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Eliminating the So-Called Statute of Repose

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January 19, 2023

*Any views expressed are those of Professor Hoke and do not represent the position of Maryland Carey Law; the University of Maryland, Baltimore; or the University of Maryland System

What is a Statute of Repose?

Long: A statute of repose establishes a time after which a person/entity is free from liability regardless of whether a claim has accrued. The limitations period begins to run at a specified time. Once the time expires, all claims of negligence are extinguished, even those that have not yet arisen.

Short: Statutes of repose *set a date certain* by which a person/entity is free of liability for negligence.

Purpose of a Statute of Repose

The purpose of a statute of repose is to ***prevent unpredictability*** for industry and professionals engaged in certain trades and professions and to protect insurers' ability to predict future claims. These protections allow for stability in the marketplace from which we all benefit.

Statute of Repose v. Statute of Limitations

Statute of Limitations (Procedural)

Sets a date by which a claim must be filed based on when the injured party knew or should have known of the harm and who caused it.

Statute of Repose (Procedural and Substantive)

Sets a date by which a claim must be filed regardless of whether the injured party is aware of injury and who caused it or whether the injury has even occurred.

Statute of Repose v. Statute of Limitations

Statutes of limitation may be changed by the legislature and those changes may be applied retroactively without constitutional concern in most circumstances.

Statutes of repose may be interpreted as providing a property right to a defendant whose negligence causes harm after passage of the established time. Altering a statute of repose retroactively may create additional burdens for a legislature.

Statute of Repose in Maryland: Purpose

In Maryland, the General Assembly uses statutes 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 (2018)

Maryland has only one statute of repose.

Statute of Repose in Maryland: Construction Industry

Courts & Judicial Proceedings §5-108 contains a “statute of repose” for *improvements to real property and to related professionals* who are *highly regulated*.

Capital improvements are *economic drivers*; this protection reflects the *public interest in a strong economy*.

Statute of Repose: Construction Industry

Owner: No cause of action accrues for wrongful death, personal injury, or property damage caused by defective and unsafe condition if harm occurs *more than 20 years after the date the improvement becomes available for use.*

Architect, Engineer, Contractor: *10 years after the date the improvement becomes available.*

Exception: Asbestos; a public health concern.

Other Statutes of Repose in Maryland



Courts and Judicial Proceedings §5-117(d)

In no event may an action for damages arising out of an alleged incident or incidents of sexual abuse that occurred while the victim was a minor be filed against a person or governmental entity that is not the alleged perpetrator more than 20 years after the date on which the victim reaches the age of majority.

Courts and Judicial Proceedings §5-117

Uncodified Section 3

That the statute of repose under § 5–117(d) shall be construed to apply both prospectively and retroactively to provide repose to defendants regarding actions that were barred by the application of the period of limitations applicable before October 1, 2017.

Questions for 2023

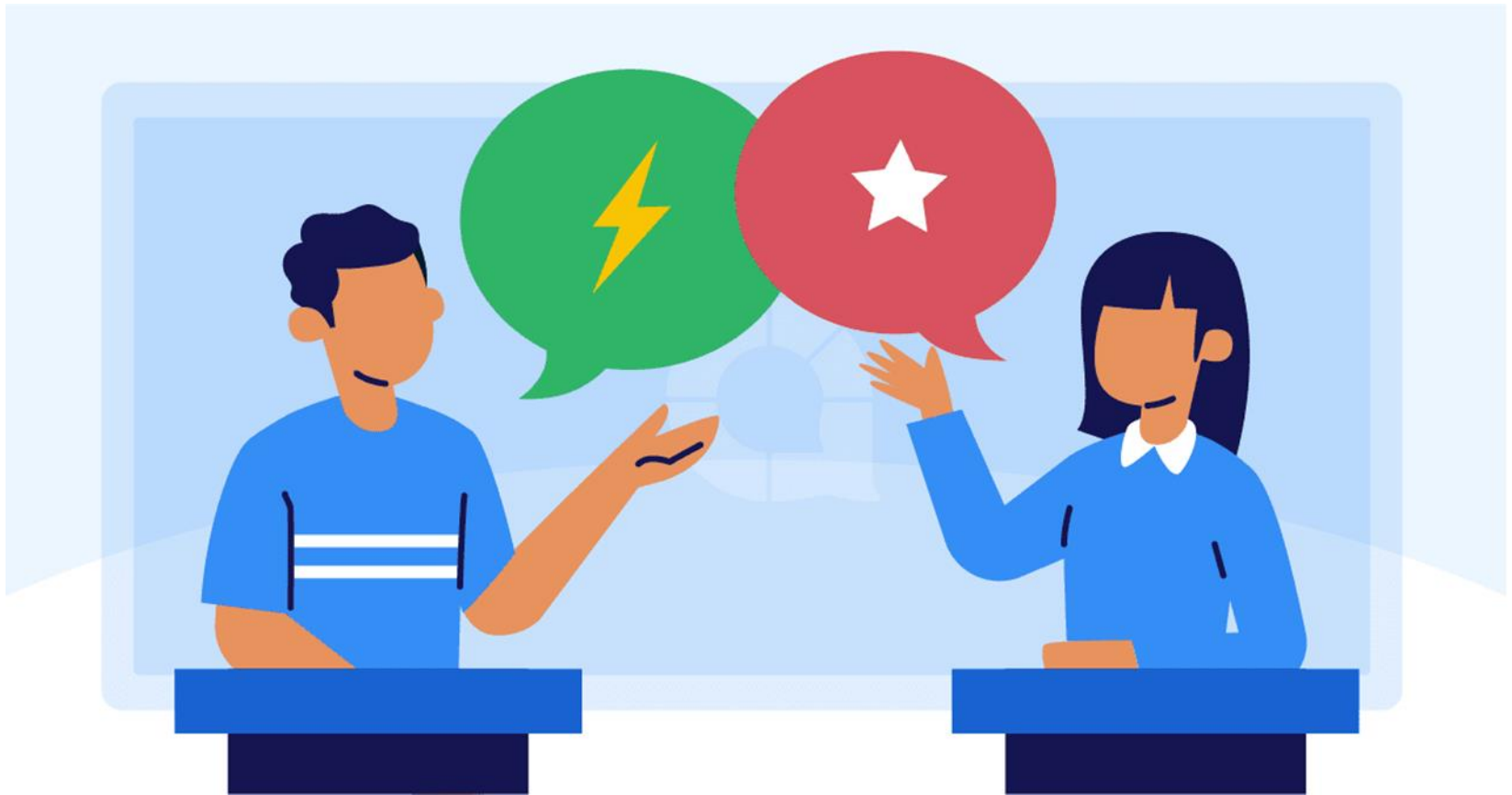
- ✓ *Was a statute of repose created in 2017?*
- ✓ *If so, what is the impact of repealing the statute of repose and having it apply retroactively?*

There is genuine debate on these questions.

The best answer is that the Supreme Court of Maryland will have to decide.

Was a Statute of Repose Created in 2017?

EARNEST DEBATE



Maryland Supremes on Statutes of Repose

Maryland courts look holistically to determine if a statute is one of limitation or one of repose.

Relevant in this inquiry are:

- ✓ what triggers the running of the period;
- ✓ whether the statute eliminates claims that have not yet accrued;
- ✓ purpose behind the statute; and
- ✓ legislative history surrounding passage.

Anderson v. United States, 427 Md. 99 (2012)

Anderson: The trigger for a statute of repose period is unrelated to when injury occurs.

§5-108: Contractor/architect/engineer: once the building is available for use, the clock starts ticking. ***Completing the building—not the injury—starts the clock and claims for injuries that occur after 10 years are barred.***

§5-117: The ***injury must have occurred for the clock to start running.*** There are no claims that could occur after the 20 years. ***Injury is the trigger.***

Language, history, and purpose support that no statute of repose was created.

The General Assembly is aware of the language used to create a statute of repose and does so in ***“consideration[] of the economic best interests of the public.”***

SVF Riva Annapolis v. Gilroy, 459 Md. 632 (2018)

Language Used in §5-117

Anderson: The General Assembly is aware of the language and conditions necessary to create a statute of repose and did so in §5-108 by using particular language that ***clearly extinguishes claims before they have accrued.***

No such language exists in §5-117; more like the medical malpractice statute in §5-109 found in *Anderson* to NOT be a statute of repose.

History: Intent of 2017 Legislature

The General Assembly never intended to create a vested right in entities that sheltered child sexual abusers.

- Full records for HB 642/SB 505 contain no discussion about constitutional implications of a statute of repose.
- Comments from members who passed the bill indicate no intention to grant permanent immunity.

History: Intent of 2017 Legislature

Delegate Atterbeary noted that permanent immunity from liability “**was never discussed,**” and *then JPR Chair Zirkin* stated “**it wasn’t anyone’s intent” to grant permanent immunity.**

Erin Cox and Justin 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).

2019 and 2020 House Repeal

HB 687 (2019) and HB 974 (2020) would have repealed the so-called statute of repose:

- ✓ 2019: Passed House by a vote of 135-3 before failing in the Senate Judicial Proceedings Committee (5-5).
- ✓ 2020: Passed the House 127-0; not voted in the Senate Judicial Proceedings Committee (early closure due to the pandemic).

Purpose: To Protect Those Who Failed to Protect Children?

What could possibly be the purpose—the public benefit—of creating extraordinary protection through a statute of repose to **EVERY ORGANIZATION** that **NEGLIGENTLY** failed to protect children from sexual abuse?

Why would this protection exist even when such protection does not exist for medical malpractice or lesser torts?

Can a Statute of Repose be Repealed Retroactively?

EARNEST DEBATE



Attorney General Advice Letters

Rowe to Clippinger March 12, 2019

No case law in Maryland finding that revival of an extinguished claim is unconstitutional.

Rowe to Dumais March 16, 2019

Proposed 2-year lookback window would likely be found unconstitutional

Public Policy Supports Constitutionality

Repeat Question:

What could possibly be the purpose—the public benefit—of creating extraordinary protection through a statute of repose to **EVERY ORGANIZATION** that **NEGLIGENTLY** failed to protect children from sexual abuse?

Public Policy Supports Constitutionality

The public interest is best served by

- ✓ Allowing survivors the opportunity to prove the harm imposed on them and by whom and to seek compensation for the harm;
- ✓ Bringing public disclosure of the names of people who have sexually abused children, which will protect today's children from harm.

Repealing Gives Survivors the Opportunity to Seek Relief

Repealing with retroactive impact the so-called statute of repose added to §5-117 in 2017 will *allow the survivors with revived claims to get to the courthouse.*

And this difficult question on the interpretation and application of the 2017 changes will be decided where it should be—the courts.

Questions?

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