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LAW BULLETIN MEDIA

## Strict statute of repose blocks Massachusetts asbestos claim

The Supreme Judicial Court of Massachusetts received a certified question from the U.S. District for the District of Massachusetts and concluded that the six-year statute of repose outlined in G.L. c. 260, Paragraph 2B, eliminates all tort claims arising from diseases or illnesses with extended latency periods, such as those associated with asbestos exposure, where the defendants had knowing control of the injurious instrumentality at the time of the exposure.

The case is *June Stearns, et al. v. Metropolitan Life Insurance Co., et al.*, No. SJC-12544 (Mass. Sup. Jud. 2019). The underlying action for which the question was certified involved the 2016 death of Wayne Oliver, a pipe inspector who died of mesothelioma after exposure to asbestos-containing insulation materials.

Between 1971 and 1978, Oliver worked in two nuclear power plants in which General Electric designed, manufactured and sold steam turbine generators. Oliver was present while the insulation was cut, mixed and applied to certain piping systems and equipment per GE specifications.

During this time, he was exposed to the asbestos particles within. It was not until April 2015 that Oliver received his malignant mesothelioma diagnosis and the following August he commenced the underlying action.

After Oliver's death, the U.S. District Court allowed the

plaintiffs, as co-executors of Oliver's estate, to amend the complaint and continue the litigation.

GE moved for summary judgment because the plaintiff's complaint was time-barred by Section 2B, which sets a firm six-year time limit for tort actions arising out of any deficiency or neglect in the design, planning, construction or general administration of an improvement to real property.

The plaintiffs countered that Section 2B was not intended to apply to cases involving ailments with extended latency periods, because the effect of such application extinguishes meritorious claims before they come to existence.

The district court determined GE's turbine generators, including insulation materials, were "indisputably" improvements to real property under the statute, but denied GE's motion on the grounds that it was not clear the statute was designed to bar a category of claims "known uniformly to have a latency period of at least 20 years."

The federal judge also found that in this particular case, GE had control of the site at the time of Oliver's exposure, conducted regular onsite maintenance and inspections for at least two decades after the construction was complete and continues to perform refueling outages, thus removing it from the category of defendants customarily protected by the statute.



### TOXIC TORT TALK

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CRAIG T. LILJESTRAND, a partner at Hinsshaw & Culbertson LLP, has experience in toxic tort litigation. He practices in the areas of asbestos, silica, welding fumes, lead paint, chemical and occupational disease claims. His client base includes Fortune 500 companies in which he has defended various industrial product and equipment manufacturers, contractors and premises owners in numerous toxic tort cases throughout the country. He is also the regional counsel for a major industrial manufacturer.

GE moved to have the judge either reconsider or certify the ruling for an interlocutory appeal to the U.S. Circuit Court of Appeals. The plaintiff moved for certification to the Supreme Judicial Court of Massachusetts. After denying GE's motion, the district court certified the question.

The Supreme Judicial Court stated the answer to the question was controlled by the

language of the statute, the history of related statutes of repose and previous cases.

The court began its analysis by stating that when the language of a statute is clear and unambiguous, it is conclusive as to the legislature's intent and the court noted that a statute of repose places an absolute time limit on liability of those within its protection, having the effect of abolishing both the cause of action and the remedy.

The court said a statute of repose may not be tolled for any reason and is not subject to any form of equitable estoppel or tolling. Finally, the court reiterated that the only way to satisfy the absolute time limit of a statute of repose is to commence the action prior to the expiration of the time limit and that Section 2B is no exception to the rule.

The court then reviewed the language of the statute and the legislative purpose of the statute and noted the primary objective in enacting Section 2B was to limit the liability of architects, engineers, contractors and others involved in the design, planning, construction or general administration of an improvement to real property to avoid exposing participants in the construction industry to possible liability extending beyond their professional careers and into retirement.

The court cited its previous holdings that statutory limitations of this nature serve a legitimate public purpose,

even though it may abolish a plaintiff's cause of action without providing an alternative remedy.

The court stated further that the six-year limitation is how the legislature struck a reasonable balance between the public's right to a remedy and the need to place an outer limit on tort liability for those involved in construction.

The court explained that the language of Section 2B was unequivocal and forbids a court from considering the fact that a plaintiff did not discover or reasonably could not

have discovered the harm before the six-year period of the statute of repose expired.

The court noted that the fact the legislature saw fit to specify a single exception to the statute of repose applicable to medical-malpractice actions and did not similarly do so in the circumstances of Oliver's case furthers the inference that no exceptions were intended.

The court noted that had the legislature wanted to exempt claims arising from negligence involving asbestos from Section 2B, it had

demonstrated that it knew how to do so.

The court concluded by acknowledging that statutes of repose may impose significant hardship on a plaintiff who has suffered injury and has a meritorious claim but who does not suffer or discover the injury within the period permitted for initiation of the suit.

While the court recognized the harsh reality, the court said it does not interpret statutes based on such concerns and that arguments of hardship are more appropriate respecting the enactment of legislation.

The Supreme Judicial Court then answered the certified question and stated Section 2B completely eliminates all tort claims arising out of any deficiency or neglect in design, planning, construction or general administration of an improvement to real property after the established time period has run, even if the cause of action arises from an ailment with an extended latency period and even if a defendant had knowing control of the instrumentality of injury at the time of exposure.