LAW360 Insurance Authority

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Md. AG's Report Puts Spotlight On Abuse Coverage Issues

By **Shane Dilworth**

Law360 (April 24, 2023, 4:21 PM EDT) -- The Maryland attorney general's release of a redacted report detailing decades of sexual abuse by the Archdiocese of Baltimore will put more attention on hotly contested issues in coverage litigation, experts say.

Insurance disputes often arise when dealing with claims that date back decades, sometimes referred to as "long-tail" claims, with arguments focusing on topics such as the number of occurrences, knowledge-based defenses, compliance with notice provisions, and lost policies.

Allegations that number in the hundreds and date back decades, such as in the case of the Catholic Archdiocese of Baltimore, greatly complicate coverage issues for insurers. (Karl Merton Ferron/The Baltimore Sun/Tribune News Service via Getty Images)

The archdiocese will likely need to tap its insurers for millions of dollars in defense costs and coverage to respond to suits filed in the wake of the nearly 500-page report's April 5 release, experts say. The redacted document lists about 150 names of clergymen and others alleged to have engaged in the abuse of more than 600 people since the 1940s. The report includes detailed narratives from victims.

Jeffrey Schulman, an insurance recovery partner at Pasich LLP, told Law360 he was intrigued by the length of the report as well as its focus on the individual alleged perpetrators.

"The report appears to be a detailed summary of the allegations against a vast number of individuals," he said.

Schulman said the information in the report will raise many of the same coverage issues as other litigation involving underlying allegations of sexual misconduct.

Potential for Wave of Suits

The number of suits the archdiocese could face may increase significantly because of a law enacted by Maryland around the time of the report's release that removed any age restrictions on victims of sexual abuse who want to file a lawsuit. The law, which will take effect in October, also set caps on noneconomic damages sought by individuals.

According to the legislation, the amount of noneconomic damages available to victims of sexual abuse cannot surpass $1.5 million. Similarly, noneconomic damages for sexual abuse claims brought against government entities cannot exceed $890,000, the law says.

Insurance recovery partner Joseph Jean and senior counsel Scott D. Greenspan of Pillsbury Winthrop Shaw Pittman LLP in New York told Law360 in a joint statement that significant numbers of lawsuits against institutions are often filed following publicized reports of sexual abuse.

Those suits, the pair said, could potentially implicate coverage under commercial general liability policies or management liability policies, such as directors and officers and employment practices liability policies. The pair said older CGL policies often provide enhanced coverage for sexual abuse claims because they are occurrence-based, meaning they can be triggered beginning when the alleged injuries occurred, while new CGL policies are usually triggered for new acts of abuse.

Conversely, management liability policies are "claims-made," the attorneys said, meaning the abuse claim must be made against the policyholder during the applicable policy term or after a retroactive date. The carrier must also sometimes be notified of the claim during the policy term in order to trigger coverage.

Claim Costs Adding Up

Scott Seaman, an insurance coverage partner with Hinshaw & Culbertson LLP, told Law360 that legislation reopening the statute of limitations can lead to an onslaught of litigation and help fuel higher costs for insurers. He pointed out that the state's earlier law raised the age limit for when victims can bring a suit over sexual abuse from 25 to 38.

Under the new law, however, there is no age restriction for individuals filing a sexual abuse suit.

"In the past, we have seen suspension or elimination of statutes of limitation result in a very large influx of litigation," he said. "This coupled with the plaintiffs bar's extensive advertising activities, for example, produced more than 82,000 claims against Boy Scouts of America and resulted in a settlement trust of $2.5 [billion] to $6.5 billion effectuated through bankruptcy."

The number of lawsuits filed after a statute of limitations is opened can lead to a religious organization filing for bankruptcy protection. Recently, a New Jersey bankruptcy judge approved a $2.3 million settlement between the Roman Catholic Diocese of Camden and the National Catholic Risk Retention Group that requires the insurance group to contribute to the diocese's overall settlement trust. The group must also pay $725,000 to two specific people who are suing the diocese for alleged sexual abuse.

The opening of the statute of limitations window, often referred to as a lookback statute, in California in 2002 resulted in multimillion-dollar settlements between sexual abuse victims and various Roman Catholic dioceses. Similarly, New York's implementation of the Child Victims Act in 2019 resulted in the filing of more than 10,000 abuse suits that later contributed to the bankruptcy of several religious institutions and youth organizations.

Seaman said there are reasons for statutes of limitations.

Dan D. Kohane, an insurance coverage partner at Hurwitz Fine PC and adjunct professor at the State University of New York at Buffalo Law School, agreed, telling Law360 that there are repercussions from opening the statute of limitations, especially for school districts that may not have money to pay for a multimillion-dollar judgment.

"I'm not questioning the legislative wisdom of the decision," he said. "You have to look at the other side as well. What's going to happen to these defendants?"

Kohane said the biggest problem with suits filed following a lookback statute is that the allegations are dated and crucial witnesses may be deceased.

Seaman also said that defending against old claims presents a host of challenges.

"Defending stale claims can be very challenging considering witness deaths, aged and infirm witnesses, faded or distorted memories, lack of surviving physical and documentary evidence, and the supercharged nature of the allegations," he said.

Kohane noted that the limits in policies issued between the 1940s and 1970s were far less than typical limits today. He said that "very few had $1 million liability insurance policies" and that far more often, insuring agreements had $100,000 per-occurrence limits, which can be quickly depleted by big verdicts.

"Juries don't render verdicts in 1960s dollars," he said. "They render verdicts in 2023 dollars. The policies don't have inflationary add-ons, so your policy didn't increase in value."

Unlimited Defense Costs

Older CGL policies, Pillsbury's Jean and Greenspan said, are important to securing more complete coverage since they don't often include exclusions found in newer policies that can bar or limit coverage. Additionally, the older policies may not have aggregate limits for bodily injury claims that fall outside what is called the products-completed operations hazard.

"In layman's terms, policyholders may contend that these older policies have no aggregate limit of liability for sexual abuse claims and provide separate per-occurrence bodily injury limits for each act of sexual abuse that falls within their policy period, which can provide policyholders with broad coverage for these often very large claims," they said.

CGL policies also provide unlimited defense costs regardless of policy limits.

Hurwitz Fine's Kohane pointed out that the duty to defend is triggered by each occurrence and the insurer is on the hook for covering all defense costs. As a result, he said, organizational policyholders often look to these policies to cover their defense.

"The obligation to defend is separate and distinct from the obligation to indemnify," he said. "While the obligation to pay the judgment has a limit, in most cases, the obligation to defend is unlimited. There is no ceiling on it."

Pasich's Schulman said the number of occurrences "could be one of the most significant issues because it is often one of the biggest drivers of the amount of available coverage." He said policyholders and carriers alike make the assessment by examining the governing law, terms and conditions of the policies, as well as the number of potential claimants.

He said many historical policies do not have aggregate limits of liability, thus potentially providing many millions of dollars in coverage. Moreover, he noted that many policies provide defense costs in addition to the limits of liability, thereby potentially providing millions more in coverage.

"Insureds want to maximize available coverage and insurers are looking at how to minimize their exposure," Schulman said.

As a result, the issue of the number of occurrences is often hotly debated and litigated.

Since insurance is a creature of state law, however, courts may have different interpretations on what constitutes an occurrence. For example, Kohane noted that New York's highest court ruled that each instance of sexual abuse by one individual is a separate occurrence. Insurers have argued, though, that multiple allegations of abuse against an individual constitute one occurrence, he said.

Exclusions for Intentional Conduct

In the 1980s, insurers started issuing policies with exclusions for injuries caused by sexual molestation or abuse. Current and older policies also include an exclusion for intentional and expected conduct, which is also hotly debated in the coverage arena for abuse claims. The question of whether an organization knew about alleged misconduct can leave carriers wondering if an intentional acts exclusion is applicable or if the policyholder breached the policy by failing to provide notice of a potential claim.

Plaintiffs bringing claims against religious organizations for sexual abuse often deal with a double-edged sword when it comes to their allegations, Kohane said. He explained that counsel representing victims will sometimes allege that the organization knew or should have known about the perpetrator's conduct, thus fueling coverage debates on intentional conduct and insufficient notice.

While insurers often cite the sexual abuse and intentional acts exclusions as a way to avoid coverage, Pillsbury's Jean and Greenspan noted that institutional policyholders can potentially avoid them by arguing the exclusions do not apply to allegations that they hired an individual who turned out to be an abuser, are ambiguous or are otherwise unenforceable.

Seth Tucker, an insurance recovery partner in Covington & Burling LLP's Washington, D.C., office, told Law360 that a finding of liability should not affect coverage since coverage requires a second level of analysis and a greater burden of proof. He said insurance coverage is determined by a subjective test that is dependent on what the policyholder actually expected — not what it should have expected, which is the test for negligence.

"If the injured victim can establish liability, that's not the end of the story," he said. "It's a much greater burden to prove expectation or intent of the sort that deprives the policyholder of coverage. It's a much higher burden than you need to prove to establish liability."

Schulman said that the issue of who on behalf of the insured knew about the alleged abuse, and when, can be of significant importance. He went on to say that "the battle lines have largely been drawn and litigated in terms of the application of an expected or intended type of exclusion."

Missing Policies

Another important issue arising from decades-old claims involves the location of old policies or the ability to piece together the terms, conditions and limits of missing insuring agreements. Typically, policyholders bear the burden of initially proving that a policy was issued if a physical copy of the agreement is not available. Insurers must only prove that exclusions applied to bar coverage after it is determined that there was coverage.

Schulman said that finding the policies or evidence of the policies is one of the first tasks a policyholder must undertake when facing a suit involving allegations dating back decades.

That can be a formidable task for policyholders since old agreements may have been discarded or stored in unlikely places. When physical copies of a policy can't be located, policyholders must find and review evidence, such as receipts, copies of standardized form policies issued during the same era and even information from reinsurers, to prove coverage.

Kohane explained that insurers must only conduct a diligent search for a policyholder's coverage but noted that the Insurance Library in Boston is a great resource for locating documents.

Recently, state insurance regulators have weighed in on the issue of missing policies and instructed carriers to be more helpful in the quest for coverage, Schulman said. He pointed out that New York regulators issued a circular to insurers instructing them to cooperate with policyholders in the search for and identification of historical policies for sexual abuse and misconduct claims.

--Editing by Aaron Pelc and Nick Petruncio.