INSURANCE COVERAGE ISSUES PRESENTED BY CHILD VICTIMS ACT LEGISLATION

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In recent years, states across the country, such as California, Minnesota, New York and New Jersey, have passed Child Victims Act (CVA) legislation. Such laws open a window for people who allege they were victims of sexual abuse as minors, enabling them to assert claims against abusers and/or the institutions that employed them that otherwise would have been barred by their state's statute of limitations.

In New York, during the two-year window opened by its Child Victims Act, over 10,000 lawsuits were filed against various organizations such as schools, municipal entities, religious institutions, hospitals, camps, daycare centers and foster home coordinators, alleging liability under a variety of theories for injury caused by the accused abusers. These claims can result in significant financial exposure.

Claims against sexual abusers have long been held inherently intentional and are not covered by general liability insurance policies because the abusive conduct and resulting injury were not caused by an "accident" and were not "unexpected" or "unintended." Institutions that employed an accused perpetrator, however, often are sued on theories of negligent hiring, retention and/or supervision. Such institutions may assert that they are entitled to insurance coverage because they were unaware of their employee's abusive conduct and did not expect or intend the abuse or the claimant's injury to occur.

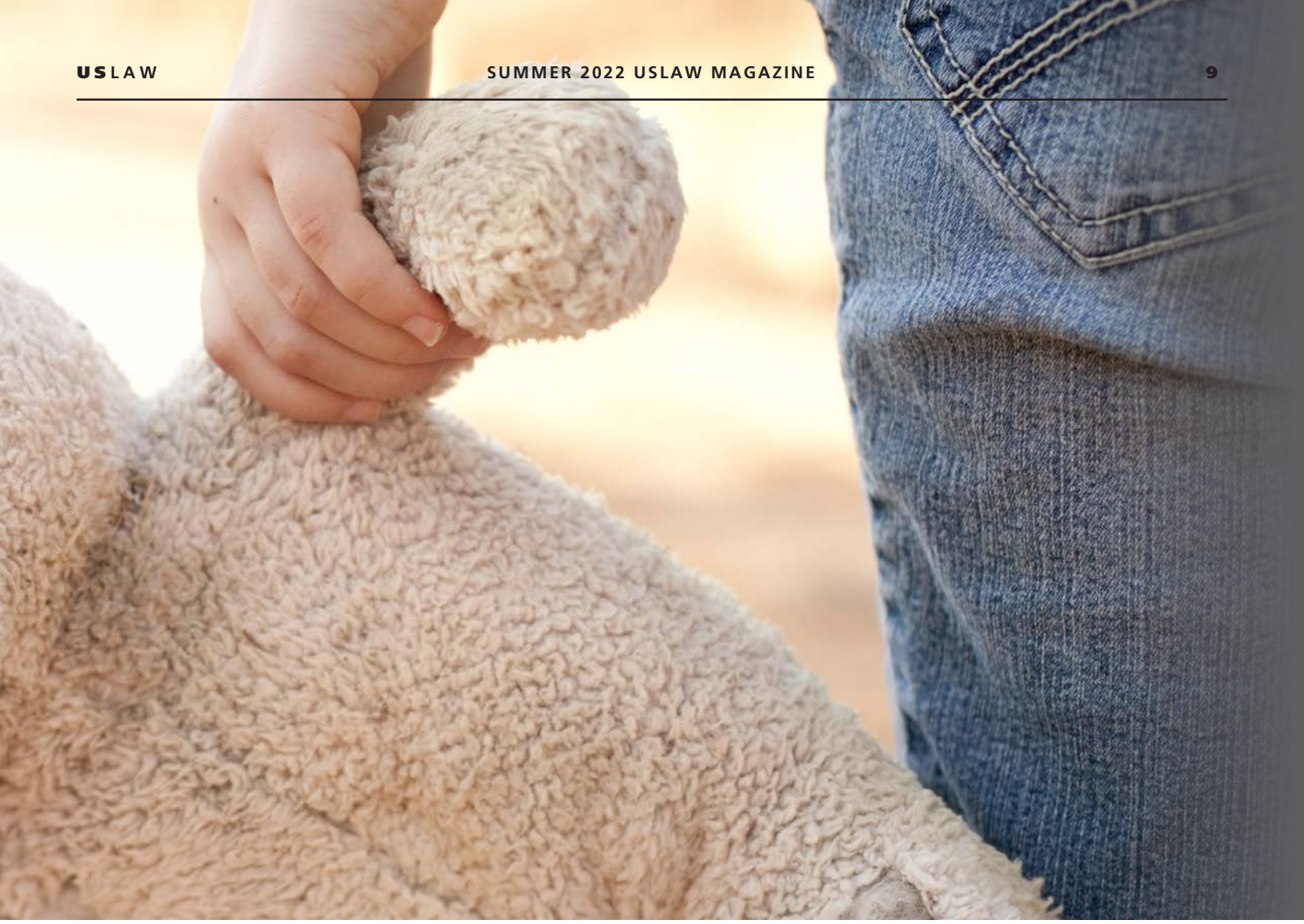
INSURANCE COVERAGE ISSUES PRESENTED BY CVA CLAIMS

Many CVA claims are based upon abuse that occurred decades ago. The insurance policies potentially applicable to such claims often are lost or incomplete. Both insureds and insurers should be familiar with their state's laws regarding the proof required to demonstrate the existence and applicability of a lost insurance policy.

Often, individual victims have suffered abuse from the same perpetrator at various times and locations over a multi-year period. A crucial coverage issue will be understanding how your state interprets the definition of "occurrence" under a liability insurance policy, and therefore, how many "occurrences" and, where applicable, how many self-insured retentions and policy limits potentially may be implicated. New York's highest court, for example, has held that "incidents of sexual abuse constituted multiple occurrences" where a claimant alleged sexual abuse by a single priest in different locations over nearly a six-year period. *Roman Catholic Diocese of Brooklyn v. National Union Fire Ins. Co. of Pittsburgh, Pa.*, 21 N.Y.3d 139, 969 N.Y.S.2d 808 (2013).

Where the abuse occurred over a period of years, issues are presented regarding trigger of coverage and allocation amongst insurers. Whether your state follows a pro rata allocation approach or allows for an all-sums allocation in instances of multi-year abuse may greatly affect how the loss is or is not covered. Additionally, how your state treats periods where the policyholder was uninsured, whether by choice or due to the unavailability of insurance in the marketplace or the insured's inability to locate its policies or establish their issuance, terms, conditions and limits, may greatly affect the availability of coverage.

Further, claims against an institution arising from repeated instances of sexual abuse potentially may lead to an award of punitive or exemplary damages. Many states specifically disallow the insurability of punitive damages, leaving the insured potentially subject to significant uninsured damages.



SEXUAL MISCONDUCT EXCLUSIONS

Since the mid-1980s, many insurers have endorsed their policies with sexual misconduct, molestation and/or abuse exclusions which preclude claims for coverage arising out of sexual or physical abuse or molestation. These exclusions are routinely held to apply to claims of negligence against the employer of a perpetrator or the owner of the premises where the act of abuse occurred. Some of these exclusions specifically exclude claims for sexual abuse acts arising from negligent hiring, retention or supervision.

EXPECTED / INTENDED DEFENSE

Liability insurance policies generally provide coverage for injury during the policy period caused by an "occurrence," which typically is defined to mean an "accident" and/or continuous or repeated exposure to conditions which unexpectedly and unintentionally result in bodily or personal injury. This language is generally interpreted to mean that injury or damage caused intentionally, or by acts which are expected or intended to cause harm, are not caused by an "occurrence." In other words, if the insured knew or should have known of an alleged abuser's proclivities to commit sexual abuse but failed to take any action to prevent such conduct, coverage may be barred.

In order to demonstrate liability under theories of negligent hiring, supervision and/or retention, claimants may attempt to show that the insured company or organization knew of an alleged abuser's conduct and proclivities but, instead of taking effective action to prevent such conduct, simply transferred the perpetrator to a different location. In such cases, however, this course of action would support an insurer's argument that the insured is not entitled to coverage. *See Diocese of Winona v. Interstate Fire & Cas. Co.*, 89 F.3d 1386 (1996) (Eighth Circuit, applying Minnesota law, held that Diocese which repeatedly transferred a perpetrator "expected or intended" that perpetrator to continue to abuse children and thus was not entitled to insurance coverage).

NOTICE CONDITIONS

Liability insurance policies generally contain conditions precedent to coverage requiring that notice of an occurrence which appears likely to implicate the policy must be provided "immediately" or "as soon as practicable". This condition is often implicated where the insured may have received notice of the abuse years prior, near the time when the abuse allegedly occurred, but did not notify the insurer. Whether such late notice bars coverage depends on the law in your state and may hinge upon whether or not the delay prejudiced the insurer.

MOVING FORWARD

A report from A.M. Best compared the potential financial implications of CVA suits to those of asbestos liabilities in the past. Potentially liable institutions and their insurers must be prepared to grapple with the significant coverage and financial issues these claims will undoubtedly raise if passed in their state.

Siobhain Minarovich is an associate with Rivkin Radler LLP and is a member of the firm's Insurance Coverage group. She concentrates her practice on insurance coverage litigation and related counseling. Prior to joining Rivkin, Siobhain represented both victims and defendant institutions in negligence suits arising from instances of sexual abuse.