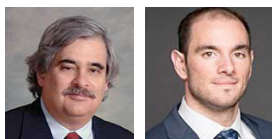


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Policyholder Alert

Insurance Coverage Exists for Sexual Abuse Claims



By Robert D. Chesler
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Key points:

Schools, churches and other institutions are facing a wave of lawsuits alleging sexual abuse that often happened decades ago.

Insurance companies often deny that they have records of old policies that should cover these claims — but when pressed, often find coverage.

Vicarious liability in these cases is generally covered, even if plaintiffs also allege intentional conduct.

In recent years, we have witnessed a wave of litigation alleging claims of sexual abuse. Many of these claims were previously time-barred. However, dramatic changes in the law in **ten states** have created “look-back windows” eliminating the statute of limitations for such claims, usually for a fixed period of time (e.g., 1-3 years). In these states, claimants can seek redress against those who allegedly committed or facilitated the abuse, even if it took place fifty years ago.

For many claimants, the target of their lawsuits is not the alleged abuser. Frequently, the perpetrators are dead, or have no assets. Instead, claimants generally target institutions that allegedly facilitated the abuse, such as universities, public entities, schools, religious organizations, businesses, and many more.

Virtually all these entities and organizations have insurance coverage available to them. Actually getting their insurance companies to step up and provide coverage, though, is no simple task.

Press Insurance Companies and Consider Filing Suit

One of the most common issues in these claims is missing policies. These claims often date back decades, leaving policyholders scrambling to locate their old insurance policies. Unfortunately, most policyholders do not have cop-

ies of their old insurance policies. Thus, policyholders are left in the precarious position of having to ask their insurance companies for copies.

Policyholders in this position often receive an unfavorable response from their insurance company, including a denial of coverage. Insurance companies often say they’ve searched for missing policies but could not locate any. Or they may say those records have been destroyed.

Either way, such statements should not be taken at face value, as the following examples from our experience in litigation illustrate.

On one occasion, an insurance company denied it had any record of its policyholder’s insurance policy, forcing the policyholder to file suit. While in suit, the policyholder served document requests on the insurance company. On the eve of when the documents were to be produced, the insurance company admitted it had found records of the policyholder’s insurance policy, and agreed to provide the policyholder with a defense.

On another occasion, a different insurance company also denied it had any record of its policyholder’s insurance policy. The policyholder filed suit and subsequently served the insurance company with a number of



document requests. Those requests, however, went unanswered, forcing the policyholder to file a motion to compel. Before the motion to compel was adjudicated by the Court, the insurance company produced insurance records confirming not only the existence of the subject insurance policy, but also that the policy covered the underlying claim. There, too, the insurance company eventually agreed to defend the policyholder in the underlying claim.

On a third occasion, another insurance company denied in certified discovery responses that it had any record of its policyholder's insurance policy. However, once a missing policy deposition was scheduled, the insurance company 'found' documents that proved the policy, and agreed to defend.

All three of these examples underscore the importance of pressing one's insurance company to produce insurance records. If an insurance company refuses, policyholders should consider filing suit. While in suit, an insurance company cannot refuse to produce relevant records in its possession. If it does, the insurance company may be compelled to produce such documents by the court or even face sanctions.

Secondary Evidence Counts

As we have seen, when an insurance company is noticed on a long-tail claim, it will often reply that it cannot locate the policy. However, producing the policy document itself is not necessary to establish coverage. Policyholders can prove the existence of an insurance policy through secondary evidence, and often very little secondary evidence is necessary. In some cases, expert testimony, a single declarations page, or records regarding premium payments may suffice.

When communicating with insurance companies, it is critical that policyholders seek not only copies of their insurance policies, but also secondary evidence of those policies.

Vicarious Liability is Generally Covered

Claimants seeking redress for alleged abuse usually sue the alleged abuser and the alleged abuser's employer. Generally, the theory of liability against the employer is that of vicarious liability. While complaints may list different causes of action against the employer, the allegations of the complaint itself usually contain alleged facts that would make the employer liable vicariously, not intentionally. This distinction

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is critical because vicarious liability is usually covered and intentional conduct is not. *Malanga v. Manufacturers Cas. Ins. Co.*, 28 N.J. 220 (1958). Generally, the duty to defend obtains when a complaint advances both covered and uncovered claims. If a suit alleges vicarious liability, the insurance company should defend, even if intentional conduct is also alleged.

Beware Aggregate Limits

Most insurance policies state that they have an aggregate limit. However, under many older policies, it is imperative to read the fine print. Frequently those policies provide that the bodily injury aggregate only applies to product liability and completed operations claims, which are not at issue in sex abuse coverage litigation. Insurance companies' contentions that their policies have aggregates should be carefully reviewed. The difference is a single limit for all claims, or a separate limit for each individual claimant.

An issue does exist in New Jersey as to what is an occurrence. In *Owens-Illinois Inc. v. United Insurance Company* (1994), the New Jersey Supreme Court held that all injuries arising out of the decision to sell and distribute asbestos products constituted a single occurrence. Insurance companies argue that similarly, all acts of sex abuse by a single perpetrator are also one occurrence, regardless of the number of children abused.

Policyholders should challenge this assertion. Sex abuse is not similar to asbestos exposure, where thousands of users suffered near identical injuries. Each case of sex abuse is fundamentally personal and unique. They cannot be grouped together as a single injury as were asbestos cases.

Conclusion

Sexual abuse suits are high stakes litigation for the policyholder, with settlements for single claimants reportedly ranging as high as millions of dollars. These claims are covered by insurance, if the policyholder can produce evidence of the policy. Unfortunately, one of the best sources of evidence is the insurance companies themselves. While many insurance companies can be relied upon to do honest searches for their policies, others procrastinate, mislead, and appear to outright lie.

Proving the policy is just the first hurdle that insurance companies will pose to their insureds. Questions will arise as to the insured's knowledge and intent, the meaning of occurrence, and multiple other issues. A policyholder should seek out experienced counsel to help navigate these issues and bring its claim to a successful resolution. ▲

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