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Memorandum

TO: Richard Barnes

FROM: Susan Phillips Read SR

DATE: May 21, 2018

RE: New York State Assembly Bill A5885-A/New York State Senate Bill S6575

I. Introduction

You have asked me whether New York State Assembly Bill A5885-A/New York State Senate Bill S6575 ("the bill") revives otherwise time-barred civil damages claims for childhood sexual abuse brought against both private and public entities. My answer is "No." As explained below, while the bill on its face undoubtedly revives such claims when brought against a private entity within a one-year window of opportunity (i.e., no earlier than six months or later than one year and six months after the bill's enactment),[1] it does not similarly revive comparable claims against a public entity. For example, if this bill were enacted into law, a 34-year old man whose high school wrestling coach sexually abused him 20 years ago would not be time-barred from recovering damages from his high school if the man attended a private school and sued within the one-year window, but he would be precluded from recovering damages if he attended a public instead of a private school. This disparity of treatment of victims exists because the bill's claim-revival provision does not abrogate or suspend the prerequisites to a lawsuit against a public entity, and its other provisions only eliminate these prerequisites prospectively.

II. Relevant Provisions of the Bill

Section 3 (Claim-Revival Provision)

Section 3 amends the CPLR to add a new section 214-g, which reads in pertinent part as follows:

> "Notwithstanding any provision of law which imposes a *period of limitation* to the contrary, every civil claim or cause of action brought against any party alleging intentional or negligent acts or omissions by a person for physical, psychological, or other injury or condition suffered as a result of conduct which would constitute [certain enumerated crimes committed against a child under 18 years of age], which is barred as

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[1] For purposes of this memorandum, I assume that the bill, if enacted into law, would be constitutional within the meaning of the Court of Appeals' recent decision in *Matter of World Trade Ctr. Lower Manhattan Disaster Site Litig.* (30 NY3d 377 [2017] [a claim-revival statute will satisfy the Due Process Clause of the New York State Constitution if enacted as a reasonable response in order to remedy an injustice]).

of the effective date of this section because the *applicable period of limitation* has expired is hereby revived, and action thereon may be commenced not earlier than six months after, and not later than one year and six months after the effective date of this section, ..." (emphases added).

Sections 6 and 7 (Amendments to General Municipal Law §§ 50-e and 50-i)

Sections 6 and 7 amend sections 50-e and 50-i of the General Municipal Law, respectively. Section 50-e requires service of a notice of claim on a public corporation[2] within 90 days after a tort claim arises as a condition precedent to commencement of an action or special proceeding (*see* General Municipal Law §§ 50-e [1] [a], [b]). Section 50-i provides that no action or special proceeding for personal injury may be "prosecuted or maintained against a city, county, town, village, fire district or school district" unless three conditions are met: a notice of claim has been served in compliance with section 50-e; at least 30 days have elapsed since service of the notice of claim; and the action or special proceeding has been commenced within one year and ninety days "after the happening of the event upon which the claim is based" (General Municipal Law § 50-i [1]).

Section 6 of the bill amends subdivision 8 of section 50-e, entitled "Inapplicability of the section." This provision currently states that section 50-e "shall not apply to claims arising under the provisions of the workers' compensation law, the volunteer firefighters' benefit law, or the volunteer ambulance workers' benefit law or to claims against public corporations by their own infant wards." Section 6 designates this text as paragraph (a) of subdivision 8 and creates a new paragraph (b), which states that "[t]his section [50-e of the General Municipal Law] shall not apply to any claim made for physical, psychological, or other injury or condition suffered as a result of conduct which would constitute" the same crimes identified in new CPLR 214-g when committed against a child under 18 years of age. Concomitantly, section 7 of the bill amends section 50-i by adding a new subdivision 5 to say that "[n]otwithstanding any provision of law to the contrary, this section [50-i of the General Municipal Law] shall not apply to any claim made against a city, county, town, village, fire district or school district for physical, psychological, or other injury or condition suffered as a result of conduct which would constitute" the same crimes identified in new CPLR 214-g committed against a child under 18 years of age.

Section 8 (Amendment to Court of Claims Act § 10)

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[2] The General Construction Law defines a "public corporation" to include "a municipal corporation, a district corporation, or a public benefit corporation" (General Construction Law § 66 [1]); a "municipal corporation" to include "a county, city, town, village and school district" (*id.* § 66 [2]); a "district corporation" to include "any territorial division of the state, other than a municipal corporation" established by law and possessing certain powers (*id.* § 66 [3]); and a "public benefit corporation" to include "a corporation organized to construct or operate a public improvement wholly or partly within the state, the profits of which inure to the benefit of this or other states, or to the people thereof" (*id.* § 66 [4]).

By section 8 of the Court of Claims Act, New York has waived its sovereign immunity from liability and action and assumed liability and consented to suit in accordance with the same rules of law as applied in Supreme Court to actions against individuals and corporations. But the State's waiver and consent is specifically conditioned upon compliance with "the limitations of" the Court of Claims Act. These limitations notably include the requirements in Court of Claims Act §§ 10 (3) (negligence or unintentional tort) and (3-b) (intentional tort) for a claimant to file in the Court and serve the Attorney General with a claim within 90 days after the claim's accrual, or, alternatively, to serve the Attorney General with a notice of intention to file a claim within 90 days after the claim's accrual, in which event the claim itself must be filed and served within two years (section 10 [3]) or one year (section 10 [3-b]) after accrual. Section 8 of the bill amends section 10 of the Court of Claims Act to add a new subdivision 10, which states that "[n]otwithstanding any provision of law to the contrary, this section [10 of the Court of Claims Act] shall not apply to any claim to recover damages for physical, psychological, or other injury or condition suffered as a result of conduct which would constitute" the same crimes identified in new CPLR 214-g committed against a child under 18 years of age.

Section 9 (Amendment to Education Law § 3813 (2)

Section 3813 (2) of the Education Law provides that "no action or special proceeding founded upon tort shall be prosecuted or maintained against" school districts, boards of education and cooperative educational services or their officers or teachers or supervisory or administrative staff or employees unless a notice of claim has been made and served in compliance with section 50-e of the General Municipal Law and the action or proceeding has been commenced pursuant to the provisions of section 50-i of the General Municipal Law. Section 9 of the bill would add the following clause at the end of existing subdivision 2: "provided, however that this section[3] shall not apply to any claim to recover damages for physical, psychological, or other injury or condition suffered as a result of conduct which would constitute" the same crimes identified in new CPLR 214-g committed against a child under 18 years of age.

III. Discussion

The Court of Appeals has declared it to be "fundamental" that "a court, in interpreting a statute, should attempt to effectuate the intent of the Legislature" (*Majewski v Broadalbin-Perth Cent. School Dist.* (91 NY2d 577, 583 [1998] [internal quotation marks omitted]); and because "the clearest indicator of legislative intent is the statutory text, the starting point in any case of interpretation must always be the language itself, giving effect to the plain meaning thereof" (*id.*). Further, "the failure of the legislature to include a matter within the scope of an act may be construed as an indication that its exclusion was intended" (Statutes § 74; *see also People v Finnegan*, 85 NY2d 53, 58 [1995]; *Matter of Corrigan v New York State Off. of Children &*

[3] The drafter might have meant "subdivision" rather than "section."

Family Servs., 28 NY3d 636, 642 [2107]; *Commonwealth of N. Mariana Is. v Canadian Imperial Bank of Commerce,* 21 NY3d 55, 60-61 [2013]).

The bill's claim-revival provision (section 3) revives time-barred claims despite "any period of limitation" or expiration of "the applicable period of limitation" to the contrary. Courts generally understand these terms to refer to the statutes of limitations made applicable to different kinds of causes of actions by the provisions of CPLR article 2, entitled "Limitations of Time." By contrast, the notice-of-claim prerequisite for a lawsuit against a non-State public entity found in General Municipal Law § 50-e, and incorporated by reference in General Municipal Law § 50-i and Education Law § 3813 (2), is a "condition precedent" to commencement of suit, not a statute of limitation. The provisions of section 10 of the Court of Claims Act are conditions on the State's waiver of sovereign immunity and are jurisdictional in nature (*see e.g. Alston v State of New York*, 97 NY2d 159 [2001]; *Colombo v State of New York*, 135 AD3d 804 [2d Dept 2016]). Thus, the language of the bill's claim-revival provision does not in any way suggest that the Legislature intends the bill to revive claims against public entities which would be barred as of the provision's effective date because of noncompliance with sections 50-e or 50-i of the General Municipal Law, section 3813 (2) of the Education Law or section 10 of the Court of Claims Act.

And it is unlikely that a New York court would consider the omission as anything other than intentional. As noted earlier, "the failure of the Legislature to include a substantive, significant prescription in a statute is a strong indication that its exclusion was intended" (*Finnegan*, 85 NY2d at 58). That is particularly true here because the Legislature has clearly shown that it knows how to revive a claim otherwise barred not only by the expiration of the applicable statute of limitations, but also by a plaintiff's or claimant's failure to comply with the prerequisites for lawsuits or claims against public entities. For example, Jimmy Nolan's Law (L 2009, ch 440) revived the causes of action of workers who participated in cleanup operations in New York City following the terrorist attacks on September 11, 2001, and who sought to sue the Battery Park City Authority (BPCA), a public benefit corporation, to allege injuries resulting from exposure to toxins at BPCA-owned properties during the course of the workers' cleanup duties. Accordingly, the Legislature amended the General Municipal Law to provide that

> "*[n]otwithstanding any other provision of law to the contrary, including any other subdivision of this section [50-i], section fifty-e of this article, section thirty eight hundred thirteen of the education law, and the provisions of any general, special or local law or charter requiring as a condition precedent to commencement of an action or special proceeding that a notice of claim be filed or presented,* any cause of action against a public corporation for personal injuries suffered by a participant in World Trade Center rescue, recovery or cleanup operations as a result of such participation *which is barred as of the effective date of this subdivision because the applicable period of limitation has expired* is hereby revived, and a claim thereon may be filed and served and prosecuted provided such claim is filed and served within one year of the effective date of this subdivision" (emphases added).

(General Municipal Law § 50-i [4] [a], as added by L 2009, ch 440 § 2).

Similarly, when the Legislature recently enacted legislation to revive certain medical malpractice claims, the claim-revival provision stated that

> *"[n]otwithstanding any other provision of law, including sections 50-e and 50-i of the general municipal law, section 10 of the court of claims act and the provisions of any general, special or local law or charter requiring as a condition precedent to commencement of an action or proceeding that a notice of claim be filed or presented,* [medical malpractice claims] barred during and up to the seven year period prior to the effective date of this act *solely because the applicable period of limitations has or had expired* before the injured plaintiff or injured claimant or the representative of their estate did not know and reasonably should not have known that they had been injured as a result of medical malpractice is hereby revived and an action thereon may be commenced provided such action is commenced within one year from the effective date of this act (emphases added).

(L 2018, ch 1 §3).

Consistent with plain meaning, these two claim-revival statutes illustrate that the Legislature does not use the terms "period of limitation" and "applicable period of limitation" to encompass the prerequisites for lawsuits or claims against public entities; and that when the Legislature wants to revive a cause of action against a public entity notwithstanding a plaintiff's or claimant's failure to comply with these prerequisites, it knows how to do so. Thus, if the bill's claim-revival provision is enacted as drafted -- that is, without making explicit that a victim's failure to comply with General Municipal Law §§ 50-e or 50-i, Court of Claims Act § 10 or Education Law § 3813 (2) will not thwart revival of a time-barred lawsuit or claim against a public entity for injuries suffered as a result of childhood sexual abuse – this class of victim will end up without a remedy as happened in California. There, the California Legislature in 2002 enacted a statute to revive for calendar year 2003 time-barred causes of action based on childhood sexual molestation brought by plaintiffs over the age of 26 against a person or entity that had "reason to know" or was "on notice[] of any unlawful sexual conduct by an employee, volunteer, representative, or agent, and failed to take reasonable steps, and to implement reasonable safeguards, to avoid acts of unlawful sexual conduct" (Code Civ Proc § 340.1 [c]). In *Shirk v Vista Unified School Dist.* (164 P3d 630, 635-637 [2007]), the California Supreme Court held that this claim-revival statute did not revive the claim of a plaintiff suing the school district that employed her alleged abuser as a teacher because she had not filed a timely notice of claim, as required by California's government claims statute, which is analogous to section 50-e of the General Municipal Law, and the claim-revival statute did not explicitly relieve her of that obligation (*id.* at 637 ["Had the Legislature intended to also revive in (section 340.1 [c]) the claim presentation deadline under the government claims statute, it could easily have said so. It

did not. We thus conclude that as January 1, 2003, plaintiff's causes of action against the School District were barred by expiration of the time for presenting a claim to the School District"]).

Finally, the provisions of sections 6, 7, 8 and 9 of the bill do not change the analysis. These amendments only provide that postenactment victims of childhood sexual abuse will not have to comply with General Municipal Law §§ 50-e and 50-i, Court of Claims Act § 10 or Education Law § 3813 (2) in order to bring suit or file a claim against a public entity to assert vicarious liability for the acts of an accused abuser. "It is a fundamental canon of statutory construction that retroactive operation is not favored by courts and statutes will not be given such construction *unless the language expressly or by necessary implication requires it*" (*Majewski*, 91 NY2d at 584 [emphasis added]). Here, the bill provides simply that sections 6, 7, 8 and 9 "shall take effect immediately" (*see* the bill at section 13). In *Majewski* the Court of Appeals held that when the Legislature only stated that certain remedial amendments to the Workers' Compensation Law were to "take effect immediately," those provisions were applicable prospectively to actions filed postenactment and were not retroactively applicable to pending actions. By parity of reasoning, sections 6, 7, 8 and 9 of the bill only apply prospectively.