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Section: News

SJC bars latent asbestos suits against builders

Pat Murphy

All eyes are on the Legislature after what experts see as a definitive ruling by the Supreme Judicial Court on the applicability of the statute of repose to construction-related injury claims involving diseases that can develop decades after exposure to a toxic agent.

In *Stearns v. Metropolitan Life Insurance Co.*, a unanimous SJC concluded that G.L.c. 260, 2B's six-year statute of repose governing actions arising from improvements to real property operates to bar tort claims involving diseases with extended latency periods, such as those relating to asbestos exposure.

The decision addressed a certified question posed by a U.S. District Court judge in a case that addressed the viability of tort claims relating to a worker who died of mesothelioma in 2016. The plaintiffs' lawsuit, which included General Electric Co. as a defendant, alleged that the decedent was exposed to asbestos in the 1970s while working as an inspector in the construction of two nuclear power plants.

Justice Elspeth B. Cypher, writing for the SJC, acknowledged the court's decision was a harsh result for plaintiffs.

"[C]onsidering the latency period for asbestos-related illnesses, this will have the regrettable effect of barring all or nearly all tort claims arising from negligence in the use or handling of asbestos in construction-related suits," Cypher wrote. "Nonetheless, the appropriate recourse is in the Legislature, not this court."

The 18-page decision in *Stearns*, Lawyers Weekly No. 10-045-19, can be found at masslawyersweekly.com.

Call to action?

"We always knew this was not going to be an easy case," said Michael J. McCann of Boston, the plaintiffs' attorney.

McCann said he was concerned about the "practical implications" of the decision.

"Now, any contractor can use asbestos or other toxic substances in the construction of schools, hospitals, commercial buildings you name it," he said. "As long as the latency period from exposure to that substance to the development of the disease is greater than the repose period, that contractor gets immunity from suit."

One good thing to come out of the decision, McCann said, is it raises a call to action for the Legislature to remedy what he labeled an "obvious injustice."

"It's hard to believe that the Legislature would allow contractors to install toxic substances into buildings with complete immunity," he said.

Boston lawyers Lawrence G. Cetrulo and Stephen T. Armato filed an amicus brief as Massachusetts Asbestos Litigation Defendants' Liaison Counsel.

"Stearns clarified in no uncertain terms that there aren't any exceptions to the statute of repose bar, no exception for latent diseases, no exception for [the defendants'] knowing control of the instrumentality that causes the injury, and not even for intentional wrongdoing or concealment of a defect," Cetrulo said.

The conclusions reached by the court are important because the Legislature is the "sole arbiter" as to what the policy in Massachusetts should be regarding the "quieting" of claims against those who improve real property, he added.

On that score, Armato observed that the Legislature revised the statute of repose in the 1980s and chose not to add any exceptions to the law.

"It's very important to note that the plaintiffs' claims still exist against other parties, just not the designer or builders of improvements to real property," Armato said.

Boston defense attorney Vincent N. DePalo agreed that Stearns should not be viewed as marking the end to asbestos litigation in Massachusetts.

"The ruling is going to have an immediate impact on contractors, engineers, architects and others that traditionally have been protected under the statute of repose," he said. "Suppliers and manufacturers generally aren't protected and those cases will continue."

John R. Felice filed an amicus brief for the Massachusetts Defense Lawyers Association. The Boston attorney said Stearns is important because it turns aside what is just the latest effort to erode the statute of repose.

"The language of the statute is clear," Felice said. "There are no exceptions. What we saw here was the plaintiffs trying to use the court in a legislative fashion."

Salem's Thomas R. Murphy filed an amicus brief on behalf of the Massachusetts Academy of Trial Attorneys. Murphy said he was not surprised by the outcome and knew the plaintiffs' bar was facing an "uphill battle," particularly given the SJC's strict construction of 2B last year in *Bridgwood v. A.J. Wood Construction, Inc.*

Calling the ruling "unfortunate," Murphy said the plaintiffs had simply asked for a more liberal reading of 2B, or at least holding General Electric responsible given that the defendant knowingly had control of the jobsites.

According to Murphy, many states have already enacted legislative exceptions to their statutes of repose to allow claims involving latent diseases.

"Maybe that's where we have to go in light of Stearns," he said.

General Electric was represented by Chicago lawyer John A. Heller and Boston's Catherine A. Mohan. Defense counsel did not respond to requests for comment prior to deadline.

Asbestos claim

The plaintiffs, June Stearns and Clifford Oliver, are co-executors of the estate of Wayne Oliver. The decedent was diagnosed with malignant mesothelioma in April 2015 and sued various defendants in Middlesex Superior Court several months later.

The case was removed to federal court before the decedent's death in July 2016. The plaintiffs filed an amended complaint to continue the action on behalf of the estate.

Their lawsuit alleged that the decedent was exposed to asbestos while working for a contractor as a pipe inspector during the construction of the Pilgrim Nuclear Power Station and the Calvert Cliffs Nuclear Power Plant, between 1971 and 1978.

Asbestos was in insulation used for steam turbine generators designed and manufactured by, and installed under the supervision of, GE. With respect to GE, the lawsuit alleged that the decedent contracted mesothelioma because the manufacturer negligently exposed him to asbestos during construction of the two power plants.

The manufacturer moved for summary judgment under G.L.c. 260, 2B.

U.S. District Court Judge Rya W. Zobel denied GE's motion in March 2018. The judge agreed with GE that the installation of the company's turbine generators was clearly an improvement to real property within the meaning of the statute of repose.

However, the judge ultimately concluded that GE did not fall within the category of defendants protected by the statute, questioning whether the Legislature intended 2B to bar claims like asbestos actions that are known to involve a disease with a latency period of 20 years or more.

The manufacturer subsequently moved to certify that portion of the judge's opinion interpreting 2B to the 1st U.S. Circuit Court of Appeals. Because the determinative question was one of Massachusetts law, Zobel instead opted for certification to the SJC.

The federal judge asked the SJC to decide whether G.L.c. 260, 2B, "can be applied to bar personal injury claims arising from diseases with extended latency periods, such as those associated with asbestos exposure, where defendants had knowing control of the instrumentality of injury at the time of exposure."

Plain language

Section 2B by its terms applies to "tort" actions for damages arising out of "any deficiency or neglect in the design, planning, construction or general administration of an improvement to real property."

The law includes a three-year statute of limitations with the caveat that "in no event shall such actions be commenced more than six years after the earlier of the dates of: (1) the opening of the improvement to use; or (2) substantial completion of the improvement and the taking of possession for occupancy by the owner."

The plaintiffs argued that 2B does not protect a defendant like GE that was allegedly in control of the improvement to real property at the time of exposure. They further argued that, as a matter of public policy, the statute should not apply to diseases with extended latency periods,

In answering the certified question, Cypher noted that the court last year in *Bridgwood* held that the statute of repose barred the G.L.c. 93A claim of a plaintiff whose home was damaged by a fire in 2012 that was allegedly caused by substandard renovations performed by defendant contractors in 2000 and 2001.

Cypher read *Bridgwood* as standing for the proposition that 2B's limitation on duration of liability serves a legitimate public purpose by protecting participants in the construction industry from fraudulent and stale claims. The justice further saw *Bridgwood* as the latest in a line of decisions in which the court refused to recognize exceptions to the statute.

Cypher found that the "unequivocal" language of 2B precluded recognizing an exception in the plaintiffs' case.

"The apparent intent of the Legislature was to place an absolute time limit on the liability of those protected by the statute," Cypher wrote. "Indeed, it 'forbids us 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,' or any other circumstances that might have tolled the running of a statute of limitations."

In answering the certified question, Cypher wrote that 2B "completely eliminates all tort claims arising out of any deficiency or neglect in the design, planning, construction, or general administration of an improvement to real property after the established time period has run."

She explained that such a result occurs "even if the cause of action arises from a disease with an extended latency period and even if a defendant had knowing control of the instrumentality of injury at the time of exposure."

Stearns v. Metropolitan Life Insurance Co.

THE ISSUE: Does the state's six-year statute of repose governing defects or negligence with respect to improvements to real property eliminate all tort claims arising after the established time period has run, including causes of action involving a disease with an extended latency period?

DECISION: Yes (Supreme Judicial Court)

LAWYERS: Michael J. McCann, Michael C. Shepard and Edwin L. Wallace, of Shepard Law Firm, Boston (plaintiffs)

John A. Heller of Sidley Austin, Chicago; Catherine A. Mohan of McCarter & English, Boston (defendant General Electric Co.)

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--- **Index References** ---

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