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Statute of Limitations for Child Sexual Abuse Civil Lawsuits in Georgia

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Wilbanks Child Endangerment and Sexual Exploitation Clinic

School of Law

UNIVERSITY OF GEORGIA

Statute of Limitations for Child Sexual Abuse Civil Lawsuits in Georgia

Update on Case Findings and Opportunities for Reform

April 8, 2019

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The Wilbanks Child Endangerment and Sexual Exploitation (CEASE) Clinic is the first of its kind in the nation, representing survivors of child sexual abuse in juvenile court dependency matters and civil litigation. The clinic not only provides direct representation to survivors, but also serves as a teaching center as part of the University of Georgia School of Law. For more information about the Wilbanks Child Endangerment and Sexual Exploitation Clinic, please visit our website at <http://cease.law.uga.edu/>

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I. Executive Summary

Child sexual abuse is a public health crisis affecting individuals and families across all socioeconomic groups. An estimated one in ten children will be sexually abused in the United States before they reach the age of eighteen; however, this is likely an underestimate given that only about one-third of children disclose their abuse. Furthermore, victims of child sexual abuse commonly experience some degree of delayed discovery regarding their abuse. The delayed discovery can come in the form of partial, or even full memory repression. Compared to the general population, individuals who are sexually abused as children are more likely to have mental health problems, experience substance abuse, drop out of school, have chronic health problems such as diabetes and high blood pressure, be involved in the criminal justice system, and experience difficulty in maintaining employment. According to at least one study, the estimated average lifetime cost per victim of child maltreatment is \$210,012. This figure includes health care costs, productivity losses, education costs, and criminal justice costs.

Only 29% of child sexual abuse reports result in criminal charges being filed. As a result, most states have enacted civil statutes of limitations to allow survivors to file claims both against abusers and also those who owed them a duty of care and knew or should have known about the abuse. In 2015 the Georgia legislature passed the Hidden Predator Act (HPA) to amend the state's civil statute of limitations. Under the HPA, survivors of child sexual abuse that occurred prior to July 1, 2015 were given a two-year retroactive window under which to file claims against their abusers. Notably, the open window excluded entities from liability. After the two-year window closed on June 30, 2017, survivors whose abuse occurred prior to July 1, 2015 could only sue until their twenty-third birthday. For those whose abuse occurred after July 1,

2015, the HPA created a delayed-discovery provision, allowing survivors over the age of twenty-three to file claims within two years of making the connection that the abuse caused their injuries.

The Wilbanks Child Endangerment and Sexual Exploitation Clinic (“CEASE”) filed six claims under the open window provision of the HPA. Four of those claims have been successfully settled, one was decided favorably for the victim at a bench trial, and one was voluntarily dismissed by the client. Through its representation of survivors, CEASE found that even in cases where the abuse occurred thirty years prior to the date of filing, claims could be successful under Georgia law and that mediation could be a powerful healing tool for survivors.

However, despite the passage of the HPA, CEASE observed several barriers for survivors to the civil justice system in Georgia. While the HPA, in theory, provided civil relief for survivors, in practice, the HPA did little to extend the statute of limitations or provide retroactive access to the civil justice system. Fewer than fifteen civil claims were filed under the retroactive window, six of which were filed by CEASE. Of the nearly 1,000,000 survivors of child sexual abuse in the state of Georgia, less than 0.000015% were able to file civil claims under the open window. Furthermore, because the delayed-discovery provision only applies to acts of child sexual abuse occurring on or after July 1, 2015 *and* where the victim is over the age of twenty-three, no delayed-discovery cases will be seen in Georgia courts for decades.

For older survivors whose abuse occurred prior to July 1, 2015, the HPA did little to improve access to justice. Since opening in January 2016, the Wilbanks Child Endangerment and Sexual Exploitation (CEASE) Clinic has performed over seventy total intakes, fifty-five of which involved potential civil lawsuits.¹ The average age of survivor contacting CEASE with

¹ The other intake claims included family law matters such as custody or divorce and juvenile court dependency matters.

civil claims is 32.7 and the average age of survivor contacting CEASE after the retroactive window closed is 40.6. Only 7.27% of intake calls received by CEASE between December 2015 and December 2018 involved child sexual abuse of a survivor between the ages of eighteen and twenty-two. All of these calls were from parents of the survivor rather than the survivor. These ages are unsurprising given that the mean age of disclosure is forty-eight and the average age of disclosure is fifty-two. In addition to the HPA's not effectively providing access to justice for survivors, several other barriers to relief also exist. For example, civil lawsuits may cost anywhere from \$18,000 to \$109,000. This cost of litigation may discourage attorneys from representing survivors unless funds are available to cover legal expenses, leaving the majority of survivors without legal counsel.

Since 2002, 80% of states have amended their civil child sexual abuse statutes of limitation. Areas of reform include abolishing the civil statute of limitations, creating retroactive windows under which previously barred survivors may file claims, extending the age by which survivors may bring claims, and providing delayed-discovery provisions. Compared to other states, Georgia's reforms under the HPA have been more limited and less effective. For example, Georgia was one of only two states to protect entities against liability under its retroactive window, while the majority of states that have passed similar windows did not limit liability against entities. Georgia heightened its negligence standard to gross negligence for delayed-discovery cases involving entities, placing a higher burden of proof on survivors and making it an outlier among states with the delayed-discovery rule.² Georgia is also amongst the minority of states across the country, and in the Southeast, that set its statute of limitations for child sexual abuse under the age of twenty-three.

² Of the thirty-three states (including Washington D.C.) that have a delayed-discovery rule, only Georgia, Hawaii, and South Dakota have a gross negligence standard for entity liability.

Opponents of reform in Georgia cite several areas of concern. The first opposition to extending liability for entities is fear that requiring current leadership to defend against the acts of former employees and volunteers would be fundamentally unfair, and that many entities truly did not know, or could not have known, that there was a perpetrator in their organizations. However, child service organization personnel are mandated reporters under Georgia law and if they comply with the statute they will not only avoid civil liability, but also criminal misdemeanor liability, as well. Additionally, negligence claims involving employees or volunteers of entities are already difficult to prove under Georgia law, especially when they involve acts of child sexual abuse. Limiting entity liability may incorrectly allocate risk where an entity knew that one of their employees or volunteers was abusing children under its care and yet declined to report the abuse or put measures into place to prevent future abuse, running afoul of the purposes of Georgia tort law.

Opponents of reform are also concerned about the possibility of frivolous claims and that extending the statute of limitations or keeping a negligence standard for entity liability would result in a floodgate of litigation. However, only 4% to 8% of reports of child sexual abuse are estimated to be false, and most of those claims involve custody disputes, not claims filed by adult survivors of child sexual abuse. Also, Georgia law already has protections against frivolous lawsuits, such as provisions for attorneys' fees and abusive litigation. The fear of a floodgate of litigation is also misguided. In states that have passed retroactive windows that allowed for entity liability, child sexual abuse claims only made up between 0.000006% and 1.74% of total annual civil case filings.

Finally, opponents of statute of limitation reform often cite concerns with the constitutionality of retroactive legislation. However, it is well-established under Georgia law that

retroactive civil statutes of limitation are constitutional. Georgia courts have found that retroactive statute of limitations do not violate substantive due process because there is no vested right in a course of procedure and that they will be upheld so long as they do not deprive anyone of life, liberty, or property without due process. Retroactive statutes of limitations have also been found constitutional under principles of substantive due process, *ex post facto* laws, and equal protection. Alleged perpetrators of child sexual abuse do not fall under a suspect class and the statute of limitation is for civil, not criminal, claims where a defendant's liberty is at stake. Finally, the retroactive application of the legislation would be justified by the rational legislative purpose of protecting children from abuse and mending harm caused to victims.

Many avenues of reform exist that the Georgia legislature could consider. For example, the legislature could abolish the civil statute of limitations going forward while providing for a time-limited retroactive window for claims that would otherwise be barred. Alternatively, the legislature could extend the age by which survivors can sue or allow retroactive application for delayed discovery claims. Statute of limitation reform would improve access for survivors to the civil justice system while also protecting against frivolous lawsuits or a floodgate of litigation. Statute of limitation reform in Georgia would align with the state's interest in protecting children from abuse, preventing future abuse, and compensating victims for the harms caused to them.

II. Background

Founded in January 2016, the Wilbanks Child Endangerment and Sexual Exploitation Clinic (CEASE) is the first clinic of its kind in the nation, representing survivors of child sexual abuse in civil litigation and in juvenile court dependency matters. The CEASE Clinic was

established in response to a new Georgia law, known as the Hidden Predator Act (HPA),³ that went into effect on July 1, 2015. The HPA extended the statute of limitations for civil claims arising out of acts of child sexual abuse by providing a two-year retroactive window under which survivors who were previously barred from filing lawsuits could bring claims against their abusers.

The CEASE Clinic’s mission is to provide direct legal services to survivors of child sexual abuse in a supportive, professional environment, as well as to educate and prepare the next generation of lawyers and social workers to represent survivors. The clinic not only provides direct representation to survivors, but also serves as a teaching center as part of the University of Georgia School of Law. Each semester eight law students and one to two masters of social work students enroll in the clinic. Students work in the clinic ten to twenty hours each week, providing direct representation to clients under attorney and social worker supervision. Students also participate in a weekly seminar where they learn about child sexual abuse, related laws, and trauma-informed practices.

When CEASE opened in January 2016, the clinic focused on representing survivors in civil lawsuits that could be brought under the HPA’s retroactive window provision, commonly referred to as the “look-back” provision. The clinic filed six lawsuits under the look-back provision. Four of the cases were settled, one was successfully litigated at a bench trial, and one was voluntarily dismissed by the survivor. Overall, CEASE has provided legal representation, advice, and/or referral resources to approximately seventy survivors of child sexual abuse, most of whom continue to be barred from filing claims, despite the passage of the HPA.

³ O.C.G.A. § 9-3-33.1 (2015).

With the closing of the window on June 30, 2017, the CEASE Clinic has been active in following legislative efforts to improve the statute of limitations for civil claims arising out of child sexual abuse in the state of Georgia. Although the scope of the problem is broad, access to the civil justice system remains narrow for survivors in Georgia. Section II of this article discusses the scope and effects of child sexual abuse. Section III discusses the Hidden Predator Act of 2015 and the current statute of limitations for civil claims arising from acts of child sexual abuse in the state of Georgia. Section IV discusses the successes seen by the CEASE Clinic under the HPA, while section V discusses the failures and barriers seen by CEASE under the law. Section VI provides an overview of laws and trends across the United States as well as a comparison between Georgia and other states. Section VII explores concerns with legislative reform. Finally, Section VIII will discuss the possibility of legislative reform and the benefits and consequences of those reforms.

III. Scope of Child Sexual Abuse and Consequences for Survivors

A. Prevalence of Child Sexual Abuse

One in five women and 1 in thirteen men report having been sexually abused as a child.⁴ In the United States, approximately 1 in 10 children will be sexually abused before their 18th birthday⁵, which translates to approximately 400,000 children a year.⁶ However, this number is

⁴ *Child Maltreatment*, WORLD HEALTH ORGANIZATION (2016), <http://www.who.int/mediacentre/factsheets/fs150/en/>.

⁵ *Raising Awareness About Sexual Abuse: Facts and Statistics*, U.S. Dep't of Justice, [https://www.nsopw.gov/\(X\(1\)S\(xxkey30tfelihlv1b4obd2k0f\)\)/en-US/Education/FactsStatistics?AspxAutoDetectCookieSupport=1#reference](https://www.nsopw.gov/(X(1)S(xxkey30tfelihlv1b4obd2k0f))/en-US/Education/FactsStatistics?AspxAutoDetectCookieSupport=1#reference).

⁶ See *Raising Awareness About Sexual Abuse*, *supra* note 5; see also *Get Statistics*, THE NAT'L SEXUAL VIOLENCE RESOURCE CTR., <https://www.nsvrc.org/statistics> (last visited April 4, 2019) (stating that "one in four girls and one in six boys will be sexually abused before they turn 18 years old"); *Child Sexual Abuse Statistics*, THE NAT'L CTR. FOR VICTIMS OF CRIME, <http://victimsofcrime.org/media/reporting-on-child-sexual-abuse/child-sexual-abuse-statistics> (last visited April 4, 2019) (stating that "experts agree that the incidence of [child sexual abuse] is far

likely an underestimate given that only about 38% of children disclose their abuse.⁷ At least 90% of children know their abusers.⁸ Thirty percent of children are abused by family members.⁹ The other 60% are sexually abused by people the family knows and trusts, such as church clergy, youth organization leaders, sports coaches, or teachers.¹⁰ “While the rate of conviction is high, arrests are made in only 29% of child sexual abuse cases and are 32% more likely to be made in incidents involving older children. For children under six, only 19% of sexual abuse incidents result in arrest.”¹¹

B. Adverse Effects of Child Sexual Abuse

Children who are sexually abused are more likely to have emotional and mental health problems, over-sexualized behavior, academic problems, be involved in the delinquency or criminal system, experience teen pregnancy, and have substance use disorders.¹² As adults, survivors of child sexual abuse are more likely to suffer from depression, report a suicide attempt, have substance use disorders, become obese or develop eating disorders, and become involved in crime.¹³ In an Adverse Childhood Experiences, or ACEs, study, performed by the Centers for Disease Control and Kaiser-Permanente, researchers found that adverse childhood experiences, such as child sexual abuse, increase the risk of a variety of negative health, relationship, and psychological outcomes, including, but not limited to alcoholism and alcohol

greater than what is reported to authorities” and that “[child sexual abuse] is also not uniformly defined, so statistics may vary”).

⁷ *Child Sexual Abuse Statistics*, Darkness to Light https://www.d2l.org/wp-content/uploads/2017/01/all_statistics_20150619.pdf.

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

abuse, depression, heart disease, liver disease, financial stress, risk for intimate partner violence, sexually transmitted diseases, suicide attempts, unintended pregnancies, and poor academic achievement.¹⁴ As the researchers pointed out, this list is not exhaustive.

C. Repressed Memory and Delayed Discovery

Several studies have been conducted outlining the psychological consequences of child sexual abuse on survivors. Clinical, non-clinical, and random survey studies show that individuals who are victims of child sexual abuse experience some degree of delayed discovery that the child sexual abuse caused lifetime psychological harm. For example, one clinical study that looked at 53 female victims of incest found that 64% “experienced some varying degree of dissociative amnesia” and that 28% suffered “severe memory deficits.”¹⁵ Another study found that approximately 33% of survivors of child sexual abuse have reported or show signs of complete amnesia of the abuse at some point during their lives.¹⁶ Studies have also found that childhood trauma such as child sexual abuse can cause neurobiological defects that can affect memory. One study conducted by the Centers for Disease Control found a relationship between “exposure of the developing brain to the stress response with resulting impairment in multiple brain structures and functions,” such as memory retention and recall.¹⁷

¹⁴ *About the CDC-Kaiser ACE Study*, CDC.gov, <https://www.cdc.gov/violenceprevention/acestudy/about.html>.

¹⁵ J.L. Herman and E. Schatzow, *Recovery and Verification of Memories of Childhood Sexual Abuse Trauma*, 4 *PSYCHOANALYTIC PSYCHOLOGY* 1 (1987).

¹⁶ David H. Gleaves, *The Evidence for “Repression”: An Examination of Holmes (1990) and the Implications for the Recovered Memory Controversy*, 5 *J. of Child Sexual Abuse* 1 (1996).

¹⁷ Robert F. Anda et al., *The enduring effects of abuse and related adverse experiences in childhood: a convergence of evidence from neurobiology and epidemiology*, 256 *European Archives of Psychiatry & Clinical Neuroscience* 174, (2006).

D. The Financial Costs of Child Sexual Abuse

According to a study published in the *Child Abuse and Neglect Journal* in 2018, the estimated average lifetime cost per victim of nonfatal child maltreatment is \$210,012, which includes \$32,648 in childhood health care costs; \$10,530 in adult medical costs; \$144,360 in productivity losses; \$7,728 in child welfare costs; \$6,747 in criminal justice costs; and \$7,999 in special education costs.¹⁸ The estimated average lifetime cost per death is \$1,272,900, including \$14,100 in medical costs and \$1,258,800 in productivity losses.¹⁹ Insurance does not cover all of the costs stemming from child sexual abuse such as mental health treatment, special education services, child welfare services, medical procedures, or productivity losses. At the end of the day, survivors and the general public pay these costs, and not the perpetrators or institutions that knew about the abuse and failed to protect children under their care. Providing access to the civil justice system can instead place the cost burden on the predators who preyed on children and the entities who intentionally, or with conscious indifference, concealed evidence of child sexual abuse.

IV. Hidden Predator Act and Current Georgia Law

The Georgia General Assembly revised the statute of limitations for childhood sexual abuse when it passed the Hidden Predator Act of 2015.²⁰ The act had several notable parts, one of which was the opening of a window for a period of two years for any victim of childhood sexual abuse to bring civil claims against an abuser.²¹ However, the open window was limited to

¹⁸ Cora Peterson, Curtis Florence & Joanne Klevens, *The Economic Burden of Child Maltreatment in the United States, 2015*, 86 *Child Abuse and Neglect* 178 (2018).

¹⁹ *Id.*

²⁰ O.C.G.A. § 9-3-33.1 (2018).

²¹ *Id.* (“For a period of two years following July 1, 2015, plaintiffs of any age who were time barred from filing a civil action for injuries resulting from childhood sexual abuse due to the expiration of the statute of limitations in

claims against the person who committed the acts of child sexual abuse only when the claim had not been litigated on the merits and no settlement agreement had been entered into.²² The legislature also declined to allow claims under the open window against entities that knew or should have known about the abuse, such as churches or youth services organizations.

Although the open window limited retroactive claims and the legislature declined to increase the age by when a survivor could bring a claim, the Georgia General Assembly did implement a delayed discovery provision for abuse that occurred on or after July 1, 2015.²³ Under the delayed discovery provision, survivors can bring claims within two years of the date the plaintiff knew or had reason to know that there was abuse and that the abuse caused an injury.²⁴

Like the open window provision, the legislature chose to limit the delayed discovery provision of the HPA. First, as stated above, the act only allows delayed discovery claims for abuse that occurs on or after July 1, 2015. Second, the act requires that the court determine from admissible evidence in a pretrial finding when the discovery of the alleged childhood sexual abuse occurred.²⁵ The court's finding must be made within six months of the filing of the civil

effect on June 30, 2015, shall be permitted to file such actions against the individual alleged to have committed such abuse before July 1, 2017, thereby reviving those civil actions which had lapsed or technically expired under the law in effect on June 30, 2015.”).

²² *Id.* (“(d)(2) The revival of a claim as provided in paragraph (1) of this subsection shall not apply to: (A) Any claim that has been litigated to finality on the merits in a court of competent jurisdiction prior to July 1, 2015. Termination of a prior civil action on the basis of the expiration of the statute of limitations shall not constitute a claim that has been litigated to finality on the merits; (B) Any written settlement agreement which has been entered into between a plaintiff and a defendant when the plaintiff was represented by an attorney who was admitted to practice law in this state at the time of the settlement, and the plaintiff signed such agreement; and (C) Any claim against an entity, as such term is defined in subsection (c) of this Code section.

²³ *Id.* (“(2)(A) Notwithstanding Code Section 9-3-33, any civil action for recovery of damages suffered as a result of childhood sexual abuse committed on or after July 1, 2015, shall be commenced: (i) On or before the date the plaintiff attains the age of 23 years; or (ii) Within two years from the date that the plaintiff knew or had reason to know of such abuse and that such abuse resulted in injury to the plaintiff as established by competent medical or psychological evidence.”).

²⁴ *Id.*

²⁵ O.C.G.A. § 9-3-33.1(b)(2)(B) (2018) (“When a plaintiff's civil action is filed after the plaintiff attains the age of 23 years but within two years from the date that the plaintiff knew or had reason to know of such abuse and that such abuse resulted in injury to the plaintiff, the court shall determine from admissible evidence in a pretrial finding when the discovery of the alleged childhood sexual abuse occurred. The pretrial finding required under this subparagraph shall be made within six months of the filing of the civil action.”).

action.²⁶ Practically speaking, it is unlikely that courts in the state of Georgia will see a delayed discovery claim for several years, if not decades. The pretrial hearing requirement may also serve as an impediment to bringing claims, as the hearing must occur within 6 months after the filing of the complaint, when legal discovery procedures are unlikely to have been completed. The legislature also left unclear what would constitute “admissible evidence” of when the discovery of the alleged sexual abuse occurred. This lack of guidance from the legislature may lead to confusion in the courts and a need for future appellate litigation.

V. Effectiveness of the Hidden Predator Act

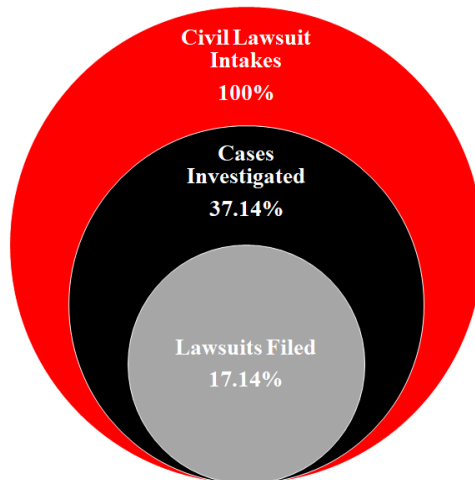
A. CEASE Clinic Successes under the Hidden Predator Act

The passage of the HPA led to many successes for the CEASE Clinic. Namely, during the HPA’s open window period, which ended on June 30, 2017, the clinic performed 35 intakes of possible civil legal claims.²⁷ After obtaining basic case information, such as jurisdiction and venue, allegations of child sexual abuse, case timelines, and possible damages, the clinic opted to investigate 13 claims further. Further investigation involved extensive case research, obtaining relevant records and evidence, and speaking with potential lay and expert witnesses. After thorough investigation and case assessment the clinic chose to file 6 civil lawsuits under the open window provision of the HPA. Four of the filed lawsuits have resulted in favorable settlements for survivors,²⁸ one resulted in a favorable bench trial verdict for the survivor, and one was voluntarily dismissed by the survivor.

²⁶ *Id.*

²⁷ The clinic has performed several other intakes, which will be addressed below.

²⁸ Due to non-disclosure agreements entered into by the parties, the results of three of the four settlements cannot be reported.



1. Success at Trial

Tim Samuels²⁹ contacted the CEASE Clinic in March of 2016 at the age of 43. Tim had been sexually abused by one of his teachers from the age of 9 until he was 18 years old. The abuse began like most cases, with grooming.³⁰ Tim’s teacher took a special interest in him and found ways to spend time alone with him. She would give him gifts and tell him that she loved him. She befriended Tim’s parents and convinced them to let her give Tim tennis lessons during the summer and stay over at her house. The abuse progressed from grooming to kissing and then eventually to oral and vaginal sex. For most of Tim’s life he believed he loved his teacher and that she had loved him. He did not realize at the time, and for several years after, that what he had experienced was child sexual abuse. He did not realize that his drug and alcohol use, expulsion from school, intimacy problems with his wife, and other mental health challenges were directly caused by the child sexual abuse. It was not until Tim’s son turned 9 years old--the age

²⁹ The names of all CEASE clients have been changed to protect confidentiality.

³⁰ *Get Answers about Sexual Abuse and Associated Risks: Common Questions*, U.S. Dep’t of Justice, [https://www.nsopw.gov/\(X\(1\)S\(a0gatoyhn2xyzkza4fpwbdq2\)\)/en-US/Education/CommonQuestions](https://www.nsopw.gov/(X(1)S(a0gatoyhn2xyzkza4fpwbdq2))/en-US/Education/CommonQuestions) (“Grooming is a method used by offenders that involves building trust with a child and the adults around a child in an effort to gain access to and time alone with her/him. In extreme cases, offenders may use threats and physical force to sexually assault or abuse a child. More common, though, are subtle approaches designed to build relationships with families.”).

at which Tim was abused--that he was finally able to make the connection that the abuse caused him a lifetime of harm. Tim found the CEASE Clinic in his search for justice over what had been done to him, hoping that he could protect other children from similar abuse.

After extensive investigation, the CEASE Clinic agreed to represent Tim in a civil lawsuit under the open window provision of the HPA. Tim emphasized that his case was not about money. Rather, Tim was seeking justice for what had happened to him and hoped to prevent harm to other children. The clinic ended up taking the case all the way to a bench trial in a Georgia Superior Court in April 2017. Although the evidence was old, it was enough to sway the judge to find for Tim. The clinic was able to present evidence of love letters and gifts the teacher had given Tim as a child, an admission from the teacher that she had kissed him on the lips when he was a minor, and expert testimony by a psychologist who specializes in child sexual abuse. At the conclusion of the trial, the judge agreed that at the very least Tim's teacher had engaged in an "inappropriate" relationship with Tim when he was a minor and that she had committed battery on his person. The judge awarded Tim \$15,000 in general damages.

2. Success at Mediation

Megan Williams contacted the CEASE Clinic in November 2016. Megan had been sexually abused by her step-father from the time she was around 5 years old until she was 17. The abuse ranged from digital penetration to oral and vaginal sex. Her step-father took nude photographs of her and at one point attempted to videotape the abuse. As a result of the abuse Megan dropped out of school and developed mental health problems that resulted in at least one hospitalization for suicidal ideations.

As in Tim's case, after thoroughly investigating Megan's claims, the clinic agreed to file a lawsuit under the open window provision of the HPA. While Megan was not opposed to going

to trial, she stated that she would prefer to settle the case. Like most of the CEASE Clinic's clients, Megan was not only seeking monetary damages. She wanted justice and to prevent future abuse. Her step-father had sexually abused at least one other child that Megan knew about and was actively seeking to start a church youth group for 12 year old girls that would meet in his home. He also continued to be around other children, such as his girlfriend's grandchildren. Megan wanted to find a way to cut off his access to other children who he might abuse and to tell her step-father that what he did was wrong.

While trials in civil lawsuits can result in monetary awards for survivors of child sexual abuse, other outcomes sought by CEASE clients and other survivors are unavailable at trial. For example, a judge in a civil lawsuit cannot order the defendant to be on a sex offender registry, obtain psychological treatment, or force the defendant to apologize to the survivor.³¹ As a result, the CEASE Clinic often advises clients that mediation may be a better forum in which to obtain the results they are seeking. Through mediation, clients can ask for apologies or for defendants to seek psychological treatment, in addition to monetary damages for the harm caused. While Defendants may insist on including non-disclosure agreements barring survivors from disclosing the specific details of the settlement agreement publicly, mediation does provide the opportunity for survivors to confront their abusers and obtain outcomes not available in a civil trial. Mediation also allows survivors to forego the retraumatization that can occur during courtroom testimony and where they are subject to cross-examination by defense attorneys. For these reasons, four out of six of CEASE's filed cases resulted in mediated agreements rather than a trial.

³¹ See, e.g., *A Survivor's Guide to Filing a Civil Lawsuit*, WCSAP.org (2004), http://www.wcsap.org/sites/default/files/uploads/working_with_survivors/advocacy/survivors_guide_to_filing_civil_lawsuit_2004.pdf.

B. CEASE Clinic Observations of Effectiveness of the Hidden Predator Act and Barriers to Civil Legal Relief

1. Barriers to Civil Relief: Observations from CEASE Clinic Data

In passing the Hidden Predator Act in 2015, the Georgia General Assembly listed several purposes of the statute, including: 1) to extend the statute of limitations for actions for childhood sexual abuse under certain circumstances; 2) to provide for retroactive claims for childhood sexual abuse under certain circumstances; 3) to provide for limitations of liability for certain legal entities; and 4) to change provisions relating to tolling of limitations for a minor's cause of action.³² Unfortunately, as written, the HPA failed to meet most, if not all, of its stated purposes.

First, Georgia has not effectively extended the statute of limitations for child sexual abuse. Prior to the passage of the HPA the statute of limitations was 5 years after the age of majority, or 23 years of age. This has not changed. Of the 55³³ clients with potential civil claims who contacted the CEASE Clinic, the average age at the time of contacting the clinic was 32.7. Since the retroactive window closed on June 30, 2017, the average age of clients contacting the CEASE Clinic has been 40.6. Overall, under the current statute of limitations in Georgia, only 34.55% of CEASE intake clients have not been barred by the statute of limitations, meaning that 65.45% would be unable to bring civil claims. The ages of clients seen by the CEASE Clinic is in line with the research that shows that the mean age of disclosure being 48 and the average age of disclosure being closer to 52.2.³⁴ Additionally, although the legislature did include a delayed discovery provision, which changed the tolling provision related to a minor's cause of action,

³² H.B.17, 153rd Gen. Assemb., Reg. Sess (Ga. 2015) <http://www.legis.ga.gov/Legislation/en-US/display/20152016/HB/17>.

³³ This number reflects the total number of civil lawsuit intakes performed by the clinic, both during and after the HPA's open window period.

³⁴ Spröber N et al, *Child sexual abuse in religiously affiliated and secular institutions: a retrospective descriptive analysis of data provided by victims in a government-sponsored reappraisal program in Germany*. 14 BMC Public Health 282 (2014).

because it only applied to abuse that occurred on or after July 1, 2015, not one survivor of child sexual abuse in the state of Georgia has been able to use this provision, despite the law being in effect for more than 3 years.

While an argument can be made that the HPA did provide for retroactive claims, fewer than 15 were filed during a two-year period. If one in ten children are sexually abused prior to age 18 and there are approximately 10 million people in the state of Georgia,³⁵ then fewer than 0.000015% of the 1,000,000 survivors of child sexual abuse in the state of Georgia were able to bring retroactive claims under the HPA.

Arguably, the stated purpose of the law that succeeded the most was limiting the liability for certain legal entities. First, the open window provision specifically excluded entities, which significantly limited retroactive claims. Second, the delayed discovery provision requires plaintiffs to prove “by a preponderance of the evidence... gross negligence on the part of such entity, that the entity knew or should have known of the alleged conduct giving rise to the civil action and such entity failed to take remedial action.”³⁶ This provision raises the standard of liability a plaintiff is required to prove from “slight diligence,” which “is that degree of care which every man of common sense, however inattentive he may be, exercises under the same or similar circumstances” to “gross negligence,” which is “the want of slight care and diligence... which even careless men are accustomed to exercise.”³⁷ By excluding entities from liability under the retroactive window and heightening the standard of care that a defendant entity must have exercised in delayed discovery cases, the HPA did effectively limit the liability of entities in civil child sexual abuse claims.

³⁵ *Quick Facts: Georgia*, U.S. Census Bureau (2018), <https://www.census.gov/quickfacts/ga>.

³⁶ O.C.G.A. § 9-3-33.1(c)(3) (2018).

³⁷ *Harris v. Reid*, 30 Ga. App. 187 (1923) (overruled on other grounds); *Peavy v. Peavy*, 36 Ga. App. 202 (1926).

2. Barriers due to age by which survivors may sue

As stated above, one of the greatest barriers observed by the CEASE Clinic in pursuing civil claims for child sexual abuse after the closing of the open window provision of the HPA has been the statute of limitations. Under current Georgia law, survivors of child sexual abuse that occurred before July 1, 2015 must bring their claims prior to their 23rd birthday.³⁸ For those who experienced abuse after July 1, 2015 claims may also be brought within 2 years of the delayed discovery that the abuse caused their various harms³⁹; however, as described above in Section IV, the delayed discovery provision will likely not allow access to the civil justice system for several years, if not decades. Given that most survivors of child sexual abuse in the state of Georgia must file their claims before reaching the age of 23, it is unsurprising that so few have exercised that right. In fact, only 7.27% of intake calls received by CEASE between December 2015 and December 2018 involved child sexual abuse of a survivor between the ages of 18 and 22.

Furthermore, all of CEASE's intakes involving survivors of child sexual abuse between the ages of 18 and 22 were not from the survivors themselves, but from parents who were seeking help on behalf of their adult children who had not yet made the discovery that their harm was directly linked to the abuse they endured. For example, CEASE received a call from a woman named Dana whose daughter, Chelsea, was sexually abused by one of her high school teachers. The abuse began when Chelsea was 15 years old. Dana found out about the abuse when Chelsea was a Senior, but after she had already turned 18. Dana reported the abuse to the school who said they would "handle it" and discouraged her from making any reports to law

³⁸ O.C.G.A § 9-3-33.1 (2018).

³⁹ *Id.*

enforcement. The teacher was removed from the school, but Dana later found out that he was moved to another school where he continued teaching. Dana decided to go ahead and report the abuse to law enforcement, who after investigating the claim, found other victims and filed criminal charges against the teacher. At no time did the school report the abuse to law enforcement.

Dana called the clinic because after the teacher was arrested, her daughter ran away from home. She felt as if the school not only failed to report the abuse, but also failed to help her daughter. In Chelsea's 18 year old mind she was in a relationship with her teacher. She did not yet understand that she was abused. She did not understand the power dynamics at play. She did not understand that the reason she went from being a straight-A student and star of the track team to quitting the sport she loved and dropping out of school was directly related to the abuse she endured. Since Chelsea was already 18 years old, the CEASE Clinic had to inform Dana that there was nothing the clinic could do legally without the consent of her daughter. The clinic advised Dana that if her daughter wanted to contact the clinic for legal assistance she would need to do so before her 23rd birthday. Unfortunately, it is unlikely that prior to running of the statute of limitations Chelsea will make the discovery that the abuse caused her harms.

As explained above in Section III, approximately 38% of survivors of child sexual abuse disclose the abuse during their childhood.⁴⁰ Children may not disclose the abuse for several reasons.⁴¹ First, children do not have a set concept of what is normal. This means that when the abuse begins to they tend to normalize the experience and do not understand that the abuse was

⁴⁰ *Child Sexual Abuse Statistics*, *supra* note 5.

⁴¹ See, e.g. Kamala London et al., *Disclosure Of Child Sexual Abuse: What Does the Research Tell Us About the Ways That Children Tell?*, 11 *Psychology, Public Policy, and Law* 194 (2005) (examining 10 adult retrospective studies which indicated that only one third of adults revealed the abuse during childhood).

wrong and not their fault until years later.⁴² In addition, children do not understand what sex is until they are older and have experienced puberty.⁴³ This makes it hard for children to articulate exactly what happened to them or even process the fact they suffered sexual abuse.⁴⁴ Finally, it can take years of therapeutic services, which can be an expensive and lengthy process, to link the abuse to one's current problems, such as substance abuse or mental health issues.⁴⁵

Most states allow for the tolling of the statute of limitations for minors.⁴⁶ However, a statute of limitations set at only 5 years after the age of majority, as is the case in Georgia, may not be sufficient to allow meaningful access to the civil justice system. First, most survivors do not report their abuse until well into their adulthood, typically well past the age of 23. As also explained above in Section III, child sexual abuse often has neurobiological effects on memory, as well as comprehension and knowledge of the abuse. The neurobiological effects further delay reporting of the abuse and the discovery of the abuse and resulting harms. Additionally, most young adults between the ages of 18 and 22 are still supported by their parents, still in school, or just entering the workforce. Most survivors in this age group do not have the resources or time to bring a complicated civil action. Most importantly, given the prevalence of neurobiological effects on victims of childhood trauma, a survivor usually requires extensive therapeutic services therapy to discover the abuse and resulting harm. As a result, few adults in Georgia between the ages of 18 and 22 will be able to exercise their right to file a civil lawsuit for child sexual abuse before the expiration of the statute of limitations.

⁴² Marci A. Hamilton, *Justice Denied: What America Must Do to Protect Its Children* 18 (2008).

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ Drew Von Bargen II, *Nittany Lions, Clergy, and Scouts, Oh My!*, 18 Mich. St. U. J. Med. & L. 51 (Spring 2014); *See also*, Ann Marie Hagen, *Tolling the Statute of Limitations for Adult Survivors of Childhood Sexual Abuse*, 76 IOWA L. REV. 355, 364 (1991).

3. Cost of Litigation

The CEASE Clinic is aware of fewer than 15 cases that were filed under the open window provision of the HPA, 6 of which were filed by CEASE. The lack of lawsuits filed is unsurprising. As reported in a study on the costs of civil litigation published by the National Center for State Courts:

Cases that resolve shortly after case initiation range from less than \$1,000 at the 25th percentile to \$7,350 at the 75th percentile per side for attorney fees. As the case progresses, those costs continue to accumulate. A case that settles after discovery is complete through formal settlement negotiations or [alternative dispute resolution] will range from \$5,000 to \$36,000 in attorney fees. If the case goes to trial, the total costs including expert witness fees can range from \$18,000 to \$109,000 per side. Based on these estimates, it becomes easy to see how litigation costs might affect a litigant's access to the civil justice system.⁴⁷

Given the high costs of litigation, few survivors can afford the costs of litigation and few attorneys are able to represent a survivor of child sexual abuse unless a large settlement or verdict is expected to help cover these costs. While some perpetrators may have the “deep pockets” necessary to justify the cost of litigation, in most cases, a lawsuit against an individual perpetrator would cost more to a survivor than it would provide benefits. While a step in the right direction in protecting the rights of survivors and providing access to the civil justice system, the HPA, with its provisions limiting entity liability, has had little effect in providing legal remedies to survivors of child sexual abuse.

⁴⁷ Paula Hannaford-Agor & Nicole L. Waters, *Estimating the Cost of Civil Litigation*, CourtStatistics.org (January 2013), http://www.courtstatistics.org/~/.media/Microsites/Files/CSP/DATA%20PDF/CSPH_online2.ashx.

VI. Georgia’s Hidden Predator Act in the Context of National Laws and Trends

A. Overview of National Laws and Trends

Many states have reformed their statutes of limitation for civil child sexual abuse claims in recent years. Four major areas of legislative reforms that have emerged are: 1) abolishing the civil statute of limitations for child sexual abuse claims, 2) creating a retroactive open window, 3) extending the statute of limitations for survivors, and 4) providing a delayed discovery provision.⁴⁸ Given the increase in media attention concerning child sexual abuse in recent years,⁴⁹ “[m]ost states and the federal government made access to justice, or SOL [statute of limitation] reform, a priority. Forty-one states plus the District of Columbia, or 80%, have amended their child sexual abuse SOLs since January 2002.”⁵⁰

The most common statute of limitation reform since 2002 has been to increase the age by which a survivor can file a claim, also known as extending the statute of limitations. Twenty states have extended their statute of limitations since 2002, although not all have been applied retroactively. The second most common trend has been to add or extend a delayed discovery provision. Fifteen states have opted to add delayed discovery provisions since 2002. The least common reforms have been to either abolish the statute of limitations or to open up a retroactive window. Since 2002, nine states have passed legislation abolishing either all or part of the civil

⁴⁸ *Child Sex Abuse Statute of Limitations*, ChildUSA.org, <https://www.childusa.org/sol/> (last visited Jan. 9, 2019).

⁴⁹ See, e.g., Kirk Johnson, *Court Approves Release of Boy Scouts’ ‘Perversion Files’*, NY Times (June 14, 2012), <https://www.nytimes.com/2012/06/15/us/court-approves-release-of-boy-scouts-perversion-files.html>; Laurie Goodstein & Sharon Otterman, *Catholic Priests Abused 1,000 Children in Pennsylvania, Report Says*, NY Times (Aug. 14, 2018), <https://www.nytimes.com/2018/08/14/us/catholic-church-sex-abuse-pennsylvania.html?module=inline>; Marisa Kwiatkowski, Mark Alesia & Tim Evans, *A Blind Eye to Sex Abuse: How USA Gymnastics Failed to Report Cases*, IndyStar.com (updated Jan. 31, 2018), <https://www.indystar.com/story/news/investigations/2016/08/04/usa-gymnastics-sex-abuse-protected-coaches/85829732/>.

⁵⁰ Marci Hamilton, *Child Sex Abuse Statute of Limitations Reform in the Wake of the Boston Archdiocese Clergy Sex Abuse Scandal January 2002*, ChildUSA.org (July 2018), <https://www.childusa.org/sol-report-july-2018/?rq=Child%20Sex%20Abuse%20Statute%20of%20Limitations%20Reform%20in%20the%20Wake%20of%20the%20Boston%20Archdiocese%20Clergy%20Sex%20Abuse%20Scandal>.

statute of limitation for child sexual abuse claims and 9 have opened up retroactive windows. Of those 9 states that abolished all or part of the civil statute of limitation, 5 fully abolished the civil Statute of limitation while three did so under limited terms. Of the 9 states that allowed retroactive windows, 2 excluded entities from liability under the open window and one set other partial limits to the window. Thirteen states have not made reforms to their statute of limitations since 2002, although some have had legislation introduced that failed to pass.⁵¹

B. Georgia Compared to Other States

While Georgia compares favorably to some states that have reformed their civil statute of limitation, Georgia's reform efforts have been limited, and as explained above in Sections IV and V, the HPA has been overwhelmingly ineffective in providing survivors access to the civil justice system. While other states have also opened up retroactive windows, Georgia was the first, and only one of two states, to protect entities from liability under its open window. Georgia was also an outlier in heightening the standard for negligence in delayed discovery claims to gross negligence.⁵² Georgia is in the minority of states that declined to extend the statute of limitation at age 23. Out of 38 states with age limits (not including delayed discovery provisions), 11 have statute of limitations at age 23 and below, while 26 have statute of limitations at age 24 and above. Of those with statutes of limitation set age 24, 13 states have statute of limitations between the ages of 24 and 30 while 14 have statute of limitations set above the age of 30. Among Southeastern states, the average statute of limitation is 25.5 years of age, with the highest being Virginia at age 38 and the the lowest being Tennessee at age 19.⁵³ Four

⁵¹ *Id.*

⁵² *See supra* note 2.

⁵³ The data reported in this paragraph was obtained from Hamilton, *supra* note 46, and calculated by CEASE Clinic director, Professor Emma Hetherington. The following Southeastern states were used in calculating the average

Southeastern states statute of limitations are set at age 23 and below,⁵⁴ five are set between ages 24 to 29,⁵⁵ and two are set at age 30 and above.⁵⁶ Thus, in comparing Georgia to both national and regional trends, Georgia's statute of limitations falls behind in protecting survivors.

VII. Concerns with Legislative Reform

A. Entity Liability

Sixty percent of children who experience child sexual abuse are not abused by a family member--they are abused by persons known to the family.⁵⁷ Parents across the state of Georgia, and the United States, entrust their children with churches, sports clubs, schools, and other entities that hold themselves out to be safe places for children. Children will always be at risk for child sexual abuse; however, entities can, and often do, decrease the likelihood of abuse by putting policies and procedures into place to prevent and report the abuse. For those organizations that have put proper policies and procedures into place to protect children, civil liability may seem unfair. Liability may also seem unfair for organizations whose current leadership had nothing to do with past abuse or where claims are so old they are difficult to defend against. Opponents of increasing entity liability also raise concerns about entities that genuinely did not or could not have known that a perpetrator was among their ranks. However, even if the statute of limitations for child sexual abuse claims were extended in the state of Georgia by raising the age by which a survivor could sue or by opening up a retroactive window,

SOL: West Virginia, Virginia, North Carolina, Florida, Georgia, Alabama, Mississippi, Louisiana, Tennessee, Missouri, and South Carolina (Arkansas is excluded as their SOL is 3 years after the delayed discovery that the injury was caused by the child sexual abuse).

⁵⁴ West Virginia, North Carolina, Georgia, and Tennessee.

⁵⁵ Florida, Alabama, Mississippi, Louisiana, and South Carolina.

⁵⁶ Virginia and Missouri.

⁵⁷ *Child Sex Abuse Statistics*, *supra* note 5.

entities who in good faith protected children within their organizations are already amply protected under Georgia law.

First, it is unknown how many cases against entities would be brought if the statute of limitation were extended and retroactively applied in Georgia. However, based on data collected by the CEASE Clinic, lawsuits against entities may be less common than one would expect. Of the 55⁵⁸ civil claim intakes performed by the CEASE Clinic, only 20% involved abuse committed by perpetrators working or volunteering for an entity. Due to the open window excluding entity liability, the clinic did not evaluate whether or not a valid negligence claim would have existed in these cases. However, the relatively low number of cases where entity liability could have been possible illustrates the fact that many, if not most, of possible claims would be against individual perpetrators and not entities.

Second, Georgia law already provides ample protection to entities against civil liability for claims of child sexual abuse. Child service organization personnel are mandated reporters under Georgia law.⁵⁹ “Child service organization personnel” are those employed by or volunteering at a business or an organization, whether public, private, for profit, not for profit, or voluntary, that provides care, treatment, education, training, supervision, coaching, counseling, recreational programs, or shelter to children.”⁶⁰ Persons who fall under this category include coaches and other sports volunteers, church clergy and volunteers working directly with or supervising youth programs, and other employees and volunteers for youth programs such as the Boy Scouts or the Boys and Girls Club. The mandatory reporter statute states that child service organization personnel “shall report” acts of abuse, including acts of sexual abuse as defined by

⁵⁸ This number reflects the total number of civil lawsuit intakes performed by the clinic, both during and after the HPA’s open window period.

⁵⁹ O.C.G.A. § 19-7-5 (2018).

⁶⁰ *Id.*

the statute.⁶¹ Personnel need only report the abuse if they have “reasonable cause” to believe the suspected abuse occurred.⁶² While a failure to report the abuse can result in a misdemeanor charge, the law provides civil and criminal immunity for those who report the abuse in good faith, whether or not the claim is substantiated.⁶³

Additional protections for entities exist under Georgia’s tort laws governing negligence claims. In order to succeed with a negligence claim under Georgia law, a plaintiff must prove: 1) that the “defendant’s conduct contribute[d] to the victim’s injury,” 2) that the “victim [was] protected under the law against the defendant’s conduct... (the duty issue),” 3) that the “defendant violate[d] his duty under law,” and 4) the harm “suffered by the victim [w]as a result of his injury (the damage issue).”⁶⁴ Survivors of child sexual abuse must therefore be able to prove that an entity’s conduct (or purposeful omissions) contributed to their abuse, that the entity owed a duty of care to them, that the entity violated their duty of care under law, and that the harm they suffered was a direct result of the abuse.

Under Georgia law, proving negligence claims against entities for child sexual abuse is a difficult task, especially for claims of sexual assault. For example, while entities may be found liable for negligence under the theory of *respondeat superior*, or the principle that an employer may be liable for the acts of their employees or volunteers, the acts of the employee or volunteer must be performed within the scope of the perpetrator’s employment.⁶⁵ Georgia courts have found that an employee’s acts of sexual molestation are a deviation from their employment duties and that they are no longer acting within the scope of employment or furthering the business of

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *McAuley v. Wills*, 251 Ga. 3, 12 (1983).

⁶⁵ *See e.g., McGhee v. Kingman & Everett*, 49 Ga. App. 767 (1934).

the employer.⁶⁶ In order to overcome the presumption that acts of child sexual abuse are outside the scope of employment, a plaintiff must prove that “the employer knew or should have known that the employee was not suited for the particular employment or... that the knew or should have known of the employee’s dangerous propensities” such that the abuse would have been reasonably foreseeable.⁶⁷ Unless the survivor can prove that the entity knew or should have known about the perpetrator’s propensity to sexually abuse children such that the abuse was foreseeable, entities cannot be held liable for the acts of abuse committed by their employees and volunteers.

Entities are already protected against civil liability under Georgia law and allowing for entity liability where the organization knew or should have known the perpetrator’s propensity for abusing children aligns with the the four main purposes of tort law in the state of Georgia:

1. The alleviation of injury: “Damages are given as compensation for injury...”⁶⁸ Damages “compensate the plaintiff for any loss sustained.”⁶⁹
2. The allocation of risk: “Traditionally, the imposition of tort liability has been intimately connected with the idea of blameworthy conduct on the part of the tortfeasor, as manifested either by an intentional act, or the failure to use the requisite degree of care under the circumstances.”⁷⁰
3. The articulation of public policy as established by the State in its “constitution, laws, and judicial decisions.”⁷¹
4. The admonition of public duty: Tort law acts to “apprise persons of their legal rights and obligations, and it acts to deter them from socially unreasonable behavior.”⁷²

⁶⁶ *Piedmont Hosp., Inc. v. Palladino*, 276 Ga. 612, 613 (2003).

⁶⁷ Charles R. Adams III, *Georgia Law of Torts* § 7:6 (2017-2018) (citing *Messenger Services, Inc. v. Bradley*, 302 Ga. App. 247 (2010); *Drury v. Harris Ventures, Inc.*, 302 Ga. App. 545 (2010); *Munroe v. Universal Health Services, Inc.*, 277 Ga. 861 (2004)).

⁶⁸ O.C.G.A. 51-12-4 (2018).

⁶⁹ Eric Hertz & Mark Link, *Georgia Law of Damages* § 1:2 (2018-2019).

⁷⁰ Charles R. Adams III, *Georgia Law of Torts* § 1:5(b) (2016-2017).

⁷¹ *Id.* at § 1:5(c).

⁷² *Id.* at § 1:5(d).

Unfortunately, as seen in cases such as those against the Catholic Church⁷³ or the Boy Scouts of America,⁷⁴ entities with knowledge that children are being abused under their care do not always put adequate protections in place, fail to report acts of child sexual abuse within their organization, and, at times, turn a blind eye to the abuse in favor of protecting the institution. In line with the purposes of tort law in Georgia, civil lawsuits are therefore allowed against entities under limited circumstances while at the same time providing protections for entities who did not know or could not have known about the abuse. Protections are in place under law to address stale evidence and old claims that would be fundamentally unfair to require entities to defend against. Protections under Georgia law also ensure that only those entities with true knowledge of or reckless disregard for the abuse may be held liable.

Furthermore, the entities and perpetrators were adults at the time of the abuse, while the victims were children. Defendants in child sexual abuse cases are often the ones with control of the evidence, such as the Boy Scouts of America who kept “Ineligible Volunteer” files on troop leaders alleged to have abused scouts.⁷⁵ Even though they often have control of relevant evidence, defendants do not bear the burden of proof. Plaintiffs bear that burden.

B. Frivolous Claims

A common concern with increasing the age by which survivors may file claims or opening up retroactive windows is the fear of frivolous claims. However, a fear of false claims is misguided. Only four to 8% of child sexual abuse claims are estimated to be false.⁷⁶ Most of

⁷³ Goodstein & Otterman, *supra* note 45.

⁷⁴ Johnson, *supra* note 45.

⁷⁵ *Id.*

⁷⁶ Mark Everson & Barbara Boat, *False allegations of sexual abuse by children and adolescents*, 28 J. of the American Academy of Child & Adolescent Psychiatry 230 (1989).

those false claims are seen in custody cases, and not in civil child sexual abuse personal injury claims. In fact, there is an absence of evidence in states where the statute of limitations was extended showing that the extension led to an increase in frivolous claims. Therefore it is unlikely that a statute of limitations that allows for more civil claims would result in an overwhelming number of frivolous lawsuits.

Additionally, Georgia law already provides for protections against frivolous lawsuits. For example, defendants can request attorney's fees for and litigation expenses for claims "that lacked substantial justification or that the action, or any part thereof, was interposed for delay or harassment," where "lacked substantial justification" means substantially frivolous, substantially groundless, or substantially vexatious.⁷⁷ Defendants can also file complaints for abusive litigation where, if successful, they "shall be entitled to all damages allowed by law as proven by the evidence, including costs and expenses of litigation and reasonable attorney's fees."⁷⁸

Finally, there is also a strong public policy argument for extending the statute of limitations despite the fear of frivolous litigation: the state of Georgia prioritizes protecting children from abuse.⁷⁹ Given the small number of false claims of abuse paired with protections against frivolous claims already provided under Georgia law, an extension of the statute of limitations meets the state's policy priorities.

⁷⁷ O.C.G.A. § 9-15-14(b) (2018).

⁷⁸ O.C.G.A. § 51-7-83(a) (2018).

⁷⁹ See e.g., O.C.G.A. § 15-11-107 ("the religious rights of a parent, guardian, or legal custodian shall not limit the access of a child to medical care in a life-threatening situation or when the condition will result in serious disability"); *Hamilton v. State*, 210 Ga. App. 398, 399 (1993) ("Our legislature has determined that the public policy of protecting this State's children against crimes outweighs the policy of protecting the harmony and unity of marriage.").

C. Floodgates of Litigation

Six States⁸⁰ have experimented with an open retroactive window. When looking at the total number of civil cases filings in each state⁸¹ compared to the number of cases filed under the retroactive windows, not one of the jurisdictions were overwhelmed with a floodgate of litigation.

	Number of cases from the open window *current 2017 ⁸²	Total number of all civil filings ⁸³	Percentage of filings that child sex abuse cases would be of total
Delaware	1175	67,523	1.74%
California	1150	827,885	.14%
Minnesota	1000	161,484	.62%
Hawaii ⁸⁴	200	34,767	.57%
Georgia	10 ⁸⁵	699,736	.001%

⁸⁰ Delaware, California, Minnesota, Hawaii, Georgia, and Utah.

⁸¹ *2016 Civil Caseloads - Trial Courts*, National Center for State Courts (2016), http://popup.ncsc.org/CSP/CSP_Intro.aspx (The total number of cases is based on data from 2016.).

⁸² *Relative Success of Civil SOL Window Statutes State-by-State*, ChildUSA.org (2017), <https://www.childusa.org/law/>

⁸³ *2016 Civil Caseload*, *supra* note 76.

⁸⁴ Like in Georgia, Hawaii also excluded entity liability from its retroactive open window. However, the other states listed in the chart do include claims against entities.

⁸⁵ CEASE Clinic has confirmed 10 cases filed under the HPA's open window only (Paulding, Monroe, Fulton, Gwinnett, Lee, Carroll, Bartow, Pierce, Toombs, and Clayton Counties). This number does not include claims of

Utah	1	145,423	.000006%
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As demonstrated by the table above, the effect that new child sex abuse cases had in jurisdictions with retroactive windows was miniscule. The highest percentage increase of new cases seen was approximately 1.74%. The fear that extending the statute of limitations or providing for a retroactive window that allows for entity liability would lead to a flood of cases is not backed up by the data available from other states and is unlikely to occur in the State of Georgia. As stated above the HPA of 2015 led to fewer than 15 civil lawsuits over the course of a two-year period. Fifteen claims can hardly be described as a floodgate of litigation. Although we do not have a crystal ball to predict whether a new open window that allows for entity liability would create a floodgate of litigation, examining other states that have enacted similar look-back provisions that include entity liability is helpful in predicting what may happen here in Georgia if the legislature passes statute of limitation reform for child sexual abuse claims.

D. Constitutional Concerns with Retroactive Legislation

A common concern with legislation that is applied retroactively is whether or not such legislation is constitutional. Based on federal and state law, retroactive civil statutes of legislation are often found to be constitutional. Under United States Supreme Court precedent, retroactive legislation is constitutional when the statute clearly states its intent to be retroactively applied and it does not violate any other constitutional provisions.⁸⁶ Statutes of limitations are created by legislatures and are procedural in nature.⁸⁷ Legislatures may alter statutes of limitation

entity liability filed under other legal theories and statutes of limitation, such as public nuisance or Georgia's Racketeer Influenced and Corrupt Organizations Act.

⁸⁶ Landgraf v. USI Film Prods., 511 U.S. 244 (1993).

⁸⁷ Chase Securities Corp. v. Donaldson, 325 U.S. 304 (1945).

so as long the alterations do not deprive someone of life, liberty, or property without due process of the law.⁸⁸

1. Procedural Due Process

Courts have overwhelmingly found that statutes of limitations are procedural in nature and that retroactive statutes of limitation do not violate substantive due process because there is no vested right in a course of procedure. For example, in *Deal v. Coleman* the Georgia Supreme Court noted “a distinction in some cases between “substance” and mere “procedure,” explaining that “there are no vested rights in any course of procedure.”⁸⁹ Statutes of limitation have been recognized as being procedural in nature and not substantive.⁹⁰

Since statutes of limitation are procedural in nature, they will be upheld so long as they do not deprive anyone of life, liberty or property without due process. In *Chase Securities Corp.*, the United States Supreme Court stated that, “Statutes of limitation find their justification in necessity and convenience rather than in logic... Their shelter has never been regarded as what now is called a ‘fundamental’ right’ in nature.”⁹¹ The Court in *Chase Securities Corp.* clearly lays out that statutes of limitations are procedural in nature and they can be changed by the legislature if the retroactive application does not deprive anyone of life, liberty, or property without due process. Georgia Courts would likely find that retroactive civil statute of limitations for child sexual abuse do not deprive anyone of life, liberty, or property. Rather, the extension of the law would simply allow claims to be brought which were barred by an arbitrary statute of limitations.

⁸⁸ *Id.* at 316.

⁸⁹ 294 Ga. 170, 177 (2013).

⁹⁰ *Canton Textile Mills, Inc. v. Lathem*, 253 Ga. 102 (1984).

⁹¹ *Chase Securities Corp. v. Donaldson*, 325 U.S. 304 (1945).

2. Substantive Due Process

Even if retroactive civil statutes of limitation were found to be substantive in nature, they would likely be upheld by Georgia courts. Under Article I, Section I, Paragraphs I of the Georgia Constitution, “No person shall be deprived of life, liberty, or property except by due process of law.”⁹² To succeed on a substantive due process claim, the challenge must involve a fundamental right or a suspect class, otherwise it is evaluated under “the lenient ‘rational basis’ test.”⁹³ Alleged perpetrators of child sexual abuse do not fall into a suspect class and while they may claim that this provision violates substantive due process rights, this claim is meritless since “[t]here is no vested right in a statute of limitation.”⁹⁴ Similarly, at the federal level, in determining the validity of retroactive legislation, courts apply a variation of the rational basis test that only requires a successful showing that “the retroactive application of the legislation is itself justified by a rational legislative purpose.”⁹⁵

The state of Georgia has a substantial interest in identifying child predators and mending harm caused to their victims. Therefore, it is likely that a court will find that the look-back provision of the HPA is justified by a rational legislative purpose, nor does it infringe upon an individual’s substantive due process rights. Georgia Courts will also likely find that retroactive statutes of limitation do not violate ex post facto laws. While both the United States and Georgia Constitution forbid the enactment of ex post facto laws, this prohibition only applies to criminal statutes or laws affecting substantive rights. Statutory enactments which solely affect court procedure are unaffected by this limitation.⁹⁶ Substantive law creates rights, duties, and

⁹² Ga. Const. Art. 1, § 1, ¶ I (West 2017).

⁹³ *Zarate-Martinez v. Echemendia*, 299 Ga. 301, 309 (2016).

⁹⁴ *Huggins v. Powell*, 315 Ga. App. 599, 602 (2012).

⁹⁵ Patrick T. Murphy, Note, *Section 27A of the SEA: An Unplugged Lampf Sheds No Constitutional Light*, 78 MINN. L. REV. 197, 203 (1993).

⁹⁶ *Murphy v. Murphy*, 295 Ga. 376, 377 (2014).

obligations while a procedural law proscribes the method of enforcing those rights, duties, and obligations. Since this Constitutional prohibition applies only to criminal laws with substantive effects, a civil statute of limitation with retroactive application and that is procedural in nature, would likely be found to be constitutional under state and federal law.⁹⁷

3. Equal Protection

Retroactive statutes of limitations will likely withstand equal protection challenges, as well. Similar to the due process analysis, a successful equal protection challenge must involve a fundamental right or a suspect class. Since there is no fundamental right to a statute of limitation, and alleged child sexual abusers do not fall under a suspect class, courts will use a rational basis review test to determine whether retroactive statutes of limitation violate equal protection.⁹⁸

For legislation to survive an equal protection claim, “the classifications drawn in the statute must bear a rational relationship to a legitimate end of government not prohibited by the Constitution.”⁹⁹ Again, based on the State’s substantial interest in identifying child predators and mending harm caused to their victims, courts will likely find that the look-back provision of the HPA is justified by a rational legislative purpose and that it does not infringe upon an individual’s substantive due process rights. Therefore, an equal protection challenge will likely fail and a civil statute of limitation that is retroactively applied would be found constitutional.

⁹⁷ See, *Huggins*, 315 Ga. App. at 602 (holding that where a statute governs only procedure of the courts, such as statutes of limitation, there is no question of retroactivity); see also, *Canton Textile Mills, Inc. v. Lathem*, 243 Ga. 102, 105 (1984) (holding that the legislature may enact a new statute of limitation for a workers’ compensation claim without violating the constitutional prohibition against retroactive laws).

⁹⁸ *Zarate-Martinez*, 299 Ga. at 309.

⁹⁹ *Id.* at 309 (quoting *State v. Nankervis*, 295 Ga. 406, 408 (2014)).

VIII. Possibilities of Reform

Four major areas of legislative reforms that may be considered in the state of Georgia are: 1) abolishing the civil statute of limitations for child sexual abuse claims, 2) creating a retroactive open window, 3) extending the statute of limitations for survivors, and 4) providing a delayed discovery provision. While abolishing the statute of limitations entirely may seem radical, it would grant the greatest number of survivors access to the justice system. This would insure that no survivor would be denied justice because of an arbitrary time limit. However a complete repeal of the statute of limitation would undoubtedly face the most opposition. A less radical option would be to enact a statute that in some way combines the three other reform options while allowing for greater access to the civil justice system for survivors.

A. Abolishing the Statute of Limitations

A minority of states and territories have abolished the civil statute of limitations for child sexual abuse claims. For example, the territory of Guam passed legislation in 2016 that abolished their statute of limitations.¹⁰⁰ The statute was signed into law by a Catholic Governor, who acknowledged potential concerns with and opposition to the bill, but noted that allowing this law would throw open the doors of justice to survivors who have not been able to be heard.¹⁰¹ In passing the bill, the legislature pointed out that many child victims do not come forward until they are adults and that it can take many years and therapeutic services to link harm to the abuse suffered.¹⁰² Abolishing the statute of limitations grants access to the greatest number of victims so long as the legislation includes a retroactive provision. Otherwise, claims which are time-

¹⁰⁰ Guam Statute 7 G.C.A. § 11301.1.

¹⁰¹ P.L. 33-187, I Mina'trentai Tres Na Liheslaturan Guahan 2016 (SECOND) Regular Session, 4.

¹⁰² *Id.* at 9.

barred before the passage of the new statute would not be able to be brought and access to the civil justice system would only be granted to survivors with future claims of abuse.

1. Model Legislation

If the Georgia legislature sought to abolish the civil statute of limitations, an example of model legislation is as follows:

§ 9-3-33.1. Childhood sexual abuse¹⁰³

a) The term “child sex abuse” means any act committed by the defendant against the plaintiff which occurred when the plaintiff was under 18 years of age and would be in violation of

- (1) Rape, as prohibited in code section 16-6-1;
- (2) Sodomy or aggravated sodomy, as prohibited in Code Section 16-6-2;
- (3) Statutory rape, as prohibited in Code Section 16-6-3;
- (4) Child molestation or aggravated child molestation, as prohibited in Code Section 16-6-4;
- (5) Enticing a child for indecent purposes, as prohibited in Code Section 16-6-5;
- (6) Pandering, as prohibited in Code Section 16-6-12;
- (7) Pandering by compulsion, as prohibited in Code Section 16-6-14;
- (8) Solicitation of sodomy, as prohibited in Code Section 16-6-15;
- (9) Incest, as prohibited in Code Section 16-6-22;
- (10) Sexual battery, as prohibited in Code Section 16-6-22.1; or
- (11) Aggravated sexual battery, as prohibited in Code Section 16-6-22.2.

b) Any civil action arising from an incident of child sex abuse may be brought at any time. The claim may be brought against a person, a legal entity, the abusers, their enablers, their aiders or abettors, those acting in concert with them, and their institutions who knew or should have known the abuse was occurring.

¹⁰³ This statute was crafted using Guam Statute 7 G.C.A. § 11301.1.

c) Any civil action arising from an incident of child sexual abuse that occurred in Georgia and has been barred because of the passage of the prior civil statute of limitations can be filed in a court of competent jurisdiction.

B. The Combination Approach

Most states have chosen not to abolish the statute of limitations for civil child sexual abuse claims. Rather, they have chosen to use a combination of approaches in reform efforts. While the combination approach may not grant civil court access to all survivors, it would allow for more survivors to bring claims while balancing the concerns of opponents to reform.

The combination approach would extend the age when survivors may bring claims, allow survivors to bring claims after the discovery that the abuse caused their harms, and would allow for a limited and retroactive open window. An extension of the age would better align with research regarding disclosure of abuse, repressed memory, and trauma. Perhaps more importantly, extending the statute of limitations past age 23 would be more in line with current research findings on child sexual abuse, thus allowing survivors time to go to therapy, properly deal with their trauma, and discover that the abuse caused their harms.

Similar to the reasoning behind increasing the age by when survivors may bring claims, a delayed discovery provision would allow for those who have repressed their memories or who have not linked their damages to their abuse to bring claims. For example, Tim suffers from a lifetime of alcohol and drug abuse, problems with intimate relationships, post-traumatic stress disorder, and depression. When Tim's son turned 9 years old, he began to experience flashbacks of the sexual abuse he experienced as a child. Tim's abuse began when he was 9 years old. Although Tim knew that the acts themselves took place, he did not fully understand that what had happened to him was abuse. Furthermore, he did not realize that the abuse directly caused

extensive psychological damages. It was not until this moment of discovery that Tim finally disclosed his abuse and sought assistance. Without a delayed discovery provision, Tim would not be able to seek a remedy for a claim he never knew he had.

The combination approach to legislative reform could also include a retroactive open window. Retroactive and time-limited windows provide an opportunity for justice for all survivors while decreasing the likelihood of a floodgate of litigation. An open window would not only include perpetrators of the abuse, but also entities who knew or should have known that the children under their care were being abused or at risk of harm. As has been seen in other states that have allowed for entity liability under open window provisions, it is likely that only a small increase in civil claim filings would occur.

1. Model Legislation

If the Georgia legislature sought to amend the civil statute of limitations by combining an extension of the statute of limitations with a delayed discovery provision and a retroactive open window, an example of model legislation is as follows:

§ 9-3-33.1. Childhood sexual abuse¹⁰⁴

a) The term “child sex abuse” means any act committed by the defendant against the plaintiff which occurred when the plaintiff was under 18 years of age and would be in violation of

(1) Rape, as prohibited in code section 16-6-1;

(2) Sodomy or aggravated sodomy, as prohibited in Code Section 16-6-2;

(3) Statutory rape, as prohibited in Code Section 16-6-3;

(4) Child molestation or aggravated child molestation, as prohibited in Code Section 16-6-4;

¹⁰⁴ This statute was created using the Georgia statute O.C.G.A § 9-3-33.1, the Connecticut statute C.G.S.A. § 52-577d, and the Arkansas statute A.C.A. § 16-56-130 as templates.

- (5) Enticing a child for indecent purposes, as prohibited in Code Section 16-6-5;
 - (6) Pandering, as prohibited in Code Section 16-6-12;
 - (7) Pandering by compulsion, as prohibited in Code Section 16-6-14;
 - (8) Solicitation of sodomy, as prohibited in Code Section 16-6-15;
 - (9) Incest, as prohibited in Code Section 16-6-22;
 - (10) Sexual battery, as prohibited in Code Section 16-6-22.1; or
 - (11) Aggravated sexual battery, as prohibited in Code Section 16-6-22.2.
- b) Any civil action arising from an incident of child sex abuse may be brought within 30 years of when the child reaches the age of majority. The civil action may be brought against a person, a legal entity, the abusers, their enablers, their aiders or abettors, those acting in concert with them, and their institutions who knew or should have known the abuse was occurring.
- c) Any civil action arising from an incident of child sexual abuse which occurred when the injured person was a minor but is not discovered until after the injured person reaches the age of majority shall be brought within five years from the time of discovery of the sexual abuse by the injured party.
- d) For a period of five years following July 1, 2019, plaintiffs who were time barred from filing a civil action for injuries resulting from childhood sexual abuse due to the expiration of the statute of limitations in effect on June 30, 2019, can file such actions against a person, a legal entity, the abusers, their enablers, their aiders or abettors, those acting in concert with them, and their institutions who knew or should have known the abuse was occurring, alleged to have committed such abuse before July 1, 2019, thereby reviving those civil actions which had lapsed or technically expired under the law in effect on June 30, 2019.

IX. Conclusion

Child sexual abuse is a public health issue that affects one in 10 children in the United States. The effects of the abuse are not only physical, but also mental and emotional, and reach beyond childhood well into adulthood. Amending the civil statute of limitations in the state of Georgia for claims involving child sexual abuse would provide greater access to the court system for survivors. Although opponents of statute of limitation reform cite fears over a floodgate of litigation, data obtained from other states that extended the statute of limitation demonstrate that this fear is misguided. Even the state of Georgia did not see a floodgate of litigation after the passage of the Hidden Predator Act in 2015. Furthermore, an extension of the statute of limitation, even if retroactively applied, would likely be found constitutional under both state and federal law. Concerns over the consequences of holding entities liable for child sexual abuse claims are also misguided as entities already have ample protection under Georgia law. An extension of the statute of limitations for civil claims involving child sexual abuse would meet the state of Georgia's goals of protecting children and holding those accountable for harms they have caused.