**2021 PARMA ANNUAL RISK MANAGERS CONFERENCE**

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**Remote Access Via Zoom**

**Many Claims, Limited Pots:  
Allocating Multiple Claims under Aggregate Group Limit Insurance Policies**

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PARMA 2021

*Many Claims, Limited Pots:  
Allocating Multiple Claims under Aggregate Group Limit Insurance Policies*

1. **Overview of SAM Claims and Evolving Insurer Responses, Including Imposition of Aggregate Limit Caps**
   1. SAM claims generally: history of increasing claims and judgment/settlement value;
      1. The number of lawsuits seeking damages for SAM claims began to swell in the 1970s. The rate continued to increase through the 1980s and 1990s, until it grew exponentially in 2000. Not only has the number of lawsuits increased, but recoveries by plaintiffs have skyrocketed since 2000. (Tom Lininger, *Is It Wrong to Sue for Rape?*, 57 Duke L.J. 1557 (April, 2008).)
      2. In 2007, the Archdiocese of Los Angeles paid $660 million, and certain clergy in San Diego paid a total of $198.1 million, to settle child sexual abuse claims.
      3. In 2018, Michigan State University paid $500 million to settle claims brought by victims of sports doctor Larry Nassar.
      4. In 2019, the University of Southern California paid $215 million to settle claims brought by victims of gynecologist George Tyndall.
   2. Brief summary of recent legislative changes reviving claims (California’s A.B. 218)
      1. Extends the limitations period for filing a “childhood sexual assault” claim from three (3) years to five (5) years, commencing upon discovery that a psychological injury or illness manifesting in adulthood was in fact the result of sexual abuse endured as a child. (Cal. Code Civ. Proc. § 340.1(a).)
      2. Increases the age limit to file a lawsuit for childhood sexual assault from twenty-six (26) years to forty (40) years. (Cal. Code Civ. Proc. § 340.1(c).) This limit does not apply if the defendant entity knew or had reason to know of misconduct that created a risk of childhood sexual assault, or if the defendant entity failed to take reasonable steps to avoid acts of childhood sexual assault. (*Id.*)
      3. Provides a three (3)-year period commencing on January 1, 2020, to revive childhood sexual assault claims that have expired as of that date. (Cal. Code Civ. Proc. § 340.1(r).) Thus, the effect of the statute is to revive, for the three year period, *all* potential claims for childhood sexual abuse without reference to any prior statute of limitations, claim presentation, or discovery requirement pursuant to which the claim(s) may previously have been barred.
      4. Gives courts discretion to award treble damages if a “cover up” was involved. (Cal. Code Civ. Proc. § 340.1(b)(1).) The statute defines “cover up” as “a concerted effort to hide evidence relating to childhood sexual assault.” (Cal. Code Civ. Proc. § 340.1(b)(2).) The concealment of such evidence has overlapping relevance with numerous other issues, such as the availability of punitive damages, establishing an employer’s negligence, or determining whether an employer’s investigation of a complaint was adequate. Cases addressing such overlapping issues may therefore be instructive in predicting what types of conduct courts would consider a “cover up” under A.B. 218. (**See** *Doe 2 v. The Citadel* (S.C.Com.Pl. 2014) 2014 WL 8727884 [example of cover up of child sexual abuse]**.**)
         1. Note that the permissibility of insurance coverage for statutory treble damages is considered on a per-statute basis. (See, e.g., *California Shoppers, Inc. v. Royal Globe Ins. Co.* (1985) 175 Cal.App.3d 1, 34 [insurer obligated to provide liability coverage for statutory treble damages imposed by Cal. Bus. & Prof. Code § 17043 because the primary purpose for multiplied damages under that statute was “to provide additional compensation to the victim rather than punish the offender”]; *Evanston Insurance Co. v. Versa Cardio, LLC* **(Mar. 21, 2018)** No. CV 17-180 PSG (SPX), 2018 WL 4860176, at \*8 [noting that Eleventh Circuit had previously determined that whether the treble damages available under the Telephone Consumer Protection Act constituted a non-covered penalty was “an open question of law that should be resolved in favor of” the insured.”].)
         2. Treble damages on account of a “cover up” to “hide evidence relating to childhood sexual assault” may be considered as arising from a willful act for which insurance coverage is precluded pursuant to Insurance Code § 533. (See, e.g.,*Shell Oil Co. v. Winterthur Swiss Ins. Co.* (1993) 12 Cal.App.4th 715, 742 [**Cal. Ins. Code §** 533 precludes coverage for willful acts]; *J.C. Penney Cas. Ins. Co. v. M.K.* (1991) 52 Cal.3d 1009, 1025 [an act is considered “willful” for purposes of **Cal. Ins. Code §** 533 when “the harm is inherent” in the act itself.]; *J.C. Penney Cas. Ins. Co. v. M.K.* (1991)52 Cal.3d 1009, 1026 [observing that molestation is inherently harmful such that the intent to harm is implicit in the act].)
   3. Insurer’s responses to increasing frequency and costs of SAM claims;
      1. Exclusions (and their Limitations)

Liability coverage exclusions for claims arising from insured’s sexual behavior (e.g., “sexual molestation” and “sexual misconduct” exclusions) have been implemented in standard policies. However, complaints generally allege a variety of conduct—“grooming” and other related conduct—which may be inappropriate but which is non-sexual in nature, or which, standing alone, may amount to “sexual harassment” for which coverage is available. Thus**,** sexual molestation and misconduct exclusions are often ineffective in disclaiming coverage, even in cases involving intentional sexual assault, because the allegation stated in the complaint have the effect of stating potential claims for other, non-intentional and/or non-excluded conduct, such as harassment. (See, e.g., *Gonzalez v. Fire Insurance Exchange* (6th Dist. 2015) 234 Cal.App.4th 1220 [Insurer was obligated to defend claims arising out of a sexual attack, despite the policy’s exclusions for “sexual molestation,” “criminal acts,” and “expected or intended” injury, because the insured faced potential liability for negligent acts that were not “inseparably intertwined” with the underlying sexual assault.]; *Cranford Ins. Co., Inc. v. Allwest Ins. Co.* (N.D.Cal. 1986) 645 F.Supp. 1440 [Where an insured psychiatrist had sex with a former patient, and the insured also committed malpractice by abandoning the patient, coverage was available under a professional malpractice policy that excluded coverage for sexual intimacy.]; *Horace Mann Ins. Co. v. Barbara B.* (1993) 4 Cal.4th 1076, 1084-85 [Insurer had a duty to defend teacher in a minor student’s lawsuit alleging sexual and other misconduct when “the gravamen of the so-called ‘parasexual’ actions . . . was its commission *in front of other students*” and insurer “had not shown that any of those public acts were inherently harmful or amounted to sexual molestation.”] [emphasis in original].)

* + - 1. Nevertheless, under California law, where non-sexual acts are “inseparably” or “inextricably” “intertwined” with sexual activity excluded from coverage, those non-sexual acts are also excluded. (See, e.g., *Jane D. v. Ordinary Mutual* (1995) 32 Cal.App.4th 643, 653 [“In reviewing the allegations of the complaint, we find the allegations of nonsexual conduct—obtaining information about plaintiff during counseling and using this information and misusing counseling techniques to create transference and to control and induce plaintiff's behavior—were ‘inseparably intertwined’ with the sexual misconduct.... Accordingly, there is no coverage[.]”]; *Marie Y. v. General Star Indemnity Co.* (2003) 110 Cal.App.4th 928, 958 [insurer had no obligation to settle claims based on conduct which was “inextricably intertwined” with non-covered conduct]; *Northland Ins. Co. v. Briones* (2000) 81 Cal.App.4th 796, 809-810 [sexual molestation exclusion precluded coverage for insured karate instructor who allegedly repeatedly raped and stalked minor student as purported “non-sexual allegations” all involved conduct that was “directed towards the goal of sexual intimacy”]; *Farmer v. Allstate Ins. Co.* (C.D.Cal. 2004) 311 F.Supp.2d 884 [sexual molestation exclusion barred coverage for insured husband’s alleged molestation and insured’s wife alleged negligence in failing to prevent said molestation].)
      2. Whether acts of non-sexual conduct are potentially separable and thus non-excluded, or “inextricably intertwined” with claims for intentional sexual misconduct is a judgment call which requires a detailed fact-based analysis, and California courts will “look beneath the surface of the pleadings to the substance of the allegations to determine whether the alleged sexual and non-sexual misconduct are separable.” (*State Farm Fire & Cas. Co., supra,* 59 Cal.App.4th 648, 664.) In this respect, as exemplified by the analysis in *Horace Mann Ins. Co. v. Barbara B.*, ***supra*, 4 Cal. 4th 1076, 1083-84,**“[i]t bears emphasis that this case reaches us in somewhat of a factual vacuum. We must not lose sight of the record before us. The record is devoid  of evidence which establishes the chronology or sequence of events comprising the alleged misconduct or that these actions were integral to the molestation. For instance, the record is devoid of evidence demonstrating that Lee's acts of public embarrassment of Barbara occurred in such close temporal and spatial proximity to the molestation as to *compel* the conclusion that they are inseparable from it for purposes of determining whether Horace Mann owed a duty to defend Lee.”

Further addressing the evaluation of the relationship between non-sexual conduct which may be excludable as “inextricably intertwined” with intentional sexual conduct, in *Coit Drapery Cleaners, Inc. v. Sequoia Ins. Co.* (1993) 14 Cal.App.4th 1595, the court addressed whether coverage existed for a claim alleging the intentional sexual harassment of an employee by her employer. (*Id.* at 1599-1601.) In its analysis, the *Coit Drapery* court characterized the California Supreme Court’s decision in *Barbara B.* as “recogniz[ing] that . . . claimed negligent conduct could lie outsidethe scope of the duty to defend, if the alleged instances of negligent conduct ‘occurred in such close temporal and spatial proximity to the molestation as to *compel* the conclusion that they are inseparable from it for purposes of determining whether [the insurer] owed a duty to defend”. (*Id.* at 1607.) Summarizing this analysis, the *Coit Drapery* court thus stated that, “[w]hile rather unclear, we take the language “temporal and spatial proximity to the molestation” [in the *Barbara B.* decision] to mean that certain alleged conduct can be ‘inseparable’ from intentional wrongful conduct and, therefore, not subject to any duty to defend, *even where such conduct might have triggered such a duty when standing alone*.” (*Coit Drapery Cleaners, Inc., supra,* 14 Cal.App.4th at 1608 [emphasis added].)

* + - 1. In any event, though the question of whether conduct is “inextricably intertwined” focuses on the “temporal and spatial” relationship between the non-intentional conduct and the alleged intentional misconduct, non-sexual acts may be found to be “inseparably” or “inextricably” “intertwined” with the sexual acts even if they occurred well after the sexual acts where there is a clear and direct connection between the intentional sexual misconduct and the non-sexual misconduct . (See, e.g., *State Farm Fire & Cas. Co. v. Century Indem. Co.* (1997) 59 Cal.App.4th 648, 664 [Negligence claim arising from perpetrator’s failure to report his own sexual misconduct was “related directly and solely to the molestation itself” and was therefore “merge[d]” with the molestation claim for purposes of determining insurer’s duty to defend.].)

Bottom line, as a result of the increasing number of SAM claims and their resulting judgment, one would expect to see increasing reliance on policy exclusions, and perhaps, increasingly aggressive exclusions.

* + 1. Increasing Complexity Around the Decision Whether to Defend Alleged Perpetrators
       1. The Obligation to Provide A Defense And Indemnification to Employees

California Government Code § 995 provides in relevant part that:

Except as otherwise provided in Section 995.2 and 995.4, upon request of an employee or former employee, a public entity shall provide for the defense of any civil action or proceeding brought against him, in his official or individual capacity, or both, on account of an act or omission in the scope of his employment as an employee of the public entity.

In turn, Government Code § 995.2 provide certain express exceptions to the obligation of the public entity to defend and/or indemnify an “employee”, stating as relevant that:

(a) A public entity may refuse to provide for the defense of a civil action or proceeding brought against an employee or former employee if the public entity determines any of the following:

(1)The act or omission was not within the scope of his or her employment.

(2) He or she acted or failed to act because of actual fraud, corruption, or actual malice.

(3) The defense of the action or proceeding by the public entity would create a specific conflict of interest between the public entity and the employee. For purposes of this section, “specific conflict of interest” means a conflict of interest or an adverse or pecuniary interest, as specified by statute or by rule or regulation of the public entity

. . .

The obligation of Government Code § 995 applies in a variety of circumstances, and includes employees of public entities such as city councils *DeGrassi v. City of Glendora* (9th Cir. 2000) 207 F.3d 636, 640-641); school districts (*Wright v. Compton Uni. School Dist.* (1975) 46 Cal.App.3d 177, 183); and even to physicians and staff employed by public hospitals or institutions (*Pac. Indem. Co. v. Am. Mut. Ins. Co.* (1972) 28 Cal.App.3d 983, 995).

* + - 1. Scope of the Obligation

Implementing the obligation set forth at Government Code § 995, Government Code § 825 states as relevant that:

(a) Except as otherwise provided in this section, if an employee or former employee of a public entity requests the public entity to defend him or her against any claim or action against him or her for an injury arising out of an act or omission occurring within the scope of his or her employment as an employee of the public entity and the request is made in writing not less than 10 days before the day of trial, and the employee or former employee reasonably cooperates in good faith in the defense of the claim or action, the public entity shall pay any judgment based thereon or any compromise or settlement of the claim or action to which the public entity has agreed.

The section further requires that where a public entity defends an employee, that it likewise pay any judgment which may result, unless it has reserved its right to withhold such payments until such time as it is established that the conduct out of which the judgment arises was within the course and scope of the employee’s employment by the public entity.

Section 825 also addresses the indemnification of public employees, however, that obligation would be rendered inapplicable in the event of a finding against an accused molester by a judge or jury.[[1]](#footnote-1) Section 825 also expressly provides that: “Nothing in this section authorizes a public entity to pay that part of a claim or judgment that is for punitive or exemplary damages.”[[2]](#footnote-2)

* + - 1. Burden of Proof

It is the employee’s burden to establish that an alleged act or omission occurred within the scope of employment for purposes of triggering a public entity’s duty to defend pursuant to Government Code § 995. (Gov’t Code § 825.2(b); *Farmers Ins. Grp. v. Cty. Of Santa Clara* (1995) 11 Cal.4th 992, 1002; *Los Angeles Police Protective League v. City of Los Angeles* (1994) 27 Cal.App.4th 168, 176.)

Critically, it bears noting that the duty to defend and indemnify an employee imposed by Government Code § 995 is not excused merely because the employee is *alleged* to have committed intentional, or even criminal misconduct. (*See, Daza v. Los Angeles Community College Dist.* (2016) 247 Cal.App.4th 260, 269 [holding, in connection with allegations of sexual assault by adult student against college counselor fell outside the scope of his employment, but, since denied by counselor, did not suffice to excuse College District’s duty to defend under Government Code § 995].) Likewise, it may be the case that the complainant alleges claims of both intentional and/or criminal conduct, and non-intentional or non-criminal conduct. For instance, a complainant may allege both that they were molested and that, prior to any molestation, the perpetrator engaged in “grooming,” which consisted of non-physical sexual harassment.

Thus, where there is no conclusive evidence that an employee committed an intentional or criminal act—for instance, because the employee disputes the allegations of intentional or criminal conduct—or where there are allegations of non-intentional and/or non-criminal conduct, a public entity’s obligation to defend the employee under Government Code § 995 applies notwithstanding the allegations of intentional or criminal conduct.[[3]](#footnote-3)

* + - 1. What Consequence for A Public Entity That Wrongfully Fails to Defend As Required by the Government Code?

“If a public entity refuses to provide a defense, the employee may either seek to compel the provision of a defense by [seeking a writ of] mandamus, or may retain his or her own counsel and subsequently seek reimbursement from the public entity.” (*Los Angeles Police Protective League, supra,* 27 Cal.App.4th at 175-176.)

Likewise, “the public entity may provide a defense under a reservation of rights, in which case it is only required to pay the judgment if the employee proves the act was within the course and scope of employment, and the public entity fails to prove that the conduct was fraudulent, corrupt or malicious.” (*Id.* at 176, citing Gov. Code §§ 825(a), 825.2(b), 825.6(b).)

Thus, if a District or Office of Education fails to defend or indemnify an employee where it should rightfully have done so, the employee may recover the costs of its defense and attorneys’ fees.

The practical result of the foregoing is that there will be increased pressure both on insurers and public agencies with respect to the decision whether to defend an accused perpetrator—or whether the evidence and any strategic benefits render it preferable to decline a defense to the accused. In any event, it is certain that where a defense is provided, it will be provided subject to a reservation of rights. It also seems likely that if defense and/or indemnity is provided, there will be efforts to compel the accused to contribute personally to any settlement.

* + 1. Notice Issues
       1. Primary Layer Notice Issues

In general, a unless the excess/umbrella polices provides otherwise, the primary insurer or insurers owe the exclusive duty to defend the insured until the primary coverage is exhausted or otherwise is not on the risk. (*Signal Companies, Inc. v. Harbor Ins. Co*. (1980) 27 Cal. 3d 359, 368 [“where there is excess coverage, whether by virtue of an excess clause in one policy or otherwise, it is the primary insurer which is solely liable for the costs of defense if the judgment does not exceed primary coverage.”].) The same rule applies even if the value of the claim exceeds the available, primary indemnity limit(s). (*Id.*)

However, *all* policies, primary or otherwise, will contain a notice provision requiring the insured to give notice to the insurer. Standing alone, late notice to a carrier will only abrogate the carrier’s obligations if there is “actual”, “substantial prejudice” to the insurer as a result. (*Shell Oil Co. v. Winterthur Swiss Ins. Co.* (1993) 12 Cal.App.4th 715, 761 [citing *Campbell v. Allstate Ins. Co.* (1963) 60 Cal.2d 303, 305-307]; *Northwestern Title Sec. Co. v. Flack* (1970) 6 Cal.App.3d 134, 141 (citing *Billington v. Interinsur. Exch. of So. Cal.* (1969) 71 Cal.2d 728, 737).

This means the insurer must demonstrate hat *but for* the insured’s lack of cooperation, the resulting outcome would have been different—i.e., that a better or lower verdict would have been entered or a lower settlement would have been achieved. (*Hall, supra,* 15 Cal.App.3d 304, 308; *Belz, supra,* 158 Cal.App.4th 615, 629-632; *Brizuela, supra,* 116 Cal.App.4th 578, 590.)

Thus, though it is a substantial bar to cross, expect even primary-level insurers to more aggressively enforce notice requirements.

* + - 1. Excess Carrier Notice Issues

Even if an excess carrier’s defense obligations are not implicated while a primary carrier is providing a defense, many excess policies require the insured to provide written notice to the excess carrier of claims or lawsuits which “appear likely” to “involve” the excess policy. In addition, many excess policies require notice of certain types of claims regardless of whether they “appear likely” to involve the excess policy (*e.g.,* molestation, wrongful death, etc.)

While the excess policy may contain formal notice or tender procedures, California applies a “constructive notice” standard – there is sufficient notice to the excess insurer if it has notice of facts which would put an reasonable excess insurer on notice that it should inquire further. (*See Span, Inc. v. Associated Internat. Ins. Co*. (1991) 227 Cal.App.3d 463, 482 [excess carrier had constructive notice that its coverage was potentially implicated where: (1) it knew an underlying action had been filed against the insured; (2) it knew the primary carrier was insolvent; and (3) a review of the litigation would have revealed that the demand was in excess of primary limits].)

There can also be “constructive notice” when one insured tenders an action in which another insured is a defendant. (*See California Shoppers, Inc. v. Royal Globe Ins. Co*. (1985) 175 Cal.App.3d 1, 37 [submission of complaint by named insured who was not a defendant in the case was constructive notice since carrier should have made inquiries which, if it had done so, it would have been alerted to the fact that another insured was named as a defendant in the same action].) As a result, under a Memorandum of Coverage providing covered party status to multiple public entities, a tender by one entity to an excess carrier may provide “constructive notice” that other insured public entities are involved in the same matter.

Notwithstanding the “constructive notice” rule, it is always recommended that the policy’s stated notice procedures be followed as closely as possible to avoid notice disputes. Also, late notice may prevent an insured from obtaining reimbursement for pre-notice defense costs by operation of the “no-voluntary payments” provision. (*See, e.g., Insua v. Scottsdale Ins. Co*. (2002) 104 Cal. App. 4th 737, 743; *Tradewinds Escrow, Inc. v. Truck Ins. Exch*. (2002) 97 Cal.App.4th 704, 710.)

Moreover, as held in *Sequoia Ins. Co. v. Royal Ins. Co. of Am.* (1992)971 F.2d 1385, 1393, where an excess policy contains a provision requiring the insured to provide notice of claims to the excess carrier, the primary-level carrier itself assumes and owes a duty to the excess carrier to provide notice of the claim as well.

Excess carriers will also place increasing reliance on notice issues. Moreover, note that late notice to the excess carrier is a far more likely trap for the unwary: litigation and related proceedings may drag on for years. Thus, there may be temptation to delay or avoid reporting to the excess carrier while the matter is developed in the litigation. In consequence, there is a far greater risk that an excess carrier, if only approached late in the litigation—on the eve of mediation or trial, for example—will point to the lengthy period of litigation and raise the bar of late notice.

Consequently, both Agencies and risk pool managers should be proactive about placing excess layers on notice of litigated SAM claims, and in keeping them apprised of the course of the litigation *even if* it is not *anticipated* that the excess layer will be implicated at settlement or trial.

1. Handling Aggregate Limits In the Public Entity or Public Risk Pool Setting
   1. Implication of group aggregate limit caps for public entities and risk pools

An “aggregate limit” places a maximum cap on the coverage available to an insured for all claims arising against it under the policy during a given policy period. In the single-insured setting, the primary and obvious concern is that in the event an insured faces claims for multiple occurrences during a single policy period even if no individual claim exceeds the available “per occurrence” limits of liability, the claims asserted may exceed the *aggregate* limits of liability available to the insured.

As should also be clear, a “group aggregate limit” significantly compounds these concerns, giving rise to issues including:

* The possibility that multiple claims against a single or multiple insureds may exceed the available group aggregate limit;
* Issues regarding the priority of claims asserted against different insureds
* Issues of timing and equitable concerns regarding the allocation of the available limits among the multiple insureds and claims.

Moreover, in addition to the facially obvious concern regarding the exhaustion of limits, complaints alleging SAM claims routinely suggest the potential that the claims asserted therein may potentially allege multiple “occurrences”, thus potentially implicating multiple policies and/or policies limits.

* 1. SAM Claims Frequently Give Rise to the Potential for Multiple “Occurrences”
     1. Basic Background on the Number of “Occurrences”

In California, the number of “occurrences” under an insurance policy is determined by the underlying “cause” or “causes” of the injury rather than number of resulting injuries. (*See, e.g., Plaisted & Cos.*, *supra,* 61 Cal.App.4th 1132, 1161, [overruled in non-relevant part by *State v. Cont'l Ins. Co.* (2012) 55 Cal. 4th 186, 201]; *State Farm Fire & Casualty Co. v. Elizabeth N.* (1992) 9 Cal.App.4th 1232, 1236.)

Furthermore, the number of “occurrences” which may ultimately be found, and thus the limits of liability which may be available to a defendant, is a question of indemnity, and is therefore a matter of what is *proved* at trial, rather than what is alleged in the complaint. (*See, Aerojet-General Corp. v. Transport Indem. Co.* (1997) 17 Cal.4th 38, 57 [stating of the insurer’s obligation, that its indemnity “duty entails the payment of money [citation], which is expressly limited [citation], in order to resolve liability [citation]. … It arises only after liability is established and as a result thereof.”]; *Buss v. Superior Court* (1997)16 Cal.4th 35, 45-46). Thus, as stated by the Ninth Circuit in *Journal Publishing Co. v. General Ins. Co.* (9th Cir. 1954) 210 F.2d 202 (applying Oregon law), “the obligation to defend is determined by what is alleged, while the obligation to pay for liability for bodily injury may be such for injury if actually sustained. In other words, if the injury in fact sustained and is otherwise within the terms of the policy, the obligation is to pay independently of what may be alleged” in the complaint. (*Id.* at 207.)

As a consequence, where claims arise in connection with multiple instances of alleged misconduct and injuries, the number of potential “occurrences” is not always readily determinable.

* + - 1. *State Farm Fire & Casualty Co. v. Elizabeth N.* (1992) 9 Cal.App.4th 1232 and *National Union Fire Ins. Co. v. Lynette C.* (1994) 27 Cal.App.4th 1434

In *State Farm Fire & Casualty Co. v. Elizabeth N., supra*, State Farm issued a homeowner’s policy to Lynn, who provided child-care services in her home. (*Id.* at 1234.) As relevant, the policy stated: “Limit of Liability. The Coverage L limit is shown in the Declarations. This is our limit for all damages from each occurrence regardless of the number of insureds, claims made or persons injured. All bodily injury and property damage resulting from any one accident or from continuous or repeated exposure to substantially the same general conditions shall be considered to be the result of one occurrence.” (*Id.* at 1236.) Consequently, after allegations that Lynn’s husband Byron Lynn molested multiple children while they were in her care, State Farm brought a declaratory relief action contending that under the policy, each of the molestations arose from a single pattern of conduct and, accordingly, constituted only a single “occurrence” making available a single limit of liability *as to each child* notwithstanding multiple alleged instances of negligence by Lynn and abuse by Byron. (*Id.* at 1235-**37**.) As analyzed by the Court of Appeal, which found only one “occurrence” and limit of liability available, “[t]he stipulated facts establish that Lynn negligently failed to provide adequate care and supervision for the children, which resulted in repeated molestation of the children by Byron. Therefore, the multiple injuries suffered by each child resulted from repeated exposure to substantially the same general conditions. Even if each injury Byron inflicted on a child resulted from a new negligent act by Lynn, each act of negligence by Lynn was substantially the same—a failure to care for and supervise the child adequately.” (*Id.* at 1238.)

In contrast, in *National Union Fire Ins. Co. v. Lynette C., supra,* 27 Cal.App.4th 1434, National Union issued three (3) policies covering successive one-year policy periods to a foster parent. During the course of the three (3) year period during which coverage was afforded, the foster father repeatedly molested the foster child. In a subsequent suit by the child against the foster parents, the trial court determined that the child had a “claim” within the meaning of the policies in each successive policy year, thereby making available three successive policy limits. (*Id.* at 1439, 1454-**55**.) On appeal, National Union contended that the trial court had erred in concluding that there were three (3) separate claims (and thus three (3) limits), contending instead that the child’s injuries resulted from a single ongoing pattern of molestation resulting from the foster mother’s negligent decision to provide foster care for a child, despite the apparently-known “pedophiliac history” of her husband. (*Id.* at 1459.)

Rejecting this position, the Court of Appeal looked to the National Union policies which applied to “acts, errors and omissions . . . occurring during the policy period” and which promised that National Union would “pay on behalf of the Insured all sums which the Insured shall become legally obligated to pay as damages because of any act, error or omission and arising out of the Insured’s activities as a Foster Parent while the foster child is in the care and custody of the Foster Parent. . .”. (*Id.* at 1454.) Consequently, the Court of Appeal rejected National Union’s attempt to limit its potential exposure, observing that noting that “[t]he basic problem with [National Union’s argument] is the language of the policies at issue, which provide coverage for acts, errors and omissions that occur during the policy period.” (*Id.* at 1458-**60**.)

* + - 1. The “Primary Right” Theory

Other decisions addressing the timing of “occurrences” reflect that “California has consistently applied the ‘primary rights’ theory, under which the invasion of one primary right gives rise to a single cause of action”. (**See, e.g.,** *Bay Cities Paving & Grading, Inc. v. Lawyers’ Mut. Ins. Co.* (1993) 5 Cal.4th 854, 860; *Friedman Prof. Mgmt. Co., Inc. v. Norcal Mut. Ins. Co.* (2004) 120 Cal.App.4th 17, 30-31; **see also,** *Lynette C., supra,* 27 Cal.App.4th 1434, 1459-1461 [discussing the reasoning of *Bay Cities*].) Under such “primary right” decisions, the invasion of the right of each individual claimant—i.e., each plaintiff alleging claims of molestation—constitutes *at least* one separate “claim” or “occurrence” as between the individual claimants, and without reference to and before consideration of whether any individual claimant’s allegations in turn reflect one or multiple occurrences.

Thus, in *Westport Ins. Corp. v. California Cas. Mgmt. Co.* (N.D.Cal. 2017) 249 F.Supp.3d 1164, the court addressed a priority of coverage dispute between two excess carriers concerning the priority of their policies in connection with claims by three (3) students for their molestation by a teacher over a period of four (4) years. There, one student alleged that he had been molested over a period of three (3) years; a second student alleged that he had been molested for one year immediately following the years during which the first student was molested; and a third student claimed he was molested for two (2) years, overlapping the molestations of the first and second students. (*Id.* at 1167.) In their subsequent complaints, the students alleged that the defendant school districts and their personnel had “failed to report these known instances of abuse to authorities as legally mandated . . . [and] never terminated, suspended, disciplined, supervised, monitored, or even credibly investigated” the teacher. (*Id.* at 1179.)

As relevant to the court’s analysis, California Casualty issued a policy of “Administrator’s Liability” insurance which defined an “Insured” as “a member of the Associat[ion] of California School Administrators who is employed by a school board, board of trustees, or other similar governing body of an educational unit.” (*Id.* at 1168.) Its policies provided limits of $150,000 per occurrence, and stated that the company would pay damages in excess (of underlying coverage) “which the insured shall become legally obligated to pay as a result of any claim arising out of an occurrence in the course of the insured educational employment activities, and caused by any acts or omissions of the insured . . . not to exceed the limits of liability stated in the Declarations…”.(*Id.* at 1168-**69**.) The California Casualty policies further stated in their “Limits of Liability” provision that: “in no event shall the Company’s liability be more than $250,000 for all damages and costs of defense arising out of one occurrence. The fact that there may be multiple claims against the Insured as a result of the occurrence shall not operate to increase the limit of the Company’s liability under this policy.” (*Id.* at 1169.) California Casualty also noted that the policies defined “occurrence” as “an event, including injurious exposure to conditions, which results in injuries and/or damage to one or more persons or legal entities other than the members and insureds under this policy during the policy period.” (*Id.* at 1179.)

Westport, relying on the decision in *Elizabeth N.,* contended that “under California law, a tortfeasor’s failure to supervise a child molester results in a separate ‘occurrence’ for each child molested in each policy period.” (*Id.* at 1178.) In opposition, California Casualty argued that “the molestation of multiple children must constitute one ‘occurrence’ because the injuries were caused by the same negligent act—each administrator’s failure to supervise the teacher.” (*Id.*) California Casualty further pointed to the language of its policy to contend that an “occurrence” could encompass claims by “one or more persons”. (*Id.*)

Rejecting California Casualty’s position, the Court of Appeal stated that it simply could “not accept that molestations of multiple children constitute the same occurrence” and that California Casualty’s policies “provide a separate $150,000 limit per child, per administrator, per policy period.” (*Id.* at 1180.)

Thus, depending on the language of the policy or policies at issue, SAM claims raise the potential that an insured may face liability not only under their general liability coverage, but as well, under any E&O-type coverage which may be available. Moreover, such claims present the potential that a given victim’s claim may reflect “multiple” occurrences depending on the specific conduct alleged therein, or that the claims of multiple victims may each be considered separate “occurrences” notwithstanding that they arise out of similar or even the same incident or conduct.

* + 1. An “Aggregation”, “Anti-Stacking” or “Deemer” Clause May Not Be Sufficient to Limit Exposure to SAM Claims In Certain Circumstances
       1. General Law Regarding “Anti-Stacking” Provisions

In *State v. Continental Ins. Co.* (2012) 55 Cal.4th 186, the California Supreme Court held that all successive, applicable policy indemnity limits can “stack” and provide coverage for continuous injuries unless one or more of the policies contains express “anti-stacking” language.

Subsequently, California Courts have recognized that appropriate policy language may limit this right. (See, e.g., *Pennsylvania General Ins. Co. v. American Safety Indemnity Co.* (2010)185 Cal.App.4th 1515, 1525). Subsequent decisions passing on the issue have generally been in agreement, holding that where appropriate language is included in the policy, no coverage is available for damage which first manifests prior to the inception of the policy in question. (*See*, *Acceptance Ins. Co. v. American Safety Risk Retention Group* (S.D.Ca. 2011) 2011 WL. 3475305; *Valley Case Work, Inc. v. Lexington Ins. Co.* (July 10, 2013) 2013 WL. 3470530 [Unpub’d].)

* + - 1. “Anti-Stacking” Provisions and SAM Claims

Consistent with the general trend in California enforcing “anti-stacking” clauses, several non-California decisions which have addressed such language in connection with SAM claims have found such limitations applicable. (*See, e.g., Philadelphia Indem. Ins. Co. v. Olympia Early Learning Center* (W.D.Wash. 2013) 980 F.Supp.2d 1266, 1272-**73**; *TIG Ins. Co. v. San Antonio YMCA* (Ct.App.Tx. 2005) 172 S.W.3d 652, 656-660 [molestation of multiple students nevertheless triggered only a single limit of liability under the applicable policies.]; *TIG Ins. Co. v. Smart School* (S.D.Fla. 2005) 401 F.Supp.2d 1334, 1336-**37** [only one limit despite the fact that a teacher molested “two children separately on multiple occasions and the abuse of one child extended into the second policy period.”].)

However, at least one decision from South Carolina has held to the contrary. In *Beaufort Cty. School Dist. v. United Nat. Ins. Co.* (Ct.App.S.C. 2011) 709 S.E.2d 85, the Beaufort County School District (“Beaufort”) was insured by South Carolina School Boards Insurance Trust (“Trust”) and United National Insurance Company (“United”). The Trust provided a self-retained limit of $150,000, and United provided coverage in excess of the SIR, although United’s policy contained a “Sexual Abuse Endorsement” which stated that the policy provided limits of “$500,000/$3,000,000 Annual Aggregate not to exceed $500,000 per member excess of $150,000 [SIR] each CLAIM”. (*Id.*) Beaufort settled the claims, for a total of $4.75 million, after which the Trust and United paid $150,000 and $500,000 respectively, contending that the seven (7) settlements constituted one “claim”, thereby exhausting their liability to Beaufort for the settlements, pointing to “anti-stacking” language in their policies’ “Sexual Abuse Endorsement” which defined the term “claim” as “all notices or suits … based on, or arising out of the same sexual abuse or series of sexual abuses by one or more employees or volunteer workers”, and a “related sexual abuses” clause which stated that “[a]ll claims based on or arising out of the same sexual abuse or a series of related sexual abuses by one or more employees … shall be deemed one sexual abuse.” (*Id*. at 513-514, 517.)

Notwithstanding those clauses, Beaufort prevailed at trial and on appeal, with the South Carolina Court of Appeal stating that the clauses “address only the issue of *when* claims are deemed to have arisen for purposes of triggering coverage in a given policy year, not *what* conduct constitutes a claim”, and thus that the clause “has no bearing on the separate question of how many claims are presented.” (*Id.,* at 519 [emphasis in original].)

In sum: setting aside the potentially substantial award which may result in even a garden-variety SAM claim, SAM Claims also present numerous avenues by which an insured may face liability on account of multiple “occurrences” (and thus policy limits) on account of misconduct with a single victim, or on account of the serialized misconduct of a single employee—and thus potentially exposure which is excess of even a substantial aggregate limit of liability.

* 1. What duties do insurers or risk pools owe to multiple insureds or members?
     1. Under California law
        1. In cases involving multiple insureds, the insurer’s duty of good faith and fair dealing extends to all of its insureds. (*Strauss v. Farmers Ins. Exchange* (1994) 26 Cal.App.4th 1017, 1021.)
        2. This duty includes an obligation to make a reasonable effort to settle a claim within policy limits whenever there is a substantial likelihood of a recovery in excess of those limits. (*Johansen v. California State Auto. Assn. Inter-Ins. Bureau* (1975) 15 Cal.3d 9, 14-15.) California law requires that before an insurer can be found to have breached the duty of good faith and fair dealing with regard to a settlement offer, that the settlement offer must have been “reasonable” *and* that the insurer must have also “unreasonably refused” it. (*Hamilton v. Maryland Cas. Co.* (2002) 27 Cal.4th 718, 725.) An insurer does not “unreasonably refuse” a settlement offer when that refusal is merely the result of “an honest mistake, bad judgement or negligence.” (*Wilson v. 21st Century Ins. Co.* (2007) 42 Cal.4th 713, 726, quoting *Chateau Chamberay Homeowners Assn. v. Associated Internat. Ins. Co.* (2001) 90 Cal.App.4th 335, 346.) An insurer’s bad faith “implies unfair dealing rather than mistaken judgment or poor prognostication.” (*Critz v. Farmers Ins. Group* (1964) 230 Cal.App.2d 788, 796.) Furthermore, an insurer also owes countervailing “duties to other policyholders and to stockholders not to honor meritless claims” and to avoid the needless dissipation of funds by paying more than it reasonably should. (*Thompson v. Cannon* (1990) 224 Cal.App.3d 1413, 1417; *see also Fleming v. Safeco Ins. Co.* (1984) 160 Cal.App.3d 31, 40.)
        3. Thus,an insurer cannot “pick and choose between its two insureds in its payment of benefits, particularly where no detriment is demonstrated by providing equal treatment to both insureds.” (*Shell Oil Co. v. Nat’l Union Fire Ins. Co.* (1996) 44 Cal.App.4th 1633, 1645.)
        4. Favoring one insured over another by accepting a policy limits offer which releases some but not all insureds could expose the insurer to a bad faith claim by the insureds that were not released. (*Shell Oil*, *supra*, 44 Cal.App.4th at 1646-47; *Rankin v. Curtis* (1986) 183 Cal.App.3d 939, 945-46 [despite a dispute over coverage for a potential additional insured, an insurer breached the covenant of good faith and fair dealing by not informing the additional insured of a lawsuit filed against the named insured and providing independent counsel to represent her interests]; *Strauss, supra,* 26 Cal.App.4th at 1021-22 [“acceptance of an offer that left two of its insureds bereft of coverage would have breached Farmers’ implied covenant of good faith and fair dealing.”].)
        5. An exception exists in cases where an insurer can pay its full policy limits on behalf of one insured while continuing to defend the other insureds, provided that the payment has the legal effect of benefiting all insureds by reducing their exposure to the plaintiff, such as by way of an offset or credit on account of such sums against any eventual judgment. (*Nationwide Ins. Co. v. Hunley* (9th Cir. 1990) 915 F.2d 557, 559-560.)
        6. Consequently, under California law, an insurer faced with claims from multiple insureds under a single coverage amount that is insufficient to satisfy all claims usually has two options:
           1. Negotiate a fair allocation with its insureds; or alternatively
           2. File an interpleader action. (*Schwartz v. State Farm Fire and Cas. Co.* (2001) 88 Cal.App.4th [“The insurer’s duty not to favor the interests of one insured over the other necessarily applies to require an excess insurer to consider the interests of *all* of its insureds . . . in the limited policy proceeds, whether or not that interest has matured to the point of requiring payment. To conclude otherwise would require insureds to engage in a race to exhaust the available primary insurance, with no right to information from the excess insurer about the amount or status of the competing claim, and with no control over actions of the primary insurer.”]; see also *Lehto v. Allstate Ins. Co.*, (1994) 31 Cal.App.4th 60 [insurer not liable for bad faith for interpleading policy limits when faced with valid, competing claims exceeding those limits].)

However, an interpleader provides no assistance where the question is not only one of resolving an existing set of claims, but rather includes the potential for and uncertainty regarding the assertion of additional, unrelated future claims.

* + 1. Under New York law
       1. Similar to California courts, New York’s high court has held that an insurer’s duty of good faith runs to all its insureds, and that the insurer may not prefer one insured over another. To do so would expose it to a bad faith claim. (*Smoral v. Hanover Insurance Co.*, (1971) 322 N.Y.S.2d 12, 14 [reasoning that just as an insurer breaches its duty of good faith and fair dealing by preferring its own interests over those of the insured, “the same considerations would apply with equal force where the company preferred one of its insureds over another”]; *Lynton v. Metcalf* (Civ. Ct. 1971) 327 N.Y.S.2d 823, 825 [citing *Smoral* in holding that a taxicab’s insurer was required to extend coverage to a passenger as an additional insured even though the insurer had already settled with the plaintiff].)
       2. Nevertheless, New York law is less developed than California law in addressing the specifics of what an insurer should do to discharge its duty toward multiple insureds under a single coverage amount. As a result, we would expect that New York Courts would likely endorse the negotiation and interpleader approach approved by California, as a method which appropriately resolves both the insurer’s obligations while protecting the interests of each individual insured to a fair apportionment of policy benefits by the Court.
    2. Jurisdictions other than New York and California have adopted a first-come, first-served approach.
       1. An insurer facing claims by multiple insureds that exceed the aggregate limit may expend their limits to resolve the claims of some, but not all, insureds without being obligated to protect the interests of the other insureds. (See, e.g., *Underwriters Guarantee Ins. Co. v. Nationwide Mut. Fire Ins. Co.,* (Fla. Dist. Ct. App. 1991) 578 So.2d 34, 35; *Millers Mut. Ins. Ass’n of Illinois v. Shell Oil Co*., (Mo. Ct. App. 1997) 959 S.W.2d 864, 870 [“an insurer should not be precluded from accepting a reasonable settlement offer for fewer than all insureds”]; *U.S. Fire Ins. Co. v. Worcester Ins. Co.*, (2005) 62 Mass. App. Ct. 799 [821 N.E.2d 91, 94]; see also *Travelers Indem. Co. v. Citgo Petroleum Corp.*, (5th Cir. 1999) 166 F.3d 761, 766 [“*Smoral* has not been followed outside of New York and the California Courts of Appeals. Every other court to consider the issue has rejected its application.”].)
       2. In the Florida case of *Underwriters Guarantee Ins. Co. v. Nationwide Mut. Fire Ins. Co.,* (Fla. Dist. Ct. App. 1991) 578 So.2d 34, a driver struck and killed a bicyclist while driving a car owned by Nationwide’s named insured. Following the accident, the bicyclist’s UM/UIM carrier paid the bicyclist’s estate and then brought a subrogation action against the driver and the owner of the car. Nationwide, on behalf of its insured driver and owner settled the matter, paying its policy limits in exchange for a full release of the owner, and then brought a declaratory relief action seeking a determination that it had no further duty to defend the driver based on a policy provision purporting to relieve it of its duty to defend “any suit” once it has paid its policy limits. The Court of Appeal affirmed the declaratory judgment in Nationwide’s favor, distinguishing *Smoral*, *supra*, 322 N.Y.S.2d 12, on the grounds that it involved a bad faith action, and in the instant case, there was “no allegation that the settlement was reached other than in good faith.”
       3. In the Missouri case of *Millers Mut. Ins. Ass’n of Illinois v. Shell Oil Co*. (Mo. Ct. App. 1997) 959 S.W.2d 864, the insurer, Millers Mutual, agreed to defend both its named insured Dunn and additional insured Shell against a negligence action. In January, 1995, the plaintiffs issued a policy limits demand to settle as to Dunn, but explicitly refusing any settlement involving Shell. Millers notified Shell of the underlying plaintiffs’ demand and refusal to consider any settlement with Shell. In February, 1995, Dunn made a demand on Millers to settle the case as to Dunn. Millers responded by conveying a settlement offer to the underlying plaintiffs on behalf of both Dunn and Shell, which the plaintiffs rejected because of Shell’s inclusion. Millers ultimately settled the suit *as to Dunn* in return for its policy limits, and Millers and Shell stipulated that the settlement was reasonable under the circumstances. Millers then terminated its defense of Shell and brought a declaratory relief action to confirm that position. Millers prevailed in the trial court. On appeal, Shell argued that Miller did not satisfy its duty to defend Shell when it paid its policy limits on behalf of Dunn, contending that there must be a *complete* settlement on behalf of all insureds in order to terminate the insurer’s duty to defend, lest the right to a “full defense” under the policy become “a near nullity.” The appellate court disagreed, reasoning that Shell had received the benefit of the policy on account of its right to offset the amounts paid by Millers against any judgment ultimately rendered against it. Affirming the judgment against Shell, the court stated that “[a]n insurer should not be precluded from accepting a reasonable settlement offer for fewer than all insureds” and again distinguished *Smoral*, *supra*, on grounds that it had involved “bad faith” not present in Miller’s handling of the litigation before it.
       4. In the Massachusetts state court case of *U.S. Fire Ins. Co. v. Worcester Ins. Co.*, (2005) 62 Mass. App. Ct. 799, an excess insurer brought suit against a primary insurer, seeking to recover costs it incurred defending the insured after the primary insurer had exhausted its policy limits to settle five claims and partially settle a sixth claim. The excess insurer argued on appeal that the prior settlements were not made in good faith, and therefore the primary insurer was not discharged from its duty to defend. The appellate court ruled in favor of the primary insurer, finding that there was nothing on the record to suggest that the primary insurer had “squandered” its limit so as to warrant the relief sought by the excess insurer.
       5. After expending its policy limits in reasonable settlements on behalf of fewer than all insureds, an insurer may terminate its defense of the other insureds. (*Anglo-American Ins. Co. v. Molin*, (Pa. Commw. Ct. 1995) 670 A.2d 194, 198–99.)
       6. Illinois courts have held that an insurer may settle for policy limits on behalf of one insured, without notice to the other insured, and thereby terminate its duties to the other insured in good faith, so long as the other insured received a benefit from the settlement, such as by gaining the ability to use the settlement amount as a set-off. (*Pekin Ins. Co. v. Home Ins. Co.,* (1985) 134 Ill.App.3d 31, 32-34; *Country Mutual Ins. Co. v. Anderson,* (1993) 257 Ill.App.3d 73, 78-79.)
  1. Issues re: potential but un-asserted claims
     1. Under California law, an insurer facing an accrued personal injury claim and an un-accrued wrongful death claim was not required to interplead funds, “but instead was privileged to prefer the personal injury claim” so long as it made a good faith preference. (*Aetna Cas. & Sur. Co. v. Superior Court*, (1980) 114 Cal.App.3d 49, 58-59 [explicitly adopting the “clear” law of other states in finding that insurer was not required to interplead funds].) In *Aetna*, the insurer settled a personal injury action brought by a passenger on behalf of insured driver. (*Id.* at 52.) The passenger subsequently died, and passenger’s children filed a subsequent wrongful death action. (*Id.* at 53-54.) The insurer moved for summary judgment seeking a declaration that it had fully discharged its obligations to the insured by settling the personal injury action and therefore owed no duty to defend the wrongful death action. (*Id.* at 51, 53-54.) The trial court denied summary judgment, but the appellate court issued a writ mandate ordering the trial court to grant the motion for summary judgment, finding that the insurer showed “wisdom and prudence” by settling the personal injury action without waiting to see if plaintiff would die. (*Id.* at 51, 57-58.)
     2. Courts outside California have similarly held that an insurer facing both asserted claims and accrued but un-asserted claims is not compelled to interplead its policy limits but may instead settle the claims as presented. (*Castoreno v. Western Indemnity Company, Inc.* (1973) 213 Kan. 103.)
        1. This outcome, however, does not represent a distinct rule in jurisdictions that already recognize an insurer’s right to settle on behalf of fewer than all insureds and then to terminate its defense of the other insureds if the settlement amounts were reasonable.
  2. What Happens When the Money Runs Out?
     1. Statute
        1. Government Code § 895.2

States as relevant that:

Whenever any public entities enter into an agreement, they are jointly and severally liable upon any liability which is imposed by any law other than this chapter upon any one of the entities or upon any entity created by the agreement for injury caused by a negligent or wrongful act or omission occurring in the performance of such agreement.

. . .

* + - 1. What is meant by “occurring in the performance of such agreement”?

There’s limited case law addressing this issue.

* + - * 1. In *Tucker Land Co. v. State of California* (2001) 94 Cal.App.4th 1191, where suit was brought against a JPA for its conduct in connection with a land purchase, the court described that section as “impos[ing] joint and several liability on the constitution members [of the agency] for *torts* committed by the JPA.” **(*Id.* at 1198.)** It further observed that comments on the section by the Law Revision Commission “explain that this section imposes liability on each of the parties to a JPA to an injured party for any tort that may occur in the performance of the agreement for which any one of the entities, or the entity created by the agreement is otherwise liable under the law.” **(*Id.*)**
        2. Subsequently, the Court in *D.K. ex rel G.M. v. Solano County Office of Education* (E.D.Cal. 2009) 667 F.Supp.2d 1184, observed of the statute that: “whenever any public entities enter into an agreement, they were jointly and severally liable upon any liability which is imposed upon any one of the entities.” **(*Id.,* at 1192.)** Thus, the District Court had no difficulty concluding that both the Solano County Office of Education (“SCOE”) and the Benicia Unified School District could be liable to Plaintiff for claims arising out of Plaintiff’s special education program which the SCOE had contracted with the District to provide.
    1. Agency Agreement

In many instances, the question of the exact parameters of the statutory liability imposed by Government Code § 895.2 may be resolved under the terms of the relevant Joint Powers Authority Agreement.

Specifically, consistent with both Government Code § 6805.1 and § 895.2, a JPA Agreement may specify that the members shall not be liable for the debts and liabilities of the Agency itself (as permitted under § 6805.1), but then provide for a proportionate assessment of the Agency’s members in the event of a shortfall in Agency funds (thus effectively apportioning liability among the members in a manner equivalent to the result of joint and several liability under § 895.2).

In short, though the Government Code suggests that JPA members will simply be jointly and severally liable to the extent of judgments or settlements in excess of the group aggregate limit, in the face of uncertainty regarding the specific scope of that liability, look to the governing JPA Agreement, which may itself provide a definitive resolution.

1. Hypotheticals
   1. Hypothetical 1  
      Four SAM claims. The value of two out of the four claims appear to exhaust the self-retention limit and the reinsurance limit.  
        
      Result  
      Risk manager is required to consider the interests of all the insureds which have presented claims. The risk manager has two options: (1) negotiate a fair apportionment, or (2) file an interpleader action.
   2. Hypothetical 2  
      Multiple SAM claims are filed. In settling the SAM claims, the self-insured-retention limit, the reinsurance limit, and the excess layer of coverage are all exhausted. Thereafter, another SAM claim is filed by a member which alleges that the risk manager failed to properly allocate settlement funds or that it preferred one member over another.  
        
      Result  
      Based on the principles above, a risk manager is not required to make settlement decisions based on un-asserted claims so long as the previously settled claims were settled in good faith.

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1. To that end, Government Code § 825 also states that:

   If the public entity conducts the defense of an employee or former employee against any claim or action with his or her reasonable good-faith cooperation, the public entity shall pay any judgment based thereon or any compromise or settlement of the claim or action to which the public entity has agreed. However, where the public entity conducted the defense pursuant to an agreement with the employee or former employee reserving the rights of the public entity not to pay the judgment, compromise, or settlement until it is established that the injury arose out of an act or omission occurring within the scope of his or her employment as an employee of the public entity, the public entity is required to pay the judgment, compromise, or settlement only if it is established that the injury arose out of an act or omission occurring in the scope of his or her employment as an employee of the public entity. [↑](#footnote-ref-1)
2. Nevertheless, Government Code § 825(b) *also* expressly *permits* a public entity to indemnify an award of punitive or exemplary damages “if the governing body of that public entity, acting in its sole discretion except in cases involving an entity of the state government, finds” that “(1) The judgment is based on an act or omission of an employee or former employee acting within the course and scope of his or her employment as an employee of the public entity”; “(2) At the time of the act giving rise to the liability, the employee or former employee acted, or failed to act, in good faith, without actual malice and in the apparent best interests of the public entity”; and that “(3) Payment of the claim or judgment would be in the best interests of the public entity.” [↑](#footnote-ref-2)
3. Note, however, that *Daza* addressed the College District’s demurrer to the *employee’s* cross-complaint for reimbursement heard after the College District had settled the underlying claims without an admission of fault. Consequently, *Daza* reflects only the *legal* conclusion that Daza’s *allegation* that he *had not committed* the underlying alleged sexual assault—and thus was “in the course and scope” of his employment—were sufficient to survive the College District’s attack at that early stage of the proceedings. (*Daza, supra,* 247 Cal.App.4th at 269.) Thus, *Daza* does not clearly stand for the proposition that a public entity owes an absolute duty to defend merely based solely upon the *potential* that the employee may have been within the course and scope of his employment for the public entity. [↑](#footnote-ref-3)