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In Search of Gold: Child Victims Claims and the Quest for Lost Policies

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Amherst Schools settle sex abuse case from 1986 for $1 million

Jay Tokasz Nov 30, 2021 Updated Nov 30, 2021 4

District Superintendent Anthony Panella said the CVA cases "present unique and difficult challenges for school districts" because they often can't find documentation of insurance coverage policies from 35 to 45 years ago.

Throughout the state, hundreds of school districts may have little to no coverage on cases from decades ago, which could result in property taxes going up, job cuts and program cuts to pay for jury verdicts and settlements in CVA cases, the deputy executive director of the New York State School Boards Association told The [Buffalo] News in November.

What Are Revival or Lookback Statutes?

- Intent is to allow individuals to bring time barred claims seeking civil recovery for injuries related to childhood sexual assault
- Claims are generally allowed against not only perpetrator but also individuals or organizations which allowed abuse

The New York Child Victims Act

Three Main Components:

Passed February 14, 2019

- Opened lookback window allowing individuals who were sexually abused as minors the ability to make time barred claims for recovery against those who allowed or perpetrated the abuse
- Revised statute of limitations for claims of sexual abuse against a minor, allowing those claims to be brought until a claimant turns 55 years old
- Municipal defendants, including school districts and district employees, will no longer be entitled to service of a Notice of Claim for lawsuits arising from the conduct covered by CVA

The New York Child Victims Act: Lookback Period

- Created one-year (extended by then Governor Cuomo for an additional year) window where an individual who was sexually abused under the age of 18 could bring a claim against “any party whose intentional or negligent acts or omissions are alleged to have resulted in the commission of said [abuse]” N.Y. CPLR § 214-g

Over 9,500 lawsuits were filed within this two-year period

The New York Child Victims Act: Expansion of the Statute of Limitations

- The CVA revised CPLR § 208, adding sub-paragraph (b). Section 208 now provides that an action brought by a person alleging a sexual tort may be commenced against any party whose intentional or negligent acts or omissions are alleged to have resulted in the commission of the alleged abuse on or before the claimant turns 55 years old. CPLR § 208(b), (2019).

This opens the door to continued claims implicating decades old insurance policies.

What Claims Are Presented

- Negligence
- Negligent Employment, Retention, Supervision, and Entrustment
- Premises Liability
- Breach of Statutory Duty to Report
- Errors and Omissions Claims

What Claims Are Being Asserted?

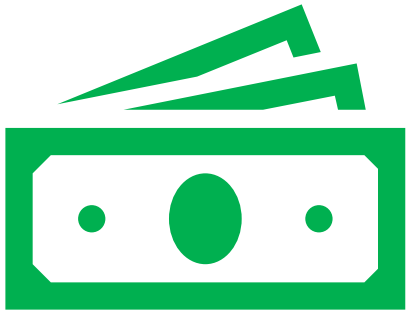
- Supervision, hiring, safety protection.
- Premises Liability:
  - Viable if the abuse occurred on the insured's property and the insured had the opportunity to control the abuser's conduct
  - May be viable even for "off property" claims

What Claims Are Being Asserted?

- Breach of Statutory Duty to Report
  - — Requires actual knowledge of the alleged abuse
  - — While a viable ground for relief, the application of typical expected or intended exclusions provide grounds for disclaimer
- Professional liability claims

The Sponsors Spoke of Justice …

- But it's often about **$$**. In most cases, the alleged abuser is not sued.
- Institutional defendants are the targets



- If the institutions had (and can find proof of coverage), it is under policies that date back scores of years
- Minimal limits, often aggregates but unlimited defense costs
- Insureds are being evaluated in 2021 dollars while the policies were in 1960's dollars

Where Does Insurance Come In

Institutions are making claims to their insurers, current and past, for coverage under CGL or Legal Liability policies

- CGL policies provide occurrence-based coverage, with limits in amounts correspondence to the time they were issued
- Legal Liability Policies provided claims-based coverage, but retro dates often dash hope for coverage.

Issues With Insurance

- Finding the right insurers
- Finding evidence of coverage
- Finding evidence of policy limits
- Finding terms and conditions

IRMI Writes:

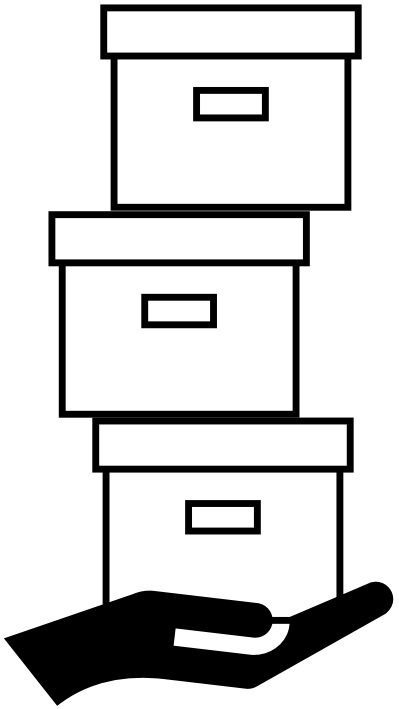
It is axiomatic that the party seeking coverage for a claim must establish that a relevant policy was purchased. Obviously, an insurance policy is a written contract and under the FRE for a party "to prove the content of a writing … the original writing … is required, except as otherwise provided by these rules" (FRE 1002). Producing the original, especially in the case of policies, is not always an option. When the original is not available, the FRE allow for secondary evidence to be used to establish existence of the original document under the following conditions:

1. The original is lost or destroyed;
2. The proponent of the document has not acted in bad faith; and
3. A diligent search for the original was unsuccessful. (FRE 1004).

https://www.irmi.com/articles/expert-commentary/judicial-reconstruction-of-missing-insurance-policies

Proving Coverage

- The policyholder has the initial burden of proving the terms, conditions, and limits of coverage
  - "a [policyholder] bears the initial burden of showing: (1) existence of an insurance contract with the [insurer] and, (2) that the policy potentially covers the loss asserted." *Bianchi v. Florists Mut. Ins. Co.*, 660 F.Supp.2d 434 (E.D.N.Y. 2009) (in nearly every jurisdiction)



Proving Coverage

The Majority Rule: A policyholder must prove the existence and applicability of coverage by a preponderance of the evidence.

- *Remington Arms Co. v. Liberty Mut. Ins. Co.*, 810 F.Supp. 1420 (Dis. Ct. Del. 1992).
  - The preponderance of the evidence standard is appropriate because, "the evidence used to establish the existence and contents of these policies is usually comprised of business records and standard forms made by and found in the possession of the party against whom they are being offered."

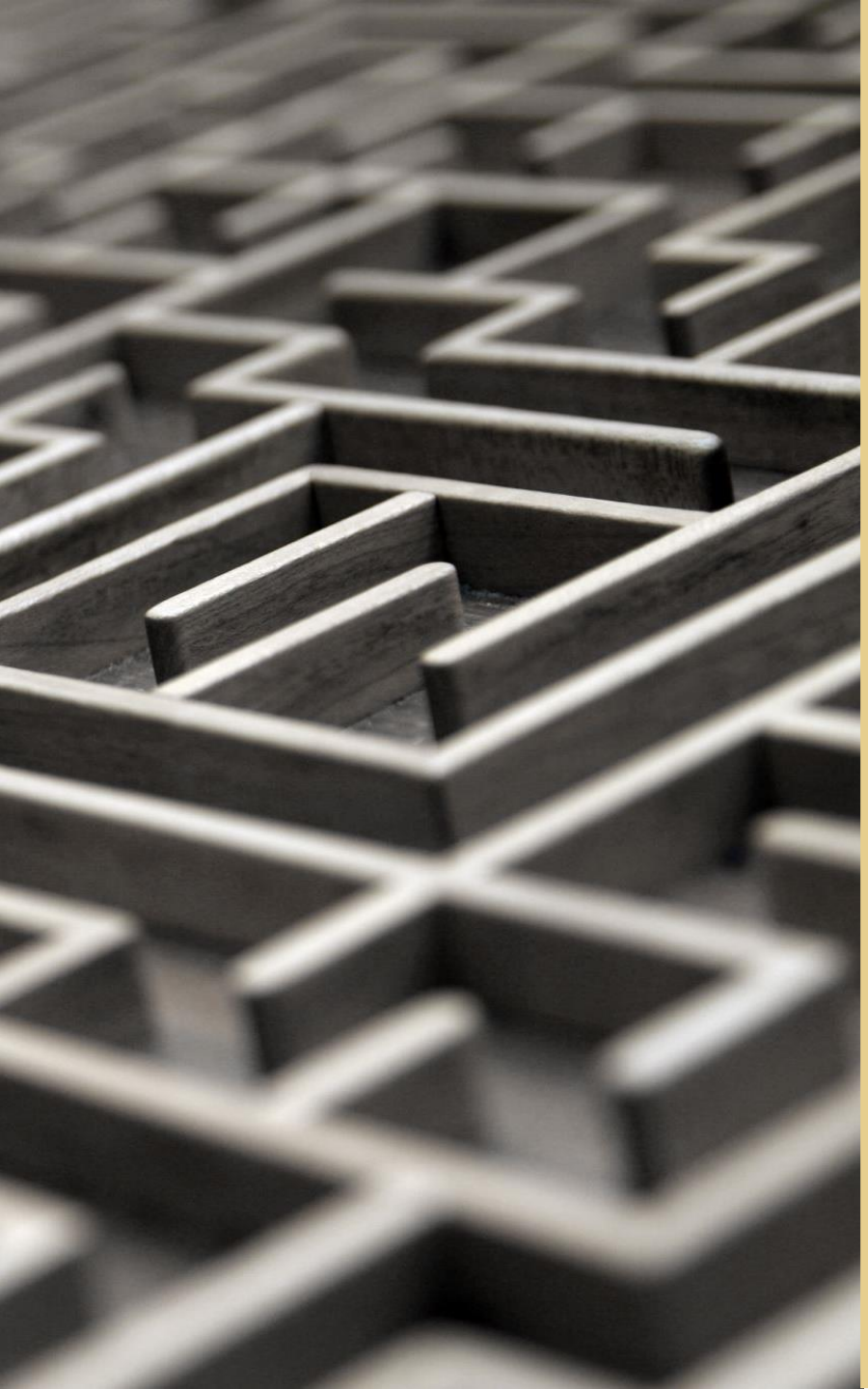
California speaks

The claimant has the burden of proving (1) he or she was insured under the lost policy during the period in issue, and (2) the substance of each policy provision essential to the claim for relief, i.e., essential to the particular coverage that the insured claims. Which provisions those are will vary from case to case;[3] the decisions often refer to them as the material terms of the lost policy…In turn, the **insurer has the burden of proving the substance of any policy provision "essential to the…defense**", i.e., any provision that functions to defeat the insured's claim.

Dart Indus., Inc. v Commercial Union Ins. Co., 28 Cal 4th 1059, 1071-72, 52 P3d 79, 87-88 [2002]

Burden of Proof

- The Minority Rule: A policyholder must prove the existence and applicability of coverage by clear and convincing evidence.
  - *Emons Industries, Inc. v. Liberty Mutual Fire Ins. Co.*, 545 F.Supp. 185 (S.D.N.Y. 1982)
    - Standing for the proposition that because insurance products are often individualized and unique to each insured, therefore clear and convincing evidence of applicable terms, conditions, an limits is required



Burden of Proof (cont.)

- *Township of Haddon v. Royal Ins. Co. of America*, No. 95-701 (JEI), 1996 WL 549301 (D. NJ. 1996).
  - "[A] plaintiff asserting rights under a lost, missing, or destroyed instrument must establish its existence and material terms by **clear and convincing evidence**."

Proving Coverage- The Majority Rule

Variety of secondary + tertiary evidence sufficiently proves existence of coverage

- *Remington Arms Co. v. Liberty Mut. Ins. Co.*, 810 F.Supp. 1420 (Dis. Ct. Del. 1992).
  - Liberty Mutual documents including, in part; business records and sample insurance policies; policies from year prior to ones in question which have been marked-up for renewal and policies for a year subsequent to ones in question which have been marked as renewals; policy jackets, internal memoranda which include direct references to the policies at issue; and retrospective premium reports which specifically reference the policies at issue.
  - Remington's own internal documents and records reflecting premium and dividend payments from the policies in question.

Proving Coverage- The Minority Rule

Documents specifically evidencing terms and conditions prove the existence of coverage, secondary evidence may be more challenging:

- *Boyce Thompson Inst. for Plant Research, Inc. v. Ins. Co. of N. Am., 751 F. Supp. 1137 (S.D.N.Y. 1990)*
  - Ledger Sheets evidencing payment of premiums and an affidavit of the policyholder's broker confirming that a policy was purchased and in effect did not rise to the level of clear and convincing evidence.
- *Township of Haddon v. Royal Ins. Co. of America, No. 95-701 (JEI), 1996 WL 549301 (D. NJ. 1996).*
  - The insured's ability to provide a policy effective after the lost policy, indicating it was a renewal of the lost policy satisfies the clear and convincing standard.

Proving Coverage- Secondary Evidence

Federal Rule of Evidence 1004

- A party may introduce secondary evidence when it has shown that
  - the original is lost and/or destroyed;
  - the proponent of the document did not act in bad faith in losing and/or destroying the document; and
  - a diligent search for the original document has proven unsuccessful.
- A proponent of a lost insurance policy wishing to introduce secondary evidence must offer a "satisfactory explanation" as to why they are unable to produce the original.

Proving Coverage- Secondary Evidence (cont.)

Federal Rule of Evidence 1004

- A "satisfactory explanation" as to the inability to produce an original document includes:
  - Proof the original was destroyed pursuant to a document retention policy;
  - Proof the original was lost absent any bad faith on the part of the insured
  - Proof the original is in possession of another party and there are no means to procure a copy

A showing by the insurer that the insured acted with bad faith in destroying the policy negates the satisfaction of this explanation and does not allow the insured to introduce secondary evidence.

Proving Coverage- Secondary Evidence (cont.)

- Federal Rule of Evidence 1004 recognizes no "degrees" of secondary evidence
- A *de facto* hierarchy should be considered such as the one below, listed in order of most supportive to least supportive:
  - Insuring Documents (declarations pages or portions of policy that identify the insured)
  - Business Documents (underwriting records, billing records to the insured, or copies of applications showing coverage & limits sought by insured)
  - Policyholder Documents (board of directors meeting minutes evidencing procurement of insurance)
  - Evidence of policy premiums paid to the insurer either by or on behalf of policyholder

Proving Coverage- Secondary Evidence (cont.)

Additional pieces of secondary evidence include:

- Unexecuted policy forms accompanied by a declarations page or other evidence
- Certificates of insurance
- Subsequent policies suggesting prior coverage was similar
- Records produced by insurance brokers (ledgers or schedules of insurance)
- Reinsurance certificates

Proving Coverage- Secondary Evidence (cont.)

Additional pieces of secondary evidence (cont.):

- Interoffice memoranda, correspondence, emails proving the insurer believed a policy was effective
- Loss prevention surveys conducted by insurers
- Sample policies used by insurers during the policy period in question
- Retrospective premium reports
- Loss history reports
- Correspondence between brokers and underwriters

Rebutting Coverage

An insurer may rebut the existence of coverage proffered by a purported insured by:

- Negating the sufficiency of the evidence offered by the purported insured. See, e.g., *Century Indem. Co. v. Aero-Motive Co.*, 254 F.Supp.2d 670 (W.D. Michigan, Southern Division 2003) (holding that a manuscript policy is different from a standard form policy, such that only the latter meets the insured's burden of proving the existence and material terms of the policy); or
- Arguing the purported insured fell short of meeting the applicable burden of proof. See Jack B. Weinstein, Evidence ¶ 1004(01) ("[T]he opponent of the party offering the secondary evidence may attach the sufficiency of the secondary evidence including the credibility of the witness. This attack, however, goes not to the admissibility but to the weight of the evidence and is a matter for the trier of fact to decide.")

Rebutting Coverage (cont.)

But remember: A policyholder need not establish every word of a lost insurance policy. The policy may be proven by secondary evidence without having to reconstruct the language of the policy verbatim.

Rebutting Coverage- Social Concerns

- The social and political surrounding revival statutes may influence the ability of an insurer to rebut the existence of coverage

  — In New York State the Department of Financial services (DFS) issued a circular letter related to the Child Victims Act:

    - DFS encourages all authorized property/casualty insurers, licensed insurance producers, adjusters, and reinsurers "not to cite the minimum requirements set forth in the Insurance Law and regulations as a basis for destroying potentially relevant records, when they know or have reason to know they have potential liability with respect to CVA-related claims."

The Three Steps to Handling a Lookback Claim

STEP 1

Determine what evidence of coverage was provided by the purported insured

Perform additional investigation or research

STEP 2

STEP 3

Analyze the claim

Step 1: What Evidence Has Been Presented

- Assess the evidence provided by the purported insured:
  - Did the insured provide policy documents or secondary evidence (proof of payment or prior claims paid)?
  - Is there proof a policy was in effect during the period of alleged abuse?
  - Is the purported insured named on the alleged policy or a successor organization?

Step 2: Investigate

If the purported insured did not provide a full copy of the policy at issue:

- If the information provided alludes to the existence of a policy, search internal records for further evidence
- Reach out to the purported insured's current broker or agent to seek any information about past losses or claims, and what company adjusted them
- Look into underwriting records to determine if a policy was ever issued

Step 3: Analyze the Claim

If a policy was found, analyze the claim following company's normal protocol

- Be sure to investigate what limits have already been exhausted

Step 3: Analyze the Claim

If no policy is found but sufficient evidence that one was issued is presented, attempt to recreate the policy

How?

- Search underwriting records for applications that may indicate which forms would provide the coverages sought by the insured
- Search internal records for policies issued to entities similar to purported insured during time period in question
- If insurer was ever engaged in coverage litigation against purported insured during the time period in question, research court records, *often policies are filed in support of motions and appeals*

After the policy as been reconstructed, analyze the claim following the company's normal protocol

Additional Concerns (cont.)

How Many Occurrences?

- The New York Court of Appeals by adopting the "unfortunate events test", when there is no policy language specifically indicating an intent to aggregate separate incidents into a single occurrence. *Roman Catholic Diocese of Brooklyn v. National Union Fire Ins. Co. of Pittsburgh, Pa.* 21 N.Y.3d 139 (2013).
  - This means each individual instance of abuse will be subject to its own "per occurrence" limit

Additional Concerns (cont.)

Allocation of Coverage & Defense Costs:

- The language triggering coverage in most policies, i.e. "this insurance applies to 'bodily injury' ... only if ... [t]he 'bodily injury' ... is caused by an 'occurrence' " and "[t]he 'bodily injury' ... occurs during the policy period", while not explicitly mandating it, is consistent with applying a pro rata allocation between multiple insurers whose polices are implicated by a claim. *Consolidates Edison Co. of New York, Inc. v. Allstate Ins. Co.*, 98 N.Y.2d 208 (2002)

Additional Concerns (cont.)

Abuse or Molestation Exclusions:

- Began to appear on CGL policies in late 1980s
- Excludes coverage for "bodily injury," "property damage," or "personal injury" arising out of:
  - Actual or threatened abuse or molestation of a person while in the care, custody or control of the insured, or
  - Negligent employment, investigation, supervision, reporting, or retention of a person whom insured is or was legally responsible for + whose conduct excluded by the above.

Abuse or Molestation Coverages:

- Began to appear on CGL policies in the late 1980s
- Essentially provides coverage for occurrences excluded by an Abuse or Molestation Exclusions, but often with sublimit, claim made forms and retro dates

Additional Concerns (cont.)

Late Notice:

- Nearly every liability insurance policy has prompt and/or timely notice requirement
- Many revival claims allege that insureds “knew or should have known” of alleged abuse
- The complaint/claim must be evaluated carefully to determine if these are just broad boilerplate allegations, or if they are alleged with specificity
- If notice to the insured is specifically alleged and insurer has no record of being notified of the abuse, this is a valid ground for disclaimer
- If notice to the insured is alleged generally, is best to assert the defense but provide coverage pending further investigation

Who Pays and How Much?

Remember—Insurer is only liable up to the limits of the policy

- Many claims implicate policies issued with limits of $300,000 to $500,000
- Aggregate policy limits have often been chipped away by prior losses and claims
- Once limit of insurance is exhausted, remaining balance of any settlement or judgment rests with the insured

- Races to the courthouse
- Bankruptcies galore, where possible
- Taxing authorities will be trying to raise revenues
- Insurers, if they can, will interplead their limits
- Settlement masters will be trying to mediate claims involving very limited coverage
- Multiple claimants, limited coverage (bad faith litigation)
- The states may need to step in to provide relief.

Questions?

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