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Policyholder Advisor

Seventh Circuit Requires Insurance to Fund Settlement with Victims of Larry Nassar's Sexual Abuse



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Key points:

Liberty Insurance Underwriters must pay into settlement trust formed by USA Gymnastics bankruptcy settlement with victims of Nassar's sexual abuse

Court holds that Nassar's guilty plea to ten counts of sexual assault is not "final adjudication" of hundreds of other pending claims

Good news for other institutions facing multiple sexual abuse claims

Survivors of USA Gymnastics and Michigan State doctor Larry Nassar's insidious sexual abuse received a ruling that will help secure funding for their \$380 million settlement with now-bankrupt USA Gymnastics. In *USA Gymnastics v. Liberty Insurance Underwriters, Inc.*, 27 F.4th 499 (7th Cir. 2022), the Court found that the directors and officers ("D&O") liability insurance policy sold by Liberty Insurance to USA Gymnastics covered the majority of claims made by survivors of Nassar's sexual abuse.

Policyholders, especially those seeking coverage for sexual abuse claims, should take note of this important decision and the Court's distinction between alleged versus adjudicated conduct. For the *USA Gymnastics* Court, the critical distinction was between conduct that was the subject of plea bargains as compared to conduct that was the subject of dismissed lawsuits or non-prosecution agreements. The plea agreement-related conduct was deemed to have been finally adjudicated – and therefore excluded from coverage. In contrast, the conduct that was subject to dismissed suits or non-prosecution agreements was not adjudicated and therefore was not excluded.

In the USA Gymnastics case, the insurance policy provision at issue excluded claims that were "based upon, arising from, or in any way related to ...any deliberately dishonest, mali-



icious or fraudulent act or omission or any willful violation of law by any Insured ...provided, however, this exclusion shall only apply if it is finally adjudicated that such conduct in fact occurred." The question was whether it was "finally adjudicated" that the conduct at issue in the settlements had occurred. If yes, then the claims and settlements were excluded from coverage; if no, then the claims and settlements were covered.

The bankruptcy court ruled that Nassar's conduct had been finally adjudicated only as to the ten crimes on which a guilty verdict was entered, and not those concerning the many other claims. Liberty Insurance appealed – and lost.

After analyzing the plea agreements between the prosecutors in Michigan and Nassar, the Seventh Circuit agreed with the lower court and concluded that only the conduct that encompassed the ten counts on which he pleaded guilty was “finally adjudicated” and excluded. But the conduct that was the subject of claims that were dismissed without prejudice or subject to a non-prosecution agreement was not “finally adjudicated” and therefore not excluded.

Another important point from this case is the Court's treatment of the Nassar-related claims as different from financial claims by defrauded shareholders. The Court reasoned that claims like those by Nassar's victims could not be logically grouped together or be said to be “in any way related to” the same wrongful act because “[t]here is no common unit of measure (like dollars) that would allow someone to assess cumulative harm the way we could with, for instance, different shareholders' claims for accounting fraud or a corrupt self-dealing merger.” Thus, the Court emphasized that sexual assaults are distinguishable from economic wrongdoing and should be treated differently, even in the context of D&O liability insurance. “An overly broad approach to ‘in any way related,’” the Court noted, “effectively nullifies the ‘final adjudication requirement,’” which is “an important and often bargained-over feature of D&O policies.” Accordingly,

the Court agreed with USA Gymnastics and found that “the policy's board language becomes ambiguous as applied to these unique facts.”

This win for survivors of Nassar's abuse and USA Gymnastics was reinforced when, on March 28, 2022, the Seventh Circuit denied Liberty Insurance's petition for rehearing and for rehearing en banc. ▲

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