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February 15, 1990

The Honorable David B. Shapiro
320 House Office Building
Annapolis, Maryland 21401-1990

Dear Delegate Shapiro:

You have asked for advice as to whether a change in Courts and Judicial Proceedings Article, §5-108, "Injury to person or property occurring after completion of improvement to realty" may be given retroactive effect. 1/ It is my view that it may.

Section 5-108

Section 5-108 was originally passed in 1970 after similar bills failed in 1967, 1968 and 1969. 2/ The legislative history 3/ reveals that the bill was enacted in response to

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1 It is my understanding that the desire is to have the change apply in pending cases, and this advice is given with that understanding. It should be understood that the provision may not be applied to alter judgments that have become final. Maryland Port Admin. v. I.T.O. Corp., 40 Md.App. 697, 722, n. 22 (1978).

2 Senate Bill 240 of 1967 passed the Senate after the limit was amended from six to nine years, but was killed in committee in the House. The 1968 and 1969 bills (Senate Bills 68, 88 and 601 and House Bill 858 of 1968 and Senate Bill 162 of 1969) all died in committee in the originating houses. Senate Bill 241 of 1970 initially failed in the House, but was revived, amended to change the limit from nine to 20 years, and passed.

3 While legislative history from this era is not usually available, the file from the summer study of Senate Bill 162 of 1969 has survived and is available from Legislative Reference.

increasing suits against design professionals and contractors arising from judicial abolition of privity requirements and the adoption of the discovery rule for purposes of applying statutes of limitation. Whiting-Turner Contracting Co. v. Coupard, 304 Md. 340 (1985). Testimony by the Building Congress of Exchange, the Maryland Council of Architects, and the Consulting Engineers Council of Maryland expressed concern that, with the new changes in the law design professionals, builders and contractors were faced with the possibility that suit could be filed against them at any time in their life, and even against their estate after their death, even though they had no control over maintenance, repair, or remodeling of the building since it was completed. They noted that the passage of time raised problems of lost evidence and faded memories, and that even where defenses were successful, they were expensive. Thus, those testifying sought to be relieved of the necessity of defending suits after the passage of a set period of time.

The 1970 bill was codified at Article 57, §20, and provided:

> No action to recover damages for injury to property real or personal, or for bodily injury or wrongful death, arising out of the defective and unsafe condition of an improvement to real property, nor any action for contribution or indemnity for damages incurred as a result of said injury or death, shall be brought more than twenty years after the said improvement was substantially completed. This limitation shall not apply to any action brought against the person who, at the time the injury was sustained, was in actual possession and control as owner, tenant, or otherwise of the said improvement. For purposes of this section, "subtantially completed" shall mean when the entire improvement is first available for its intended use.

In 1973 the section was recodified as Courts and Judicial Proceedings Article, §5-108, which read:

> (a) 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.
>
> (b) This section does not apply if the defendant was in actual possession and control of the property as owner, tenant, or otherwise when the injury occurred.
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> (c) A cause of action for an injury described in this section accrues when the injury or damage occurs.

Code Revision explained the change as follows:

> This section is new language derived from Article 57, §20. It is believed that this is an attempt to relieve builders, contractors, landlords, and realtors of the risk of latent defects in design, construction, or

> maintenance of an improvement to realty manifesting themselves more than 20 years after the improvement is put in use./ The section is drafted in the form of a statute of limitation, but, in reality, it grants immunity from suit in certain instances. Literally construed, it would compel a plaintiff injured on the 364th day of the 19th year after completion to file his suit within one day after the injury occurred, a perverse result to say the least, which possibly violates equal protection. Alternatively, the section might allow wrongful death suits to be commenced 18 years after they would be barred by the regular statute of limitations.
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> The section if conceived of as a grant of immunity, avoids these anomalies. The normal statute of limitations will apply if an actionable injury occurs. [4/]
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> Subsection (c) is drafted so as to avoid affecting the period within which a wrongful death action may be brought.

Subsequent changes shortened the limit to ten years for architects and engineers (Chapter 698 of 1979) and for contractors (Chapter 605 of 1980).

The proposed legislation would provide that the section would not apply to a defendant who is a manufacturer or supplier of materials that are part of the improvement to real property. The legislation is being proposed in response to a series of court cases that have held that the section applies to bar suits against manufacturers of construction materials containing asbestos where those materials were installed over 20 years ago. See, First United Methodist Church v. U.S. Gypsum Co., 882 F.2d 862 (4th Cir. 1989); In re Personal Injury Asbestos Cases, Circuit Court for Baltimore City (Levin, J. 11/1/89); State of Maryland v. Keene Corp., Circuit Court for Anne Arundel County, Civil Action No. 1108600 (Thieme, J. 6/9/89); Mayor and City Counci of Baltimore v. Keene Corp., Circuit Court for Baltimore City, Case No. 84268068/CL25639 (Davis, J. 6/2/89).

Federal Due Process

The federal cases on retroactivity leave no doubt that retroactivity of the proposed legislation would not violate the federal Due Process Clause. The case that establshed the modern federal approach to retroactivity is Usery v. Turner Elkhorn

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4 It is my view that this would be the law in any event. For example, in Comptroller of Virginia v. King, 232 S.E.2d 895 (Va. 1977), it was held that Virginia's statute of limitations involving injuries from improvements to real property simply set an arbitrary outside limit on the initiation of lawsuits, and did not extend existing limits, such as the two-year limit for personal injury action. In addition, Code Revision's attempt to cure this problem was unsuccessful, as the Legislature found it necessary to amend the section in 1979 to clarify that an action must be filed within three years of accrual.

Mullen S.Ct.
Peters approach

Mining Co., 428 U.S. 1 (1976), which involved federal legislation establishing a system for compensation for coal miners disabled by black lung disease. Mine operators argued that the statute was unconstitutional because it imposed liability on them for disabilities suffered by miners who left their employ prior to the effective date of the Act, thus charging them "with an unexpected liability for past, completed acts that were legally proper and, at least in part, unknown to be dangerous at the time." Id. at 15. The Court concluded that "legislation readjusting rights and burdens is not unlawful solely because it upsets otherwise settled expectations.... This is true even though the effect of the legislation is to impose a new duty or liability based on past acts." Id. at 16. Thus, the Court held that, as with other laws not impinging on a fundamental right, the appropriate test was rational basis. Specifically, the Court stated that:

> "It is by now well-established that legislative Acts adjusting the burdens and benefits of economic life come to the Court with a presumption of constitutionality, and that the burden is on one complaining of a due process violation to establish that the legislature has acted in an arbitrary and irrational way." Id. at 15.

The Court went on to say that:

> "It does not follow, however, that what Congress can legislate prospectively it can legislate retrospectively. The retrospective aspects of legislation, as well as the prospective aspects, must meet the test of due process, and the justifications for the latter may not suffice for the former." Id. at 16-17.

While recognizing that the mine operators may not have known of the dangers, and had possibly acted in reliance upon their lack of liablity, the Court found that the Act was a rational measure to spread the costs of employee disability to those who have profited from the fruits of their labor. Id. at 18.

Like the statute in question in the Elkhorn Turner case, the proposed legislation seeks to allocate the benefits and burdens of economic life and, therefore, is subject to rational basis scrutiny. And, even if the proposed legislation is seen as creating new liability, it must also be seen as a rational measure to allocate the costs of personal injury from exposure to asbestos and for removal of asbestos to those who profited from its sale, and who were the most likely to have known of the dangers. 5/ Precisely that conclusion was reached in Wesley

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5 The dangers of asbestos exposure have been known since at least the turn of the century. See, District of Columbia v. Owens-Corning Fiberglass Corp., 1989 WL 99482 (D.C.App. 1989). Purchasers and employees, however, were unlikely to know asbestos was contained in the building materials.

Wash DC case

Statute original 1970

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Theological Seminary v. U.S. Gypsum Co., 876 F.2d 119 (D.C.Cir. 1989) (cert. pending #89-777), which upheld the retroactivity of a similar change to the D. C. statute governing claims arising from improvements to real property. 6/ In that case the Court specifically noted the absence of reliance, as the limitation did not exist at the time the materials were supplied, but was enacted afterwards. The Court also found that it made no difference for purposes of constitutional analysis that the asbestos liability was not created, as in Turner Elkhorn, but revived.

It is worthy of note that, as was the case in the Wesley Theological Seminary case, the statute in Maryland was not effective until July 1, 1970. Thus, no case that currently is held to be barred involves a manufacturer or supplier who could have relied on the bar at the time the materials were supplied.

There is an aditional factor minimizing the importance of reliance for purposes of due process analysis. That is that until the recent decisions of the lower courtrs in the asbestos cases, it was not generally understood that manufacturers and suppliers were covered by §5-108. 7/ It is undisputed that §5-108 was enacted in response to cases expanding the exposure of design professionals and contractors to liability. The legislative record reflects testimony concerning the problems faced by architects, professional engineers, contractors and builders and is free from any similar discussions with respect to manufacturers and suppliers. 8/ In fact, the Legislature has declined to give similar protecton to products liability defendants. 9/ The Revisor's Note from 1973 states that the section applies to builders, contractors, landlords and realtors. And no reported case has applied the section to a manufacturer or supplier. 10/ Thus, the action of the

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[6] The D. C. statute is similar to Maryland's, a point frequently noted by the courts construing them. See, President and Directors, Etc. v. Madden, 505 F.Supp. 557 (D.Md. 1980) aff'd 660 F.2d 91 (4th Cir. 1981); In re Personal Injury Asbestos Cases, Circuit Court for Baltimore City (Levin, J. 11/1/89).

[7] In fact, that issue is still not settled, as it has not yet been considered by a State appellate court, and lower courts' interpretations of law enjoy no presumption of correctness on review. Rohrbaugh v. Estate of Stern, 305 Md. 443 (1986).

No appellant decision. *

[8] The sole mention of manufacturers is a passing in the testimony of an opponent, Wallace Dann, see Judiciary Committee Minutes, June 24, 1969, p. 3.

[9] See Senate Bill 988 of 1977.

[10] Whiting-Turner Contracting Co. v. Coupard, 304 Md. 304 (1985), has been cited as evidence that the section appies to suppliers of building materials and equipment. That question was not an issue in the case, however, and the passing reference to suppliers no more settles the issue of their inclusion than the omission of any mention of suppliers in (continued)

Legislature in making the change retroactive could be seen as simply restoring the law to the state the parties most likely believed existed. 11/ Numerous cases have upheld retroactive changes in the law under similar circumstances.

In Seese v. Bethlehem Steel Co., 168 F.2d 58 (4th Cir. 1949), the Court upheld application of the Portal-to-Portal Act, which provides that an employer need not pay an employee for time spent dressing and walking to the worksite unless such pay was provided by contract or was paid as a matter of custom and practice, to pending cases filed after a recent Supreme Court case had held that the Fair Labor Standards Act required such pay in all instances. In the words of the Court:

> "[A]ll that congress has done by the legislation here under consideration is to validate the contracts and agreements between employers and employees which were invalid under the Fair Labor Standards Act by reason of the interpretation placed by the Supreme Court upon that Act." Id. at 64.

Similarly, in Rhinebarger v. Orr, 657 F.Supp. 1113 (S.D.Ind. 1987), aff'd 839 F.2d 387 (7th Cir.), cert. denied, 109 S.Ct. 71 (1988), the Court upheld a retroactive Act designed to delay the applicability of the Fair Labor Standards Act to the states following the Supreme Court decision in Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528 (1985), and held that the Act applied to cases filed after Garcia, but prior to the effective date of the Act.

And, in Sanelli v Glenview State Bank, 483 N.E.2d 226 (Ill. 1985), the Court upheld retroactive application of a statute that specifically permitted a long-accepted practice that a recent case had found to be a violation of fiduciary duty. The Court held that the:

Poffenberger v. Risser, 290 Md. 631, 634, n. 2 (1981) mandates the conclusion that they are excluded.

11 Even if the section were intended to include manufacturers and suppliers in general, it seems unlikely that the General Assembly intended "injury ... resulting from the defective and unsafe condition of an improvement to real property" to include injuries from such materials as asbestos, which is unsafe completely apart from its role as a part of an improvement to real property. This difference can be illustrated by comparing asbestos and a defective steel beam. The steel beam is not dangerous by itself, and can be brought to the work site and left there without noticeable risk to anyone. Only when the steel beam is included in a building does it become dangerous, because it is unable, due to its defect, to bear enough weight to perform its expected role in the improvement. Acoustical tile treated with asbestos, in contrast, is dangerous in its own right. Left at the worksite, it is potentially as dangerous as when installed as a ceiling. Unlike the steel beam, however, it performs its role as a part of the improvement to real property adequately -- the beams are covered and sound is absorbed.

"General Assembly may enact retroactive legislation which changes the effect of a prior decision of a reviewing court with respect to cases which have not been finally decided."

Clearly then, retroactive application of the proposed change to §5-108 would not violate federal due process.

State Due Process

The State Due Process Clause, Declaration of Rights, Article 24, 12/ is generally interpreted as in pari materia with the federal provision. Northampton Corp. v. Washington Suburban Sanitary Com., 278 Md. 677 (1976). In the area of retroactive legislation, however, the Court of Appeals has not yet adopted the modern federal rule as reflected by Turner Elkhorn and Pension Benefit Guaranty Corp. v. R. A. Gray & Co., 467 U.S. 717 (1984) (unanimous), but has adhered to the older rule which looks to whether the proposed retroactivity would infringe upon "vested rights". Thus, the Court has said that "[a] statute, even if the Legislature so intended, will not be applied retrospectively to divest or adversely affect vested rights." Vytar Associates v. City of Annapolis, 301 Md. 558, 572, n. 6 (1989). Although it has been applied in other contexts, this concept has largely been used to invalidate the retroactive imposition of taxes and fees. See, Vytar, supra; Washington National Arena v. Prince George's County, 287 Md. 38, cert. denied 449 U.S. 834 (1980); National Can Corp. v. State Tax Com'n, 220 Md. 418 (1959); Comptroller v. Glenn L. Martin Co., 216 Md. 235, cert. denied 358 U.S. 820 (1958).

The term "vested right" has been recognized to be conclusory -- "a right is vested when it has been so far perfected that it cannot be taken away by statute." Hochman, The Supreme Court and the Constitutionality of Retroactive Legislation, 73 Harvard Law Review 692, 696 (1960); Sanelli v. Glenview State Bank, 483 N.E.2d 226 (Ill. 1985). Factors that have been suggested in determining whether a right has vested include:

Vested Rights

"the nature and strength of the public interest served by the statute, the extent to which the statute modifies or abrogates the asserted preenactment right, and the nature of the right which the statute alters." Hochman, 73 Harv.L.Rev. at 697.

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12 Article 24 provides:

"That no man ought to be taken or imprisoned or disseized of his freehold, liberties or privileges, or outlawed, or exiled, or, in any manner, destroyed, or deprived of his life, liberty or property, but by the judgment of his peers, or by the Law of the land."

In this situation the public interest is strong. The public clearly has an interest in providing remedies for those injured by toxic and carcinogenic materials with long latency periods, and in imposing that liability on the parties best able to learn of the danger and prevent it. The State also has an interest in helping owners of buildings that contain asbestos obtain funds for its removal so that no further injury occurs. In addition, the State has an interest in obtaining funds to remove asbestos from its own buildings so as to remove a threat to the health of those citizens that use the buildings. District of Columbia v. Owens-Corning Fiberglass Corp., 1989 W.L. 99482 (D.C.App. 1989). It is also clear that the "right" asserted, freedom from suit, would be completely abrogated. It is my view, however, that the public interest outweighs any disadvantage to the defendant, especially when the nature of the right asserted is taken into account.

One factor that weighs against a finding that a right is vested is a finding that the right rests on "insubstantial equities". Hochman, 73 Harv.L.Rev. at 720. One class of such cases are those extending statutes of limitations, as "no man promises to pay money with any view to being released from that obligation by lapse of time." Campbell v. Holt, 115 U.S. 620, 628 (1885). Another is whether the Act is curative, Hochman, 73 Harv.L.Rev. at 721. Both factors weigh against finding a vested right in this situation. Thus, balancing these factors, it would appear that no vested right should be found. This is in accord with the general rule in Maryland that changes in statutes of limitation may be made retroactive, Allen v. Dovell, 193 Md. 359 (1949), as well as the rule that "there can be no vested right to violate a moral duty, or to resist the performance of a moral obligation," Grinder v. Nelson, 9 Gill 299 (1850). This has long been the federal rule. In Campbell v. Holt, 115 U.S. 620 (1885), the Supreme Court upheld a statute reviving causes of action on which statutes of limitation had run. After differentiating the limit involved from one, such as adverse possession, that would vest title to real property, the Court held as follows:

Revival of Cases.

> "The implied obligation of defendant's intestate to pay his child for the use of her property remains. It was a valid contract, implied by the law before the statute began to run in 1866. Its nature and character were not changed by the lapse of two years, though the statute made that a valid defense to a suit on it. But this defense, a purely arbitrary creation of the law, fell with the repeal of the law on which it depended.
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> "It is much insisted that this right to a defense is a vested right, and a right of property which is protected by the provisions of the fourteenth amendment. It is to be observed that the words 'vested right' are nowhere used in the constitution, neither in the original instrument nor in any of the amendments to it.... We certainly do not understand that a right to defeat a just debt by the statute of limitations is a vested right so as to be beyond legislative power in a proper case." Id. at 627-628.

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It has been asserted, however, that the decision in Smith v. Westinghouse Electric, 266 Md. 52 (1972), compels the conclusion that §5-108 creates vested rights. That case involved a change in the statute of limitations applicable to actions for wrongful death. The Court noted that the wrongful death act created a new cause of action for something the deceased person never had -- the right to sue for injuries. It then held that where a cause of action and its limitation are created together, the timeliness of the action is a condition precedent to the right to maintain the action. See also, Chandlee v. Shockley, 219 Md. 493 (1959). In that situation, the Court held that the extension of the limit could not be made retroactive.

No Court of Appeals case has extended the rationale of Smith beyond the specific situation where the cause of action and its limitation are created by the same act, or by a later act specifically directed at the newly created cause of action. The case upon which Smith relied, William Danzer & Co. v. Gulf of S.I.R. Co., 268 U.S. 633 (1925), has been similarly limited. In Chase Securities Corporation v. Donaldson, 325 U.S. 304 (1945), the Court stated that Danzer "held that where a statute in creating a liability also put a period to its existence, a retroactive extension of the period after its expiration amounted to a taking without due process of law." And, in Radio Position Finding Corporation v. Bendix Corporation, 205 F.Supp. 850 (D.Minn. 1962), affirmed 371 U.S. 577 (1963) (per curiam), the Court differentiated Danzer as a case where "[r]ight and remedy were inextricably mixed, so that the removal of the bar of limitations constitute[d] the creation of an additional remedy." 13/ Since the limitation in §5-108 was created separately from, and applies generally to, a variety of causes of action, it is clear that the Smith case does not mandate the conclusion that it creates a vested right.

Substantive
needs the
procedural

Nevertheless, it has been argued that §5-108 is a substantive, rather than a procdural limitation, and that Smith compels the conclusion that no substantive limitation can be extended retroactively to revive barred causes of action. It is clear, however, that under Maryland law an interference with substantive rights is not always of constitutional magnitude, WSSC v. Riverdale Fire Co., 308 Md. 556, 569 (1987); State commisson on Human Relations v. Amecom Div., 278 Md. 120, 123 (1976). In addition, while §5-108 has been held to be

13 Even as so limited, it is not clear that Danzer is good law. See, Wesley Theological Seminary v. U.S. Gypsum Co., 876 F.2d 119 (D.C.Cir. 1989); Nachtsheim v. Wartnick, 411 N.W.2d 882 (Minn.App. 1987). While the Supreme court has not directly overruled Danzer, it has upheld retroactive extension of a limitations period that was created simultaneously with the cause of action. International Union of Elec, Radio & Machine Wkrs v. Robbins & Meyers, 429 U.S. 229 (1976) (Title VII).

substantive for purposes of determining whether the limit runs against the State, State of Maryland v. Keene Corp., Circuit Court for Anne Arundel County, Civ. Action §1108600 (Thieme, J., 6/9/89); Mayor and City Council of Baltimore v. Keene Corp., Circuit Court for Baltimore City, Case No. 84268068/CL25639 (Davis, J. 6/2/89), 14/ determining whether it is tolled by fraud, First United Methodist Church of Hyattsville v. U.S. Gypsum, ___ F.Supp. ___ (D.Md. 1988), affirmed 882 F.2d 862 (4th Cir. 1989) (cert. pending 89-728) and for choice of law purposes, President & Directors v. Madden, 505 F.Supp. 557 (D.Md. 1980), affirmed 660 F.2d 91 (4th Cir. 1981), it seems clear that the statute does not give rise to the type of right deemed vested in Smith.

At least one court has held that statutes like §5-108 are not substantive. In Bellevue School District 405 v. Brazier Const., 691 P.2d 178 (Wash. 1984), it was held that:

> "The builder limitation statute ... creates no new right, but merely defines a limitation period within which a claim ordinarily must accrue. Even without this statute, a common law right would still exist."

The Court went on to note that, despite the fact that the limit ran from a different time than a typical statute of limitations, the policy is the same: to prevent stale claims and to place a reasonable time limit on exposure. This similarity of purpose militates against finding that §5-108 would create vested rights while a more typical statute of limitations would not. However, it has been argued that because §5-108 can bar a cause of action, while most statutes of limitation simply bar a remedy, §5-108 does create vested rights. That distinction, however, has been described as "somewhat metaphysical", Wesley Theological Seminary v. U.S. Gypsum Co., 876 F.2d 119 (D.C. Cir. 1989) (cert. pending §89-777); see also, School Board of the City of Norfolk v. U.S. Gypsum Co., 360 S.E.2d 325 (Va. 1987) (dissent), and clearly is not one that should determine the issue. 15/

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14 There are reasons to question the correctness of the assumption of these courts that the limit runs against the State if it is substantive. Adverse possession, §5-103, vests title in real property, and thus clearly creates vested rights, yet it does not run against the State. Central Collection Unit v. Atlantic Container Line, 277 Md. 626 (1976). And the District of Columbia statute has been held not to run against the government. District of Columbia v. Owens-Corning Fiberglass Corporation, 1989 WL 99482 (D.C.App. 1989).

15 This is especially true since prior to the 1983 Code Revision, the section clearly only barred the remedy, not the right. The change in language that occurred in the course of Code Revision was designed to address certain interpretive problems arguably raised by the interaction of the section and other statutes of limitation. See, infra. There is no indication that the purposes or policies behind the section had changed, or that the General Assembly felt that it was necessary to create new rights for defendants. In the absence of such evidence, it should not be assumed that such a change was intended. (continued)

In conclusion, it is my view that §5-108, whether it is conceived as barring accrual of any common law or statutory action that may arise from a defect in an improvement to real property, or simply barring a remedy, does not become such an intrinsic part of those causes of action as to create a vested right in the defendant. In the absence of such a vested right, the proposed change may be made retroactive.

I hope that this is responsive to your inquiry.

Sincerely,

Kathryn M. Rowe
Assistant Attorney General

KMR:maa

Geisz v. Greater Baltimore Medical, 313 Md. 301, 322 (1988); Rohrbaugh v. Estate of Stern, 305 Md. 443 (1986).