

# A Look Ahead at Look Back Legislation: A Primer for Coverage Issues for CVA Claims

**Presented by:**

Jason Gurdus, Esq. and Siobhain Minarovich, Esq.



# What Is A Child Victims Act (“CVA”)?

- Alters / Extends existing Statute of Limitations
  - Typically applies only prospectively, not retroactively
- Opens a window for survivors to bring previously extinguished claims;
- May allow both civil and criminal claims;
- Allows claims against perpetrators and institutions;
- Prioritizes claims in court system.

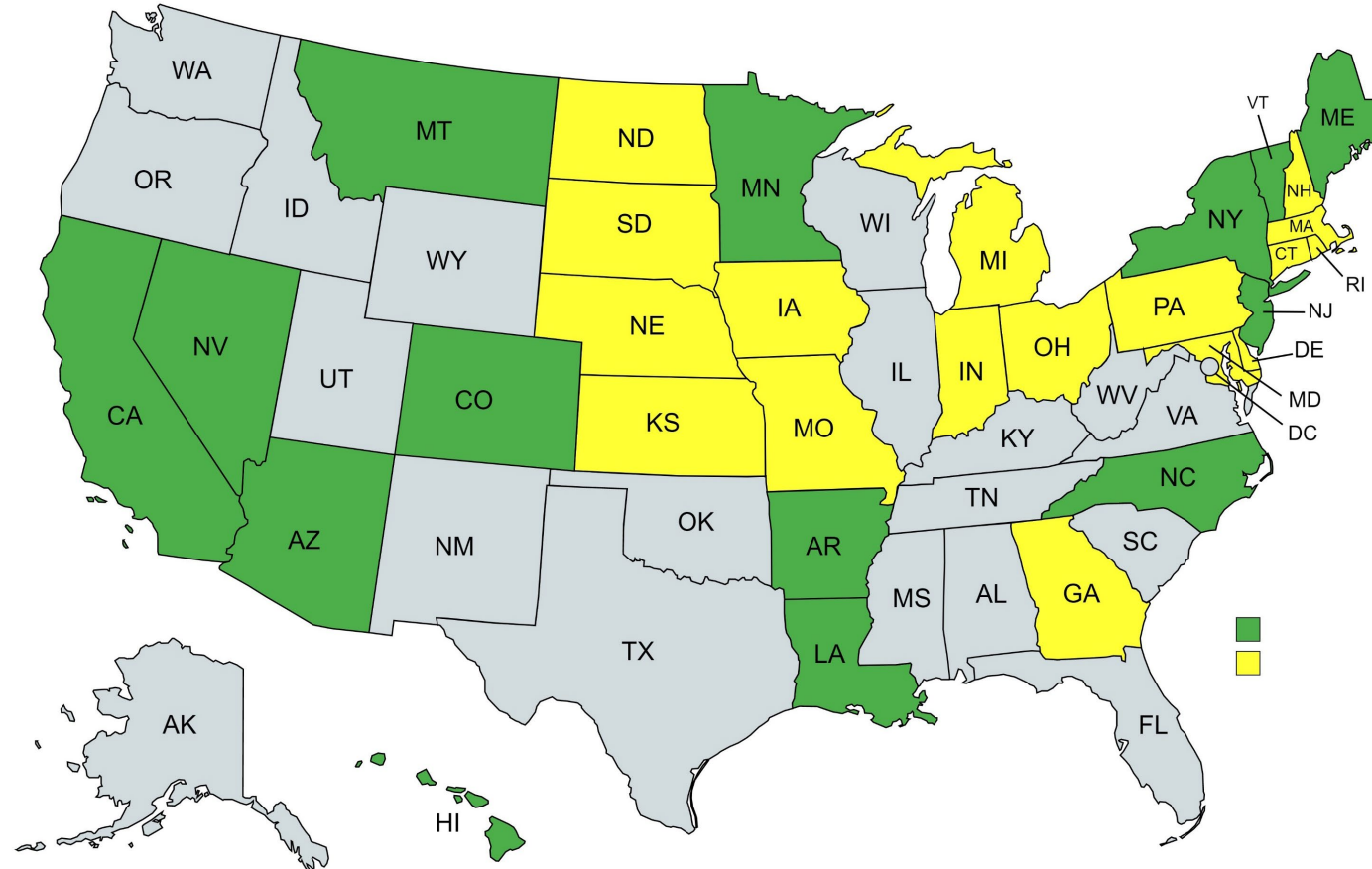
## NY CPLR § 214–g

- *Notwithstanding any provision of law which imposes a period of limitation to the contrary . . . 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, . . . 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: . . . (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.*

# Overview of the States

**Green** =  
States with  
Look Back  
Windows

**Yellow** =  
States  
Considering  
Legislation



# States With Look Back Windows

- Delaware (July 2007 – July 2009)
- Hawaii (April 2012 – April 2020)
- Minnesota (May 2013 – May 2016)
- Montana (May 2019 – May 2020)
- Arizona (May 2019 – Dec. 2020)
- New York (Aug. 2019 – Aug. 2021)
- New Jersey (Dec. 2019 – Nov. 2021)
- California (2002 & Jan. 2020 – Dec. 2022)
- North Carolina (Jan. 2020 – Jan 2022)
- Louisiana (Aug. 2021 – July 2024)
- Colorado (Jan. 2022 – Jan. 2025)
- Arkansas (Feb. 2022 to Jan. 2024)
- Vermont (Permanent Window)
- Maine (Permanent Window)
- Nevada (Permanent Window)

# States Where CVA Legislation Has Been or Is Being Considered

- Georgia\*
- Indiana
- Iowa
- Kansas
- Maryland
- Massachusetts\*
- Michigan\*
- Missouri
- Nebraska
- North Dakota
- Ohio
- Pennsylvania
- Rhode Island
- South Dakota

\*States with a prior window that applied on a limited basis. E.g., to doctors only or to perpetrators only.

# What Are We Seeing?

- Civil suits against perpetrators and institutions including, schools, religious organizations, municipal entities, foster care agencies, hospitals, camps, daycare centers.
- Primarily suits against institutions allege negligent hiring, retention, and supervision.
  - May also include causes of action for: Breach of Statutory Duty to Report; Negligence / In Loco Parentis; Negligent Infliction of Emotional Distress; Premises Liability; and Breach of Fiduciary Duty.
- In New York, over 10,000 CVA lawsuits were filed during the two-year revival window.
- Numerous organizations including the Boy Scouts and several catholic Dioceses have filed for bankruptcy as a result of exposure faced from these claims.
- Approximately 82,000 claims filed in the Boy Scouts bankruptcy case.

# Common Issues in CVA Cases

- Constitutional Challenges
- Does the Act apply to abuse outside of the state?
- What is the applicable liability standard? e.g., Employee Requirement? Property or Chattels Requirement?
- Who / Which Entity Hired, Supervised, Retained, or Controlled the Perpetrator?
- Defining the Act of Sexual Abuse, e.g., Must It Have Been a Violation of the Penal Code?
- “Scandalous Material” in Complaint
- Abuse That Spanned Over the Age of Consent
- Discovery Issues with Documents and Witnesses



# Publicly Reported, Post-CVA, Verdicts & Settlements Against Perpetrators

- **November 2010:** Jury in Delaware awarded \$30 million against Catholic priest; more than 100 instances of abuse
- **June 2021:** \$125,000 default judgment against Scout leader; two instances of forced fondling
  - No expert testimony on causation. Court noted that the plaintiff graduated from college, enjoyed a long-term marriage, had children, and was able to retire in his late 50s after a successful work career.
- **March 2022:** \$25 million jury verdict award against Scout leader for one victim; three years of abuse; forced minors to commit sex acts together and would photograph them.
  - \$15 million for pain and suffering and \$10 million in punitive damages
- **October 2022:** \$30 million jury verdict in Nassau county; four years of abuse, including rape
  - \$6 million for past pain and suffering; \$4 million for future pain and suffering; \$20 million for punitive damages
- **December 2022:** \$65 million default judgment award against former YMCA counselor; seven years of abuse on a daily basis, including rape, oral sex, and digital penetration
  - \$20 million past compensatory damages; \$20 million future compensatory damages; and \$25 million Punitive Exemplary Damages

# Publicly Reported, Post-CVA, Verdicts & Settlements Against Institutions

- **2015:** Ohio jury awarded \$3.5 million for pain and suffering against church; two instances of rape by pastor during counseling sessions
  - Award reduced to \$350,000 due to state’s cap on non-economic damages in personal injury suits
- **April 2022:** \$500,000 default judgment against Boys & Girls Club of Western Broome County in New York; sexually abused 2x/week for two years, including sodomy
- **May 2022:** California jury awarded \$10 million against School District for sexual abuse of student by PE teacher
- **October 2022:** \$600,000 default judgment against Boys & Girls Club of Western Broome County in New York; abuse 7x, including sodomy
- **January 2023:** \$3.25 million settlement by City of Rye, New York; man abused by a Boy Scout leader and city fire lieutenant in the early 1970s when he was 7 years old; sodomized the victim, took naked pictures of him and shut him in a crawlspace when it was cold out to punish and intimidate him
- **February 2023:** \$450,000 award against City of Perth Amboy, NJ; abuse by a firefighter at multiple Department firehouses, spanned four years, more than 20x, included sodomy, oral copulation, forced masturbation.
  - Jury entered a verdict for \$331,000 but the award will rise to \$450,000 under a high/low agreement of \$4.5 million/\$450,000

# Bankruptcies as a Result of CVA Claims

- Examples: Boy Scouts of America; Approx. 30 Catholic Dioceses and Religious Orders Across the Country, including five of the eight New York Dioceses; USA Gymnastics
- Corporate (Reorganization):
  - Obtain approval or Confirmation of a Plan of Reorganization under Chapter 11 for orderly repayment of all or a portion of claims against a debtor in exchange for which creditors will be permanently enjoined from enforcing their claims outside of their Confirmed Plan.
- Filing of Bankruptcy Petition Imposes an Automatic Stay on Underlying Cases
  - Creditors are enjoined from exercising their ordinary remedies to enforce or collect debts arising prior to the filing. Creditors are prevented from trying to collect debts, threatening debtors or commencing litigation. Litigation is stayed. The Automatic Stay remains in effect until the bankruptcy case is closed or dismissed, unless the stay is lifted or modified (including by consent) by the Bankruptcy Court.
- Options for insurers seeking a determination of coverage:
  - Declaratory action in nonbankruptcy forum (this option requires seeking modification of automatic stay)
  - Adversary proceeding, withdrawal of reference
- Important Differences Between Proofs of Claim versus Litigation with Discovery

# Examples of Bankruptcy Numbers

Debtor	Debtor / Insurer Contributions	Total Settlement	Claimants	Average Per Claimant
Boy Scouts	\$804,000,000 / \$1,656,000,000	\$2,460,000,000	82,000	\$30,000
Diocese of Duluth, MN	\$10,000,000 / \$29,500,000	\$39,200,000	125	\$313,600
Diocese of Portland, OR	\$23,250,000 / \$51,750,000	\$75,000,000	173	\$433,526
USA Gymnastics	\$34,000,000 / \$346,000,000	\$380,000,000	476	\$798,319

# Coverage Issues For CVA Claims

## Initial Considerations When Presented With CVA Claim:

- Demands for Coverage under Decades Old Policies
- Claim May Contain Minimal Facts Due to Passage of Time
- Dates Of Abuse Set Forth in Claim
- Sensitive and Confidential Nature of Claim
  - Is there a Confidentiality Order in place?
- Primary v. Excess Policies – Follow Form?



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# Lost Policies – What is Lost May Never Be Found

- Well Beyond Insurance Companies' Record Retention Periods
- Insured Has Burden Of Proving Its Existence And Its Terms
- Insured May Rely on Secondary Evidence
- Standard of Proof



# Claims Against Abusers

- Claims Against Abusers Are Generally Not Covered
- Do Not Involve Accidents/Inherently Intentional – Not An Occurrence
- “[H]arm to children was inherent in the nature of the acts alleged and whatever injuries resulted were, as a matter of law, ‘intentionally caused’ within the meaning of the policy exclusion.” *Allstate Ins. Co. v. Mugavero* (New York)
- Exclusions Apply to Abusers –
  - Intentional
  - Assault and Battery
  - Sexual Misconduct



# Do Claims Against Insured Employer Institutions Constitute An Occurrence?

- Common Definition of Occurrence: “an accident, including continuous or repeated exposure to substantially the same general harmful conditions. . . . which is neither expected nor intended from the standpoint of the insured.”
- Expected/Intended Defense: Did The Insured Know Or Should It Have Known That Injuries Were Substantially Certain to Result From An Abuser’s Acts
- Standpoint of the Insured
- Pleading Negligence



# How Many Occurrences Are We Talking About?

- Fact-Intensive Analysis: Temporal and Spatial Nexus -- Fancy Words For When and Where
- “[I]ncidents 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.* (New York)
- Single Occurrence Approach – Supervision, Training or Hiring of Perpetrators
- Influence of SIRs or Deductibles

# Trigger Of Coverage

## Theories:

- Injury-In-Fact Theory
- First Encounter Theory
- Continuous Trigger Theory

# Pro Rata Approach To Allocation

- Spreads Loss Across All Policy Periods In Which Injury Took Place
- Treatment of Periods of No Insurance
- SIRs and Deductibles – How Many Apply?
- Insured's Defense Costs



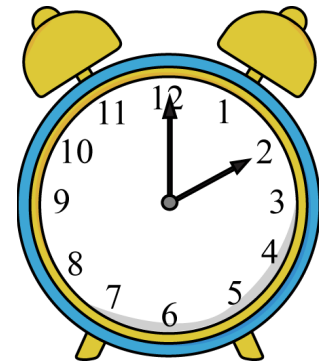
# All Sums Approach to Allocation

- Insured May Select Any Policy In Effect During Periods In Which Injury Occurred
- Which Policy Year Will Be Chosen? Limits v. SIRs/Deductibles
- *In re Viking Pump, Inc.* case (New York)



# Timely Notice Conditions

- “As Soon As Reasonably Possible”
- Both Occurrence and Lawsuit? What’s In The Policy?
- Statute of Limitations Effect
- Prejudice To Insurer Required In Most States
- New York’s Limited Exception To Prejudice



# Applying Policy Exclusions To Insured Employer

- Sexual Misconduct/Abuse Exclusion: . . . arising out of: (1) the actual or threatened abuse or molestation by anyone of any person while in the car, custody or control of any insured, or; (2) the negligent a. employment; b. investigation; c. supervision; d. reporting to the proper authorities, or failure to so report; or e. retention; of a person for whom any insured is or ever was legally responsible and whose conduct would be excluded by Paragraph 1. above.
- Assault and Battery Exclusion: This insurance does not apply to “bodily injury” arising out of any actual or alleged assault or battery.
- Effect of “Arising Out Of” Language
- Inclusion of Negligent Hiring, Supervision or Retention Language in Exclusions
- Differences between “The” Insured and “An” Insured

# Punitive Damages

- States Differ On Whether Insurable
- Generally Prohibited In States Where Most Likely To Be Awarded (i.e., New York, New Jersey, California, Pennsylvania)
- Punitive Damages Based On Vicarious Liability
- Choice of Law Provision

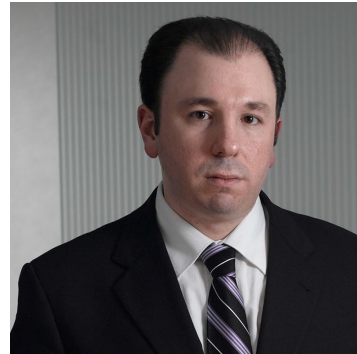


# Questions?





# For More Information, Please Contact



Jason Gurdus  
(516) 357-3134

[jason.gurdus@rivkin.com](mailto:jason.gurdus@rivkin.com)



Siobhain Minarovich  
(516) 357-3034

[siobhain.minarovich@rivkin.com](mailto:siobhain.minarovich@rivkin.com)

