

# SECOND OPINION

INSIGHT ON PRIVATE & HEALTHCARE MATTERS



## Sexual Misconduct – Are You Covered?

Sexual Misconduct coverage is nothing new. Healthcare Insureds have purchased this coverage for years as protection from employees who abuse their position of trust and power. However, in the wake of the #MeToo movement and present-day social media, there is no room for error – and quite possibly, little room for coverage. Looking the other way when rumors surface is no longer tolerated – by the victims, by the media, and in one recent case, by the insurance carrier. With their reputation at stake, insureds need to look inward to create a culture that does not tolerate abuse, responds swiftly to allegations and protects victims.

### One massive mess

The news is riddled with cases of pervasive sexual abuse that went on for years with many victims ignored by the institutions that are there to treat and heal them. Not only are these high-profile cases a public embarrassment – class actions and settlements are soaring. Many carriers are pulling away from offering Sexual Misconduct coverage and those that still do are significantly reducing the limit amounts offered. The exposure itself is difficult to underwrite. Carriers can ask all the "right" questions, but if healthcare facilities are unaware of improper behavior within their workplace, or have elected to not properly investigate allegations, the answers to the "right" questions become mute.

A recent case<sup>1</sup> involving the University of Southern California (USC) shows just how far carriers are now willing to go to deny claims. USC is alleged to have actively ignored allegations of sexual abuse committed by one of its gynecologists for years (from 2009 to 2016). USC conducted an internal investigation in 2016 but never reported its findings to the state medical board. The doctor retired under a separation agreement with a payout in 2017.

Although USC knew about the allegations before it signed off on its 2018 insurance policy, it never disclosed this information to its insurer, Arch Specialty Insurance Company. Arch denied coverage, contending that it did not believe it had a duty to cover the cost of the underlying suit. Arch further argued that the USC policy excluded incidences of sexual abuse or molestation. As of this writing, the case is still in litigation. Will Arch be compelled to provide coverage? If not, will other carriers further down the tower follow suit?

The exposure is becoming increasingly more difficult for carriers to capture and underwrite. Pair that with an insured's possible inability to effectively investigate and hold individuals accountable if allegations are proven to be true – and it brings rise to the question: Why would the market support this type of coverage without proper pricing and restrictions?

### Is Sexual Misconduct coverage available?

Clients can still obtain coverage, but securing full defense and indemnity coverage throughout an entire program is increasingly harder to get. Typically, coverage under a Medical Professional policy is offered as a sublimit under the Professional Liability side/tower, although some policies offer separate limits as well. Every policy is different and carriers treat the coverage differently and, in doing so, are cautious to provide too much coverage.

Brokers need to distinguish between the various coverages available to their insureds. Which policy affords coverage? Is coverage available through a medical professional or general liability policy, or do you need to obtain it via an Employment Practices Liability policy? Another option might be to consider purchasing a standalone Sexual Misconduct policy, which some (but not all) carriers offer.

### Other items to consider would be:

- Is the coverage provided for defense expenses only or are loss payments (such as settlements and indemnity payments) included as well?
- Is the defense and/or loss capped within the Sexual Misconduct limit provided?

- Does the policy wording afford coverage for just insured versus patient or does it also include patient versus patient?
- If the insured has an umbrella or excess policy, is Sexual Misconduct coverage included? Just because coverage is afforded on a primary basis, it does not mean coverage would be included on an umbrella or excess basis – it comes down to knowing the policy form you are working with.
- What are the carrier's reporting requirements?
- Does your insured have the policies and procedures in place and are they following these to the rule?

### Is your insured prepared?

Organizations need to be more diligent in creating and implementing policies and procedures that address this evolving risk, especially the ability to follow up on rumors or allegations. Brokers should be asking their insureds probing questions regarding their workplace culture and current handling of investigations in order to determine a better understanding of the insured's coverage needs. Along with verifying that coverage is available, there are many other challenges an insured may face:

- Ongoing criminal prosecutions, media coverage/management, multiple claims/multiple victims
- Vicarious liability of their employees, including accusations of negligent hiring, supervision and/or retention (keeping an individual on staff during investigation and even after a settlement – even though the individual wasn't prosecuted criminally)
- Being accused of inadequate policies and procedures, training and response to complaints (was the act foreseeable, and if so, why weren't actions taken to protect the population?)

In order to mitigate or avoid these risks, an insured should be proactive in developing a mechanism that assures there are controls and procedures in place for each situation. Many insurance policies offer proactive risk management services at no additional cost to provide tools to help the victims and make work environments better and safer, and not just coverage to help protect organizations when it goes wrong. An insured should take advantage of any services offered to them in order to create and implement proper procedures for sexual misconduct.

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### Risk Management Tips<sup>2</sup>

#### Prevention Do's:

- develop and implement effective sexual misconduct policies
- provide training and education to all staff and members of the organization on a regular basis
- identify and institute risk mitigation procedures (clear and simple procedures for submitting a complaint)
- take all complaints seriously

#### After a complaint, the insured should:

- initiate an investigation, complete initial interviews, and document everything
- conduct an internal investigation and involve law enforcement, if applicable
- be sure to report the allegations and investigation to state agencies and/or insurance company
- evaluate employment action, if needed

### The Sleeping Giant is Awake

Organizations have been asleep at the wheel for a long time and, as a result, many people have been hurt. With the current social media environment and #MeToo awareness, it should not be a surprise that carriers are limiting coverage with terms and conditions, and charging for it too. By implementing better policies and procedures, insureds can place themselves in a better position to aide and protect their own employees and their patients.

#### End Notes

- <sup>1</sup> **Risk & Insurance**, online article (October 10, 2019) "As USC Doctor Faces Sexual Misconduct Charges, Insurance Coverage Debated in Court." <https://riskandinsurance.com/usc-doctor-faces-sexual-misconduct-charges-insurance-debate-in-court/>
- <sup>2</sup> ASHRM presentation. "Sexual Misconduct Allegations: Law Ethics, and Controlling Risk"

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#### QUESTIONS?

Contact your local Allied World Underwriter.