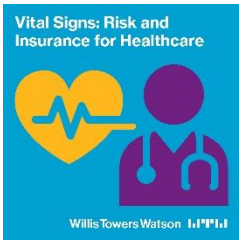

Episode 4: Coverage for sexual misconduct

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NANCY COLLINS: So I think the carriers are more emboldened to cut back on coverages, especially where they've seen some explicit claims. Some carriers are going to have a sort of a top-down mandate on what will be allowed and what will not be allowed, and taking the negotiation authority away from an underwriter, or an underwriter manager. So those are problematic for insureds.

SPEAKER: Welcome to the Willis Towers Watson Podcast-- Vital Signs-- Risk and Insurance for Health Care, where we discuss the risk management and insurance trends and issues facing the US healthcare industry. We'll speak with our industry experts and clients in search of ways to improve your risk and insurance vital signs.

MARYANN MCGIVNEY: Welcome everyone to Willis Towers Watson's Podcast Vital Signs-- Risk and Insurance for Health Care. Today's podcast represents episode four of our first podcast series. In this series, we are looking at HPL coverage issues, that's healthcare professional liability coverage issues, and exclusions in a hard market. And today, we're going to be discussing coverage for sexual misconduct.

My name is Maryann McGivney. And I head up Willis Towers Watson's Healthcare Industry Practice. Today, I am fortunate to have two guests joining me. First, we have La'Vonda McLean. Welcome La'Vonda.

LA'VONDA MCLEAN: Thank you. Happy to be here.

MARYANN MCGIVNEY: We're glad to have you here. La'Vonda heads up our Healthcare Finex Practice. So in our world, that's the financial lines of coverage, like D&O employment practices, fiduciary and crime. La'Vonda is going to help us to understand how these particular types of claims can sometimes cross over from HPL into other coverages.

MARYANN MCGIVNEY: Our second guest today is Nancy Collins. Hi, Nancy.

NANCY COLLINS: Hi, Maryann. Thanks for having me.

MARYANN MCGIVNEY: And we're glad that you could join us, too. Nancy is our Client Advocate and a Senior Member of our Healthcare Center of Excellence out of Atlanta. So she addresses questions and issues regarding the HPL form every day. So she's a good one to have on to talk about this particular topic related to HPL.

So I want to jump into the topic today, which is not a new one. But the reason I wanted to have this discussion is that sexual misconduct coverage has become significantly more complicated in the last couple of years. And it seems to be undergoing yet another evolution as the market hardens,

particularly, related to the batching of claims, which was our last podcast. So let's start with some basics about coverage.

Nancy, I've always counseled clients that there are primarily three ways that coverage can be addressed in a policy. Would you share with our audience what those methods are?

NANCY COLLINS: Sure. In medical malpractice policies, like any other policy, we see one of three approaches. The policy is either going to be silent, it's going to be providing affirmative coverage, or it's going to contain a written exclusion. So I would say, from the perspective of the HPL, the written exclusion for abuse is the most easy to address. Typically, the wording for a full exclusion would be something along the lines of the carrier will not pay damages because of and have no obligation to defend a claim or suit alleging liability arising out of sexual activity. Just as clear as that.

MARYANN MCGIVNEY: Good. Thank you for that. And I do want to tackle the discussion today in light of those three methods. But since Nancy has already mentioned the exclusions on the HPL, La'Vonda, what about D&O and EPL? Is it typical to have sexual misconduct exclusions on those forms?

LA'VONDA MCLEAN: Thank you, Maryann. Yes, it's safe to say that for healthcare clients, every D&O/EPL policy has some form of sexual abuse and misconduct exclusion. Most carriers include an affirmative sexual abuse, sexual assault, sexual molestation exclusion, which will also include the failure to supervise or report any person alleged to have engaged in such misconduct. Other carriers take the position that the bodily injury exclusion encompasses sexual misconduct-related claims. Not all exclusions are alike, and you have to be careful of certain language to make sure that it does not inadvertently include sexual harassment claims, which under EPL policies, it's definitely coverage that you want to have. So in the D&O/EPL world, it is safe to say that every policy is going to have some form of an exclusion as it pertains to this particular coverage area.

MARYANN MCGIVNEY: Well, that's no fun. We don't like when there's exclusions in the policy.

LA'VONDA MCLEAN: Neither do I, Maryann.

MARYANN MCGIVNEY: But exclusions are at least easy to follow, right? They're pretty straightforward. We know when something is not covered, it specifically states, it's not covered. The thing that I think is more difficult to understand and appreciate is when a policy is silent on a particular coverage. So La'Vonda, what does it mean when a policy is silent regarding a coverage term?

LA'VONDA MCLEAN: So in our world with the D&O policy, silence can be a good thing. The D&O policy, in essence, is an all-risk policy that specifically excludes a particular risk. Therefore, if an exclusion does not exist, then at the very least, we have an argument that the claim may be covered. However, there are other exclusions that must be contemplated regarding the sexual misconduct exposure. And you have to take that into consideration when you're thinking about quote, unquote "is this actually a silent coverage in the policy." As I stated earlier, the bodily injury exclusion is one of those. I've had several clients that have said, I don't have a sexual abuse molestation exclusion. I can assure you that the carrier's position is that it's covered under the bodily injury exclusion.

Another exclusion that could be potentially triggered is the conduct exclusion, which is deliberate criminal acts. And another exclusion that became very prominent in an area of concern with the proliferation of sexual misconduct-related claims is the prior acts coverage exclusions. So for instance, what happens when an employer practices related sexual harassment claim, for

example, was reported under a policy 10 years ago? And now, due to, for example, which we did see with the hashtag #MeToo movement, there's news coverage about this past situation, and then it becomes a recent D&O claim. So those are different areas that we have to consider and look at as we're assessing whether or not coverage is actually silent under the policy.

MARYANN MCGIVNEY: Silence takes a little more interpretation to really appreciate whether the coverage is there or not. It might be buried in a different exclusion or it might be open to interpretation.

LA'VONDA MCLEAN: Absolutely.

MARYANN MCGIVNEY: Well, is silence a good thing pertaining to sexual misconduct in an HPL form, Nancy? Or do you have the same types of issues?

NANCY COLLINS: I think you have the same types of issues. Maybe they're not quite as involved. When the policy is silent, a lot of people will offer the opinion that there will be coverage at least once until the carrier closes the coverage gap. Meaning, there's nothing that mentions it than it should be covered. But I think that's a little bit broad brush, and you have to make sure that you're considering other wording in the policy, such as intentional conduct. So in that situation, if the policy is silent, I think the bad actor is going to have some trouble with the intentional conduct exclusion.

The corporate defendant, on the other hand, is probably going to have allegations of both sort of maybe a punitive type, willful misconduct, but also some negligence that will be alleged against them. And in that case, I think the allegations that the corporate defendant negligently hired retained or supervised the offender would not be excluded from an intentional conduct exclusion. So it's risky to assume that you're going to have coverage under a silent policy. So I don't know that that's the route I would go. But if you have a case, I guess you have a good chance of arguing. At least, the corporate defendant should have defense and possibly indemnity.

MARYANN MCGIVNEY: And what about final adjudication? Sometimes, we hear that you have coverage until final adjudication. How does that fit in?

NANCY COLLINS: Yes. So a final adjudication is something that we look to put in when we're talking about affirmative coverage mainly. But the final adjudication language is something that you want to be as broad as possible. So that when you get to summary judgment or you get to a trial court or you get to a criminal proceeding, and there is some sort of adjudication on the guilty party, that the carrier's not able to just end coverage at that point, you want full and final adjudication, which would take you up through the appeals process, give you leverage to get some settlement dollars out of your carrier, and then also, aggressively defend an innocent person, which is obviously what you want out of your policy.

MARYANN MCGIVNEY: So let's talk about the affirmative since we're sort of stepping into those waters. And I think sometimes, that can be really misleading. It seems like affirmative would be the best scenario and exactly what you want. But especially given that silence leaves a lot to interpretation, it's logical to think that affirmative coverage is best. So Nancy, are there any concerns that we should be aware of with affirmative coverage?

NANCY COLLINS: Sure. With affirmative coverage, you'll often see it in the form of an insuring agreement. And with a separate insuring agreement addressing abuse and molestation, I think it gives you a better opportunity as the insured to endorse, amend, and manuscript that wording. So you want to make sure that you are getting what you want out of that type of wording, which I believe should be as often as possible full defense and indemnification for a loss. That would be

the gold standard. That allows you to fully defend, especially an innocent insured to your corporate defendant, and then also allow you to buy your piece by way of settlement if you so choose or if you ultimately need to do that.

There are some considerations. The insuring agreement can be a tactic to put in some sub-limits on a policy. And if the sub-limits are in place, then you have to worry about umbrella attachment. And obviously, you want this coverage to run as far up your tower as possible. So that's one thing you have to look out for. And then you just want to make sure if it's a separate insuring agreement, then you're not getting broad notice requirements or notice language. So you want to try to limit the official notice recipient to a small group of people. So it can't be any insured that is aware of the abuse or alleged abuse, but it's a small group of risk managers, legal counsel, that would actually trigger notice under the policy.

MARYANN MCGIVNEY: So some very specific defined group.

NANCY COLLINS: Correct.

MARYANN MCGIVNEY: And as we're talking about affirmative, La'Vonda, is that even available on the D&O or EPLI? It sounded like earlier, you were saying that probably wasn't something that you could get in the marketplace.

LA'VONDA MCLEAN: That's correct, Maryann. The D&O/EPL policies, it is pretty much impossible, very much highly unlikely that any carrier would offer any sort of affirmative coverage for this particular risk. As I said with the D&O/EPL policies, it's in essence an all-risk policy. So if there isn't a specific exclusion, then in that regard, there is coverage for it as long as we're taking into consideration some other exclusions as we've already previously discussed. It's just an exposure that carriers do not feel they can adequately price for. And it's not a risk they are willing to provide coverage for under a D&O/EPL policy.

There is one area, though, that I do want to specifically highlight. When it comes to the D&O policy, when the underlying allegations are sexual misconduct-related, but the claim itself is D&O related, for example, the D's & O's breached their fiduciary duty to the organization by allowing a corporate culture sweeping these types of claims under the rug, you definitely want coverage for that. So you want to be mindful of how the exclusion is under the D&O policy to make sure that if there is D&O related claim that arises out of the sexual misconduct types of claims, that you do have coverage for that. And I can tell you that the market is changing. Every carrier is not the same with how they approach this. So that is definitely an area that we pay attention to and advise our clients on.

MARYANN MCGIVNEY: Yeah. That's some good advice. But what about standalone policies? You do hear people talking about buying standalone sexual misconduct coverage. Is that widely available? And are they a better solution?

LA'VONDA MCLEAN: That is definitely going to be a better solution than trying to fight with your D&O/EPL carrier to get the coverage. There are standalone products available in the marketplace. But we don't have a very broad market. There's only really a handful of carriers that offer it. The benefit of this coverage, it's similar to cyber, is that it offers risk management tools, such as training modules or prevention training and other tools under that policy. It may also include crisis management and investigatory services. The policies also extend coverage for negligent employment investigation and supervision.

But there are caveats to these policies. So there are areas that we talk to and discuss with our clients to make sure that their policies and procedures align with how the coverage is triggered

under the policy. But there are some options out there available.

MARYANN MCGIVNEY: Well, that's at least a little help there. Nancy, are there standalone products available for HPL?

NANCY COLLINS: There are. There are few and far between, I would say. It can solve the issue of the absence of coverage or a gap in your tower from time to time. There are nuances with these policies. And the carrier may attach your application and parts of your policies and procedures, and make them part of reps and warranties on the policy. So that's always getting pretty serious when you're representing and warranting that you are doing certain things in your organization that could come back and nullify coverage if it turns out you're not.
Also, the policy may restrict coverage to employees who've been through criminal screening and abuse registry checks. So if you have some gap or something happens and that's not happened again, it could nullify your coverage. So standalone coverage is there, Like I said, but it's few and far between.

LA'VONDA MCLEAN: And Nancy makes a great point about the criminal screening requirement. Some of the policies as well will include a requirement that you complete background checks of all employees. So that's been an area for me where I've pressed the carriers on how do we make sure that our clients are truly adhering to that and what's the record requirement to even prove that. So that's one of those areas where you have to be mindful. And once again, as I said, when we look at your policies and procedures, do you include that as part of it because that is a requirement under some of these policies?

MARYANN MCGIVNEY: And documentation in our world is always the critical piece of that. To be able to document that you are doing something that you're required to do is really important in a claim scenario.

LA'VONDA MCLEAN: I absolutely agree.

MARYANN MCGIVNEY: So aside from the coverage discussion, often when there's an event, there are some other concerns that are not always immediately obvious. So what are some of the other issues an organization should be thinking about, La'Vonda, I'll ask you, when they have a sexual misconduct incident or alleged incident?

LA'VONDA MCLEAN: Yes. So one area, I think, that we need to keep in mind is the reputational harm aspect of this. That can be a very big component of these particular claims that are happening. So under your D&O/EPL policy, you may have a small sub-limit it could be 25,000 to 100,000, for public relations or crisis management coverage. So you just want to make sure that we are assessing and looking at that language to see if a sexual misconduct-related allegation triggers the PR crisis management coverage that you have under your policy.
Some other areas to keep in mind, and this really became a big area of focus after the # MeTooMovement, is arbitration agreements and non-disclosure agreements. So some states have limited the enforceability of an NDA, a nondisclosure agreement, and settlement agreements with legislation proposed in other states, and in addition to the enforceability of arbitration agreements in the context of sexual misconduct claims.

So these are two documents that clients use often to help protect themselves, especially from alleged accusers going to the media and things of that sort. But you have to just keep that in mind now. There is some state law in place around that. In addition, the federal tax cuts in Jobs Act prohibits deducting as a business expense any settlement or payment related to sexual harassment or sexual abuse if the settlement or payment is subject to a nondisclosure agreement. And I think just the other area is thinking about the impact to the boards. So this is something that I

touched on a little bit earlier, where I advised around making sure that you understand the language under your D&O policy if there is an exclusion. Because there has been impact to boards that we've seen from these claims. Boards can be subject to derivative lawsuits based upon the corporate culture. And for a series of workplace incidents, this can cost significant loss of shareholder value for publicly-traded companies. And while we did see most of this from a publicly-traded company perspective, there's no entity that's immune from this. So non-profit, private entities, this is an area that can also be a problem for those entities as well.

So those are just a few other things that we should keep in mind as we think about what coverage would be available and just some obstacles that are now present themselves in the marketplace.

MARYANN MCGIVNEY: A little more complicated than it might seem on the surface.

LA'VONDA MCLEAN: Exactly. Exactly.

MARYANN MCGIVNEY: Any additional thoughts, Nancy, about concerns related to a sexual misconduct event?

NANCY COLLINS: I would just offer up that when I go to review a policy, one of the first things that I do is go and look for this should-have-known language. And I'm not sure how many people actually consider the gravity of the wording that can be in your policy. So many carriers are seeking to further cut off their obligations for coverage through the use of the word that punishes insured. Usually, the corporate defendant, because it, quote, unquote, "should have known of a bad actors propensity to be an offender." So as we know, an employer can be liable for the intentional acts of its employees if it knew or should have known the employee was likely to offend or be an offender.

So carriers have begun to insert this sort of subtle but exclusionary wording in its policies, essentially giving the carrier, usually an adjuster after a claim, the authority or the backdrop to deny a claim based on whatever allegations may be found in a lawsuit filed by the patient. So if you've ever read a lawsuit, you know that sometimes they can contain quite dramatic claims, and eventually, those become unfounded. So in your negotiations with the carriers, I would suggest that if you can't strike 'knew or should have known' completely, at the very least strike 'should have known' language from the wording.

And the small change will provide much needed protection for the organization in the event of a claim of negligent hiring retention or supervision. So I would say really emphasize your focus on that wording as you're reviewing your policy.

MARYANN MCGIVNEY: Yeah, that sounds like a really subjective situation.

NANCY COLLINS: Yep, that's exactly the problem with it, Maryann.

MARYANN MCGIVNEY: Yeah, well, let's talk for a minute about the hashtag #MeToo movement, because, La'Vonda I know you and I have had a lot of this discussion over the last two years. as how that movement has really impacted coverage for sexual misconduct. So do you want to comment on that movement and the impact it's had?

LA'VONDA MCLEAN: Sure, so there's been more focus on corporate culture due to the potential increase and severity of sexual misconduct related claims. There's increased scrutiny of internal policies and procedures and training, prior claims, what the internal complaint procedures are, and who the employees that are involved in the sexual misconduct claims. So for example, C-suite executives that may be involved. What I would say as I said earlier, these exclusions have pretty

much always existed on health care entities, D&O and EPL policies.

But there's just been further underwriting more questions around certain aspects of this. And some carriers, they may even go as far as sub-limiting any available coverage that may be available under the policy. Or as I said, they may put on a stricter D&O exclusion so that you don't have potential D&O coverage for these types of claims if they do become a D&O claim. And then there may be certain individuals that could be excluded from coverage in particular if there's concern about that particular individual, particularly if they are C-suite, that has been involved in some past claims activity, especially if there's been a significant settlement.

So those are sort of the changes that have impacted the D&O, EPL world. I would just say more scrutiny, more questions being asked, and more information that we need to provide the carriers.

MARYANN MCGIVNEY: Sure. So let's follow that thought process a little further and let's talk about how the market-- how the hard market has changed the way carriers are looking at sexual misconduct. So I'd like for both of you to comment on the marketplace. But we'll start with the HPL, Nancy. What does the HPL marketplace look like, particularly related to sexual misconduct coverage?

NANCY COLLINS: I think it's impacting the coverage. I think the carriers are more emboldened to cut back on coverages, especially where they've seen some explosive claims. Some carriers are going to have a sort of a top down mandate on what will be allowed and what will not be allowed. And taking the negotiation authority away from an underwriter or an underwriter manager. So those are problematic for insureds, because once you're into that level of definitive decision making, you're not going to have as much luck.

So I think the general returned to underwriting discipline which we're seeing across many lines of coverage is going to impact the availability of the coverage. So I would say keep fighting the good fight, and if it's a priority for your organization, set that out as part of your strategy from the beginning.

MARYANN MCGIVNEY: Yeah, and I think one of the things that I've seen some changes in too is the batch language related to sexual misconduct, because I know there's a lot of concern with carriers about being able to string a bunch of sexual misconduct claims together and call it one claim and drive some severity into the tower. So there could be some changes around that too.

NANCY COLLINS: Absolutely. For clients who have large retentions, that's a big concern. And I think the related claims and batch language has to be watched.

MARYANN MCGIVNEY: La'Vonda how about in the D&O and EPL marketplace, is this impacting your rates and terms?

LA'VONDA MCLEAN: It has had an impact even though there's some pretty strict exclusions under the policy. As you well know, there's a very crafty plaintiffs attorneys and some language wasn't as tight as others. But part of the hard market for the healthcare entities for D&O and EPL, the basis was the increased severity of covered sexual misconduct related claims. What's interesting is while the frequency of the claims did not necessarily increase, the severity significantly increased. And so we're feeling the impact of that in the marketplace.

So for example, in the past at sexual harassment related claim, may have settled for 500,000. And now these claims are settling for a million plus. And all of the lawsuits or letters that clients receive are referencing #MeToo as the starting basis. So that has just increased the severity of these claims. And as I just stated earlier, the only change, really, outside of that is just more scrutiny of

the risks claims settlement philosophy at the organizations and tighter exclusionary language, and quite frankly, higher retentions as well and higher pricing. So we have seen it impact the marketplace.

MARYANN MCGIVNEY: So before we wrap up, I know our discussion today has been mostly focused on coverage, but I thought we should have just a couple of thoughts on how maybe our clients can risk manage this exposure. Nancy, anything you want to recommend that our clients can do to be proactive with their HPL coverage?

NANCY COLLINS: Yeah, it's a tough market, for sure. But I would say, speak up in your organization about the importance of this coverage. I can't tell you how many times I've heard people in leadership say, we would never have anybody like that here. We're just not made that way. But I think an easy way to talk about it is that you're investing in protecting and providing a full and vigorous defense to those accused of wrongdoing. Not just individuals, but also your health care organization.

So be prepared to speak about that danger of the 'should have known' language and what it could mean to leadership if a denial or a reservation of rights occurs as a result of that language. Engage with the underwriters on it, and let them know it's a priority for you. Welcome them into your company and its policies and procedures and show them you have a culture of transparency where employees are encouraged to speak up when they see things that don't look right. Those should be a few things I would just throw out there.

MARYANN MCGIVNEY: Yeah, good advice. Thanks. That's very helpful. And I'd like to thank both of you for joining me today. Nancy, I really appreciate your sharing your expertise with us. I know you're entrenched in HPL issues all day long. So your center of excellence does a great job dealing with our healthcare issues and taking care of our health care clients. So I appreciate your joining me.

NANCY COLLINS: Thank you, Maryann. It was my pleasure.

MARYANN MCGIVNEY: And La'Vonda you and I have had a lot of discussions over the years about HPL, GL, D&O, EPL, how does it all work together, a lot of coordination. So thank you for all that you do for our clients as well.

LA'VONDA MCLEAN: Absolutely, and thank you for having me, Maryann. I appreciate it.

MARYANN MCGIVNEY: It was a good discussion. So I'd also like to thank our audience and those that tuned in to join this discussion. As I mentioned earlier, this is the fourth podcast in a five part series addressing HPL coverage and some of the more important exclusions and coverage terms. And we hope you will join us again next time on vital signs, risk and insurance for health care.

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