2019 CLM New York Conference
December 5, 2019
New York, NY

Statutory Revival of Molestation Liabilities: Coverage & Claims Handling Guidance Against the Deluge

I. Introduction and Framing the Issues

Reviver or "Window" Statutes

While sexual abuse claims against religious entities, schools, medical institutions, and other not-for-profit agencies are not new, these cases have once again come to the fore and are creating new issues for the church and their insurers due to the implementation of so-called "reviver" or "window" statues. Seventeen states and Washington, D.C. have laws going into effect this year that extend or eliminate the amount of time victims of sexual abuse have to sue or seek criminal charges against their abusers. Moreover, some states, including New York, have created short-term windows during which victims can sue their abusers and the institutions they were affiliated with regardless of when the alleged abuse occurred.

Examples of Such Statutes

New York's statute, called the Child Victims Act, was signed by Governor Cuomo in February 2019. The Act provides that "a civil action for conduct constituting a sexual offense against a child, shall be brought before the child turns 55 years old." Additionally, starting on August 14, 2019, adult survivors of child sexual abuse have one year to file suit against their abusers or negligent institutions, regardless of how long ago the abuse took place. In preparation for the commencement of the one-year window, the state court system designated 45 judges to handle the anticipated influx of cases. On the first day of the one-year window, 427 lawsuits were filed.

In June 2019, Governor Greg Abbott of Texas signed a bill that extends the civil statute of limitations to the age of majority (18) plus 30 years against perpetrators and institutions.

In California, Governor Jerry Brown signed a series of bills that went into effect on January 1, 2019, which include extending the existing statute of limitations period for civil claims of sexual assault from three to 10 years and expanding employer liability for acts of harassment by non-employees.

Impact on Insurers

The passage of such statutes will inevitably lead to an avalanche of claims and lawsuits against these entities, which may not be financially prepared to take on the enormous potential liability and costs that such matters may entail. In fact, according to a recent report from A.M. Best, insurers that insure religious institutions, and other institutions facing these types of claims (like schools and municipal entities) will likely need to increase the reserves they set aside to pay for such claims. The insurers have compared these sexual abuse claims to asbestos-liability because the claims can affect decades-old policies and the settlement amounts can be difficult to predict.

Insurance Coverage Available for Such Claims

The insurance coverage available to these entities can play a crucial role in addressing the financial exposure associated with sexual abuse claims. However, the entities seeking coverage for such claims must confront a whole host of insurance coverage issues. And, in light of the upcoming onslaught of these claims, insurers have begun to be more aggressive in contesting coverage. While, at the same time, the religious institutions, realizing insurance may be their primary means for sufficiently funding these claims, have also gotten equally aggressive in pursuing any potential coverage.

II. Theories of Liability for Sex Abuse Claims against these Institutions

Intentional Acts

Sexual molestation is often presumed to be an act of intentional harm, subjective intent notwithstanding. Still, whether an intentional act is attributable to an employer is incident-specific under theories of agency or *respondeat superior*. For example, if an employer instructs security guards to use force in performing their duties, the employer may be held liable for a patron's injuries that result from intentional use of such force. Nonetheless, if the facts demonstrate that an employee was not furthering the purpose of the entity's business, the employer will not be held liable for the intentional harm which he or she caused. Most courts, however, have not recognized vicarious liability claims based on agency principles or *respondeat superior* because the act by the offender did not fall within the scope of the offender's employment.

Conspiracy

These lawsuits often allege a conspiracy among officials of these institutions to conceal, if not permit, the alleged abuse. A typical complaint alleges that the administrators of these institutions conspired to cover up the incidents of sexual abuse and to prevent disclosure, prosecution and civil litigation by failing to report incidents of sexual abuse to law enforcement or child protection agencies; by denying abuse they had substantiated; by aiding these child molesters in evading detection, arrest and prosecution; failure to warn; and failure to seek out and redress the injuries the priests/educators/leaders/doctors had caused.

Negligence

In order to circumvent the intentional act exclusion found in most insurance policies, plaintiffs' attorneys frequently seek to blame those in a supervisory capacity for negligently hiring,

retaining or handling the offender or other negligence principles involving vicarious liability. Courts are divided on whether they recognize such negligence claims based on vicarious liability principles of negligent hiring, training, etc.

III. Coverage Implications and Defenses

Issues under CGL Policies

Duty to Defend

Defense is likely the real exposure with these claims. As discussed in detail below, CGL policies have many exclusionary provisions that may ultimately eliminate or reduce an insurer's indemnity exclusionary indemnity exposure. However, given that the duty to defend is always broader than the duty to indemnify, insurers may still be obligated to provide a defense if other allegations in these lawsuits create potential liability under the policy (i.e. negligence claims).

Historic Policies

Insurance coverage for the institutions named in the suits exists under the CGL policies in effect when the abuse occurred, which in these instances, may be policies spanning all the way back to the 1950s. Institutions have likely not kept those historic policies or do not know where to look for them. The institution can prove the existence of insurance through secondary evidence (*i.e.* letters describing the coverage, certificates of insurance, the terms and conditions of insurance policies issued before or after the missing coverage, specimen insurance policies forms, etc.) and may prove their existence by preponderance of the evidence. Unfortunately for insurers, it can take very little evidence to defeat a summary judgment motion by the insurance company on this issue. Institutions usually hire insurance archaeologists to sift through their records to find policies or secondary evidence of them.

Abuse or Molestation Exclusion

Many CGL policies these days contain exclusions barring coverage for abuse and molestation and courts have been finding more and more been that such exclusions apply to bar coverage even if the entity was not a direct participant in the abuse. These decisions usually stem from broad language in the exclusion, i.e. the use of the phrase "arising out of" or "arising from," and the phrase "directly or indirectly" i.e. coverage is excluded because all of the claims arise directly or indirectly from the perpetrator's act of sexual molestation. However, historic policies, which are now in play, likely did not contain such exclusions. As such, insurers will have to find alternative defenses to coverage.

Is There an "Occurrence"?

In order for there to be coverage under a CGL policy, there must be an "accidental event," which most courts usually interpret to mean something that it occurs without design coordination or expectation. Most courts find that employee's sexual assault is obviously expected or intended by the employee and not an "accident." However, it is much harder to prove that it is not an "accident" vis a vis the entity institution, as the issue of whether an insured expected or intended injury rests, in most states, on the insured's subjective intent.

However, as noted above, most cases against institutions are pled with specific knowledge of the abuse on the part of the institution, along with allegations of negligence. There are a considerable number decisions that acknowledge that when the complaint alleges facts consistent with an expectation of harm, further allegations that the insured "should have known" of the potential for injury or that the insured acted "negligently or intentionally" do not override factual allegations indicating intent. However, other courts have allowed a "negligence" allegation to override allegations of specific knowledge.

Additionally, a significant number of courts have concluded explicitly or implicitly that negligent supervision or hiring of an alleged abuser by an institution is, by itself, an occurrence. On the other hand, there are courts that have reasoned that negligent supervision or hiring does not transform a non-accident (the sexual molestation) into an accident, even if the insured-employer did not expect harm. In other words, hiring a bad actor, such as a pedophile, may be negligence, but it is not an "accident."

Intentional Act Exclusion

This exclusion (in most instances) will exclude coverage for perpetrator, but does it exclude coverage for the entity? Insurers need to pay close attention to policy language. Insurers are more successful in defeating coverage when the exclusion is broader, i.e. when the exclusions states that there is no coverage for "bodily injury caused intentionally by or at the direction of an insured." Furthermore, given the political environment, courts may be more likely to apply these exclusions to the entity institution (even if the claims sound in negligence), especially if there is significant evidence that the church entity condoned or tolerated the actions of the offending clergy.

Is There "Bodily Injury"?

Even if the injury alleged resulted from an "occurrence" and even if the injury was neither expected nor intended, there is no coverage unless the claimant suffered "bodily injury." A claim involving sexual abuse may involve no allegation of lasting physical harm to the victim. There may be no observable bodily injury. The trauma of sexual abuse is often psychological in nature. Frequently, therefore, a claim may seek damages only for mental distress or emotional trauma and not refer to lasting physical injury. There is some debate amongst the courts as to whether or not mental distress and emotional trauma falls within the definition of "bodily injury". A court's decision on this issue usually depends on the exact wording of the definition of "bodily injury", which can vary from policy to policy.

Issues under E&O or Professional Liability Policies

Claims-Made and Retroactive Date Issues

Sexual abuse claim arising from very old events will likely not be covered under these policies, given that retroactive dates in these policies usually only go back a few years.

Prior Knowledge Exclusions

Again, because many of these acts span a long period of time, insurers may be able to disclaim coverage based on this exclusion, i.e. that if anyone within the group of persons described in the exclusion knew that an abuse claim was going to be brought against it, coverage under the policy for a subsequent claim based on those events is precluded. The Insurer has the burden to prove that these types of exclusions apply. The specific language of the exclusion will dictate the scope of the exclusions' preclusive effect -- i.e. who needs to be aware of the issue (could simply be the "insured", sometimes needs to be a specific employee of the insured, i.e. the risk manager) and what is the prior knowledge date (sometimes the retro date, sometimes the effective date of the policy). Some courts apply an "objective" standard when deciding whether these exclusions apply, i.e. the exclusion applies where a claim was foreseeable from a reasonable, objective viewpoint (this is the majority viewpoint). However, some courts apply a "subjective" standard in that the court will examine what the insured actually knew at the time it entered into the insurance contract.

Is There "Professional Services"?

E&O/professional liability policies are designed to provide coverage for liability arising out of a policyholder's negligent actions inherent in the practice of that particular profession or business. Some courts have held that allegations of negligent hiring and supervision do fall within the purview of these policies. Additionally, some courts have held that if the acts of abuse are inextricably intertwined with, for example, medical treatment by a treating physician, then coverage must be afforded under these policies. However, there must be something more than just an act flowing from mere employment.

Bodily Injury Exclusions

These exclusions could serve to bar coverage; however, there are courts that have held that such exclusions do not apply if the injuries are emotional, as opposed to physical in nature, which many of these claims are. Notwithstanding such exclusions, some professional liability policies contain an exception where the "bodily injury" directly results from the insured's "professional services." This then begs the question of whether sexual abuse would ever be considered to "directly result" from an insured's professional services. It may depend on the jurisdiction and the type of professional services.

IV. How Should Insurers Be Handling These Claims to Minimize Bad Faith

Step 1: Marshall the Pieces

Insurers should create a timeline of the tortious events at issue in each lawsuit and determine to the best it can when the "damage" or "injury" was sustained or surfaced. Additionally, the insurer must immediately determine what policies it had in force during this timeline, what the aggregate limits are for each policy, and what possible deductibles/retentions or self-insurance periods are implicated. To the extent there are any notice issue, the insurer should investigate whether it has been prejudiced by the lack of notice. And finally, an immediate investigation must be undertaken to determine the insureds' fault (most specifically the deep pocket entity insured) and the extent of the damage exposure at issue in each lawsuit.

Step 2: Analyze Groundrules for Defense and Coverage under Each Applicable Policy

The insured must examine the defenses available to all possibly exposed parties in the lawsuits, i.e. the defenses available to the abuser himself, personnel that supervised the abuser, and the institution or employer of the abuser.

The insurer, on the other hand, given the amount of claimants in each lawsuit, must determine the applicable coverage trigger (when dealing with a CGL policy, which will most likely be the case). Is the first encounter the sole "occurrence"? Does the "cause theory" apply (which it likely will when dealing with negligent supervision claims as alleged against the insured entity)? Or will the "exposure rule" apply, i.e. will there be an "occurrence" for each year of molestation or abuse? Additionally, the insurer must analyze and assess the defense obligations for each insured implicated in the lawsuit. As there is likely a conflict between the abuser(s) and the entity, each will require their own counsel (assuming in the first instance the abuser is entitled to coverage/a defense). Furthermore, given the likely myriad coverage issues at play in these lawsuits, even if the insurer recognizes a duty to defend, the insureds will be entitled to retain their own independent counsel, as the insurer will be defending under a reservation of rights. Finally, the insurer should examine whether there is coverage available under any other policies issued to the insured and attempt to negotiate sharing in the cost of defense on an allocated basis with those other carriers.

Step 3: What Should Insurers Do When There are Multiple Claims and Insufficient Limits

A scenario that is likely to arise, given the expanded statute of limitations, is, as noted above multiple lawsuits against the insured entities, which could, quite quickly erode the limits available to the insured to defend and settle the claims. Therefore, in order make sure it is acting in good faith, the insurer must be aware as to how the court in the jurisdiction the claim is brought in approaches good faith claims handling in these situations. The traditional view is that an insurer may settle some claims even if there are claims outstanding after the exhaustion of limits. However, there is a trend among some courts to analyze whether the insurer maximized benefit to the insured. The concern is that insurers seek to quickly terminate defense obligations with quick settlements without due regard to the insurer's remaining exposure.

The *Farinas v. Florida Farm Bureau General Insurance Company* case out of Florida provides guidance as to how to best avoid extra-contractual liability in these situations: (1) the insurer should conduct a full examination of all known claims to assess how to best limit the insureds' direct exposure; (2) the insurer should settle as many claims as possible within the available limits; and (3) avoid indiscriminate settlements that leave the insured at risk. In Texas, the court in *Texas Farmers Ins. Co. v. Soriano* followed a more traditional bad faith analysis when examining whether an insured acted in good faith in failing to settle certain claims against its insured. The court found that settling fewer than all the claims to exhaustion is permissible if the sums are reasonable under standard good faith principles. The court recognized that settlements are desirable to the judicial system and encourage prompt submissions by claimants.

Step Four or "Fourth Down": **When Claims Cannot be Settled within Limits, There are Conflicting Threats of Bad Faith Suits, or Other Risks Are Presented, Is it Time to Punt with Interpleader or Declaratory Judgment?**

The objective of an interpleader action is to get into court with request for discharge of further liability. The benefits of an interpleader is that it eliminates third part contractual claims that an insurer is unwilling to settle where liability of its insured is "reasonably clear." It also may abdicate the insurer's responsibility to make hard decisions on which claims to pay over others. Certain obstacles exists in seeking an interpleader, however. For example, interpleader is disfavored for third-party claims in certain jurisdictions. Second, certain courts recognized that interpleader does not advance the interest of the insured. Additionally, there is some downside for insurers seeking interpleader. First, the insurer's defense obligation is not terminated by interpleader payment under most policy terms and jurisdictions. Second, the proceeds of the policy is no longer accessible to either the insurer or the insured to extinguish losses when favorable settlement demands are made. Third, an interpleader may force cases to trial against the insured. And finally, an interpleader does not necessarily foreclose an extra-contractual suit with an examination of the insurer's motivation and conduct under bad faith standards.

V. Suggestions for Extra-Contractual Avoidance for the Upcoming Wave of Abuse Claims

The Basics

Make sure there is a prompt investigation of claim liability and damages. Conduct an investigation into whether there are other policies available to coverage the loss or, in the very least, contribute. Keep an open line of communication with the insured and make sure that the insured is informed of all decisions made by the insurer and document every step in notes and with written communications with the insured. If there is a reason to deny the claim make sure that the position is in writing and sent to the insured as soon as the determination is made.

If the insurer has determined that there is a defense obligation or coverage generally, given the large exposure, the insurer should attempt a global settlement of all claims. This can be done through individual negotiations or the insurer can invite claimants to agree to an allocation of the available policy proceeds. However, when a global resolution does not appear possible, the insurer should give the insured control to negotiate closures of the claims and solicit insured's input on resolution decisions.