FOCUS: INSURANCE LAW

Insurance Coverage Issues Presented By New York's Recent Abuse Victims Legislation

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In 2019, New York's Child Victims Act ("CVA") took effect and, in 2022, New York's Adult Survivors Act ("ASA") took effect.[1] These laws open a limited window in time for individuals who allege they were victims of sexual abuse as minors or as adults to assert claims against their abusers and/or the institutions that employed them in connection with claims that otherwise would have been barred by New York's statute of limitations.

During the two-year window opened by the CVA, nearly 11,000 lawsuits were filed in New York courts against various organizations, such as schools, municipal entities, religious institutions, hospitals, camps, daycare centers, and foster home coordinators, alleging liability under various theories for injury caused by the accused abusers while the victims were minors.

The CVA also allows those who are victims of sexual abuse to bring lawsuits up until their 55th birthday (rather than up until the prior deadline of the age of 23) if the victims were still eligible to file a lawsuit at the time of the passage of the legislation. The ASA's one-year window allowing claims brought by individuals abused while an adult only recently began on November 24, 2022. Claims under both the CVA and the ASA may result in significant financial exposure for the institutions that face such claims. Institutions will likely look to their insurance policies to cover this exposure.

Claims against sexual abusers have long been found inherently intentional and are not covered by general liability insurance policies because the abusive conduct and resulting injury was not caused by an "accident," nor was it "unexpected" or "unintended." Institutions that employed an accused perpetrator, however, often are sued on theories grounded in negligence, such as negligent hiring, retention and/or supervision. Such institutions may assert that they are entitled to insurance coverage because they were unaware of their employee's abusive conduct and did not expect or intend the abuse or the claimant's injury to occur.

Many CVA and ASA claims are based on abuse that took place decades ago. The insurance policies potentially applicable to such claims often are lost or incomplete because of the passage of time. Under New York law, an insured must provide certain proof to show the existence and applicability of a lost insurance policy.

When an insured demonstrates it has made a "diligent but unsuccessful search and inquiry for the missing policy," the insured may rely on secondary evidence to attempt to prove the existence and terms of the policy.[2] Secondary evidence includes broker documents, financial statements, invoices, cancelled checks, correspondence, and other business documents, as well as testimony by either the insured and its broker or the insurer.[3]

Individual victims have often suffered abuse from the same perpetrator at various times and locations over a multi-year period involving policies with "per occurrence" limits of liability. Important coverage issues include how New York interprets "occurrence" as defined under a liability insurance policy, how many "occurrences" are involved and, where applicable, whether one or more self-insured retentions and policy limits might be implicated by a claim. New York's highest court has held that "incidents of sexual abuse constituted multiple occurrences" where a claimant alleged sexual abuse by a single priest in different locations over nearly a six-year period.[4]

When the abuse occurred over several years, trigger of coverage issues and issues of how damages should be allocated among an institution's insurers also arise. Depending on the language of the policies, New York follows either a "pro rata" allocation approach or, in limited circumstances, an "all-sums" allocation. "Pro rata" allocation spreads the loss across all policy periods in which the injury or damage took place. In contrast, under an "all sums" allocation, the insured may select any policy in effect during the periods in which the injury or damage occurred to satisfy its liabilities up to the policy limits.

Additionally, under a "pro rata" allocation, insurers may advocate allocation of loss to the insured during periods of no insurance, whether as a result of the insured's choice because of the unavailability of insurance in the marketplace, or due to the insured's inability to locate its policies or establish their issuance, terms and/or conditions.

Starting in the mid-1980s, many insurers endorsed their policies with sexual misconduct, molestation and/or abuse exclusions which preclude claims for coverage arising out of sexual or physical abuse or molestation. Some of these exclusions specifically exclude claims for sexual abuse acts arising from negligent hiring, retention, or supervision of the perpetrator. New York and other courts routinely apply these exclusions to preclude coverage for negligence and other claims against the employer of a perpetrator or the owner of the premises where the act of abuse occurred.

Fortuity concepts are also implicated in CVA and ASA coverage claims. Liability insurance policies generally cover injury during the policy period caused by an "occurrence," which typically is defined to mean an "accident" and/or continuous or repeated exposure to conditions which unexpectedly and unintentionally results in bodily or personal injury. This language is generally interpreted to mean that injury caused intentionally, or by acts expected or intended to cause harm, is not caused by an "occurrence." In other words, if the insured knew or should have known of an alleged abuser's proclivities to commit sexual abuse but took no action to prevent such conduct, coverage to the insured may be barred.

To establish liability under theories of negligent hiring, supervision and/or retention, claimants may try to show that the insured company or organization knew of an alleged abuser's conduct and proclivities but, rather than taking effective action to prevent such conduct, simply transferred the perpetrator to different locations. In such cases, however, this response may support an insurer's argument that the insured is not entitled to coverage on the basis of no "occurrence."

Liability insurance policies also generally contain conditions precedent to coverage requiring that notice of an occurrence which appears likely to implicate the policy must be provided "immediately" or "as soon as practicable" by the insured to the insurer. This condition is often implicated where the insured may have received notice of the abuse around the time when the abuse allegedly occurred, but the insured never notified the insurer.[5]
For policies issued before January 17, 2009, New York does not require proof that the insured's untimely notice of occurrence prejudiced its insurer. Policies issued on or after January 17, 2009, require a showing of prejudice by the insurer to deny coverage.

Further, claims against an institution arising from repeated instances of sexual abuse might lead to an award of punitive or exemplary damages. New York specifically disallows the insurability of punitive damages, leaving the insured potentially subject to significant uninsured damages.[6]

Moving forward, potentially liable institutions, as well as their insurers, must be prepared to contend with the significant coverage and financial issues that claims under the CVA and the ASA will no doubt raise.

1. 2019 N.Y. Laws Chap. 11; 2022 N.Y. Laws Chap. 203.
2. *Cosmopolitan Shipping Company, Inc. v. Continental Insurance Company,* 2020 U.S. Dist. LEXIS 241310 at *1 (S.D.N.Y. Dec. 22, 2020).
3. See *Burt Rigid Box, Inc. v. Travelers Property Casualty Corp.*, 302 F.3d 83, 92-93 (2d Cir. 2002); *Gold Fields American Corp. v. Aetna Casualty and Surety Co.*, 173 Misc. 2d 901, 905 (Sup. Ct., N.Y. Co. 1997).
4. *Roman Catholic Diocese of Brooklyn v. National Union Fire Ins. Co. of Pittsburgh, Pa.*, 21 N.Y.3d 139 (2013).
5. See New York Insurance Law §3420(a)(5).
6. See *Home Ins. Co. v American Home Prods. Corp.*, 75 N.Y.2d 196, 200 (1990).

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