Insurance Coverage for Sexual Abuse and Harassment Claims

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Dennis J. Artese, Marshall Gilinsky,
John P. Lacey, Jr.

Introduction

Welcome & Introductions

We encourage all to ask questions by typing into the "Q&A" section

The CLE code will be provided at the end of the program

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Dennis J. Artese

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Dennis Artese is a shareholder in the New York office of Anderson Kill and Chair of the firm's Climate Change and Disaster Recovery practice group. He is also co-chair of the firm's Construction Industry practice group.

Dennis's national practice concentrates on all types of insurance recovery litigation, with an emphasis on securing insurance coverage for property and business interruption losses stemming from natural disasters and other perils as well as for construction-related first-party property losses and third-party liability claims.

Dennis has substantial experience in all phases of litigation, arbitration and property insurance appraisals, and has recovered hundreds of millions of dollars of insurance proceeds on behalf of policyholders in connection with a variety of property, builder's risk, commercial general liability, umbrella and excess liability, D&O, E&O, crime, and political risk insurance claims. Dennis also has extensive experience in litigating insurance broker malpractice cases and other general commercial litigation disputes, including construction-related disputes.

Dennis is the General and Climate Change Insurance Editor of the *Journal of Emerging Issues in Litigation*. He has been recognized by **Super Lawyers** for Insurance Coverage since 2012. He also has been recognized by **The Legal 500 US** for Insurance Advice to Policyholders and singled out as being a "superb lawyer and subject-matter expert."

While attending St. John's University School of Law, Dennis received the CALI Award for academic excellence in Commercial Transactions, Evidence, and a Judicial Externship with the Honorable Margaret C. Reilly, New York State District Court Judge, Nassau County. Dennis also was a staff member of *The New York Litigator* at St. John's.

Marshall Gilinsky

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Marshall Gilinsky is a shareholder of Anderson Kill and practices in the firm's Insurance Recovery and Commercial Litigation Departments. Marshall is co-chair of the firm's Sexual Harassment and Abuse Insurance Recovery Group, and a member of the firm's Banking and Lending Group and Hospitality Industry Practice Group.

During his 20-year career representing policyholders, Marshall has recovered hundreds of millions of dollars for his clients, successfully litigating disputed claims under a variety of insurance products, including property and business interruption insurance, commercial general liability (CGL) insurance, errors and omissions (E&O) insurance, directors' and officers' (D&O) insurance and life insurance.

Marshall has represented clients on numerous high-stakes, complex insurance claims arising out of prominent losses such as 9/11, Hurricane Katrina, Superstorm Sandy and the "Big Dig" in Boston. He also focuses extensively on assisting clients that own and manage captive insurance companies, especially with respect to resolving coverage disputes between the captive and its reinsurers.

Marshall's success in solving clients' problems stems from his ability to understand their businesses – as well as their insurance programs – in order to maximize the value of the clients' insurance assets. He frequently writes and lectures on a variety of topics of interest to professionals and practitioners in the insurance arena, and is frequently quoted in the press, including appearances in *The New York Times*, *The Wall Street Journal*, *National Law Review*, CNN.com and *Business Insurance*.

John P. Lacey Jr.

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John is an attorney in Anderson Kill's Newark, New Jersey office and a member of the firm's Insurance Recovery and Corporate and Commercial Practice Groups.

As a member of Anderson Kill's Insurance Recovery Practice Group, John counsels individual and corporate policyholders on a wide variety of coverage disputes, including matters that involve first-party property damage, business interruption losses, trade credit losses, the rights of loss payees and additional insureds, cyber-crimes, criminal acts, professional liability, directors and officers liability, intellectual property, environmental liability, and general liability – namely, disputes involving alleged abuse, emotional distress, and other personal injuries.

As a member of Anderson Kill's Corporate and Commercial Litigation Practice Group, John also represents individuals and businesses in commercial contract disputes, shareholder disputes, broker malpractice litigation, employment disputes, and disputes involving product liability.

Before, during, and after law school, John served as a deputy clerk in the Clerk's Office of the United States District Court for the District of New Jersey. While in law school, John also served as a judicial extern to the Honorable James B. Clark, III, U.S.M.J., in the United States District Court for the District of New Jersey.

After graduating from Seton Hall Law School, John served as a law clerk for the Honorable Owen C. McCarthy, J.S.C., in the Superior Court of New Jersey, Monmouth County.

John was named to **The Best Lawyers in America: Ones to Watch list for 2024**.

OVERVIEW

- Rise in Claims of Harassment, Abuse and Molestation
- Changes Regarding Statutes of Limitations
- Types of Insurance: What policies are applicable & How do they work?
- Insurance Archaeology and Finding Historic Policies
- Notifying and Working with Your Insurance Companies
- Insurance Company Claims Handling Tactics
- Expected or Intended Defense

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RISE IN CLAIMS ALLEGING SEXUAL HARASSMENT, ABUSE & MOLESTATION

Claims of Sexual Harassment and Abuse - #MeToo

- **Increase in Claims** - EEOC reported that in FY 2018 claims rose 13.6% to over 7,600. EEOC attributed the increase to #MeToo movement and an increased willingness to report.
- **Increase in Awards** - EOCC recovered almost $70 Million for victims of workplace sexual harassment and assault in FY 2018, an increase of nearly 50% over the previous year.

RISE IN CLAIMS ALLEGING SEXUAL HARASSMENT, ABUSE & MOLESTATION

Claims of Childhood Sexual Abuse

» Religious institutions

» Youth and athletic organizations

» Educational institutions

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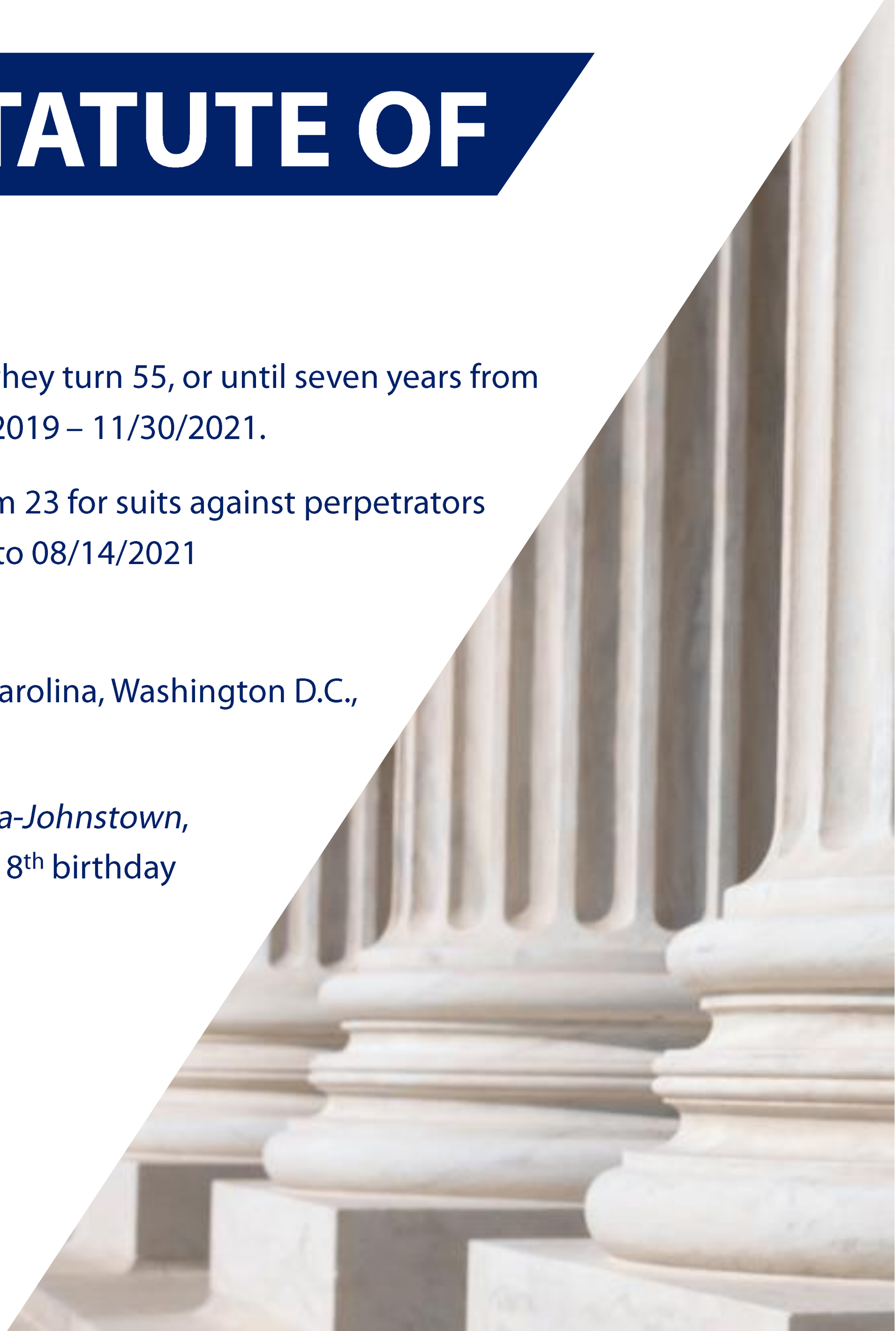
CHANGES REGARDING THE STATUTE OF LIMITATIONS



- **New Jersey**: Statute of Limitations expanded to allow child sexual abuse victims to file until they turn 55, or until seven years from the time they became aware of their injury, whichever comes first. Lookback window 12/01/2019 – 11/30/2021.
- **New York**: Age limit for victims of childhood sexual abuse to file suit extended to age 55; from 23 for suits against perpetrators and 21 for suits alleging negligence against institutions. CVA lookback window: 08/14/2019 to 08/14/2021
- **NY Adult Survivors Act (ASA) Window**: 11/24/2022 to 11/24/2023
- Numerous others, including Arizona, California, Delaware, Georgia, Hawaii, Michigan, North Carolina, Washington D.C., Minnesota, Colorado, Arkansas, Louisiana, Manie, Nevada, and Vermont
- **Pennsylvania**: Possible expansion of common law right to file suit. *Rice v. Diocese of Altoona-Johnstown*, 2019 Pa. Super. 186 (Pa. Super. Ct. 2019) (allowing filing of abuse claim 35 years after victim's 18th birthday based on application of discovery rule).

INSURANCE FOR ABUSE AND HARASSMENT CLAIMS

These Claims Are Covered

» Comprehensive General Liability ("CGL") Policies

» Employment Practices Liability ("EPL") Policies

» Directors & Officers ("D&O") Policies

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INSURANCE FOR ABUSE AND HARASSMENT CLAIMS

Comprehensive General Liability ("CGL") Policies

» This type of policy is important for policyholders who are facing a large number of claims or claims that span many years. This is because, even where allegations of abuse occurred decades ago, CGL policies will still respond today.

» There is typically coverage under multiple policies as a single claim can span multiple years and trigger coverage in each policy year.

» Most CGL policies cover defense costs outside of policy limits.

INSURANCE FOR ABUSE AND HARASSMENT CLAIMS

Employment Practices Liability (“EPL”) Policies

» These policies are specifically designed to cover allegations of workplace harassment.

» They apply on a “claims made” basis, meaning that the policy in effect when the claim is made is the one that responds to the claim.

» Although EPL policies cover defense costs, that coverage usually erodes the policy’s limits.

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INSURANCE FOR ABUSE AND HARASSMENT CLAIMS

Directors & Officers ("D&O") Policies

» These are also "claims made" policies under which defense costs typically count against policy limits.

» Usually defined very broadly in standard form policies; they encompass allegations of "wrongful acts" directed against the company, institutions, or officers that are named as defendants in sexual harassment, abuse, and molestation cases.

INSURANCE FOR ABUSE AND HARASSMENT CLAIMS

Insurance Archaeology is the process of recovering old insurance policies and analyzing their available coverage.

Policy information may also be found in documents such as certificates of insurance, insurance ledgers, annual reports, canceled premium checks and year-end financial summaries.

INSURANCE ARCHAEOLOGY

And The Quest To Find Lost Policies

Where To Look

» Insurance Companies: Most make at least a nominal attempt at looking at their files and databases.

» Insurance Brokers: A great resource for documents as well as personal knowledge of insurance placed.

» Outside Underlying Defense Counsel: They may have files with evidence of policy information, usually in relation to old third-party lawsuits or claims they defended.

» The Government or Other Third-Party Vendors: If you did work for a local, state, or federal entity, then chances are you would have had to show proof of insurance.

Notifying and Working with Your Insurance Company - Overview

When faced with allegations of abuse, it is important to notify insurance companies as quickly as possible. This keeps the insurance company from using “late” notice as an excuse not to provide coverage.

To expedite the process, follow these steps:

» Locate your insurance policies.

» Review the scope of your policies.

» Communicate with your insurance companies.

» Give notice under all policies that might apply.

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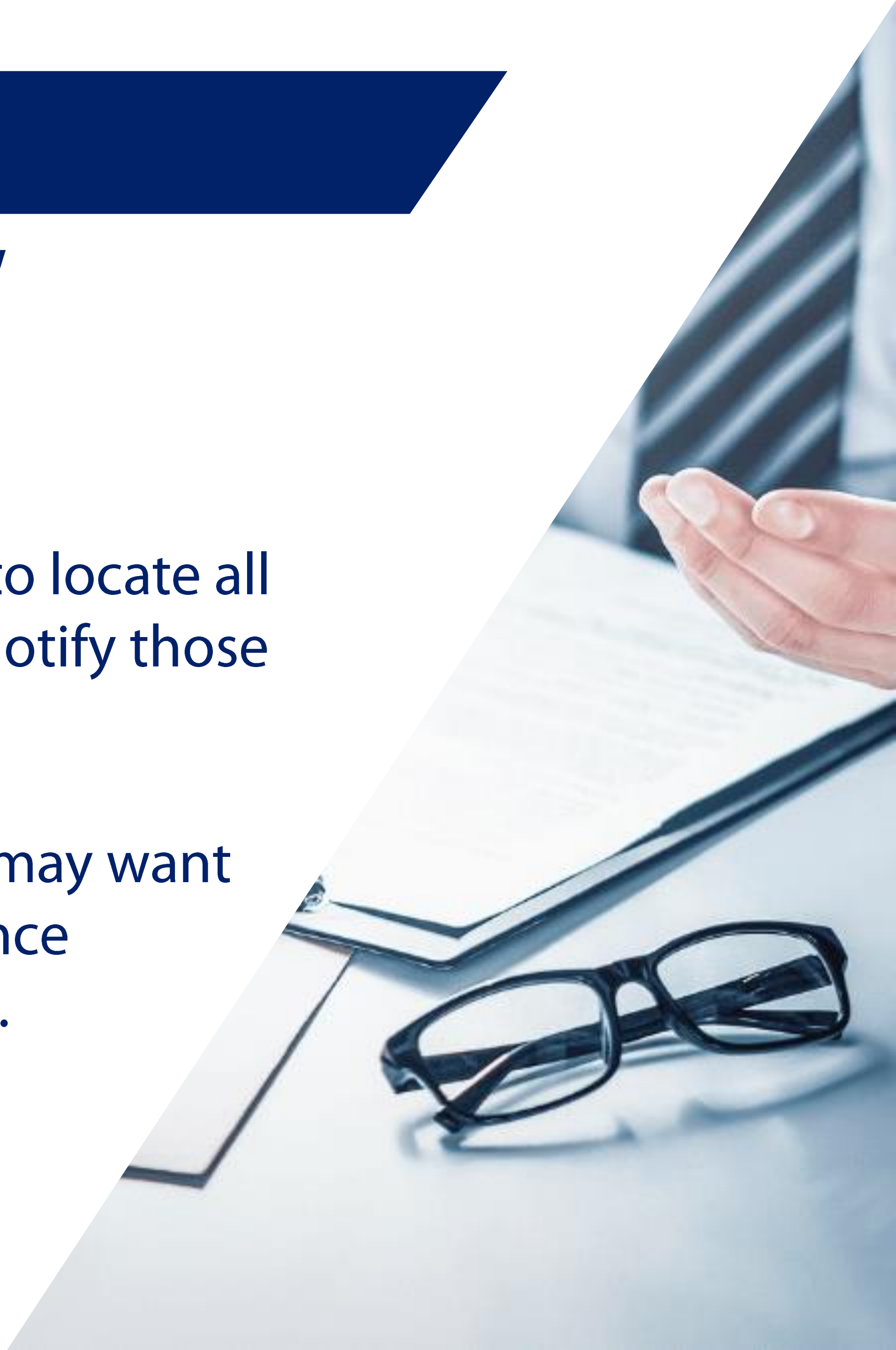
Notifying and Working with Your Insurance Company - Overview

Locating Your Insurance Policies

After any claim, one of the first steps you should take is to locate all potentially applicable insurance policies and promptly notify those insurers of your loss.

Since purchases of policies can span back decades, you may want to recruit the help of your insurance broker or an insurance archaeologist to help you locate past applicable policies.



Notifying and Working with Your Insurance Company - Overview

Review the Scope of Your Insurance Policies

Understanding the full extent – and limitations – of the coverage you have purchased is important both at the point of purchase and at the time of a loss.

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Notifying and Working with Your Insurance Company - Overview

Communicate With Your Insurance Company

Before you are faced with claims and allegations, develop a strategy for:

- Communicating with your insurance company and its adjusters to make sure that notice is given promptly.
- Relaying required information.
- Preserving loss details to the extent possible.

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Notifying and Working with Your Insurance Company - Overview

Communicate With Your Insurance Company

The best practices for corresponding with your insurance company are:

» Provide the company with all reasonably requested information as soon as possible – create a system to confirm their receipt.

» Communicate frequently so that the resolution of your issue feels more like a partnership than a provided service or obligation.

» Take note of any insurance company misconduct or failure to perform and seek counsel if necessary.

Notifying and Working with Your Insurance Company - Overview

Communicate With Your Insurance Company

It is essential to keep track of policy deadlines and notice requirements imposed by your insurance company or broker.

If you fail to comply with policy notice provisions, you risk forfeiting coverage or triggering a costly legal battle
to obtain it.

INSURANCE COMPANY CLAIMS HANDLING TACTICS

- Insurance companies often try to use a policyholder's discomfort against it.
  - Embarrassment
  - Control
  - Fear of Other Claims
- Insurance Companies often force vulnerable policyholders to absorb otherwise covered costs in order to accomplish a quick, non-public resolution.

INSURANCE COMPANY CLAIMS HANDLING TACTICS

Precedent Allows Policyholders To Push Back:

» Insurance companies have a duty to work with the policyholder to negotiate and pay reasonable settlements – in full.

» In considering the reasonableness of a proposed settlement amount, an insurance company must take into "consideration all the factors bearing upon the advisability of a settlement for the insured." Haugh v. All State Ins. Co., 322 F. 3d 227, 238 (3d Cir. 2003).

INSURANCE COMPANY CLAIMS HANDLING TACTICS

Precedent Allows Policyholders To Push Back

Those considerations include, among other factors, the reputational harm and potential loss of goodwill that can result from a failure to settle. *See Landow v. Medical Ins. Exch.*, 892 F. Supp. 239, 241 (D. Nev. 1995) ("in determining whether to settle, the insurer has a duty to consider injury to the insured, such as emotional distress and injury to business goodwill that proximately flow from the failure to settle"); *Bodenhamer v. Superior Court,* 192 Cal. App. 3d 1472, 1478-1479 (1987) ("An express term of the liability contract is to pay claims of third parties where the insured is liable. An implied promise is to process the claims in a manner which will not injure the insured, which in this case includes injury to the business."); T*an Jay Internat. v. Canadian Indem. Co.*, 198 Cal. App. 3d 695, 704 (1988) (allowing bad faith award based on damage to policyholder's reputation because of insurance company's failure to settle); *United States Fire Ins. Co. v. Button Transp., Inc.*, 2006 Cal. App. Unpub. LEXIS 3472, at *59 (Apr. 26, 2006) (allowing bad faith award based on policyholder's loss of goodwill because of insurance company's failure to settle); *Rawan v. Continental Cas. Co.,* 483 Mass. 664, 685, 670-71 (Mass. 2019) (noting that a valuable purpose of liability insurance is the protection of the policyholder's reputation and goodwill, and affirming the insurance company's contractual obligations even where the policyholder acts unreasonably in connection with settlement negotiations in order to protect its reputation).

EXPECTED OR INTENDED DEFENSE

- Claims against employers for negligent hiring, supervision or retention of an alleged perpetrator of sexual abuse generally are covered under standard CGL policies

- Exclusion: "This policy does not apply to bodily injury or property damage which is either expected or intended from the standpoint of the Insured."

- Occurrence definition: "[A]n accident, including continuous or repeated exposure to conditions, which results in bodily injury neither expected nor intended from the standpoint of the insured."

EXPECTED OR INTENDED DEFENSE

» Burden of proof is on the insurance company to show that the policyholder expected or intended the specific harm to occur to a particular claimant.

» Foreseeability is not enough; have to consider the employer’s response to complaints of abuse in light of standards and customary practices during the relevant time.

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THANK YOU!

Questions?

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