BULLIVANTHOUSER

Ronald J. Clark
Portland, Shareholder

Direct Dial: 503.499.4413
Fax: 503.295.0915
Email Attorney

The scope of "arising out of" and abuse exclusions

By Ronald J. Clark

It is an unfortunate fact that sexual abuse of children is a prevalent problem. Given that liability insurance is not intended to protect against actions that are contrary to public policy, it seems obvious – and fitting – that homeowners policies should contain exclusion for liability arising from sexual abuse. What has proven troubling for the courts, however, is how broadly to interpret such exclusions.

The general rule is that exclusions in insurance policies should be narrowly construed. However, public policy dictates construing sex abuse exclusions broadly in order to promote the underlying public policy. Thus, a tension arises between policy construction and public policy.

For example, consider a situation in which a neighborhood child is molested by an insured. As a result, the girl's parents sue both the insured abuser and the insured spouse, alleging sexual abuse and "negligence" for failing to discover and stop the abuse. Both the alleged abuser and the spouse then turn to their homeowners insurer, seeking coverage for their defense costs and any amounts they may be required to pay in damages. In situations in which the insurance policy contains exclusion for any damages "arising out of sexual molestation," the insured abuser is certainly excluded from coverage. But what about the spouse? Is the non-abusing spouse precluded from coverage under the policy because of the insured abuser's sexual misconduct? Moreover, what if the alleged abuser is a non-insured third party, but the abuse occurs at the insureds' home?

Around the nation, where courts have considered the issue, the conclusions have been mixed. Generally, courts will exclude coverage for negligence claims alleged against the "non-abusing" spouse in sexual molestation situations in which there is an exclusion for damages "arising out of" sexual molestation. In adopting that approach, courts reason that the language of the exclusion is focused on the alleged injury, not on the abuser's role in the sexual molestation.

Situations in which a third party is accused of molesting a child at the residence of policyholders have presented a different problem for courts interpreting the "arising out of sexual molestation" exclusion. For example, the Eighth Circuit Court of Appeals recently ruled that the third party's actions were "incidental" to the negligence claim and therefore the molestation exclusion did not apply. Other courts dealing with sexual misconduct exclusions have reached similar conclusions.

Recently, the Circuit Court of Multnomah County dealt with the issue of coverage in a case involving negligence claims against a "non-abusing" spouse following alleged sexual abuse committed by her husband. Judge David Gernant granted the insurance company's motion for summary judgment, agreeing with the insurance company's argument that the "arising out of sexual misconduct" exclusion applied to the insured spouse and therefore the company had no duty to defend her against claims made by the victim's family. *Ristine v. Hartford Ins. Co. of the Midwest*, Multnomah County Case No. 0204-03158. The case is pending on appeal before the Oregon Court of Appeals (CA A120828). The briefing and oral argument have been completed and a decision is anticipated soon.

The author appreciates the assistance of Ryan P. Boyle, who will be attending his third year of law school at the University of Oregon this Fall.