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New Jersey Alert

Claims Brought Under The New Jersey Child Sex Abuse Act Are Covered Under Historic General Liability Insurance


By Robert D. Chesler and John P. Lacey Jr.

Key points:

The primary financial target in sexual abuse suits is often the institution that employed the alleged abuser.

New Jersey law generally affirms insurance coverage for such institutions under commercial general liability (CGL) policies.

Allegations of vicarious liability and negligence are generally covered by CGL.

Victims of sex abuse have filed hundreds, if not thousands, of claims in New Jersey against schools, school boards, municipalities, non-profit organizations, religious institutions and others. Often, claimants sue these institutions because they employed the alleged perpetrator, making any organization that had children in its care or custody a potential target.

From a financial standpoint, the institution that hired an alleged perpetrator is usually the primary target. The perpetrator is typically dead or without assets. If victims are to obtain compensation, it usually must come from the institution that employed the alleged perpetrator; the employer is seen as the deep pockets. However, in many instances, those pockets are not deep enough. To avoid bankruptcy, the institution must rely on its historic insurance policies — that is, occurrence-based policies that were in effect when the alleged abuse occurred — to meet the demands of claimants seeking redress.

Generally, alleged sexual abuse claims constitute bodily injury claims that are covered by historic general liability insurance policies. Nonetheless insurance companies often dispute such coverage on various grounds. One battleground is the insurability of claims pursuant to the New Jersey Child Sexual Abuse Act, N.J. Stat. Ann. § 2A:61B-1 ("CSAA").

Claimants seeking redress for alleged sexual abuse often assert multiple causes of action, including a claim under the CSAA. Enacted in 1992, the CSAA is the first statutory cause of action for sexual abuse in New Jersey. The CSAA establishes two classes of abusers: those persons who inflict the abuse (active abusers), and those who "knowingly permit[or acquiesce" in the abuse (passive abusers). The passive abuser provision in the CSAA applies to institutions, but its exact reach is unclear. However, it does seem to require some knowledge of abuse or failure to act.

Disputes involving historic general liability policies often turn on whether the underlying allegations are cast in terms of negligent or intentional conduct, the latter of which is not covered. Because the CSAA seems to require some knowledge of abuse or failure to act, insurance companies argue this requirement provides them with a loophole for evading their duty to defend policyholders.

Insurance companies presume that a claimant who asserts a CSAA claim is alleging intentional wrongdoing. As a result, insurance companies often refuse to defend, in whole or in part, complaints asserting a CSAA claim. However, instead of looking at the label the claimant attaches to the cause of action, it is necessary to look at the substantive allegations of the complaint itself. In the overwhelming majority of cases, such a review will show the claimant is alleging negligence or asserting allegations that are akin to vicarious liability. Typically, claimants do not allege intentional wrongdoing. If they do, such allegations generally are either disputed or mixed with allegations of negligence. In either case, such allegations do not obviate an insurance company's duty to defend because negligence — even gross negligence — and vicarious liability are covered by historic general liability insurance.

Historic general liability insurance policies contain what is commonly known as an "occurrence" clause. Occurrence clauses vary, but most are defined as "an accident, including continuous or repeated exposure to conditions, which results in bodily injury or property damage neither expected nor intended from the standpoint of the insured." In construing this provision, New Jersey courts have held that a separate coverage analysis is required for each "insured" implicated in the underlying claim. In other words, if an underlying sex abuse claim asserts claims against two "insureds" — for example, an alleged abuser and his employer — the alleged abuser's intentional conduct does not disqualify his employer from coverage.

That principle was affirmed decades ago in *Malanga v. Manufacturers Cas. Ins. Co.* In that dispute, an insurance company denied a partnership coverage for a claim arising out of an assault and battery committed by one of its partners. 28 N.J. 220 (1958). The jury in the underlying action determined the partner had committed the assault and battery in the ordinary course of the partnership's business and returned a verdict against the partner and the partnership. At issue was whether the partnership was entitled to insurance coverage for the jury verdict, holding the partnership vicariously liable for its partner's assault and battery in the course of partnership business. The New Jersey Supreme Court answered that question in the affirmative.

Negligence — even gross negligence – and vicarious liability are covered by historic general liability insurance.

Over Decades, New Jersey Courts Find Coverage for Vicarious Liability

In determining whether coverage existed for the partnership's vicarious liability, the court reasoned that while an assault and battery is a premeditated act from the perspective of the partner, to his passively liable partnership it is an unforeseen occurrence, i.e., an 'accident' within the meaning of the policy. The court noted that because there was no contention the partner's wrongful act was performed with the knowledge and consent of the other partners, and the assault and battery was not committed by or at the direction of the partnership, the partnership's vicarious liability was covered under the policy.

In *Atl. Emps. Ins. Co. v. Chartwell Manor Sch.*, multiple suits were filed against a private boarding school and its headmaster, after the headmaster pled guilty to criminal charges that included various acts of endangerment and sexual assault on a number of male students. 280 N.J. Super. 457, 460 (App. Div. 1995). While the court had little trouble confirming the headmaster's guilt, the court held that issues of fact existed as to the school's knowledge of the abuse. Id. at 471. Thus, liability would not attach to the school itself without a factual finding that it knew of the abuse.

More recently, in *D.R. v. Allstate Ins. Co.*, an insurance company denied a day care operator coverage for a claim arising from her son's alleged molestation of a child. No. A-0180-08T1, 2010 WL 289082 (N.J. App. Div. Jan. 27, 2010). In reversing the trial court, the Appellate Division held that: (1) because the day care operator had no knowledge of the molestation by her son and had no reason to anticipate that her operation of the day care center would result in injury inflicted by her son on attendees, (2) the day care operator neither intended nor expected injury to occur, and thus, (3) the day care operator's vicarious liability fell squarely within the definition of an accidental occurrence.

New Jersey law supports the proposition that CSAA claims are covered under historic general liability insurance. Insurance companies, however, will continue to argue otherwise. Policyholders must realize that they have effective tools to challenge such coverage denials.

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