

Pa. Ruling Limits Asbestos Claims In Construction Suits

By **Matt Fair**

Law360, Philadelphia (July 02, 2014, 6:50 PM ET) -- A recent Pennsylvania Superior Court opinion affirming that the state's 12-year statute of repose can be used to quash asbestos claims signals a major victory for engineers and other entities involved in the construction and installation of large-scale property improvements containing the cancer-causing fiber.

In a published decision, a three-judge panel found that personal injury claims brought against Foster Wheeler Corp. over on-the-job exposure to asbestos from a boiler installed in 1955 were barred by a 12-year statute of repose that runs from the point when a defendant completes an improvement to real property.

The decision, which overturned a Philadelphia County judge's conclusion that a 2009 state Supreme Court decision had created an exception to the statute for asbestos claims, is a clear victory that entities involved in the design or construction of heavy industrial equipment can rely on to avoid liability, Duane Morris LLP attorney Sharon Caffrey told Law360.

"For a limited group of defendants, this has a very significant impact," Caffrey said in an interview. "It is a significant holding for engineers who could be potential defendants, or people who put in large appurtenances to real estate."

The Superior Court's decision came in a case brought in June 2010 by former Pennsylvania Power & Light Co. worker David Graver and his wife, alleging he developed mesothelioma after being exposed to asbestos from a massive boiler that Foster Wheeler had helped to design and install at a steam plant along the Susquehanna River.

A Philadelphia County judge denied Foster Wheeler's bid for summary judgment after ruling that "strong dicta" in the Supreme Court's 2009 decision in *Eleanor Abrams v. Pneumo Abex Corp.* created an exemption to the 12-year statute of repose that traditionally governs personal injury claims arising against entities involved in the construction of real property or any improvements to the property.

A jury awarded the Gravers \$4.5 million in damages, which was ultimately knocked down to \$750,000.

On appeal, however, Judge Jack Panella of the state's Superior Court ruled that language in the *Abrams* decision stating that "no statutory right of repose exists with respect to asbestos cases" was not intended to create precedent. In so ruling, the court said that if Pennsylvania is to adopt an asbestos-related exception to the statute of repose in construction cases, it should not come from the courts but

from lawmakers, as have exceptions to time limits in asbestos cases in Maryland, New Jersey and Virginia.

“The Superior Court was faced with a difficult choice between applying what was pretty clearly dicta in the Supreme Court's Abrams decision, which suggested an asbestos exception to the statute of repose, and the language of the statute itself, which contains no such exception,” said John Hare, chair of the appellate advocacy and post-trial practice group at Marshall Dennehey Warner Coleman & Goggin PC. “Given that choice, I think the court properly applied the statutory language because, as Judge Panella pointed out, exceptions to statutes generally come from the legislature, not the courts.”

Robert Paul, an attorney for the Gravers, told Law360 on Wednesday that he would likely seek en banc review of the decision or an appeal to the Supreme Court.

“We are disappointed with the decision,” he said. “We anticipate seeking further appellate review.”

While Caffrey said that the decision affected a small subset of defendants typically fingered in asbestos litigation, Shook Hardy & Bacon LLP managing partner Sean Wajert said that an increasingly inventive plaintiff's bar had more regularly started including entities involved in the design and installation of large-scale industrial equipment into their product liability suits.

“As mass tort litigation has evolved, clearly plaintiffs have frequently tried to bring in defendants who have a good-faith claim that their product was involved in an improvement to a real property,” said Wajert, who helped draft an amicus brief in the Graver case on behalf of the Coalition for Litigation Justice. “It clearly doesn't apply to all asbestos defendants and all asbestos-containing products. On the other hand, it is not an infrequent situation.”

Wajert said the language in the Abrams decision was clearly dicta, noting that the case centered on statutes of limitations and not on statutes of repose. In Abrams, the Supreme Court ruled that plaintiffs who received damages for a nonmalignant asbestos-related disease were not barred by the statute of limitations from later bringing claims against a new defendant for a malignant asbestos-related disease.

“It is kind of the farthest reaches of dicta,” he said, noting the major differences between the Abrams and Graver cases. “The parties were not the right parties, the issues were not the right issues, and it was very much a reach beyond the facts and the holding of the Abrams case.”

Indeed, Judge Panella's opinion highlighted the key differences between statutes of limitations and statutes of repose before ultimately concluding that the Abrams decision was distinguishable from the dispute at the center of the Graver case.

“The statute of repose is something that deals with improvements to real property. It's different from a statute of limitations, and that was a big point of the Superior Court's decision,” Caffrey said. “The Superior Court basically said we have to apply the statute of repose and that statutes of repose have no flexibility unlike a statute of limitations.”

Caffrey said it would be interesting to see how the courts would reconcile the Graver decision with two other recent holdings by the Supreme Court allowing common-law asbestos claims to be brought against employers outside of a 300-week window in the state's Workers' Compensation Act providing exclusive remedy for job-related asbestos injuries.

“The Supreme Court is now allowing actions by people who have a latent disease that develops after that limitation period in the workers’ compensation statute,” she said. “If an employer is a premises owner and the issue involves products or equipment that is appurtenant to the premises where the person is working, it’s going to be interesting to see where the courts have to draw the line. If work on a boiler caused mesothelioma, can there be a statute of repose argument?”

The Gravers are represented by Robert E. Paul and Richard P. Myers of Paul Reich & Myers PC.

Foster Wheeler is represented by Leroy J. Janiczek of Reilly Janiczek & McDevitt PC and Maria Katina Karos of Sedgwick LLP.

The case is David and Frances Graver v. Foster Wheeler Corp., case numbers 470 EDA 2012 and 641 EDA 2012, in the Superior Court of Pennsylvania.

--Additional reporting by Andrew Scurria. Editing by Elizabeth Bowen and Philip Shea.

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