Sexual Abuse and the Child Victim Act: Implications for Liability and Coverage

FLORINA ALTSHILER, ESQ.
PARTNER, RUSSO & TONER LLP



#Metoo Movement



#MeToo movement brings greater attention to victims of sexual abuse.

Media outlets focus on allegedly pervasive misconduct

Public demands that time restrictions on criminal and civil actions be stayed or lifted nationwide

Child Sex Abuse Disclosure

- Most victims miss the statute of limitations because of the disclosure delay that is common among child sex abuse victims.
- Statistically, 1/3 of the victims of child sex abuse disclose as children and another 1/3 never disclose.
- Studies show that the average age to disclose is 52, with the median age 48.

New SOL Reform Laws Effective 2019



Montana

- Eliminates the criminal SOL for felonies and misdemeanors.
- Extends the civil SOL against perpetrators and institutions to the earlier of age 27 or 3 years after discovery that injury was caused by childhood sexual abuse.
- Opens a 1-year revival window on May 7, 2019 against institutions and perpetrators who are alive and have been convicted of or admitted to the abuse.

(HB 640) (Governor Signed into Law on May 7, 2019).

Utah

- Eliminates the criminal SOL for felony human trafficking of a child, which includes trafficking for sexual exploitation of the child.

(HB 20) (Governor Signed into Law on March 21, 2019).

- Extends the criminal SOL for felony crimes where the SOL has run as of May 5, 2003 and no charges had been filed, by extending the time from 1 to 4 years that a prosecution must be commenced after a perpetrator has been identified by DNA evidence.

(HB 192) (Governor Signed into Law on March 25, 2019).

- Waives governmental immunity for civil claims of negligence or injury resulting from sexual battery against a student by a school employee, in a position of trust, who is criminally charged, that the school knew or should have known was a sex offender.
- Extends the civil SOL for claims against a governmental entity or its employee to 2 years after a claim arises or discovery of a claim.

(HB 311) (Governor Signed into Law on March 25, 2019).

Washington State

- Eliminates the criminal SOL for felony rape, sexual misconduct, child molestation, and sexual exploitation of a minor and extends the criminal SOL to 20 years from the offense for rape and indecent liberties, regardless of victim's age.

(SB 5649) (Governor Signed into Law on April 19, 2019).

- Extends the criminal SOL for felony sex offenses by extending when the SOL begins to run to 2 years from identification of perpetrator by DNA, regardless of victim's age.

(HB 1166) (Governor Signed into Law on April 23, 2019).

Washington D.C.

- Eliminates the criminal SOL for felony sexual abuse, child sexual abuse, sexual abuse of a minor, and incest.
- Extends the civil SOL where victim was under age 35 to age 40 with a 5-year discovery rule. Also, opens a 2-year revival window on May 3, 2019.

(B22-0021/DC Act 22-593/L22-0311) (Law Effective on May 3, 2019).

North Dakota

- Extends the criminal SOL for felony and misdemeanor sex offenses to 21 years from the offense.

(HB 1425) (Governor Signed into Law on March 21, 2019).

New Jersey

- NJ Gov. Phil Murphy signed legislation extending the statute of limitations in civil actions from two years to seven years.
- Parties who would still be time-barred under the new law have a two-year window from the statute's effective date of Dec. 1, 2019 to file claims.
- The measure also allows any institutions or person who *knowingly* permitted sexual abuse or protected a sexual abuser to be held civilly liable.
- In addition, if an incident of sexual assault occurred before the victim turned 18, that person would be able to file a claim up to seven years after the assault was discovered or up until age 55.

New York State
Child Victims Act

- "You endured this pain so that others will not now feel that same pain.

Your suffering will stop others from suffering.“

New York State Governor Cuomo

Civil suits stemming from these sexually-based offenses will undoubtedly flourish

Exposing academic institutions, religious institutions, employers, and municipal entities.

Alleging negligence in hiring, supervision, and retention of the alleged perpetrators.



Criminal Actions

- Extends the time to bring felony charges by five years

(until the victim turns 28)

Not retroactive

Criminal SOL across America

- As of January 1, 2017, California eliminated its statute of limitations for rape and other sexual-assault charges. The change did not, however, apply retroactively.
- In June 2016, Colorado doubled the amount of time sexual assault victims have to seek criminal charges, from 10 to 20 years.
- In 2015 Nevada extended its time limit from 4 to 20 years.
- 41 states have eliminated the criminal statute of limitations on *child* sex abuse claims since The Boston Globe in 2002 revealed widespread child sexual abuse in the Catholic Church.

Jurisdictions with No Criminal SOL (for at least some crimes)

- Alabama None for victims abused when < 16
- Alaska None for victims abused < 18 (felony charge)
- Arizona None for victims abused < 15 or <18 if the abuser is a parent, guardian, teacher or priest
- Arkansas None (as of 2013)
- California None for felony sex offenses
- Colorado None for felony child sexual offenses
- Connecticut None for class A felonies
- Delaware None
- Florida None for 1st degree sexual battery (defined by Fla. Stat. § 794.011) for victims abused < 18

Georgia Criminal SOL

None for crimes committed on and after July 1, 2012, in following:

(1) trafficking a person for sexual servitude;

(2) cruelty to children in the first degree;

(3) rape;

(4) aggravated sodomy;

(5) child molestation or aggravated child molestation;

(6) enticing a child for indecent purposes; or

(7) incest.

Jurisdictions with No Criminal SOL (for at least some crimes)

- Hawaii None for Class A felonies
- Idaho None for felony sex abuse and lewd conduct w/ a child
- Illinois None
- Indiana None if offense committed with threats or use of deadly force (class A)
- Kansas None for rape
- Kentucky None for felonies
- Louisiana None for crimes punishable by death or life imprisonment, including aggravated rape and forcible rape
- Maine None for incest; unlawful sexual contact; sexual abuse of a minor; rape or gross sexual assault, formerly denominated as gross sexual misconduct where victim was under 16
- Maryland None for felonies

- Massachusetts None where victim under 16 (after +27 years DNA or other corroborating evidence needed)
- Michigan None 1st degree crimes
- Minnesota None if DNA evidence preserved
- Mississippi None if (1) victim was abused during ages 14-16 and offender is 3 years older; (2) victim was abused under 14 and offender 2 years older; (3) victim was abused under 18 and abuser is in a position of authority or trust; or (4) involving touching or handling of children for lustful purposes
- Missouri
- Murder, forcible rape, attempted forcible rape, forcible sodomy, attempted forcible sodomy, or any class A felony
- Montana None
- Nebraska None for 1st or 2nd degree sexual assault for victim of any age, or 3rd degree when victim was abused under the age of 16
- New Jersey None for sexual assault or aggravated sexual assault

- New Mexico None for 1st degree felonies
- North Carolina None
- Oregon None for some felonies if DNA exists
- Rhode Island None 1st sexual assault, 1st/2nd child molestation
- South Carolina None
- South Dakota None for class A, B, and C felonies; all child rape & forcible rape
- Texas None for most sex crimes against young children
- Utah None for rape of a child, object rape of a child, sodomy on a child, sexual abuse of a child, aggravated sexual abuse of a child, human trafficking of a child
- Vermont None for aggravated sexual assault
- Virginia None for felonies
- Washington None for felony rape, sexual misconduct, child molestation, and sexual exploitation of a minor

- West Virginia None for sexual assault, 1st degree sexual abuse, sexual abuse by parent, guardian, custodian, or person in a position of trust to child
- Wisconsin None for 1st degree sexual assault, or repeated class A or B felony offenses against the same child
- Wyoming None
- Washington D.C. None for felony sexual abuse, child sexual abuse, sexual abuse of a minor, and incest.
- Federal Government None

New York State Child Victims Act Civil Lawsuits

- Opens a one-year/one-time window, beginning Aug. 14, 2019, for victims to seek compensation *regardless* of the abuse date
- With the look-back period open, lawyers and victims are planning to come forward with their stories -- and sue.

Statute of Limitations Expanded

Starting now, any victim under 55 can sue, no matter how long ago it happened (CPLR 208(b)). Allows civil relief against abusers and enabling institutions until victims turn 55 (expanding, significantly, the earlier five-year statute of limitations)

Under the one-year lookback provision (CPLR 214-g), starting in August 2019, one can sue, but only if they're *over* 55.

- Now the statute of limitations will be based on age, not length of time since the allegations.

N.Y. C.P.L.R. LAW § 214(g)

- "Notwithstanding any provision of law which imposes a period of limitation to the contrary and the provisions of any other law pertaining to the filing of a notice of claim or a notice of intention to file a claim as a condition precedent to commencement of an action or special proceeding, every civil claim or cause of action brought against any party alleging intentional or negligent acts or omissions by a person for physical, psychological, or other injury or condition suffered as a result of conduct which would constitute a sexual offense as defined in article one hundred thirty of the penal law committed against a child less than eighteen years of age, incest as defined in section 255.27, 255.26 or 255.25 of the penal law committed against a child less than eighteen years of age, or the use of a child in a sexual performance as defined in section 263.05 of the penal law, or a predecessor statute that prohibited such conduct at the time of the act, which conduct was committed against a child less than eighteen years of age, which is barred as of the effective date of this section because the applicable period of limitation has expired, and/or the plaintiff previously failed to file a notice of claim or a notice of intention to file a claim, is hereby revived, and action thereon may be commenced not earlier than six months after, and not later than one year and six months after the effective date of this section. In any such claim or action: (a) in addition to any other defense and affirmative defense that may be available in accordance with law, rule or the common law, to the extent that the acts alleged in such action are of the type described in subdivision one of section 130.30 of the penal law or subdivision one of section 130.45 of the penal law, the affirmative defenses set forth, respectively, in the closing paragraph of such sections of the penal law shall apply; and (b) dismissal of a previous action, ordered before the effective date of this section, on grounds that such previous action was time barred, and/or for failure of a party to file a notice of claim or a notice of intention to file a claim, shall not be grounds for dismissal of a revival action pursuant to this section."

Actions Against Municipalities

- Removes the 90-day notice-of-claim requirement for bringing claims against municipalities and school districts for child sexual abuse claims.

N.Y. C.P.L.R. § 208 (b)

- "Notwithstanding any provision of law which imposes a period of limitation to the contrary and the provisions of any other law pertaining to the filing of a **notice of claim** or a notice of intention to file a claim as a condition precedent to commencement of an action or special proceeding, with respect to all civil claims or causes of action brought by any person for physical, psychological or other injury or condition suffered by such person as a result of conduct which would constitute a sexual offense as defined in article one hundred thirty of the penal law committed against such person who was less than eighteen years of age, incest as defined in section 255.27, 255.26 or 255.25 of the penal law committed against such person who was less than eighteen years of age, or the use of such person in a sexual performance as defined in section 263.05 of the penal law, or a predecessor statute that prohibited such conduct at the time of the act, which conduct was committed against such person who was less than eighteen years of age, such action may be commenced, against any party whose intentional or negligent acts or omissions are alleged to have resulted in the commission of said conduct, on or before the plaintiff or infant plaintiff reaches the age of fifty-five years. In any such claim or action, in addition to any other defense and affirmative defense that may be available in accordance with law, rule or the common law, to the extent that the acts alleged in such action are of the type described in subdivision one of section 130.30 of the penal law or subdivision one of section 130.45 of the penal law, the affirmative defenses set forth, respectively, in the closing paragraph of such sections of the penal law shall apply."

NY Gen. Mun. § 50–e (b)

- "This section shall not apply to any claim made for physical, psychological, or other injury or condition suffered as a result of conduct which would constitute a sexual offense as defined in article one hundred thirty of the penal law committed against a child less than eighteen years of age, incest as defined in section 255.27, 255.26 or 255.25 of the penal law committed against a child less than eighteen years of age, or the use of a child in a sexual performance as defined in section 263.05 of the penal law committed against a child less than eighteen years of age."

Nationwide

- California, Minnesota, Delaware and Hawaii created these “lookback windows” enabling victims to file civil lawsuits against institutions such as churches and youth groups that bore some responsibility for the abuse.



Jurisdictions with No Civil SOL (for at least some claims)

- Alaska — None for felony sex abuse/assault of minor, felony exploitation of minor
- Connecticut — None if events forming the civil claim led to conviction of first-degree aggravated sexual or sexual assault
- Delaware — None as to perpetrator, or as to gross negligence against employer
- Florida — None for sexual batteries committed against victims under 16 years old
- Illinois — None
- Maine — None
- Minnesota — None for victims abused under age of 18
- Nebraska — None as to perpetrator
- Utah — None for victims abused under age 18 against perpetrator

Jurisdictions that Revived Expired Civil SOL (waiver of SOL for set period of time or up to certain age)

- California (2003) 1-year window revived civil SOLs, closed
- Connecticut (2010) Revives expired claims to age 48
- Delaware (2007-09) 2-year window revived SOLs, closed. Also enacted follow-up window for healthcare providers (existing window did not cover them)
- Georgia (2015-17) 2-year window revives civil SOL against perpetrator
- Hawaii (2012) 2-year window revived SOL against perpetrators and institutions.
  (2014) Extended window for another 2 years.
  (2018) Extended original window to be open until April 24, 2020.
- Massachusetts (2014) Revives civil SOL up to age 53 against perpetrator; revives civil SOL with delayed discovery +7 years against entities
- Minnesota (2013-16) 3-year window, closed
- Montana (2019-20) 1-year revival window opened on May 7, 2019 against institutions and perpetrators who are alive and have been convicted of or admitted to the abuse.
- New York (2019-20) 1-year revival window will open on August 14, 2019 against perpetrators and institutions. (A 2683, S2440) (Law Effective on February 14, 2019).
- Utah (2016) Retroactive revival to age 50 and 2-year window against perpetrator only
- Washington D.C. (2019-21) 2-year revival window opened on May 3, 2019.

California Suspended SOL in 2003

- Suspending their statute of limitations for one year, allowed childhood sexual-abuse lawsuits to be filed in 2003 regardless of when the incidents allegedly occurred.
- About 850 Catholic clergy abuse victims and 150 others sued churches, the Boy Scouts and other institutions for employing known molesters.
- U.S. Supreme Court struck down California's window for *criminal* prosecutions, but the window was been held open for *civil* lawsuits.
- By year's end, the Archdiocese of Los Angeles had been hit with more than 500 suits.
- They settled about 570 total claims of abuse against 221 priests, brothers, lay teachers and other church employees spanning the last 70 years.
- Facing huge payments to settle abuse litigation, five dioceses, including San Diego's, have filed for bankruptcy protection.
- At least 10 bishops and archbishops resigned over their alleged involvement in sexual abuse or in covering up the abuse of others.
- Parishes have been terminated, schools shuttered and ministerial programs shut down.

Delaware Child Victims Act

- Delaware became the first state to follow California with a window law of its own.
- Delaware Child Victims Act created a two-year window to file suits and abolished the civil statutes of limitations on sexual abuse cases going forward.
- During the open window, there were about 1,175 civil cases
- After settling victim lawsuits for $77 million, the Wilmington Diocese filed for bankruptcy protection in 2009, which led to layoffs, property sales and near liquidation of a fund that was used to defray capital costs for local churches.
- The bankruptcy did not require parishes to close.

Minnesota Child Victims Act

- More than 850 child sex abuse claims, including about 500 against Minnesota Catholic clergy
- 3-year window closed in 2016
- Dioceses across Minnesota declared bankruptcy
- Five of the six Catholic dioceses in Minnesota, home to about 1.2 million Catholics, have turned to Chapter 11 federal bankruptcy protection to settle hundreds of claims of sexual abuse at the hands of priests.
- Dioceses file for Chapter 11 bankruptcy, reorganize and emerge as leaner operations.

Hawaii

- (2012) 2-year window revived SOL against perpetrators and institutions.
- (2014) Extended window for another 2 years.
- (2018) Extended original window to be open until April 24, 2020.
- Since 2012, most of the claims have been connected to the Diocese of Honolulu.
- Exposed Dr. Robert Browne, the psychiatrist who sexually boys at Kamehameha Schools over a 30-year period ending in the 1980s. Browne also treated priests for pedophilia.
- Hawaii Preparatory Academy in Waimea also settled a court claim.

Pennsylvania

- In Pennsylvania, victims can raise criminal complaints until they are 50 and civil complaints until they are 30.
- From 2013 through 2018, the Pennsylvania Catholic Conference has spent more than $3.7 million on lobbying, state records show.
- The Insurance Federation of Pennsylvania spent more than $9.7 million.
- No look-back window to date

THE EVOLVING CONSTITUTIONALITY OF REVIVING EXPIRED STATUTES OF LIMITATIONS

- It is unconstitutional to revive a criminal SOL
- Child sex abuse civil SOL is constitutional as addressed in decisions by the highest state courts:
- Massachusetts - Sliney v. Previte
- Connecticut - DOE v. HARTFORD ROMAN CATH. DIOCESAN CORP. 119 A.3d 462 (2015)
- Revival of civil claims is permissible under the due process clause of the Fourteenth Amendment to the United States constitution; see, e.g., Chase Securities Corp. v. Donaldson, 325 U.S. 304, 311-13, 65 S.Ct. 1137, 89 L.Ed. 1628 (1945); Campbell v. Holt, 115 U.S. 620, 629, 6 S.Ct. 209, 29 L.Ed. 483 (1885)
- The two leading decisions from the United States Supreme Court, Campbell v. Holt and Chase Securities Corp. v. Donaldson hold that a defendant does *not* have a vested property right in a statute of limitations defense such that a legislative change reviving an otherwise time barred cause of action violates the defendant's rights under the due process clause of the Fourteenth Amendment to the United States constitution.
- Must look to the state constitution and argue that it affords defendant greater protection against retroactive revival than does the federal constitution.

SOL Revival is Constitutional

- The courts of eighteen states follow the federal approach embodied in Campbell v. Holt, supra, 115 U.S. 620, 6 S.Ct. 209, and Chase Securities Corp. v. Donaldson, supra, 325 U.S. 304, 65 S.Ct. 1137, and allow the retroactive expansion of the statute of limitations to revive otherwise time-lapsed claims — seemingly without limitation.
- Of those states, three, namely, Iowa, West Virginia, and New Mexico, do not squarely ground their decisions in any particular state or federal constitutional provision.
- One, Georgia, grounds its leading decision, Canton Textile Mills, Inc. v. Lathem, 253 Ga. 102, 105, 317 S.E.2d 189 (1984), in an interpretation of that state's constitutional provision prohibiting retroactive legislation.
- Fourteen states, namely, Arizona, California, Delaware, Hawaii, Idaho, Kansas, Massachusetts, Michigan, Minnesota, Montana, New Jersey, North Dakota, Washington, and Wyoming, hold that the retroactive expansion of the statute of limitations to revive time barred claims is not a violation of a defendant's substantive due process rights because there is no vested right to a statute of limitations defense as a matter of state constitutional law.

SOL Revival is Not Constitutional

- In contrast, the courts of twenty-four states support the position that legislation that retroactively amends a statute of limitations in a way that revives time barred claims is per se invalid.
- Of those states, seven, namely, Alabama, Colorado, Missouri, New Hampshire, Oklahoma, Tennessee, and Texas, ground their holdings in independent state constitutional provisions prohibiting retroactive legislation.
- One, Vermont, grounds that holding in a state statute prohibiting retroactive legislation.
- Five, namely, Indiana, Kentucky, Maine, Oregon, and Pennsylvania, do not cite a source for the vested right or otherwise perform a constitutional analysis in support of this holding.
- This leaves eleven states, Arkansas, Florida, Illinois, Louisiana, Nebraska, North Carolina, Rhode Island, South Carolina, South Dakota, Utah, and Virginia, which have rejected the United States Supreme Court's approach to this issue in Campbell v. Holt, supra, 115 U.S. 620, 6 S.Ct. 209, and Chase Securities Corp. v. Donaldson, supra, 325 U.S. 304, 65 S.Ct. 1137, and held, as a matter of state constitutional law, that the retroactive expansion of the statute of limitations, which revives an otherwise time-lapsed claim, is an incursion on a vested property right that amounts to a per se violation of substantive due process.
- See Johnson v. Lilly, 308 Ark. 201, 203-204, 823 S.W.2d 883 (1992); Wiley v. Roof, 641 So.2d 66, 68-69 (Fla.1994); Doe A. v. Diocese of Dallas, 234 Ill.2d 393, 409, 334 Ill.Dec. 649, 917 N.E.2d 475 (2009); Henry v. SBA Shipyard, Inc., 24 So.3d 956, 960-61 (La.App.2009) (en banc), writ denied, 27 So.3d 853 (La.2010); Givens v. Anchor Packing, Inc., 237 Neb. 565, 571-72, 466 N.W.2d 771 (1991); Colony Hill Condominium Assn. v. Colony Co., 70 N.C. App. 390, 394, 320 S.E.2d 273 (1984); Kelly v. Marcantonio, 678 A.2d 873, 883 (R.I. 1996);56 Doe v. Crooks, 364 S.C. 349, 351-52, 613 S.E.2d 536 (2005); State of Minnesota ex rel. Hove v. Doese, 501 N.W.2d 366, 370 (S.D.1993); Roark v. Crabtree, 893 P.2d 1058, 1062-63 (Utah 1995); Starnes v. Cayouette, 244 Va. 202, 212, 419 S.E.2d 669 (1992).

How would New York rule?

- The New York Court of Appeals has held that the legislature "may constitutionally revive a personal cause of action" if it reasonably determines that "the circumstances are exceptional and are such as to satisfy the court that serious injustice would result to plaintiffs not guilty of any fault if the intention of the [l]egislature were not effectuated."
- Gallewski v. Hentz & Co., 301 N.Y. 164, 174-75, 93 N.E.2d 620 (1950).



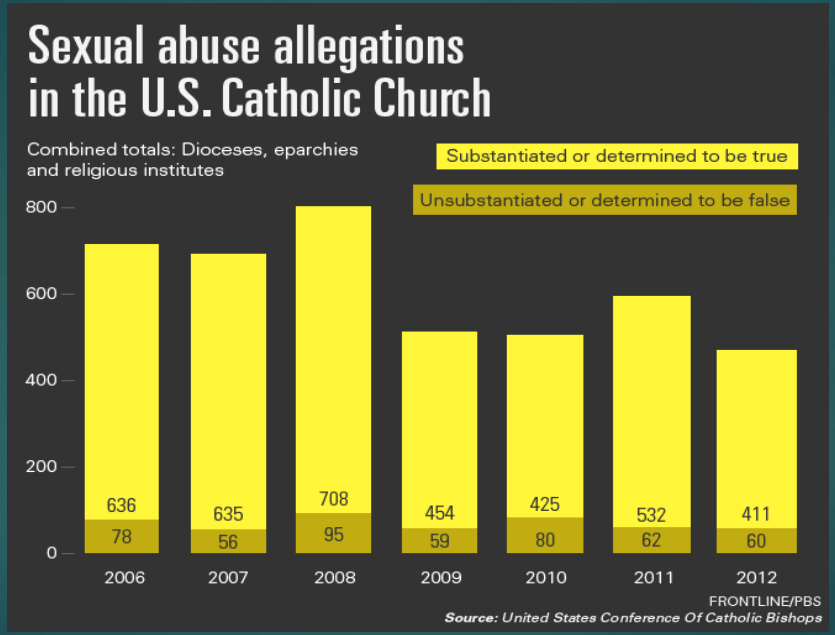
Sex-based accusations create a particularly significant exposure

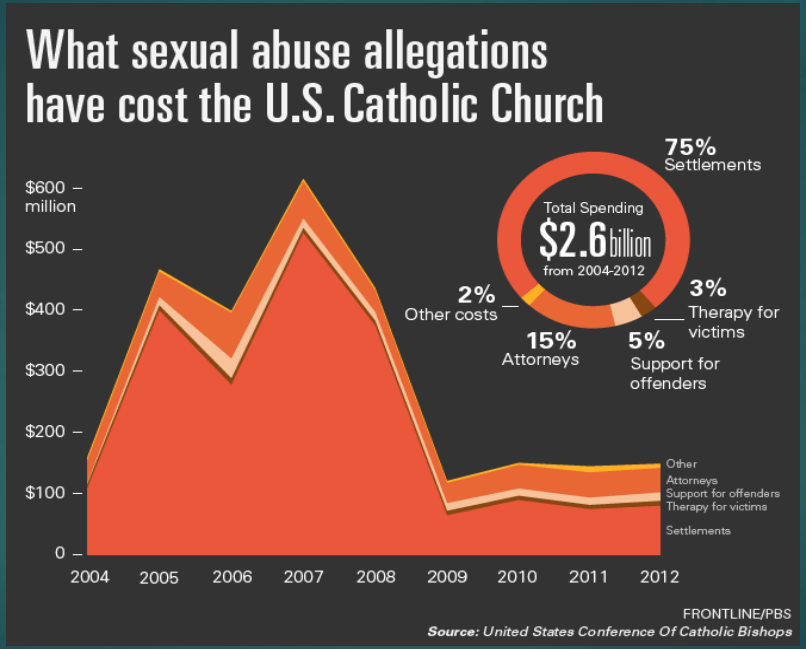
Ability to mitigate the associated costs may determine survival

2018

USA Gymnastics declared bankruptcy in response to litigation over Larry Nassar's sexual abuse of young female athletes.

Michigan (2018) 90 day window opened for victims of Larry Nassar to revive expired claims


Sexual abuse allegations in the U.S. Catholic Church
Combined totals: Dioceses, eparchies and religious institutes
Substantiated or determined to be true
Unsubstantiated or determined to be false
800
600
400
200
0
636
78
635
56
708
95
454
59
425
80
532
62
411
60
2006
2007
2008
2009
2010
2011
2012
FRONTLINE/PBS
Source: United States Conference Of Catholic Bishops


What sexual abuse allegations have cost the U.S. Catholic Church
$600 million
$500
$400
$300
$200
$100
0
2004
2005
2006
2007
2008
2009
2010
2011
2012
Total Spending
$2.6 billion
from 2004-2012
75% Settlements
3% Therapy for victims
5% Support for offenders
15% Attorneys
2% Other costs
Other
Attorneys
Support for offenders
Therapy for victims
Settlements
FRONTLINE/PBS
Source: United States Conference Of Catholic Bishops

Sex Abuse Settlements

- In 2007 the Archdiocese of Los Angeles agreed to a **$660-million** settlement with 508 people who have accused priests of sexual abuse
- More than $114 million has been promised in previous settlements, bringing the total liability for clergy misconduct in the Los Angeles Archdiocese to more than **$774 million**.
- In 2005, Orange County, CA, Diocese of Orange paid out $100 million to 90 alleged victims who had filed lawsuits. As part of the settlement, the diocese released thousands of documents indicating a high-level cover-up of priest abuses.
- Boston settled its claims for $157 million – in the Boston Archdiocese scandal, victims faced "charitable immunity" laws that limited the amount of financial damages they could recover.
- Portland, Ore. settled at $129 million.

Fiscal Impact of the New York Child Victims Act

- Damages claimed include pain and suffering and medical care and treatment for depression, PTSD, substance abuse, alcoholism, and suicide, among many other health impacts.
- Approximately 1/3 of child sex abuse victims develop PTSD.
- The correlation between trauma and substance abuse is particularly strong for adolescents with PTSD; studies indicate that up to 59% of young people with PTSD subsequently develop substance abuse problems. http://www.nctsn.org/sites/default/files/assets/pdfs/SAToolkit_1.pdf
- 1 in 3 New Yorkers receive Medicaid - Medicaid liens placed on settlement funds for the coverage directed to the problems arising from the sex abuse.
- It is widely agreed that 20-25% of children are sexually abused by the age of 18.
- Enactment of the "window" portion of this Act will lead to reimbursement of New York Medicaid for at least $250,000,000 -- when Medicaid liens are paid out of settlements.
- This is a conservative figure, which assumes that approximately 2000 victims will take advantage of the window and that, on average, they will receive $ 250,000 in settlement, which is below the national average of approximately $350,000. Medicaid often accounts for roughly 50% of the settlement. 2000 x $250,000 x .5 = $250,000,000.
- The number of cases that have been filed pursuant to windows have ranged from 2 to 1,175.
- The most recent window to close was in Minnesota, where 1,000 victims obtained settlements.
- New York's population is 3.5 times larger than Minnesota, and, therefore, one could expect 3,500 to take advantage of the opportunity to litigate through the look back window.
- If 3,500 lawsuits are filed and settled at an average of $250,000, we are looking at a total of over $437 Million in Medicare liens alone (and approximately **$875 Million in settlement payouts**).

The Economic Burden of Child Maltreatment in the United States And Implications for Prevention

Child Abuse Negl. 2012 Feb; 36(2): 156–165.
Published online 2012 Feb 1. doi: 10.1016/j.chiabu.2011.10.006

- The estimated average lifetime economic cost per victim of nonfatal child maltreatment is $210,012 in 2010 dollars (not accounting for pain and suffering damages), including:
- $32,648 in childhood health care costs;
- $10,530 in adult medical costs;
- $144,360 in productivity losses;
- $7,728 in child welfare costs;
- $6,747 in criminal justice costs; and
- $7,999 in special education costs.



- There is 10-year pattern of liability insurance companies denying coverage for sexual assault claims.
- Often on the theory that the act alleged is intentional in nature and not an "occurrence" which can trigger coverage.

See, e.g., Green Chimneys School for Little Folk v. Nat'l Union Fire Ins. Co. of Pittsburgh, PA, 244 A.D.2d 386, (1st Dep't 1997); Public Mutual Ins. Co. v. Camp Raleigh, 233 A.D.2d 273 (1st Dept. 1996) ("the inclusion in the underlying complaint of causes of action sounding in negligent hiring and supervision does not alter the fact that "the operative acts giving rise to any recover are the intentional sexual assaults.'"); but see Public Service Mut. Ins. Co. v. Goldfarb, 53 N.Y.2d 392, 399, (N.Y., 1981) (holding that "[w]hether [coverage for underlying sexual abuse] is permissible depends upon whether the insured, in committing his criminal act, intended to cause injury").

- Many policies adopt the definition of "occurrence" which requires that a claim arise from an "accident."
- Whether allegations of sexually-based offenses are encompassed by the term "accident" under these policies, then, will determine whether there is coverage.



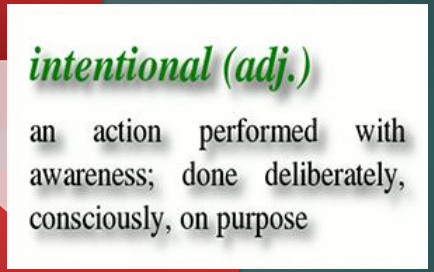


New York state courts have long held that the injuries alleged to have been caused by sexual abuse of minors is "inherent in the nature of the acts alleged" so that the injuries were, as a matter of law, intentionally caused by the perpetrator, precluding coverage under most liability insurance policies.

See generally *Allstate Ins. Co. v. Mugavero*, 79 N.Y.2d 153 (1992).

"Intentional Act" exclusion scope varies with the circumstances and the jurisdiction interpreting the policy.

Sexual molestation is often presumed to be an act of intentional harm, subjective intent notwithstanding.





- The New York Court of Appeals, however, has called the holdings in those cases into question.
- It is possible that coverage may exist for sexual abuse and other intentional torts, even when a policy's definition of "occurrence" requires an "accident."

Whether an intentional act is attributable to the employer is incident-specific.

If the employer instructs security guards to use force in performing their duties, the employer may be liable for a patron's injuries which result from the intentional use of such force.

If the facts demonstrate that an employee was not furthering the purpose of the entity's business, the employer will not be liable for the intentional harm which he caused.

In an attempt to circumvent the intentional act exclusion, plaintiffs' attorneys seek to blame those in a supervisory capacity for negligently hiring, retaining or handling the offender.

Policies drafted more recently contain specific exclusions for claims of sexual "molestation," "physical abuse," and/or "sexual harassment."

While older policies exclude acts based upon the actor's status

Newer ones focus on the acts themselves, regardless of who the actor is.

RJC v. Republic Franklin Insurance, 2 N.Y.3d 158 (2004) NY Court of Appeals

- Policy only covers an "accident" (i.e., not acts which RJC "expected or intended").
- They reasonably could have anticipated that respondent superior would govern the corporate entity's responsibility.
- Since the employee departed from his duties solely for personal benefit—not to further a business objective—his actions were "unexpected, unusual and unforeseen" from RJC's viewpoint.
- Accordingly, the conduct was a covered "accident," and not excluded by the "expected or intended" clause."
- Had the court found that RJC condoned or tolerated these actions, the court probably would have attributed the acts to the employer.

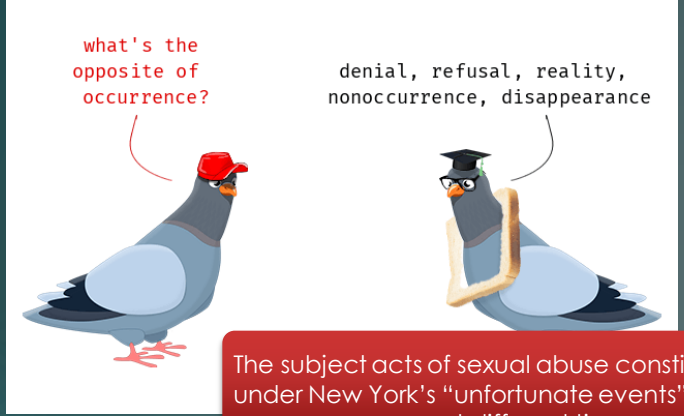
Roman Catholic Diocese v. National Union Fire Ins., 969 N.Y.S.2d 808 (2013).

- New York's High Court addressed insurance coverage for sexual abuse claims
- The Diocese had sued its insurer to recover the $2 million it paid a minor who claimed a priest sexually abused him over six years at multiple locations.
- The separation of insurance condition requires the insurer to view the policy exclusions for the emplo
  employee separately.



So Many Policies, So Little Time . . .

- The pro rata allocation methodology which the Court of Appeals approved in Consolidated Edison Co. of New York v. Allstate Insurance Co., 774 N.E.2d 687 (2002) was consistent with the allegations of "bodily injury," and with the clear and unambiguous language of the CGL policies.
- the Second Department noted that the allocation method advocated by the Diocese, the "joint and several" method, conflicted with both New York law and the CGL policies' requirement that any "bodily injury" take place during the applicable policy period in order to be covered (but not before or after that period).
- Thus, because the victim allegedly sustained "bodily injury" during several different policy periods in a six-year span, the Appellate Court held that the Diocese's settlement must be allocated on a pro rata basis across all of the periods



The subject acts of sexual abuse constituted multiple occurrences under New York's "unfortunate events" test because they occurred over many years, at different times, and at various locations.

Accordingly, the Appeals Court held that the Diocese was required to exhaust a separate $250,000 SIR for each CGL policy

Also it rejected the Diocese's argument that the policies' definition of "occurrence" should be construed as permitting it to aggregate the multiple acts of sexual abuse as a single occurrence.



- The requirement that a carrier timely disclaim coverage under §3420(d) did not apply to National Union's SIR-based defense.
- The Appellate Court relied upon the statute's plain language and two Appellate Division, First Department, decisions on the issue.

The Court of Appeals affirmed the Second Department's decision.



Ruling that National Union had not waived its "multiple occurrence" argument.



That the Diocese was required to exhaust a separate $250,000 SIR per occurrence for each CGL policy.



That the Diocese's settlement must be allocated across each of the seven policy periods.

- The Court noted that while §3420(d) precludes an insurer from denying coverage where the bases are not timely asserted, the statute does not apply to defenses that simply limit the insurer's ultimate liability.





- This is the first time the court addressed the meaning of "occurrence" in the context of claims based on numerous incidents of sexual abuse of a minor by a priest, which spanned several years and several policy periods.

Consolidated Edison Co. of N.Y. v. Allstate Ins. Co.,

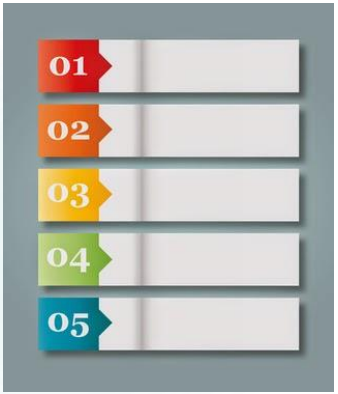
It is well established that "[i]n determining a dispute over insurance coverage, [the court] first look to the language of the policy." *Consolidated Edison Co. of N.Y. v. Allstate Ins. Co.*, 98 N.Y.2d 208, 222, (2002)

In doing so, a court must "construe the policy in a way that 'affords a fair meaning to all of the language employed by the parties in the contract and leaves no provision without force and effect.'" *Consolidated Edison*, 98 N.Y.2d at 222

The Unfortunate Event Test Rules – Can't Aggregate Three Accidents into One

The Court adopted the "unfortunate event" test, specifically rejecting other approaches that would equate the number of occurrences with either "the sole proximate cause" or by the "number of persons damaged."

Arthur A. Johnson Corp. v. *Indemnity Ins. Co. of N. Am.*, 7 N.Y.2d 222, 227 (1959)



- The New York Court of Appeals addressed how to determine whether "there [are] one or more [occurrences] within the meaning of [an insurance] clause limiting coverage to a certain amount per [occurrence]."

Appalachian Ins. Co. v. General Elec. Co., 8 N.Y.3d 162, 173 (2007).

The court stated that absent policy language indicating an intent to aggregate separate incidents into a single occurrence.

The unfortunate event test should be applied to determine how occurrences are categorized for insurance coverage purposes.

The Unfortunate Event Test

Whether there is a close temporal and spatial relationship between the incidents giving rise to injury or loss.

Or if the incidents can be viewed as part of the same causal continuum, without intervening agents or factors.

- In looking at the definition of "occurrence," the court determined, that nothing evinces an intent to aggregate the incidents of sexual abuse into a single occurrence.



Arthur A. Johnson Corp. v. Indemnity Ins. Co. of N. Am., 7 N.Y.2d 222 (1959)

- Clearly, incidents of sexual abuse that spanned a six-year period and transpired in multiple locations lack the requisite temporal and spatial closeness to join the incidents.
- "(W)e conclude that the collapses of separate walls, of separate buildings at separate times, were in fact separate disastrous events, and, thus, two different accidents within the meaning of the policy")."

- The court explained while the incidents shared an identity of actors, “it cannot be said that an instance of sexual abuse that took place in the rectory of the church in 1996 shares the same temporal and spatial characteristics as one that occurred in 2002.



Hartford Acc. & Indem. Co. v. Wesolowski, 33 N.Y.2d 169 [1973] The Causal Continuum Factor

The court held that a three-car collision amounted to a single occurrence "[w]here the insured's automobile struck one oncoming vehicle, ricocheted off and struck a second more than 100 feet away.

The two collisions here occurred but an instant apart" and "[t]he continuum between the two impacts was unbroken, with no intervening agent or operative factor.

Contrary to the Diocese's and dissent's view that the negligent supervision was the sole causal factor, and thus requires a finding of a single occurrence.

The unfortunate event test requires us to focus on "the nature of the incident[s] giving rise to damages." *Appalachian*, 8 N.Y.3d at 171

As stated in *Appalachian*, cause should not be conflated with the incident.



- Each incident involved a distinct act of sexual abuse
- Interspersed over an extended period of time
- Perpetrated in unique locations
- It cannot be said, that these incidents were precipitated by a single causal continuum.

Multiple, Repeated Occurrences



Sexual abuse does not fit neatly into the policies' definition of "continuous or repeated exposure" to "conditions."

Lee v. Interstate Fire & Cas. Co., 86 F.3d 101, 104 (7th Cir. 1996)

- This "sounds like language designed to deal with asbestos fibers in the air, or lead-based paint on the walls, rather than with priests and choirboys. A priest is not a 'condition' but a sentient being".



State Farm Fire & Cas. Co. v. Elizabeth N.
9 Cal. App. 4th 1232, 1235 (1992)

- In which two children attending a day care center had been sexually molested over a period of a month or more.

- The U.S. Court of Appeals for the First District, Division 3, of California held that the multiple instances of sexual molestation constituted a single occurrence for insurance coverage purposes.



- The New York Court of Appeals declined to follow that holding because of what they believed to be "materially distinguishable differences."
- The policy in Elizabeth N. expressly provided that "[a]ll bodily injury and property damage resulting from any one accident or from continuous or repeated exposure to substantially the same general conditions shall be considered to be the result of one occurrence." Id. at 1236.
- There is no language within National Union's policies indicating an intent to aggregate the sexual abuse into a single occurrence.



The California Court of Appeal reasoned that the negligent failure of the day care owner to adequately care for, and supervise the children, subjected them to repeated molestation by the perpetrator.

The parties in *Elizabeth N.* agree[d] that the number of occurrences depends on the cause of injury rather than the number of injurious effects.





THE CALIFORNIA COURT OF APPEAL REASONED THAT THE NEGLIGENT FAILURE OF THE DAY CARE OWNER TO ADEQUATELY CARE FOR, AND SUPERVISE THE CHILDREN, SUBJECTED THEM TO REPEATED MOLESTATION BY THE PERPETRATOR.

NEW YORK APPLIED THE UNFORTUNATE EVENT TEST, AN INQUIRY PRIMARILY FOCUSED ON THE NATURE OF THE INCIDENT[S] GIVING RISE TO DAMAGES.

Wisconsin Supreme Court Finds No Insurance Coverage for Employers Sued for Negligent Supervision of Employees Committing Assault

- 20 years ago, he Wisconsin Supreme Court ruled in Doyle v. Engelke, 219 Wis.2d 277, 580 N.W.2d 245 (1998) that a standard commercial general liability (CGL) policy covered employers whose negligence in hiring or supervising an employee led to an intentionally caused injury by that employee.
- In the recent decision of Talley v. Mustafa, 2018 WI 47, Doyle has now been at least partially overruled. Majority opinion reasoned that coverage was barred due to the intentional conduct of Scott in punching Talley in the face, notwithstanding the allegation that it was Mustafa's negligence in supervising Scott that led to that event.
- The Court held that there was no "occurrence" triggering coverage, since "occurrence" was defined (in relevant part) as an "accident" and Scott's act of punching Talley in the face was not an accident.

This is the first time that New York's highest court addressed whether an insurer can waive its right to assert an argument based upon the number of occurrences or whether a particular allocation method should be employed.

Due to the fact that these issues often arise in coverage disputes, this prong of the court's decision has implications beyond the CGL context.





- If the Court of Appeals adopted the Diocese's waiver argument, carriers could have faced enormous pressure to assert their positions on this defense in the initial coverage positions they communicate to their insureds or risk waiving them.

This decision is also the first in which the

New York Court of Appeals addressed the number of occurrences and allocation issues in the context of conduct-based offenses such as sexual assault and misconduct.





The court's holding will likely have implications to similar coverage disputes arising under New York law.

Nationwide, case law is less developed and Courts in other jurisdictions may look to these New York court holdings for guidance on policy interpretation and application.

- Unlike New York State, many state courts do hold that claims involving multiple injuries or acts nonetheless constitute a single occurrence under CGL policy wording if the injuries/acts can be traced back to a single cause.
- In reaching that conclusion, these courts sometimes rely upon the same definition of "occurrence" contained in the Diocese CGL policies, which includes "continuous or repeated exposure to the same general harmful conditions."



The Court of Appeals ruling on the "number-of-occurrences" issue may influence how other jurisdictions which employ the "sole cause" test determine the issue.



Questions?

Florina Altshiler, Esq.
Partner

RUSSO & TONER LLP
12 Fountain Plaza, Suite 600,
Buffalo NY 14202
Tel: (716) 800-6389

faltshiler@russotoner.com