



# American Tort Reform Association

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February 10, 2020

The Honorable Fred Patton  
Chairman, House Judiciary Committee  
Kansas State Capitol  
300 SW 10th Street, Room 519-N  
Topeka, Kansas 66612

**Re: House Bill 2306 (hearing February 11, 2020)**

Dear Chairman Patton:

I am writing on the behalf of the American Tort Reform Association (ATRA) to express our concern with H.B. 2306, which would retroactively eliminate the statute of limitations for civil actions alleging injuries associated with childhood sexual abuse. ATRA, founded in 1986, is a broad-based bipartisan coalition of businesses, municipalities, associations, and professional firms that have pooled resources to promote a fair, balanced, and predictable civil justice system. ATRA supports efforts to protect children from sexual abuse and to provide survivors of abuse with a reasonable period to file a civil claim. In completely eliminating the statute of limitations, however, H.B. 2306 abandons a critical element of the civil justice system, setting a troubling precedent. In addition, despite its language, the bill cannot constitutionally revive claims based on conduct that occurred decades ago, as explained below.

For statutes of limitations to serve their purpose of encouraging prompt and accurate resolution of lawsuits and to provide the predictability and certainty for which they are intended, they must be finite and any changes should only be made prospectively. Unfortunately, the approach taken in H.B. 2306 is contrary to these principles.

Tort law, by its very nature, deals with horrible situations – accidents resulting in serious injuries that have a dramatic impact on a person's life, negligence in the workplace or a defective product that leads to person's death, and diseases contracted through exposure to toxic substances, for example. Every type of civil claim, no matter how tragic the injury or offensive the alleged conduct, must be brought within a certain time period. Statutes of limitations are a foundational element of a fair and well-ordered civil justice system. They protect the integrity of the civil justice system by ensuring that judges and juries make decisions about liability based on the best evidence available. Statutes of limitations recognize that as time passes, witnesses become difficult to locate or pass away, records are lost or discarded, and memories fade. They also safeguard due

process by allowing individuals and organizations named in lawsuits a fair opportunity to present a defense.

There is no magic number as to what is a fair length of time to bring a lawsuit. 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, courts and defendants must be protected from having to address cases in which the search for the truth may be seriously impaired by the passage of time. By striking this balance, statutes of limitations promote justice, discourage unnecessary delay, and preclude the prosecution of stale or fraudulent claims. The possibility of an unfair trial is heightened when heart-wrenching allegations are involved.

Claims that significantly rely on people's memories or statements or whether a person acted or did not act in the way society expected at that time generally must be brought in a short period. For this reason, in Kansas, most personal injury actions, including medical malpractice actions and wrongful death claims, must be brought within two years.<sup>1</sup> Claims that typically rely on hard, tangible evidence have longer periods. For instance, claims for breach of a written contract or those involving land disputes must be brought within five years.<sup>2</sup> These laws reflect a legislative judgment that a period of between two and five years typically 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. In addition, Kansas law recognizes that when the injury is to a child, he or she must have additional time to bring a claim. When a child is harmed, that person can bring an action one year after he or she turns 18, but the action must be filed no later than eight years after the conduct giving rise the lawsuit occurred.<sup>3</sup>

In 1992, the legislature adopted a longer statute of limitations for survivors of childhood sexual abuse. That law, which H.B. 2306 would amend, provides that a person may file a lawsuit within three years of turning 18 years of age or three years from when the person discovers or reasonably should have discovered that the injury or illness was caused by childhood sexual abuse, whichever is later.<sup>4</sup>

While many states have extended their statutes of limitations for childhood sexual abuse claims in recent years, only a handful have taken the extreme step of eliminating the period to file a claim, as H.B. 2306 proposes. The vast majority of states adhere to the principle that every action is subject to a finite statute of limitations. If the legislature finds the current period to bring claims for childhood sexual abuse is

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<sup>1</sup> K.S.A. 60-513.

<sup>2</sup> K.S.A. 60-511.

<sup>3</sup> K.S.A. 60-515(a).

<sup>4</sup> K.S.A. 60-523.

insufficient, then it can and should extend it. ATRA has no objection to setting a longer period for filing claims so long as the new period is finite and applies prospectively. For example, the Committee might consider quadrupling the amount of time to file a childhood sexual abuse claim from 3 years to 12 years of turning 18, rather than allowing lawsuits to simply be filed “at any time.”<sup>5</sup>

ATRA is also concerned with the retroactivity of H.B. 2306, which purports to revive time-barred claims by keeping in place language indicating that the section applies to “any action commenced on or after July 1, 1992, including any action which would be barred by application of the period of limitations applicable prior to July 1, 1992.” The Committee should be aware that while the legislature can extend the time to file childhood sexual abuse claims, the new period cannot revive a claim after the eight-year statute of repose period has ended without violating due process. H.B. 2306’s elimination of the statute of limitations cannot constitutionally apply to cases brought after the statute of repose expired. The Kansas Supreme Court<sup>6</sup> and Court of Appeals have repeatedly and consistently applied this principle.<sup>7</sup>

Aside from the constitutional issues raised by reviving time-barred claims, retroactive elimination of the statute of limitations is unsound policy. Those named as defendants in revived actions will primarily be organizations whose employees or volunteers interacted with children many years ago. Under the bill, a revived claim may allege no more than negligence, meaning that it may assert that an organization should have known that an employee or volunteer was a perpetrator and did not take sufficient action to prevent the abuse. These lawsuits will be evaluated in hindsight based on what we now know and the steps to protect children that we take for granted today. As a result, organizations such as schools, boys and girls clubs, and others will be at risk of claims based on alleged actions or omissions of people that may be dead and where employment and other records no longer exist. The people involved in those

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<sup>5</sup> The Committee could consider adopting a longer statute of limitations for actions against perpetrators than negligence claims against organizations, which are significantly different in the allegations and evidence involved. Kansas’s neighbors are among states that take this approach. *See* Colo. Rev. Stat. Ann. § 13-80-103.7 (requiring claims against perpetrators to be filed within 6 years of age 18); Mo. Rev. Stat. § 537.046 (requiring claims against perpetrators to be filed within 10 years of turning age 21 or 3 years after discovery of the injury caused by the abuse); Neb. Rev. Stat. § 25-228 (enacted in 2017) (eliminating statute of limitations for claims against perpetrators and requiring claims against entities to be filed within 12 years of plaintiff turning age 21); Okla. Stat. Ann. tit. 12, § 95(A)(6) (enacted 2017) (requiring claims against perpetrator to be filed before plaintiff’s 45th birthday and claims against entities to be filed within 2 years of turning 18).

<sup>6</sup> *Shirley v. Reiff*, 820 P.2d 405, 412 (Kan. 1996) (finding the running of statute of repose creates a substantive right and “cannot be removed and the claim cannot be revived [by the extended statute of limitations for childhood sexual abuse case] without taking the defendant’s property and without violating the defendant’s due process rights”); *Ripley v. Tolbert*, 921 P.2d 1210, 1224 (Kan. 1996) (same).

<sup>7</sup> *See, e.g., Doe v. Popravak*, 421 P.3d 760, 768 (Kan. Ct. App. 2017) (“Once the statute of repose under K.S.A. 60-515 barred Doe’s claims, nothing in K.S.A. 2016 Supp. 60-523 could bring those claims back to life.”); *T.L. Doe v. St. Benedict’s Abbey*, 189 P.3d 580 (Kan. Ct. App. 2009) (“[B]ecause Doe’s claims were barred by the statute of repose in 1985, the enactment of K.S.A. 60-523 in 1992, which effectively abolished the statute of repose in childhood sexual abuse cases, cannot revive Doe’s claims.”); *Waltrip v. Waltrip*, 155 P.2d 1220 (Kan. Ct. App. 2007) (“[O]nce [the defendant’s] right to repose vested, it could not be divested by the later enactment of K.S.A. 60-523.”).



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organizations today, and the communities those organizations serve today, will be subject to liability, not those who were in charge of the organizations years ago.

Recognizing the extreme difficulty for volunteer groups, schools, and other organizations to defend themselves against decades-old allegations in which witnesses and records are long gone, the unsound precedent it sets for other types of lawsuits, and the questionable constitutionality of such laws, most states have not revived time-barred claims. Only about one third of states have taken a retroactive approach. Some of these states have limited revived claims to those against perpetrators or alleging criminally responsible conduct, or required a lawsuit against an organization to allege more than mere negligence. The H.B. 2306 includes no such constraints.

The approach taken by this legislation sets a troubling precedent for other types of claims. As discussed earlier, tort claims often address horrible, tragic situations. In all of these cases, Kansas has a set period to bring a claim to protect the ability of the judicial system to reach decisions based on reliable evidence. The law states that, at some point, liability exposure for businesses ends. Retroactively changing a statute of limitations sends a message that even if the law says liability exposure has ended, it may return when evidence is no longer available to evaluate what occurred.

ATRA commends the legislature for considering steps to protect survivors of sexual abuse. It is important, however, that Kansas's civil justice system maintain the predictability and certainty of statutes of limitations for any type of civil claim. H.B. 2306's complete elimination of the statute of limitations and retroactive application exposes organizations that provide services to children in Kansas to decades-old claims where witnesses and records are no longer available and never-ending liability in the future. It may also open the door to similar changes in the statutes of limitations applicable to other claims. This is not a sound path for Kansas's civil justice system.

Sincerely,

A handwritten signature in blue ink, appearing to read "Sherman Joyce", is written over a circular stamp or seal. The signature is fluid and somewhat abstract, with a long horizontal stroke extending to the right.

Sherman Joyce  
President

cc: Members of the House Judiciary Committee