

The National Forum for Environmental & Toxic Tort Issues (FETTI) Winter/Spring 2016 Case Law Update Newsletter

Illinois Passes New Law Exempting Asbestos-Related Claims from Ten-Year Construction Statute of Repose

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On December 19, 2014, outgoing Illinois Governor Pat Quinn signed into law Illinois Public Act 098-1131, exempting asbestos-related claims from Illinois's long-standing construction statute of repose. The statute effectively removes the ten-year statute of repose in construction-related cases when the plaintiff claims injury as a result of exposure to asbestos. This law has the potential to increase asbestos-related litigation and to expand liability to previously un-reachable defendants. However, the new law's constitutionality is suspect and it may be vulnerable to constitutional challenge on multiple grounds.

History of Public Act 098-1131

Public Act 098-1131 was first introduced as Senate Bill 2221, which was originally intended to amend the Clerk of Courts Act and addressed reimbursements that State correctional institutions received for administrative assistance. Senate Bill 2221 was later amended to exempt from the Illinois construction statute of repose all claims arising out of injury caused by the release of "any pollutant" (Amendment No. 2).¹ This amendment was filed in the Illinois House of Representatives on November 25, 2014—the day before Thanksgiving.

After referral of Amendment No. 2 to the Rules Committee and Judiciary, Senate Bill 2221 was again amended on December 2, 2014 (Amendment No. 3) to narrow the scope of the exemption from claims based upon injury resulting from "any pollutant" to just those claims based upon injuries resulting from "asbestos."²

That same day, the Illinois House of Representatives voted to approve Amendment No. 3 and passed Senate Bill 2221, as amended. The Senate passed the bill the following day. There exists some speculation that the passage of Senate Bill 2221 was the effort of the lame duck session of the Illinois General Assembly to push the measure through before Republican Governor-Elect Bruce Rauner takes office.³

¹ Senate Bill 2221, House Floor Amendment No. 2, filed November 25, 2014.

² Senate Bill 2221, House Floor Amendment No. 3, filed December 2, 2014.

³ See, e.g., Isringhausen Gvillo, Heather: 'Rammed through' Illinois asbestos bill could face constitutional challenge; Critics say it could impose unending liability, Legal Newsline (December 4, 2014), retrieved from <http://legalnewsline.com/issues/asbestos/253822-rammed-through-illinois-asbestos-bill-could-face-constitutional-challenge-critics-say-it-could-impose-unending-liability>.

Governor Pat Quinn signed Senate Bill 2221 into law on December 19, 2014, which bill thereby became Public Act 098-1131. The new law officially amends 735 ILCS 5/13-214, which statute codifies Illinois's construction statute of repose. Previously, the statute provided in relevant part:

No action based upon tort, contract or otherwise may be brought against any person for an act or omission of such person in the design, planning, supervision, observation or management of construction, or construction of an improvement to real property after 10 years have elapsed from the time of such act or omission.⁴

Public Act 098-1131 amends this statute by adding subsection (f), which provides that the statute “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.”⁵ The law will take effect on June 1, 2015.

Potential Ramifications of Public Act 098-1131

This amendment effectively eliminates the ten-year statute of repose for claims arising out of the “design, planning, supervision, observation or management of construction, or construction” of improvements to real property if those claims are related to an injury caused by alleged exposure to asbestos. This exemption has the potential to affect not only the number of asbestos cases filed in Illinois, but also the defendants named therein. Potential asbestos defendants that have been insulated from the asbestos litigation by virtue of the construction statute of repose—including contractors, architects, and engineers—may now be subject to liability for their respective roles in construction projects involving the use of asbestos-containing products.

Potential Constitutional Challenges to Public Act 098-1131

As with any statute with this potential breadth and depth, Public Act 098-1131 may be subject to various constitutional challenges. First, Public Act 098-1131 may meet a challenge that the Act violates the Special Legislation Clause of the Illinois Constitution, which states that “The General Assembly shall pass no special or local law when a general law is or can be made Applicable”⁶ and which “expressly prohibits the General Assembly from conferring a special benefit or exclusive privilege on a person or a group of persons to the exclusion of others similarly situated.”⁷

This provision was one of several grounds upon which the Civil Justice Reform Amendments of 1995 were struck down in the 1997 case *Best v. Taylor Machine Works*, because these amendments imposed a limit on the amount of damages recoverable by plaintiffs with the most severe injuries but imposed no such limit for plaintiff with lesser injuries.⁸ The Special Legislation clause has also been used to prevent the retroactive application of legislation that

⁴ 735 ILCS 5/13-214(b).

⁵ Illinois Public Act 098-1131.

⁶ Ill. Const. 1970, art. IV, § 13.

⁷ *Best v. Taylor Mach. Works*, 179 Ill. 2d 367, 390-91 (1997).

⁸ 179 Ill. 2d at 402-404.

allowed certain Fair Employment Act plaintiffs to file a complaint in circuit court, but not other plaintiffs, thereby subjecting some employers to open-ended liability but not others.⁹ Using this rationale, a potential challenge to Public Act 098-1131 exists on the ground that it arbitrarily subjects only those defendants whose construction activities involved the use of asbestos-containing products to liability while all other construction defendants retain the protection of the construction statute of repose.

Perhaps the most evident challenge is based upon the violation of due process that occurs when a previously time-barred claim is revived by the legislature. Illinois courts have consistently held that the legislature lacks the power to revive previously time-barred claims once they are barred.¹⁰ This is because the right to assert a statute of limitations bar as a defense to a claim after the statute has run is a *vested right* of the would-be defendant that cannot be taken without due process of law.¹¹ The same vested right inures to a defendant upon the expiration of a statute of repose.¹²

Parting Thoughts

Although constitutional challenges to Public Act 098-1131 will likely be forthcoming, it is unknown if any such challenge will be decided before the effective date of the new law of June 1, 2015. Therefore, those potential defendants who were involved in the construction of improvements to real property in the 1960s, 1970s, and 1980s who may be subject to liability under the new law—and their insurers—should seek advice regarding how best to prepare for any potential claims and how to proceed under the new law.

⁹ *Wilson v. All-Steel, Inc.*, 87 Ill. 2d 28, 40 (1981).

¹⁰ *See, e.g., M.E.H. v. L.H.*, 177 Ill. 2d 207 (1997); *Sepmeyer v. Holman*, 162 Ill. 2d 249 (1994); *Wilson*, 87 Ill. 2d 28.

¹¹ *See Sepmeyer*, 162 Ill. 2d at 254-55, citing *Board of Education of Normal School District v. Blodgett* (1895), 155 Ill. 441, 40 N.E. 1025 (“We find the issue well settled that the expiration of the statute of limitations creates a vested right beyond legislative interference.”); *Wilson*, 87 Ill. 2d at 42 (“The proposition that a limitations defense which has fully accrued vests a property right in the defendant entitled to due process protection is a general rule followed by many jurisdictions.”).

¹² *M.E.H. v. L.H.*, 177 Ill. 2d at 214-15.