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TO: Members, Assembly Committee on Children and Families
FROM: WCJC; James A. Friedman, Legal Counsel; Andrew C. Cook
RE: Assembly Bill 453
DATE: Oct. 21, 2009

The Wisconsin Civil Justice Council (WCJC) provides the following constitutional and legal analysis of AB 453. While WCJC recognizes and appreciates the sincere motives of the authors to respond to a perceived wrong and appreciates the plight of the alleged victims who are targeted to be aided by this legislation, WCJC opposes AB 453 purely from a legal/constitutional standpoint.

We thank you for allowing us to present this information for your consideration.

I. Summary

Assembly Bill 453 would provide a three-year reviver window for plaintiffs to file childhood sexual abuse claims, regardless of the previous expiration of the statute of limitations. The bill also would eliminate the applicable statute of limitations prospectively.

For over 100 years, the Wisconsin Supreme Court consistently has rejected reviver statutes as unconstitutional. The Wisconsin Supreme Court subscribes to the view that the expiration of a statute of limitations vests a property right in a defendant. The resurrection of a time-barred claim, therefore, amounts to a taking of property without due process of law. As such, AB 453 likely would fail a constitutional challenge in Wisconsin.

II. Proposed Wisconsin Reviver Statute

Currently, child sexual abuse claims in Wisconsin must be brought before the plaintiff reaches age 35. (Wis. Stat. § 893.587.) Assembly Bill 453 would amend Wis. Stat. § 893.587 to eliminate this statute of limitations: “An action to recover damages against any person for injury caused by an adult’s sexual contact with anyone under the age of 18 or by an act committed by an adult that would create a cause of action under s. 895.442 [action for sexual exploitation by a member of the clergy] may be commenced at any time.” The bill also would add the following reviver: “A cause of action described under sub. (2) that was barred by a statute of limitations or a time limit in effect before the effective date of this subsection ... is revived and that action may be commenced within 3 years after the effective date of this subsection.”

III. The Proposed Wisconsin Reviver Statute is Likely Unconstitutional in Wisconsin

In a line of cases stretching back more than 100 years, the Wisconsin Supreme Court has held that reviver statutes are unconstitutional. *See, e.g., Haase v. Sawicki*, 20 Wis. 2d 308, 310-13 (1963) (collecting cases, and holding reviver statute unconstitutional).

The basis for these holdings is that under Wisconsin law, the running of a statute of limitations destroys the plaintiff's remedy *and* the right to the claim (creating a right for the defendant to assert the statute of limitations as a bar). *Wenke v. Gehl Co.*, 274 Wis. 2d 220, 258 n. 31 (2004) (collecting cases).

Once a statute of limitations runs in Wisconsin, a defendant has a vested property right to assert that statute of limitations as an absolute defense to the claim against him. *Maryland Casualty Co. v. Belezny*, 245 Wis. 390, 393 (1944) (“In Wisconsin the running of the statute of limitations absolutely extinguishes the cause of action for in Wisconsin limitations are not treated as statutes of repose.”); *Eingartner v. Illinois Steel Co.*, 103 Wis. 373, 376 (1899) (“The bar created by the statute of limitations is as effectual as payment or any other defense, and when once vested cannot be taken away even by the legislature.”).

Under Wisconsin law, any legislative action reviving a time-bared claim would appear to take away a defendant's vested property right and, thereby, constitute an unconstitutional taking without due process of law. *Laffitte v. Superior*, 142 Wis. 73 (1910) (“The limitation of actions is a right as well as a remedy, extinguishing the right on one side and creating a right on the other, which is as of high dignity as regards judicial remedies as any other right and it is a right which enjoys constitutional protection.”). Under Wisconsin law, such a taking may, therefore, be a violation of section 1, article I of the Wisconsin Constitution as well as the Fourteenth Amendment to the Constitution of the United States. *Haase*, 20 Wis. 2d at 311; *Aicher v. Wisconsin Patients Compensation Fund*, 237 Wis. 2d 99, 116 (2000) (“Defendants have a constitutional right to rely upon statutes of limitations to limit the claim against them.”); *Westphal v. E.I. du Pont de Nemours & Co., Inc.*, 192 Wis. 2d 347, 373 (Ct. App. 1995) (same); *cf. Bethhauser v. Medical Protective Co.*, 172 Wis. 2d 141, 150-51 (1992) (statute applied retroactively to shorten statute of limitations would potentially be unconstitutional because it would extinguish a vested property right in a cause of action); *Hunter v. School Dist. of Gale-Etrick-Trempealeau*, 97 Wis. 2d 435, 446-47 (1980) (same).

Assembly Bill 453 is likely unconstitutional under Wisconsin law because it would take the vested property right in the expiration of the statute of limitations governing childhood sexual abuse claims by individuals age 35 or over.

IV. The Illinois Supreme Court Recently Held Parallel Legislation Unconstitutional

In a recent opinion, the Supreme Court of Illinois reaffirmed the long-standing rule under Illinois law that “once a claim is time-barred, it cannot be revived through subsequent legislative action without offending the due process protections of our state's constitution.” *Doe v. Diocese of Dallas*, No. 106546, 2009 WL 3063427, at *9 (Ill. Sept. 24, 2009). This rule is similar to Wisconsin law, as discussed in Section III, above.

In *Diocese of Dallas*, the Illinois Supreme Court addressed the issue of whether the current version of the Illinois statute of limitations, as amended in 2003, is applicable to claims for childhood sexual abuse that were otherwise time-barred under the statute before the 2003 amendment took effect. *Id.* at *1. The plaintiff alleged that he was sexually molested by a priest in 1984, when he was 14 years old. *Id.* The plaintiff did not reveal the alleged abuse until 1998, and he did not file a lawsuit until 2003. *Id.* at *2.

Applying its analysis in *M.E.H. v. L.H.*, 177 Ill. 2d 207 (Ill. 1997), the Illinois Supreme Court found that the 2003 amendment to the statute of limitations could not be applied to revive the plaintiff's claims, which already were time-barred under the previous statute. *Id.* at *9.

In the present situation, AB 453 seeks to revive claims that are otherwise time-barred by the present statute of limitations applicable to childhood sexual abuse claims. Wisconsin courts have applied a similar rule to Illinois regarding legislative action to revive otherwise barred claims. Accordingly, the analysis of the Supreme Court of Illinois in *Diocese of Dallas* should provide additional weight to the argument that AB 453 is unconstitutional under Wisconsin law.

V. Conclusion

For the above constitutional and legal reasons, WCJC opposes AB 453.