Allegations of Clergy Misconduct

Policy Considerations Addressing the Revival of Time-Barred Claims

In the wake of the recent release of another investigating grand jury report regarding abuse of minors by clerics, Pennsylvania state lawmakers have introduced a proposal to revive previously time-barred civil claims arising out of allegations of childhood sexual abuse. If passed, the new law would open a two-year "window" during which victims could file such claims without regard to the previously applicable statute of limitations. No claim, no matter how old, would be time-barred.

Other states, including Delaware, California, Minnesota, and Hawaii, have passed similar measures. The impact has been substantial – jury awards and settlements measured in the hundreds of millions of dollars and a steady stream of bankruptcy filings. Although the Catholic Church has been the focal point in the mainstream media, the impact has been felt by the insurance industry and a wide array of nonprofits whose missions involve service to children.

The backdrop to this ongoing crisis is the scourge of child abuse. This abhorrent behavior – described in vivid and lurid detail in grand jury reports and the press – evokes strong emotions to both punish any surviving wrongdoers (and those who protected them) and to compensate victims who have been harmed. Rightfully so. What good is a system of criminal and civil justice that cannot accomplish those goals?

Illustration / R. Edwards

Lost in the common narrative, however, is the timing of the harms in need of redress. Based on reporting in the popular press, it would be easy to assume that the most recent grand jury report exposed hundreds of new abusers. But most of the abuse chronicled in the report occurred in the last century; approximately 80 percent of the alleged abusers are now deceased and most of the rest are aged and out of active ministry. Furthermore, on the positive side, the report revealed that, since the Catholic Church in the United States established strict procedures for reporting and handling allegations of abuse in 2003, only two cases involving persons under age 18 – of the thousand reported from the seven dioceses studied – have been reported in the last 10 years. In other words, there is evidence that the reforms in dealing with abuse and abuse allegations are having their intended effect and preventing harms to children, even though it is not reported in the media.

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Because the narrow focus was on Catholic Church abuse, no one knows precisely what happened in youth clubs or public schools, or whether they report the same progress in preventing claims because they are protecting children.

None of this, of course, diminishes the impact to victims, no matter how long

ago the abuse occurred. This is where the desire for justice, powerfully evoked by the sickening stories recounted in grand jury reports, runs headlong into the policy rationale behind statutes of limitation. And the natural desire for punishment collides with the reality that many of those who committed the abuse and any "cover-up" are no longer alive,

The public policy considerations behind civil limitations are well-recognized and have a long history. Some commentators trace limitation periods to biblical times, when debts were deemed released after a set period of years. In English law, limitation periods can be traced back as least as far as the 11th century (placing time limits on claims by adverse possession to real property), and the concept was formalized by Parliament's Limitations Act of 1623. Our Supreme Court noted well over a century ago that statutes of limitations are "found and approved in all systems of enlightened jurisprudence." For good reason. The search for truth is impaired, sometimes mortally so, through the passage of time. Physical evidence is lost, memories fade, and witnesses become unavailable through death or disappearance. What remains are shadows of the participants, fragments of memory, and shards of detail cobbled together in a proceeding that invokes justice, but will be fair to few. It would be a different case entirely if the records and memories demonstrate that the abuse occurred and the institution knew. But the proof thresholds in the "window" laws are not based on actual knowledge. As debate over these bills unfold, the policies that undergird statutes of limitations are so often repeated they begin to sound cliché. Yet, limitation defenses are substantial, not merely technical. Supreme Court Justice William Rehnquist (not yet Chief Justice at the time) stated in plain terms: "Statutes of limitations are not simply technicalities. On the contrary, they have long been respected as fundamental to a well-ordered judicial system."

To complicate matters further, insurance policies secured decades ago by religious organizations and other nonprofits who serve children did not contemplate such expensive and late-filed risks. They were written expecting that these risks would sunset. Moreover, the nature and scope of the societal problem of child abuse was not well identified or understood during that past era. Insurance carriers simply did not underwrite general liability policies and collect premiums expecting exposures of the type or magnitude presented by this crisis. Nor did they educate or audit their insureds on now prevalent policies and procedures designed to help ensure the protection of children (and to mitigate risk) – a reflection of the times, not a failing of the insurance industry. No one anticipated legislative activity half a century later to revive decades-old claims that had long been considered extinguished. Putting aside the challenges of defending against aged allegations of misconduct, even trying to locate insurance policies (some written by carriers no longer in business) can be a daunting task in and of itself. These challenges obviously create acute tension between carriers and their policyholders.

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The revival of time-barred claims (as enacted in other states and proposed in Pennsylvania and elsewhere) seems a highly imperfect solution to a broad and long-standing societal problem. As detractors from such legislative efforts rightfully point out, "window" legislation benefits only a portion of the victims in the absence of tandem amendments that repeal governmental immunity. (Although private Catholic institutions draw the most headlines, recognized studies and press reports alike have documented the serious problem of childhood sexual abuse in our public institutions.) Similarly, without damage caps that reflect historic policy limits and awards, juries are left to assess damages caused by the negligent and reckless conduct of those who supervised abusers based on today's inflated dollar and valuations, as opposed to those in place at the time of the misconduct.

Yet, concluding that no remedy can be fashioned to these horrific wrongs simply because of the passage of time seems equally unpalatable (even if proven to be correct from a constitutional perspective). Where does all of this leave those in the business of assessing, managing, and transferring risk? Proposed "window" legislation in Pennsylvania and elsewhere must be monitored closely and taken seriously. The stakes are high. Passively hoping that such measures do not pass may prove to be a successful strategy. However, proactively engaging in discussions around creative solutions to heal those who have suffered this trauma may carry a far higher chance of success. As momentum towards a compensation fund for victims – in lieu of reviving time-barred claims – begins to build in some quarters, it is worth considering whether insurance carriers should play an active role in such discussions. The notion of participating at any level in something akin to a voluntary payment may be the bridge too far for some, yet the alternative may prove far costlier. ●

Mark E. Chopko and Michael D. O'Mara are Partners at Stradley Ronon in Philadelphia. mchopko@stradley.com and momara@stradley.com.