New Jersey Law Journal
STATEWIDE LEGAL AUTHORITY SINCE 1878
An ALM Publication
VOL. 225 NO. 27 MONDAY, JULY 8, 2019 NJLJ.COM

INSURANCE

Insurance Coverage in the Wake of NJ's Extended Statute of Limitations for Child Sex Abuse

By Robert D. Chesler and Pamela D. Hans

New Jersey has enormously extended the statute of limitations for child sex abuse crimes. The new statute allows childhood victims of sexual molestation to file suit until they turn 55, or until seven years from the time that they became aware of their injury, whichever comes later. Further, for those previously barred from seeking recovery, the law establishes a two-year window to file suit.

Childhood sex abuse litigation is already well-established in the legal firmament. The Catholic Church has been the most notorious target of such suits, but everyone from universities to daycare centers to the Boy Scouts to private schools has been affected. With the extension of the statute of limitations, New Jersey can expect the floodgates for this litigation to open even more widely.

While it is satisfying for the victims to see their abusers punished via the criminal justice system, the abusers are not the chief targets for those victims seeking monetary damages in civil lawsuits. Such relief generally comes from the institutions that employed the abusers and serve as the so-called "deep pockets" in abuse litigation. Those institutions must realize that they have insurance coverage for these types of claims.

The new statute allows childhood victims of sexual molestation to file suit until they turn 55, or until seven years from the time that they became aware of their injury, whichever comes later.

Lost Policies

Insurance coverage for institutions named in suits alleging sexual abuse by employees exists under the general liability insurance policies in effect when the abuse occurred. General liability policies are occurrence-based and provide coverage when the bodily injury took place within the policy period, as opposed to claims-made policies, which provide coverage when the claim is made within the policy period. Insurance coverage for an allegation of sexual abuse that took place in 1970 exists under the 1970 general liability policy. If sex abuse took place over several years, the general liability policies in each of those years must respond.

Of course, many institutions do not save their old liability insurance policies, or know where to look for evidence of them. The institution must recognize that it can prove the existence of insurance through secondary evidence. *E.M. Sergeant Pulp & Chemical Co. v. Travelers Indemnity Co.*, No. 2:2012 cv01741 (D.NJ.

Robert D. Chesler, a shareholder in Anderson Kill's Newark office, and Pamela D. Hans, managing shareholder of the firm's Philadelphia office, are members of the firm's Insurance Recovery Group.

2015). The applicable standard is preponderance of the evidence. *Borough of Sayreville v. Bellefonte Insurance Co.,* 120 N.J. Super. 598 (App. Div. 1998*)*. It can take very little secondary evidence to defeat a summary judgment motion by the insurance company on this issue. See *E.M. Sergeant*. Many institutions employ insurance archaeologists to sift through their records to find policies or secondary evidence of them. As insurance archaeologist Sheila Mulrennan of IAG, Ltd. comments, "I had a case where an old letter contained an insurance prefix, which we knew belonged to a certain London insurance broker. We followed up and produced $170,000,000 in coverage."

Expected or Intended

Institutions generally are brought into childhood sex abuse litigation through allegations of negligent hiring or supervision. Liability insurance covers negligent behavior, and also grossly negligent and reckless behavior. However, coverage does not exist for intentional or expected injury. If a claimant alleges that an insured institution "should have known" of ongoing sex abuse, coverage should exist. However, allegations that an institution knew of and turned a blind eye to sex abuse could give rise to attempts by an insurance company to restrict coverage. Ordinarily, in New Jersey, the issue of whether an insured expected or intended injury rests on the insured's subjective intent. However, if the facts are egregious enough, the courts will apply an objective standard and presume intent to cause injury. *Morton Int'l Inc. v. General Accident Insurance Co.*, 134 N.J. 1 (1993).

Atlantic Employers Insurance Co. v. Tots & Toddlers Pre-School Day Care Center, 239 N.J. Super. 276 (App.Div. 1990), is instructive in this regard. Robert and Nancy Knighton, husband and wife, owned Tots & Toddlers. Robert Knighton was a pedophile and abused children there. He argued that he did not intend to cause any injury, and that a fact issue existed as to intent. As the Appellate Division noted, "[w]hile socially unacceptable, they argue that a pedophile or other sexual deviant may not necessarily intend to cause his or her victims any injury ….." The Appellate Division rejected this argument, and applied an objective test as to liability for sex abuse crimes.

The trial court also held that Nancy Lighton and Tots & Toddlers were liable, even though the claimants did not allege that she committed any sex abuse. The Appellate Division reversed and remanded, reasoning that if Nancy Lighton and Tots & Toddlers were only negligent, they may be entitled to insurance coverage. However, the court also stated that they might not be entitled to coverage if "they participated in, condoned, or had knowledge of the illegal activity." Sexual abuse complaints against institutions can contain allegations that the institution knew of and turned a blind eye to sex abuse. Thus, an institution's right to insurance coverage may involve a factual determination on the state of its knowledge.

Know Your Insurance Policies

While commentators often speak of standardized insurance policies, critical and indeed dispositive differences arise both among different general liability policies and in the ways in which policyholders structure their insurance programs. Some policies have first dollar coverage, while others have high deductibles or retentions. Policies may have per occurrence or aggregate limits. Older policies may not have applicable aggregates. Policies can be retrospectively rated, meaning that the insured must pay back to the insurance company a portion of any recovery that it receives from that insurance company. It is essential for a policyholder to understand its insurance program in order to maximize recovery.

New York Law

New York has also passed a Child Victims Act, extending statutes of limitation for child sex abuse. It should be noted that New York insurance law differs from New Jersey law in several key respects, including late notice, the duty to defend, and how to count the number of occurrences. In particular, under New Jersey law, an insurance company can only deny coverage on the basis of late notice if it can demonstrate appreciable prejudice, a standard that is rarely met. New York law on late notice can be far more draconian. In any state, it is imperative to provide notice of a claim to an insurance company at the earliest opportunity. Of course, in order to do so, an institution must know who its insurance companies are, placing a premium on obtaining policy information as soon as possible.

Conclusion

Since the 1970's, corporate America has faced waves of liability—asbestos, environmental, directors and officers, natural catastrophes, and more. In each instance, insurance companies have fought bitterly against fulfilling their obligations to provide coverage for such claims. Institutions and others facing sexual abuse claims can expect the same. Companies must prepare to find their insurance policies and pursue their coverage claims. ■

Reprinted with permission from the July 8, 2019 edition of the NEW JERSEY LAW JOURNAL. © 2019 ALM Media Properties, LLC. All rights reserved. Further duplication without permission is prohibited. For information, contact 877.257.3382, reprints@alm.com or visit www.almreprints.com. # 151-08-19-03