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PERSPECTIVE

Who will have to pay for your #MeToo experience?

By Jaymeson Pegue

The #MeToo movement presents not only a watershed moment in the social conscience of the country, it presents a basic legal-economic question. Who pays? The offender? The offender's employer? Congress? Or an insurance carrier?

The current list of big name offenders offers guidance. It can be grouped into two classes. In Class One are the private sector alleged offenders. This group includes Donald Trump, Bill Cosby, Roger Ailes, Bill O'Reilly, Harvey Weinstein, James Toback, Matt Lauer, Louis C.K., Charlie Rose and others. This class also includes the employers of these individuals, depending on the circumstances of the wrongful conduct. Class Two includes the public sector alleged offenders, accused of wrongdoing while holding public office: Judge Roy Moore, Rep. John Conyers, Rep. Blake Farenthold and more.

What becomes important about the classifications is the question of who will pay for the offense? Who will bear the potentially enormous cost of defense, not to mention the indemnity exposure. Assume that suit is filed, or a claim is made, and the process for seeking damages is begun in civil court. Assume further that the claim or suit is based on the original harassment allegations, if the statute of limitations has not run, or on an ancillary tort committed in the aftermath of the original abuse or harassment.

For this article, we set aside the Class Two Public Sector offenders because of the process in place in Congress, and the apparent use of taxpayer dollars to resolve claims.

Focusing on the private sector offenders, some examples are helpful. For Bill Cosby, his defense in a host

of defamation suits is being paid for by AIG, Inc. AIG contested its responsibility for defending Cosby and it lost.

The policy at issue in the Cosby matter is a homeowners' policy. While some commentators have characterized this type of policy as one available primarily to the wealthy, many standard homeowners' policies, and excess/umbrella policies will include personal injury coverage. In this coverage, the policy will afford coverage for a variety of offenses, which most non-insurance attorneys would recognize as common law torts. Among the listed offenses may be defamation. And so, for Cosby, even though the statutes of limitation had long since run on the original abuse claims, the alleged defamation of the accusers by calling them liars was sufficient to implicate this coverage.

The Cosby policy was issued subject to an exclusion for claims arising out of sexual misconduct. That said, the court held the exclusion to be ambiguous in the context of the suit for defamation, finding that there was not a sufficient connection between the original offense allegedly committed by Cosby and the later occurring defamation. With express coverage for defamation, and an ambiguous exclusion, it is AIG, not Cosby, who is currently bearing the enormous financial penalty for the defense of the suit. With the underlying case still ongoing, there is no ripe dispute on the duty to indemnify.

In the case of Roger Ailes, the cost of defending and settling the myriad claims filed against him seems to have been absorbed by Fox Entertainment Group. No day of reckoning for him. This is an example of the employer absorbing the financial penalty for the actions of the wrongdoer. Fox, in turn, had

to answer to its shareholders when they brought suit against it for a failure to reveal the extensive settlement payments it had made on his behalf. The shareholder suit settled in late November 2017. Fox and Bill O'Reilly face newly filed defamation suits by women who had previously resolved their original abuse claims against O'Reilly. Like Cosby, and Trump, O'Reilly allegedly defamed the women in his defense of himself.

Many Class One private sector offenders, and their employers, are buffered from financial exposure either by an EPLI policy, a general liability policy, or some other type of E&O or D&O coverage.

The cost of pursuing people like Trump, Cosby, Ailes and O'Reilly, is enormous. In recognition of that reality, Gloria Allred, counsel for Summer Zervos, has sought public funding. Ms. Zervos has filed a defamation suit against Trump for his statements made repeatedly during his campaign whereby he called her, and others who claimed he had sexually assaulted them, liars. The newly formed non-profit, Time's Up, seeks to raise money for a Legal Defense Fund to provide resources to claimants in pursuit of redress for their grievances. With almost \$14 million raised to date, the Fund will be administered by the National Women's Law Center in order to lend financial support to those claimants whose cases do not easily draw legal representation and financial resource.

However, that is only one side of the economic picture for the "me too" movement as it finds its way into the Courts. Beyond funding for the claimants are the issues of funding for the defense, funding of any settlement or judgment, and the availability of insurance for the defendant and/or his or her employer.

General liability policies, issued on an occurrence basis, have long relied upon language which excludes coverage for intentional conduct. Whether through the "occurrence" definition, or the intentional acts exclusion, the goal has been for carriers to avoid responsibility for intentional conduct in many forms. To the extent the policy affords coverage for specific torts within the coverage for personal injury, torts like defamation, the goal was to exclude coverage by endorsement if the tort "arose out of" certain conduct. This is at issue in the Cosby case.

In California, and other jurisdictions, there is a statutory overlay in Insurance Code Section 533, which precludes indemnification for intentional acts as well.

If the #MeToo movement has, as one of its motivations, a desire to deter and eradicate the offensive and allegedly illegal conduct at its core, will it need to also address, and litigate, the issue of who pays? Without direct financial responsibility for the conduct, will it stop? Is this a risk the insurance industry should absorb?

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