



Revival of adult sexual abuse claims

AB 2777 AND THE UPDATES TO CCP SECTION 340.16; WHAT THE LAW ALREADY ALLOWED AND THE PRACTICAL EFFECTS OF THESE CHANGES

The New Year brings with it a reflection on the past as well as a slew of hopes, concerns, and goals for the year(s) to come. In 2022, the California Legislature looked back on the 2019 decision to extend the statute of limitations for adult sexual-abuse claims without expressly applying the law retroactively, and realized a disservice was done to many victims of sexual abuse. With AB 2777, it sought to remedy those failures. This article will focus on (1) what the law already allowed, and (2) what the changes mean (on a practical level) for attorneys and our clients.

What CCP section 340.16 allowed pre-2023

Section 340.16 of the Code of Civil Procedure focuses on the statutes of limitations for recovery of damages suffered as the result of the sexual assault of an adult. As of 2019, section 340.16, subdivision (a) extended the statute of limitations for adult sexual abuse to the later of: (1) within 10 years of the last act or attempted act against the plaintiff or (2) within three years from when the plaintiff discovers or should have discovered an injury or illness resulted from a sexual assault or attempted sexual assault.

Under section 340.16, subdivision (b), a "sexual assault" is limited to "any of the crimes described in Section 243.4 [Sexual Battery], 261 [Rape], 264.1 [Gang Rape], 286 [Sodomy], 287 [Oral Copulation with a Minor], or 289 [Forcible Sexual Penetration with a Foreign Object], or former Sections 262 [Spousal Rape] and 288a [Oral Copulation with a Minor], of the Penal Code, assault with the intent to commit any of those crimes, or an attempt to commit any of those crimes."

Following the public knowledge of the heinous acts of physicians like ex-USC gynecologist George Tyndall, former USA Gymnastics physician Larry Nassar, and UCLA physician James Heaps, the Legislature also enacted legislation to add subdivisions (c) and (d) to section 340.16 via AB 1510 and AB 3092. These subdivisions were crafted to allow

the numerous victims of sexual assault by physicians at the student-health centers of private institutions, as well as at UCLA hospitals in particular to prosecute their claims. Notably (for our later discussion), section 340.16, subdivision (c)(2)(C) expressly states that it does not revive claims brought against a public entity. And there are other quirks and limitations to these subdivisions. For example, the windows for the revival of these claims were only open for one year each, with the later of the two revival windows sunsetting on December 31, 2021. Hence, sections 340.16 subdivisions (c) and (d) are no longer viable avenues for victims to bring claims and a detailed discussion of their limitations will not be included here.

What do the changes to section 340.16 mean for my clients and cases?

As of January 1, 2023, AB 2777 took effect and, once again, changes were made to section 340.16. Changes were made to sections 340.16, that effectively create two avenues to bring some formerly time-barred claims.

Section 340.16, subdivision (b)(3) – Sexual abuse of an adult between 2009 and 2019

Section 340.16, subdivision (b)(3) formerly limited the statute to actions commenced on or after January 1, 2019, and did not expressly revive time-barred claims. This prevented those with time-barred claims from taking advantage of the expansion from a two-year statute of limitations (the time available to victims prior to 2019) to the ten-year statute of limitations when the change was made. (See *Quarry v. Doe I* (2012) 53 Cal.4th 945, 957; *Douglas Aircraft Co. v. Cranston* (1962) 58 Cal.2d 462, 465.)

As of January 1, 2023, section 340.16, subdivision (b)(3) now reads:

This section applies to any action described in subdivision (a) that is based upon conduct that occurred on or after January 1, 2009, and is commenced on or after January 1, 2019, that would have been barred solely because the applicable statute of limitations has or had expired. Such claims are hereby

revived and may be commenced until December 31, 2026. This subdivision does not revive any of the following claims: (A) A claim that has been litigated to finality in a court of competent jurisdiction before January 1, 2023. (B) A claim that has been compromised by a written settlement agreement between the parties entered into before January 1, 2023.

The goal of the language that made it into the final version of section 340.16, was to expressly revive the claims of those who would have qualified to bring claims pursuant to section 340.16, subdivision (a) as of January 1, 2019, if they had not been time-barred. (*Hearing on Proposed Amend. to AB2777 Sexual Assault: Statute of Limitations: Hearing Before Cal. Assemb. Comm. on JUD., ABPCA*, p. 10, (May 3, 2022).)

This change to section 340.16, subdivision (b)(3) results in the revival of civil claims in which the plaintiff can establish that the sexual conduct claimed against the defendant meets the definition of at least one of the crimes described above between January 1, 2009 and January 1, 2019 (excluding claims previously litigated or settled). "Therefore, the universe of claims covered by section 340.16, and therefore the universe of claims that are covered by the bill's proposed revival language, is relatively small. Claims for sexual assaults that would be misdemeanors, for example, are not revived by the bill's proposed amendments to section 340.16 (a) and (b)." (*Hearing on Proposed Amend. to AB2777 Sexual Assault: Statute of Limitations: Hearing Before Cal. Assemb. Comm. on JUD., ABPCA*, p. 15, (May 3, 2022).) If you encounter a potential client that meets these criteria, you can now file those claims until December 31, 2026.

The "cover up"

Section 340.16, subdivision (e) – Cover up of inappropriate sexual conduct or communication

Statutes of limitations "do[] not discriminate against the just and the unjust claim." (*Chase Securities Corp. v. Donaldson* (1945) 325 U.S. 304, 314.)

Because statutes of limitations exist, many bad actors and corrupt institutions are incentivized to cover up, refuse to disclose, or otherwise bury evidence of inappropriate conduct until after the filing deadlines have passed. For instances of sexual misconduct, this may look like shuffling bad employees to different work locations or positions, or requiring prior victims or other witnesses to sign non-disclosure agreements so they cannot warn others of predatory agents within an institution.

While an entity or individual *may* be equitably estopped from asserting a statute of limitations argument where they have engaged in conduct that “actually and reasonably induced the plaintiff to refrain from filing a timely suit,” there is no guarantee that a court will do so or that an attorney will take on such a case, knowing that the statute of limitations is likely to be such a large hurdle. (*Hearing on Proposed Amend. to AB2777 Sexual Assault: Statute of Limitations: Hearing Before Cal. Assemb. Comm. on JUD.*, ABPCA, p. 17, (May 3, 2022) (citing *Lantzu v. Centex Homes* (2003) 31 Cal.4th 363, 385.) For this reason, the Legislature enacted what is now section 340.16, subdivision (e) as the Sexual Abuse and Cover Up Accountability Act.

Section 340.16, subdivision (e) reads:

(1) Notwithstanding any other law, any claim seeking to recover damages suffered as a result of a sexual assault that occurred on or after the plaintiff’s 18th birthday that would otherwise be barred before January 1, 2023, solely because the applicable statute of limitations has or had expired, is hereby revived, and a cause of action may proceed if already pending in court on January 1, 2023, or, if not filed by that date, may be commenced between January 1, 2023, and December 31, 2023.

(2) This subdivision revives claims brought by a plaintiff who alleges all of the following: (A) The plaintiff was sexually assaulted[.] (B) One or more entities are legally responsible for damages arising out of the sexual assault [; and] (C) The entity or entities,

including, but not limited to, their officers, directors, representatives, employees, or agents, engaged in a cover up or attempted a cover up of a previous instance or allegations of sexual assault by an alleged perpetrator of such abuse.

The key element to this new law is the “cover up,” which is defined as “a concerted effort to hide evidence relating to a sexual assault that incentivizes individuals to remain silent or prevents information relating to a sexual assault from becoming public or being disclosed to the plaintiff, including, but not limited to, the use of nondisclosure agreements or confidentiality agreements.”

In the original iteration of the bill, the language included examples under the definition of cover-up that included “moving an alleged perpetrator to another position at the entity or a subsidiary entity,” and “assisting an alleged perpetrator in gaining employment at another entity following allegations.” All the examples were ultimately removed or incorporated into the definition of “cover up,” as “some of the examples used by the bill in print do not necessarily correlate with efforts to cover up a sexual assault or other misconduct.” (*Hearing on Proposed Amend. to AB2777 Sexual Assault: Statute of Limitations: Hearing Before Cal. Assemb. Comm. on JUD.*, ABPCA, p. 16, (May 3, 2022).) While these examples may not necessarily illustrate a cover-up, they may be a good place to look when investigating the potential claim and including in a “totality of the circumstances” evaluation regarding an alleged cover-up.

There are five other important aspects of this new law that should be highlighted. First, unlike the changes to section 340.16, subdivision (b)(3), the Legislature opted not to include an outer limit for the age of the claim(s) revived under subdivision (e). Second, subdivision (e) allows for only a one-year revival from January 1, 2023 to December 31, 2023. Third, subdivision (e) (8) notes that a plaintiff is not precluded from bringing an action under both subdivisions (e) and (a) or (b). Fourth, subdivision (e)(5) revives related claims

arising out of the sexual assault, including wrongful termination and sexual-harassment claims. Accordingly, if your survivor was harmed within the context of employment and there is evidence of a cover-up, you may be able to recover attorneys’ fees under the FEHA or Labor Code section 1102.5 as part of your revived claim.

Does not apply to public entities

The fifth (and possibly most contentious) issue that should be highlighted, is that section 340.16, subdivision (e) does not appear to apply to public entities. While section 340.16, subdivision (e) is silent as to public entities (unlike subdivision (c)), there is no express exemption from the presentation requirement pursuant to the Government Tort Claims Act. Moreover, Government Code section 905 enumerates those claims that are exempted from presentation. Government Code section 905, subdivision (m) specifically lists, “Claims made pursuant to Section 340.1 of the Code of Civil Procedure for the recovery of damages suffered as a result of childhood sexual assault.” (Emphasis added.) Lastly, the hearing notes from the Assembly Committee on Judiciary regarding AB 2777, makes clear that the legislature was aware of the failure to include such an exemption from the Government Tort Claims Act, stating:

The business coalition opposing the bill points out that, ‘To apply to public sector agencies, AB 2777 would need to eliminate the six-month government claims presentation deadline during 2023, which it does not. (Cal. Gov. Code § 911.2.)’ This is true. . . . The bill does not eliminate the presentation requirement for claims against either the state, or local governmental entities. (*Hearing on Proposed Amend. to AB2777 Sexual Assault: Statute of Limitations: Hearing Before Cal. Assemb. Comm. on JUD.*, ABPCA, p. 19, (May 3, 2022) (emphasis in original).

Conclusion

Many survivors face serious difficulty in recognizing, coming to terms with, and finding the strength to prosecute their claims. Civil claims allow survivors the ability to heal further and obtain the financial means to receive the medical

treatment often necessitated by sexual abuse. The revival of these claims for 2023 allows for more people to effectuate closure and obtain justice in the New Year.

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