

*May 2015***IN THIS ISSUE**

In this issue, Andrew Kopon and Vincenzo Chimera discuss the recently enacted asbestos exemption to the Illinois statute of repose, and provide defense practitioners with suggestions to defeat arguments that the exemption revives previously time-barred claims.

Can the New Illinois Asbestos Exemption Amendment to the Construction Statute of Repose Revive Time-Barred Claims?

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Illinois recently enacted an amendment to the ten-year statute of repose for construction related injuries, in order to exempt asbestos claims. Prior to the asbestos exemption's enactment, the statute of repose broadly covered construction based tort actions:

[n]o action based upon tort ... 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.

735 ILCS 5/13-214(b).

The "express purpose" of the statute was to insulate "all participants in the construction process from the onerous task of defending against stale claims." *MBA Enterprises, Inc. v. Northern Illinois Gas Co.*, 717 N.E.2d 849, 852 (Ill. App. 3d 1999). The statute now offers less protection to participants in the construction process because Governor Patrick Quinn signed an asbestos exemption amendment into law late in his final term, prior to leaving office. The asbestos exemption makes clear that Section 214(b)'s ten-year statute of repose no longer applies "to an action that is based on personal injury, disability, disease, or death resulting from the discharge into the environment of asbestos." 735 ILCS 5/13-214(f); P.A. 098-1131. This asbestos exemption becomes effective on June 1, 2015.

Practical implications of the asbestos exemption

Prior to the asbestos exemption's enactment, Section 214(b) gave protection to those defending construction-related asbestos claims. A statute of repose – unlike a statute of limitations – begins to run not when the action accrues, but after a fixed period of time. "The difference between a statute of limitations and a statute of repose is that 'a statute of limitations governs the time within which lawsuits may be commenced after a cause of action has accrued, while a statute of repose extinguishes the action itself after a fixed period of time, regardless of when the action accrued.'" *Wisniewski v. Diocese of Belleville*, 943 N.E.2d 43, 69 (Ill. App. 5th 2011) (quoting *DeLuna v. Burciaga*, 857 N.E. 2d 229, 237 (Illinois 2006)). Section 214(b) barred asbestos litigation claims when the defendant's act or omission dealing with the design, planning, supervision, observation or management of construction, or construction of an improvement to real property, took place at least ten years prior to the injury. See *King v. Paul J. Krez Co.*, 752 N.E. 2d 605, 610 (Ill. App. 1st 2001) (finding that Section 214(b) protects those who engage in the activities enumerated in the statute).

Accordingly, the effect of Section 214(b) was generally, if a plaintiff learned he or she suffered an asbestos related injury on the particular premises ten years after the act or omission dealing with the construction or

improvement of the real property, the action was time barred. And while Section 214(a) provides a four-year statute of limitations for some construction related injuries, a plaintiff would only get the benefit of this four-year limitations period if he or she “knew or should reasonably have known of such act or omission” giving rise to the injury less than ten years after the construction related act or omission. 735 ILCS 5/13-214(a)(b). Otherwise, the claim would be time barred by Section 214(b).

Often times with asbestos claims, Illinois plaintiffs try to avoid the statute of repose by arguing the defendant was merely a seller or manufacturer of the asbestos product, and therefore not covered by Section 214(b). The key issue in these cases was whether the manufacturer performed “some role related to the construction site beyond provision of standard products generally available to the public and not custom designed for the project.” *People v. Asbestospray Corp.*, 616 N.E. 2d 652, 657-58 (Ill. App. 4th 1993). A related issue was whether the manufacturer’s product constituted a real property improvement. Courts would consider “whether the addition was meant to be permanent or temporary, whether it became an integral component of the overall system, whether the value of the property was increased, and whether the use of the property was enhanced.” *St. Louis v. Rockwell Graphic Systems, Inc.*, 605 N.E.2d 555, 556 (Illinois 1992). The practical effect of the asbestos exemption means that these Section 214(b) statute of repose issues are no longer relevant to the plaintiffs’ bar when

it comes to asbestos litigation because they are excluded from the protection of the Illinois construction statute of repose.

Not surprisingly, the asbestos exemption will likely lead to an increase in asbestos-related law suits. Although Section 214(a)’s four-year statute of limitations offers some protection against construction-related asbestos claims, it now incorporates the common law discovery rule. The discovery rule “has the effect of postponing the commencement of the statute of limitations ‘until the injured party knows or reasonably should know that he has been injured and that this injury was wrongfully caused.’” *Castello v. Kalis*, 816 N.E.2d 782, 788 (Ill. App. 1st 2004) (quoting *Golla v. General Motors Corp.*, 657 N.E.2d 894 (Illinois 1995)). Asbestos-related illnesses can remain latent for a significant length of time. For example, those afflicted with mesothelioma – a cancer caused by exposure to asbestos – often times do not show any symptoms until decades after exposure. As a result, construction-related asbestos actions frequently arise decades after the act or omission that caused exposure. The asbestos exemption means Section 214(b) will no longer shorten this “long tail of liability that results from the discovery rule[.]” *Meyers v. Underwood*, 738 N.E.2d 118, 129 (Ill. App. 1st 2000) (citation omitted) (internal quotation marks omitted).

Retroactive application to previously time barred claims

The important issue Illinois courts must deal with, however, is whether the asbestos exemption applies retroactively to actions previously time barred by Section 214(b). With respect to retroactive application, Illinois courts apply a two-step analysis: (1) the legislature must show intent to apply the amendment retroactively; and (2) retroactive application cannot violate the Illinois constitution. *Caveney v. Bower*, 797 N.E.2d 596, 601 (Illinois 2003) (citing *Commonwealth Edison Co. v. Will County Collector*, 749 N.E.2d 964 (Illinois 2001)). Significantly, the asbestos amendment does not state whether it applies retroactively to actions already time barred by Section 214(b).

In such a situation, Illinois courts look to the Section 4 of the Statute on Statutes. Section 4 provides, among other things, that:

[n]o new law shall be construed to repeal a former law, whether such former law is expressly repealed or not, as to any offense committed against the former law, or as to any act done, any penalty, forfeiture or punishment incurred, or any right accrued, or claim arising under the former law, or in any way whatever to affect any such offense or act so committed or done, or any penalty, forfeiture or punishment so incurred, or any right accrued, or claim arising before the new law takes effect, save

only that the proceedings thereafter shall conform, so far as practicable, to the laws in force at the time of such proceeding. 5 ILCS 70/4

The Illinois Supreme Court “has recognized section 4 as a clear legislative directive as to the temporal reach of statutory amendments and repeals when none is otherwise specified[.]” *Allegis Realty Investors v. Novak*, 860 N.E.2d 246, 253 (Illinois 2006). Section 4 allows retroactive application for “procedural or remedial provisions” but “prohibits retroactive application of statutory changes that affect substantive provisions or vested rights.” *People v. Glisson*, 782 N.E.2d 251, 257 (Illinois 2002).

Illinois courts should hold that Section 4 does not permit the asbestos exemption to apply to claims previously time-barred by Section 214(b), because that would violate vested due process rights under the Illinois constitution. Dating back over a century, the Illinois Supreme Court made clear that once a claim is time-barred, defendants have a vested property right, grounded in the Illinois constitution’s due process clause, to rely upon the limitations period. *See Board of Education of Normal School Dist. v. Blodgett*, 40 N.E. 1025, 1026 (Illinois 1895) (reasoning “[a]s early as 1820 this court decided, in effect, that a completed bar of the statute of limitations is a vested right.”). This principle has been applied consistently since that time. *See Sepmeyer v. Holman*, 642 N.E.2d 1242, 1244 (Illinois 1994) (finding “[o]ur cases have been uniform in holding

that the legislature lacks the power to reach back and breathe life into a time-barred claim.”); see also *M.E.H. v. L.H.*, 685 N.E. 2d 335, 340-41 (Illinois 1997) (reasoning “[a]s we have previously discussed, a defense based on the expiration of a limitations period is a vested right protected by the constitution and beyond legislative interference.”).

In *M.E.H.*, the Court dealt with the issue of whether a repealed statute of repose could nevertheless bar a childhood sexual abuse tort action. *Id.* at 336. There, the repealed statute of repose prevented two sisters from prevailing on their childhood sexual abuse tort claims more than 12 years after their 18th birthdays. *Id.* at 338. The statute of repose time-barred the sisters’ claims prior to its repeal. *Id.* at 339. The Court held the repeal of the statute of repose “did not alter the viability of the plaintiffs’ claims” because “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.” *Id.* It added, “[t]hat right cannot be taken away by the legislature without offending the due process protections of our state’s constitution.” *Id.*

The Court affirmed this principle in *Doe A. v. Diocese of Dallas*, 917 N.E.2d 475 (Illinois 2009). *Doe A.* held an amendment to the statute of limitations for sexual abuse, extending the statute of limitations period from two to five years, could not revive a time-barred claim. *Id.* at 483. There, a sexual abuse victim’s tort claim was time barred by the applicable two-year statute of

limitations period in December of 2000. *Id.* at 480. The abuse victim, however, argued the five-year statute of limitations amendment, made effective in 2003, applied to his action. *Id.* The Court rejected this argument, finding the principle that the legislature cannot revive a time-barred claim “date[s] back more than a century”, has been “consistently followed” and “remain[s] valid today.” *Id.* at 484-485 (citations omitted). The Court explicitly stated “that once a claim is time-barred, it cannot be revived through subsequent legislative action without offending the due process protections of our state’s constitution.” *Id.* at 486.

Illinois courts have continued to give great protection to defendants’ due process rights under the Illinois constitution when dealing with time-barred claims. This remains the case, even though federal courts give these due process rights far less protections by applying a rational basis review under the federal constitution. See *General Motors Corp. v. Romien*, 503 U.S. 181, 191 (1992) (finding “[t]he retroactive aspects of [economic] legislation, as well as the prospective aspects, must meet the test of due process’: a legitimate legislative purpose furthered by rational means.”) (quoting *Pension Benefit Guar Corp.*, 467 U.S. 717, 730 (1984)). States may interpret the due process clause of their constitutions to give greater protection than the federal constitution. See *Chase Securities Corp. v. Donaldson*, 325 U.S. 304, 312-313 (1945) (reasoning “[m]any [states] have, as they are privileged to do so, interpreted their own ...

constitutions to give clauses a more rigid interpretation"). Illinois courts have done just that by refusing to adopt the more deferential federal due process analysis. The Illinois Supreme Court has made clear that when a statute of repose or a statute of limitations is repealed, if the time limitation period has expired prior to repeal "the defendant has a vested right to invoke the bar of the limitations period as a defense to a cause of action." *M.E.H.*, 685 N.E. 2d at 339.

Conclusion

Accordingly, defense practitioners seeking to challenge application of the asbestos exemption to a previously time-barred claim on due process grounds should challenge the application based on the Illinois Constitution. This would be the case in a diversity action in federal court as well, because federal courts are bound by Illinois law when assessing a challenge based on the Illinois constitution. *See Anderson v. Catholic Bishop of Chicago*, 759 F.3d 645, 648 (7th Cir. 2014) (applying Illinois due process analysis to a challenged application of the sex abuse statute of repose based on the Illinois due process clause); *see also Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938). Also, defense practitioners who can establish that the due process clause precludes application of the asbestos exemption should be prepared for opposing counsel to argue, in some cases, that the defendant is a seller or manufacturer of the asbestos product, and that as a result Section 214(b) does not apply.

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