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MEMORANDUM

TO: Karen Melchert
FROM: Patrick T. Nash
Jacob D. Smith
DATE: October 15, 2009
RE: Clergy: Constitutionality of Proposed Wisconsin Reviver

I. Summary of Findings

A Bill pending in the Wisconsin legislature 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 has consistently 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, the pending Bill would likely 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. Wisconsin Assembly Bill 453 (the “Bill”) 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 § 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.”

The Bill was introduced and referred to the Committee on Children and Families on September 25, 2009.

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 at fn. 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. Beleznyay, 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 (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-barred claim would take away a defendant's vested property right and constitute an unconstitutional taking without due process of law. Laffitte v. City of 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 is a violation of Section 1, Article I of the Wisconsin Constitution as well as the Fourteenth Amendment of 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 (Wis. App. 1995) (same); cf. Betthausser 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 District of Gale-Ettrick-Trempealeau, 97 Wis.2d 435, 446-47 (1980) (same).

The Bill is likely unconstitutional under Wisconsin law because it would take from religious institutions and other entities the vested property right in the expiration of the statute of limitations governing childhood sexual abuse claims by individuals age 35 or over.

IV. A Recent Opinion By The Supreme Court Of Illinois Supports The Conclusion That The Bill Is Likely 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 the rule recognized by Wisconsin law, as discussed in Section III above.

In Diocese of Dallas, the 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. Prior to the 2003 amendment, the statute of limitations required plaintiffs to bring claims for sexual abuse within two years of the abuse or discovery of injury caused by the abuse. Id. at *3. Accordingly, the plaintiff's claims would have been time-barred by the prior statute.

Two defendants moved to dismiss the claim as being time-barred under the prior statute. Id. The trial court dismissed the plaintiff's claims, holding that the claims were time-barred under the statute when he filed suit and the amended statute could not be applied to revive the claims. Id. at *4. On appeal, the appellate court determined that the legislature intended the 2003 amendment to apply retroactively. Id. at *5. The appellate court also found that the amended statute extended to the plaintiff's case and, therefore, reversed the trial court's order. Id. The defendants appealed to the Supreme Court of Illinois. Id.

The Supreme Court determined that the legislature clearly indicated that the 2003 amendment to the statute of limitations applied to cases pending as of the effective date of the statute and did not exclude cases where the underlying events occurred before the amendment became effective. Id. at *7. Accordingly, the plaintiff's claim would have been timely under the 2003 amendment unless the legislative intent was barred by the constitution. Id. The Supreme

Court then addressed the constitutionality of the legislature's intent. Id. Applying its analysis in M.E.H. v. L.H., 177 Ill. 2d 207 (Ill. 1997), the Supreme Court found that the 2003 amendment to the statute of limitations could not be applied to revive the plaintiff's claims, which were already time-barred under the previous statute. Id. at *9. The Supreme Court therefore reversed the appellate court's decision and affirmed the trial court's ruling. Id. at *11.

In the present situation, the Bill 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 the Bill is unconstitutional under Wisconsin law.