

Preparing Insurance For Revived Sexual Abuse Claims In NJ

By Seth Tucker and Kelsey Ruescher-Enkeboll (September 27, 2019, 2:42 PM EDT)

On Dec. 1, New Jersey will open a two-year window in which any survivor of child sexual abuse may file suit concerning the abuse, regardless of how old the survivor is or when the alleged abuse took place. In addition to creating this two-year revival window, New Jersey's new law will also extend the civil statute of limitations for claims for sexual abuse of a minor: Currently, absent equitable tolling, survivors have to bring suit by two years after their first realization that they had been harmed by sexual abuse; as of December, survivors will be able to bring suit until their 55th birthday or within seven years of their first realization that the abuse caused harm, whichever is later.



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A similar law went into effect this year in New York. New York's Child Victims Act extended the civil statute of limitations so that new victims have until their 55th birthday to file suit concerning their abuse, and it also created a one-year revival window in which survivors of child sexual abuse can bring otherwise expired claims.



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New Jersey and New York are hardly alone. This year, more than a half-dozen other jurisdictions, including Arizona, Vermont and the District of Columbia have enacted laws retroactively easing the statute of limitations for civil claims of child sex abuse, opening a "revival" period in which expired claims can be brought, or eliminating the statute of limitations for abuse claims altogether. Similar bills have been introduced in at least six other states, including California, Georgia and Pennsylvania.

In nearly every state to enact such a law, the effect is to revive expired claims not only against the actual perpetrator, but also against any other person or institution that is allegedly responsible, in whole or in part, for the abuse. Practically speaking, that means that claims of negligent hiring, negligent training, negligent supervision and the like are revived as well.

The recent change in New York law likely provides a preview of what to expect when the window opens in New Jersey or elsewhere. By the end of the first day of the window period in New York, hundreds of

new Child Victims Act lawsuits had been filed.[1] Within one month, the 151-year-old Diocese of Rochester had filed for bankruptcy protection. Given the strong legislative push for claim revival, as well as the hundreds of lawsuits already filed in New York, New Jersey institutions should expect a wave of claims starting on Dec. 1 when New Jersey's new law takes effect.

As a result of these changes to the statute of limitations, corporations, day care centers, schools, religious institutions, hospitals and youth organizations in New Jersey (or the other relevant states) may face claims stemming from alleged abuse dating back years or even multiple decades.

The sad fact is that predators of children go wherever children are found. This is so whether children were at the center of the organization's activities, as in the case of a school or a youth sports league, or at the periphery, as was the case with Penn State, which reportedly paid more than 100 million dollars to victims who were not enrolled at the university but were abused as minors by an assistant football coach.

Seasonal programs, such as summer jobs programs for youths, may have brought an influx of both minors and temporary adult supervisors into an organization. Even corporations whose core business does not involve children can be at risk of suit if, for example, they offered daycare to the children of employees.

Claims alleging abuse of a minor that happened many years earlier pose special challenges for our justice system. In the intervening years, memories may have faded. Critical witnesses — including the alleged abuser, who was necessarily older than the now-adult claimant, or the personnel accused of negligent supervision — may be deceased or otherwise unavailable. And documents that might have corroborated or refuted the allegations, such as ordinary time-and-place records for the accused employee, may have long since been discarded because they had no evident continuing utility.

Indeed, the difficulties courts and litigants face when addressing claims that arise out of long-ago incidents are at the forefront of the reasons we have statutes of limitations in the first place. But in states that have lengthened or nullified their statute of limitations (temporarily or permanently) for claims alleging the sexual abuse of a minor, the legislatures have concluded that the importance of allowing these victims to bring their claims outweighs these other considerations.

For institutional defendants facing these claims, it will be essential to look to insurance for protection. That insurance can be the policy currently in effect when the claim is brought or policies that were in effect years or even decades ago when the claimed abuse happened. If the newly extended statutes of limitations open the door for claims that allege sexual abuse in the 1960s, for example, the institution's insurance policies from the 1960s would be the first place to look for coverage.

Insurance can be critically important to an institution facing a tort lawsuit — or a series of them. Even a meritless or unsuccessful tort lawsuit can be expensive to defend, and the cost of defense should usually be borne by the institution's insurers. Standard general liability policies typically provide "litigation insurance," obligating the insurance company to defend the policyholder so long as the claim might

result in covered liability. Further, defense costs are often not subject to limit. As a result, defense coverage is often the most valuable benefit provided by the insurance policy. And of course, if the claim is covered, the policy will pay the judgment or settlement, up to the policy's limit.

In some instances, insurance funding can mean the difference between the organization remaining in business or going bankrupt. This makes insurance important not only to the organization but also to victims of past abuse, who might go uncompensated but for this backstop. At a minimum, insurance funding minimizes the diversion of the institution's funds away from the institution's core mission, and for that reason, insurance provides a broad benefit to the wider community.

Proving the existence and terms of old policies is critical to obtaining coverage, but can be challenging. Institutions rarely have decades of old, expired liability policies neatly filed, organized and ready for review. More often, if old insurance policies have been retained at all, they might be boxed up and stored in a basement or a back room. Because it takes time and effort to reconstruct the historic insurance program, institutions that could reasonably anticipate new claims alleging long-ago child sexual abuse should begin the process now.

As a first step, institutions should collect and organize the policies they have. Then, if there are gaps, they should expand the search to accounting records, old legal or litigation files, and any other files that might discuss insurance. They should also contact their insurance brokers, whose files may include policies or "secondary evidence," such as correspondence with insurers that can provide insurer names, coverage dates, policy numbers, descriptions of coverage or other relevant information. Armed with secondary information, they can write their former insurers to ask for policies or policy information.

Finally, if this process fails to fill in the holes, they should consider retaining an "insurance archaeologist," that is, a specialist in the art and science of unearthing insurance policies or secondary information of coverage.

Policy reconstruction can be crucial in the event of a coverage claim. Under New Jersey law, an insured must prove the existence and the essential coverage terms of lost or missing insurance policies, and the burden of proof is the preponderance-of-the-evidence standard, not a higher burden such as clear and convincing proof.[2] Insureds can satisfy their burden of proof using secondary evidence.[3]

Institutions facing claims that they are liable because an employee, volunteer or other connected individual has sexually abused a child may face resistance from their insurers. Although some insurers acknowledge that their policies provide a defense and may, depending on the facts, provide coverage for a settlement or judgment, others may resist.

Based on our experience representing policyholders pursuing coverage for long-ago injury or damage, we suspect that some insurers may resist coverage by asserting that a policyholder, in making a coverage claim in 2019 for abuse alleged to have happened decades earlier, has provided notice of an occurrence impermissibly late. If the insured itself had no prior knowledge of the abuse, any such argument should be a nonstarter, because the insured could not have given notice earlier.

Even if the insured learned of the abuse some time ago, coverage may still be available. Under New Jersey law, the burden is on an insurer alleging “late notice” to prove that it has suffered “appreciable prejudice” — a high standard — in order to prevail on such a defense.[4] The question of whether an insurer has suffered appreciable prejudice is a factual question unique to each case.[5] In considering whether appreciable prejudice from late notice exists, New Jersey courts consider (1) whether an insurer’s “substantial right” has been “irretrievably lost” due to the policyholder’s delay in providing notice and (2) “whether the insurer can demonstrate that it would have had a meritorious defense had there been timely notification.”[6]

Another coverage defense we have seen raised, specifically in abuse cases, is that insurance covers only “accidents” or nonintentional conduct, and that because sexual abuse or molestation was intentional on the part of the perpetrator, coverage does not apply. Fortunately for policyholders, most jurisdictions, including New Jersey,[7] focus on the state of mind of the insured that is seeking coverage. If that insured is not the perpetrator — for example, if it is the institution that employed the alleged perpetrator — the excuse that there was no “accident” or that the abuse was “intentional” vanishes. From the standpoint of the employer, the abuse was almost always an “accident.”

On this point, as the saying goes, money talks. Generally speaking, insurance has long protected employers from claims alleging intentional wrongdoing by their employees. More specifically, news reports of two group settlements in diocesan bankruptcies document the insurance industry paying hundreds of millions of dollars on molestation claims in the last two years alone.

Further, as the Wall Street Journal reported in late July, after the passage of New York’s Child Victims Act, major insurers The Travelers Companies Inc. and Chubb Ltd. added tens of millions of dollars to their reserves in recognition that their liability policies might soon be called on to respond to newly viable abuse claims.[8]

In New Jersey, the window on claims that were previously barred by the statute of limitations is opening soon. For the good of the organization as well as victims, any institution that might find itself accused would be well-advised to focus without delay on its insurance program.

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[1] Sharon Otterman, Hundreds of Child Sexual Abuse Lawsuits Flood N.Y. Courts, N.Y. Times (Aug. 15, 2019).

[2] Borough of Sayreville v. Bellefonte Ins. Co., 728 A.2d 225 (N.J. Super. Ct. App. Div. 1998).

[3] E.M. Sergeant Pulp & Chem. Co. v. Travelers Indem. Co. Inc., 2017 WL 239339 (D.N.J. Jan. 19, 2017).

[4] Cooper v. Gov't Emps. Ins. Co., 237 A.2d 870 (N.J. 1968).

[5] Cont'l Ins. Co. v. Beecham, Inc., 836 F. Supp. 1027, 1048 (D.N.J. 1993).

[6] State Nat'l Ins. Co. v. County of Camden, 10 F. Supp. 3d 568, 583 n.15 (D.N.J. 2014).

[7] See D.R. v. Allstate Ins. Co., 2010 WL 289082, at *2 (N.J. Super. Ct. App. Div. Jan. 27, 2010) (finding coverage, under a policy with an exclusion for intentional acts of "the insured person," for a day care center owner because she "had no knowledge of the molestation by [the perpetrator] and had no reason to anticipate that her operation of the day care center would result in injury inflicted by [the perpetrator] on attendees"); see also Atl. Emp'rs Ins. Co. v. Tots & Toddlers Pre-Sch. Day Care Ctr., Inc., 571 A.2d 300, 304 (N.J. Super. Ct. App. Div. 1990).

[8] Nicole Friedman, Insurers Face Rise of Child Sex-Abuse Claims, Wall St. J. (July 21, 2019).