

## CLIENT ALERT

### United States Supreme Court Refuses Review of Ruling Denying Sexual Molestation Coverage

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On January 13, 2020, the United States Supreme Court rejected a petition for certiorari filed by New Jersey's Montville Township Board of Education seeking review of an action in which it sought defense and indemnity coverage from its insurance carrier Zurich American Insurance Company for molestation claims. Both the Third Circuit and U.S. District Court in New Jersey had ruled in favor of the carrier, upholding the "prior acts" exclusion in the policy Zurich issued to Montville, and determining that the insurer had no duty to defend or indemnify the sexual molestation claims.

Zurich began issuing CGL policies to Montville in 2004, including the relevant policy covering the period July 1, 2011-July 1, 2012, which required Zurich to defend and indemnify claims for bodily injury, but which also contained a "Prior Known Acts Exclusion," providing that "this insurance does not apply to . . . [a]ny claim or 'suit' based upon, arising out of or attributable, in whole or in part, to any 'abusive act' of which any insured . . . has knowledge prior to the effective date of this Coverage Part . . . ."

The underlying action involved allegations by Child M that she had been abused by a teacher, Jason Fennes, in 2011, while he was employed by Cedar Hill Prep school. Fennes later pled guilty to abusing several children and was sentenced to state prison. Prior to the alleged abuse at Cedar Hill Prep school, Fennes had been employed by Montville from 1998-2010, but left amid allegations of inappropriate behavior. Although the Montville incidents were reported to the New Jersey Division of Youth and Family Services (DYFS), it had determined that none of the allegations rose to the level of abuse. Subsequently, Montville suspended Fennes, and they entered into a termination agreement, under which Montville would provide limited information about Fennes (and the alleged abuse) to prospective employers. Child M alleged Montville was negligent in its failure to notify Cedar Hill Prep or authorities of the prior abuse, and Cedar Hill Prep cross-claimed against Montville for contribution and indemnification. Based upon Montville's alleged knowledge of "abusive acts" by Fennes before the effective date of its coverage, Zurich disclaimed any obligation to defend or indemnify, based on the prior acts exclusion in its policy.

Montville's petition for writ of certiorari argued that New Jersey law imposed a "broad duty" on an insurer to defend a claim against its insured, and that both the Third Circuit and the District Court had "erroneously" determined that a prior acts exclusion precluded coverage. Montville further argued that both courts had misapplied the "four corners" rule by evaluating coverage based upon the disputed allegations of the complaint without considering extrinsic evidence of their truth or accuracy. Montville claimed this was in direct contravention of *SL Industries v. American Motorists Ins. Co.*, 128 N.J. 188 (1992), and urged the United States Supreme Court to establish a uniform standard of coverage evaluation which would reject the "four corners" rule. To support its denial of knowledge of Fennes' abuse, Montville provided extrinsic evidence of the DYFS' investigations.

Zurich's brief opposing certiorari argued that the Third Circuit correctly applied established law on the duty to defend. While *SL Industries* abides by the "four corners" rule, it also allows use of extrinsic evidence when determining a duty to defend "where facts extrinsic to the complaint in effect expand the claim, bringing [it] within the policy's coverage," Zurich argued. In this case, both the Third Circuit and District Court had reviewed the extrinsic evidence, but determined it did nothing to change the nature

of the allegations, or that Montville's liability was premised on prior knowledge. Last week, the U.S. Supreme Court denied Montville Township's petition for review of these rulings.

The case is *Montville Township Board of Education v. Zurich American Ins. Co.*, case number 18-3073, in the United States Supreme Court.

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