Rejuvenation of Abuse Claims Sparks a Need to Evaluate Historical Liability Coverage

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On April 11, 2023, Maryland Governor Wes Moore signed into law the Child Victims Act of 2023, allowing Maryland to join the growing number of states to rejuvenate previously time-barred lawsuits by victims of child sexual abuse against public school boards, government entities and private institutions. The Act also increases the statutory cap on civil damages for child sexual abuse—damages against public school boards and government entities are capped at $890,000 per incident, while per-incident damages against private institutions, including independent schools, are capped at $1.5 million. Maryland follows other states, like California and New York, which paved a path for abuse victims to bring previously time-barred claims based on alleged abuse that occurred decades earlier. Maryland is the first state, however, to pass this type of statute with a lookback period of infinite duration—meaning there is no limit for how long ago the alleged abuse occurred, and the statutes of limitation for lawsuits based on future acts of abuse are eliminated. Other states, such as New York and New Jersey, created limited lookback periods (one or two years), during which survivors were able to file previously time-barred claims.

Institutions facing a potential waive of lawsuits brought under the Act will likely need to examine old insurance policies issued decades ago for potential coverage. For example, an April 2023 Interim Public Release of the Attorney General’s Report on Child Sexual Abuse in the Archdiocese of Baltimore reported allegations of abuse of more than 600 people since the 1940’s. Suits seeking damages for sexual abuse claims could implicate coverage under commercial general liability policies, professional liability policies and employment practices policies spanning over the past 80 years.

Older policies often contain significantly different terms than more recent policies. Unlike recent policies, older policies are unlikely to exclude sexual abuse claims and may even specifically cover them. As with any insurance policy, it will be important to understand the terms and conditions of any older coverage. This may be particularly important when it comes to determining policy limits, including any aggregate limits. Unlike newer policies, which are more likely to include aggregate limits for bodily injury claims, older policies likely do not contain aggregate limits. Thus, while the per-occurrence limit of an older policy may be lower than a more recent policy, the older policy may be of significantly greater value where there are multiple occurrences of abuse.
Older policies also are more likely to provide for unlimited defense, whereas newer policies more often will include the cost of defense within the policy’s aggregate limit of liability. Where the defense costs can erode policy limits, a costly defense may leave the policyholder with little or no coverage for any judgment or settlement of the alleged claims.

Often times, older insurance policies cannot be readily located; however lost policies should not be a deterrent. Where a policy cannot be located in its entirety, other evidence demonstrating its existence may be used to establish coverage, such as declaration pages or financial documents showing paid premiums. Skilled insurance coverage counsel can also “reconstruct” lost policies using historical insurer forms and other secondary evidence of coverage.

Policyholders may also face disputes between insurers centering on how the limits of a primary policy have been reached across all triggered years of coverage before any excess policies can be implicated. Child sexual abuse claims may allege abuse or injury spanning over several years or even decades. These types of claims—sometimes called “long-tail claims”—often spark coverage controversy where insurers disagree over the allocation of their expense between different policy periods and levels of coverage.

Insurers may contend that coverage for rejuvenated abuse claims is barred by policy exclusions. For example, some policies exclude claims caused by intentional and expected conduct—a controversial issue in the coverage arena in the context of sexual abuse claims. Other policies may include language in the definition of an “occurrence,” that limits the definition to injuries that were neither “expected nor intended” by the policyholder. Insurers may investigate whether an organization knew or had constructive knowledge of the alleged abuse and argue there is no coverage based on the policy exclusion. Policyholders have pushed back on this assertion, arguing that the exclusionary wording is ambiguous or otherwise unenforceable. Policies may also contain territorial restrictions. Insurers may investigate where the abuse occurred and deny coverage for any allegations of abuse outside the coverage territory.

These are only a few of the issues that can arise in evaluating child sexual abuse claims brought under Maryland’s new legislation. Also critical is understanding how various policies may work together to provide comprehensive coverage for the claims. Engaging experienced coverage counsel early in the claim process will help to determine potential pitfalls that might be avoided as the liability cases proceed, secure maximum coverage for the costs of any investigation and defense and set expectations for the amount of coverage available for defense and indemnification of rejuvenated sexual abuse claims.

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