Indiana
Civil Litigation
Review

Volume XX 2023

An Overview of Coverage Issues Arising under Occurrence-Based Policies for Sex Abuse Liabilities in Indiana

Jonathon "Yogi" Snider

DEFENSE TRIAL COUNSEL OF INDIANA

AN OVERVIEW OF COVERAGE ISSUES ARISING UNDER OCCURRENCE-BASED POLICIES FOR SEX ABUSE LIABILITIES IN INDIANA

Jonathon "Yogi" Snider*

In fall 2016, the decades-long, systemic sexual abuse of female athletes by Larry Nassar—at the time serving as the program physician for the Michigan State University (MSU) athletic program, USA Gymnastics (USAG), and the U.S. Olympic and Paralympic Committee (USOPC)—was exposed thanks in large part to an investigation by Indiana's own *IndyStar*,[1] which was the first to report the allegations against Nassar.[2] Following the *Star*'s initial investigative report, hundreds of Nassar's victims came forward with claims of sexual abuse spanning nearly thirty years.[3] The fallout gripped the attention of the nation. Ultimately, Nassar was convicted and sentenced to a de facto life in prison,[4] USAG declared bankruptcy,[5] USAG and USOPC settled civil claims of negligence against them for $380 million, most of which was paid for by their insurers,[6] and MSU settled civil claims against it brought by 332 victims for $500 million.[7] As of August 2020, Michigan State

* Jonathon "Yogi" Snider is a senior associate in the Commercial Litigation Practice Group at Dinsmore & Shohl LLP.

1 Mark Alesia, Tim Evans, and Marisa Kwiatkowski, *Former USA Gymnastics Doctor Accused of Abuse*, IndyStar, Sept. 12, 2016, https://www.indystar.com/story/news/2016/09/12/former-usa-gymnastics-doctor-accused-abuse/89995734/

2 Carla Correa, *The #MeToo Moment: For U.S. Gymnasts, Why Did Justice Take So Long?*, N.Y. Times, Jan. 25, 2018, https://www.nytimes.com/2018/01/25/us/the-metoo-moment-for-us-gymnasts-olympics-nassar-justice.html.

3 Alesia, *supra* note 1.

4 Jean Casarez, Eric Levenson and Laura Ly, *Larry Nassar Victim Reach $380 Million Settlement with USA Gymnastics, U.S. Olympic Committee and Insurers*, CNN, last updated Dec. 13, 2021, https://www.cnn.com/2021/12/13/us/larry-nassar-gymnastics-settlement/index.html.

5 *Id.*

6 *Id*.

7 Eric Levenson, *Michigan State University Reaches $500 Million Settlement with Larry Nassar Victims*, CNN, last updated May 17, 2018, https://www.cnn.com/2018/05/16/us/larry-nassar-michigan-state-settlement/index.html.

had recovered in excess of $100 million from five of the approximately twelve insurers it sued for breach of contract.[8]

The Nassar saga was not the last controversy involving sexual abuse of multiple female athletes in Olympic programs in Indiana. Indiana is also the home of USA Diving (USAD), the national governing body for the sport of diving.[9] In 2018, Amy Stevens, along with various other minor athletes identified only as Jane Does, filed suit in the Southern District of Indianapolis against the perpetrator of the sexual abuse, Johel Ramirez Suarez; the 2008 USA Olympic diving coach and president of Ripfest Diving Club ("Ripfest"), John Wingfield; USAD; Ripfest; and ultimately also sued the owner of the training facilities where the abuse allegedly occurred, Arcadia Church Events & Sports ("Arcadia").[10] Amy Stevens alleged Suarez sexually assaulted her approximately twelve times in 2015 and 2016 under the guise of a massage.[11] During the same time period, Jane Doe 1, a fellow USA diving coach, was allegedly touched in an inappropriate sexual manner by Suarez, including at least two occasions in 2016; one where Suarez forced himself into her bed and sexually assaulted her and another where he attempted to do so.[12] Hamilton County prosecutors ultimately charged Suarez with ten felonies and twenty-two misdemeanors, including five counts of sexual misconduct with a minor and child seduction.[13] Suarez pleaded guilty to three counts of battery as a Class B misdemeanor and was sentenced to time served.[14]

Most recently, Butler University, located on the north side of Indianapolis, became embroiled in controversies similar to USAG and USAD after four Jane Does, each a former student-athlete on the women's soccer team, filed suit in the Southern District of Indianapolis against a former assistant athletic trainer, Michael Howell, Butler's senior associate athletic director for student-athlete health, performance, and well-being, Ralph Reiff, and Butler University.[15] Each Jane Doe similarly alleged she was groomed and sexually assaulted by Howell.

---

[8] Scott Pohl, *Insurers Begin to Pay MSU to Cover Costs of the Nassar Settlements*, WKAR PUBLIC MEDIA, Aug. 10, 2020, https://www.wkar.org/news/2020-08-10/insurers-begin-to-pay-msu-to-cover-costs-of-the-nassar-settlements.

[9] USA Diving, LinkedIn, https://www.linkedin.com/company/usa-diving/ (last visited Sept. 13, 2023).

[10] *See generally* Compl., Am. Compl., Second Amend. Compl., Third Am. Compl., and Fourth Amend. Compl., Stevens v. USA Diving, Inc., No. 1:18-cv-03015 (S.D. Ind.).

[11] *See id.*

[12] *See id.*

[13] Probable Cause Affidavit, State v. Suarez, Cause No. 29C01-1711-F5-8587 (Ham. Cir. Ct., Nov. 17, 2017).

[14] Guilty Plea and Sentencing Order, State v. Suarez, Cause No. 29C01-1711-F5-8587 (Ham. Cir. Ct., Nov. 17, 2017).

[15] Complaint and Jury Demand, Jane Doe 1 v. Butler Univ., No.1:23-cv-01302 (S.D. Ind., July 26, 2023); Complaint and Jury Demand, Jane Doe 2 v. Butler Univ., No.1:23-cv-01303 (S.D. Ind., July 26, 2023); Complaint and Jury Demand, Jane Doe 3 v. Butler Univ., No.1:23-cv-01306 (S.D. Ind., July 26, 2023); Complaint and Jury Demand, Jane Doe 4 v. Butler Univ., No.1:23-cv-01457 (S.D. Ind., Aug. 17, 2023); *see also* David Gay, *3 Butler Women's Soccer Players Sue Former Trainer for Sexual Assault, Misconduct*,

> The assaults and sexual misconduct—which included Howell rubbing his erect penis against female players and dripping his sweat on the athletes as he groped their outer vaginal areas, breasts, and nipples—trace back many years and were perpetrated in Butler's training room, offices, buses, and in Howell's private hotel rooms as he traveled with the team for away games … .[16]

Jane Does 1, 2, and 4 allege multiple instances of abuse against them (at different times from 2019 to 2021).[17] Jane Doe 3 alleges a single instance of abuse in 2021. As to Butler and Reiff, the Jane Does claimed negligence for failure to supervise, failure to train, failure to investigate, failure to implement policies and procedures, and failure to protect.[18] The claims against Howell, Reiff, and Butler remain pending at the time of this publication.

It is universally accepted that sex crimes, especially those against minors, are intentional. It is also universally accepted that there is no liability coverage under occurrence-based general liability policies for the perpetrators of sexual abuse because public policy frowns upon providing individuals like Nassar the ability to seek indemnity under a policy and escape personal exposure for their intentional acts. However, when a victim of sexual abuse makes claims against nonperpetrators of the abuse—such as the perpetrator's masters, employers, parents, or the owners of property where the sexual abuse took place, the nonperpetrating parties generally turn to their carriers for coverage.

In Indiana, coverage attorneys are no strangers to considering or evaluating direct claims against the nonperpetrators of sexual abuse for negligence, whether it be based in negligent hiring, training, supervision, or retention, or failure to report the abuse or otherwise protect the victim from the abuse. Such claims were brought against USAG, USAD, and Butler. On occasion, evaluating coverage for such claims is straightforward. Depending on the facts, practitioners may not even need to undertake a comprehensive evaluation of identifying the triggered policy or the occurrence. However, with respect to claims arising from sexual abuse, there are almost always considerations affecting the nature and extent of any liability coverage under an occurrence-based policy. Questions have and will continue to arise. What is the trigger of coverage? Is it the date of abuse or date of bodily injury? How identify the date coverage is triggered when the date of the abuse or date of bodily injury cannot be accurately determined? When is coverage triggered in the event a victim is unable to appreciate and discover the physical and

---

Fox 59 News, July 26, 2023, https://fox59.com/indiana-news/3-butler-womens-soccer-players-sue-former-trainer-for-sexual-assault-misconduct/.

16 Compl., ¶ 1, No.1:23-cv-1302; Compl., ¶ 1, No.1:23-cv-1303; Compl., ¶ 1, No.1:23-cv-01306; Compl., ¶ 1, No.1:23-cv-01457.

17 Compl., No.1:23-cv-1302; Compl., No.1:23-cv-1303; Compl., No.1:23-cv-01457.

18 Compl., ¶ 212, No.1:23-cv-1302; Compl., ¶ 171, No.1:23-cv-1303; Compl., ¶ 138, No.1:23-cv-01306; Compl., ¶ 138, No.1:23-cv-01457.

emotional trauma caused by the sexual abuse until several years after the abuse?[19] What is the "occurrence"? Can it vary depending upon the claims made against the insured? How does the inclusion of an exclusion for sexual abuse and molestation affect coverage for insureds alleged to be negligent as a result of sexual abuse by their employees, children, or property guests? And last, to the extent sexual abuse claims can and will trigger multiple policies over the course of multiple years, how can practitioners anticipate allocating liability?

This article may raise more questions than it answers, given the current state of Indiana law. As discussed below, the answers to the majority of the previous questions vary depending on the facts and policy language at issue. This article addresses coverage issues arising under occurrence-based liability policies, namely commercial general liability (CGL) policies,[20] for claims against insureds arising out of another's act of sexual abuse. Part I of this article addresses triggers of coverage (including the event courts look to when considering the type of harm suffered by victims of sexual abuse and how that may affect the trigger theory applied by a court), the circumstances under which practitioners and their clients may anticipate multiple triggers, and the identification of an occurrence and whether multiple occurrences have been alleged or established.

To the extent liability coverage is triggered, Part II of this article addresses the enforceability and applicability of policy exclusions for intentional expected harms and sexual abuse and molestation, especially since the insurance industry has changed coverage forms in an attempt exclude all liability coverage arising out of sexual abuse and molestation, including claims of negligent hiring, training, and supervision. Finally, Part III briefly addresses methods of allocating payment of damages among insurers who are liable for the same risk at different times in the event multiple policies have been triggered.

I. TRIGGER OF COVERAGE

Often the first step for practitioners in evaluating coverage is to determine which, if any, policy has been triggered. Liability coverage under occurrence-based policies is typically triggered by "bodily injury" or "property damage" taking place during the policy period that results from an "occurrence."

---

19 *See* American College of Obstetricians and Gynecologics, *Adult Manifestations of Childhood Sexual Abuse*, No. 498 (Aug. 2011), https://www.acog.org/clinical/clinical-guidance/committee-opinion/articles/2011/08/adult-manifestations-of-childhood-sexual-abuse (noting the "long-term effects of childhood sexual abuse are varied, complex, and often devastating" and that women "with no prior conscious memories of their abuse" may in the future "begin to experience emotions, dreams, or partial memories" of the abuse).

20 While this article addresses policy language typically used in standard commercial general liability coverage forms, many of the issues addressed in this article are relevant to other occurrence-based policies, including homeowners' policies. Other types of insurance coverage outside the scope of this article that could potentially be triggered by claims of negligence include professional liability, D&O, E&O, educator, daycare, and foster care. APPLEMAN ON INSURANCE LAW & PRACTICE ARCHIVE § 119.6 (2d 2011).

Standard general liability coverage grants require (1) that "bodily injury" be caused by an "occurrence" and (2) that the "bodily injury" *occur during the policy period*. Stated differently, there is no requirement that the occurrence happen during the policy period; rather, coverage is triggered if bodily injury happens during the policy period so long as the bodily injury was caused by, or results from, an occurrence.

A. IDENTIFYING THE OCCURRENCE

Liability coverage for a certain policy is triggered by bodily injury that occurs during the policy so long as the bodily injury is caused by an occurrence. While the definition of *occurrence* in standard liability policies has evolved over time, it is widely accepted that *occurrence* means an accident, including continuous or repeated exposure to substantially the same general harmful conditions.[21] In Indiana, an accident is "a happening without intention or design."[22] Thus, an occurrence, by definition, introduces an element of fortuity into the equation.[23] Fortuity is required because insuring against nonfortuitous events awards intentional, willful, and wanton conduct.[24]

It is universally accepted that the insured's act of sexual abuse in not an occurrence. This is one reason that there would be no liability coverage under a commercial general liability policy for individuals like Nassar, Suarez, or Howell. The occurrence analysis comes into play, however, for the masters like USAG, USAD, and Butler, or property owners like Arcadia, who are alleged to be liable for unreasonable, as opposed to intentional, conduct.

In *Wayne Township Board of School Commissioners v. Indiana Insurance Co.*, the principal of Robey Elementary, located in Clermont, Indiana, molested a minor student.[25] The minor filed suit against the principal and the school board and district ("School").[26] There was no dispute that the principal's conduct was not accidental and thus not an occurrence.[27] As to the school board and district, however, the minor alleged their negligence caused her severe emotional distress. The parties disputed whether the alleged negligence could be separated from the principal's intentional conduct in such a manner to satisfy the policies' occurrence requirement, and whether the emotional trauma caused by abuse fell within the policy's definition of *bodily injury* (a topic that is addressed in further detail below).[28]

---

[21] 17-119 Appleman on Insurance Law & Practice Archive § 119.6 (noting that under older CGL coverage forms the coverage trigger was the date of the "occurrence" as opposed to the date of "bodily injury").

[22] Auto-Owners Ins. Co. v. Harvey, 842 N.E.2d 1279, 1283 (Ind. 2006).

[23] *See id.* at 1287.

[24] *See id.*

[25] Wayne Township Bd. of Sch. Comm'rs v. Indiana Ins. Co., 650 N.E.2d 1205, 1207 (Ind. Ct. App. 1995), *trans. denied*.

[26] *Id.*

[27] *Id.*

[28] *Id.*

The School argued that the principal's intentional act of sexual abuse should not be imputed to it.[29] Indiana Insurance argued no occurrence had been alleged against the School because the law inferred "that the injury [was] intended from the standpoint of the insured."[30] However, the court of appeals found dispositive a provision in Indiana Insurance's CGL policy requiring liability coverage, if any, be applied separately as to each insured.[31] As a result, the law could not infer the principal's intent to the school board and district.[32] Moreover, because the school board's and district's liability to the minor arose from alleged unreasonable—not intentional—conduct, the court concluded the alleged injuries indeed arose from an occurrence.

Given the Court's approach in *Wayne Township*, coupled with common CGL policy language requiring policies be separately applied as to each insured, direct negligence claims against insureds relating to another's intentional conduct will likely be deemed an occurrence.

B. MULTIPLE OCCURRENCES

Because an insured may be liable for negligent conduct relating to another's sexual abuse, the logical next step in evaluating coverage is to determine the potential for multiple occurrences. "[T]he question of how many 'occurrence' limits are available to respond to a particular lawsuit brought against an insured, as well as an insured's retention or deductible obligations, may be impacted by whether a lawsuit involves a 'single occurrence' or 'multiple occurrences.'"[33] This is especially true in the context of sexual abuse where there may be allegations of multiple injuries suffered by multiple victims during a single policy period and over the course of multiple policy periods.

There are various approaches used by a court to calculate the number of occurrences. Although not yet in the context of sexual abuse, Indiana has adopted the "cause theory" for determining the number of occurrences during a policy period in cases involving multiple injuries. In *Thomson Inc. v. Insurance Co. of North America*,[34] the insured was alleged to be liable to employees who claimed exposure to industrial solvents. Seeking to maximize its liability coverage, the insured argued that each individual claim brought by individual claimants was a separate occurrence. Conversely, the carrier argued that the employees' exposure to industrial solvents fell plainly within

---

[29] *Id.*

[30] *Id.* 1966 and 1973 CGL coverage forms defined *occurrence* as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions, which results in bodily injury or property damage neither expected nor intended from the standpoint of the insured." APPLEMAN, *supra* note 20, at 201.

[31] *Wayne Township Bd. of Sch. Comm'rs*, 650 N.E.2d at 1207.

[32] *Id.*

[33] Lee Siegel, Gena Sluga, Minal Unruh, and John Trimble, *Navigating Challenging Coverage Issues in a Sexual Tort Case*, at 10, DRI Sexual Torts Seminar, Mar. 13–14, 2023.

[34] 11 N.E.3d 982, 1000–06 (Ind. Ct. App. 2014), *trans. denied*.

the policies' definition of a single occurrence because the exposure suffered by all claimants was a repetitive and continuous result of substantially the *same* harmful conditions.[35]

In declining to adopt either interpretation advanced by the parties, the court adopted the Illinois Supreme Court's analysis of the same issue in *Nicor, Inc. v. Associated Electric & Gas Insurance Services Ltd.* There, the Illinois Supreme Court explained:

> The definitions of occurrence used in the insurance policies [at issue] are typical of commercial liability policies. As in our case, such policies often describe an occurrence using terms such as "accident," "happening" or "event." While the form of such terms is singular, what seems like a single accident, happening, or event to the person who triggered the incident giving rise to the loss for which coverage is sought may be perceived as multiple accidents, happenings or events from the perspective of those who sustained injury or damage as a result of the insured's conduct. Accordingly, the terms of the insurance policy are not always sufficient, standing alone, to permit a definitive determination as to whether a particular case involves one occurrence or many.
>
> In order to overcome this problem, American courts have developed two basic approaches for assessing the number of occurrences that took place within the meaning of policies such as those at issue in this case, the cause theory and the effect theory. The effect theory, as its name implies, determines the number of accidents or occurrences by looking at the effect an event had, *i.e.,* how many individual claims or injuries resulted from it. Under the cause theory, on the other hand, the number of occurrences is determined by referring to the cause or causes of the damages.
>
> The difference between these two approaches is illustrated by the following hypothetical. Assume that a motorist is traveling down a street lined with parked cars. Looking away from the roadway to change the station on his car's radio, the motorist allows his vehicle to wander. As a result, his car strikes the sides of three of the parked cars in succession, damaging each of them. The owners of the three damaged vehicles sue, and the vehicle owner seeks indemnification from his automobile insurance carrier. Under the effect theory, the fact that three cars were damaged and three claims were filed would mean that there were three "occurrences" for purposes of determining liability coverage, absent specific policy language to the contrary. Under the cause theory, on the other hand, the fact that the damage to all three vehicles resulted from the same conditions and was inflicted as part of an unbroken and

[35] *Id.* at 1000.

> uninterrupted continuum would yield the conclusion that there was only one occurrence. Neither the cause theory nor the effect theory inevitably favors one party to an insurance contract over another. Whether a particular approach would be more beneficial to the insurance carrier or its insured depends on the limits of coverage, the number of claims, the magnitude of the claimant's losses, and the size of applicable deductibles in a given case. For example, attributing damages sustained by multiple claimants to multiple occurrences would be beneficial to the insured where the claims are large relative to the per-occurrence policy limits, for it would maximize the coverage the insured will receive. It would benefit the insurance carrier where, as in this case, the individual claims are each smaller than the applicable deductible, for it would allow the insurer to avoid paying anything. The full loss would be borne by the insured.[36]

The applying the cause theory, the court in *Thomson* held that the employees' alleged injuries were caused by two occurrences:

> In this case, the Taiwan Class Action plaintiffs' alleged injuries have two causes: (1) exposure to organic solvents while working in the factory (through inhalation, dermal contact, and ingestion of contaminated water); and (2) exposure to organic solvents while using contaminated groundwater in the dormitories (through drinking, bathing, and clothes washing). The specific means and timing of exposure and the resulting injuries may differ with respect to each plaintiff, but it is undeniable that the alleged injuries were caused by "continuous or repeated exposure to substantially the same general harmful conditions" in the factory and in the dormitories. It is also undeniable that the policies differentiate between per-occurrence and per-person limits and that the per-occurrence limit fixes the amount that the insurer will pay for the sum of damages because of all bodily injury arising out of any one occurrence and regardless of the number of claims made or suits brought or the number of persons making claims or bringing suits. All of this cuts decisively against Thomson's argument that each bodily injury must be a separate occurrence and that a deemer clause is required to group multiple injuries into a single occurrence. Thus, based on the cause theory and the unambiguous language of the relevant policies, we affirm the trial court's finding of two occurrences in this case.[37]

---

[36] *Id*. at 1005–06 (quoting Nicor, Inc. v. Associated Elec. & Gas Ins. Servs. Ltd., 860 N.E.2d 280, 286–87 (Ill. 2006)) (alteration in original).

[37] *Id*. at 1006.

More recently, in *Auto-Owners Insurance Co. v. Long*, The Art of Design, the insured, shipped ten bottles of a hazardous chemical to an individual in Florida.[38] Contrary to United Postal Service (USPS) regulations, the package was neither (1) properly sealed nor (2) labeled as containing hazardous substances.[39] During the shipping process, the box broke open, the bottles spilled, and toxic fumes were released.[40] An USPS employee died after being exposed to the toxic fumes.[41]

At issue in the coverage action was a CGL policy issued by Auto-Owners to The Art of Design.[42] The decedent's estate alleged The Art of Design was liable for the decedent's death and filed an action against Auto-Owners seeking a declaration of coverage under a commercial general liability policy that Auto-Owners had issued to The Art of Design.[43] The primary issue was the number of occurrences under the policy. The estate contended that The Art of Design's failure to properly seal and label the package amounted to two occurrences because they each in part caused the death.[44]

The court of appeals disagreed. Relying upon *Thomson*'s adoption of the cause theory, the court concluded that there was only one occurrence, reasoning as follows:

> While the Insured failed to both properly label and package the box, there was only one accident that resulted from the Insured's failure to take appropriate preventative measures to avoid a spill. Stated differently, although the Insured did two things wrong in shipping the package, the wrongdoing resulted in one spill, *i.e.,* "one proximate, uninterrupted, and continuing cause which resulted in" Long's injury.[45]

Thomson and *Long* clearly suggest Indiana courts are inclined to implement the cause theory to determine the number of occurrences. In the context of sexual abuse claims, however, there is no clear precedence applying the cause theory and—even if it were to apply—specifying the effect it may have on the number of occurrences. To illustrate this, imagine a situation where a school hired a teacher it knew or should have known had a propensity to sexually abuse students. The school is subsequently alleged to have negligently hired and negligently supervised the teacher after it is discovered the teacher sexually abused multiple students over the course of a single policy

---

[38] 112 N.E.3d 1165 (Ind. Ct. App. 2018).

[39] *Id.* at 1166–67.

[40] *Id.*

[41] *Id.* at 1167.

[42] *Id.*

[43] *Id.*

[44] *Id.*

[45] *Id.* at 1168.

period. Is the cause of the students' injuries the separate act of abuse such that the number of acts dictates the number of occurrences? Is the cause of the students' injuries the school's single decision to hire of the teacher, or the school's failure to supervise the teacher, or some combination of both? This analysis may require viewing the issue in a vacuum from the standpoint of the insured making the claim. In the foregoing hypothetical, one could reasonably argue the school's negligence in hiring and supervising the teacher resulted in exposing the students to the same harmful condition. However, at least one state supreme court has rejected this notion.

In *Worcester Insurance Co. v. Fells Acres Day School*, the Massachusetts Supreme Court, applied the cause theory in calculating the number of occurrences for purpose of evaluating coverage for a daycare facility after employees sexually abused multiple victims at the daycare.[46] The victims urged the Court to find multiple occurrences, citing allegations of "numerous discrete acts of abuse, negligence, and breach of duty by several different defendants, some individual and one corporate, at different locations.[47] The Court agreed, reasoning the "allegations preclude the possibility that there was but a 'single, ongoing cause' of the injuries alleged."[48]

In *Society of the Roman Catholic Church v. Interstate Fire & Casualty Co.*, two priests of the insured Diocese of Lafayette molested thirty-one children over the course of seven years.[49] As expected in instances of systemic, long-term abuse of minors, the evidence failed to establish the number of times each child was molested or the extent of injury suffered by each.[50] The primary and excess policies at issue were occurrence-based policies.[51] Under Louisiana law, coverage is triggered when bodily injury is caused by an occurrence during a policy period and "extends to all resulting damage emanating from the injury" but "does not … cover bodily injury occurring outside the policy period."[52]

The district court concluded that (1) occurrence is applied on a per child basis with all subsequent acts of molestation to be treated as injuries resulting from that occurrence regardless of the number of acts against each child, and (2) the parents' claims against the insured arose from the same occurrences. On appeal, the United States Court of Appeals for the Fifth Circuit first addressed the meaning of *occurrence* in the context of the children's

---

46 558 N.E.2d 958, 973–74 (Mass. 1990); *see also* Lee Siegel, Gena Sluga, Minal Unruh, and John Trimble, *Navigating Challenging Coverage Issues in a Sexual Tort Case*, at 10, DRI Sexual Torts Seminar, Mar. 13–14, 2023.

47 558 N.E.2d at 973–74.

48 *Id.*

49 26 F.3d 1359, 1361 (5th Cir. 1994).

50 *Id.*

51 *Id.* at 1362.

52 *Id.*

claims against the insured.[53] The policies agreed to indemnify the insured for all sums the insured became obligated to pay for damages arising out of any occurrence happening during the policy period.[54] *Occurrence* was defined under the policies as

> an accident or a happening or event or a continuous or repeated exposure to conditions which unexpectedly and unintentionally result in personal injury, or damage to property during the policy period. All such exposure to substantially the same general conditions existing at or emanating from one location shall be deemed one occurrence.[55]

The court found the definition of the term *occurrence* to be "malleable," or susceptible to change, depending on the circumstances presented. In the court's view, each of the following could fall within the meaning of *occurrence*: (1) the insured's continuous negligent supervision of a priest, (2) the negligent supervision of a priest with respect to each child, (3) the negligent supervision of a priest with respect to each molestation, or (4) each time the insured learned of facts sufficient to create a duty to intervene.[56] Relying upon Louisiana precedent addressing continuing injuries (a topic discussed in the next section of this article), the court held that "the damage to each child is a separate occurrence."[57]

With respect to the parents' claims, the court rejected the notion the parents' claims against the insured were occurrences separate and distinct from those covered in the children's claims.[58] Instead, the court noted that the dispositive issue was whether the parents' injuries were derivative of their children's occurrences.[59] Because the parents would not have suffered harm but for their children being molested, the court held that the parents' injuries did not amount to separate occurrences. [60]

Complexities in determining the number of occurrences arise even in cases where there are multiple acts of abuse against a single victim over several years. In *Roman Catholic Diocese of Joliet, Inc. v. Lee*, a priest molested a child on multiple occasions over the course of several years.[61] The insured's liability to the victim was the result of its negligent supervision of the

---

53 *Id.* at 1363.

54 *Id.*

55 *Id.* at 1363–64.

56 *Id.* at 1364.

57 *Id.*

58 *Id.* at 1364–54.

59 *Id.*

60 *Id.*

61 292 Ill. App. 3d 447, 455 (Ill. Ct. App. 1997).

priest.[62] Although the court found that the child's injuries arose from a single negligent omission (*i.e.,* the negligent supervision of the priest), the court rejected the "first encounter" rule and concluded that the ongoing negligent supervision of the priest over the course of several policy periods constituted a single occurrence for each triggered policy period.[63] The court reasoned that the insured's decision not to supervise the priest was "revisited" at a later time and thus the decision to continue to leave the priest unsupervised triggered subsequent policy periods when molestation occurred.

> Although an employer may initially leave an employee to his or her own devices, the decision not to supervise may be revisited. Thus, if a diocese receives warnings about a priest's misconduct and fails to take remedial action, then a second occurrence takes place and policy coverage is triggered again by any subsequent injury resulting from the omission.[64]
>
> In the instant case, it appears undisputed that the Diocese learned of the abusing priest's inappropriate behavior in early 1986, during period II, but failed to take remedial action. Accordingly, the Diocese's negligent supervision of the abusing priest constituted a second occurrence during period II and coverage under that policy was triggered when the priest subsequently molested the minor.[65]

The court emphasized that while the policies covered occurrences only during the policy period, there is no limitation that all damages occur during the policy period thus rendering application of the "first encounter" rule "inappropriate" and "inequitable" in cases of ongoing sexual abuse spanning multiple policy periods.

> Rather, it provides without qualification that indemnification extends to all "damages on account of personal injuries arising out of any occurrence." Thus, the policies cover consequential damages resulting from a molestation, but they exclude from coverage injuries occurring outside the policy period. When one considers that a molestation occurring after the policy period is not a consequence of the first molestation (which is covered), but is a new injury with its own resulting damages (which is excluded from coverage), it becomes clear that the application of the first encounter rule conflicts with the expressed intent of the insurance companies to limit their coverage to damages emanating from molestations taking place during their policy period.[66]

---

[62] *Id.*

[63] *Id.*

[64] *Id.*

[65] *Id.*

[66] *Id.*

Many other courts have found multiple occurrences in instances of sexual abuse. Applying Illinois law, the United States Court of Appeals for the Seventh Circuit has noted that claims of negligent supervision relating to sexual abuse may involve a separate occurrence for each act of abuse.[67] In New York, claims of negligence by multiple victims of sexual abuse by a foster mother amounted to multiple occurrences—at least one per victim per policy period.[68]

The purpose of this article is not to predict how Indiana courts may evaluate the number of occurrences in sexual abuse claims. Despite the various approaches taken by other courts, practitioners in Indiana are left with no choice but to expect at least one occurrence being found under a policy where there are claims of negligence against an insured relating to another's act of sexual abuse regardless of the number of victims or acts of abuse. Once an occurrence has been identified, practitioners must also anticipate addressing the timing of bodily injury suffered for purposes of determining which policies have been triggered.

C. "BODILY INJURY" CAUSED BY AN OCCURRENCE

As noted above, occurrence-based liability coverage applies to only "bodily injury" occurring during the policy period and resulting from an occurrence. No Indiana court has addressed, in significant detail, the unique nature of harm suffered by individuals of sexual abuse, especially minor victims. Nonetheless, the harm suffered by victims of sexual abuse can be physical, emotional, or both. Emotional trauma presents complex questions because emotional trauma may not manifest itself until the minor reaches adulthood, years after the abuse has ended.

1. Emotional Trauma as Bodily Injury

General liability policies provide coverage for bodily injury caused by an occurrence. While variations are to be expected, the term *bodily injury* is usually defined in standard ISO liability coverage forms to mean "bodily injury, sickness, or disease sustained by a person, including death resulting from any of these at any time." Bodily injury undoubtedly includes physical harm suffered by victims of sexual abuse, but interesting questions arise nationwide in the context of sexual abuse claims because sexual abuse victims often allege emotional trauma rather than or in addition to physical harm.[69]

In Indiana, it is well established that bodily injury includes physical and mental injuries. In *Wayne Township*, the School and its insurer disputed

---

[67] Lee v. Interstate Fire & Cas. Co., 86 F.3d 101 (7th Cir. 1996).

[68] National Union Fire Ins. Co. v. Roman Catholic Diocese, No. 653575/2014 (N.Y. Sup. Ct. Feb. 27, 2017).

[69] 17-119 APPLEMAN ON INSURANCE LAW & PRACTICE ARCHIVE § 119; *see also* State Farm Fire & Cas. Co. v. D.T.S., 867 S.W.2d 642 (Mo. Ct. App. 1993) (suggesting the emotional and psychological damages suffered by a minor victim of sex abuse would not fall within the policy's definition of *bodily injury*).

whether the student's alleged emotional trauma caused by the principal's sexual abuse fell within the policy's definition of bodily injury. Specifically, the carrier argued bodily injury meant physical injuries only.[70] The court disagreed, reasoning that the policy's definition was not limited to physical injury to the victim's body but extended beyond physical injury to include both sickness and disease.

> The act which [the victim] alleges as the source of her emotional trauma is [the principal's] physical intrusion upon her body. [The CGL carrier] conceded during oral argument that had the school negligently allowed an employee to break [the victim's] leg, any emotional damages resulting therefrom would be covered under the policy. We find no distinction between emotional injuries arising from a broken leg and emotional injuries arising from the intrusion alleged in [the victim's] complaint. [The victim] has alleged that the school's employee physically intruded upon her person, physically seized control of her body, and inflicted injury. That [the victim] has not suffered a physical trauma at the hand of [the principal] is of no consequence.[71]

Accepting that the emotional trauma suffered by victims of sex abuse falls within the standard definition of bodily injury, the trauma suffered can be emotional, physical, or both. It thus creates issues in identifying the timing of the bodily injury for purposes of determining whether coverage has been triggered.

2. Timing of Bodily Injury and Occurrences

In general, determining when bodily injury occurred is straightforward. For example, if a customer were to claim damages for a broken arm caused by a slip and fall in a grocery store aisle resulting from a spill the store should have cleaned up, it is easy to identify the bodily injury and the occurrence. The bodily injury is the broken arm; the occurrence is the store's negligence in failing to keep its premises in a reasonably safe condition; and the timing of the bodily injury is when the fall occurred. However, since bodily injury is interpreted in Indiana to include physical and emotional trauma, complexities arise in identifying triggered policies when (1) multiple acts of abuse occur over multiple policy periods, (2) the minor victim is unable to appreciate and discover its damages until years later, or (3) physical trauma may immediately occur as a result of sex abuse, but emotional trauma does not manifest itself until years later.

---

[70] Wayne Township Bd. of Sch. Comm'rs v. Indiana Ins. Co., 650 N.E.2d 1205, 1210–12 (Ind. Ct. App. 1995), *trans. denied*.

[71] *Id.* at 1211.

To identify triggered policies in complex factual situations where the timing of bodily injury cannot be determined, courts nationwide apply several different trigger theories depending on the type of bodily injury or property damage and the policy language at issue. The primary theories are (1) manifestation, (2) injury-in-fact or actual damage, (3) exposure, and (4) continuous trigger.

> Under a manifestation theory, "the date of loss is assigned to the policy period when property damage or [bodily injury] is discovered, becomes known to the insured or a third party, or should have reasonably been discovered." "The injury-in-fact trigger of coverage approach implicates all of the policy periods during which the insured proves some injury or damage." Under the exposure theory, "all insurance contracts in effect when the property was exposed to hazardous waste" are triggered. Finally, pursuant to the continuous trigger approach, which has been adopted by most courts, "any policy on the risk at any time during the continuing loss is triggered[.]" Under this theory, it is assumed that "once [bodily injury] or property damage begins it always continues and that property damage results when property is first exposed to hazardous materials."[72]

Indiana courts have not addressed potential issues arising from identifying the trigger of coverage in the context of sexual abuse claims. To date, Indiana has applied only the injury-in-fact and the multiple, or continuous, trigger theories. In *Allstate Insurance Co. v. Dana Corp.*, (hereinafter *Dana I*), the court applied the injury-in-fact approach to determine the number of triggered commercial general liability policies for an insured's claim of coverage for liability arising from soil and groundwater contamination.[73] It was undisputed that the insured's liability arose from the disposal of contaminants during the policy in effect from 1978 to 1979.[74] However, evidence was also presented establishing that the contaminants continued to migrate and cause injury during the subsequent policy period.[75] The policies at issue stated as follows:

> "Occurrence" means an accident, event or happening including continuous or repeated exposure to conditions which results, during the policy period, in Personal Injury [or] Property Damage … neither expected nor intended from the standpoint of the Insured….

---

[72] PSI Energy, Inc. v. Home Ins. Co., 801 N.E.2d 705, 732 n.25 (Ind. Ct. App. 2004) (quoting Eric Holmes, 23 Appleman on Insurance 2d § 145.3(B)(1) at 13–14 (2003)) (citations omitted), *trans. denied*.

[73] 737 N.E.2d 1177, 1201 (Ind. Ct. App. 2000) (*reversed, in part, on other grounds*, Allstate Ins. Co. v. Dana Corp., 759 N.E.2d 1049 (Ind. 2001)).

[74] *Id.* at 1200.

[75] *Id.*

> All such Personal Injury [or] Property Damage … caused by one event or by continuous or repeated exposure to substantially the same conditions shall be deemed to result from one Occurrence.[76]

At the outset, the court emphasized that it was not adopting or "choosing a specific triggering approach," but was instead interpreting the policy to determine what approach the parties had chosen by agreement.[77] Because the policy required that injury occur during the time the policy was in effect and did not preclude continuing exposure to conditions from being an occurrence for the purposes of more than one policy period, coupled with evidence establishing injury during both policy periods, the court concluded that the repeated and continuous exposure to conditions resulting in property damage was sufficient to trigger coverage under both policies. [78]

The court of appeals subsequently followed *Dana I* in *PSI Energy, Inc. v. Home Insurance Co.* in determining whether and how successive insurance policies were triggered in instances of environmental contamination. One commentator has summarized *PSI Energy* as follows:

> In PSI Energy, the court considered a series of insurance policies, the 1961 to 1973 Policies, with certain policy language and a set of insurance policies from 1973 to 1983, with different policy language, to determine how coverage under each was triggered. The 1961 to 1973 Policies used language substantially similar to the Dana policies. The court similarly determined that the particular policy language required the use of the "injury-in-fact" trigger of coverage approach. *Id.* at 733. Therefore, property damage or bodily injury during the policy period was the triggering event. The subsequent policies, because they defined "occurrence" differently, required a different trigger. They defined an "occurrence" as "the happening, or series of happenings arising out of or caused by one event taking place during the term of the policy." *Id.* at 734. The court determined that under this language, the policies require that the causal events giving rise to the damage [also] take place during the policy period. *Id.* (emphasis added). The claimant, therefore, was required to prove a subsequent chemical leak in each policy period in order to trigger subsequent policies. The policy trigger in PSI Energy was different between the two types of policies: one required proving injury during the subsequent policy period, and the other required proving the injury-causing event during the subsequent policy period.[79]

---

[76] *Id.* at 1200–01.

[77] *Id.* at 1201.

[78] *Id.*

[79] Clendening Johnson & Bohrer, P.C., *Coverage Issues: Sheehan Construction*, Nov. 20, 2012, https://www.lawcjb.com/blog/2012/11/coverage-issues-sheehan-construction/.

Because the court of appeals in *Dana I* and *PSI Energy* made clear it was merely interpreting the policy language as opposed to adopting a specific approach, one can reasonably expect courts to have the discretion to select a trigger method on a case-by-case basis depending on the facts at hand and the policy language. As Indiana courts have not addressed trigger theories in the context of complex sexual abuse claims, practitioners remain in a position to litigate these issues and advance their clients' interests.

> In the context of liability for bodily injury, as opposed to liability for the property damage at issue in *Dana I* and *PSI Energy*, the Indiana Supreme Court applied the multiple trigger theory[80] in a certified question in *Eli Lilly & Co. v. Home Insurance Co*.[81] There, the insured under multiple successive product liability policies was alleged to be responsible for manufacturing and selling a drug from 1947 to 1971 that caused later development of various diseases in women.[82] The United States Court of Appeals for the Seventh Circuit certified various questions regarding trigger methods in instances of delayed manifestation.[83]

The policies issued to the insured were manuscript policies written specifically for the insured.[84] However, the policy language was described at the time by the Indiana Supreme Court as "identical in all material respects" to the coverage provision in the insurance industry's commercial general liability policy (CGL).[85] Specifically, the policies provided as follows:

> underwriters hereby agree, subject to the limitations, terms and conditions hereafter mentioned, to indemnify the Assured for all sums which the Assured shall be obligated to pay … for damages, direct or consequential, and expenses, all as more fully defined by the term "ultimate net loss," on account of
>
> (i) personal injuries, including death at any time resulting therefrom, … caused by or arising out of each occurrence anywhere in the world.[86]

---

80 The continuous trigger theory recognizes that "when progressive indivisible injury or damage results from exposure to injurious conditions for which civil liability may be imposed, courts may reasonably treat the progressive injury or damage as an occurrence within each of the years of a comprehensive general liability policy." Chemical Leaman Tank Lines v. Aetna Cas. & Sur. Co, 89 F.3d 976, 995 (3d Cir. 1996) (applying continuous trigger theory under New Jersey law to determine policies triggered by claims of environmental contamination against the insured). Under the continuous trigger theory, proof of actual injury in the sense of manifestation of injury is not required. *Id*.

81 482 N.E.2d 467 (Ind. 1985).

82 *Id.* at 468.

83 *Id.*

84 *Id.* at 469.

85 *Id.*

86 *Id.*

Acknowledging the delayed manifestation of disease caused by consumption of the insured's drug, which the Court found similar to asbestos-related illnesses, the Court relied strictly upon the policy language in applying the multiple trigger theory, which provided that each insurer during the period from the ingestion of the drug to the manifestation of the disease was liable for indemnifying the insured.[87] However, the Court did not provide much, if any, analysis of the trigger theories; rather, the Court found the policy to be ambiguous and applied the most policyholder-friendly trigger theory consistent with "the rule of interpretation that the courts should strive to give effect to the reasonable expectations of the insured."[88] At best, *Eli Lilly*, like *Dana I* and *PSI Energy*, emphasizes that identifying the appropriate trigger theory is a fact-sensitive and policy-sensitive inquiry.

3. Trigger Methods Applied Elsewhere

In the sexual abuse context, courts across the country have adopted various approaches. In *Pennsylvania State University v. Pennsylvania Manufacturers' Association Insurance Co.,* a Pennsylvania trial court addressed whether Pennsylvania State University (PSU) or its CGL carrier was liable for PSU's share of settlements of claims arising out of the Gerry Sandusky scandal, which the court described as a "series of heinous crimes … against a multitude of children over a 40 year period … ."[89] PSU sought coverage under policies issued between 1969 and 2011.[90] Between 1969 and his retirement in 1999, Sandusky committed several acts of molestation. Between 1969 and 1988, at least four events of molestation or inappropriate sexual contact were reported to or witnessed by PSU athletic staff.[91]

Applying an occurrence-based trigger analysis as opposed to bodily harm, the court found that PSU's negligence resulting in continuous exposure to a recurring harm is a single occurrence, and each single occurrence triggered coverage during the first policy year in which it manifests and only during that first policy year.[92] The court also addressing the timing of bodily injury in the context of sexual abuse and its impact on the trigger of coverage.

> Unlike environmental pollution or asbestos damage, which can remain hidden for many years before it manifests, the physical violation (bodily injury) arising from child sexual abuse is experienced immediately by the victim, although the harm often continues to be felt long thereafter. To the extent that PSU's negligence enabled Sandusky to abuse his victims, such bodily injury manifested when

---

87 *Id.* at 470–71.

88 *Id.* at 471.

89 2016 Phila. Ct. Com. Pl. LEXIS 158, *2 (May 4, 2016).

90 *Id.* at *3.

91 *Id.* at *4–5.

92 *Id.* at *26.

> the first abuse of each victim occurred. With respect to each victim, the policy in place at the time the first act of abuse occurred is the only one that potentially provides coverage.[93]

Thus, even if Sandusky had abused the same victim over the course of multiple policy periods, the only policy triggered was the one in effect on the date of the first act of abuse.

In *Diocese of Duluth v. Liberty Mutual Group*, the Bankruptcy Court for the District Court of Minnesota was tasked with determining the number of occurrences and triggers of coverage under occurrence-based policies related to claims of negligence against the insured arising out of sexual abuse committed by the Diocese's priests.[94] While acknowledging multiple instances of abuse of the same victim by the same priest in the same year constituted a single occurrence for the applicable policy period, the Diocese broadly argued each alleged act of abuse constituted a separate occurrence. The carriers disagreed, arguing the ongoing negligence supervision of the priests by the Diocese amounted a single occurrence that allowed the continuous and repeated exposure of the victims to the abusive priests.

The bankruptcy court applied Minnesota's actual-injury rule to find the coverage-triggering injury took place at the time of first injury.[95] Although not addressing the issue with much detail, the court suggested that bodily injury occurs at the time of abuse "even though the injury is not 'diagnosable,' 'compensable' or manifest during the policy period as long as it can be determined, even retroactively, that some injury did occur during the policy period."[96] Ultimately, the court did not calculate the number of triggered policies or the number of occurrences.[97] However, the court hinted that the number of occurrences could be both per victim and per priest, which would undoubtedly increase the number of occurrences under a given policy. The court added that if a victim were injured by two priests during the same policy period, there would be two occurrences, but if the same victim were injured by the same priest on multiple occasions during a policy period, there would be only one occurrence.[98]

In *Western World Insurance Co. v. Lula Belle Stewart Center, Inc.*, an endorsement providing molestation coverage limiting coverage to when molestation "first occurred" convinced a the district court that the applicable trigger theory was injury-in-fact.[99] In *Bishop of Charleston v. Century*

---

93 *Id.* at *27–28.

94 565 B.R. 914 (Minn. Mar. 30, 2017).

95 *Id.* at 923.

96 *Id.* at 924 (citations omitted).

97 *Id.*

98 *Id.*

99 473 F. Supp. 2d 776, 780 (E.D. Mich, Feb. 9, 2007).

Indemnity Co., the South Carolina District Court applied the continuous trigger theory, reasoning as follows:

> [C]overage is not limited to the policy in effect when the sexual abuse began. Where abuse was ongoing over a number of years, the policyholder can access successive years of coverage. This does not mean that the policyholder can access coverage for periods beginning after the last act of abuse, even though sexual abuse undoubtedly causes lifelong harm. The Diocese's position, apparently, is that any policy purchased at any time after an act of sexual abuse provides full coverage for the life of the victim. Were that the law, insurers would need to charge premiums for each period sufficient to cover decades of potential liability.[100]

In *May v. Maryland Casualty Corp.*, a volunteer basketball coach at schools operated by the insured sexually abused two students.[101] The parties to the coverage action agreed that the suits against the insured arose "out of a series of pedophilic offenses against each of the two victims" justifying the application of a "first encounter" trigger theory. This theory provided that "the insurer at risk at the time of the first encounter with each victim is liable for all injuries resulting from the violation of that victim even though subsequent molestations occurred beyond the policy term. The basis for such theory is that the injury occurred at the time of the first encounter, albeit that there have been subsequent violations to the victim."[102]

In *Society of the Roman Catholic Church v. Interstate Fire & Casualty Co.*, two priests of the insured, the Diocese of Lafayette, molested thirty-one children over the course of seven years from 1976 to 1983.[103] As is no surprise in instances of systemic abuse, the evidence failed to establish the number of times each child was molested or the extent of injury suffered by each child.[104] The primary and excess policies at issue were occurrence-based policies.[105] Under Louisiana law, coverage is triggered when bodily injury is caused by an occurrence during a policy period and "extends to all resulting damage emanating from the injury[,]" but "does not … cover bodily injury occurring outside the policy period."[106]

The district court concluded that (1) occurrence should be applied on a per child basis with all subsequent acts of molestation be treated as injuries

---

100 225 F. Supp. 3d 554, 565–66 (D.S.C. Aug. 31, 2016).

101 792 F. Supp. 63 (E.D. Mo. June 5, 1992).

102 *Id.* at 65.

103 26 F.3d 1359, 1361 (5th Cir. 1994).

104 *Id.*

105 *Id.* at 1362.

106 *Id.*

resulting from that occurrence regardless of the number of acts against each child, (2) the parents' claims against the insured arose from the same occurrences, and (3) the first encounter rule applied, meaning that "the insurance carrier covering the Diocese during the occurrence of the first molestation of each child was responsible for all resulting damages to that child (and his parents), including damages from molestations occurring after the expiration of that carrier's policy."[107]

On appeal, the United States Court of Appeals for the Fifth Circuit first addressed the meaning of *occurrence* in the context of the children's claims against the insured.[108] The policies agreed to indemnify the insured for all sums the insured became obligated to pay for damages arising out of any occurrence happening during the policy period.[109] *Occurrence* was defined under the policies as "an accident or a happening or event or a continuous or repeated exposure to conditions which unexpectedly and unintentionally result in personal injury, or damage to property during the policy period. All such exposure to substantially the same general conditions existing at or emanating from one location shall be deemed one occurrence."[110]

The court found that the definition of *occurrence* was "malleable," or susceptible to change, depending on the circumstances presented. The court deemed each of the following were susceptible to falling within the meaning of *occurrence*: the insured'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 insured learned of facts sufficient to create a duty to intervene.[111] Employing Louisiana precedent addressing continuing injuries, the court held that "the damage to each child is a separate occurrence." [112]

Concerning the parents' claims, the court rejected the notion that those claims were occurrences separate and distinct from those of the children's claims.[113] Rather, the court noted that the dispositive issue was whether the parents' injuries were derivative of their children's occurrences.[114] Because the parents would not have suffered harm but for their children's injuries, the court held that the parents' injuries did not amount to separate occurrences. [115]

Having determined that the damage to each child constituted a separate occurrence and that the parents' claims were merely derivative of their

---

[107] *Id.* at 1362–63.

[108] *Id.* at 1363.

[109] *Id.*

[110] *Id.* at 1363–64.

[111] *Id.* at 1364.

[112] *Id.*

[113] *Id.*

[114] *Id.*

[115] *Id.*

children's claims, the court tackled the issue of identifying the number of occurrences per child.[116] Louisiana had not previously addressed a situation in the abuse context where multiple individuals were "repeatedly injured" by an insured over the course of multiple policy periods.[117] In an attempt to predict how the Louisiana Supreme Court would address the issue, the court relied upon a line of Louisiana cases applying the "exposure"—as opposed to the first encounter—rule in asbestos cases. Ultimately, the court believed that the Louisiana Supreme Court would apply the exposure rule, reasoning in part:

> When a priest molested a child during a policy year, there was both bodily injury and an occurrence, triggering policy coverage. All further molestations of that child during the policy period arose out of the same occurrence. When the priest molested the same child during the succeeding policy year, again there was both bodily injury and an occurrence. Thus, each child suffered an "occurrence" in each policy period in which he was molested.[118]

The court rejected the district court's use of the first encounter rule as inconsistent with policy language clearly limiting coverage to bodily injury occurring during the policy period.

> The district court … failed to recognize the distinction between the future damages resulting from a molestation and the subsequent injurious acts of molestation. All the policies cover consequential damages resulting from a molestation. However, a subsequent molestation, occurring outside the policy period, is not a consequential damage of the previous molestation; it is a new injury, with its own resulting damages.[119]

Further, the court emphasized the first encounter rule, as applied in the context of long-tail claims of sexual abuse, "would prevent insurance companies from limiting their coverage to damages emanating from molestations taking place during their policy period" and inequitably "any coverage to a child who was molested a day before the Diocese procured insurance coverage, even though separate molestations continued through the policy year and beyond."[120]

Lastly, the court addressed application of the "actual injury" rule in these contexts. While acknowledging it would be the preferred method of allocating

---

116 *Id.*

117 *Id.* at 1365.

118 *Id.* at 1365–66.

119 *Id.* at 1366.

120 *Id.*

loss among multiple policy period, the court realized type of harm suffered by victims of child sex abuse is unique.

> It may be that a child's psychological injury wrought by prolonged molestations during [Insurer A's] three years of coverage dwarfs the injury emanating from later molestations during the time the [insured] was self-insured. If that were the case, [Insurer A] would bear a significantly larger amount of the loss than would the [insured, Insurer B, and Insurer C]. Unfortunately, there is no measure of the amount of damage caused by the molestations during any given policy period. This leaves us with only one avenue under the policies' language, which is to allocate the loss based upon the policy periods. Thus, the loss is apportioned according to the percentage of the time or period of each child's molestation occurring during each carrier's policy period.[121]

Coverage counsel applying Indiana law to evaluate coverage for liability arising out of complex sexual abuse claims are in a unique position to craft their clients' strongest arguments based upon the unique set of facts and applicable policy language before them.

II. Exclusion for Sexual Abuse and Molestation

The CGL's standard endorsement excluding abuse and molestation has proven to be an effective tool for limiting coverage of risks arising out of sexual abuse. Beginning in 1987, ISO promulgated the abuse and molestation exclusion as a form endorsement to be added to general liability policies to negate coverage for claims arising out of abuse or molestation.[122] The exclusion was developed in response to an increasing number of far-reaching sexual abuse claims that alleged harm to children arising from negligent hiring or supervision by the insured, rather than from the abuse itself.[123] Standard abuse and molestation exclusionary language provides that insurance under the policy does not apply to

> (1) The actual or threatened abuse or molestation by anyone of any person while in the care, custody or control of any insured; or
>
> (2) The negligent employment, investigation, supervision, reporting or failure to report, or retention of a person for whom any insured is or ever was legally responsible and whose conduct would otherwise be excluded under (1) above.

---

121 *Id*. at 1366–67.

122 *Andrew G. Simpson, Physical Abuse Must Involve 'Imbalance or Misuse of Power' for Exclusion: Court*, Insurance Journal, March 17, 2023, https://www.insurancejournal.com/news/east/2023/03/17/712619.htm#:~:text=In%201987%2C%20the%20Insurance%20Services,out%20of%20abuse%20or%20molestation.

123 *See* Dorchester Mut. Ins. Co. v. Krusell, 485 Mass. 431, 441 (Mass. 2020).

A plain reading of the exclusion necessitates highlighting three key points likely to become the central focus of practitioners, carriers, and policyholders litigating the applicability of the exclusion to claims arising out of sexual abuse.

First, the exclusion appears to apply not only to physical acts of abuse and molestation, but also "threatened" abuse or molestation, which suggests verbal sexual harassment falls within the scope of the exclusion. Second, while the terms *care*, *custody*, and *control* are undefined, they are clearly intended to have separate meanings because each is written in the disjunctive. Third, the perpetrator apparently need not be an insured or otherwise related to the insured in any capacity; rather, the only requirement is that the victim of any actual or threatened abuse be in the care, custody, or control of any insured.

Fortunately, the Indiana Supreme Court has provided some guidance with respect to how the exclusion may apply. In *Holiday Hospitality Franchising, Inc v. AMCO Insurance Co.*, a hotel sought coverage under a commercial general liability coverage for claims of negligence against it arising out of an employee's act of entering a minor guest's room without permission and molesting the child.[124] The child's mother filed suit against the hotel under agency and vicarious liability theories, alleging that the hotel was liable for battery, intentional infliction of emotional distress, negligent hiring, retention, and supervision, and negligence infliction of emotional distress.[125] The hotel's insurer thereafter sought a declaration that it owed no coverage, in part because the policy contained an abuse and molestation exclusion similar to the one above.[126]

At the outset, the Indiana Supreme Court stated the "obvious" in noting "the plain and ordinary meaning of the abuse/molestation exclusion as a whole" was "intended to exclude from coverage those claims arising from" a perpetrator's acts of abuse and molestation.[127] However, the Court acknowledged the exclusion, while written in the disjunctive, was limited to only those acts against victims in the care, custody, *or* control of an insured.[128] Because neither *care*, *custody*, nor *control* were defined by the policy, the Court applied the terms' plain and ordinary meanings.

> Webster's defines "care" in this context as "[t]he function of watching, guarding, or overseeing." Webster's II New College Dictionary 168 (1995). "Custody" is defined as "[t]he act or right of guarding, esp. such a right granted by a court." *Id.* at 280. "Control" means "[t]o exercise authority or influence over" or "[t]o hold in restraint."

---

124 983 N.E.2d 574, 576 (Ind. 2013).

125 *Id.* at 579–80

126 *Id.* at 577.

127 *Id.* at 578.

128 *Id.* at 576.

> *Id.* at 246. Black's Law Dictionary is similar, defining "care" as "[u]nder the law of negligence or of obligations, the conduct demanded of a person in a given situation," Black's Law Dictionary 240 (9th ed. 2009), defining "custody" as "[t]he care and control of a thing or person for inspection, preservation, or security," *id.* at 441, and "control" as [t]o exercise power or influence over," *id.* at 378.[129]

The Court raised and dismissed any argument that the minor was in the custody of the insured hotel when abused.[130] The Court also found that there was no evidence to suggest the minor was in the control of an insured at the time of abuse, but suggested such an argument may have merit to the extent evidence demonstrated the hotel maintained policies and procedures and the power enforce the same against hotel guests.[131]

Despite recognizing the fact-sensitive nature of the inquiry, the Court concluded as a matter of law that the child victim was in the care of the hotel at the time the molestation occurred because the child victim was a guest of the hotel.[132] Specifically, the Court reasoned that the hotel owed the child a duty of care, as the child was permitted by the hotel to stay there, and the child was secure "behind a door locked by an electronic key provided by the insured."[133]

Concurring with the majority, then-Chief Justice Dickson agreed with the majority that care was established as a matter of law because under Indiana law, a hotel guest is a business invitee and thus is owed a duty of reasonable care by the hotel.[134] Then Justice Rucker, writing for the dissent, took a different approach and found that, while one could view the evidence to support an inference that the victim was in the care of the hotel, other designated evidence (including evidence that the victim's mother at no point communicated with the hotel regarding its care of the victim and fully intended for the victim to be under the care of the friend who rented the room) was sufficient to create a question of fact for the jury.[135]

Holiday Hospitality is good news for carriers seeking to exclude risks arising from sexual abuse. However, the split court suggests there may be issues in applying and enforcing the exclusion to more complex sexual abuse claims, especially since the standard CGL coverage form does not define *care*, custody, or *control*. In a similar case out of the United States District Court for Maryland, the district court found dispositive that the hotel lacked knowledge

---

129 *Id.* at 580.

130 *Id.*

131 *Id.*

132 *Id.*

133 *Id.*

134 *Id.* at 582.

135 *Id.* at 582–83.

the victim was on the premises and thus the victim could not have been in the *care*, *custody*, or *control* of the victim as a matter of law.[136]

The abuse and molestation exclusion has been used elsewhere to negate coverage under CGL policies for the employers of sex abuse perpetrators. In the Jerry Sandusky saga, the policies issued to PSU from 1992 through 1999 included an exclusion similar to the exclusion enforced in *Holiday Hospitality* except that PSU's exclusion was limited to the care, custody, or control of "an insured" as opposed to "any insured." The Pennsylvania trial court found, without providing detailed commentary,that the victims of Sandusky's abuse were clearly within Sandusky's care, custody, and control at the time of the abuse. However, the court questioned whether Sandusky was indeed an insured at the time of abuse, especially seeing as his heinous acts were outside the scope of his employment with PSU. However, the court was not persuaded that fact should affect coverage because the exclusion would be rendered meaningless. Moreover, the court enforced the exclusion to bar coverage for PSU with respect to Sandusky's acts of abuse off-campus, writing:

> The next question is whether his abusive acts that occurred off-campus and away from PSU football games also fall within the purview of the AME. When he abused children in his own home or at Second Mile events, he was still a PSU Assistant Coach and Professor, and clothed in the glory associated with those titles, particularly in the eyes of impressionable children. By cloaking him with a title that enabled him to perpetrate his crimes, PSU must assume some responsibility for what he did both on and off campus.[137]

III. METHODS IN ALLOCATING INSURERS' INDEMNITY OBLIGATIONS

Over the course of thirty years, Larry Nassar molested hundreds of minors in multiple locations while employed by multiple institutions and caused years of physical and mental trauma. The extent of his conduct unquestionably forced numerous liability insurers to evaluate liability coverage for Nassar's various employers and the owners of properties where the abuse occurred. A primary issue addressed by these insurers, to the extent liability under the policy was anticipated or established, was how to allocate the insurers' liability to their insureds among all triggered policies. As the foregoing discussion establishes, coverage attorneys in Indiana should anticipate complex sexual abuse claims that may give rise to genuine questions

---

136 *Id.*

137 Pennsylvania State Univ. v. Pennsylvania Mftrs Ass'n Ins. Co., 2016 Phila. Ct. Com. Pl. LEXIS 158, at *13 (May 4, 2016).

as to how to allocate loss among multiple insurers. As one would expect, this issue requires review of policy language.

A. ALL SUMS V. PRO RATA

Allocation of indemnity for losses spanning multiple policy periods varies significantly in jurisdictions throughout the United States.[138] Oftentimes, the appropriate allocation method is based upon a combination of the policy's coverage grant language and the coverage trigger theory applied by the court. However, as one commentator notes, "Courts do not uniformly choose and apply the possible trigger theories, nor do they uniformly apply allocation methods."[139]

There are two primary approaches[140] to allocating indemnity among multiple policies for ongoing continuous bodily injury: the "all sums" approach and the "pro rata" approach.[141] The all-sums approach, often preferred by insureds and also referred to as the "joint-and-several" approach, provides that any insurer whose policy is triggered by an occurrence be liable for all sums the insured is liable to pay—subject to the policy's limits of liability—regardless of (1) the existence of an "other insurance" clause in the policy, (2) the number of other policies triggered by the ongoing loss, and (3) the extent of coverage available under the other triggered policies.[142] As a result, the all sums approach provides an insured the right "to choose, at its discretion, which policy is required to respond to the full liability 'subject only to the provisions in the policy that govern the allocation of liability when more than one policy covers an injury.'"[143] Stated practically, the insured can "simply select one triggered [policy] and exhaust the coverage provided during that [policy] period"[144] and continue selecting insurers to pay full limits until the insured's liability to the third part has been satisfied.[145]

Conversely, the pro rata method of allocating damages, which is generally preferred by insurers, holds each insurer liable only for the percentage of time it was on the risk as compared to the entire period of injury. Thus, if Insurer A issued policies with $1 million limits to the insured covering five years of liabilities, and the insured is liable for ongoing damage spanning

---

138 Steven Rawls, *Allocation of Damages for Ongoing Losses over Multiple Policies: Who Pays and How Much?*, International Risk Management Institute, Jan. 1, 2006, https://www.irmi.com/articles/expert-commentary/allocation-of-damages-for-ongoing-losses-over-multiple-policies-who-pays-and-how-much.

139 *Id.*

140 For a more detailed discussion regarding arguments advanced by proponents of each method, see Hugh Scott, *Where Is the Pro Rata v. All Sums Debate Today?*, Law 360, Dec. 12, 2014, https://www.choate.com/images/content/1/3/v2/1319/Scott-Riley-Where-Is-The-Pro-Rata-V.-All-Sums-Debate-Today.pdf.

141 Rawls, *supra* note 138.

142 *Id.*

143 *Id.* (quoting Spaulding Composites Co., Inc. v. Aetna Cas. & Sur. Co., 819 A.2d 410, 416 (N.J. 2003)).

144 *Id.*

145 *Id.*

the course of fifty years totaling $1 million, then general application of the pro rata method would result in Insurer A being liable to the insured for $100,000. Under the all sums approach, the insured could select Insurer A and expect all its $1 million liability to be covered regardless of Insurer A insuring the risk for only 10 percent of the total period of continuous injury.

B. INDIANA'S USE OF BOTH METHODS

Traditionally, Indiana has been considered an all sums jurisdiction.[146] In *Allstate Insurance Co. v. Dana Corp.*, the Dana Corporation was subjected to liability for environmental contamination it caused in manufacturing automotive components at sixty-three facilities located across nineteen states. Allstate, as a successor to one of Dana's excess liability carriers, and Dana disputed, among other things, whether Allstate was liable for all sums caused by Dana's contamination subject to the limit of liability. Specifically, Dana argued that Allstate was liable for all sums and its obligation to pay would be joint and several with any other insured who had to pay under the policy, whereas Allstate argued that it was liable only for damage that occurred during the policy period.[147]

In addressing the dispute, the court of appeals in *Dana I* first looked to the policy language. The Allstate policy's coverage grant required it to indemnify Dana for "for all sums which [Dana] shall be obligated to pay by reason of the liability imposed upon [Dana] … because of … property damage … to which this policy applies, caused by an occurrence, happening anywhere in the world."[148] The policy defined *occurrence* as "an accident or event including continuous or repeated exposure to conditions which results, during the policy period, in … Property Damage … . All … Property Damage … caused by an … event or happening including continuous or repeated exposure to conditions."[149] Given the policy's use of the phrase *all sums* and lack of language limiting coverage to only those damages that occurred during the policy period or a particular policy period, the court reasoned that Allstate was liable for all sums up to its policy limits.

On transfer, the Supreme Court in *Dana II* affirmed, explaining:

> These policies require Allstate to indemnify Dana for all sums paid as a result of liability arising from any covered accident or event resulting in property damage … that occurs during the policy period. Allstate contends it is responsible only for the portion of damages incurred in a particular policy period. It argues for a proportional allocation of damages among each triggered policy

---

146 *See* Allstate Ins. Co. v. Dana Corp. ("*Dana II*"), 759 N.E.2d 1049 (Ind. 2001).

147 Allstate Ins. Co. v. Dana Corp. ("*Dana I*"), 737 N.E.2d 1177, 1188 (Ind. Ct. App. 2000) (*reversed, in part, on other grounds*, Allstate Ins. Co. v. Dana Corp., 759 N.E.2d 1049 (Ind. 2001)).

148 *Id.* at 1190.

149 *Id.* at 1191.

> period. In the case of evolving damages, an "occurrence" as that term was used in the CGL policies of this era may take place over time. *Cf. Eli Lilly & Co. v. Home*, 653 F. Supp. 1, 19 (D.C.C. 1984). If so, the "other insurance" clauses typically found in these policies may have the effect of prorating the damages among the insurers on the risk at different times in that period.
>
> However, there is no language in the coverage grant … that limits Allstate's responsibility to indemnification for liability derived solely for that portion of damages taking place within the policy period. By the policy's terms, *once an accident or event resulting in Dana's liability—an occurrence—takes place within the policy period, Allstate must indemnify Dana for "all sums" Dana must pay as a result of that occurrence, subject to the policy limits. We agree with the Court of Appeals that whether or not the damaging effects of an occurrence continue beyond the end of the policy period, if coverage is triggered by an occurrence, it is triggered for "all sums" related to that occurrence.*[150]

Following *Dana I* and *Dana II*, there was confusion among courts and practitioners with respect to whether Indiana had formally adopted an all sums approach in allocating "damages between two primary insurers whose policies covered the same risk at different times and during different policy periods."[151] Nonetheless, *Dana I* and *II* at the very least provided policyholders alleged to be liable for long-tail liabilities with significant leverage in forcing settlements with their insurers because they could argue any settlement amount paid by the selected insurer would be less than the limits of liability.[152]

Fourteen years after *Dana II*, the court of appeals addressed a similar coverage dispute between a policyholder and its insurer in *Thomson Inc.*

---

[150] *Dana II*, 759 N.E.2d at 1057–58 (emphasis added).

[151] *E.g.,* Federal Rural Elec. Ins. Exch. v. National Farmers Union Prop & Cas. Co., 805 N.E.2d 456, 466 (Ind. Ct. App. 2004), *vacated by* 816 N.E.2d 1157 (Ind. 2004) (noting the parties moved to dismiss the appeal after the Supreme Court granted transfer).

[152] Although outside the scope of this article, the all sums approach with no limitation on stacking creates significant practical issues for insurers. In practice, a policyholder with a policy containing all sums language could strategically select an insurer (commonly referred to in practice as the "*Dana* pick") that the policyholder wished to hold liable for all sums up to the policy's liability limits, settle with that insurer, and then repeat the process with another insurer. As policyholders enter into successive settlements with their *Dana* picks, many of the agreements are confidential and oftentimes contain buyback provisions. With the amounts of the settlements and the full extent of the insured's liability each being unknown, nonsettling insurers are forced to either settle with the policyholder without regard to amounts already recovered by the policyholder—thus creating the potential for a double recovery—or continue covering the insured's defense costs until the full extent of the insured's liability is determined, which can take decades—at least in the environmental context. Moreover, a significant rationale supporting the all sums method of allocation is that insurers who believe they have paid more than their fair share can subsequently seek contribution from other insurers who covered the same risk. However, there is a genuine question whether nonsettling insurers can later seek contribution from settling insurers who paid less than their equitable share when the settling insurers "bought back" the policies issued to the policyholder as a part of their settlement.

v. Insurance Co. of North America.[153] There, the insured was alleged to be liable to employees who claimed that exposure to industrial solvents from 1970 through 1992 caused, or increased their risk of developing, cancer. They sought liability coverage under various policies issued from 1994 through 2006. The policies at issue differed significantly from those in *Dana*. Specifically, the policies in *Thomson* provided that the insurers would pay "those sums"—as opposed to "all sums"—the insured became liable to pay as damages because of bodily injury or property damage. In addition, the policies contained a "critical phrase" noting that coverage applied only to bodily injury or property damage that "occurs during the policy period … ."[154] In light of these differences, the court in *Thomson* held the pro rata method of allocating indemnity among multiple insurers covering the same risk at separate times was appropriate.[155]

Yet, the insured identified genuine problems arising from the application of the pro rata method:

> With long tail claims like those in this case, how would a court determine exactly when and in what quantum the "bodily injury" occurred? We do not understand many of the mechanisms by which chemical exposure may cause cancer. How would the Court decide if 10% or 15% or 50% should be attributed to any one year?[156]

In addressing these "difficult" but not "insurmountable" problems, the court found comfort from back East:

> The Supreme Judicial Court of Massachusetts has observed that "[c]ourts in other jurisdictions have struggled to define the scope of coverage where successive CGL policies are triggered by long-tail claims for injuries which take place over many years and are caused by environmental damage or toxic exposure." *Boston Gas Co. v. Century Indem. Co.*, 454 Mass. 337, 910 N.E.2d 290, 301 (Mass. 2009).
>
> Determining the proper method for prorating losses raises a myriad of issues, which have caused courts to adopt several different pro rata allocation methods in cases involving long-tail claims. See S.M. Seaman & J.R. Schulze, *Allocation of Losses in Complex Insurance Coverage Claims* § 4.3[b], at 4-17-4-21 (2d ed. 2008). The ideal method is a "fact-based" allocation, under which courts would "determine precisely what injury or damage took place during each contract period or uninsured period and allocate the loss accordingly." *Id.* at § 4.3[b][1], at 18. "Although such an allocation is the

---

153 11 N.E.3d 982 (Ind. Ct. App. 2014), *trans. denied*.

154 *Id.* at 1019, 1021.

155 *Id.* at 1021.

156 *Id.*

> most consistent with the contract language, the inability to make such determinations or the litigation costs associated with such an exact allocation has caused courts to use various proxies for deriving fair apportionment." *Id.*[157]

The "various proxies" identified by the Court in *Boston Gas* for apportioning liability on a pro rata basis were the time-on-the-risk method and the years-and-limits method.[158] Under the time-on-the-risk method, which is

> [p]erhaps the most common method of apportionment, … "each triggered policy bears a share of the total damages [up to its policy limit] proportionate to the number of years it was on the risk [the numerator], relative to the total number of years of triggered coverage [the denominator]."[159]

The method makes practical sense.

> Apportioning costs among all triggered years is compatible with having determined that some injury or damage resulted in all of those years. Consistent with the contract language, an insurer pays its percentage of loss attributed to its policy period. … [T]he time-on-the-risk method offers several policy advantages, including spreading the risk to the maximum number of carriers, easily identifying each insurer's liability through a relatively simple calculation, and reducing the necessity for subsequent indemnification actions between and among the insurers.[160]

On the other hand, however, the time-on-risk method likely lacks sufficient equity to justify its implementation in instances where there is disparity in the limits of liability among the triggered policies.[161] In these situations, insurers with lower limits are likely to advocate for the years-and-limits method, which has been adopted in several states, including New Jersey and New Hampshire.[162]

> Under pro-ration by years and limits, loss is allocated among policies "based on both the number of years a policy is on the risk as well as that policy's limits of liability. The basis of an individual insurer's liability is the aggregate coverage it underwrote during the period in which the loss occurred." … Under this approach,

---

157 *Id.* (quoting Boston Gas Co. v. Century Indem. Co., 910 N.E.2d 290, 301, 312 (Mass. 2004)).

158 *Boston Gas Co.*, 910 N.E.2d at 312–14.

159 *Id*. at 312–13 (quoting 23 E.M. Holmes, Appleman on Insurance § 145.4[A][2][b], at 24 (2d ed. 2003)).

160 *Id.* (alteration in original and citations omitted).

161 *See id.*

162 EnergyNorth Natural Gas, Inc. v. Certain Underwriters at Lloyd's, 934 A.2d 517, 523 (N.H. 2007).

> "an insurer's proportionate share is established by dividing its aggregate policy limits for all the years it was on the risk for the single, continuing occurrence by the aggregate policy limits of all the available policies and then multiplying that percentage by the amount of indemnity costs."[163]

In light of the somewhat fact-sensitive nature of applying a fact-based, time-on-risk, or time-and-limits allocation method, the court in *Thomson* declined to adopt a particular approach, reasoning in part that trial courts are "best situated to select (and customize, if necessary) the fairest method of apportioning liability among the insurers."[164] After the Supreme Court denied the insured's petition to transfer in 2015, *Thomson* represents the most recent opinion from an Indiana appellate court addressing allocation of coverage in long-tail claims.[165]

To summarize, the policy language at issue will dictate, at least in some capacity, the appropriate allocation method. If a policy contains all sums language, carriers and practitioners should anticipate the policyholder invoking *Dana* to pressure carriers with the hope of effecting cascading settlements. Conversely, if a policy contains effective those sums language as detailed in *Thomson*, carriers' exposure should be limited to only those damages that occur during the policy period.

IV. CONCLUSION

It is evident that Indiana courts, compared to other states, have lacked the opportunity to address many of the coverage issues arising out of sexual abuse. It is also evident that the approaches taken by all courts with identifying the triggers of coverage and number of occurrences is inconsistent, especially in instances where there are multiple victims of sexual abuse over the course of multiple policy periods. Given these two points, coupled with the likelihood of sexual abuse claims increasing, practitioners in Indiana should view coverage issues arising out of sexual abuse as a unique opportunity to create and establish the most effective approach to applying liability coverage to claims of sexual abuse.

---

163 *Id.* (citations omitted).

164 Thomson, Inc. v. Insurance Co. of N. Am., 11 N.E.3d 982, 1022–23 (Ind. Ct. App. 2014), *trans. denied*.

165 Thomson Inc. v. Insurance Co. of N. Am., 33 N.E.3d 1039 (Ind. 2015).