

SENATE JUDICIARY COMMITTEE
Senator Thomas Umberg, Chair
2021-2022 Regular Session

AB 2777 (Wicks)
Version: May 4, 2022
Hearing Date: June 14, 2022
Fiscal: No
Urgency: No
CK

SUBJECT

Sexual assault: statute of limitations

DIGEST

This bill revives otherwise time-barred claims for damages arising from sexual assault and other inappropriate conduct of a sexual nature, as specified.

EXECUTIVE SUMMARY

The statute of limitations for damages arising from a sexual assault that occurred when the victim was an adult is the later of either 10 years from the date of the last actionable conduct or three years from the discovery of the injury resulting, as specified. When that limitations timeline was extended in 2009 from two years to 10 years it only provided that benefit to victims whose claims had not yet expired when the bill was signed.

This bill revives claims that could have been brought if that limitations period was afforded to claims dating back ten years from when the bill went into effect, those occurring on or after January 1, 2009. This bill also revives claims seeking to recover damages suffered as a result of a sexual assault or other inappropriate conduct, communication, or activity of a sexual nature that would otherwise be time-barred if the plaintiff alleges certain facts, including that a responsible entity engaged in a cover up or attempted a cover up of a previous instance or allegations of sexual assault or other inappropriate conduct of a sexual nature. These revivals do not apply to claims litigated to finality or compromised by a written settlement.

This bill is sponsored by the Victim Policy Institute. It is supported by a variety of organizations, including the California Partnership to End Domestic Violence. It is opposed by a coalition of industry groups, including the Civil Justice Association of California.

PROPOSED CHANGES TO THE LAW

Existing law:

- 1) Requires all civil actions be commenced within applicable statutes of limitations. (Code Civ. Proc. § 312.)
- 2) Provides that in any civil action commenced on or after January 1, 2019, for recovery of damages suffered as a result of sexual assault, as defined, where the assault occurred on or after the plaintiff's 18th birthday, the time for commencement of the action shall be the later of the following:
 - a) within 10 years from the date of the last act, attempted act, or assault with the intent to commit an act, of sexual assault against the plaintiff; or
 - b) within three years from the date the plaintiff discovers or reasonably should have discovered that an injury or illness resulted from an act, attempted act, or assault with the intent to commit an act, of sexual assault against the plaintiff. (Code Civ. Proc. § 340.16(a), (c) ("Section 340.16."))
- 3) Defines "sexual assault," for the purposes of the above provision, to mean any of the crimes described in Section 243.4, 261, 262, 264.1, 286, 287, former 288a, or 289 of the Penal Code, assault with the intent to commit any of those crimes, or an attempt to commit any of those crimes. (§ 340.16(b)(1).)
- 4) Clarifies that it is not necessary that a criminal prosecution or other proceeding have been brought as a result of the sexual assault or, if a criminal prosecution or other proceeding was brought, that the prosecution or proceeding resulted in a conviction or adjudication. It further makes clear that Section 340.16(b) does not limit the availability of causes of action permitted under Section 340.16(a), including causes of action against persons or entities other than the alleged person who committed the crime. (§ 340.16(b)(2).)
- 5) Provides revival periods for claims arising from sexual assault or other sexual misconduct perpetrated by physicians in two unique circumstances. (§ 340.16(c), (d).)
- 6) Provides that an action for recovery of damages suffered as a result of childhood sexual assault must be commenced within 22 years of the date the plaintiff attains the age of majority or within five years of the date the plaintiff discovers or reasonably should have discovered that psychological injury or illness occurring after the age of majority was caused by the sexual assault, whichever period expires later. (Civ. Proc. Code § 340.1(a).)

- 7) Applies the above statute of limitations to the following actions, as specified:
 - a) an action against any person for committing an act of childhood sexual assault;
 - b) an action for liability against any person or entity who owed a duty of care to the plaintiff if a wrongful or negligent act by that person or entity was a legal cause of the childhood sexual assault that resulted in the injury to the plaintiff; and
 - c) an action for liability against any person or entity if an intentional act by that person or entity was a legal cause of the childhood sexual assault that resulted in the injury to the plaintiff. (Civ. Proc. Code § 340.1(a).)
- 8) Revives any claim for damages for childhood sexual assault, as described above, that has not been litigated to finality and that would otherwise be barred as of January 1, 2020, because the applicable statute of limitations, claim presentation deadline, or any other time limit had expired, is revived, and these claims may be commenced within three years of January 1, 2020. A plaintiff shall have the later of this three-year time period or the time period described in paragraph 6) above. (Civ. Proc. Code § 340.1(q).)
- 9) Provides that claims for money or damages against local public entities must be presented in accordance with specified procedures, unless specifically exempted. (Gov. Code § 905.) A written claim relating to a cause of action for death or for injury to person or to personal property shall be presented not later than six months after the accrual of the cause of action with the ability to file an application to present an untimely claim up to one year after the accrual of the cause of action. (Gov. Code §§ 911.2, 911.4.) A claim relating to any other cause of action shall be presented not later than one year after the accrual of the cause of action. (Gov. Code § 911.2.) "Local public entity" includes a county, city, district, public authority, public agency, and any other political subdivision or public corporation in the State, but does not include the State. (Gov. Code § 900.4.)
- 10) Establishes numerous exceptions to the claims presentation requirements including claims made pursuant to Section 340.1 of the Code of Civil Procedure for the recovery of damages suffered as a result of childhood sexual abuse. (Gov. Code § 905.)

This bill:

- 1) Revives any action or causes of action for sexual assault that is commenced on or after January 1, 2019, where the assault occurred on or after January 1, 2009 when the plaintiff was an adult that would have been barred solely because the applicable statute of limitations has expired. The revival period extends until December 31, 2026.

- 2) Provides that any claim seeking to recover damages suffered as a result of a sexual assault or other inappropriate conduct, communication, or activity of a sexual nature and any related claims that would otherwise be barred before January 1, 2023, solely because the applicable statute of limitations has or had expired, is hereby revived for a one-year period if the plaintiff alleges the following:
 - a) the plaintiff was sexually assaulted or was subjected to other inappropriate conduct, communication, or activity of a sexual nature;
 - b) one or more entities are legally responsible for damages arising out of the misconduct; and
 - c) the entity or entities, including, but not limited to, their officers, directors, representatives, employees, or agents, engaged in a cover up or attempted a cover up of a previous instance or allegations of sexual assault or other inappropriate conduct, communication, or activity of a sexual nature by an alleged perpetrator of such abuse.
- 3) Defines “cover up” as a concerted effort to hide evidence relating to a sexual assault or other inappropriate conduct, communication, or activity of a sexual nature that incentivizes individuals to remain silent or prevents information relating to a sexual assault or other inappropriate conduct, communication, or activity of a sexual nature from becoming public or being disclosed to the plaintiff, including, but not limited to, the use of nondisclosure agreements or confidentiality agreements.
- 4) Clarifies that it does not alter the otherwise applicable burden of proof, as defined in Section 115 of the Evidence Code, that a plaintiff has in a civil action subject to this statute. It further clarifies that the above revival does not preclude a plaintiff from bringing an action for sexual assault pursuant to the statute.
- 5) Provides that these revival provisions do not apply to claims that have been litigated to finality in a court of competent jurisdiction or compromised by a written settlement agreement between the parties entered into before January 1, 2023.

COMMENTS

1. Statutes of limitations

A statute of limitations is a requirement to commence legal proceedings (either civil or criminal) within a specific period of time. Statutes of limitations are tailored to the cause of action at issue – for example, cases involving injury must be brought within two years from the date of injury, cases relating to written contracts must be brought four years from the date the contract was broken, and, as commonly referenced in the media, there is no statute of limitations for murder. Although it may appear unfair to bar

actions after the statute of limitations has elapsed, that limitations period serves important policy goals that help to preserve both the integrity of our legal system and the due process rights of individuals.

For example, one significant reason that a limitations period is necessary in many cases is that evidence may disappear over time – paperwork gets lost, witnesses forget details or pass away, and physical locations that may be critical to a case change over time. Limitations periods also promote finality by encouraging an individual who has been wronged to bring an action sooner rather than later – timely actions arguably ensure that the greatest amount of evidence is available to all parties.

In general, California law requires all civil actions be commenced within applicable statutes of limitations. (Code Civ. Proc. § 312.) Under existing law, the general statute of limitations in California to bring an action for assault, battery, or injury to, or for the death of, an individual caused by the wrongful act or neglect of another is two years. (Code Civ. Proc. § 335.1)

Currently, certain actions for childhood sexual abuse must be commenced within 22 years of the date the plaintiff attains the age of majority or within five years of the date the plaintiff discovers or reasonably should have discovered that psychological injury or illness occurring after the age of majority was caused by the sexual assault, whichever period expires later. (Civ. Proc. Code § 340.1.)

In 2018, AB 1619 (Berman, Ch. 939, Stats. 2018) added Section 340.16 to the Code of Civil Procedure expanding the statute of limitations for recovery of damages suffered by an *adult* as a result of sexual assault. The default statute of limitations applicable to such claims was two years. Section 340.16 now provides that a case seeking damages suffered as a result of sexual assault, as defined, where the assault occurred when the plaintiff was 18 years of age or older, must be brought by the later of the following:

- (a) within 10 years from the date of the last act, attempted act, or assault with the intent to commit an act, of sexual assault against the plaintiff; or
- (b) within three years from the date the plaintiff discovers or reasonably should have discovered that an injury or illness resulted from an act, attempted act, or assault with the intent to commit an act, of sexual assault against the plaintiff.

This statute thus starts the clock for adult victims of sexual assault to assert their civil claims against those responsible.

2. Revival of claims

When AB 1619 went into effect on January 1, 2019, it extended the clock for all relevant claims that had not already expired, those dating back less than two years from that

date. Therefore, even though the new limitations period was ten years, those claims that accrued more than two years before the effective date of the new law did not reap the benefit of the extension.

This bill revives claims based upon conduct that occurred on or after January 1, 2009, and that are commenced on or after January 1, 2019, that would have been barred solely because the applicable statute of limitations has or had expired. This functions to revive actions that could have been brought if AB 1619 had applied its 10-year statute of limitations retroactively. The revival period lasts until December 31, 2026.

The bill also revives any claims, regardless of the date the conduct occurred, based on sexual assault or other inappropriate conduct, communication, or activity of a sexual nature where the plaintiff alleges certain facts. The first is that the plaintiff was sexually assaulted or was subjected to other inappropriate conduct, communication, or activity of a sexual nature.

Secondly, it must be alleged that one or more entities are responsible for relevant damages and that the entity or entities engaged in a cover up or attempted a cover up of a previous instance or allegations of sexual assault or other inappropriate conduct, communication, or activity of a sexual nature by an alleged perpetrator of such abuse. The bill defines "cover up" as a concerted effort to hide evidence relating to a sexual assault or other inappropriate conduct, communication, or activity of a sexual nature that incentivizes individuals to remain silent or prevents information relating to a sexual assault or other inappropriate conduct, communication, or activity of a sexual nature from becoming public or being disclosed to the plaintiff, including, but not limited to, the use of nondisclosure agreements or confidentiality agreements. The one-year revival period lasts until December 31, 2023.

The Victim Policy Institute, the sponsor of this bill, asserts:

This bill opens a one-year window in the statute of limitations but does so only when there is evidence a defendant entity has engaged in a cover-up of a prior incident of sexual abuse or misconduct.

Cover ups feed isolation and fear. By knowing there had been prior sexual misconduct that was covered up by the same entity, subsequent victims will feel empowered to say: "Me too." The Sexual Abuse and Cover Up Accountability Act addresses the fact that the statute of limitations does not account for the science of trauma and its latent effects.

This bill does not change any legal standard or burden of proof with regard to any claim brought before a judge or court

It should be noted that with regard to the cover-up allegation, there does not need to be a connection between the cover up alleged and the conduct underlying the revived

claim. In addition, while the plaintiff is required to make these allegations, there is no requirement that the allegations be established to any legal standard or provide any evidence of the cover up.

The intent of this latter revival is to cover claims for conduct occurring while the plaintiff is an adult. However, while subdivision (a) of Section 340.16 specified that condition, this new provision does not and could be misread to apply to childhood sexual assault claims as well, which is not the author's intention. To ensure there is no confusion, the author has agreed to an amendment that so limits this provision.

Both revivals effectuated by this bill do not apply to claims that have been litigated to finality or compromised by a written settlement before the bill takes effect.

3. Revival of time-barred claims

This bill explicitly revives claims seeking to recover damages arising out of a sexual assault or other conduct of a sexual nature that would otherwise be barred because the applicable statute of limitations has expired.

As can be imagined, there are exceptionally egregious instances of a statute of limitations running out and leaving a victim of such heinous acts without a remedy. Recently, the Legislature has revived time-barred claims for sexual assaults in several contexts.

AB 218 (Gonzalez, Ch. 861, Stats. 2019) provided that the claims provided for in Section 340.1 involving childhood sexual assault that would otherwise be barred as of January 1, 2020, because an applicable statute of limitations, claim presentation deadline, or any other time limit had expired, are explicitly revived by the bill. AB 218 created a three-year window in which such claims can be brought, or, if later, within the statute of limitations period newly established by the bill.

AB 1510 (Reyes, Ch. 462, Stats. 2019) amended Section 340.16 by reviving claims that arose out of either sexual assault, or other inappropriate contact, communication, or activity of a sexual nature by a physician where the conduct occurs at a student health center between January 1, 1988 and January 1, 2017. The revival applied to claims that would have otherwise been time-barred prior to January 1, 2020, solely because the applicable statute of limitations had expired. AB 1510 provided that a cause of action could proceed if already pending in court or, if not filed, could be commenced within a one-year revival period starting January 1, 2020.

The revival period created by AB 1510 was tailored to a now infamous scandal at the University of Southern California student health clinic, where one full-time gynecologist, Dr. George Tyndall, was repeatedly accused of sexually assaulting, and

engaging in other sexual misconduct with, numerous patients, and the school was accused of failing to act to stop his crimes and protect students.

AB 3092 (Wicks, Ch. 246, Stats. 2020) dealt with a similar situation with similar legislative action. It closely tracked the provisions included by AB 1510, but revived claims seeking to recover damages arising out of a sexual assault or other inappropriate contact, communication, or activity of a sexual nature by a physician while employed by a medical clinic owned and operated by UCLA, or a physician who held active privileges at a hospital owned and operated by UCLA, at the time that the sexual assault or other inappropriate contact, communication, or activity of a sexual nature occurred, between January 1, 1983, and January 1, 2019.

The perpetrator at the center of this scandal was Dr. James Heaps. UCLA was found to have failed to adequately respond to allegations, potentially allowing preventable misconduct, namely the sexual assault of additional students.

More recently, AB 1455 (Wicks, Chap. 595, Stats. 2021) amended the statute of limitations for seeking damages arising out of a sexual assault that occurred while a plaintiff was an adult and that was committed by a law enforcement officer. It also eliminated the claim presentation requirements for such claims. The bill also revived such claims that would otherwise be barred by the existing statute of limitations, any government claim presentation deadline, or any other applicable time limit, and applied an extended statute of limitations as to those revived claims.

4. Policy implications of revival

The California Supreme Court has squarely addressed the modification of statutes of limitations and the revival of stale claims:

The Legislature has authority to establish—and to enlarge—limitations periods. . . . [H]owever, legislative enlargement of a limitations period does not revive lapsed claims in the absence of express language of revival. This rule of construction grows out of an understanding of the difference between prospective and retroactive application of statutes. . . . As long as the former limitations period has not expired, an enlarged limitations period ordinarily applies and is said to apply prospectively to govern cases that are pending when, or instituted after, the enactment took effect. This is true even though the underlying conduct that is the subject of the litigation occurred prior to the new enactment. . . . However, when it comes to applying amendments that enlarge the limitations period to claims as to which the limitations period has expired before the amendment became law—that is, claims that have lapsed—the analysis is different. Once a claim has lapsed (under the formerly applicable statute of limitations), revival of the claim is seen as a

retroactive application of the law under an enlarged statute of limitations. Lapsed claims will not be considered revived without express language of revival.

(*Quarry v. Doe I (Quarry)* (2012) 53 Cal.4th 945, 955-957, internal citations omitted.) The court continues, specifically addressing the policy reasons against revival:

“The reason for this rule is a judicial perception of unfairness in reviving a cause after the prospective defendant has assumed its expiration and has conducted his affairs accordingly.” As one court commented, “a statute of limitations grants prospective defendants relief from the burdens of indefinite exposure to stale claims. By reviving lapsed claims, the Legislature may appear to renege on this promise. As Judge [Learned] Hand wrote, there may be something ‘unfair and dishonest’ in after-the-fact withdrawal of this legislative assurance of safety.” Individuals, as well as businesses and other enterprises ordinarily rely upon the running of the limitations period: “The keeping of records, the maintenance of reserves, and the commitment of funds may all be affected by such reliance To defeat such reliance . . . deprives [enterprises] of the ability to plan intelligently with respect to stale and apparently abandoned claims.”

(*Quarry*, at 958, internal citations omitted.)

The California Supreme Court thus makes the case against reviving claims that have expired, highlighting the principle that such revival, while within the Legislature’s power, should not be provided lightly. (See also *Chase Sec. Corp. v. Donaldson* (1945) 325 U.S. 304, 314 [finding statutes of limitations are “good only by legislative grace and to be subject to a relatively large degree of legislative control”]; *Liebig v. Superior Court* (1989) 209 Cal. App. 3d 828, 831-834; *Lent v. Doe* (1995) 40 Cal.App.4th 1177, 1181 [finding the Legislature has the power to revive causes of action].) The courts have made clear that important state interests must be at stake to justify such a disruption of the law.

In analyzing the expansion of the limitations period in AB 1619, this Committee stated:

The nature of sexual assault arguably supports the need for a longer statute of limitations for survivors to be able to raise their claims. While recovering from sexual assault, many survivors do not have the capacity to also pursue civil remedies. As stated by the author [of AB 1619], the “current two-year statute of limitations simply does not provide sexual assault survivors adequate time to heal from the physical and emotional trauma of a sexual assault and prepare for a civil case.” Researchers are learning more about the aftermath of sexual assault. As more information about the potential for post-traumatic stress syndrome (PTSD), depression, and other mental health complications in sexual assault survivors is unveiled, it is clear that two years does not provide victims with the time needed to

heal from the trauma of sexual assault.¹ By providing victims the later of 10 years or within 3 years from when the plaintiff discovers or reasonably should have discovered an injury or illness that resulted from the sexual assault, this bill would provide victims with a timeframe that is more respectful of the violence they have endured and the trauma that has resulted.

These same principles arguably support a revival period for the claims at the center of this bill.

According to the author:

At a moment of reckoning in the United States about sexual harassment, abuse and sexual assault, California has made landmark decisions that recognize for many survivors it take years before being able to come forward. With this bill, California takes another step to protect survivors of sexual abuse when there is evidence of cover up by a defendant entity.

It should be noted that just last month New York State signed a similar bill into law. New York Senate Bill S66A revived otherwise time-barred sexual offense claims where the plaintiff was over 18 years of age at the time of the offense regardless of how long ago the offense took place. The law also provides for expedited judicial proceedings to adjudicate such claims. Governor Kathy Hochul stated the compelling state interest effectuated by the bill:

The fight against sexual assault requires us to recognize the impact of trauma within our justice system. I am proud to sign this legislation, which is part of our collective responsibility to protect one another and create an environment that makes survivors feel safe. While our work is not done, eradicating sexual assault begins with our ability to bring the perpetrators of these heinous acts to justice and this legislation is a historic step forward.²

5. Stakeholder positions

The California Partnership to End Domestic Violence writes in support:

The emotional trauma following sexual assault does not present the same in all survivors and may lead to a delay in seeking medical or legal assistance. Women may not define a victimization as a rape or sexual

¹ *Statistics about Sexual Violence* (2015) National Sexual Violence Resource Center, http://www.nsvrc.org/sites/default/files/publications_nsvrc_factsheet_media-packet_statistics-about-sexual-violence_0.pdf. Internet citations are current as of June 8, 2022.

² Press release, *Governor Hochul Signs Adult Survivors Act* (May 24, 2022) Office of Governor Hochul, <https://www.governor.ny.gov/news/governor-hochul-signs-adult-survivors-act>.

assault for many reasons such as self-blame , embarrassment, not clearly understanding the legal definition of the terms, or not wanting to define someone they know who victimized them as a rapist or because others blame them for their sexual assault. When the perpetrator is someone they trusted, it can take years for victims even to identify what happened to them as a violation. The time a survivor needs to process and recover from their assault, enough to engage with the legal system, can take months and even years, certainly longer than currently allowable for many survivors to seek civil restitution.

Whether a criminal case is filed or not, survivors of sexual assault may also turn to the civil court for recovery of costs related to medical and non-medical needs, which are required for healing. If a survivor awaits the outcome of a criminal case to initiate civil proceedings, they may find their search for justice blocked, if the statute of limitations has expired. Given the potential lifetime costs a survivor may face, both immediate and long-term, the option to recover damages through the civil court is critical. The loss of this option is punitive and possibly injurious to the survivor. . . .

AB 2777 is a commonsense bill, which would build upon the precedent established by bills passed in recent years to give survivors their day in court.

A coalition of industry groups, including the Civil Justice Association of California, writes in opposition:

AB 2777 provides a one-year “reviver” window in 2023 to sue for alleged sexual assault or other inappropriate conduct of a sexual nature that can go back in time for half a century or more. As a result, this bill could result in an onslaught of ancient claims against which businesses of all types and sizes across every industry will have no ability to defend themselves due to records and witnesses that are no longer accessible.

As Governor Brown explained when he vetoed comparable reviver provisions in bills before him:

The reason for [the] universal practice [of barring actions after a lapse of years] is one of fairness. [¶] There comes a time when an individual or organization should be secure in the reasonable expectation that past acts are indeed in the past and not subject to further lawsuits. With the passage of time evidence may be lost or disposed of, memories fade and witnesses move away or die. (Veto Messages re: AB 3120, Sept. 30, 2018, and SB 131, Oct. 12, 2013.)

AB 2777 flies in the face of these long-established principles underlying statutes of limitation. As a matter of policy, statutes of limitations recognize that when claims reach too far back in time, the legal system is no longer able to find employees, other witnesses, or records from the time period of the claim to evaluate what did or did not occur. This leaves juries with comparatively little evidence, and leaves defendants with no basis for an appropriate response or ability to defend themselves in court. Those evidentiary problems are magnified because AB 2777 encompasses many types of potential plaintiffs – such as customers, visitors, and vendors – for which records may be minimal or nonexistent in the regular course of business.

The coalition also argues that the “scope is so vague and overbroad that it could include a vast number of subjective claims and be subject to abuse”:

AB 2777 applies to both alleged acts of sexual assault as well as “other inappropriate conduct, communication, or activity of a sexual nature,” phraseology which is unclear and subject to broad interpretation. For example, does an inappropriate communication of a sexual nature include a risqué joke?

Additionally, “cover up” is defined to include “assisting an alleged perpetrator in gaining employment at another entity following allegations of sexual assault or other inappropriate conduct, communication, or activity of a sexual nature.” What if a past employer of an alleged perpetrator who was let go or quit work receives a reference request from a prospective future employer? Is the past employer “assisting” the alleged perpetrator in gaining employment if it only confirms dates of employment and provides no other information?

SUPPORT

Victim Policy Institute (sponsor)
California Partnership to End Domestic Violence
California Sexual Assault Forensic Examiners Association
Family Violence Appellate Project
Rape Trauma Services: A Center for Healing and Violence Prevention
Thompson Law Offices, P.C.
Valor California

OPPOSITION

American Tort Reform Association
California Business Properties Association

California Business Roundtable
California Chamber of Commerce
California Retailers Association
Civil Justice Association of California
National Association of Mutual Insurance Companies
National Federation of Independent Business
Torrance Chamber of Commerce
Tulare Chamber of Commerce
Western Electrical Contractors Association

RELATED LEGISLATION

Pending Legislation: AB 2959 (Assembly Judiciary Committee, 2022) provides that claims for childhood sexual assault are not required to be presented to any governmental entity prior to the commencement of an action. This bill is currently in the Senate Appropriations Committee.

Prior Legislation:

AB 1455 (Wicks, Ch. 595, Stats. 2021) *See* Comment 3.

AB 3092 (Wicks, Ch. 246, Stats. 2020) *See* Comment 3.

AB 218 (Gonzalez, Ch. 861, Stats. 2019) *See* Comment 3.

AB 1510 (Reyes, Ch. 462, Stats. 2019) *See* Comment 3.

AB 1619 (Berman, Ch. 939, Stats. 2018) *See* Comment 1.

PRIOR VOTES:

Assembly Floor (Ayes 57, Noes 0)

Assembly Judiciary Committee (Ayes 8, Noes 0)
