

# The Legal Intelligencer

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## Lawyers Say Sovereign Immunity Won't Affect Penn State Abuse Suits

Penn State University will not be able to invoke sovereign immunity as a defense in the wake of the child sex abuse scandal, lawyers have told *The Legal*, in what court watchers are calling inevitable civil action calling for massive amounts of money against the university.

What was perhaps a trivial detail for some — that Penn State is a state-related university and not a member of the Pennsylvania System of Higher Education — now becomes a key distinction that could extend the university's liability into an eighth digit. That, as opposed to a \$250,000 maximum for damages state institutions face in civil court and a \$1 million cap in the aggregate.

"There's absolutely no question" that Penn State cannot invoke sovereign immunity, said Daniel J. Sherry Jr. of Philadelphia plaintiffs firm Eisenberg Rothweiler Winkler Eisenberg & Jeck. "State schools could have an argument."

*The Legal* spoke with two Philadelphia law firms — Eisenberg Rothweiler and Ross Feller Casey — that devoted hours of attorney research last week to digging up any case suggesting Penn State, or any state-related school, could invoke sovereign immunity. No case said it could.

But according to Matthew Casey, of Ross Feller, research did not reveal a case saying the school could not, either, but added it would be "very unlikely" the university could limit its liability through that avenue.

Other attorneys said details in the 23-page grand jury presentment handed down regarding former assistant coach Jerry Sandusky leave open the possibility of civil litigation naming Sandusky's charity, The Second Mile, and former head coach Joe Paterno.

In what could be a valuable piece of case law for claims against the university, the Commonwealth Court held in *Roy vs. Pennsylvania State University* that Penn State was not an agent of the state, dismissing petitioner Stephen Roy's claim for lack of jurisdiction. Although the 1990 case does not address sovereign immunity, the ruling seems to indicate that courts would decline to grant such immunity to the university.

The university, though about a third of its board is composed of state actors, will have to stand on its own feet if and when civil suits are filed.

Accordingly, Philadelphia plaintiffs attorney Slade McLaughlin said Penn State will likely take a proactive approach in settling claims.

"These are cases they are going to want to put to bed very quickly and very quietly," McLaughlin said. "I think it's already been an uproar for the school and I don't think they want to stretch it out over the years with civil litigation."

"I'm thinking Penn State reaches out to victims before victims reach out to Penn State," added McLaughlin, who represents at least one plaintiff in a claim against the Archdiocese of Philadelphia.

Meanwhile, at least one branch campus of the university has made a push to ensure that legal bills racked up by the school would not be picked up by the state's taxpayers.

Lisa Powers, director for Penn State's office of public information, said the faculty senate at Penn State Abington has contacted the university in an effort to prevent the university's legal bills from falling on the public. She said the university's directors and officers liability insurance will cover the costs of any lawsuits.

In another break for the alleged victims, the state's statute of limitations grants a person 12 years from his or her 18th birthday to file a claim. This apparently paves the way for civil action from all eight of the victims mentioned in the grand jury's 23-page report, assuming information about the alleged victims' ages was correct.

According to plaintiffs attorneys, the exposure to the university and its staff is broad. As details continue to emerge, attorneys said Sandusky's charity, The Second Mile, could also be named in lawsuits. According to tax forms, The Second Mile ended 2010 with about \$9 million in the bank, and one plaintiffs lawyer said its insurance coverage might be of no help.

Raynes McCarty attorney Gerald A. McHugh Jr. said many carriers have exclusions for sexual misconduct written into liability policies in response to an increase in claims.

Former Philadelphia District Attorney Lynne Abraham, now a partner at the Philadelphia office of Archer & Greiner, has been retained by The Second Mile to do an independent investigation for the organization's board, which she said has about 40 members.

Abraham told several members of the media Monday that she was hired by the board late last week to "find out if this charity has a future."

She said the board members were "distraught, dismayed, incensed [and] saddened."

Abraham noted she had not gotten to the point of preparing for any type of civil action, but said the firm does not do criminal work and "this case will be no exception."

While there was no indication that the charity was facing criminal charges, court watchers noted there was substantial civil exposure for the charity following the grand jury's presentment.

According to McLaughlin, the same was true of Paterno, who has hired Washington, D.C., white-collar criminal defense attorney J. Sedgwick Sollers, according to several news reports.

Pennsylvania Association for Justice President Ken Rothweiler agreed that Paterno had civil exposure, but also did not rule out the possibility of forthcoming criminal charges against Paterno and former Penn State President Graham Spanier.

"Both Spanier and Paterno may be guilty of the same indictable offense that [Penn State athletic director Tim] Curley and [former Vice President of Finance and Business Gary] Schultz have been indicted for," Rothweiler said. They "had the ultimate obligation to report it to police."

For now, however, no charges have been brought against Paterno or Spanier. And Casey said it will be the civil lawsuits, which will likely be stayed during criminal proceedings, that could "unearth" details about how much Penn State officials and board members knew about Sandusky's alleged sexual abuse.

"Those are the types of questions that a civil investigation, with the benefit of subpoena power and court authority will be able to uncover," Casey said. "In building a civil damages case, you are going to find out more about the texture of the knowledge and the list of people who knew."

Attorney Thomas W. Sheridan of Sheridan & Murray said he would not wait for criminal matters to wrap up before filing lawsuits. Sheridan pointed to Sandusky's seemingly unceremonious retirement following the 1999 season as a point of questioning lawyers would want to thoroughly cover.

"Did [Sandusky's] retirement arise following the investigation in 1998?" Sheridan asked. "Any lawyer worth his salt is going to pursue these questions in their lawsuits."

The 1999 season, one of Sandusky's most successful years as a coach, culminated with a shutout victory for Penn State over Texas A&M at the Alamo Bowl. According to the grand jury presentment, the game was also the scene where Sandusky allegedly threatened to send one of his victims home after the victim "resisted his advances."

On Nov. 11, several news outlets reported Texas prosecutors were investigating the alleged incident in order to bring more charges against the disgraced coach.

According to the 23-page grand jury report, the Alamo Bowl followed a 1998 investigation of Sandusky for sexual abuse that did not lead to charges.

Attorneys said the 1998 investigation, which at least one top administrator at the university was aware of, would be of particular relevance to lawsuits because of the conditions Sandusky negotiated as part of his retirement deal. According to the report, Sandusky negotiated emeritus status with the university, which came with an office and a telephone in the Lasch Building — where he allegedly raped a boy in the shower in 2002 — access to all recreational facilities, a parking pass, an Internet account, faculty discounts at the school bookstore and educational privilege for Sandusky and his dependents.

According to the report, Schultz knew of the 1998 investigation. Despite working above university police, Schultz "never sought or reviewed a police report on the 1998 incident," the grand jury alleged. Schultz faces charges of perjury and failure to report an incident of child abuse along with Curley.

"Penn State literally gave him a key and an office and all of the things that he ended up using to facilitate this abuse," Casey said, adding civil cases "should be centered around the administrators." They were the ones with the most civil duty, he said.