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Institutions and Insurance After Texas Doubles Time Limit on Child Sex Abuse Claims

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On June 1, Texas Governor Greg Abbott signed House Bill 3809 into law, giving child sex abuse victims more time to sue in civil court. The law, which goes into effect on Sept. 1, doubles the time in which child sex abuse victims can file civil claims against individual abusers as well as institutions.

The economic, political and societal pressures on states to extend or suspend time limits for child sex abuse lawsuits make it all the more important for institutions to carefully evaluate their insurance policies and maximize their insurance recovery.

Texas's prior statute of limitations for personal injury claims arising from child sex abuse was 15 years and started to run when the victim turned 18. But studies show that the average age at which child abuse victims disclose abuse is 52, so most victims could not bring claims in Texas civil courts.

The amended law addresses this by extending the statute of limitations for claims arising from six specific offenses involving child sex abuse. It lets victims of childhood sexual abuse bring civil lawsuits against abusers and institutions up to 30 years after their 18th birthday.

This is significant as it will open the floodgates for child sex abuse lawsuits against major institutions in Texas, similar to the hundreds of sex abuse cases that have been filed against the Catholic Church and the Boy Scouts of America following the enactment of similar laws in other states.

In fact, several sex abuse lawsuits have already been filed in civil courts in Houston and Dallas, including against the Archdiocese of Galveston and The Village Church. These lawsuits will be followed by disputes with insurers about the institution's coverage for sex abuse claims.

Understanding and Maximizing Coverage in Sex Abuse Cases in Texas

To prepare for this wave of coverage litigation, Texas institutions – particularly, religious organizations, schools, universities, medical facilities, and youth programs – should be aware of key considerations and best practices to maximize coverage in sex abuse cases.

Locate and Review All Policies from the Period of Alleged Abuse

Child sex abuse lawsuits are likely to implicate multiple policy years. The scope of coverage was narrowed in the 1980s with sexual abuse exclusions, but alleged sexual abuse may date back to the 1960s or earlier. It is important in maximizing coverage to perform an extensive search of records and archives for all policies held by the institution during the period of the alleged abuse.

If needed, engage a lost-policy expert to work with counsel to locate all insurance policies from the period of alleged sexual abuse. There are many very good lost-policy experts who can expedite the process of locating historic insurance policies.

In some instances, triggered policies may have been lost. Even if a lost policy cannot be found, the policy's existence and terms be proven by secondary evidence, such as testimony from employees responsible for the institution's insurance program, testimony from brokers or adjusters familiar with the policies issued to the institution, evidence of policy forms and exclusions approved by the Texas Department of Insurance, or historic communications regarding insurance or claims made thereunder.

Provide notice of claims as soon as possible

Providing written notice of claims in accordance with the applicable policy is a critical step to obtaining an insurance recovery. Disputes about whether notice of claims is timely are likely to arise in situations where the institution is alleged to have had knowledge of sexual abuse prior to the filing of the lawsuit.

An institution may not know about alleged sexual abuse until the lawsuit is filed. Where the underlying sexual abuse lawsuit is the institution's first notice of alleged abuse and a potential claim for coverage, the timeliness of its notice of claims is less likely to be a point of contention.

Be prepared to argue about the trigger test for coverage of sex abuse claims

Since often the limits were much lower in the earlier policies, the key to maximizing coverage will be

to trigger as many policies as possible for the same alleged abuse.

The Texas Supreme Court has given guidance on the trigger test to be applied with respect to long-tail property damage claims, but declined to render an opinion with respect to the trigger rule governing continuous or repeated bodily-injury claims like sexual abuse. The Fifth Circuit, however, in *Guaranty National Insurance Co. v. Azrock Industries*, provided an Erie guess that a Texas court would apply the exposure theory to long-tail bodily injury claims. The exposure trigger theory finds coverage if the plaintiff is exposed to whatever agent ultimately results in bodily injury during the policy period. Since the *Azrock* case, several other courts interpreting Texas law have also concluded that an exposure trigger theory applies in long-tail bodily injury cases.

Triggering multiple policies over a period of years greatly broadens the coverage obligation and increases the potential insurance recovery significantly. There is case law to support that exposure is the trigger test for long-tail bodily injury claims, but Texas state courts have not ruled on the issue, leaving ample room for arguments that another trigger theory (that maximizes coverage) applies in sex abuse cases.

Whether bodily injury was caused by an "occurrence" is determined from the policyholder's standpoint

The typical Commercial General Liability ("CGL") policy requires that the insurer indemnify the policyholder for damages arising from personal injury resulting from an occurrence during the policy period. A critical issue in determining coverage for sexual abuse claims is whether the alleged sexual abuse is an "occurrence" as defined in the policy.

A common CGL policy defines an "occurrence" as an accidentresulting in bodily injury which is neither expected nor intended by the policyholder. This standard definition does not include injury resulting from intentional acts like sexual abuse.

But Texas courts have extended coverage to claims of negligent hiring and supervision of alleged abusers by policyholders. In *King v. Dallas Fire Insurance Co.*, the Texas Supreme Court held that claims of negligent training and supervision of an employee accused of assault qualify as an "occurrence" under a CGL policy, holding that "the actor's intent is not imputed to the insured in determining whether there has been an occurrence."

Accordingly, where sex abuse is alleged to have resulted from negligent hiring or supervision and, as such, was unexpected and unintended from the standpoint of the institution, there is a covered occurrence even though the abuse was intentionally inflicted by the abuser.

In some cases, the underlying complaint may plead facts alleging specific knowledge of abuse on the part of an institution, arguably consistent with an expectation of harm, as well as claims of negligent hiring and supervision. In Texas, allegations of negligent hiring and/or supervision of an abuser will override claims of an institution's specific knowledge of abuse in determining whether there is an "occurrence" to trigger coverage of the claims.

For example, in *Roman Catholic Diocese of Dallas v. Interstate Fire & Casualty Co.*, the victim's causes of action against the Diocese included: (1) failing to warn of known dangerous propensities; (2) knowingly breaching and participating in breaches of its fiduciary duties to plaintiff; (3) fraud; (4) acting with malice and conscious indifference; and (5) conspiring to cover up incidents of priests sexually abusing minors.

Notwithstanding these allegations, the petition also alleged the Diocese was negligent in hiring and retaining the priest-abuser "when it [knew or] should have known of his dangerous sexual propensities." Based on the "should have known" allegation, the court concluded the insurer was obligated to defend because the alleged negligent hiring and retention did not require the Diocese to have known about the priest's sexual propensities for the plaintiff to succeed.

Evaluate as early as practicable whether a single-occurrence or multiple-occurrence determination maximizes coverage of the claims

A frequent issue in coverage cases, especially those involving claims of sex abuse against multiple victims or over a long period of time, is whether the claims should be treated as a single occurrence or multiple occurrences under a CGL policy. This determination can have a number of significant impacts on the amount of coverage available to the policyholder.

If an institution faces dozens of abuse claims and each claim is treated as a separate occurrence, then none of the claims individually may exceed a "per occurrence" deductible or self-insured retention, resulting in a lack of coverage for the claims. By contrast, if the CGL policy has no deductible or retention and has relatively low limits of liability, the policyholder can maximize coverage by arguing for multiple occurrences, making more "per occurrence" limits available.

Texas applies the "cause" test to determine the number of occurrences, which focuses on the events that caused the alleged injuries, rather than on the number of injuries. The Fifth Circuit Court of Appeals in *H. E. Butt Grocery Co. v. National Union Fire Insurance Co.*, applied the cause test to determine the number of occurrences arising from the alleged negligent hiring and supervision of a sexual predator-employee that resulted in the sexual assault of two different children within two weeks at the same HEB store.

There, the court affirmed the district court's determination that two acts of sexual assault on two different children should be treated as multiple occurrences. Although the alleged negligent

supervision was an ongoing and contributing cause, the court recognized that the true cause of the injuries was the sexual abuse itself, to which each individual child was separately exposed. The court concluded that two separate acts of sexual abuse on two different children could not constitute only one "occurrence" under the CGL policy.

In *Mid-Continent Casualty Co. v. Calvary Temple of Irving*, the U.S. District Court for the Northern District of Texas addressed the number of occurrences issue under similar facts but suggested the opposite – that the occurrence at issue in cases that allege negligent hiring and supervision of an abuser is not the actual sexual abuse but rather the victims' "repeated exposure over the years to the negligently supervised [predator-employee]." According to the court, if the institution received warnings about the abuser's deviant proclivities and ignored them, it may be appropriate to call those lapses multiple occurrences.

Texas courts have been far from uniform in their application of the cause test to determine the number of occurrences. Given this lack of consistency, policyholders should evaluate and argue for the number of occurrences that will maximize coverage. The most advantageous position on the number of occurrences can change, depending on the policy terms, the overall coverage program and the claims at issue. Presenting a plausible interpretation of the term "occurrence" and the number thereof may be sufficient to defeat the insurer's position since, under the law governing policy ambiguities, policyholders generally prevail by advancing a reasonable alternate interpretation of the policy.

Make a targeted tender of claims under the triggered policies that provide the most coverage

Texas has adopted the "all sums" allocation approach, which means a policyholder can collect the full amount of its claims from any triggered policy it chooses, subject to the policy's limits. In other words, as long as the targeted policy is triggered by some injury occurring during the policy period, when the rest of the abuse occurred is irrelevant.

Once a policy or policies have been chosen, the implicated carriers will have the obligation to defend and/or indemnify the institution for covered claims up to the limit of the targeted policy. After the carriers have paid the claims, they may seek contribution from the other insurers that issued policies triggered by the claims.

In sex abuse cases that often involve several years or decades of coverage, the triggered policies will provide varying coverage, including different coverage provisions, definitions, exclusions, defense duties and policy limits. These differences should be taken into account when choosing which policy or policies to target for tender of a request for defense and/or indemnity.

Leverage Texas statutory protections for unfair claim settlement practices

Texas statutory protections governing unfair claims settlement practices can not only increase damages, including treble damages and attorneys' fees, but may also be leveraged to resolve claims before litigation. Under Texas law, policyholder institutions may recover under the bad faith statute without showing an injury independent of the loss of policy benefits.

When faced with a sex abuse lawsuit, institutions understandably are not focused on maximizing insurance recoveries. Investigating and responding to the underlying abuse allegations generally take precedence over evaluating the reasonableness of the insurer's investigation. Retaining experienced coverage counsel early in the claim process can help these efforts and allow the institution to fight back against an insurer's bad faith and wrongful withholding of policy benefits.

Sex Abuse Lawsuits and Corresponding Coverage Obligations Are Here to Stay

While sexual abuse lawsuits are not restricted to specific institutions, religious organizations, schools, hospitals and youth programs are likely targets. Texas lawmakers responded to the growing public pressure by doubling the statute of limitations for bringing child sex abuse claims.

Texas is not alone. Seventeen states have revised the limitations period for sexual abuse claims in the last year. As more and more states extend or suspend limitation periods for child sex abuse claims, the number of lawsuits will continue to increase exponentially.

As Texas institutions confront and develop meaningful approaches to addressing child sex abuse within their ranks, economics will require funding from insurers to cover the costs of investigating, defending and resolving these claims. Insurance companies are already preparing for the impending payout. Two major U.S. insurers – Travelers and Chubb – stated during recent earnings calls that they have added to their reserves due to uncertainty about sexual-abuse liabilities.

With the doubling of the limitations period, child sex abuse lawsuits in Texas are not going away anytime soon. Policyholders should expect that insurers will resist funding settlements of the lawsuits given the lack of cases decided under newly enacted laws. But no amount of delay or resistance by insurers will make the lawsuits and corresponding coverage obligations go away.

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