



## Memorandum

Date: May 1, 2006

To: Senate and House Chairs of the Joint Committee on the Judiciary

From: Edward F. Saunders, Jr., Esq., Executive Director

Re: Retroactive enlargement of civil statutes of limitation

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Representative Gale Candaras submitted to your Committee on March 14th a statement favoring retroactive enlargement of the civil statute of limitations governing child abuse claims. Her support is based on the conviction that “[a]dults who abuse children should not avoid civil liability by taking advantage of the trauma inflicted on the victim[.]” Candaras Statement at 6. As suggested in its earlier testimony (dated March 29, 2006), the MCC agrees that injured plaintiffs should have a reasonable opportunity to become aware that there has been an injury, to realize the cause of the injury, and to gather the evidence needed to establish their right to a remedy. Retroactive enlargement of the civil statute of limitations, however, is neither a necessary nor an appropriate means to achieve this end.

In her statement, Rep. Candaras fails to consider the impact that retroactive enlargement of civil statutes of limitations would have on potential defendants other than those alleged to have perpetrated the abuse. In two places, she suggests that the only people who will be disadvantaged by a retroactive enlargement of the civil limitations period are “child abusers.” *See id.* at 4, 6. On the contrary, the more likely groups affected by a change in the civil statute of limitations are those individual supervisors and institutional employers who were previously associated with the perpetrator. The perpetrators themselves are unlikely to have any substantial means to be able to answer judgments, and many are dead. Moreover, no insurer will defend or cover perpetrators, because by definition their acts are considered “intentional” and therefore not eligible for coverage. The real targets here would be the Church and other employers who are faced, now decades after the fact, with arguments that they should have prevented the harm which occurred from the acts of the perpetrator. In many of these cases, the first word that the institution and the employers will have heard about the matter is a notice letter from a plaintiff’s lawyer.

The statement of Rep. Candaras relies heavily on *City of Boston v. Keene Corp.*, 406 Mass. 301 (1989), as support for the proposed reform. The legislation challenged in *Keene* allowed governmental agencies an expanded window within which to bring suit against asbestos manufacturers in order to recover the cost of removing asbestos from public buildings. *Id.* at 302-03. There is no question that in *Keene* the Supreme Judicial Court approved the constitutionality of that legislation, which retroactively extended a civil limitations period. However, *Keene* dealt with circumstances dramatically different than those with which we are

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confronted in the sexual abuse context. The factual scenario in *Keene* is inapposite to that which we face here, namely, tort claims where the cause of action depends for proof on faded memories and missing testimony from deceased witnesses. We do not believe that *Keene* would support the retroactive revival of a time-barred cause of action in that context. In other words, it is one thing for due process purposes to allow public claims against a product's manufacturer where there is no question that it manufactured the product, and quite another to revive private claims against non-perpetrating defendants involving actions of others in the distant past. The due process concerns that arise from causes of action that depend for proof on faded memories and deceased witnesses become particularly acute for non-perpetrating defendants.<sup>1</sup>

In earlier MCC testimony expressing opposition to the various bills pending to reform the limitations period on civil claims arising from sexual abuse of minors (March 29, 2006), we discussed the careful balance currently struck by the legislature and the courts between the competing interests of plaintiffs, defendants, and society as a whole. Representative Candaras's statement fails to consider the strong public policy concerns behind statutes of limitations as discussed in that testimony. Further, it neglects to acknowledge the present flexibility of the discovery rule in Massachusetts as applied to sexual abuse claims. Given these concerns and the flexibility presently available, a change in the statute of limitations, especially a retroactive one, would be unfair and ill-advised.

One important factor bearing on the unfairness of retroactive revival of time-barred claims is the inability of defendants to insure against exposure to liability. This was a key factor in cases that considered the retroactivity of the 1971 charitable immunity change. *See Trala v. Shea*, 335 F. Supp. 81, 82 (D. Mass. 1971) (“[R]etroactive application of the new principle imposing liability would mean in practice that many charities would not have been seasonably apprised of the economic need for insurance against the risks to which they have been newly subjected”); *Ricker v. Northeastern Univ.*, 361 Mass. 169, 172-73 (1972) (interpreting *Colby v. Carney*, 356 Mass. 527 (1969), as “giving notice to charitable corporations conducting operations in Massachusetts of the advisability of insurance against possible tort liabilities” and holding that the subsequent modification in the law was “wholly prospective”). It is not possible to insure now for conduct occurring in the distant past. Further, even if an organization previously had insurance, attempting to find policies or reconstruct coverage for claims involving decades-old conduct is difficult and often impossible, and the insurer may no longer be in business. Finally, even if insurance policies can be located for older claims, the policies were often written with extremely low limits. All of this bears on the unfairness of retroactive revival of claims.

The majority of states faced with the issue have flatly rejected retroactivity with respect to changes in statutes of limitations on civil claims. *See Waller v. Pittsburgh Corning Corp.*, 742 F. Supp. 581, 583 (D. Kansas 1990) (“Most of the state courts addressing the issue have held that the legislation which attempts to revive claims that have been previously time barred impermissibly interferes with vested rights of the defendant, and thus violates due process”). In so doing, some of those states have relied on constitutional provisions prohibiting retroactive laws of any sort. *See, e.g., Doe v. Roman Catholic Diocese*, 862 S.W.2d 338 (Mo. 1993) (en banc) (holding that application of an expanded statute of limitations to revive a claim of

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<sup>1</sup> Reliance on “suppressed memories” is a matter of at least some controversy within the scientific (and legal) communities and should not be taken for granted.

childhood sexual abuse would violate the prohibition against retrospective laws in art. I, § 13 of the Missouri Constitution); *Baker Hughes, Inc. v. Keco R&D, Inc.*, 12 S.W.3d 1 (Tex. 1999) (holding that application of an expanded statute of limitations to revive a trade secrets misappropriation claim would violate the prohibition against retroactive laws in art. I, § 16 of the Texas Constitution). Admittedly, the Massachusetts Constitution and Declaration of Rights do not have such a provision. However, many states have held that lapsed statutes of limitations create vested rights in defendants under general due process provisions alone and without reference to any constitutional provisions specifically prohibiting retroactivity. *See, e.g., Wiley v. Roof*, 641 So.2d 66, 68 (Fla. 1994) (“Regardless of whether the statute of limitations pertains to a right or a remedy, retroactively applying a new statute of limitations robs both plaintiffs and defendants of the reliability and predictability of the law”); *M.E.H. v. L.H.*, 685 N.E.2d 335, 339 (Ill. 1997) (“More than a hundred years ago, our court held that once a statute of limitations has expired, the defendant has a vested right to invoke the bar of the limitations period as a defense to a cause of action. That right cannot be taken away by the legislature without offending the due process protections of our state’s constitution.”); *Kelly v. Marcantonio*, 678 A.2d 873, 882-83 (R.I. 1996) (“[T]he ‘great preponderance’ of state appellate courts do not apply the general federal rule [that statutes of limitation are procedural and not substantive in nature.]”); *Starnes v. Cayouette*, 419 S.E.2d 669, 673 (Va. 1992) (retroactive application of expanded statute of limitations in sexual abuse context would violate due process guarantees).

Furthermore, recent United States Supreme Court precedent may cast doubt on the rationale of cases like *Keene*, which suggest that retroactive imposition of an enlarged statute of limitations does not change a substantive rule of law but instead merely makes available a new remedy. *See Keene*, 406 Mass. at 312-13; Candaras Statement at 4. In *Stogner v. California*, 539 U.S. 607 (2003), the Court held that a new criminal statute of limitations reviving causes of action based on sexual abuse of minors and barred by prior limitations statutes violated the Ex Post Facto Clause. The *Stogner* decision concentrates not on distinctions between substance and procedure or between remedies and rights but instead on the practical effect of resurrecting prosecutions after the relevant statute of limitations has expired. *Id.* at 613-18, 631-33. While not binding in the civil context, *Stogner* may signal a shift away from arcane binary distinctions of procedure versus substance and instead toward considerations of fundamental fairness.

The Supreme Judicial Court has used due process protections to invalidate retroactive legislation, demonstrating that there is a threshold of unfairness that may not be crossed. *See, e.g., Pielich v. Massasoit Greyhound, Inc.*, 441 Mass. 188 (2004) (holding that changes to a statute protecting employees from being required to work in contravention of sincerely held religious beliefs had a “substantial effect” on the defendant employer’s rights and that retroactive application would therefore violate due process); *St. Germaine v. Pendergast*, 416 Mass. 698, 703-04 (1993) (rejecting as “unreasonable” and therefore unconstitutional the retroactive application of a statute providing for civil liability for building code violations that would have held “[defendant’s] past actions to a new and signification obligation”).

The above discussion as to whether the Legislature has authority to effect a retroactive change in the statute of limitations should not be taken so as to ignore the (perhaps more pressing) question regarding the wisdom of such a change. Which is to say, even assuming for the sake of argument that the Legislature permissibly *can* revive time-barred claims, *should* it do so? The

statement of Rep. Candaras fails to consider all of the legal and policy concerns that the Legislature must take into account when answering this crucial question. In particular, we point to the issues of fairness and difficulties in proof in trying decades-old charges, and to the inability of defendants to insure against revived liability, as weighty concerns that should not be dismissed. The statement also overlooks the present flexibility of the discovery rule in Massachusetts applicable to sexual abuse claims. The MCC urges the Committee to give these issues their due consideration and renews its request that the Committee give H.909/S.1057, S.939, S.826, and S.848 adverse reports.

The Church again acknowledges the profound suffering that has occurred as a result of clergy abuse of children. Sean Cardinal O'Malley, Archbishop of Boston, has stated that the Catholic Church, nationally and locally, is "unflinchingly committed to facing this scandal head on and doing all in our power to prevent anything like it from ever happening again."<sup>2</sup> While its work is not completed, the Church has taken and continues to take, steps to compensate and provide pastoral assistance to survivors of sexual abuse, and to insure that such misconduct will never occur again.

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<sup>2</sup> Statement of then-Archbishop O'Malley, Regarding Clergy Sexual Abuse in the Archdiocese of Boston from 1950-2003 (Feb. 26, 2004), available online at <http://www.rcab.org/news/releases/2004/statement040226.html>.