

***REINSURANCE IMPLICATIONS OF
SETTLEMENT OF HIGH RISK, MULTI-
PARTY SEXUAL MOLESTATION CLAIMS***

May 1, 2026

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New Jersey • New York • Pennsylvania

Introduction

Unique Facts of Sexual Molestation Claims

- More than one perpetrator
- Multiple victims spanning multiple years
- Victims abused by more than one perpetrator
- Abuse occurring at multiple locations, sometimes outside the insured's premises
- Abuse occurring 30+ years ago
- High value jury exposure
- Multi-level coverage involved

Negligent hiring, training, and supervision

DIRECT INSURANCE COVERAGE ISSUES

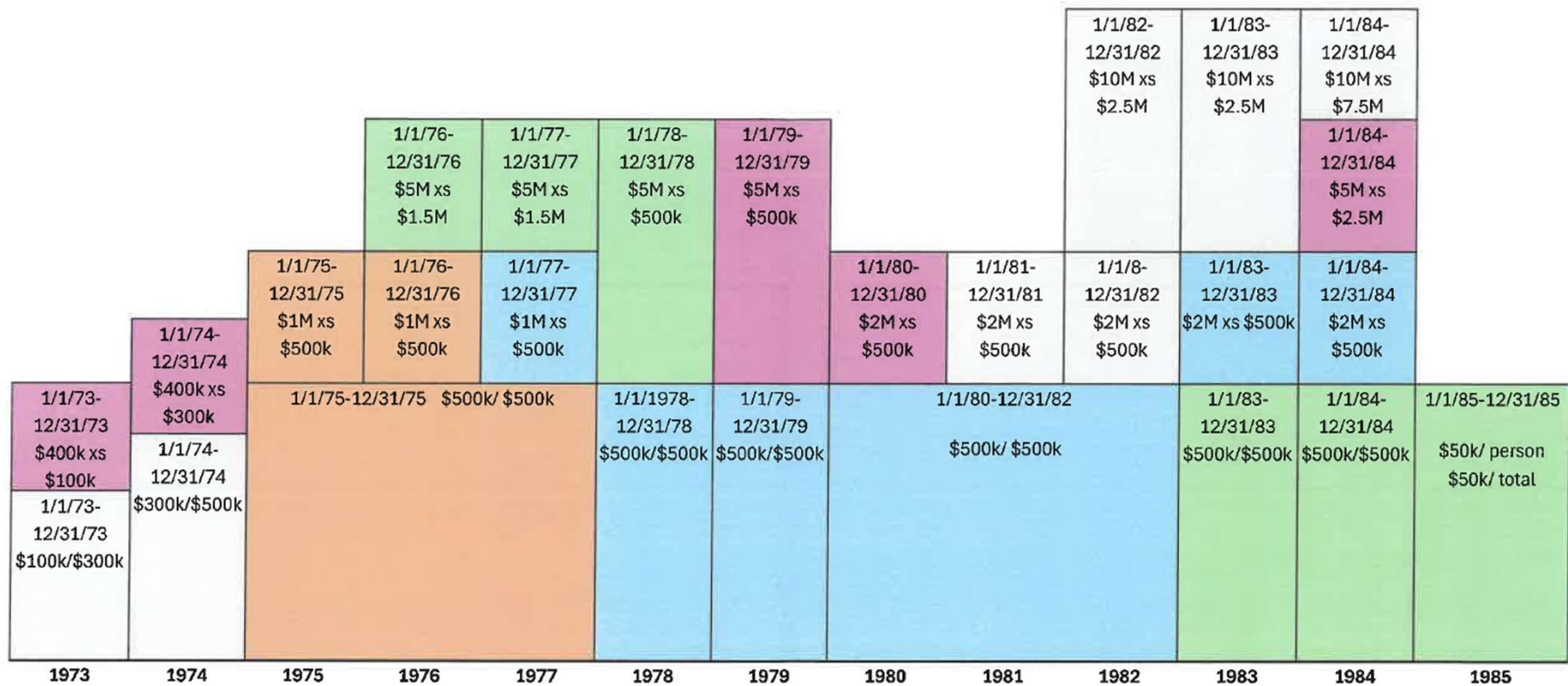
- Exclusions:
 - No coverage for intentional acts
 - Sexual molestation exclusions

- Number of occurrences/ limits

- Application of deductibles and retentions

- Allocation to primary, low excess and high excess insurance
 - Issues of survivor's memories re: timing of abuse
 - Exhaustion of underlying insurance through layers/piecemeal settlements
 - Economic realities and consideration of reinsurance implications

Sample Coverage Chart



REINSURANCE RECOVERY IMPLICATIONS

- Loss allocation
- Exclusions
- Different coverage positions (e.g., number of occurrences) among insurers
- Number of reinsurance occurrences
- Requirement of underlying exhaustion of coverage
- Follow the settlements/follow the fortunes
- Risks attaching vs. losses occurring
- Concurrency between the insurance policy and facultative coverage
- Arguments made by reinsurers: "To permit the reinsurer to revisit coverage issues resolved between the insurer and its insured would place insurers in the untenable position of advancing defenses in coverage contests that would be used against them by reinsurers seeking to deny coverage." Travelers v. INA, 609 F.3d at 149, quoting Commercial Union v. Seven Provinces, 9 F. Supp. 2d at 66 (D. Mass. 1998).

COMPARISON TO LATENT INJURY ENVIRONMENTAL AND TOXIC TORT COVERAGE AND REINSURANCE DISPUTES

Travelers v. Lloyd's, 96 N.Y. 583 (2001)

- \$140 million underlying insurance settlement with DuPont treating each pollution site as one occurrence
- \$72.5 million underlying insurance settlement with Koppers on 25 sites
- "Each and every loss" defined as: "all losses arising out of one disaster and/or casualty...."
- "Disaster and/or casualty" defined as "each and every accident, occurrence and/or causative incident, it being further understood that all loss resulting from a series of accidents, occurrences and/or causative incidents having a common origin and/or being traceable to the same act, omission, and/or mistake shall be considered as having resulted from a single accident, occurrence and/or causative incident

Holding: The words "series of" have inherent spatial and temporal boundaries that are not satisfied by geographically widespread losses from New Jersey to Oregon over a multitude of sites over many decades

Travelers v. INA, 609 F. 3d 143 (3d Cir. 2010)

- Settlement with major manufacturer ("Acme") by payment of \$80 million for indemnity only, not defense, on breast implant claims and \$20 million for chemical products claims was reasonable even though cedent at the time of settlement had not yet paid any indemnity and had only paid defense
- Held that allocation of \$80 million to high excess indemnity claims without allocation to defense or to underlying coverage was reasonable because experts testified that the defense would be paid by another similarly situated insurer and the allocation allowed Travelers to exhaust an underlying layer
- The "Net" nature of the settlement transaction and the agreed characterization with the insured supported the reasonableness of the settlement for follow the fortunes purposes

- **MAXIMIZATION OF REINSURANCE RECOVERY:** "In the post settlement allocation context, this means that an insurer breaches this duty [of good faith] when it makes allocation decisions primarily for purposes of increasing its reinsurance recovery.... We make clear, however, that the insurer's negative duty not to make allocation decisions primarily in order to increase reinsurance recovery does not translate into a positive duty on the part of the insurer to minimize its reinsurance recovery....What this means for the reinsurer's burden of persuasion is that, to establish a breach of the duty of good faith, it is not sufficient simply to demonstrate that a particular allocation decision increased the insurer's access to reinsurance, at least not where the insurer is able to point to some legitimate (i.e., non-reinsurance-related) reason for the challenged decision."
- **INTERESTING FOOTNOTE 24:** "It is true that the final settlement agreement did dictate certain allocation decisions. But it is clear from the record of the negotiations over the final text of that agreement that the allocation language was inserted at Travelers' insistence, a point it has conceded during this litigation. The focus of active bargaining between the parties was the final dollar figure, not the details of the coverage Travelers would ultimately provide to Acme."

Questions?