NY Sex Abuse Insurance Suit Showcases Possible Arguments

By **Robert Chesler and Pamela Hans** (January 14, 2020)

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In 2019, 23 states passed laws reforming the statute of limitations for child sex abuse, according to the advocacy group Child USA. Among them was New York, where the Child Victims Act, passed last year, waives the statute of limitations on all child abuse claims in a one-year window that began Aug. 14, 2019. After Aug. 13, 2020, the statute of limitations will take effect when the victim is 28 years old in criminal cases — and 55 years old in civil cases.

In New York as in other states, plaintiffs responded swiftly. Hundreds of suits were filed on Aug. 14, when the window opened. In the wake of the litigation flood, insurance coverage disputes have followed swiftly. In New York, insurance companies or policyholders have filed at least three complaints that related to insurance coverage for sexual abuse claims. A fourth may be imminent, as Continental Insurance Company has requested permission to file a coverage complaint in the Diocese of Rochester bankruptcy.

The complaints filed in New York involving Rockefeller University, the Archdiocese of Manhattan and the Diocese of Buffalo, raise a variety of issues that are likely to reverberate in states across the country. The complaint filed by Rockefeller University mainly concerns delay and inaction by insurance companies in responding to notices of claim. The complaint filed by the Archdiocese of Manhattan addresses its insurance companies' obligation to defend sex abuse complaints that contain allegations of negligence.

Perhaps the most notable of the three is the complaint filed by Continental Insurance Company against the Diocese of Buffalo in the Supreme Court of the State of New York, County of Erie. In that complaint, Continental asks the court to rule that there is no coverage available to the diocese for the abuse claims — and raises almost every possible defense that an insurance company may have against a policyholder accused of sex abuse. This article will examine the issues raised in the complaint, and appropriate responses by policyholders.

The Primacy of the Child Victims Act

The complaint, which was filed on Oct. 3, 2019, recounts that since the opening on Aug. 14, 2019, of the window created by the New York Child Victims Act for claimants to bring previously time-barred complaints, plaintiffs have filed 165 sex abuse complaints against the diocese. This underscores the huge impact that state victim rights acts are having on policyholders, insurance companies and victims.

Every institution that in any way had contact with children or young adults, no matter how long ago the contact took place, is now potentially open to previously time-barred claims because of these changes in the law; and the exposure is massive.

Based on the magnitude of the exposure, policyholders can expect that their insurance companies will fight back aggressively and proactively against claims for coverage for sex abuse.

Proving the Policy

The complaint next addresses the issue of the existence of Continental's insurance policies. It states that neither party has copies of the insurance policies, but that the diocese has presented secondary evidence; it does not state whether Continental had any secondary evidence of the insurance policy. In its complaint, Continental does not admit the existence of the policies.

A policyholder pursuing a claim for coverage when it does not have a copy of the insurance policy can prove its existence through secondary evidence. It appears that the Diocese of Buffalo had excellent secondary evidence of the relevant policies. For example, the complaint contained the policy periods and policy numbers of insurance policies that Continental Insurance Company sold to the diocese between 1973 and 1978. Moreover, Continental recites the key coverage provisions that its policies would have had if they in fact existed, relying on standardized language. However, the complaint does not state whether any information on policy limits existed.

For policyholders, marshaling adequate evidence to establish the limits of insurance policies can be a significant challenge when the insurance policies or declaration pages cannot be located. There are, however, sources that policyholders can look to for evidence of policy limits. Those sources include insurance brokers, contracts and other filings. In addition, policyholders can use an expert witness to identify what limits an insurance company would have sold to that policyholder or similar policyholders during the policy periods in question.

However, in E.M. Sergeant Pulp & Chemical Co. v. Travelers Indemnity Co.,[1] where the policyholder proved the existence of the policies but did not know the limits, the court assigned the lowest limit that the insurance company issued during the relevant time period.

Even when the policyholder does not have evidence of the policy limit, insurance policies have great value, because commercial generally liability insurance policies as a rule obligate the insurance company to provide a defense to the policyholder — and policy limits do not apply to defense costs. In short, the duty to defend is unlimited. Defense costs are a major exposure.

Expected or Intended Harm

The complaint then turns to the heart of the insurance industry's defense against sex abuse claims: whether the policyholder expected or intended the sex abuse or, phrased differently, whether an accident occurred.

Insurance companies that have received claims from policyholders, including the Catholic Church, have pointed to reports documenting practices such as covering up sex abuse complaints and harboring perpetrators of sexual abuse by transferring priests who were suspected of or known to have engaged in abuse — points noted in public investigative reports and in Continental Insurance Company's complaint. Continental argues that the court should deny coverage to the diocese, essentially asserting that if the diocese was aware of the risk of sex abuse by a priest, the court should deny coverage.

Negligence and Allegations of Intentional Conduct

Complaints routinely allege more than one cause of action and combine allegations of

negligence and intentional conduct. The question when evaluating an insurance company's obligations to its policyholder is often focused on which claims in the complaint are — and are not — covered by the policy.

Sex abuse complaints against institutions often allege that the institution was negligent in hiring or supervision. Negligence is covered by the general liability policy. However, some complaints also allege that the institution knew of or ignored the abuse. Intentional harm is generally not covered. When a claim alleges both negligence, which is covered by insurance, and intentional acts resulting in harm, which generally are not, insurance policies have a duty to defend the policyholder.

However, in a recent case involving a young adult accused of sex abuse, the plaintiff also sued the mother, alleging that she was negligent in supervision. Despite the allegation of negligence, the U.S. District Court for the Southern District of New York held that the mother was not entitled to coverage even for the allegations of negligence because the crux of the underlying complaint was the sex abuse.[2] This is a troubling result.

Notice

The Continental complaint moves on to two policy conditions: notice and voluntary payments.

Timely notice is often an issue for policyholders faced with claims arising out of alleged sexual abuse. Policyholders may not notify their insurance companies of a claim immediately may be because they do not know that coverage exists for these claims, while others may have difficulty locating the policies in place when the abuse allegedly occurred — particularly when the alleged abuse took place decades ago. Indeed, the insurance brokers who were involved in the purchase of the insurance policies may no longer be in business.

For policyholders, planning ahead by looking for old insurance policies even when there is not a claim can save headaches in the event that a claim is brought. This early work can forestall providing late notice when a claim surfaces. Policyholders should always give prompt and broad notice of any claim, whether formal or informal, to their insurance companies. They should also check with counsel, however, before sharing documents with the insurance company to avoid inadvertently waiving privilege.

Voluntary Payments

Close kin to the notice issue is the problem of voluntary payments. Liability policies generally do not allow policyholders to settle claims without the insurance company's consent. Continental asserts in its complaint that coverage does not exist for any claims settled by the diocese without first gaining Continental's consent. Often an institution will want to settle a sex abuse claim quickly and quietly and will not think of approaching its insurance company and asking its consent to settle a claim.

In a few states, including New Jersey, an insurance company cannot deny coverage because of voluntary payments unless it can show prejudice.[3] However, in many states, failure to gain the insurance company's consent to settle is a serious coverage obstacle. Policyholders should always keep their insurance companies informed of developments in their cases so that the insurance companies can respond promptly to settlement issues.

The Policy Application

A related issue raised by Continental concerns the application for the insurance policy. The application usually asks the policyholder to identify all potential claims of which it has knowledge. If a policyholder knows of but does not tell the insurance company about a claim, the insurer may raise that failure to disclose as a defense to coverage. It appears that Continental Insurance Company is asserting that the diocese should have alerted the insurance company to prior claims or potential claims when the diocese was purchasing the insurance policy. This is another basis for Continental's coverage denial. Indeed, a material misrepresentation on the application can result in the rescission of the policy.

Trigger

Continental clearly has asserted a number of reasons to deny coverage. However, it also asks the court, if it finds a duty to defend or indemnify, to address three issues affecting the extent of its liability: trigger, allocation and number of occurrences.

Trigger refers to which policy has to respond to a claim. General liability policies are triggered if property damage or bodily injury occurred during their policy periods. Sex abuse is bodily injury. Thus, if sex abuse occurred in 1990, the 1990 general liability applies to the resulting claim. If abuse occurred from 1990 to 1992, each of the policies in effect in those years obligate the insurance companies to defend the policyholder. Some states have decided that coverage for abuse claims is triggered only by the first abusive act. However, in states where more than one insurance policy period can be triggered, finding all old insurance policies is key.

The fact that more than one insurance policy may be triggered by a claim places a premium for the policyholder on finding evidence of its old insurance policies. As noted, the policyholder need not have the actual policy, but can prove the policy through secondary evidence. In many states, the standard of proof is the preponderance of the evidence. Insurance brokers and counsel can assist policyholders in locating old policies. Many policyholders, though, employ an insurance archaeologist to ensure a thorough search of all possible records that may contain information on insurance.

Allocation

Allocation refers to allocation of defense costs and settlement payments between the insurance company and the policyholder. Many sex abuse claims will contain a mix of allegations of negligent and intentional conduct by the policyholder. An insurance company may seek to have its policyholder contribute to defense costs or settlements because some of the allegations in the complaint are couched in intentional harm terms and therefore not covered.

As to defense costs, a majority of states hold that if even one count of the complaint contains a potentially covered cause of action, the insurance company is responsible for all defense costs. However, some states, such as New Jersey, allocate defense costs between covered and uncovered claims.

The situation is trickier with respect to settlement payments. Such payments are typically for a lump sum and do not assign fees between covered and uncovered causes of action. In a settlement, an insurance company may argue that it is only responsible for damages attributable to covered causes of action. Many states hold that the allocation burden lies with the policyholder but offer little guidance on how to allocate. A policyholder may utilize an expert witness on this issue.

Number of Occurrences

The final issue raised by Continental is one of the most important for policyholders: the number of occurrences. Liability insurance policies respond to "occurrences," which are basically defined as accidents. If a complaint alleges negligent supervision by an institution that resulted in five sexual assaults by five different perpetrators or five assaults by the same perpetrator, is that one occurrence or five occurrences?

This issue is particularly important because of policy deductibles. Assume that a policy has a per occurrence deductible of $50,000 and plaintiffs have filed ten complaints against the institution. Is each instance of sex abuse a separate occurrence, or is the institution's failure to supervise a single occurrence? If the former, the institution has to pay $500,000. If the latter, the institution need pay only $50,000. Once again, state law differs dramatically on this issue.

Conclusion

The Diocese of Buffalo complaint provides an excellent issue spotter for sex abuse insurance claims. A word of caution though. Insurance companies are adept at creating new coverage issues with which to bedevil their policyholders. Moreover, since insurance law is state law, each issue has to be decided 50 times. Policyholders should quickly select experienced insurance professionals and counsel to help navigate this morass.

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[1] E.M. Sergeant Pulp & Chem. Co. v. Travelers Ind. Co., 2017 WL 239339 (D.N.J. 2017).

[2] Metropolitan Prop. And Cas. Ins. Co. v. Colmey, 18 CV 9259 (VB) (S.D.N.Y. Nov. 20, 2019).

[3] Solvents Recovery Service v. Midland Ins. Co., 218 N.J. Super. 49 (App. Div. 1987).