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**ON BEHALF OF THE
AMERICAN TORT REFORM ASSOCIATION**

**REGARDING A.B. 453:
AN ACT REMOVING THE STATUTE OF LIMITATIONS
AND REVIVING TIME-BARRED CLAIMS**

**BEFORE THE WISCONSIN HOUSE COMMITTEE ON
CHILDREN AND FAMILY LAW**

OCTOBER 21, 2009

Chairwoman Grigsby and Members of the Committee, on behalf of the American Tort Reform Association (“ATRA”), I want to thank you for allowing me to testify before you today in regard to A.B. 453, which would eliminate the statute of limitations and revive time-barred claims. I had the opportunity to testify before this Committee when it considered such legislation in January 2007.

I am an attorney in the Public Policy Group of Shook, Hardy & Bacon L.L.P.’s Washington, D.C. office. Most of our firm’s practice generally involves representing corporate defendants in multi-state litigation. I have written extensively on liability law and civil justice issues. I am a graduate of George Washington University, where I graduated with honors with degrees in law and public administration. I graduated from the State University of New York College at Geneseo with a B.S. in Management Science.

I serve as co-counsel to ATRA, a broad-based coalition of more than 300 businesses, corporations, municipalities, associations, and professional firms that have pooled their resources to promote reform of the civil justice system with the goal of ensuring fairness, balance, and predictability in civil litigation.

Sexual abuse against a child is intolerable and should be punished, both through criminal prosecution and civil claims. I commend the Committee for considering steps to further protect victims of sexual abuse. My testimony today is limited to discussing general principles underlying statutes of limitations, as well as the reasons why

retroactive changes to such laws are often view as unconstitutional and unsound policy by courts and legislatures.

Statutes of Limitations: An Overview

Tort law, by its very nature, deals with horrible injuries stemming from sometimes horrible acts. It provides a mechanism for recovery for the person who is permanently disabled or maimed due to a negligent act or a defective product; for the person who contracts a painful, terminal disease due to negligent exposure to a toxic substance; and for the person who is injured at birth and will have mental and physical problems for the rest of his or her life due to medical malpractice. All of these situations have victims. All have lifelong injuries. All are heart wrenching. And all are subject to a finite statute of limitations.

Statutes of limitations are basically a legal “countdown” that begins when someone is injured. When the time period expires, a claim may no longer be brought.

In Wisconsin, personal injury and wrongful death claims must generally be brought within three years. Wis. Stat. § 893.53. Medical malpractice claims must be brought within three years of the date of injury or one year from discovery of the injury, but not more than five years from the date of the act. Wis. Stat. § 893.55(1m). There is a two-year statute of limitations for claims involving intentional torts, such as libel, slander, assault, battery, and invasion of privacy. Wis. Stat. § 893.57. Contract and property claims are subject to a six-year limitations period. Wis. Stat. §§ 893.43, 893.52. These laws reflect a legislative judgment that a two, three, or six year period provides claimants in these actions with an adequate time to pursue a claim while giving defendants a fair opportunity to contest complaints made against them.

Generally, when a child is injured, Wisconsin law provides him or her with two years after turning 18 to bring a claim (until age 20). Wis. Stat. § 893.16(1). In the case of childhood sexual abuse, the legislature decided in 2004 to provide significantly more time: until age 35, 15 years longer than for other types of claims. Wis. Stat. § 893.587. It is an amount of time significantly longer than the statute of limitations applicable to child sexual abuse claims in most other states.

Why Do We Have Statutes of Limitations?

There's no magic number as to what is a fair length of time for a statute of limitations. They are inherently arbitrary. Yet, statutes of limitations are important because some period is needed to balance an individual's ability to bring a lawsuit with the ability to mount a fair defense and to protect courts from stale or fraudulent claims. As time passes, witnesses become difficult to locate or pass away, records are lost or discarded, and memories fade. Without statutes of limitations, litigation can become a "he said-she said" situation.

As legislators, you must strike a difficult balance. On the one hand, potential plaintiffs should have an adequate opportunity to bring a claim. On the other hand, defendants and the courts must be protected from having to deal with cases in which the search for the truth may be seriously impaired by the loss of evidence, witnesses, and fading of memories. By striking this balance, statutes of limitations promote justice, discourage unnecessary delay, and preclude the prosecution of stale or fraudulent claims. These laws are essential to a fair and well-ordered civil justice system. The possibility of an unfair trial is heightened when heart-wrenching allegations are involved.

In addition, statutes of limitations also provide predictability and certainty to the business community as well as nonprofit organizations. It allows them to accurately gauge their potential liability and make financial and insurance coverage decisions accordingly.

A.B. 453 Goes Too Far

A.B. 453 would eliminate the statute of limitations entirely, an action unprecedented in Wisconsin civil law. It would subject organizations to an indefinite threat of liability.

While the legislation may not target any particular group or institution, as a practical matter, the effects are more likely to be felt by nonprofit and private organizations that serve children, and religious institutions, than the perpetrators themselves. That is because when a lawsuit is brought after such a length of time, the perpetrator may already be dead, or, if he was an employee of an organization, may not be able to be found. Perpetrators may also be judgment proof (have no money to pay claims). In any event, a nonprofit organization, business, or religious institution is more easily identifiable and more likely to have financial resources, and for this reason,

attorneys working on a contingency fee will naturally name them as defendants. These defendants, like any individual or business that is subject to decades-old allegations, will have a very difficult time in court. Their employees from that period may be gone, their records may be gone, and their institutional memory may be gone – this is precisely the reason for statutes of limitations.

The proposed legislation exacerbates the problems with abolishing the statute of limitations by doing so *retroactively*. In so doing, the legislature would permit expired cases, no matter how many years ago they occurred, to be filed within three years of enactment. There are three compelling reasons not to do so.

First, *retroactively* abolishing all limitations in this instance would create a dangerous precedent with adverse consequences for other types of defendants in Wisconsin. As I discussed earlier in my testimony, statutes of limitations are inherently arbitrary and there are many situations in which they can be perceived as unfair.

Second, retroactively changing a statute of limitations throws a core rule of law up in the air. One of the principle purposes of a statute of limitations is to provide a period when the risk of a lawsuit ends. As the Florida Supreme Court has found, “retroactively applying a new statute of limitations robs both plaintiffs and defendants of the reliability and predictability of the law.” *Wiley v. Roof*, 641 So. 2d 66, 68 (Fla. 1994).¹ Predictability and certainty is important for nonprofit organizations and businesses in their decision making. For example, nonprofit employers may have purchased insurance or more insurance had they known that they could be subject to lawsuits for an indefinite period of time.

¹ In the criminal context, the Supreme Court of the United States recently held that a new statute of limitations enacted in California that allowed prosecutions based on sexual abuse of minors for which the statute of limitations had already expired so long as the victim makes a report to the police within one year of enactment violated the Ex Post Facto Clause of the United States Constitution. See *Stogner v. California*, 539 U.S. 607 (2003). The Supreme Court’s consideration of the practical effect of resurrecting prosecutions after the relevant statute of limitations has expired is instructive. *Id.* at 613-18, 631-33. The Supreme Court found that in such a situation “the government has refused to play by its own rules,” has deprived the defendant of “fair warning,” and, quoting Justice Learned Hand, found that “extending a limitations period after the State has assured a man that he has become safe from pursuit seems to most of us unfair and dishonest.” *Id.* at 607-08 (internal alterations and quotations omitted).

Third, retroactively eliminating a statute of limitations to “revive” expired claims is unconstitutional. For well over a century, the Wisconsin Supreme Court has recognized retroactively changing statutes of limitations to revive expired claims violate the vested rights of defendants. These cases deal with the precise issue posed by H.B. 453’s reviver clause. Each and every time, the Wisconsin Supreme Court, in no uncertain terms, has found that the running of the statute of limitations is absolute and cannot be changed by subsequent legislation without violating due process rights:

- “[I]f the time limited for commencing a suit expires while the statute is in force and before the suit is brought, the right to bring the suit is barred, and no subsequent statute can renew that right.”
Sprecher v. Wakeley, 11 Wis. 432, 439 (1860).
- “The bar created by the statute of limitations is as effectual as payment or any other defense, and once vested cannot be taken away even by the legislature. That is the doctrine of this court expressed in many cases.”
Eingartner v. Illinois Steel Co., 103 Wis. 373, 376 (1899) ((quoting *Woodman v. Fulton*, 47 Miss. 682 (1873))).
- “Under our system the statute of limitations does not act merely on the remedy. It extinguishes a right on one side and creates a right on the other which is as high dignity as regards judicial remedies as any other; a right entitled to constitutional protection.”
Laffitte v. City of Superior, 142 Wis. 73, 109 (1910).
- “In Wisconsin[,] the running of the statute of limitations absolutely extinguishes the cause of action. . . .”
Maryland Cas. Co. v. Belezny, 245 Wis. 390, 393 (1944).
- “If a statute of limitations extinguishes the right as well as the remedy, then a statute which attempts to reinstate a cause of action that has been barred is constitutionally objectionable under the foregoing rule. This is because the statute seeks to impose a new duty or obligation even though none existed when the retrospective statute was enacted.”
Haase v. Sawicki, 20 Wis.2d 308, 312 (1963).
- “[A] statute which attempts to revive or reinstate a cause of action that is barred is constitutionally objectionable because a retroactive extension of the period of limitations after its expiration amounts to a taking of property without due process of law. . . . Clearly, once a statute of limitations has run, the party relying on the statute has a vested property right in the statute-of-limitations defense, and new law which changes the period of limitations cannot be applied retroactively to extinguish that right.” *Borello v. U.S. Oil Co.*, 130 Wis.2d 397, 415-16 (1986).

What each of these court decisions recognize is that just as the legislature cannot suddenly shorten a statute of limitations to eliminate a plaintiff's vested right to sue, it cannot revive expired claims and eliminate a defendant's vested defense that a claim is time barred. See Wis. Stat. § 893.05 (codifying the constitutional principle that "[w]hen the period within which an action may be commenced on a Wisconsin cause of action has expired, the right is extinguished as well as the remedy").

For example, consider the outcome if the legislature decided that it made the wrong decision in 2004 by setting the statute of limitations at age 35, not 25, in childhood sexual abuse cases, and it today reduced the period to 25 retroactively. The result would be that a 30-year-old, who thought he had five more years to sue, would be without a claim. That law would likely be found unconstitutional. See *Hunter v. School Dist. Gale-Etrick-Trempealeau*, 97 Wis.2d 435, 441, 447 (1980) (finding it unconstitutional for the legislature to retroactively amend a statute of limitations to bar a plaintiff's cause of action for negligence that accrued prior to the amendment because the plaintiff had a vested right and an amendment "would have the effect of destroying or terminating that right"). The same principle applies equally to a law that would change the rules midstream to take away an organization's defense.²

² Those who argue that the reviver clause is constitutional and suggest a balancing test would permit a court to revive expired claims rely on cases that did not involve a retroactive change to a statute of limitations. Moreover, some of the cases relied upon by proponents actually found retroactive changes to the vested rights of both plaintiffs and defendants *unconstitutional*. See, e.g., *Neiman v. Am. Nat'l Prop. & Cas. Co.*, 236 Wis.2d 411, 424-25 (2000) (retroactive increase of damages available in wrongful death cases from \$150,000 to \$500,000 is unconstitutional, noting that defendants could have purchased greater liability insurance had they known of greater than anticipated liability); *Martin v. Richards*, 192 Wis.2d 156, 200-01 (1995) (retroactive cap on noneconomic damages violated due process; and noting that "because retroactive legislation presents unique constitutional problems in that it often unsettles important rights, it is viewed with some degree of suspicion and must be analyzed within a framework different than that of prospective legislation"). Other cases relied upon by proponents involve purely procedural changes that did not impacting a right or a remedy, see *City of Madison v. Town of Madison*, 127 Wis.2d 96, 102 (1985) (retroactive change to procedure for town to incorporate), or involved a minor retroactive tweak to a law that only weakly impacted the challenger's settled expectations and property rights, see *Paternity of John R.B.*, 277 Wis. 378, 397-98 (2005) (retroactive change to credit permitted against child support due required father to pay an additional \$30 per month).

Some states have found revival statutes unconstitutional based on an explicit constitutional provision precluding retroactive laws.³ Many others, like the Wisconsin Supreme Court, have relied on the basic protections of the Due Process Clause of the state's constitution.⁴ The Illinois Supreme Court is the most recent to consider the issue. Last month, the court ruled that a 2003 amendment extending its statute of limitations in childhood sexual abuse cases by three years could not be retroactively applied to time-barred claims based on principles of vested rights "dat[ing] back more than a century."⁵

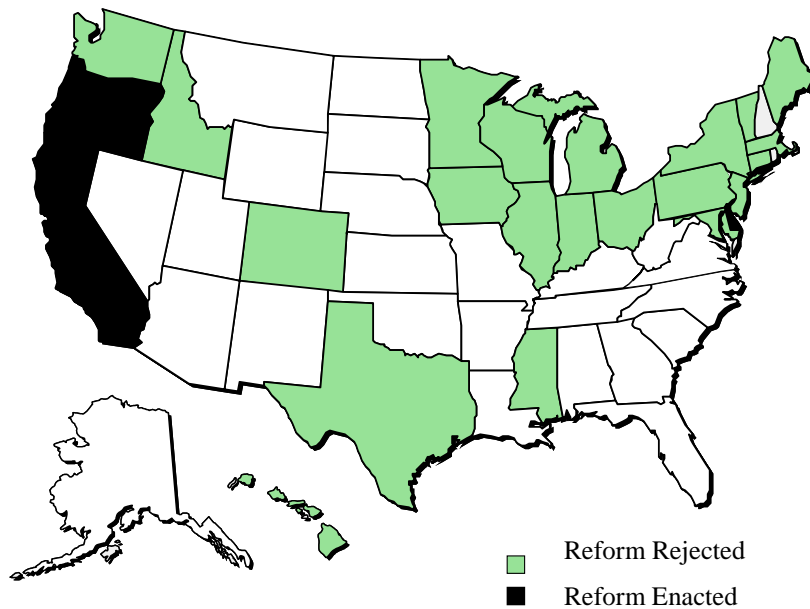
Recognizing the unfairness of changing rules mid-stream, the extreme difficulty for organizations who are not directly responsible for the abuse to defend themselves against decades-old allegations where witnesses and records are long gone, the bad precedent it sets for other types of lawsuits, and the questionable constitutionality of such laws, most states have not followed in the footsteps of California.⁶ Almost all state legislatures in which proposals similar to A.B. 453 have been introduced in recent years have either rejected them or not acted upon them, except for Delaware and Oregon.

³ See, e.g., *Doe v. Roman Catholic Diocese*, 862 S.W.2d 338, 341 (Mo. 1993) (en banc); *Gould v. Concord Hospital*, 493 A.2d 1193, 1195-96 (N.H. 1985); *Baker Hughes, Inc. v. Keco R&D, Inc.*, 12 S.W.3d 1, 4 (Tex. 1999).

⁴ See, e.g., *Waller v. Pittsburgh Corning Corp.*, 742 F. Supp. 581, 583 (D. Kansas 1990) (citing numerous decisions); *M.E.H. v. L.H.*, 685 N.E.2d 335, 339 (Ill. 1997); *Kelly v. Marcantonio*, 678 A.2d 873, 882-83 (R.I. 1996); *Starnes v. Cayouette*, 419 S.E.2d 669, 673 (Va. 1992); see also *Perez v. Richard Roe 1*, 52 Cal.Rptr.3d 762 (Cal. App. 2 Dist. Dec. 27, 2006) (No. B182814), as modified (Jan. 26, 2007), review denied (Apr. 11, 2007) (ruling that it was a violation of the separation of powers for the legislature to revive actions that the judiciary had already dismissed as time-barred under the statute of limitations that previously existed).

⁵ *Doe v. Diocese of Dallas*, No. 106546, 2009 WL 306347 (Ill. Sept. 24, 2009).

⁶ The unanticipated surge of stale lawsuits has had dire economic consequences. During California's one-year window, approximately 1,000 lawsuits were filed, including about 200 lawsuits that did not involve the Catholic Church. See Bart Jones, *Church Pushed to Financial Brink*, *Newsday*, Mar. 22, 2009, at A15, available at 2009 WLNR 5402533. Some of the claims dated back to conduct that allegedly occurred over seventy years prior. The change in law resulted in nearly \$1 billion in potential liability for school districts, churches, insurers, and others. Ultimately, the Diocese of San Diego filed for Chapter 11 bankruptcy in 2007, and is the largest American diocese to file for bankruptcy protection. See David Gregory, *Some Reflections on Labor and Employment Ramifications of Diocesan Bankruptcy Filings*, 47 *J. Cath. Legal Stud.* 97 (2008) (providing details on each diocese or archdiocese bankruptcy). Earlier this week, the Catholic Diocese of Wilmington filed for bankruptcy as a result of the sudden surge of lawsuits filed after Delaware passed such legislation in 2007. The Wilmington diocese estimates that it faces \$100 million in liability. See Maureen Milford, *Wilmington Diocese Files for Bankruptcy*, *News Journal*, Oct. 18, 2009, at <http://www.delawareonline.com/article/20091018/NEWS/91018021>.



In sum, if the legislature begins down the path of eliminating settled rules in particular situations, Wisconsin citizens could be left with a patchwork legal system that is chaotic, permits unverifiable claims, and may create insurability problems for businesses, associations, and other potential civil defendants.

There are less extreme options that are constitutional and sound policy. If the legislature feels that permitting claims until the person turns 35 is insufficient, then it might consider adding a rule permitting such claims within two years of when the victim discovers, or reasonably should have discovered, the abuse. Any such change must be prospective in nature, applying only to future claims.

I thank the Committee for the opportunity to testify today and would be pleased to answer any questions.