

New Jersey District Court Denies Coverage Based on Prior Known Acts Exclusion

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The United States District Court for the District of New Jersey recently held that an insurer had no duty to defend a sexual abuse action brought against a school board, based on a prior known acts exclusion in the insurer's policy. The decision, *Montville Township Board of Education v. Zurich American Insurance Company*, Docket No. 2:16- cv-4466, affirmed the applicability of a prior act exclusion in an Abusive Act Coverage part of a general liability policy where an insured had knowledge of a former employee's sexual conduct prior to the effective date of coverage.

Montville Township arose from an underlying action in which the insured, Montville School Board ("the Board"), employed Jason Fennes as a first grade teacher in Montville, New Jersey between 1998 and 2010. According to the underlying plaintiff's complaint, Fennes engaged in sexual misconduct with students during this time, of which the Board was aware. Rather than reporting Fennes to authorities, the complaint alleges that the Board agreed not to inform potential employers of his misconduct in exchange for his resignation. Fennes then began working at Cedar Hill Prep School, also in New Jersey, where he allegedly sexually assaulted the plaintiff. The plaintiff and her parents sued Cedar Hill Prep in 2012, amending their complaint in 2015 to include the Board. The amended complaint alleged that the Board's silence "enabled and facilitated" the plaintiff's eventual abuse.

The Board brought the instant action against its insurer, Zurich American Insurance Company, seeking defense and indemnification for the underlying action. Zurich denied coverage on the basis of a Prior Known Acts exclusion in its policy, barring coverage for claims arising from abusive acts, where the insured had knowledge of those acts prior to the policy's inception date of June 2011. This position was premised on allegations in the amended complaint that the Board was aware of Fennes' sexual misconduct during his tenure at Montville prior to 2011. The Board argued that this did not constitute prior known acts for purposes of the exclusion, claiming that the amended complaint "[did] not allege with specificity that the Board had knowledge of any information which would clearly meet the definition of an 'abusive act' as used in [the policy's] Abusive Act Coverage Part." The policy defined "abusive act" to include "abuse or molestation done to any person....resulting in 'injury' to that person, by anyone who causes...the person to engage in a sexual act: (a) without consent...(b) if that person is incapable of appraising the nature of the conduct...[or] (c) by engaging...in lewd exposure." According to the Board, the amended complaint's allegations that it had knowledge of "abusive and/or sexual conduct" and "sexual molestation and/or child abuse" did not clearly fit within this definition.

The Court sided with Zurich, holding that a straightforward reading of the amended complaint established that the Board was aware of "abusive acts" prior to the policy's effective date. The Court further explained that a comparison of the allegations against the Board to the clear sexual assault allegations against Cedar Hill Prep established that the Board's alleged conduct did indeed constitute "abusive acts" as defined. Taken together, the

amended complaint, policy, and Prior Known Acts exclusion clearly and unambiguously established that the Board knew about the prior acts of sexual misconduct upon which its liability was premised. While the decision did not create new law, it indicated the Court's unwillingness to inject ambiguity into the language of a clearly drafted complaint. While exclusionary clauses are narrowly construed and ambiguities are resolved in favor of coverage, an insured may not cloud the water with a strained interpretation of clear exclusionary language.