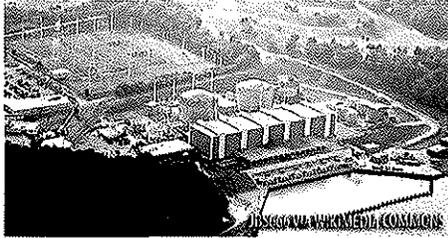




## Statute of repose doesn't bar asbestos claim 40 years later

*Time limit would wrongly create 'absolute immunity,' judge says*

By: Eric T. Berkman    April 19, 2018



The Calvert Cliffs Nuclear Power Plant, one of two sites where the decedent worked as a pipe inspector between 1971 and 1978

The statute of repose's six-year window did not bar a claim by the estate of a man who contracted mesothelioma several decades after being exposed to asbestos at work, a U.S. District Court judge has ruled.

The lawsuit claimed that nuclear power plant inspector Wayne Oliver, who died in 2016, developed mesothelioma as a result of his exposure to asbestos used in steam turbine generators designed, manufactured and installed by defendant General Electric Co. at a pair of plants where Oliver worked.

GE argued in a summary judgment motion that the Massachusetts statute of repose, G.L.c. 260, §2B, applied. The statute states that a plaintiff must bring any tort action alleging negligence in the design, planning, construction or administration of an "improvement to real property" within six years of completion.

But Judge Rya W. Zobel found that application of the statute of repose in a case such as the one before her would not further the legislative intent behind the statute.

"The combination of extended latency periods and known risks of exposure make unreasonable an asbestos defendant's expectation of a slate 'wiped clean of ancient obligations,'" Zobel wrote, denying GE's motion. "[I]t is not at all clear that the six-year statute of repose was designed to bar a category of claims known uniformly to have a latency period of at least twenty years. To so hold would transform a statute intended to limit liability into one that creates absolute immunity."

The 19-page decision is *Stearns, et al. v. Metropolitan Life Insurance Co., et al.*, Lawyers Weekly No. 02-184-18. The full text of the ruling can be found [here](#).

### 'Needed clarification'

Plaintiffs' counsel Michael C. Shepard of Boston called the ruling a "needed clarification" to the Massachusetts statute.

"Due to the long latency of mesothelioma and other asbestos-related diseases, a six-year statute of repose would essentially act as a complete ban on bringing a cause of action and would grant a defendant complete immunity after six years," he said.

Shepard added that applying the statute in a case such as *Stearns* would hypothetically enable GE — which, he said, knew the risks of using asbestos products at the time yet refused to consider other available options — to install asbestos insulation in a building today with no liability concerns since nobody could possibly develop cancer within the six-year window.

Andrew S. Wainwright of Boston, who represents plaintiffs in toxic tort cases, said the statute of repose was intended to acknowledge that buildings may last a long time but cannot be guaranteed forever, a rationale that does not apply to latent diseases.

"For any latent disease where the exposure occurred so long ago, the question is not how long the building will last, but how long after exposure it takes the disease to develop," he said.

GE's attorney, Catherine A. Mohan of Hartford, Connecticut, declined to comment, but Salem's Mark A. Lavoie, who represented co-defendant NStar Electric, which was granted summary judgment on other grounds, said the statute of repose has been upheld consistently since the Supreme Judicial Court first examined it in the 1982 *Klein v. Catalano* decision.

In that case, the SJC applied the statute to bar a claim against an architect brought by a plaintiff who was injured when a building's outer door struck him, shattering the door's glass panels. The court upheld the statute's constitutionality in that case, finding it struck a proper balance between the public's right to a remedy and the need to limit liability for those involved in construction activities.

"That's why this ruling was a bit of a surprise," Lavoie said. "The ramifications are obvious: It could open to the door to expose certain defendants who otherwise might have been protected. So it's a significant decision."

Martin J. Rooney of Braintree, who defends toxic tort cases, called Zobel's public policy analysis "problematic" since the Legislature had engaged in its own analysis in enacting the statute.

Rooney also noted that attacks on the statute are becoming frequent. In fact, he said, the SJC recently heard arguments in *Terry Bridgwood v. A.J. Wood Construction, Inc.*, a case challenging the applicability of the statute to Chapter 93A cases.

"While it is certainly understandable that individual plaintiffs feel aggrieved by the application of the statute to their particular case, the repose period is the balance struck by the Legislature for the overall good of the judicial system and the economy," he said. "It should be the Legislature that addresses any exemptions or alterations to that statute."

Kyle E. Bjornlund, a Boston attorney and co-chair of the Massachusetts Defense Lawyers Association's Toxic Torts Committee, pointed out that while other jurisdictions have included "carve-outs" in their statutes, creating specific exceptions for latent diseases caused by asbestos, the Legislature did not do so in enacting the Massachusetts statute or in amending it on two subsequent occasions.

"And there were certainly plenty of asbestos-related PI actions pending in Massachusetts courts in 1985 when the statute was most recently revised," he said.

Meanwhile, Nancy A. Kelly of Boston, who defends asbestos cases, said the decision may be persuasive but it is not controlling. In fact, Kelly said, Superior Court Judge Heidi E. Brieger recently issued a ruling that the statute barred claims based on initial installation of asbestos products but not those based on repairs to existing asbestos products.

"Judge Brieger didn't utilize the same analysis as Judge Zobel," Kelly said. "This issue won't be settled until the SJC interprets the statute of repose and what it means in an asbestos case, or until the Legislature speaks and decides to carve out an exception."



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*— Nancy A. Kelly, Boston*

## **Deadly exposure**

Oliver, the decedent, worked as a pipe inspector during the construction of Pilgrim Nuclear Power Station and Calvert Cliffs Nuclear Power Plant between 1971 and 1978.

Defendant GE designed, manufactured and sold steam turbine generators to be installed at both plants, and its engineers supervised each installation. Oliver worked for architect-engineer Bechtel Corp., which was not a party to the action.

GE's specifications called for insulation materials containing asbestos. New England Insulation, the subcontractor installing the insulation, apparently tried to persuade GE to use a non-asbestos alternative that GE allegedly rejected.

Oliver worked throughout the Pilgrim facility and was apparently in both the nuclear reactor building and on the turbine floor while insulation work was being performed. He also apparently took on a similar role at Calvert Cliffs.

Between the two facilities, Oliver allegedly was exposed to asbestos from 1971 to 1978. He remained in excellent physical health until 2015, when he was diagnosed with malignant mesothelioma. He died in April 2015.

In 2017, Oliver's estate filed suit against GE; NStar, which owned the facility; and a number of other entities involved in plant construction and operations.

The defendants moved for summary judgment on grounds that the claim was untimely under the statute of repose.



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— Judge Rya W. Zobel



### Timely action

Zobel rejected the plaintiffs' argument that the statute of repose could not bar their claim because pre-installation asbestos-containing insulation materials did not constitute "improvements to real property."

"The nature of the activities enumerated in Section 2B — design, planning, and construction — clearly contemplate the process of improvement as well as the finished product, and thereby reach integral components like asbestos-containing insulation," the judge said.

Nonetheless, Zobel found the statute of repose inapplicable on public-policy grounds.

In doing so, she distinguished the case from *Klein*.

"In upholding the statute of repose, the SJC noted that — at least in the context of personal injury — the vast majority of claims would be brought within the six-year period," Zobel said. "The same is categorically untrue of asbestos exposure, whose effects will rarely, if ever, appear within the six-year window deemed sufficient for ordinary personal injury claims."

Zobel also noted that, unlike cases such as *Klein*, staleness of evidence is not as important a consideration, nor is the perceived injustice in prolonging the liability of actors whose work had been completed years earlier.

Accordingly, she concluded, the statute of repose should not be interpreted as barring the plaintiffs' claim.

### Stearns, et al. v. Metropolitan Life Insurance Co., et al.

**THE ISSUE:** Did the six-year statute of repose bar a claim brought by the estate of a man who contracted mesothelioma several decades after being exposed to asbestos at work?

**DECISION:** No (U.S. District Court)

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

Catherine A. Mohan of McCarter & English, Hartford, Connecticut; Stesha A. Emmanuel and Anne E. Shannon, of McCarter & English, Boston; Mark B. Lavoie of McDonough, Hacking & Lavoie, Salem (defense)

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