

**CIVIL ACTIONS & COMPENSATION FOR CHILD SEXUAL ASSAULT SURVIVORS**  
**“BEST PRACTICES FOR LITIGATING CHILD SEX ABUSE CIVIL CASES”**

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**I. INTRODUCTION**

**A. Civil Litigation (10:00 am-10:50am)**

1. Case selection
2. Statutes of Limitation
3. Theories of Recovery

**B. Discovery, Trial, Settlement & Insurance Issues (12:10pm-1:00pm)**

**C. Other Types of Compensation for CSA Survivors**

1. Restitution (criminal)
2. Crime Victim Compensation (social safety net)
3. Fund Programs (private programs)

**II. CIVIL LITIGATION**

**A. Evaluating the case**

1. First step – what does the client want?
2. Institutional defendant or viable third party claim
3. Immunities
  - a. State/Public Agencies
    - i. **PA:** 42 Pa.C.S.A. § 8522
    - ii. **NJ:** Tort Claims Act, N.J.S.A. 59:1-1 *et seq.* (but recent change in law took away immunity for public schools’ negligence leading to sexual abuse of a minor); N.J.S.A. § 2A:14-2a; N.J.S.A. § 2A:14-2b
    - iii. **NY: N.Y. CT. CL. ACT § 8** – *waiver of common law immunity for public and governmental entities*
      - Foster agencies and government agencies’ liability: (agencies and counties can be liable for negligent supervision of children in foster care if agency knew or should have known of abuse occurring)
        - *McCabe v. Dutchess Cty.*, 895 N.Y.S.2d 446 (App. Div. 2010)
        - *Barnes v. Cty. of Nassau*, 487 N.Y.S.2d 827 (App. Div. 1985)
        - *Bartels v. Cty. of Westchester*, 429 N.Y.S.2d 906 (App. Div. 1980)
    - iv. **CA:** Gov. Code, § 814 - public entities are now liable in tort to the extent declared by statute, subject to stated immunities and defense
      - section 815.2 - a public entity is vicariously liable for the negligence of its employee acting in the scope of his/her employment (§ 815.2(a)) subject to any statute declaring that employee is immune from liability (§ 815.2(b))

- Failure to discharge mandatory duty (Gov. Code, § 815.6) -
  - liability would attach where a social service agency’s negligence in placement of children or failure to properly supervise children after placement in foster care
- v. **Federal Tort Claims Act** – no claims against the federal government or employees for “assault or battery” claims or for negligent hiring/retention arising from same (but may be able to state federal claim)
- b. Ways around immunity
- i. **NJ:** LAD and sexual abuse by state/government employee
  - ii. **PA:** recent change in immunity protection (amendment 42 Pa.C.S.A. § 8522)
  - iii. **CA:** Statutory exceptions
- c. Charitable Immunity Act (NJ) N.J.S.A. §§ 2A:53-7 to 11
- i. immunizes simple negligence only (*except* in hiring, supervision of employee leading to sexual abuse of a minor)
  - ii. Exceptions:
    - simple negligence in the hiring, supervision, or retention of an employee agent or server for servant that led to the sexual abuse against a minor;
    - malice or fraud, or intentional, reckless, willful and wanton, or even gross negligence
    - LAD claims
5. Statute of limitations
- a. **PA** 42 Pa.C.S.A. § 5533
- i. Sexually abused below the age of 23:
    - Have until the age of fifty-five (55) to file a claim (previously had until the age of 30 if abused under the age of 18)
    - Must have been within the old statute of limitations to get the benefit of the new, extended statute
    - No window yet – pending constitutional amendment efforts
  - ii. Adult sexual assault – two years from date of assault
- b. **NJ** - N.J.S.A. § 2A:61B-1
- i. Have until the age of fifty-five (55) or seven (7) years from the time survivor becomes aware that their trauma is linked to financial harm to file a claim (previously had until the age of 20 if abused under the age of 18)
  - ii. Two year look back window (beginning December 1, 2019) to file claims if sexually abused as a minor *OR* sexually assaulted as an adult which applies to institutional defendants too
- c. **NY** - N.Y.C.P.L.R. § 214 (G)
- i. One year look back window (beginning August 14, 2019) to file claims if sexually abused as a minor (extended to January 14, 2021 due to Covid-19)
  - ii. Have until the age of fifty-five (55) to file a claim if abused as a minor (previously had until the age of 23)
  - iii. One year look back for adult survivors is pending in the legislature
  - iv. Other NY general crime victim SOL exceptions:

- **CPLR Section 215:** 1 year from completion of criminal charges through dismissal, acquittal or verdict (defendant must have been charged)
  - **CPLR 213(c):** 5 years from date of offense if the act constitutes rape, 1st degree criminal sexual act or 1st degree aggravated sexual abuse (even if defendant not charged)
  - **CPLR 213(b):** 7 years from date of conviction of any crime; 10 years from date of conviction for 1<sup>st</sup> or 2<sup>nd</sup> degree rape, aggravated sexual abuse, sexual abuse or criminal sexual act
- v. **CA - CAL. CIV. PROC. CODE § 340.1**
- Three (3) year look-back window beginning on January 1, 2020 for minor sexual abuse survivors against perpetrator and institutional defendants – claims revived for survivors until age 40, even after window closes
  - Within 10 years of the date of the last act if sexual assault on adult starting on January 1, 2019 - retroactive?
  - Within three years from the date the plaintiff discovers or reasonably should have discovered that an injury or illness resulted from an act
- d. **SOL's in Other Jurisdictions:**
- i. CHILDUSA website's legal section <https://childusa.org/law/>

## B. COMMON LAW & STATUTORY CLAIMS/THEORIES OF LIABILITY

### 1. Common Law Theories

#### a. Intentional Torts

- i. Assault & Battery
- ii. Intentional Infliction of Emotional Distress
- iii. False Imprisonment
- iv. Fraud – discuss utility of fraud claims in abuse, assault cases (i.e. SOL, discovery, etc.)
- v. Violation of state consumer protection laws (valid in PA, NJ, NY and CA)
- vi. Defamation – discuss utility in abuse, assault cases

#### b. Negligence Torts

- i. Negligence
  - **General Rule:** no duty of protection of others absent special relationship
  - **But ask yourself:** Is there a duty owed to the child based on the relationship between defendant and the child?
    - Custodial, *in loco parentis* (school, camp, hospital, housing, etc.)
    - **NJ** “school personnel owe a duty to exercise reasonable care for the safety of students entrusted to them. This duty extends to supervisory care required for the student’s safety or wellbeing as well as to reasonable care for the student at school-sponsored activities in which the student participates.” *See* New Jersey Standard Civil Jury Instruction 5.32, Duty of Teacher and School Personnel to Student.

**Handout #1**  
Ratification  
Theory  
Brief

- **PA** *T.A. v. Allen*, 447 Pa.Super. 302, 669 A.2d 360 (1995) (duty of spouse of sex offender has duty to report/warn if related to victim)
- **NY** *Mirand v City of New York*, 84 NY2d 44, 49 (1994) (schools are under a duty to adequately supervise the students in their charge and they will be held liable for foreseeable injuries proximately related to the absence of adequate supervision)
- Breach of Assumed Duty
  1. *Reider v. Martin*, 359 Pa.Super. 586, 519 A.2d 507 (Pa.Super. 1987) (breach of assumed duty Restatement (Second) of Torts, § 323, Negligent Performance of Undertaking to Render Services; “touchstone in determining if a ‘program of security’ exists is whether or not the program promises to provide an additional factor of safety”)  
Statutory duties such as mandatory reporting, custodial, etc.
- Ratification theory
- **Resources for protection protocols/standard of care to protect against CSA:**
  - “Minor Athlete Abuse Prevention Policies” U.S. Center for SafeSport ([link to publication](#)) (2019)
  - Protecting Young Victims from Sexual Abuse and Safe Sport Authorization Act of 2017 ([link to summary of Act](#)) (2017)
  - “Preventing Child Sexual Abuse In Youth-Serving Organizations” ([link to purchase](#)) (Bates, Army 2016)
  - “Preventing Child Sexual Abuse in Youth-serving Organizations: Getting Started on Policies and Procedures” Centers for Disease Control and Prevention (2007) ([link to publication](#))
- **Negligently failing to report suspect abuse by mandatory reporters**
  - **PA:**
    - Child Protective Services Law (CPSL), 23 Pa.C.S.A. § 6311 *et seq.*
  - **NJ:**
    - **N.J.S.A. § 9:6-8.10** requires that every citizen who has “reasonable cause to believe” a child is being sexually abused must report this to DCP&P (formerly known as DYFS)
      - But note that NJ Courts have said this does not provide a private cause of action; “evidence of negligence only”
    - **N.J.S.A. § 6A:16-10.1** (schools boards’ obligation to report suspected abuse)
    - **J.S. v. R.T.H.**, 155 N.J. 330, 714 A.2d 924 (1998), New Jersey Supreme Court held that a woman should have confronted her husband about the great deal of time he spent with two neighborhood girls, 12 and 15, when she admitted having

**Handout #2**  
complaint for  
negligence in  
religious  
institution’s  
failure to report  
suspected abuse

knowledge her husband's propensities. The court relied upon empirical data which indicated that while sexual abuse of a child can be difficult to detect, it is a risk which can be foreseen by a spouse. Thus, third-party claims may be asserted against *any* persons who have reasonable cause to suspect child abuse and fail to report it.

- **NY: Mandatory Reporters of Suspected Child Abuse, Neglect or Maltreatment – [Social Services Law §§ 413, 420](#):** Requires certain persons and officials in a professional or official capacity such as teachers, social service workers, school officials, law enforcement officials, registered nurses, physicians, medical examiners and day care center workers to report suspected child abuse, maltreatment or neglect to the statewide central register of child abuse and maltreatment. Willful failure on the part of any person required to report a case of suspected abuse may be the basis for a civil action for damages.
- **CA:** The Child Abuse and Neglect Reporting Act (CANRA) pursuant to Penal Codes 11164 through 11174.3
- **Other jurisdictions' mandatory reporting statutes:**
  - CHILDUSA website's legal section <https://childusa.org/law/>
- negligent infliction of emotional distress
- negligent supervision (of offender or victim)
  - **PA:** *Hutchinson v. Luddy*, 2000 PA Super. 316, 763 A.2d 826, 837 (Pa.Super. 2000) (negligent supervision pursuant to Restatement (Second) of Torts, § 317)
  - *Krasevic v. Goodwill Industries of Central Pa., Inc.*, 2000 PA Super. 348, 764 A.2d 561 (Pa.Super. 2000)
  - *J.E.J. v. Tri County Big Brothers/Big Sisters*, 692 A.2d 582 (Pa.Super. 1997) (defendant did not owe duty to members of general public to report child abuse committed by its volunteer)
  - *V.B.T. v. Family Services of Western Pa.*, 705 A.2d 1325 (Pa.Super. 1998)
- negligent hiring/retention
  - **NJ:** Standard Civil Jury Instruction 5.76, Negligent Hiring
  - **PA:** *R.A. v. First Church of Christ*, 748 A.2d 692 (Pa.Super. 2000) (pre-employment screening must be conducted reasonably; intentional or criminal acts can be within scope of employment)
- negligent failure to rescue/negligent rescue:
  - **Restatement (Second) of Torts, § 314A(4)**, "Special Relations Giving Rise to Duty to Aid or Protect"
  - **Restatement (Second) of Torts § 321**, "Duty to Act When Prior Conduct is Found to Be Dangerous"
  - **Restatement (Second) of Torts § 322**, "Duty to Aid Another Harmed by Actor's Conduct"

**Handout #5**  
Complaint for  
Sexual Exploitation

- **Restatement (Second) of Torts § 323**, "One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of the other's person or things, is subject to liability to the other for physical harm resulting from his failure to exercise reasonable care to perform his undertaking, if: (a) his failure to exercise such care increased the risk of harm, or (b) the harm is suffered because of the other's reliance upon the undertaking."
- **Restatement (Second) of Torts § 324**, "One who, being under no duty to do so, takes charge of another who is helpless to adequately aid or protect himself is subject to liability to the other for any bodily harm caused to him by. (a) the failure of the actor to exercise reasonable care to secure the safety of the other while within the actor's charge; (b) the actor's discontinuing his aid or protection, if by so doing he leaves the other in a worse position than when the actor took charge of him."

- ii. Breach of contract (nursing home/school cases)
- iii. Emotional harm damages available
- iv. Loss of consortium for spouses and parents
  - PA – tort of seduction *Fairmount v. Stutler*, 54 Pa. 375 (1867)
  - NJ
    - per quod – *Murray v. Cohen*, 4 N.J. Misc. 139 (Sup.Ct. 1926)
    - breach of fiduciary duty – *Carey v. Lovett*, 132 N.J. 44 (1993)

## 2. Statutes for CSA Victims

### a. Federal

- i. **Title IX**, 20 U.S.C.A. §1681(c) (gender discrimination in education)
  - Applies to schools, K-12, colleges and universities who receive federal funds
  - Standard is high:
    - “Actual knowledge”
    - “Deliberate indifference”
    - “severe, pervasive and objectively offensive” *see, e.g., Douglas v. Brookville Area Sch. Dist.*, 836 F. Supp. 2d 329, 344 (W.D. Pa. 2011)
- ii. **Child Pornography/Masha’s Law**, 18 U.S.C. § 2255
  - Damages \$150,000 per image or “Actual damages”
  - SOL-10 years from date of discovery
- iii. **Sexual Exploitation**, 18 U.S.C. § 2255
- iv. **Sex Trafficking – Victims of Trafficking and Violence Prevention Act (TVPA) – U.S. Code Title 22 Chapter 78**
- v. **Civil Rights/State Created Danger**, 42 U.S.C.A. § 1983
  - *L.R. v. Sch. Dist. of Phila.*, 836 F.3d 235 (3d Cir. 2016) (release of minor to unauthorized person who sexually abused met standard for “state created danger” civil rights claim)

**Handouts #3, 4**  
Complaints for  
Title IX, 1983  
& Negligence

**Handout #6**  
Complaint for  
Sex Trafficking

**Handouts #3, 4**  
Complaints for  
Title IX, 1983  
& Negligence

- *Pascocciello v. Interboro School District*, 2006 U.S. Dist. LEXIS 27390 (E.D.Pa. 2006) (permitted 1983/stated created danger claim for school principal's letter of reference which assisted pedophile get a job which provided access to victim)

**b. Pennsylvania**

**c. New Jersey**

i. **Child Sexual Abuse Act**, N.J.S.A. § 2A:61B-1

- *Hardwick v. American Boychoir School*, 188 N.J. 69, 902 A.2d 900, 2006 N.J. LEXIS 1153 (2006)
- Two categories: "Active abuser" and "passive abuser"
- statutory damages of \$10,000 plus reasonable attorney's fees, *or* actual damages, whichever is greater
- "Actual damages" includes compensatory, punitive damages, costs of suit and attorney's fees
- punitive damages recoverable and are unlimited

ii. **Law Against Discrimination ("LAD")**, N.J.S.A § 10:5-1 et seq.

- *L.W. v. Toms River Regional Schools Board of Education*, (sexually hostile education environment)
- Also applies to all places of public accommodation: YWCA, camps, hospitals, etc.
- Negligence standard vs. Deliberate indifference standard
- LAD is the exception to everything:
  - Punitive damages caps
  - Tort Claims Act and Charitable immunity

iii. **Parents and Supervising Custodians**, N.J. Stat. Ann. § 9:17B-3

**d. New York**

**e. California**

**C. GENERAL CIVIL LITIGATION & DISCOVERY CONSIDERATIONS**

1. Different standard: civil vs. criminal
2. File civil case after conclusion of criminal case (if possible). The most important consideration is: **DO NOT ALLOW THE CIVIL LITIGATION INTERFERE WITH THE CRIMINAL PROSECUTION:**

a. Allows you to obtain Police/Prosecutors' investigation

- i. PA: issues with Criminal History Records Information Act (CHRIA)
  - NJ: obtain via Open Public Records Act (OPRA)
  - NY: victim has right to obtain police report under New York State Sexual Assault Victim Bill of Rights,
  - NY Article 23, Fair Treatment Standards for Crime Victims, § 646 – Police Reports "A victim of crime shall be entitled, regardless of physical injury, without charge to a copy of a police report of the crime."

b. Likely your case will be stayed anyway (but Courts have wide discretion)

c. If you don't wait, you may be supporting a criminal defense

**Handouts #4, 5**  
Complaints  
for CSAA

**Handouts #3, 4**  
Complaints  
for LAD

**Handout #7**  
CHRIA Brief  
(PA)

**Handout #8**  
Motion for SJ  
based upon  
conviction

- d. Possible information from criminal or cooperation
- e. Collateral estoppel:
  - *Shaffer v. Smith*, 543 Pa. 526, 529, 673 A.2d 872, 874 (1996) (a criminal conviction collaterally estops a defendant from denying his acts in a subsequent civil trial)
3. Stays of Discovery (if criminal case pending at same time)
4. Pleading the Fifth Amendment in civil case:
  - a. Adverse inference: *Baxter v. Palmigiano*, 425 U.S. 308, 318, 96 S. Ct. 1551, 47 L. Ed. 2d 810 (1976); *Harmon v. Mifflin County Sch. Dist.*, 552 Pa. 92, 713 A.2d 620, 623 (Pa. 1998).
5. Trial/Settlement Considerations
  - a. Naming the criminal as a defendant:
    - i. Allocation of Fault/Appportionment**
      - Most states permit the comparison of criminal conduct to negligent conduct
        - For example, New Jersey & Pennsylvania law permits the comparison of fault between intentional and negligent tortfeasors under the Comparative Negligence Act, N.J.S.A. § 2A:15-5.1 to 5.8, *Steele v. Kerrigan*, 148 N.J. 1,689 A.2d 685 (1997); *Blazovic v. Andrich*, 124 N.J. 90, 590 A.2d 222 (1991); *Martin v. Prime Hospitality Corp.*, 2001 N.J. Super. LEXIS 419 (App. Div. November 14, 2001)
      - Some states do not permit this comparison (like Florida)
      - Where this is allowed, consider using an analogy: Would we blame the lion or the lion's trainer for the failure to properly secure the lion in its cage at a circus where the lion had escaped in the past yet the cage was not secured despite these prior incidents? In our case, the perpetrator was simply acting as criminals do when given the opportunity (created by the negligent defendant), just as the lion acted as lions do.
    - ii. Joint & Several Liability**
      - Explained
      - For pure joint and several jurisdictions, it doesn't make a difference if you join or don't join
    - iii. Strategies:**
      - Keep the focus on the institution
      - Consider forcing the institutional defendant to join the perpetrator
      - If there is no allocation of fault to non-parties, don't join perpetrator
  - b. Consider that the criminal defendant may be your best witness
  - c. Compensatory damages
  - d. Punitive Damages
    - i. Bifurcate or you could end up with all damages being award for punitive damages
  - e. Settlement Considerations
    - i. Settlement Values
      - Can range widely: several hundred thousand to several million

**Handout #9**  
Jurisdictional  
Chart on  
Allocation, Fault  
Comparison and  
Joint and Several  
Liability



**Handout #10**  
Permanent  
Restraining  
Order

- Value is a function of available assets and egregiousness of defendant's actions (inaction) more so than actual damages
- ii. Release:
  - Dealing with confidentiality
  - Permanent Restraining Order
- iii. Taxability Issues

### **III. OBTAINING INSURANCE COVERAGE FOR VICTIMS OF CSA**

#### **A. Step 1: Get the Insurance Policy**

1. **Obtain Policy Information in discovery**, Fed. R. Civ. P. 26(a)(1)(A)(iv) which includes production of coverage denials or correspondence outlining an insurer's reservations of rights. *See, e.g., Cessante v. City of Pontiac*, 2009 U.S. Dist. LEXIS 30217 (E.D.Mich. 2009) *but see Native American Arts v. Bundy-Howard*, 2003 U.S. Dist. LEXIS 4393 (N.D. Ill.) (finding Rule 26(a)(1)(D)'s reference to "any insurance agreement" did not include an insurer's reservation of rights letter).
  - a. But this might be too late to get insurance information
2. **Get from other Victims' Attorneys**
  - a. NCVBA, AAJ, other trial lawyer organizations
3. **Obtain from the Defendant's Attorney or Insurance Broker:**
  - a. Common interest in obtaining insurance coverage
  - b. No conflict of interest to the insured and doesn't violate duty to cooperate clauses in insurance policies
4. **Obtain from the State Insurance Department (Florida, Pennsylvania)**
5. **Types of Insurance Policies to Consider:**
  - homeowner's/renter's insurance
  - umbrella/excess insurance
  - professional liability insurance (medical professional, legal professional or other professional)
  - commercial general liability insurance (CGL)
  - dram shop/alcohol service insurance
  - director's and officer's insurance (D&O)
  - automobile insurance (including uninsured (UM) and underinsured (UIM) motorist insurance)
  - crime/fidelity insurance (white collar crime/financial crimes)
  - errors and omissions insurance (E&O)
  - workers' compensation insurance
  - Employment Practices Liability Insurance (EPLI)

#### **B. Step 2: Analyze the Insurance Coverage**

1. **Miller's Standard Insurance Policies Annotated** ([link here](#)): According to West, *Miller's* contains over 150,000 annotations to state and federal cases since 1978 that interpret 93 standard insurance policies and more than 800

endorsements. Many larger law libraries contain *Miller's* within their collection. *Miller's* is arranged by annotating the policy language contained in standard insurance policies, typically published by the Insurance Services Organization (ISO), a private company, and licensed for use by insurance companies. ISO publishes standard policy and endorsement forms. According to ISO's website: "ISO monitors legislative, regulatory, and legal developments; and we modify our forms to reflect law changes, new regulations, and court rulings." [www.iso.com](http://www.iso.com). *Miller's*, in turn, annotates every policy word and phrase with relevant decisions nationwide to assist in policy interpretation.

**2. Common Insurance Policy Language:**

**a. Policy definitions of "personal injury" vs. "bodily injury"**

**b. "Sexual Abuse or Molestation" Exclusion**

- i. Focus on allegations in your complaint not included in the express language of the exclusion
  - i. Such as "negligent policy making"
  - ii. Negligently failing to rescue the victim

**c. Intentional or Expected Harm Exclusion** (older policies are more specific; newer policies are broader)

- i. **Most states:** This is an objective analysis
- ii. **NJ:** burden is upon the insurer to demonstrate that the insured *subjectively* intended some injury in order to apply these exclusions. See, e.g., *S.L. Industries, Inc. v. American Motorists Ins. Co.*, 128 N.J. 188, 207, 607 A.2d 1266, 1276, 1992 N.J. LEXIS 382 (1992); See also, *Id.*, citing, *Voorhees v. Preferred Mutual Ins. Co.*, 128 N.J. 165, 183, 607 A.2d 1255, 1992 N.J. LEXIS 384 (1992)
- iii. **"Inferred intent":** nearly every state hold that child sexual abuse is intentional as a matter of law, *Villa v. Short*, 195 N.J. 15 (2008); *J.S. v. R.T.H.*, 155 N.J. 330 (1998); *Highpoint Ins. Co. v. J.M.*, 398 N.J. Super. 562 (App.Div. 2008);
  - *Shelby Casualty Ins. Co. v. H.T.*, 391 N.J. Super. 406, 416, 918 A.2d 659, 664, 2007 N.J. Super. LEXIS 86 (2007) (no offered intent for minor on minor sexual abuse; holding that there would be no universal application of an inferred intent rule because "Improper sexual behavior by a minor is not necessarily accompanied by an understanding of the effect on the victim." ).
  - Focus on the negligent conduct

**d. Severability of Insureds/Separation of Insureds Clause vs. Joint Obligations clause**

- i. **"Joint obligations" clause:** Bad acts of one insured disclaims coverage for all insureds.
- ii. **"Severability of insureds" or "Separation of insureds" clauses:** Courts are more likely provided coverage for the "innocent" or

**Handout #11**  
Summary  
Judgment Brief  
seeking  
insurance  
coverage for  
sexual assault

“negligent” insured, irrespective of the intentional or expected acts of a co-insured.

- e. **Definition of “occurrence” and multiple occurrence arguments**
  - i. **“Cause” test:** New Jersey and Pennsylvania follow the “cause” test which provides that all losses flowing from the harm or caused by the harm alleged will constitute a single “occurrence.” See *Bombav. State Farm Fire & Cas. Co.* 379 N.J. Super. 589; 879 A.2d 1252; 2005 N.J. Super. LEXIS 255 (App.Div. 2005); *Donegal Mutual Insurance Co. v. Baumhammers*, 938 A.2d 286 (Pa. 2007).
  - ii. **“Immediate cause of the harm” test:** Other states look at immediate cause of the harm. *Koikos v. Travelers Ins. Co.*, 849 So. 2d 263 (Fla. Supreme Court 2003). This analysis typically results in multiple policy limits applicable.
- f. **Older policies are better than newer policies:** Insurance policy forms, like some wines, are better with age. Notably, the older the policy form, the more likely there exists broader coverage obligations. Therefore, where the tort extends over longer periods (such as is seen in some sexual abuse cases), ask for all applicable policy periods or look to see if acts might have occurred during the period covered by an older policy(ies).

### 3. Frequent Issues to be Considered in Insurance Lawsuits:

- a. ***Does victim have standing to bring Declaratory Judgment Lawsuit***
  - i. usually not, but it depends
  - ii. Consider an assignment of rights which gives standing
- b. ***Is the victim a necessary party to the insurance lawsuit?*** (it depends)
- c. ***In what court (state or federal) should the declaratory judgment case be brought?***
  - i. Being proactive is most helpful here. Bring the insurance lawsuit (if possible) or encourage the insured defendant to bring the insurance coverage lawsuit before the insurance carrier does so.
  - ii. Insurance companies typically file coverage lawsuits in federal court.
  - iii. Usually, if possible it is best to have same court presiding over the tort action and the insurance coverage action.
  - iv. If its best for your case, you can argue for remand Under the Declaratory Relief Act, 28 U.S.C.A. § 2201: a federal district court *may, but is not required to*, exercise its jurisdiction to hear a declaratory judgment action. *Brillhart v. Excess Ins. Co. of America*, 316 U.S. 491, 494, 62 S. Ct. 1173, 1175, 86 L. Ed. 1620 (1942); *Wilton v. Seven Falls Co.*, 515 U.S. 277, 282, 115 S. Ct. 2137, 2140, 132 L. Ed. 2d 214 (1995); *Allstate Ins. Co. v. Seelye*, 198 F.Supp. 2d 629 (W.D.Pa. 2002). The Act affords district courts “unique and substantial discretion in deciding whether to declare the rights of litigants.” *State Auto Ins. v. Summy*, 234 F.3d 131, 133 (3d Cir. 2000).
- d. **Duty to Defend vs. Duty to Indemnify**

- i. **Duty to Defend:** Duty to defend is broader and usually compares the policy coverage to the four corners of the complaint.
  - *Weyerhaeuser Co. v. Commercial Union Ins. Co.*, 142 Wash. 2d 654, 690, 15 P.3d 115 (2000)
  - *Seaboard Sur. Co. v. Gillette Co.*, 64 N.Y.2d 304, 486 N.Y.S.2d 873, 876, 476 N.E.2d 272, 275 (1984)
  - *Pacific Indemnity Co. v. Linn*, 766 F.2d 754, 766 (3d Cir. 1985) (determination is if complaint “states a claim against the insured to which the policy potentially applies, the court takes the allegations of the complaint as controlling.
  - *Fitzpatrick v. American Honda Motor Co.*, 78 N.Y.2d 61, 66, 575 N.E. 2d 90, 571 N.Y.S.2d 672 (1991) (the duty to defend is triggered "when the 'four corners of the complaint' filed against the insured suggest the reasonable possibility of coverage.”)
  - *But see Flomerfelt v. Cardiello*, 202 N.J. 432, 202 N.J. 432; 997 A.2d 991; 2010 N.J. LEXIS 546 (2010) (the nature of the claims in the complaint (not the facts alleged) are compared with the insurance policy in seeking whether there is a duty to defend the insured)
- ii. **Duty to indemnify:** Conversely, the duty to indemnify is generally narrower than the duty to defend. In many states, the duty to indemnify must await the outcome of a court’s liability determination.
  - *Unionamerica Ins. Co. v. J.B. Johnson*, 2002 PA Super. 273, 806 A.2d 431, 434 (Pa.Super. 2002). (“The duty to indemnify arises only if, **after trial on the third-party claim**, it is determined that the loss suffered is covered by the terms of the policy.”) (emphasis added);
  - *Nationwide Mut. Fire. Co. v. McNulty*, 1997 U.S.Dist. LEXIS 20979, at \*5 (E.D.Pa. December 30, 1997) (“The indemnification issue . . . requires resolution of the merits of the underlying dispute.”);
  - *Capano Mgmt. Co. v. Transcontinental Ins Co.*, 78 F.Supp.2d 320 (D.Del. 1999) (issue of insurer’s duty to indemnify was premature at summary judgment stage where court held that insurer had duty to defend and underlying action was not yet resolved).
- iii. **Strategies**
  - Ask the court to deny the summary judgment on insurance coverage until trial of the underlying case
  - Ask the court to stay the decision on coverage until trial of the underlying case
  - Identify the factual issue and put question on verdict sheet in underlying tort action
  - Bring claims where there could be insurance coverage:
    - Defamation/slander
    - False Imprisonment
    - Negligent failure to rescue/negligent rescue

**Handout #12**  
 Brief for Insurance  
 Coverage for  
 Negligent Rescue/  
 Negligent Failure to  
 Rescue

- Malicious prosecution/Abuse of process

#### **IV. LEGAL AUTHORITY FOR FINANCIAL RECOVERY FOR CRIME VICTIMS**

##### **A. State Constitutions/Statutes**

###### **1. PA**

- a. Pennsylvania Crime Victims' Bill of Rights, 18 P.S. § 11.201:
  - i. “(1) To receive basic information concerning the services available for victims of crime.”;
  - ii. “(2) The rights extended to victims of crime in Chapter 2 are to be honored and protected by law enforcement agencies, prosecutors and judges in a manner no less vigorous than the protections afforded criminal defendants.”
  - iii. “(6) To be restored, to the extent possible, to the precrime economic status through the provision of **restitution, compensation** and the expeditious return of property which is seized as evidence in the case when in the judgment of the prosecutor the evidence is no longer needed for prosecution of the case.”
- b. PA State Constitutional Amendment (“Marsy’s Law”):
  - i. Voted upon favorably, now must pass by resolution in both houses
  - ii. Will Guaranty:
    - Right to be heard (Standing)
    - Equal protection for victims

###### **2. NJ**

- a. NJ State Constitution, N.J. Constitution, art I, para. 22:
  - i. A victim of a crime shall be treated with fairness, compassion and respect by the criminal justice system. A victim of a crime shall not be denied the right to be present at public judicial proceedings except when, prior to completing testimony as a witness, the victim is properly sequestered in accordance with law or the Rules Governing the Courts of the State of New Jersey. ***A victim of a crime shall be entitled to those rights and remedies as may be provided by the Legislature.*** (emphasis added)
- b. Crime Victims Bill of Rights, N.J.S.A. § 52:4B-36, Rights for compensation:
  - i. (h) To be informed about available remedies, financial assistance and social services
  - ii. (i) To be compensated for their loss whenever possible

###### **3. NY**

- a. Article 23, Fair Treatment Standards for Crime Victims
  - i. § 641(1)(a): "availability of crime victim compensation"
  - ii. § 641(3)(d): “specific information shall be provided regarding the right to seek restitution and reparation”

###### **4. CA**

- a. **Constitutional Rights:** Since 1982, California has had Victim’s Bill of Rights providing victims of crime with state constitutional standing and rights, guaranteeing that their voices will be heard.

b. Expanded by Proposition 9, the Victim's Bill of Rights Act of 2008 to include, *inter alia*:

- (13) Right to restitution.
- “It is the unequivocal intention of the People of the State of California that all persons who suffer losses as a result of criminal activity shall have the right to seek and secure restitution from the persons convicted of the crimes causing the losses they suffer.
- Restitution shall be ordered from the convicted wrongdoer in every case, regardless of the sentence or disposition imposed, in which a crime victim suffers a loss.
- All monetary payments, monies, and property collected from any person who has been ordered to make restitution shall be first applied to pay the amounts ordered as restitution to the victim.”

**B. Federal Statutes**

1. 18 U.S.C. § 3771 (2004) Crime victims' rights, section (a)(6) “The right to full and timely restitution as provided in law.”

**III. OTHER AVENUES OF RECOVERY**

**A. Four Sources of Compensation for CSA Survivors**

1. Civil Litigation (civil)
2. Restitution (criminal)
3. Crime Victim Compensation (social safety net)
4. Fund Programs (private programs)
5. Not all mutually exclusive avenues; can mostly work together but choice of funds will bar subsequent civil lawsuit

**B. Criminal Restitution**

**1. Restitution: General Considerations**

- a. Amount ordered by judge as part of criminal sentencing
- b. Reimburses out of pocket expenses *only*
- c. Medical bills, property damage, lost wages, etc.
- d. Must be a sum certain in a court order (no “to be determined” amounts)
- e. Without regard to defendant’s ability to pay
- f. Court order doesn’t guarantee payment by offender
- g. Restitution Order May be collected in the same manner as a civil judgment (most states)
- h. Prepare for the client and provide supporting documentation

**2. Federal**

- a. Recover \$1 billion/year; less than 10% actually recovered
- b. “The right to full and timely restitution as provided in law”
- c. General restitution statute, 18 U.S.C. § 3663 (***Discretionary***)
- d. Specific restitution statutes for sexual offenses, 18 U.S.C. § 3663A, Mandatory Victim Restitution Act (***Mandatory***)
  - i. (3) human trafficking, 18 U.S.C. § 1593

### **Handout #13**

Brief for  
Restitution for  
future counseling  
expenses

- ii. (4) sexual abuse, 18 U.S.C. § 2248
  - iii. (5) sexual exploitation of children, 18 U.S.C. § 2259
    - *Paroline v. United States*, 572 U.S. 434, 134 S. Ct. 1710 (2014) (child pornography case; “but-for” causation not required but restitution should be ordered only for portion of harm): “In this special context, where it can be shown both that a defendant possessed a victim’s images and that a victim has outstanding losses caused by the continuing traffic in those images but where it is impossible to trace a particular amount of those losses to the individual defendant by recourse to a more traditional causal inquiry, **a court applying § 2259 should order restitution in an amount that comports with the defendant’s relative role in the causal process that underlies the victim’s general losses.**”) (emphasis added).
  - iv. (6) stalking or domestic violence, 18 U.S.C. § 2264
  - v. (10) reckless disregard of sex trafficking, 18 U.S.C. § 2421A
  - vi. (11) transportation or travel for unlawful sexual purposes, 18 U.S.C. § 2429
  - e. Further Federal Restitution resources:
    - i. CRS Report RL34138, Restitution in Federal Criminal Cases.
    - ii. CRS Report RL33679
    - iii. Crime Victims’ Rights Act: A Summary and Legal Analysis of 18 U.S.C. § 3771, by Charles Doyle
  - f. Sample brief for federal restitution in child exploitation in federal criminal case (successful in obtaining restitution award in excess of \$50,000 for future counseling)
- 3. PA**
- a. 18 PA.C.S.A. § 1106. Restitution for injuries to person or property
- 4. NJ**
- a. N.J.S.A. § 2C:11-3C
  - b. N.J.S.A. § 2C:43-3
  - c. N.J.S.A. § 2C:46-1 *et seq.* (Clerk docket the restitution order as a judgment)
- 5. NY**
- a. Criminal Procedure Law Section 420.10
    - i. Gives rights to crime victims to request restitution and have the district attorney present such request to the court and assist the crime victim in the filing and collection of a restitution order in cooperation with the designated agency of the court as provided in.
  - b. Penal Law 60.27 Rights of Child Victims
    - i. Executive Law Sections 642-a
    - ii. Criminal Procedure Law Article 65 and Sections 190.30(4) and 190.32
    - iii. Social Services Law Sections 422 and 4230
- 6. CA**
- a. California Penal Code Section 1202.4

## **C. Crime Victim Compensation Programs**

### **1. General considerations for state programs**

- a. Funded by fines imposed upon convicted defendants in that state
- b. Pays crime related expenses
  - i. Counseling, medical expenses — not anguish, pain and suffering
  - ii. Travel to/from court and counseling
  - iii. Lost wages
  - iv. Relocation
- c. Limited benefits (approximately \$20,000-\$40,000)
- d. Payor of last resort (only pays if no other insurance, public welfare benefits, pensions, cash assistance, SSI, restitution, disability, workers compensation, etc.)
- e. Victim cannot have been involved in the crime
- f. Has a right to repayment/lien but you can negotiate
- g. If claim is denied wrongfully, fund pays counsel fees
- h. Requires timely police report (but not in NY for sexual assault)
- i. Time limits for claims usually 1-3 years but allow for good cause exceptions (delayed discovery, CSA, etc.)

### **2. Pennsylvania Crime Victim Compensation, Crime Victims Act, 18 P.S. § 11.101 *et seq.* (all details of Pa Crime Victim Compensation Program can be found [here](#))**

- a. Total benefits up to \$35,000 but sub-limit of \$10,000 in counseling benefits

### **3. New Jersey Crime Victim Compensation (N.J. Stat. Ann. § 52:4B-35 *et seq.*) (official cite can be found [here](#))**

- a. \$25,000 maximum
- b. Attorneys fees up to \$200/hour; \$3,000 maximum for representation in criminal matter
- c. Attorneys fees up to 15% of VCCO award for victim compensation benefits
- d. Report to police within 9 months
- e. Report to VCCO within 3 years

### **4. New York Crime Victim Compensation (official cite can be found [here](#))**

- a. NYS Office of Victim Services
- b. No Police report required under the Sexual Assault Reform Act (SARA) As a sexual assault victim, you are no longer required to report the crime to the police in order to establish eligibility for NYS Office of Victim Services compensation funds.

### **5. California Crime Victim Compensation (official cite can be found [here](#)) includes:**

- a. Medical care
- b. Mental health treatment
- c. Lost wages

### **6. Other Jurisdictions (Link to National Association of Crime Victims Compensation Boards can be found [here](#))**

### **7. Federal Crime Victim Compensation**

- a. 1 year time limit



## **IV. FUND PROGRAMS**

### **A. General considerations about Funds**

1. Most all funds closed, *except*:
  - a. Michigan State University Healing Assistance Fund
  - b. Fund for Victims of Jeffrey Epstein
2. Voluntary
3. If compensation accepted, victim give up right to bring any tort case
4. Factors considered:
  - a. level of verifiable documentation
  - b. whether or not law enforcement corroboration exists
  - c. Administrators find claim credible
  - d. Nature/extent/ongoing effects of resulting harm

**Handout #14**  
Chart of Victim  
Compensation  
Funds  
(2019 & 2020)