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## Much Ado About Nothing? Change to Illinois Construction Statute of Repose Should Only Apply to Claims Arising from Construction that Occurred after 2004

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On December 19, 2014, Governor Pat Quinn signed into law Illinois Senate Bill 2221, amending the construction-related statute of repose as it applies to certain asbestos lawsuits. From pleased Democratic lawmakers to outraged right-leaning business groups, factions on both sides of the aisle have proclaimed the legislation a game-changer. On its face, it appears to broaden the scope of asbestos litigation to include additional claims that would have previously been time-barred. However, a closer look at the legislation and Illinois Supreme Court jurisprudence suggests that the new law is unlikely to provide plaintiffs with any additional relief whatsoever. Simply put, under Illinois Supreme Court precedent the law cannot revive previously barred claims, so the only claims affected by the new law are those originating from construction projects that occurred in 2005 and later. Because asbestos products were almost completely phased out of construction in the 1970s, few, if any, claims will be saved from the time-bar by the new law.

### Senate Bill 2221 becomes Public Act 98-1131 as a “veto session surprise”

Illinois Code of Civil Procedure Section 13-214 establishes a ten-year statute of repose under which all civil actions arising out of an act or omission involving the “design, planning, supervision, observation or management of construction, or construction of an improvement to real property” are barred unless brought within 10 years of the time of the act or omission. (735 ILCS 5/13-214(b).) In the context of asbestos litigation, this statute has shielded a variety of defendants, including architects, construction companies, engineers, premises owners, and even some product manufacturers from liability arising out of the use of asbestos-containing materials in the construction of buildings or certain portions of buildings. (Cameron Turner and Jaime Bennett, *Applying the Illinois Construction Statute of Repose to Asbestos Litigation*, Illinois Bar Journal December 2014, Vol. 102, at p. 592-93.)

In Senate Bill 2221, introduced in final form on December 2, 2014, the Illinois legislature specifically excluded asbestos lawsuits from the statute of repose, adding a provision to Section 13-214 stating that the statute of repose “does not apply to an action that is based on personal injury, disability, disease, or death resulting from the discharge into the environment of asbestos.” (S.B. 2221, 98th Gen. Assembly (Ill. 2014).)

The bill’s sponsor, state Sen. Kwame Raoul, described his intent in introducing the bill: “The deadly diseases caused by asbestos exposure know no statute of limitations, so it’s fitting that our law is finally catching up to medical realities. We are giving sufferers and their families no more and no less than what they deserve: their day in court.” (Kurt Erickson, *Quinn signs asbestos lawsuit changes into law*, Bloomington Pantagraph, Dec. 20, 2014, available at <http://www.pantagraph.com>.) Opponents of the bill referred to it as a “veto session surprise” given the timing of its passage at the end of the legislative session and the end of Gov. Quinn’s term and stated a belief that the bill will “open up a whole new way for personal injury lawyers to file asbestos lawsuits . . . .” (Ann Maher, *Bill that gives claimants more time to file asbestos litigation passes*, The Madison-St. Clair Record, Dec. 3, 2014, available at <http://madisonrecord.com>.) The bill passed with a party-line vote and was signed into law by Gov. Quinn on December 19, 2014. (*Id.*; Erickson, *supra*.) The law, Public Act 98-1131, has an effective date of June 1, 2015. (Public Act 98-1131, <http://www.ilga.gov/legislation/publicacts/fulltext.asp?Name=098-1131>.)

## The Questionable Constitutionality of Public Act 98-1131

As outlined above, it is clear that the legislature enacted Public Act 98-1131 in an effort to revive certain asbestos claims that were previously barred by the operative statute of repose. While the proponents of Public Act 98-1131 have argued that the legislation will serve the noble purpose of empowering a class of victims who would not have otherwise had their day in court, this argument overlooks the fact that plaintiffs from around the country file suits in Illinois against scores of other defendants. In attempting to revive construction claims, the legislature has needlessly overstepped its bounds. Further, constitutional protections are implicated with the passage of laws that retroactively strip away vested defenses to legal actions.

Indeed, the Supreme Court of Illinois has previously refused to allow the legislature to breathe life into time-barred civil claims. The Court encountered an issue nearly identical to Public Act 98-1131 in the case of *Doe v. Diocese of Dallas*. (234 Ill.2d 393, 334 Ill.Dec. 649, 917 N.E.2d 475 (2009).) The *Doe* case involved a civil childhood sexual abuse claim that was previously time-barred by a two-year statute of limitations but was brought pursuant to an amended statute of limitations that provided a five-year discovery rule. (*Id.* at 480.) The Court was tasked with determining whether the new five-year limitations period could be retroactively applied to resuscitate a claim that was time-barred under the previous two-year statute of limitations. (*Id.* at 482.) While it was clear that the legislature intended the five-year statute to apply retroactively, the Court found that retroactive application was unconstitutional in that it ran afoul of the defendant's due process rights under the Illinois Constitution. (*Id.* at 483.) Specifically, the Court relied on its previous holding in *M.E.H. v. L.H.*, 177. 2d 207, 226 Ill.Dec. 232, 685 N.E.2d 335 (1997), finding that:

"Once a statute of limitations has expired, the defendant has a vested right to invoke the bar of the limitations period as a defense to a cause of action. That right cannot be taken away by the legislature without offending the due process protections of our state's constitution."

*Doe*, 917 N.E.2d at 484 (quoting *M.E.H.*, 177 Ill.2d at 214-15, 226 Ill.Dec. 232, 685 N.E.2d 335).

The *Doe* holding has been recognized and followed by Illinois' Fifth District Appellate Court in *Wisniewski v. Diocese of Belleville*, 406 Ill. App. 3d 1119, 347 Ill. Dec. 753, 943 N.E. 2d 43, 71 (Ill. App. 5th Dist. 2011) (stating "the legislature's repeal of the statute of repose is not applied retroactively to revive claims that had expired prior to the repeal of the statute of repose. The Illinois Supreme Court has held that the Illinois Constitution does not permit retroactive application of amendments to Section 13-202.2(b) to revive otherwise time-barred claims for childhood sexual abuse) and the United States Court of Appeals for the Seventh Circuit in *Anderson v. Catholic Bishop of Chicago*. (759 F.3d 645 (7th Cir. 2014) (while the plaintiff in *Anderson* attempted to circumvent the applicable limitations period for sexual abuse claims by relying on exceptions carved out for fraud and estoppel, the *Anderson* court relied on the *Doe* opinion as creating a vested right to assert statutes of limitations and repose defenses).)

## The True Impact of Public Act 98-1131

The *Doe* decision and its progeny demonstrate that Public Act 98-1131 is unconstitutional as applied to any claim that would have been time barred by the previously effective statute of repose. The Supreme Court of Illinois has determined that a defendant has a vested right to invoke repose and limitations bars and that vested time-bar defenses cannot be taken away by subsequent legislation.

As of June 1, 2015, the effective date of the new law, potential defendants who used asbestos-containing materials during construction projects at any time prior to June 1, 2005, have a vested right to invoke the ten-year statute of repose found in Section 13-214(b). Thus, any defendant who is sued for a construction project that took place prior to June 1, 2005, will be permitted to invoke the defense. In contrast, the asbestos-claims exception to the statute of repose will be applicable to construction projects that cause the release of asbestos from June 1, 2005, through the present and into the future.

The use of asbestos in new construction declined significantly in the 1970s and was virtually eliminated by the early 1980s. While plaintiffs in asbestos cases often claim that some "old stock" supplies of asbestos materials were used beyond those dates, it is hard to fathom that any asbestos-containing materials would have continued to be used into the 1990s. Thus, with regard to strictly new installation activities (whether completely new construction or remodeling), it is unlikely that Public Act 98-1131 will provide plaintiffs with any additional relief.

Because Public Act 98-1131 will only provide additional claims from activities taking place after June 1, 2005, the impacted claims will likely involve demolition of old buildings that used asbestos-containing materials or asbestos remediation activities. During the demolition of old buildings and asbestos remediation work, it is possible that companies involved have caused or will cause the “discharge into the environment of asbestos,” which could trigger the exception created by Public Act 98-1131. If anyone happens to become ill due to these discharges of asbestos and files suit to recover for the injury, then the companies involved with the demolition or remediation will not be able to invoke the ten-year statute of repose in Section 13-214(b). The difficulty in proving asbestos exposure in a demolition or remediation case will provide a separate challenge for such plaintiffs, but Public Act 98-1131 removes at least one obstacle.

While Public Act 98-1131 has been hailed as the death of the statute of repose in asbestos cases, a closer examination of its constitutionality indicates that the statute of repose remains alive and well. In fact, if Illinois courts follow precedent, Public Act 98-1131 is unlikely to have any significant impact on the current state of asbestos litigation.

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