

BUSINESS INSURANCE

Coverage Battles Over Abuse Suits Loom

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Rising childhood sexual abuse claims filed against religious institutions, schools and other organizations with childcare responsibilities often have policyholders and their insurers at an impasse, resulting in lawsuits seeking coverage for decades-old abuses.

The stalemate between policyholders and insurers emanates from wordings in general liability policies dated before the mid-1980s that leaves room for interpretation about issues such as whether multiple incidents of sexual abuse perpetrated by one abuser against one child constitute a single or multiple occurrence, experts say.

“I think this is going to be a messy fight between the policyholders and the carriers because I think the carriers are going to start digging in, given the potential exposure, and really try to expose the institutions for what they knew when they knew it,” said Robin Cohen, New York-based head of the insurance recovery practice of McKool Smith who is counseling policyholders on the issue.

Sixteen states and the District of Columbia have so-called statute of limitation reviver laws on the books — eight of which opened the windows for filing claims this year, according to Philadelphia-based nonprofit Child USA, which focuses on abuse prevention and tracks reviver legislation.

New York’s Child Victims Act passed in February extended the time to bring felony charges by five years — until the victim turns 28 — and allows victims to seek civil relief against abusers and enabling institutions until they turn 55.

“New York was previously viewed as having one of the toughest statute of limitations in the country,” said Karen Bitar, a New York-based partner in the litigation department of Seyfarth Shaw LLP and a former sex crimes prosecutor in Brooklyn. “This is a complete sea change for the state.”

The one-year window to file claims that previously were or would have been dismissed under New York’s prior law opened Aug. 14, and it has already triggered hundreds of civil lawsuits.

“As a constitutional matter, a claim that was adjudicated on the merits cannot be revived,” said Marci Hamilton, founder and CEO of Child USA and a professor at the University of Pennsylvania. “But claims that were solely dismissed on the statute of limitations are eligible for revival. We will see some of those, but we’re not going to see all of those because survivors move on and some just aren’t interested and some just don’t have the ability to prove damages. We’ll see a lot of cases, but it’s not going to be a tsunami.”

Rising claims have already resulted in litigation between policyholders and insurers.

New York-based The Rockefeller University “reluctantly” filed a lawsuit on Aug. 4 against 13 insurers for their “refusal to honor their contractual obligations under four decades of insurance policies that require defendants to pay for the defense, settlements, and/or judgments in connection with hundreds of claims against the University,” according to court documents in *The Rockefeller University v. Aetna Casualty & Surety Company et al.*

In June, the Archdiocese of New York filed a lawsuit in the New York Supreme Court, a trial level court, against 33 insurers seeking a declaratory judgment asserting they were obligated to provide coverage for childhood sexual abuse claims, with the complaint in *Archdiocese of New York v. Insurance Co. of North America et. al.*, specifically referencing New York’s Child Victims Act.

The insurance policies at issue often predate the mid-1980s, when insurers began specifically excluding sexual misconduct claims from general liability policies.

The older policies were often written on an occurrence basis, and the definition of occurrence referred to accidents and resulting damage “neither expected nor intended” by the policyholders; three insurance policies featured as exhibits in *The Rockefeller University* case include such language.

The number of occurrences has also emerged as a source of contention, as policyholders and insurers debate whether one person abused counts as one occurrence or whether occurrences are defined based on the number of individual acts of abuse — a key issue in determining the extent of coverage, experts say.

James Murray, a Washington-based partner who leads Blank Rome LLP’s policyholder insurance recovery practice and is representing several institutions called the policy language “hopelessly ambiguous.” “The per occurrence limit does not have an aggregate, so the issue is what constitutes the occurrence,” he said.

Many insurers will argue that “the negligent oversight is the occurrence. That’s not necessarily frivolous. I think it’s wrong. We say occurrence is undefined, and our position is that the occurrence is each act of abuse that occurs during that year.”

“This whole issue of number of occurrences and which policy you trigger is going to be huge in determining the insurance industry’s liability,” Ms. Cohen said. “For the institutions, what they’re really going to be concerned about is that the carriers are going to align themselves with the victims and suggest that the institutions knew what was going on.”

Insurers faced persistent questions about the rising exposure during the latest round of earnings conference calls and it will likely be a recurring theme in earnings reports going forward because insurers will likely have to adjust their prior-period reserves, analysts say.

Travelers Cos. Inc., the first insurer to report and generally a bellwether for the rest of the industry, stated that its general liability product line for primary and excess coverages included the “modest” impact of the enactment of reviver legislation.

“The impact on our book from these legislative changes in the second quarter was much smaller than the first-quarter impact from the adoption of similar legislation in New York,” Dan Frey,

executive vice president and chief financial officer of Travelers, said during the insurer's earnings conference call on July 23.

On CNA Financial Corp.'s earning call last month, James Anderson, the insurer's chief financial officer, said: "We have to wait and see how much new claim activity is generated from New York and any of the other states as a result of these statutes. Let me just say as I sit here today, I feel really good about our overall reserve strength."