

OAG - Support - SB 889.pdf

Uploaded by: Joshua Auerbach

Position: FWA

CANDACE McLAREN LANHAM
Chief Deputy Attorney General

CAROLYN A. QUATTROCKI
Deputy Attorney General

LEONARD J. HOWIE III
Deputy Attorney General

CHRISTIAN E. BARRERA
Chief Operating Officer

ZENITA WICKHAM HURLEY
Chief, Equity, Policy, and Engagement

PETER V. BERNS
General Counsel



WILLIAM D. GRUHN
Chief
Consumer Protection Division

ANTHONY G. BROWN
Attorney General

STATE OF MARYLAND
OFFICE OF THE ATTORNEY GENERAL
CONSUMER PROTECTION DIVISION

Writer's Direct Dial No.

March 6, 2024

TO: The Honorable William C. Smith, Jr., Chair, Judicial Proceedings Committee

FROM: Joshua N. Auerbach, Assistant Attorney General

RE: Senate Bill 889 – Civil Enforcement Actions Brought by the Attorney General
- Statute of Limitations - (SUPPORT WITH AMENDMENTS)

Senate Bill 889, which was introduced at the request of the Attorney General, would clarify that civil actions brought in court by the Attorney General to enforce statutes enacted by the General Assembly are not subject to the separate one-year limitation period set forth in § 5-107 of the Courts and Judicial Proceedings Article. This limitation period on prosecutions for fines was first adopted in 1777, and it was never intended to limit civil regulatory enforcement, which, of course, did not exist in anything like its present form at the time of the law's enactment. As discussed below, the Maryland courts have already confirmed that CJP § 5-107 does not apply to enforcement actions brought by the Attorney General in administrative proceedings. SB 889 would clarify that CJP § 5-107 is equally inapplicable in court.

By way of background, the General Assembly has directed the Attorney General to enforce numerous statutes and, in doing so, has often conferred authority on the Attorney General to seek or impose penalties against those who violate the law. These statutes include, most notably, the Consumer Protection Act, the Securities Act, the Antitrust Act, and the civil rights enforcement law enacted last year (HB 772/SB 540). Penalties serve a powerful deterrent purpose under these statutes. The imposition of penalties protects Maryland consumers and investors and safeguards Marylanders' civil rights.

Each of these statutes contains a comprehensive set of provisions establishing rules and principles for the Attorney General's enforcement activities, specifying the circumstances when penalties may be imposed and the appropriate considerations for determining whether penalties should be imposed and, if so, in what amount. For example, the enforcement

provisions of the Consumer Protection Act occupy an entire subtitle within the Commercial Law Article of the Code, *see* Md. Code Ann., Com. Law. §§ 13-401 to 13-411, and those provisions include a section containing detailed instructions from the legislature concerning civil penalties, *id.* § 13-410. The civil rights enforcement law enacted last year is quite similar, incorporating both a comprehensive set of provisions to guide the Attorney General’s investigative and enforcement actions, *see* Md. Code Ann., State Gov’t §§ 20-1040 to 20-1040, as well as a section specifically addressing penalties, *id.* § 20-1046(b). Importantly, none of these statutes mentions CJP § 5-107. None contains any suggestion that the General Assembly intended for the Attorney General’s enforcement activities to be subject to the eighteenth-century limitation on fines separately codified at CJP § 5-107.

If CJP § 5-107 were nonetheless superimposed on these statutes, it would render meaningless, in a large number of cases, the penalty authority that the statutes confer, particularly in cases involving complex or systemic wrongdoing. Such wrongdoing—for example, predatory or discriminatory lending—often takes more than one year just to come to light. Then, it will often take a year or more for the Office of the Attorney General to conduct a thorough investigation of such misconduct—even longer if, as in many cases, the target of the investigation does not fully cooperate and requires OAG to go to court to enforce an investigative request or subpoena. (In one recent investigation, it took more than three years from OAG’s filing of a subpoena enforcement action for the court to issue an order requiring the defendant to produce the electronic data requested in the investigation.) Defendants in enforcement cases often incorrectly argue that, under CJP § 5-107, they cannot be penalized for egregious misconduct, because their liability for penalties expired under CJP § 5-107 before OAG even learned about the misconduct, or because their liability expired during the period when they were resisting OAG’s efforts to investigate the misconduct.

Notably, the Appellate Court of Maryland has twice rejected this argument in the context of enforcement actions brought by OAG through administrative proceedings, including in a case decided last year. *See In the Matter of Cricket Wireless, LLC*, 259 Md. App. 44, 67-76 (2023); *Maryland Securities Commissioner v. U.S. Securities Corp.*, 122 Md. App. 574, 588-94 (1998). Moreover, no Maryland appellate court has ever applied CJP § 5-107 to limit any civil statutory cause of action brought by the Attorney General, whether brought in administrative proceedings or in court.

However, thirty-five years ago, the U.S. District Court did misapply CJP § 5-107 to a case filed in federal court. *See Attorney General of Maryland v. Dickson*, 717 F. Supp. 1090 (D. Md. 1989). The decision in *Dickson*, which involved an odometer rollback scheme that harmed hundreds of Maryland consumers, has been criticized on other grounds by the Supreme Court of Maryland. *See Price v. Murdy*, 462 Md. 145, 152 n. 3 (2018). The Appellate Court of Maryland has similarly declined to follow *Dickson* in other respects. *See State v. Cottman Transmissions Systems*, 86 Md. App. 714, 736 n. 17 (1991). Nonetheless, for several decades, defendants in civil enforcement action have cited *Dickson* and argued that they cannot be penalized under CJP § 5-107 for anything they did more than one year before the initiation of the action. Senate Bill 889 would finally resolve this longstanding

issue and ensure that penalties are meaningfully available as an enforcement tool in actions brought by the Attorney General in court.

There are a number of policy reasons why a government agency should not be subject to limitations periods like those that apply to private actions. First, as noted above, many pernicious forms of illegal conduct take significant time to come to light. For example, the victims of the odometer rollback scheme in *Dickson* did not themselves become aware of and complain about the scheme until more than one year after the defendant Dickson had already sold more than 300 of the unlawfully altered vehicles. The U.S. District Court nonetheless found that the Attorney General could not seek penalties under the Consumer Protection Act for any of that wrongful conduct.

Second, government agencies should be allowed to investigate unlawful conduct to determine whether the law has been violated and the extent of the violation before filing an action. It would not be in anyone's interest for the government to bring an action before all the facts are developed. In particular, certain complex forms of misconduct take significant time to investigate properly. CJP § 5-107, with its one-year limit on the imposition of fines running from the date of the commission of the "offense," plainly was not written with complex financial fraud and other similar misconduct in mind. Even in cases where OAG is fortunate enough to learn of such misconduct within one year of its occurrence, the misapplication of CJP § 5-107 to OAG civil enforcement actions would have the unfortunate effect in many cases of forcing the Office to choose between conducting an investigation prior to bringing an enforcement action and retaining its authority to seek or impose penalties if it ultimately determines that a violation has occurred.

Third, and relatedly, businesses should have an incentive to cooperate with investigations, but limiting penalties based on a limitations period rewards dilatory behavior. A person who violates the law but who manages to delay OAG's investigation would be rewarded for doing so by insulating themselves from monetary penalties.

Fourth, a short limitations period could result in Maryland receiving less than its proportionate share from any enforcement effort brought jointly with other states who are not subject to a similar limitations period.

The Office of the Attorney General has submitted two amendments. The first removes a separate provision that would alter the statute of limitations for Antitrust actions, which we believe would be better addressed in a separate bill. The second clarifies the language of the limitations provision.

Senate Bill 889 will clarify that the limitations provision contained in CJP§ 5-107 does not apply to civil enforcement cases brought by the Attorney General and, in doing so, ensure that penalties are meaningfully available and effective in actions brought in court. For these reasons, the Office of the Attorney General urges the Judicial Proceedings Committee to give SB 889 a favorable report with the requested amendments.

cc: Members, Judicial Proceedings Committee

SB0889 - MSBA Support FWA Letter (2024.03.06).pdf

Uploaded by: Shaoli Katana

Position: FWA



MSBA Main Office
520 West Fayette Street
Baltimore, MD 21201
410-685-7878 | msba.org

Annapolis Office
200 Duke of Gloucester Street
Annapolis, MD 21401
410-269-6464 | msba.org

To: Members of the Senate Judicial Proceedings Committee
From: Maryland State Bar Association (MSBA)
Subject: SB 889 – Civil Enforcement Actions Brought By the Attorney General – Statute of Limitations
Date: March 6, 2024
Position: **Favorable with Amendment**

The Maryland State Bar Association (MSBA) supports with amendment **Senate Bill 889 – Civil Enforcement Actions Brought By the Attorney General – Statute of Limitations**. SB 889 provides that certain civil enforcement actions brought by the Attorney General may be instituted at any time.

MSBA represents more attorneys than any other organization across the state in all practice areas. Through its advocacy committees and various practice-specific sections, MSBA monitors and takes positions on legislation that protects the legal profession, preserves the integrity of the judicial system, and ensures access to justice for Marylanders.

MSBA supports the concept of clarifying the time limit but has concerns that the bill removes all time limits and should be amended. For these reasons, MSBA urges a **favorable report with amendment on SB 889**.

Contact: Shaoli Katana, Advocacy Director (shaoli@msba.org, 410-387-5606)

SB 889_MDCC_Civil Actions - Enforcement Actions b

Uploaded by: Hannah Allen

Position: UNF



MARYLAND
Chamber of Commerce

LEGISLATIVE POSITION:

Unfavorable

Senate Bill 889

Civil Actions - Enforcement Actions by the Attorney General - Statutes of Limitations

Seante Judicial Proceedings Committee

Thursday, March 7, 2024

Dear Chairman Smith and Members of the Committee:

Founded in 1968, the Maryland Chamber of Commerce is the leading voice for business in Maryland. We are a statewide coalition of more than 6,800 members and federated partners working to develop and promote strong public policy that ensures sustained economic recovery and growth for Maryland businesses, employees, and families.

Senate Bill 889 repeals the 1-year statute of limitations for a civil enforcement action brought by the Attorney General for a fine, penalty, or forfeiture and repeals the 4-year statute of limitations for a civil enforcement action brought by the Attorney General to enforce antitrust laws. This proposed legislation allows the Attorney General to bring a civil action for antitrust at any time.

The purpose of statutes of limitations is to protect defendants from unfair legal action after a significant amount of time has passed. When too much time has passed, relevant evidence may be lost and witness memories fade. As such, Senate Bill 889 stands to open companies up to potential liability going back years to a point that an employer may no longer have the necessary records or institutional knowledge to defend against. The liability concern is immense.

Finally, Maryland continues to bear the burden of perception as a state unfriendly to businesses and economic development. SB 889 increases the liability and therefore the cost of engaging in business in Maryland.

For these reasons, the Maryland Chamber of Commerce respectfully requests an **unfavorable report** on **SB 889**.

MDCHAMBER.ORG

60 West Street, Suite 100, Annapolis 21401 | 410-269-0642

MBIA Letter of Opposition SB 889.pdf

Uploaded by: Lori Graf

Position: UNF

March 6, 2024

The Honorable William Smith
Chairman, Senate Judicial Proceedings Committee
Annapolis, Maryland 21401

**RE: MBIA Letter of Opposition SB 889 Civil Actions – Enforcement Actions by the Attorney General
– Statutes of Limitations**

Dear Chairman Smith,

The Maryland Building Industry Association, representing 100,000 employees statewide, appreciates the opportunity to participate in the discussion surrounding **SB 889 Civil Actions – Enforcement Actions by the Attorney General – Statutes of Limitations**. MBIA **opposes** the Act in its current version.

This bill authorizes a civil enforcement action brought by the Office of the Attorney General (OAG) to enforce the provisions of the Maryland Antitrust Act to be instituted at any time and specifies that a civil enforcement action brought by OAG is exempt from the one-year statute of limitations under § 5-107 of the Courts and Judicial Proceedings Article for prosecutions or suits for a fine, penalty, or forfeiture. The removal of these statutes of limitations poses a significant threat to our industry and the businesses we represent. By allowing civil enforcement actions to be initiated at any time and exempting them from existing statutes of limitations, this bill opens the door to continuous or indefinite scrutiny over alleged violations that may have occurred many years ago. This indefinite exposure to potential enforcement actions places an unjust burden on our members, who could find themselves facing legal challenges and regulatory scrutiny long after the alleged violations took place. Such prolonged enforcement actions can damage a business' reputation and have the potential to drive-up costs for our industry.

For these reasons, MBIA respectfully urges the Committee to give this measure **an unfavorable** report. Thank you for your consideration.

For more information about this position, please contact Lori Graf at 410-800-7327 or lgraf@marylandbuilders.org.

cc: Members of the Senate Judicial Proceedings Committee

SB 889 SOL AG 030724 UNF APCIA .pdf

Uploaded by: Nancy Egan

Position: UNF

**Testimony of
American Property Casualty Insurance Association (APCIA)
Senate Judicial Proceedings Committee**

SB 889 Civil Actions -Enforcement Actions Brought by the Attorney General - Statute of Limitations

March 7, 2024

Letter of Opposition

The American Property Casualty Insurance Association (APCIA) is a national trade organization representing nearly 60 percent of the U.S. property casualty insurance market. Our members write approximately 67.1 percent of all property and casualty insurance sold in Maryland. APCIA appreciates the opportunity to provide written comments in opposition to Senate Bill 889. This bill would eliminate the statute of limitations for actions the attorney general may bring related to alleged anticompetitive business activities within Maryland. For reasons of fundamental fairness, we must oppose the limitless ability to bring suits for such matters.

The Maryland Supreme Court has repeatedly recognized that statutes of limitations strike a balance and “primarily to assure fairness to defendants on the theory that claims, asserted after evidence is gone, memories have faded, and witnesses disappeared, are so stale as to be unjust.” *Shailendra Kumar, P.A. v. Dhandra*, 426 Md. 185, 205, 43 A.3d 1029 (2012) (quoting *Bertonazzi v. Hillman*, 241 Md. 361, 367, 216 A.2d 723 (1966)).

We oppose the limitless civil litigation proposed in this legislation because civil defendants and those we insure may not receive a reasonable opportunity to defend themselves with the passage of time. That is particularly true compared to civil law enforcement by the state’s chief legal officer. With the passage of this bill an Attorney General, will have the power of the state at his or her disposal in terms of prosecuting claims, developing information, facts, claims, etc. Conversely, civil defendants will find that exculpatory documents, witnesses, and recollection are lost.

In this situation, it is worse still as by its nature this is to apply to already competitive business activities. Those activities will be characterized as anticompetitive when facts, memories or documents might prove otherwise had they been available. This legislation is unfair to Maryland businesses and civil defendants.

For all these reasons, the APCIA urges the Committee to provide an unfavorable report on Senate Bill 889.

Nancy J. Egan, State Government Relations Counsel, DC, DE, MD, VA, WV

Nancy.egan@APCIA.org Cell: 443-841-4174