Lawyer Insights

Md. Abuse Law Makes Past Liability Coverage Review Vital

By Michael Levine and Olivia Bushman
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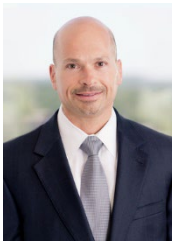


On April 11, Maryland Gov. Wes Moore signed into law the Child Victims Act, allowing Maryland to join the growing number of states to rejuvenate previously time-barred lawsuits by victims of child sexual abuse against public school boards, other government entities and private institutions.

The act also increases the statutory cap on civil damages for child sexual abuse. Damages against public school boards and other 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.

The Maryland act follows those passed in other states, like California and New York, which paved a path for abuse victims to bring previously time-barred claims based on abuse alleged to have 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 — e.g., one or two years — during which survivors were able to file previously time-barred claims. Claims that precede the limited lookback period, no matter how meritorious, still remain time-barred in those jurisdictions.

Institutions facing a potential wave of lawsuits brought under Maryland's act will likely need to examine prior insurance policies 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 1940s.

It is likely, therefore, that lawsuits seeking damages for sexual abuse claims will implicate coverage under commercial general liability policies, professional liability policies and employment practices policies issued over the past 80 years or longer.

Older policies often contain significantly different terms than more recent policies. For example, unlike modern 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.

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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 recently issued 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.

Likewise, where a policy contains an aggregate limit of liability, once that limit is reached and the policy is exhausted, no further defense will be afforded.

Often, older insurance policies cannot be readily located. However, the inability to locate copies of the policies should not be a deterrent. Where a policy has been lost or otherwise cannot be located in its entirety, secondary evidence demonstrating its existence and terms may be used to establish coverage.

Such evidence may include declaration pages or financial documents showing paid premiums. It may also be possible to 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 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 claims.

Where abuse allegations trigger coverage under multiple policies, the majority of jurisdictions follow a pro rata allocation of liability — where each insurance carrier is allocated a proportional share of the total loss

covered under the various policies for the portion of the loss occurring during its policy period.

A minority of states follow an all-sums approach — where the policyholder can collect its total liability under any one triggered policy, up to policy limits. In 2020, the Maryland Supreme Court confirmed Maryland's adoption of the majority pro rata allocation rule in the long-tail context.[1]

It may be helpful to create a coverage chart to help determine which policies are available for various years of coverage. When assessing claims, a coverage chart can help determine which policies are triggered by the allegations, as well as each insurer's time on the risk.

For example, where available policies provide coverage on an occurrence basis, pro rata allocation will spread coverage across all triggered years — beginning with the first year in which harm occurred, and ending with the last year in which harm triggered. Knowing which policies remain available to respond to sexual abuse claims will be critical.

Years where coverage has been exhausted, or where the insurer may be insolvent, need to be considered. Finally, where multiple insurers contribute to the costs of the policyholders' defense, a joint defense funding agreement may be necessary to, among other things, head off disagreement over allocation and responsibility for periods of exhaustion or other unavailability of coverage.

Notes:

1. Rossello v. Zurich Am. Ins. Co., 468 Md. 92, 226 A.3d 444 (2020).

Michael Levine *is a partner in the firm's insurance coverage group in the firm's Washington office. Mike is a Legal 500 and Chambers USA-ranked lawyer with more than 25 years of experience litigating insurance disputes and advising clients on insurance coverage matters. He can be reached at +1 (202) 955-1857 or mlevine@HuntonAK.com.*

Olivia Bushman *is an associate in the firm's insurance coverage group in the firm's Washington office. Olivia has represented clients in all stages of complex insurance coverage actions, with matters involving environmental liability, mass torts, products liability, and bad faith. She can be reached at +1 (202) 778-2207 or obushman@HuntonAK.com.*