ANDERSON KILL
NEW JERSEY
ALERT

June 2019

Insurance Coverage for Sexual Molestation Claims

By Robert D. Chesler

In New Jersey, one of the chief problems afflicting sexual molestation victims attempting to seek redress from their tormenter has been the two-year statute of limitations for bodily injury claims. Many, if not most, molestation claims are made several years after the bodily injury first occurred; and while the two-year statute was ameliorated to some degree by the discovery rule, it still presented a major obstacle.

That has now changed. The New Jersey legislature passed and Governor Murphy has now signed a new law greatly expanding the statute of limitations for claims of child sex abuse. As a result, New Jersey will likely experience an explosion of claims against everyone from clerics to teachers to scout troop leaders to pediatricians. These individuals will probably not be entitled to insurance coverage in most cases because of the intentional nature of the injury that they allegedly inflicted. Under New Jersey law, if the actions of the insured are egregious enough, the court will presume intent to cause harm.

However, sexual molestation plaintiffs typically sue not only their abusers but also the institutions they worked for at the time of the abuse. These claims would most likely be pursuant to allegations of negligent hiring or negligent supervision. Standard comprehensive general liability insurance policies cover these claims.

Policy Triggers

Insurance coverage exists under the general liability policy that was in effect at the time of the bodily injury. If an individual was assaulted in 1970, the institution's 1970 general liability policy applies. If the individual was assaulted repeatedly between 1970 and 1975, the policies in effect in each of those years will respond. Old liability insurance policies therefore respond to claims brought today.

One issue here is that the underlying claimant may not specify exactly when the molestation occurred. Policyholders should always provide notice to insurance companies as broadly as possible, under any years that could conceivably be triggered. Moreover, the insurance company's duty to defend is broader than its duty to indemnify. Lack of clarity on timing in the underlying complaint may mean that the insurance company must defend.

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Lost Policies

Most institutions will no longer have any information on their insurance policies from 10 years ago, much less 50. The institution's first task is to find its insurance records. It is critical to know that an actual copy of the policy is not required; and a policyholder can prove its policy by secondary evidence.

The standard in New Jersey is preponderance of evidence, not clear and convincing. Very little evidence is needed to defeat an insurance company's motion to dismiss on the missing policy issue. In a recent environmental claim, the insured had little more than 50-year-old ledger entries, yet used an expert on reconstructing insurance policies to defeat summary judgment and settle its claim.

If a policyholder needs to take steps to locate older insurance policies, insurance brokers are a good source of information, or the policyholder can review financial records and ledgers. As mentioned above, many policyholders opt for the services of a lost policies expert, known as an insurance archaeologist. These experts specialize in locating information that can lead to the reconstruction of an insurance program.

The Structure of the Insurance Program

Insurance programs are structured in a wide variety of ways. Many policies provide for separate per-occurrence and aggregate limits, e.g., $1,000,000 per occurrence and $2,000,000 aggregate. Moreover, some old policies did not have aggregates at all, which meant multiple occurrences could repeatedly trigger the per occurrence limit ad infinitum. At the same time, though, many policies have high deductibles or retentions. It's important for an institution to understand its insurance program before it prepares a strategy to pursue insurance coverage.

Expected or Intended

Another hurdle will be whether the institution expected or intended the injury. Institutions will generally claim that they were shocked to discover that their employees committed abuse. However, many cases involve allegations that the institution knew of or turned a blind eye to abuse. Whether such allegations rise to the level of expected or intended behavior necessary for a denial of coverage will be highly factual.

Many cases will involve allegations that the institution "should have known" of the abuse. This is a claim that lies in negligence. While insurance coverage exists for negligent, grossly negligent and even reckless behavior, institutions may still find themselves fending off arguments that their alleged conduct was egregious enough for the court to presume intent.

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Late Notice

General liability policies normally require notice of a claim "as soon as practicable"; however, many institutions don't realize they may have insurance coverage for sexual abuse claims until the underlying litigation has commenced and progressed.

Policyholders may think providing notice at a late date in the underlying proceeding is futile, and many insurance companies will reject coverage on that ground; but in New Jersey, late notice will only foreclose insurance coverage if the insurance company can demonstrate appreciable prejudice. This has proven an almost impossible burden for insurance companies to meet. At least in New Jersey, late notice should never discourage a policyholder from seeking coverage. New York law on this issue may not be as favorable.

Conclusion

When an institution is sued for an employee's sexual misconduct, insurance may not be the first thing that comes to mind. However, there is coverage for such claims, and it is important to start the process of locating historical policies and putting insurance companies on notice. Insurance companies should be there with their policyholders to defend and settle these important claims. If insurance companies seek to avoid or minimize their coverage obligations, policyholders should pursue their very valuable right to defense and indemnity coverage.