

Testimony in Support of House Bill 974
Civil Actions-Child Sexual Abuse-Definition and Statute of Limitations (Hidden Predator Act of 2020)
Before the House Judiciary Committee, February 20, 2020

This memo addresses whether language added to the Maryland Code in 2017 created a right in certain persons and institutions that permanently bars liability for child sexual abuse claims after a certain period of time. The memo also discusses the likelihood of false claims of child sexual abuse and the impact of House Bill 974 on institutions.

In 2017, Courts and Judicial Proceedings Article §5-117 was modified to prospectively extend the statute of limitations to twenty years for civil matters alleging child sexual abuse against a perpetrator and an entity that owed a duty of care to the victim. An entity, including a governmental entity, may be held liable if it employed or otherwise exercised responsibility over the alleged perpetrator and acted with gross negligence. In uncodified language, §5-117 also created a so-called statute of repose that acts prospectively and retroactively to bar claims after the period of limitations has run. House Bill 974, the Hidden Predator Act of 2020, proposes to repeal the statute of limitations and the statute of repose, and to create a two-year look-back window for time-barred child sexual abuse claims.

Question #1: What would be the effect on certain revived claims of sexual abuse if the so-called statute of repose in §5-117 is repealed?

Statutes of Repose and Statutes of Limitation Explained

A statute of repose sets a legislatively determined time after which a defendant is free from liability for a civil claim. When applying a statute of repose, the statute begins to run when a defendant acts, usually by placing a product into the stream of commerce or engaging in a professional service. The statute runs until a legislatively set time, after which it bars a remedy even if a claim has not yet accrued. *Statute of Repose*, Black's L. Dictionary (11th ed. 2019). Put another way, when a product is sold or a service is rendered, the manufacturer is no longer liable for injuries caused by the product and the professional is no longer liable for harm caused by their services after the statute of repose has run. For example, if a statute of repose of 10 years applies to engineering services, and an individual is harmed in year 12 because of the negligence of the engineer, the individual is barred from recovering damages from the engineer. It does not matter that the harm was not caused until after the statute of repose expired nor that the engineer acted negligently; the 10-year period of repose expired, and no claims may be brought.

By contrast, when applying a statute of limitations, a claim (usually a plaintiff's injury) must first accrue for the statute to begin to run. For example, if an individual is exposed to a toxin in year one but harm from the exposure is not known until year 12, the statute of limitations begins to run at year 12, when the harm was experienced and known to the individual, not at year one when the exposure occurred. Unlike statutes of repose designed to cutoff liability, a statute of limitations is procedural and

may be changed at any time. The legislature sets a statute of limitations “to spare the courts from litigating stale claims” and to protect against cases involving lost evidence and faded memories. *Chase Sec. Corp. v. Donaldson*, 325 U.S. 304, 314 (1945). Further, because a statute of limitations exists only for the public policy purpose of encouraging plaintiffs to file timely claims, they do not create fundamental rights. *Id.*

The purpose of a statute of repose is to prevent unpredictability for industry and professionals engaged in certain trades and to protect insurers’ ability to predict future claims. These protections allow for stability in the marketplace from which we all benefit. A statute of repose is used in many jurisdictions to protect defendants in product liability and product defects cases, construction defects cases, estate cases, and medical malpractice cases. When the statute of repose expires and bars a claim, the protected manufacturer or professional has a vested right in immunity from suit. Deprivation of that right must meet rigid due process standards to survive constitutional scrutiny.

Maryland’s Statutes of Repose and Related Case Law

In Maryland, the General Assembly uses a statute of repose to create vested property rights in “consideration[] of the ***economic best interests of the public.***” *SVF Riva Annapolis v. Gilroy*, 459 Md. 632, 636 n.1 (2018) (holding that the statute of repose did not apply). Maryland’s general statute of repose provides (1) a 20-year bar for claims involving improvements to real property, (2) a 10-year bar for claims against architects, professional engineers, or contractors, and (3) a 5-year bar for medical malpractice claims. MD. CODE ANN., CTS. & JUD. PROC. §§5-108(a)–(b), 5-109(a) (West 2019). Hence, in Maryland, as in other jurisdictions, a statute of repose prevents liability for claims related to maintenance of real property, professional services in construction, and medical malpractice.

In stark contrast to claims in the commercial and professional services context, the uncodified language in the 2017 modifications to §5-117 purports to create a statute of repose on child sexual abuse claims. Here, the statute of repose begins to run with a plaintiff’s injury—the sexual assault—and automatically ends 20 years after a plaintiff reaches the age of 18 (i.e. age 38). This tolling mechanism is more appropriate to a statute of limitations than a statute of repose because survivors of child sexual abuse do not discover their injury until, on average, age 52, and the statute will likely run long before a survivor is even aware of the possibility of filing a claim. *Child Sex Abuse Statutes of Limitation*, CHILDUSA (last visited Feb. 13, 2020), <https://www.childusa.org/sol>. Statutes of repose in Maryland have always been intended to protect the “economic best interests” of defendants for the benefit of the public. Applying a statute of repose in the context of interpersonal violence, particularly protecting those who sexually assault children, is a significant departure from Maryland law, does not fall within the purpose of statutes of repose, and is an inappropriate mechanism that prevents survivors from suing their abusers. Therefore, the uncodified language in §5-117 should not be interpreted as creating a vested right in sexual predators and entities that sheltered such heinous criminals while allowing children to suffer grievous harm.

This conclusion is consistent with the apparent legislative intent from 2017. It is apparent that the General Assembly never intended to create a vested right in child sexual abuse cases for perpetrators and the entities that sheltered them. The 2017 bill files, House Bill 642 and Senate Bill 505, include no discussion or debate, either in Committee or on the Floor of the House or Senate,

regarding the constitutional implications of a statute of repose. Delegate Atterbeary noted that permanent immunity from liability “was never discussed,” and Senator Zirkin stated “it wasn’t anyone’s intent” to grant permanent immunity. Erin Cox and Justin Wm. Moyer, *When Maryland Gave Abuse Victims More Time to Sue, it May Have Also Protected Institutions, Including the Catholic Church*, WASH POST (Mar. 31, 2019), https://www.washingtonpost.com/local/when-maryland-gave-abuse-victims-more-time-to-sue-it-may-have-also-protected-institutions-including-the-catholic-church/2019/03/31/769537ca-4f3a-11e9-911a-7d51996d6f38_story.html. Last year, when House Bill 687 (Hidden Predator Act of 2019) was introduced to, in part, repeal the statute of repose, legislators in both Chambers reiterated that they had not intended to create a vested right for defendants. The 2019 bill passed on the House floor by a vote of 135-3 before it failed in the Senate Judicial Proceedings Committee by a 5 to 5 vote.

Hence, not only is a statute of repose for child sexual abuse claims inapposite to Maryland law of statutes of repose, the 2017 General Assembly did not intend to create a true statute of repose granting vested rights in those who sexually assault children or those who protect the offenders. Repeal of the uncodified language adopted in 2017 should not interfere with property rights and should apply retroactively consistent with the proposed look-back provision in House Bill 974.

Impact of Repeal of the Uncodified Language in §5-117

Repealing a statute of repose prospectively does not raise constitutional concerns because a defendant does not have a vested right until the statute has run. For this reason alone, this Committee should feel comfortable passing House Bill 974 with the repeal of the uncodified language from 2017. The question of whether the repeal can be applied retroactively is not answered directly in Maryland case law; but the better answer is that the repeal could apply retroactively given the odd nature of a so-called statute of repose for child sexual assault and the lack of intent to vest rights by the General Assembly.

If the repeal of the uncodified language is applied retroactively, a defendant for whom a claim would have expired under the 2017 provision may argue that reviving a claim that had previously expired is an unconstitutional deprivation of rights. While there is no clear resolution of such a challenge, “there is no reported case in Maryland that would mandate [the] unconstitutionality” of repealing the 2017 uncodified language. Kathryn M. Rowe, Md. Office of the Att’y Gen., Letter to Hon. Luke Clippinger, 2017 Leg., 439th Sess. (Md. 2019). Further, the U.S. Supreme Court ruled long ago that reviving a time-barred claim is constitutional as long as it does not infringe on a defendant’s vested property right. *Donaldson*, 325 U.S. at 316. It is highly doubtful that the 2017 uncodified language created a vested right in child predators and those who sheltered them, especially in light of no manifest legislative intent to create such a right.

This conclusion is not inconsistent with Maryland law. An examination of Maryland court decisions reveals two relevant cases that address the issue of vested rights, however, neither case concerns the retroactive repeal of a statute of repose. In *Dua v. Comcast Cable of Md., Inc.*, where the legislature enacted laws that retroactively altered consumer contracts, the Court of Appeals relied on property law when it held that “the State is constitutionally precluded from abolishing a vested property right or taking one person’s property and giving it to someone else.” 370 Md 604, 623 (2002). In *Doe v. Roe*, the court addressed an earlier iteration of §5-117 that extended the statute of

limitations for child sexual abuse claims when it ruled that the statute was remedial and did not create a vested right because the legislature intended it to apply prospectively. 419 Md. 687, 691–92 (2011). Here, the court expressed no opinion on time-barred claims without clear legislative intent that the statute should apply retroactively. *Id.* Hence, while the court recognized a retroactive vested right in a commercial claim, it did not find a prospective vested right in a child sexual abuse claim. This supports a prediction that, should the General Assembly pass House Bill 974 with the intent to allow the retroactive revival of time-barred claims, Maryland courts would abide that legislative intent.

Statutes of Repose in Other States

No other jurisdiction has instituted a statute of repose for civil claims of child sexual abuse. Moreover, there is a trend among the states to extend civil statutes of limitation for child sexual abuse claims (e.g. AL, AZ, CA, CT, GA, IL, MI, MN, MT, NC, NH, NJ, NY, PA, RI, TN, TX, UT, VT) or to eliminate them entirely (e.g. AR, CO, DE, MS, ND, NM, KS, SC, WA, WY). The Delaware Supreme Court considered the constitutionality of a 2007 law that abolished the statute of limitations for child sexual abuse claims and instituted a two-year look-back window. The court followed the U.S. Supreme Court’s precedential ruling that reviving time-barred claims may be constitutional and held that the 2007 law could be “applied retroactively because it affects matters of procedure and remedies, not substantive or vested rights.” *Sheehan v. Oblates of St. Francis De Sales*, 15 A.3d 1247 (Del. 2011). In the absence of Maryland case law that specifically addresses the issue of retroactive vested rights in so-called statutes of repose, the Court of Appeals may consider decisions like Delaware’s to be persuasive.

Question #2: Will House Bill 974 encourage false claims or claims that are indefensible due to stale evidence?

House Bill 974 proposes to abolish both the statute of repose and the statute of limitations for civil claims of child sexual abuse. The ability to bring a claim at any time should not be construed as an invitation to falsify a claim. Although several studies show that approximately 10% of child sexual abuse claims are false, most of these fabricated allegations are made by children, not adult survivors. When a civil claim is brought in Maryland, the plaintiff bears the burden of proof and must come forward with sufficient, admissible evidence to support the allegation. When the plaintiff is unable to do so during the pre-trial discovery phase, the defendant may file a motion to dismiss and/or a motion for summary judgment. If the plaintiff cannot show sufficient evidence to justify trial on the claim, the case will be dismissed, or summary judgment will be awarded to the defendant. MD. R. 2-322, 2-501 (2019). Even when a case survives these early challenges, the plaintiff faces the rigorous rules of evidence and must prove all elements of the claim and damages by a preponderance of evidence. When, over time, memories may fade and evidence may be lost, the plaintiff must still produce enough reliable, relevant evidence to persuade the trier of fact that the sexual assault occurred, and the damage was sustained. While no system of justice is perfect, our system is designed with many mechanisms to test a plaintiff’s ability to prevail at trial and to stop a case if such proof is lacking.

Question #3: Is the intent of House Bill 974 to punish institutions?

The intent of House Bill 974 is to discover child sexual predators who remain hidden in Maryland communities and may still be abusing children, and to reveal those entities that were negligent in their supervision of these offenders. The bill gives survivors, who may not fully comprehend the harm they suffered until evoked many years later, access to justice that they otherwise would not have. Maryland law should not erect artificial barriers to prevent survivors from seeking and securing recompense through civil action for the harm they suffered. By permitting civil claims against culpable governmental, private, and non-profit institutions, passage of House Bill 974 will not flood the courts, but it will reveal hidden predators and hold their institutional enablers accountable. In jurisdictions with retroactive look-back windows, on average 1,000 claims were filed revealing 125–300 predators. *Hidden Predator Act 2020*, STATE COUNCIL FOR CHILDHOOD ABUSE AND NEGLECT (2020).

No one entity is the target of this bill and no one entity will survive or fail as a result of this bill. Only those entities against whom credible, supported claims are made and successfully litigated will suffer. There can be no sympathy for such organizations even if they otherwise contribute positively to the community. No charitable effort or community service can cancel the debt owed to those who have survived this most horrific crime of child sexual assault.

The argument that allowing claims against private entities is unfair because governmental entities that may be culpable for harboring sexual offenders are more protected from suit has nothing to do with House Bill 974. Rather, the State's inherent entitlement to sovereign immunity from liability pre-existed the ability to bring civil claims for child sexual abuse and is designed to protect the public fisc, especially in light of the high degree of risk in undertaking extensive government operations. Government actors may be unwilling to exercise discretionary powers but for the assurance of protection through sovereign immunity. *See The State as a Party Defendant: Abrogation of Sovereign Immunity in Tort in Maryland*, 36 Md. L. Rev. 653 (1977), available at: <http://digitalcommons.law.umaryland.edu/mlr/vol36/iss3/9>. That the State's liability may be limited to damages permitted under the State Tort Claims Act (MD. STATE GOV'T Title 12, Subtitle 1), the legislative waiver of sovereign immunity for civil actions is not unique to claims of child sexual assault. No private entity warrants similar protection, regardless of how popular, well-supported, or philanthropic such an entity may be.

Passage of House Bill 974 will demonstrate Maryland's unwavering support for survivors of child sexual abuse. For these reasons, we urge a favorable report on House Bill 974.

This testimony is submitted on behalf of the Public Health Law Clinic at the University of Maryland Carey School of Law and not by the School of Law, the University of Maryland, Baltimore, or the University of Maryland System.