

Presentation of Leichling v. Honeywell Case

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I. INTRO:

- a. Alex asked me to speak to you today about the 4th Circuit's decision in Leichling v. Honeywell, 842 F.3d 848. This is a December 2016 decision, so it is about a year old, but it touches on an issue important to marine terminal operators, and that is, the possible protections offered to them by a state "statute of repose."

II. What is a "statute of repose?" It is analogous to a statute of limitations, but where a statute of limitations is a procedural device that operates as a defense to limit the remedy available from an existing cause of action, a "Statute of Repose" creates a substantive right in those protected to be free from liability after a legislatively determined period of time. *Carven v. Hickman*, 135 Md. App. 645, 652 (2000), *aff'd by, Hickman, ex. rel Hickman v. Carven*, 366 Md. 362 (2001).

Many states have adopted a Statute of Repose, in one form or another, based on a National Model Rule endorsed in the 1980's by the American Institute of Architects, the National Society of Professional Engineers, and the Association of General Contractors.

Maryland's Statute of Repose in Md. Code Ann, Courts & Judicial Proceedings §5-108(a) states:

Except as provided by this section, no cause of action for damages accrues and a person may not seek contribution or indemnity for damages incurred when wrongful death, personal injury, or injury to real or personal property resulting from the defective and unsafe condition of an improvement to real property occurs more than 20 years after the date the entire improvement first becomes available for its intended use.

Md. Code Ann, Courts & Judicial Proceedings §5-108. Hence, Section (a) of the Statute bars suits in which (1) a plaintiff's alleged injuries resulted from an alleged defective and unsafe condition of an "improvement to real property," and (2) 20 years have elapsed since the entire improvement first became available for its intended use.

The courts in Maryland and the Fourth Circuit have had several recent opportunities to provide instruction on the proper scope and effect of Maryland's Statute of Repose, including the 2016 case of *Leichling v. Honeywell International, Inc.*, 842 F.3d 848, 851 (4th Cir. 2016).

III. But before we get to *Leichling v. Honeywell*, the threshold question is who does the Statute of Repose protect?

Section (b) of the statute protects by name architects, professional engineers or contractors and gives them a shorter, 10 year statute of repose from any suits brought more than 10 years after an improvement to real property with a latent unsafe condition comes on line.

Section (d)(ii)-(iv) of the statute EXCLUDES from protection manufacturers or suppliers of asbestos products.

Section (d)(i) excludes defendants in actual possession or control of the property as owner, tenant, or otherwise “when the injury occurred.” BUT how does that section (d)(i), which appears under a heading for asbestos-related injuries, restrict, if at all, Section (a) of the Statute, which appears to embrace a 20 year statute of repose for anyone else not specifically excluded or covered elsewhere, regardless of the defendant’s identity, so long as the case does not involve asbestos claims.

Under Maryland Law, the answer is unclear.

In Rose v. Fox Pool Corp., 335 Md. 351 (1994), a case involving suit brought by swimmer for diving injuries against the manufacturer of an allegedly defective in-ground swimming pool, Maryland’s highest Court, the Maryland Court of Appeals, interpreting the broad language of Section (a), held that the “no cause of action” language in 5-108(a) is clear and creates a blanket prohibition against all suits that meet the statutory criteria. Since Section (d) of the statute only excludes manufacturers of asbestos products from the benefit of the statute of repose, all other manufacturers are protected, stating “the defendant’s identity is irrelevant to determining whether 5-108(a) bars a particular cause of action for a non-asbestos-related injury.” The decision in the Rose case is cited with approval by the Maryland Court of Appeals in 2016 in Leichling v. Honeywell, where the court stated that, with the exception of claims against asbestos manufacturers, “otherwise, the statute bars suits that are covered by Section (a) of the statute.”

In Gilroy v. SVF Riva Annapolis LLC, 235 Md. App. 104 (Sept. 1, 2017), a case involving a suit brought by a workman for injuries sustained while trying to repair an HVAC unit on an allegedly improperly designed roof of a shopping center, Maryland’s intermediate appellate court limited the Rose case to its facts (involving “non-asbestos manufacturers”) and held that even though Section(d)(i) is nestled among a half dozen other provisions that relate only to asbestos claims, it nevertheless applied to bar application of the statute of repose in a non-asbestos case where the defendant Shopping Center was in actual possession or control of the property as owner, tenant, or otherwise “when the injury occurred.”

The Gilroy Court reversed a grant of summary judgment in favor of the property owner on the statute of repose and remanded the case, so the ultimate outcome of the case

remains to be seen, but there appears to be an apparent conflict between the Gilroy decision of the intermediate appellate court and the broader ruling in the Rose case (and by extension, in the Leichling v. Honeywell case) by Maryland's highest Court, so the resolution of that conflict remains to be seen for owners or occupiers of real property at the time of the plaintiff's injury.

However, even under Gilroy, a previous owner or occupier of real property—who was not the owner or occupier at the time of a recent injury—could seek protection of the Statute of Repose, as could a current owner or occupier of land who was not the owner of the property at the time of a long ago injury. The key in Maryland for now, until the Maryland Court of Appeals has the final word, is ownership “at the time the injury occurred,” not when the cause of action may accrue, as in tolling cases.

IV. The next question is “what is an improvement to real property” to which the Statute of Repose applies? The Leichling v. Honeywell case provides guidance.

A. FACTS: From 1854 to 1985, Honeywell manufactured chromium at a waterfront plant in Baltimore, Maryland. 842 F.3d at 850. Through the manufacturing process, Honeywell produced significant amounts of waste, including COPR, which the EPA classifies as a powerful carcinogen. Beginning in the 1940's, Honeywell stockpiled COPR waste near the docks, piers, and wharves in and around the Port of Baltimore.

During this same time period, Honeywell owned 85 acres adjacent to Dundalk Marine Terminal in Baltimore, and during the 1950's, Honeywell began using COPR as fill material on its 85 acre site. *Id.* In 1967, the Maryland Port Authority bought Honeywell's 85 acre property and used it to expand Dundalk Marine Terminal. One of the terms of the sale was that Honeywell had to continue to supply COPR fill to the Port Authority that the Authority could utilize for the expansion of Dundalk Marine Terminal. *Id.* This arrangement continued until 1976. *Id.*

The Plaintiff, Mr. Leichling, had worked at Dundalk Marine Terminal as a longshoreman from 1973 through 2001, and he died in 2012 from lung cancer that his survivors claimed was caused by the COPR fill at the Terminal. His survivors brought various tort claims—not against the owner of Dundalk Marine Terminal, the Maryland Port Authority, but against Honeywell, for depositing the contaminated fill at the terminal.

In defense, Honeywell raised the Maryland Statute of Repose, claiming that its provision of COPR fill to the Port Authority for use in enlarging Dundalk Marine Terminal constituted an “improvement to real property” and, therefore, that Mr. Leichling's claims were barred by the Statute of Repose.

- B. ISSUE: The issue in *Leichling* was whether Honeywell's use of COPR as fill on its 85 acre property amounted to an "improvement" under the Statute. In conducting its analysis, the *Leichling* Court noted that courts in Maryland interpreting the Statute generally apply a "common sense" test, which defines an "improvement" as:

[a] valuable addition made to property (usually real estate) or an amelioration in its condition, amounting to more than mere repairs or replacement, costing labor or capital, and intended to enhance its value, beauty or utility or to adapt it for new or further purposes. Generally has reference to buildings, but may also include any permanent structure or other development, such as a street, sidewalks, sewers, utilities, etc. An expenditure to extend the useful life of an asset or to improve its performance over that of the original asset. Such expenditures are capitalized as part of the asset's cost.

Leichling, 842 F.3d at 851, citing *Rose v. Fox Pool Corp.*, 335 Md. 351, 376 (1994)(quoting *Black's Law Dictionary* 757 (6th ed. 1990)).

- C. HOLDING: The *Leichling* Court found that, under this "common sense" test, Honeywell utilized COPR fill to create a 85-acre parcel which it then transferred to the Maryland Port Authority. The Port Authority, in turn, used – and continues to use – the parcel as an active marine terminal. Hence, the expansion of the 85 acre site with COPR - if not an improvement to real property standing alone - was at least an integral component of the expansion project and bestowed a greater utility upon both Honeywell and the Maryland Port Authority. 842 F.3d at 853. The Court thus confirmed that the use of COPR fill resulted in an "improvement" to property and that the Statute of Repose barred plaintiffs' tort claims brought against Honeywell more than 20 years after the expansion of Dundalk Marine Terminal with the COPR fill was completed in 1976.

V. Takeaways if you are a terminal operator:

- A. If you are sued (whether directly or by way of a cross-claim for indemnity) for personal injury or property damage (to real or personal property) and the injury involves an improvement to real property (anything that enhances the value of the property) that was put in service a long time in the past, check to see whether your state Statute of Repose offers you a complete defense.
- B. If you are/were the owner or occupier of the real property at issue at the time the person was injured, you may or may not be able to take advantage of the Statute of Repose, but check your local law. Maryland law is not firmly established yet on this point.