Supreme Judicial Court

FOR THE COMMONWEALTH OF MASSACHUSETTS

NO. SJC-12544
MIDDLESEX COUNTY

JUNE STEARNS AND CLIFFORD OLIVER, AS CO-EXECUTORS OF THE ESTATE OF WAYNE OLIVER
PLAINTIFFS-APPELLEES,

v.

METROPOLITAN LIFE INSURANCE COMPANY, ET AL.,
DEFENDANTS-APPELLANTS.

ON APPEAL AS A CERTIFIED QUESTION FROM THE ORDER OF THE UNITED STATES DISTRICT COURT—DISTRICT OF MASSACHUSETTS, CASE NO. 1:15-CV-13490-RWZ

BRIEF OF *AMICUS CURIAE*
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STATEMENT OF INTEREST

Lawrence G. Cetrulo and Cetrulo LLP were appointed by the Massachusetts Superior Court as Defendants' Liaison Counsel in the Massachusetts Asbestos Litigation ("MAL") in 1985 by the Honorable William C. O'Neill. As Liaison Counsel, Attorney Cetrulo and Cetrulo LLP act on behalf of MAL Defendants by communicating and liaising between the Court and all MAL Defendants. Attorney Cetrulo and Cetrulo LLP's role as Liaison Counsel also requires proposing case development schedules and filing briefs to protect the interests of all MAL Defendants. When an issue arises that may impact every Defendant involved in the MAL, it is the role of Defendants' Liaison Counsel to intervene to protect those interests effectively and efficiently.

To promote these objectives, Defendants' Liaison Counsel participates as *amicus curiae* in cases raising issues of importance to Defendants in the MAL. Lawrence G. Cetrulo and Cetrulo LLP believe that this is such a case and that their perspective can assist the Court in resolving the important issues raised by this appeal.

STATEMENT OF THE ISSUES PRESENTED

Whether or not the Massachusetts statute of repose, Gen. Laws. Ch. 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.

STATEMENT OF THE CASE

Defendants' Liaison Counsel, as *amicus curiae*, adopts Defendant-Appellant General Electric Company ("General Electric")'s statement of the case regarding the prior proceedings.

STATEMENT OF THE FACTS

Defendants' Liaison Counsel, as *amicus curiae*, adopts Defendant-Appellant General Electric's Statement of the Facts.

ARGUMENT

The Court's role is to interpret the law, not to create it. See Rosenbloom v. Kokofsky, 373 Mass. 778, 780 (1977) ("The scope of the authority of this court to interpret and apply statutes is limited by its constitutional role as a judicial, rather than a legislative, body"). See also School Comm. of

Springfield v. Board of Ed., 362 Mass. 417, 458-59 (1972) ("although we will pass on questions of law related to the interpretation and the enforcement of the statute, it is not appropriate for us to enter directly into… strictly administrative function[s] committed to agencies of the executive department of government").

In interpreting the law, the Court's "primary duty… is to effectuate the intent of the Legislature in enacting" the law. Global NAPs, Inc. v. Awiszus, 457 Mass. 489, 496 (2010), citing International Org. of Masters v. Woods Hole, Martha's Vineyard & Nantucket S.S. Auth., 392 Mass. 811, 813 (1984). "It is not the province of courts to add words to a statute that the Legislature did not choose to put there in the first instance" (Awiszus, 457 Mass. at 496), nor is it the place of the courts to create new statutory remedies or duties Congress never intended. See Passatempo v. McMenimen, No. 060205BLS1, 2006 WL 760300, at *4 (Mass. Super. Mar. 6, 2006) (declining to "expand the reach of the statute of repose beyond that set forth in the clear language of the Legislature"). See also Shell Oil Co. v. City of Revere, 383 Mass. 682, 687 (1981) ("Our deference to

legislative judgments reflects neither an abdication of nor unwillingness to perform the judicial role; but rather a recognition of the separation of powers and the 'undesirability of the judiciary substituting its notion of correct policy for that of a popularly elected Legislature'") (quoting Zayre Corp. v. Attorney General, 372 Mass. 423, 433 (1977)); Lunn v. Comm., 477 Mass. 517, 534 (2017) ("The prudent course is not for this court to create, and attempt to define, some new authority….The better course is for us to defer to the legislature to establish and carefully define that authority if the Legislature wishes that to be the law of this Commonwealth"); Hancock v. Comm'r of Ed., 443 Mass. 428, 456 (2005) ("We are, of course, mindful…of the responsibility…to defer to the Legislature in matters of policymaking.'") (quoting Campaign for Fiscal Equity, Inc. v. State, 100 N.Y. 2d 893, 927 (2003)); Porter v. Nowak, 157 F.2d 824, 825 (1st Cir. 1946) ("No mere omission, no mere failure to provide for contingencies, which it may seem wise to have specifically provided for, justify any judicial addition to the language of the statute") (quoting United States v. Goldberg, 168 U.S. 95, 103 (1897)).

See also McGonagle v. United States, 155 F. Supp. 3d 130, 136 (D. Mass. 2016) ("courts should not create new bases for liability").

Nor may the Court read unwritten exceptions into statutes. See Dist. Atty. for Plymouth Dist. v. Bd. of Selectmen of Middleborough, 395 Mass. 629, 633 (1985) (statutory "[e]xceptions are not to be implied").

Plaintiffs-Appellees June Stearns and Clifford Oliver, as co-executors of the estate of Wayne Oliver, ask this Court to answer the District Court's Certified Question (Stearns v. Metropolitan Life Ins. Co., No. 15-13490-RWZ, 308 F.Supp.3d 471 (D. Mass. 2018)) in the affirmative, and thereby read into the Massachusetts Statute of Repose, Gen. Laws. Ch. 260, § 2B, an unwritten latent disease exception. See Brief of Estate, pp. 9-10.

The Statute of Repose does not include a latent disease exception. There is no evidence the Massachusetts Legislature ever intended to include such an exception in the Statute of Repose. Nor have Massachusetts Courts, prior to the District Court's decision, ever interpreted the Statute of Repose to include such an exception. To adopt the Estate's position, this Court would therefore have to create an

exception which does not presently exist. The creation of new law, new statutory exceptions, and new remedies is the function of the Massachusetts Legislature, not the Court.

Defendants' Liaison Counsel respectfully urges, therefore, that the Court answer the Certified Question in the negative, and hold that the Statute of Repose applies exactly as enacted by the Massachusetts Legislature—without an unwritten latent disease exception.

I. In Enacting the Statute of Repose, the Massachusetts Legislature Intended to Limit Liability in the Construction Setting.

During the late 1960s and early 1970s, product liability litigation surged in the United States. This increase in product liability litigation was accompanied by a corollary increase in the cost of product liability insurance. See U.S. Dep't of Commerce, Interagency Task Force on Product Liability, Final Report VII-22 (1977). In an attempt to decrease both product liability litigation and the associated costs of product liability insurance, certain state legislatures enacted statutes of repose, cutting off liability for improvements to real property after a

specified time period.[1] In enacting statutes of repose, these state legislatures sought to protect parties from litigating claims related to construction and capital equipment projects long since completed,[2] while also ensuring the availability and affordability of insurance to cover claims which may arise.[3]

a. The Massachusetts Legislature Did Not Include Any Latent Disease Exception To The Statute Of Repose.

In 1968, Massachusetts adopted its own statute of repose. In relevant part, the Massachusetts Statute of Repose provides:

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[1] Michael Martin, A Statute of Repose for Product Liability Claims, 50 Fordham L. Rev. 745, 750 (1982).

[2] "Statutes of repose… protect important legal and social policy interests, and represent a conscious policy decision that… Defendants deserve the peace of mind that comes with a close-ended limitations period." Andrew Ferrer, Excuses, Excuses: The Application of Statutes of Repose to Environmentally-Related Injuries, 33 B.C. Envtl. Aff. L. Rev. 345, 355 (2006), citing Josephine H. Hicks, Note, The Constitutionality of Statutes of Repose: Federalism Reigns, 38 Vand. L. Rev. 627, 632 (1985) (Statutes of repose were intended to address the long-standing problem of "older products, latent medical problems, and permanent or durable improvements" that have exposed Defendants to "abnormally long periods of potential liability and unusually large numbers of potential Plaintiffs").

[3] Ferrer, supra note 2, at 355 ("Predictable liability endpoints for business enable actuaries to more accurately calculate the rest than determine premium prices, thereby increasing insurance policy options and stabilizing costs for Defendants").

> An action of tort for damages arising out of any deficiency or neglect in the design, planning, construction or general administration of an improvement to real property … shall be commenced only within three years next after the cause of action accrues; provided, however, 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.

See Mass. Gen. Laws ch. 260, § 2B.

"General Laws c. 260, § 2B, was enacted in response to case law abolishing the rule that once an architect or builder had completed his work and it had been accepted by the owner, absent privity with the owner, there was no liability as a matter of law." Klein v. Catalano, 386 Mass. 701, 708 (1982). "These cases greatly increased the liability of architects, contractors, and others involved in the construction industry," creating an "unlimited class of potential claimants, but also, in many instances… an extension in duration of the liability for negligence." Id. (internal citation omitted). "Since an ordinary statute of limitations did not begin to run until either the date of the injury or its discovery, those involved in construction were subject to possible liability throughout their professional lives and into

retirement." Id. at 708-09. In response to what it viewed as the problem of potentially unlimited liability in the construction setting, the Massachusetts "Legislature placed an absolute outer limit on the duration of this liability." Id. at 709. Accord Pobieglo v. Monsanto Co., 402 Mass. 112, 123 (1988) ("Statutes of repose evince a clear legislative intent for an absolute time bar").

As this Court has recognized, the Massachusetts Legislature's intent, when enacting the Statute of Repose, in "limiting the duration of liability is a well[-]recognized public purpose." Klein, 386 Mass. at 709. As this Court has also recognized, "[t]here comes a time when a defendant ought to be secure in his reasonable expectation that the slate has been wiped clean of ancient obligations, and he ought not to be called on to resist a claim 'when evidence has been lost, memories have faded, and witnesses have disappeared.'" Id., citing Rosenberg v. North Bergen, 61 N.J. 190, 201 (1972). "Otherwise, those engaged in the design and construction of real property [would] have to mount a defense when '[a]rchitectural plans may have been discarded, copies of building codes in force at the time of construction may no longer be in

existence, persons individually involved in the construction project may be deceased or may not be located.'" Klein, 386 Mass. at 709-10 (citing Howell v. Burk, 90 N.M. 688, 694 (Ct. App. 1977)). In enacting the Statute of Repose, "the Legislature struck what it considered to be a reasonable balance between the public's right to a remedy and the need to place an outer limit on the tort liability of those involved in construction." Klein, 386 Mass. at 710.

In its Brief, the Estate argues that creating an unwritten latent disease exception to the Statute of Repose is not contrary to the Massachusetts Legislature's intent in enacting the Statute. See Brief of Estate, p. 26. Specifically, the Estate contends that, in enacting the Statue of Repose, the Massachusetts Legislature did not intend to completely eliminate liability for construction setting, but rather only to limit liability. Id.

The Estate's position is belied by the express language of the very decision it cites in support— Klein v. Catalano. See Klein, 386 Mass. at 709 (the Massachusetts "Legislature placed an absolute outer limit on the duration of this liability") (emphasis added). Accord Pobieglo, 402 Mass. at 123 ("Statutes

of repose evince a clear legislative intent for an absolute time bar").

b. Had The Massachusetts Legislature Desired To Include A Latent Disease Exception To The Statute Of Repose, It Would Have Done So.

In its Brief, the Estate does not deny that, as written, the Statute of Repose, does not include a latent disease exception. See Mass. Gen. L. ch. 260, § 2B. Rather, the Estate asks the Court to create new law by applying an unwritten exception in this case. See Brief of Estate, pp. 29-33.

Creating new law is the function of the Legislature, not the Court. Had the Massachusetts Legislature wished to include a latent disease exception, it could have done so. This Court cannot simply interpret the Statute of Repose to contain an unwritten latent disease exception which the Legislature did not see fit to include in the very text of the Statute.

Further, had the Massachusetts Legislature wanted to include a latent disease exception, it has demonstrated that it knows how to do so. Indeed, the Legislature included such an exception in a separate section in the Statute of Repose concerning medical malpractice actions.

As this Court has recognized, "the Legislature allowed only one exception to the statute of repose, that pertaining to actions arising from a foreign object left in the body." See Joslyn v. Chang, 445 Mass. 344, 350 (2005). This exception, which is inapplicable here, is the only possible exception to the Statute of Repose. See Dist. Atty. for Plymouth Dist., 395 Mass. at 633 ("Where there is an express exception, it comprises the only limitation on the operation of the statute and no other exceptions will be implied"). Accord Joslyn, 445 Mass. at 350 ("The fact that the Legislature specified one exception… strengthens the interference that no other exception was intended") (citing LaBranche v. A.J. Lane & Co., 404 Mass. 725, 729 (1989)). See also Joslyn, 445 Mass. at 350 ("[e]nforcement of the statute of repose as a rigid prohibition of action is consistent with [this Supreme Judicial Court's] cases, which are clear that statutes of repose are not subject to any form of equitable tolling, except as specifically provided by the statute… the Court "cannot introduce an equitable exception [into the Statute of Repose] when the Legislature has fashioned an iron-clad rule") (citing

Protective Life Ins. Co. v. Sullivan, 425 Mass. 615, 631 n.19 (1997)) (emphasis added).

As this Court has recognized, its "duty… is to adhere to the very terms of the statute [of repose], and not, upon imaginary equitable considerations, to escape from the positive declarations of the text. No exceptions ought to be made, unless they are found therein; and if there are any inconveniences or hardships growing out of such a construction, it is for the legislature, which is fully competent for that purpose, and not for the court, to apply the proper remedy." Joslyn, 445 Mass. at 352 (emphasis added).

The Court has an obligation and a responsibility to interpret and apply the Statute of Repose exactly as enacted by the Massachusetts Legislature – without a latent disease exception.

II. Massachusetts Law Does Not Support the Estate's Position.

If the Court were to interpret the Statute of Repose as including an unwritten latent disease exception, it not only would divert from the clear language of the Statute and the Massachusetts Legislature's intent in enacting it, it would also divert from the Massachusetts Courts which have

uniformly applied the Statute of Repose in cases involving latent diseases. There is no precedent for the Estate's position.

The Estate readily admits that there is no Massachusetts judicial decision or other legal authority in support of their contention that the Massachusetts Statute of Repose contains an unwritten latent disease exception. See, Brief of Estate, p. 32. Because there is no Massachusetts authority to support its position, the Estate instead relies upon decisions of Courts in other States, interpreting different Statutes of Repose, enacted by different State Legislatures. See Id., pp. 30-32. To justify its reliance on non-Massachusetts case law interpreting non-Massachusetts statutes, the Estate notes that no Massachusetts Appellate Court has addressed whether the Statute of Repose contains an unwritten latent disease exception. See Brief of Estate, p. 30. Conveniently, the Estate fails to mention that Massachusetts trial courts have addressed this issue, and have held that the Statute of Repose applies to cases involving latent diseases.

By way of example, judges in the Massachusetts Asbestos Litigation ("MAL") in the Massachusetts

Superior Court, who are familiar with tort claims arising out of latent diseases, have consistently applied the statute of repose, as intended by the Legislature—uniformly and without adopting an unwritten latent disease exception. See, e.g., Donlan v. A.W. Chesterton Co., et al. (C.A. No. 07-774) (2007); Sylvestre v. New England Ins. Co., No. MICV201507031, 2017 WL 5308017, at *1 (Mass. Super. Ct. Apr. 27, 2017) (holding the statute of repose "clearly cover[s]" Defendant's work during the design, construction and installation of an asbestos-insulated boiler, and holding "the construction of [asbestos-insulated boiler] is precisely the kind of undertaking that the statute of repose was enacted to protect") (emphasis added).

These judges, who are highly familiar with latent diseases caused by alleged asbestos exposure, have consistently applied the Statute of Repose. The Court need not adopt the decisions of the few foreign courts which have interpreted foreign states' statutes of repose to include an unwritten latent disease exception. This Court should instead follow the decisions of the Courts of this Commonwealth, which

have consistently applied the Statute of Repose as written—without a latent disease exception.

III. Application of an Unwritten Latent Disease Exception Would Violate the Due Process Rights of Numerous Parties.

In order to permit the Estate to proceed against General Electric in this case, the Court would have to not only read into the Statute of Repose an unwritten latent disease exception, it would also have to apply this unwritten exception retroactively. Retroactive abrogation of the rights of those who have relied upon the Statute of Repose is unconstitutional.

A statute generally will not apply retroactively absent clear legislative intent. When a statute does not contain an express prescription of its proper reach, "the court must determine whether the new statute would have retroactive effect, *i.e.*, whether it would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed. If the statute would operate retroactively, [the Court's] traditional presumption teaches that it does not govern absent clear congressional intent favoring such a result." Landgraf v. USI Film Prods., 511 U.S. 244, 280 (1994)

(emphasis added). The Legislature "possesses the power to resurrect claims extinguished by a statute of repose… but it must manifest those powers in the clearest possible terms." See Lieberman v. Cambridge Partners, L.L.C., 432 F.3d 482, 490 (3d Cir. 2005). Here, there is no indication that the Massachusetts Legislature intended a latent disease exception to the Statute of Repose to apply at all, let alone retroactively.

Applying an unwritten latent disease exception to the Statute of Repose retroactively as to General Electric would also violate General Electric's due process rights. See Landgraf, 511 U.S. at 266 (The Due Process Clause "protects the interests in fair notice and repose that may be compromised by retroactive legislation"). Cf. Galloway v. Diocese of Springfield in Illinois, 367 Ill. App. 3d 997, 1000 (2006) (Even the repeal of a statute of repose cannot revive claims which had already been extinguished without violating due process).

"A defense based on the expiration of a limitations period is a vested right protected by the constitution and beyond legislative interference. By analogy, the same is true of a defense based on the

expiration of a statute of repose. These rights are as valuable and entitled to as much protection as the plaintiffs' right to bring the suit itself." M.E.H. v. L.H., 177 Ill. 2d 207, 218 (1997) (internal citations omitted).

A Statute of Repose is not simply a procedural limitation, as the Estate contends (see, Brief of Estate, pp. 26-27) but is instead "a substantive definition of rights." Bolick v. Am. Barmag Corp., 306 N.C. 364, 366–67 (1982), citing Stevenson, Products Liability and the Virginia Statute of Limitations—A Call for the Legislative Rescue Squad, 16 U. Rich. L. Rev. 323, 334 n.38 (1982). Accordingly, revival of a defendant's liability through reversal of, or applying an exception to, the Statute of Repose, "long after [Defendants] have been statutorily entitled to believe it does not exist, and have discarded evidence and lost touch with witnesses, would be so prejudicial as to deprive them of due process." Colony Hill Condo. I Ass'n v. Colony Co., 70 N.C. App. 390, 394 (1984), citing Danzer v. Gulf & Ship Island Railroad Co., 268 U.S. 633 (1925).

IV. Whether the Estate is Without Recourse Against a Particular Party is Irrelevant.

The Estate's brief to this Court focuses on the fact that, if the Court fails to create a latent disease exception to the Statute of Repose, the Estate will be left without remedy against General Electric.[4] See Brief of Estate, pp. 27-38.

Specifically, the Estate claims that, because the Statute of Repose as written would leave certain companies immune from suit for alleged injuries arising from improvements to real property, members of the public might be left to suffer the consequences of their latent diseases without a remedy against those companies. See Brief of Estate, pp. 25-33. Whether or not the Estate can properly maintain a claim against General Electric does not justify the abandonment of bedrock legal principles. See Mutual Pharmaceutical Co., Inc. v. Bartlett, 570 U.S. 472, 490 (2013) ("sympathy…does not relieve us of the responsibility of following the law").

To the extent the law must be changed to provide a remedy against contractors and others protected by

[4] The Estate does not claim it is without remedy entirely. Indeed, the Estate brought suit against other viable defendants who did not assert a statute of repose defense.

the Statute of Repose, it is the Massachusetts Legislature which must change it. This Court, while properly tasked with interpreting the Statute of Repose, is not equipped with the requisite expertise to take an active role in changing it. See Huck v. Wyeth, Inc., 850 N.W.2d 353, 377 (Iowa 2014) ("courts are not institutionally qualified to balance the complex, interrelated, and divergent policy considerations"); Dunham v. Ware Sav. Bank, 384 Mass. 63, 73 (1981) ("Although the question we decide today is a proper subject for judicial determination, the competing policies at issue in this case make it ideally suited to legislative resolution").

While the Estate may find it unfair that it cannot maintain its claim against General Electric, it is not this Court's role to determine whether a piece of legislation like the Statute of Repose is unfair or unwise. See e.g., PLIVA, Inc. v. Mensing, 564 U.S. 604, 625-26 ("'[I]t is not this Court's task to decide whether the statutory scheme established by Congress is unusual or even bizarre.'" (quoting Cuomo v. Clearing House Ass'n, L.L.C., 557 U.S. 519, 556 (2009))); Suliveres v. Com., 449 Mass. 112, 116-17 (2007); Com. v. Leno, 415 Mass. 835, 841 (1993)

("Whether a statute is wise or effective is not within the province of courts"); Mellor v. Berman, 390 Mass. 275, 283 (1983) ("It is not for this court to judge the wisdom of legislation or to seek to rewrite the clear intention expressed by the statute").

Whether the Statute of Repose would impose hardship on the Estate is immaterial. See Joslyn, 445 Mass. 351-52 ("As we have stated previously, we recognize that statutes of repose may impose great hardship on a plaintiff who has suffered injury and has a meritorious claim but who does not suffer or discover the injury within the period permitted for initiation of suit. The duty of the court is to adhere to the very terms of the statute, and not, upon imaginary equitable considerations, to escape from the positive declarations of the text. No exceptions ought to be made, unless they are found therein; and if there are any inconveniences or hardships growing out of such a construction, it is for the legislature, which is fully competent for that purpose, and not for the court, to apply the proper remedy") (emphasis added, internal citation omitted).

That the Statute of Repose may preclude the Estate's claims against General Electric in this

particular instance does not justify the abandonment of bedrock legal principles solely to grant Plaintiff relief. Courts must exercise judicial restraint– a principle fundamental to the separation of powers within the Government. The judicial system is not the appropriate place to engage in policymaking.

V. There is No "Control" Exception To The Statute of Repose For Contractors.

The Estate argues that contractors such as General Electric, who allegedly were "in control" of an improvement to real property during the construction process, before the improvement was completed and turned over to the owner, are not protected by the statute of repose against certain latent injury claims that arise decades after the improvement was completed. The Estate's argument defeats the very purpose of the statute of repose by exposing construction contractors (and architects, designers, engineers, etc.) to potentially endless liability for deficiencies or neglect in their construction-related activities. There is no basis in the statutory language for such a "control" test to determine whether a contractor who allegedly was negligent in the process of constructing an

improvement may claim the protection of the statute. By its terms, the protection of the statute arises by operation of law six years after the improvement is opened to use or substantially completed and turned over to the owner.

Adding a "control" test to the application of the Statute of Repose would have a wide-ranging and negative impact on the construction industry. First, if having "control" of some part of an improvement to real property while in the very act of constructing that component negated a contractor's protections under the Statute of Repose, everyone involved in the construction of an improvement to real property could indefinitely remain subject to potential litigation. This would potentially impact every entity involved in the construction of a large project such as the Pilgrim nuclear power plant. As shown by the record in this case, Bechtel, which had overall responsibility for designing and building the power plant, employed numerous subcontractors. A593-594.

Second, having to determine if a party had "control" of a specific site or element of a large construction project at any particular time would place a huge burden on potential defendants.

"Control" in the context of an ongoing construction project is not an abstract concept. It will turn on such things as the precise language of pertinent contracts and subcontracts, applicable building codes and regulations, and industry standards and practices. This is precisely the kind of in-depth factual inquiry which is hindered by the passage of time "when evidence has been lost, memories have faded, and witnesses have disappeared" Klein, 386 Mass. at 709 (internal quotations and citations omitted). These additional burdens would not just impact insurance costs, but likely increase costs across the board. It would also discourage developers from using smaller sub-contractors, or from allowing more than one subcontractor to collaborate on a particular project.

VI. The Estate's Position, if Adopted, Will Harm the People of Massachusetts.

Even if the judicial system were the appropriate place to engage in policymaking, which it is not, public policy considerations do not support the Estate's position.

As set forth above, the Massachusetts Legislature enacted the Statute of Repose to provide for the "best

economic interests of the public as a whole."[5] If the Court were to interpret the Statute of Repose in the manner advocated by the Estate, it is the people of the Commonwealth of Massachusetts who will suffer.

Manufacturers "most consistently exposed to" the risk of litigation are "those producing capital goods, such as industrial machinery."[6] "These manufacturers sell relatively few products and, therefore, may be less able to 'pass through' the costs" of litigation "into the price of new machines." Id. Indeed, "even the investigation and processing of claims is an expensive procedure, and the expense is greater when witnesses and records are difficult to obtain or have long since disappeared." Id.

Without the protection of the Statute of Repose, contractors will face the very heightened liability that the Massachusetts Legislature sought to restrict, particularly as such contractors cannot necessarily "trust that taking appropriate environmental safety measures by today's standards would adequately defend them against future liability," causing "great difficulty in predicting and planning for future

[5] Ferrer, supra note 2, at 354.

[6] Martin, supra note 1, at 747.

liabilities." [7] In contrast, the "[m]ore certain liability and stabilized insurance rates" which result from the Statute of Repose "facilitate efficient business planning and ultimately benefit businessmen, professionals, consumers, and the economy."[8]

CONCLUSION

It is the duty of this Court to apply the Statute of Repose as directed by the Legislature. There is no legitimate basis to read an unwritten latent disease exception into the Statute of Repose.

WHEREFORE, the *amicus curiae*, Defendants' Liaison Counsel respectfully requests that this Court answer the Certified Question in the negative, and hold that there exists no unwritten latent disease exemption within the Massachusetts Statute of Repose.

[7] Ferrer, supra note 2, at 367.

[8] Hicks, supra note 2, at 633.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this nineteenth day of November 2018, I have served two (2) copies of the within Amicus Brief by priority mail, postage prepaid upon:

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MASS. R. A. P. 16(k) CERTIFICATION

I hereby certify that this brief complies with the rules of the Court including, but not limited to, Mass. R. A. P. 16(a), 18, and 20.

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