

CAP SPECIALTY® WHITE PAPER

Sexual Abuse and Molestation

SEPTEMBER 2020



EXECUTIVE SUMMARY

Sexual misconduct, and its far-reaching impact, is an issue at the forefront of society. Changes in the laws are making it easier for victims of sexual misconduct to have their day in court, no matter how long ago the incident occurred. This changing landscape, while a step forward for victims of sexual misconduct, gives rise to risk-management challenges for many businesses, especially those that provide services to children and the infirm. This whitepaper outlines the types of claims that can be made against businesses, legal changes that are spurring the increase in these types of suits, what that means for the business operating environment and loss-control considerations for preventing sexual misconduct.

THE TRAGEDY OF IT

Although sexual misconduct is especially prevalent in facilities that offer overnight or extended stays, such as schools, group homes, mental-health facilities and camps, it can occur anywhere at any time. Below are just a few examples of situations that resulted in claims. In some cases, the defense costs were at least half of the policy limits. In each case, the insured's full policy limits were exposed:

- A 16-year-old in a group home for at-risk youth was sexually assaulted on numerous occasions by the 48-year-old married administrator of the home. The girl and her family, along with several other residents in the program, sued for negligent hiring, retention, and supervision.
- The husband of an in-home daycare operator was accused of inappropriately touching a 10-year-old child. The husband was licensed as a "back up provider" but was not generally involved in the day to day operations of the daycare. He was charged with two counts of felony sexual abuse and it is anticipated a civil action will be initiated, alleging negligent supervision by the named insured.
- A woman was a patient in a mental-health facility after a suicide attempt. The facility housed both male and female patients, but to prevent suicides there were no locks on the rooms' doors. A male patient entered the woman's room and sexually assaulted her. She sued the facility for negligent supervision, monitoring, safeguarding and care.
- An employee of an insured installed unauthorized cameras in customers' homes while he was installing security alarms. Unbeknownst to the customers, the cameras captured video of children and other family members. The employee viewed the recordings on his home computer. He pled guilty to 28 charges, which included various counts of child pornography and unlawful use of video equipment. The insured was sued for negligent hiring, training and supervision and for vicarious liability for its employee's crimes.

- A male staff member at a group home showed a resident boy pornography on the employee's phone and sexually assaulted the boy in his room. Even though use of personal cell phones and entry into residents' rooms was prohibited by the facility's protocols, other staff failed to report the violation. The boy's mother sued the employee, alleging assault and battery, and the group home, alleging negligent training, supervision and retention.
- A security company allegedly failed to observe and report prostitution in a hotel, including evidence of young women being trafficked. A negligence claim was brought against the insured security company for failure to provide reasonable, adequate and sufficient security and failure to take appropriate steps to protect hotel patrons, including alleged sex trafficking.
- An insured performed a home study of a prospective foster home and deemed the home fit for foster children. Later, the adult son of the foster family sexually assaulted a teen foster child in the home. The guardian ad litem for the foster children sued, alleging that the insured was negligent in performing the home study.

A HARSH REALITY

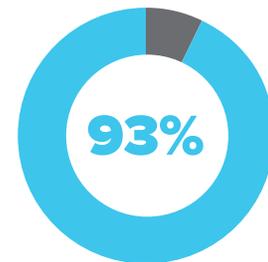
Every 73 seconds an American is sexually assaulted, and every nine minutes that victim is a child.¹ In response to this tragedy, 43 states, the federal government and Washington, D.C. have implemented or proposed reforms to criminal sexual abuse statutes of limitations ("SOLs"), 12 states have implemented or proposed reforms to civil sexual abuse SOLs, and 17 states and D.C. have enacted "reviver" statutes, which allow previously tolled civil cases to now be brought.²

Two examples are New Jersey, which in 2019 opened a two-year window during which any survivors of child sexual abuse may file a lawsuit, regardless of how long ago the injury occurred, and New York, which enacted a similar law that extended the SOL for civil

SOME FACTS ABOUT SEXUAL MISCONDUCT IN THE UNITED STATES:

8 OUT OF 10

ASSAULT VICTIMS
KNOW THEIR ATTACKERS



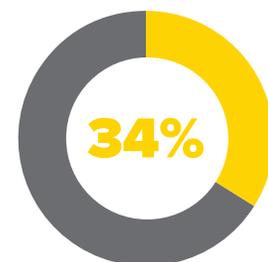
93% OF CHILD SEXUAL
ASSAULT VICTIMS
KNOW THEIR ATTACKERS

AGES
12-34

ARE THE **HIGHEST RISK YEARS**
FOR RAPE AND SEXUAL ASSAULT



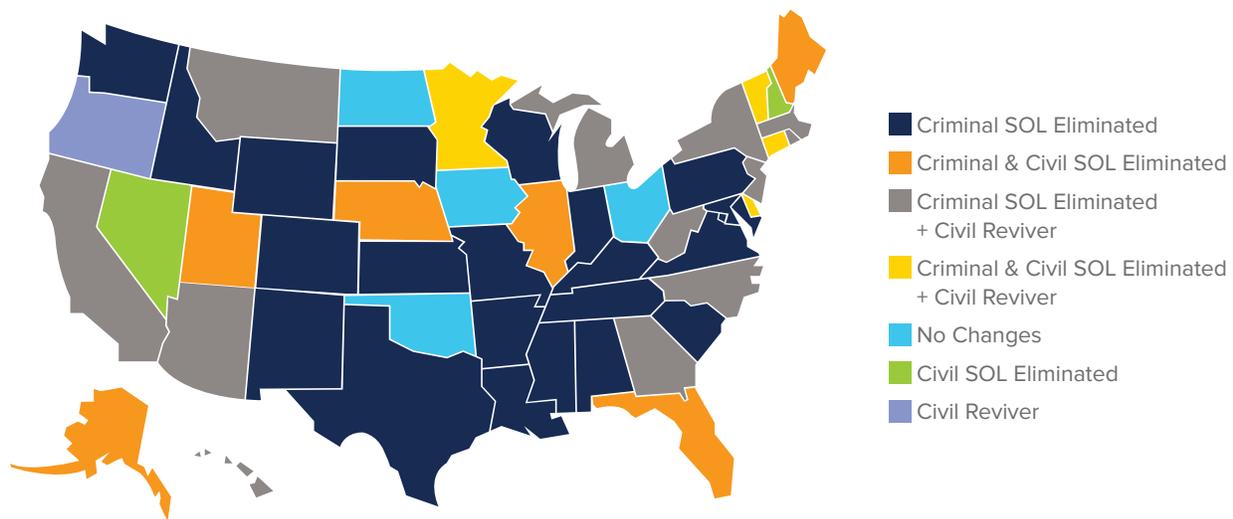
96% OF ALL CHILD SEXUAL
ASSAULT PERPETRATORS
ARE **MALE**



34% OF CHILD SEXUAL
ASSAULT PERPETRATORS ARE
FAMILY MEMBERS

suits until the victim's 55th birthday. Within two days of the New York SOL window opening, over 500 lawsuits were filed.

CHILD SEX ABUSE STATUTES OF LIMITATION



In the states that have enacted such laws, previously expired claims may not only be brought against the actual perpetrator, but also against any potentially responsible parties that may have contributed. For example, in *Woods v. Chapel Hill-Carrboro City Schools Board of Education*, the plaintiff alleged that a minor child was sexually abused by older students, and that school personnel “failed to promptly and appropriately investigate and respond.”³

Numerous attorneys are advertising that they can help the victims of these tragic incidents with legal action. Lawsuits are never pleasant, but sexual-misconduct lawsuits are particularly unpleasant, bringing a great deal of emotional pain, reputational harm, expense and even possible criminal charges. As we have shown above, plaintiffs’ counsel cast a wide net, naming not only the abuser as a defendant, but also the supervising/hiring organization and its board members, trustees, administrators, and any other individuals who have any type of supervisory or ancillary role. The universe of plaintiffs is also expanding to include not just the direct victim, but family members who may have loss of consortium claims and other individuals who were in the “zone of danger” and were either allegedly harmed by witnessing the abuse or simply by having been put at risk. Defending these claims has become even more difficult, as records are often lost, witnesses can’t be found, and the climate is plaintiff-friendly.

WHY SUCH AN IMPORTANT LEGAL SHIFT?

The legal reforms regarding sexual misconduct can be traced, in part, to recent developments, including:

- the “#MeToo” movement, which has shined a spotlight on pervasive abuse of power against women;
- media coverage of dozens of former USA Gymnastics national team members testifying against team physician Dr. Larry Nassar;
- Pennsylvania Attorney General Josh Shapiro’s grand jury investigation into six Roman Catholic dioceses showing a pattern of sexual abuse and alleged cover-up within the church; and
- Julie K. Brown’s reporting for the Miami Herald on the lax punishment of Jeffrey Epstein’s child sex trafficking operation and allegations of involvement of some of the most powerful men in the world.

EVALUATING THE RISK

Any organization can be subject to a sexual misconduct action, but schools, churches, camps, tutoring centers, nursing homes and, of course, daycares are the types that should be most concerned about exposure.

The length of time the organization has physical responsibility for, or custody of, individuals, especially at-risk individuals like children, developmentally disabled, physically infirm, psychiatric patients, and addicts, is a big factor in determining the exposure to liability. The more prolonged the activity, the greater the hazard.⁴

Every lawsuit must be acknowledged and vigorously defended. Even claims that are quickly dismissed can cost tens of thousands of dollars, while those that have merit can cost millions in settlement and defense. Sexual misconduct cases are also subject to the ongoing “social inflation” trend, which means that when these matters go to juries, the verdicts can be astronomical.

RISK MANAGEMENT: STAYING SAFE

Loss prevention is a first-line strategy against these claims. All levels of an organization, from leadership to management to the front line, must be educated about sexual misconduct and become committed to its prevention. For regulated businesses, mandatory training is increasing, and businesses must track the requirements and the participation.

Standard operating procedures should be implemented, minimizing any individual’s opportunity to be alone with potential victims, and setting expectations for all employees to speak up when they see

or suspect something. For example, sensitive functions, such as assisting with toileting or bathing, should always be performed by two staff. Sexual misconduct is less likely to happen when there is a witness present.

Specific actions companies can take to mitigate risk include:

- » Engage a reputable agency to conduct a thorough background check on all new hires. Require key vendors and other third parties who have regular access to facilities to do the same for all their employees and contractors. Always consult with counsel before making a hiring decision on anyone who has relevant information disclosed in a background check.
- » Institute strict rules of conduct for everyone in the organization and provide training on sexual misconduct, so employees and volunteers understand exactly what is and is not acceptable. Require everyone in the organization, including directors and officers, employees, agents, and contractors to regularly certify receipt and understanding of all applicable policies. Retain the records indefinitely.
- » Provide clear guidance to all persons that misconduct of any kind will not be tolerated. Ensure that there are clear channels of communication to report concerns – preferably through management, but also ensure there is an anonymous method available. Numerous “alert line” or “ombudsman” services are available and should be considered.

Overall, be vigilant about observing all relationships that affect the organization.

CONCLUSION

One of the harsh realities is that sexual misconduct occurs with great frequency. With it comes a host of legal ramifications that can be devastating for a business, both reputationally and financially. It is imperative to have strong controls in place to prevent losses, and proper liability insurance to defend against these claims.

1 www.rainn.org (retrieved 7/24/20)

2 www.childusa.org/2020sol (retrieved 9/5/20)

3 Alicia Woods, as Guardian Ad Litem for R.W., a minor child, and individually, Plaintiff, v. Chapel Hill-Carrboro City Schools Board of Education, et. al. 2020 WestLaw 3065253.

4 Quigley, C. 2019. Childhood Sexual Abuse Claims and Law Reforms – 3 Things Underwriters Can Do, retrieved from <https://www.genre.com/knowledge/blog/childhood-sexual-abuse-claims-and-law-reforms-en.html> (retrieved 7/24/20)

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