Agreement

- a. We will pay those sums that the insured becomes legally obligated to pay as damages because of an "insured event" to which this insurance applies. We will have the right and duty to defend the insured against any claim or "suit" seeking those damages. However, we will have no duty to defend the insured against any claim or "suit" seeking damages for an "insured event" to which this insurance does not apply. We may, at our discretion, investigate any alleged "sexual misconduct" and settle any claim or "suit" that may result. But:

Coverage for Sexual Misconduct Claims: CGL Endorsement: Definitions

3. "Insured event" means an act of "sexual misconduct" or acts of "sexual misconduct" committed by one insured while performing duties related to the conduct of your business.

4. "Sexual misconduct" means:

- a. With respect to a person who is a minor or who is legally incompetent: sexual molestation, including but not limited to, any sexual involvement, sexual conduct or sexual contact, whether or not there is apparent consent of the "victim".
- b. With respect to an individual with whom an insured has a "counseling relationship": sexual exploitation,

including but not limited to, the development of, or the attempt to develop, a sexual relationship whether or not there is apparent consent of the "victim".

- c. With respect to any other person: sexual molestation including but not limited to, any unwanted sexual involvement, sexual conduct or sexual contact.

Coverage for Sexual Misconduct Claims: CGL Endorsement: Exclusions

I. The following exclusion is added to the policy and is applicable to "bodily injury" and "property damage" under COVERAGE A. **BODILY INJURY AND PROPERTY DAMAGE LIABILITY**; "personal and advertising injury" under COVERAGE B. **PERSONAL AND ADVERTISING INJURY**; and "incidental medical malpractice injury" under COVERAGE C. **LIMITED INCIDENTAL MEDICAL MALPRACTICE LIABILITY COVERAGE**:

Less expected exclusion...

Expected Exclusion...

c. Any individual insured who intentionally caused the harm alleged in the "insured event".

However, we will provide a civil defense to such individual insured until the limits of insurance under this policy have been exhausted by the payment of damages and/or "defense expenses" or until such time as that individual insured is judicially determined to have intentionally caused such alleged harm.

This insurance does not apply to "bodily injury", "property damage", "personal and advertising injury", or "incidental medical malpractice injury" caused by, arising out of, or resulting directly or indirectly, in whole or in part from sexual abuse or molestation, including but not limited to, the following:

1. actual or threatened sexual abuse or molestation of any person, committed by or alleged against any person, including, but not limited to, any insured, any employee of such insured, a leased or temporary worker working for such insured, a patron of such insured, or any other person;
2. actual or threatened sexual abuse or molestation of any person, committed by or alleged against any independent contractor under contract with the

Named Insured regardless of any duty to defend and/or indemnify such independent contractor contained in such contract and notwithstanding whether the Named Insured would be liable in the absence of such contract; or

3. any act or failure to act to suppress or prevent actual or threatened sexual abuse or molestation of any person, by any person in Paragraph 1. or 2. above

and regardless of the theory of liability or cause of action alleged in the complaint or claim against the insured, including, but not limited to, vicarious liability, negligent employment, negligent investigation, negligent instruction, negligent supervision, negligent reporting to the proper authorities, or failure to so report, negligent retention, negligent hiring, negligent placement, and/or negligent training.

All other terms and conditions of the policy remain the same.

.... So what is covered?

Coverage for Sexual Misconduct Claims

Directors & Officers Liability

- Indemnifies the corp for “wrongful acts” of the corp’s Ds&Os (and sometimes employees)
- Standard BI exclusions apply, which may include MA
- Possible “willful” or “intentional” conduct exclusions
- Insured v. insured exclusion

Coverage for Sexual Misconduct Claims

Crisis Management or Reputation Risk

- Reputation costs to a corp in these situations are very costly
- Crisis Management - When triggered, coverage for hiring a public relations firm
- Reputation Risk – coverage for business loss sustained as a result of a negative publicity event
- Policies vary widely; Sexual misconduct claims may or may not be covered

Corporation

Employee sues Corporation and manager for making sexually inappropriate comments and then firing her when she complained to HR.

Under a CGL policy, is the claim covered?

Under an EPLI policy, is the claim covered?

Higher Education

Student A assaults Student B in on-campus housing. Student A is a baseball player. Student B reported the assault to the Student Affairs office.

Student B sues the University. Claims that the University created an environment that encouraged assault of women because she was assaulted.

Is it covered? Does it make a difference if it was the fifth such reported assault in the past year?

Conclusion

- As with all coverage questions, resolution is very fact specific
- Policies differ dramatically in who is covered, what is covered, and to what extent claims are covered

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