INSURANCE COVERAGE FOR REVIVED CLAIMS UNDER THE NY CHILD VICTIMS ACT

MILLER | FRIEL
PLLC

PLI Presentation

September 11, 2019

TOPICS

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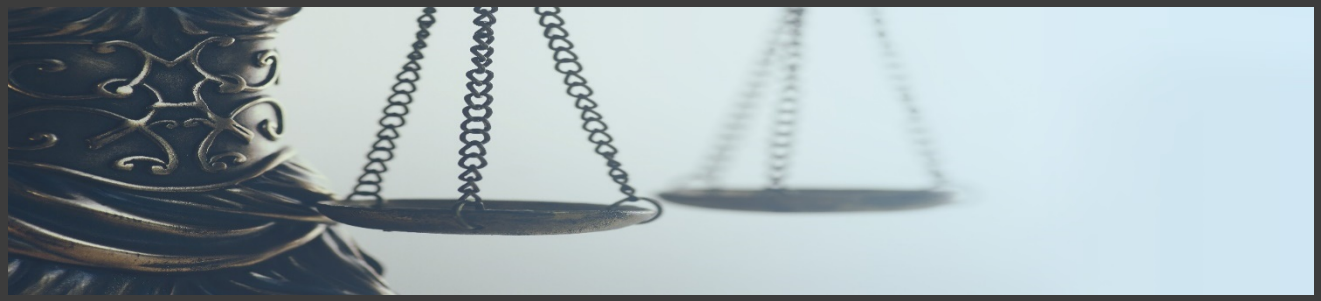

1. Overview of NY Child Victims Act
2. Similar Laws in Other States
3. Policies Providing Coverage
4. Notice
5. Insurer Information Requests
6. Alleged Defenses to Coverage
7. Settling Claims – Best Practices

1. OVERVIEW OF NY CHILD VICTIMS ACT

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- **New York Law** (N.Y. C.P.L.R. 214-g (McKinney 2019).
  - **Revives claims for childhood sexual misconduct or abuse that might otherwise be barred by statutes of limitation.**
  - **The Act creates a one-year look-back window for claimants to file claims against their alleged abusers.**
  - **The statute went into effect on February 14, 2019 with a mandatory six-month waiting period. The six-month moratorium lifted on August 14, 2019. Claimants have a full year to file any such revived claims, or until August 14, 2020.**

1. OVERVIEW OF NY CHILD VICTIMS ACT

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- New York Child Victims Act lawsuits
  - Window opened on August 14, 2019:
    1. By 5:00 a.m., 200 lawsuits filed;
    2. Over 400 lawsuits filed the first day;
    3. Over 500 filed in the first two days.
  - Defense lawyers anticipate more.
  - Plaintiffs' lawyers contend that only a small portion of potential lawsuits have been filed.

2. SIMILAR LAWS IN OTHER STATES

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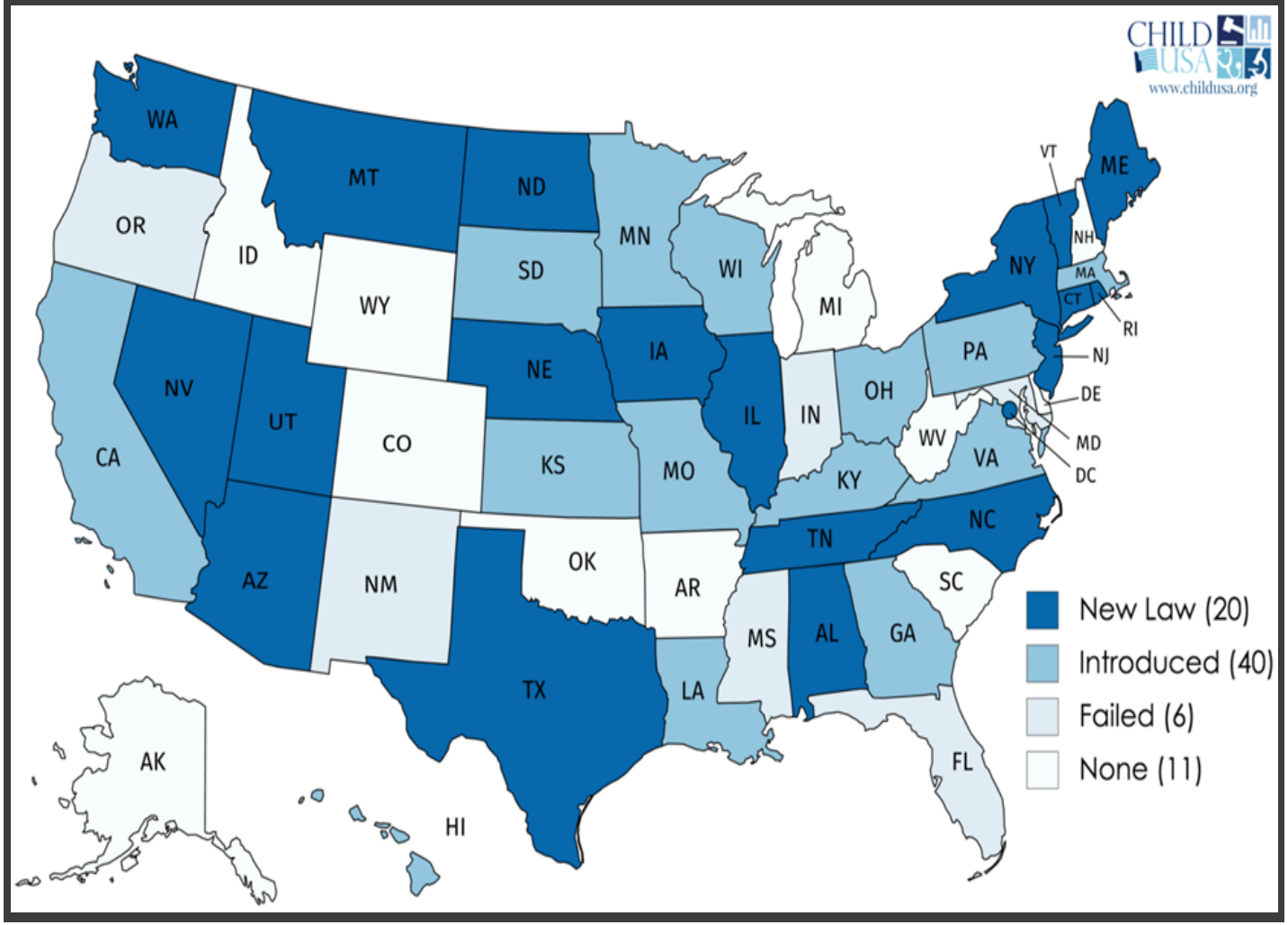
- **Other Jurisdictions**



2. SIMILAR LAWS IN OTHER STATES

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- **Other Jurisdictions**

1 = Revival window for claims against perpetrator doctors only

2 = Revival window, revival up to a certain age or revival of all claims, against perpetrators only or private organizations only

3 = Revival window or revival up to age 30-54, for claims against perpetrators and private organizations

4 = Revival window for 2 or more years or revival up to age 55, for claims against perpetrators, private organizations and government

5 = Revival of all expired claims against perpetrators, private organizations and government without a time limitation

The Sean P. McIlmail Statute of Limitations Research Institute at CHILDUSA

CHILDUSA THE THINK TANK FOR CHILD PROTECTION

www.childusa.org

3. POLICIES PROVIDING COVERAGE

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- Two types of policies most commonly provide coverage:
  - General Liability (GL) – occurrence-based policies.
  - D&O/EPL – claims-made policies.
- Each kind of policy raises different issues.

3. POLICIES PROVIDING COVERAGE

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- General Liability (GL) – occurrence-based policies:
  - Provide coverage for "bodily injury" taking place during the policy period.
  - Bodily injury typically includes ongoing emotional distress.
  - Multiple years triggered.
  - One policy may provide an unlimited defense (defense costs do not erode limits).
  - Multiple policies provide additional limits for settlement.

3. POLICIES PROVIDING COVERAGE

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- General Liability (GL) – occurrence-based policies:
  - Lost policies can be an issue.
  - Abuse may be alleged over a period of decades (1960s, 1970s, 1980s).
  - All policies issued during those years, and thereafter, could provide coverage.
  - Consider hiring an insurance archaeology group.
  - Best practice for insurance companies is to recognize coverage so long as a policyholder can show that a policy was issued, even if the actual policy can no longer be located.

3. POLICIES PROVIDING COVERAGE

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- D&O/EPL – claims-made policies:
  - Many D&O or management liability policies expressly cover sexual harassment. *See Village of Piermont v. Am. Alt. Ins. Corp.*, 151 F. Supp. 3d 438, 441 (S.D.N.Y. 2015) (sexual assault covered under D&O policy).
  - Allegations against institutions for actions of their employees often fall squarely within this coverage.
  - Current D&O policies may contain sexual conduct exclusions, but EPL coverage grants may not contain such exclusions.
  - The applicable claims-made policy is the one in force when a claim was made.

4. NOTICE

4. NOTICE

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- **Notice law varies from state to state**
  - The vast majority of states follow the notice-prejudice rule, where the insurer must prove that it was prejudiced by the alleged late notice.
  - Some states follow other standards.
  - Choice of law can be critical:
    - Where a lawsuit is filed against a policyholder does not determine what state's law applies with respect to notice.
    - Choice-of-law analysis seldom provides a bright-line answer.

4. NOTICE

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- **Practical advice for providing notice**
  - Notice can be one of the most complicated and important things that a policyholder does.
  - Oftentimes left to insurance brokers:
    - Insurance brokers know the insurance market as well as insurance industry custom and practice.
    - However, insurance brokers may not have historic general liability insurance information.
    - Insurance brokers also don't know how the law treats coverage.
  - If the case is significant, have coverage counsel provide notice.

5. INSURER INFORMATION REQUESTS

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- Once notice is provided, policyholders should expect an onslaught of requests for information.
- Information requests are inapplicable to defense coverage, which is based on policy language and allegations only.
- Information requests are used to create defenses that may not otherwise not exist.
  - They are typically onerous.
  - Some requests may be impossible to fulfill.
  - Yet, they typically require a response.

5. INSURER INFORMATION REQUESTS

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- Guidelines:
  - Demand that the insurer provide a coverage determination with respect to defense.
  - Confirm that the insurer has consented to defense counsel.
  - Explain the obvious – that discovery has not yet taken place, so it is impossible to provide the information requested.
  - Respond as appropriate in good faith.
  - Understand that information requests may be designed to be impossible – the insurer may be trying to build a case for breach of the duty to cooperate.

6. ALLEGED DEFENSES TO COVERAGE

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- Overview of coverage litigation.
  - Case law analysis found in Munich RE 2010 overview entitled, "Coverage and Liability Issues in Sexual Misconduct Claims."
  - Multiple coverage lawsuits have been filed in most jurisdictions.
  - Recent lawsuits filed:
    - *Archdiocese of N.Y. v. Ins. Co. of N. Am.*, (N.Y. Sup. Ct. July 1, 2019);
    - *Rockefeller Univ. v. Aetna Cas. & Sur.*, (N.Y. Sup. Ct. Aug. 6, 2019).

6. ALLEGED DEFENSES TO COVERAGE

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- Common insurer defenses include:
  - Sexual abuse exclusions.
  - No occurrence / injury neither expected nor intended.
  - Policy not triggered (alleged misconduct took place outside of the insurer's policy period).

6. ALLEGED DEFENSES TO COVERAGE

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- **Sexual Abuse Exclusions:**
  - Not standard form.
  - Favorable versions provide for defense.
  - As with all exclusions, interpreted in favor of coverage.
  - Issues:
    - Subjective vs objective intent.
    - Default rule – severable. May apply to individual bad actor, but not to organization.
    - Allegations of negligence, false imprisonment, etc., may not trigger exclusion. *See Village of Piermont v. Am. Alt. Ins. Corp.*, 151 F. Supp. 3d 438, 451 (S.D.N.Y. 2015) (exclusion invalid as to false imprisonment claims).

6. ALLEGED DEFENSES TO COVERAGE

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- No occurrence / injury neither expected nor intended.
  - "Occurrence" defined as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions."
  - Definition of occurrence: "which is neither expected nor intended from the standpoint of the insured" (or in exclusion).
  - Two issues raised:
    - Number of occurrences.
    - Expected or intentional vs. negligent conduct.

6. ALLEGED DEFENSES TO COVERAGE

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- Occurrence – How many occurrences?
  - Each alleged victim, each act of misconduct, each offender, or something else.
  - New York applies the "unfortunate event" test. *Roman Catholic Diocese of Brooklyn v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa.*, 991 N.E.2d 666, 672 (N.Y. 2013).
  - The unfortunate event test requires consideration of "whether there is a close temporal and spatial relationship between the incidents giving rise to injury or loss, and whether the incidents can be viewed as part of the same causal continuum, without intervening agents or factors." *Id.*

6. ALLEGED DEFENSES TO COVERAGE

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- Occurrence / Neither expected nor intended – intentional vs. negligent conduct.
  - Insurers tend to paint with a broad brush, arguing that the policies don't cover intentional conduct.
  - Insurance carrier arguments, at most, can be considered with respect to individuals accused of wrongdoing.
  - Not applicable to organizations for at least two reasons:
    - No institution intends to harm children;
    - Claims against organizations are negligence-based.

6. ALLEGED DEFENSES TO COVERAGE

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- **Trigger:**
  - All policies in force during the time period of alleged bodily injury are triggered.
  - Multiple policies are likely triggered.

6. ALLEGED DEFENSES TO COVERAGE

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- **Trigger: Two accepted variations of rule:**
  - **"All Sums" – policyholder can collect its total liability under any triggered policy, up to policy limits. *Matter of Viking Pump, Inc.*, 27 N.Y.3d 244, 255-56 (N.Y. 2016); *Keyspan Gas E. Corp. v. Munich Reins. Am., Inc.*, 31 N.Y.3d 51, 58 (N.Y. 2018).**
  - **"Pro Rata" – each insurance carrier is allocated a "pro rata" share of the total loss covered under the various policies for the portion of the loss occurring during its policy period. *Keyspan Gas,* 31 N.Y.3d at 58.**
  - **New York has not adopted a strict "all sums" or "pro rata" allocation rule. *Viking Pump*, 27 N.Y.3d at 257; *Keyspan Gas*, 31 N.Y.3d at 58.**

7. SETTLING CLAIMS – BEST PRACTICES

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- **Approach settlement in two phases:**
  - Defense.
  - Indemnity.

7. SETTLING CLAIMS – BEST PRACTICES

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- Defense
  - Create coverage chart.
  - Overlay allegations with appropriate trigger scenario.
  - Approach primary insurers on the risk for defense and ask them how they would like to proceed – pay 100 percent themselves or allocate amongst insurers.
  - Insurers typically prefer “pro rata” allocation model, even if model does not apply to defense costs.
  - Arrange for face-to-face meeting to reach defense funding agreement amongst insurers.

7. SETTLING CLAIMS – BEST PRACTICES

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- **Settlement**
  - **Unclear if early settlement is possible, but varies from case to case, policyholder to policyholder.**
  - **Volume of cases filed is challenging the courts. Discussions appear to be underway to structure ADR process.**
    - Insurers will participate in that ADR process.
    - Policyholders need to be prepared with respect to legal issues raised by insurers.
  - **Settlement of claim without insurer consent can be an issue.**

CONTACT INFORMATION

Mark E. Miller
Direct: (202) 760-3161
millerm@millerfriel.com

MILLER | FRIEL
PLLC