TESTIMONY IN SUPPORT OF HOUSE BILL 1

Civil Actions - Child Sexual Abuse - Definition, Damages, and Statute of Limitations
The Child Victims Act of 2023
House Judiciary Committee
March 2, 2023
Submitted by Professor Kathleen Hoke

I am writing in support of House Bill 1 and to address concerns related to the retroactive application of the legislation. This bill will provide the possibility of relief for survivors of child sexual abuse whose claims expired due to the passage of the relevant limitations period. Although concerns about the constitutionality of the retroactive application of the bill are understandable, it is likely that the bill will survive constitutional scrutiny.

House Bill 1 would eliminate the limitations period for civil claims of child sexual abuse, allowing claims to be filed at any time. The change would apply retroactively, reviving claims that had been time barred under previous versions of the statute. The bill would also cap damages on revived claims against private plaintiffs and on revived and future claims against state and local governments and county boards of education. Advocates and the supporting medical and legal experts will no doubt thoroughly explain to the Committee the strong public policy reasons for the legislation. This testimony will address the question on the constitutionality of the retroactive application of the legislation.

Legislation that revives a time-barred claim is rightfully subject to constitutional scrutiny. That is particularly true in this instance because of language added to Courts and Judicial Proceedings §5-117 in 2017, extending the then-8-year statute of limitations to 20 years and purportedly creating a statute of repose in the process. House Bill 1 provokes the question of whether §5-117 is a statute of repose or of limitations, whether that distinction matters, and whether the limitations period can be repealed with retroactive effect in either case. These are relevant questions for a conscientious legislator to consider before voting on the bill. The best answer is that House Bill 1 would survive constitutional scrutiny.

In 2017, the General Assembly passed House Bill 642 (Chapter 12) and Senate Bill 505 (Chapter 56), amending §5-117 to extend the statute of limitations for civil claims of child sexual abuse to the later of: 1) twenty years after the victim reaches the age of majority, or 2) three years after the date on which a perpetrator is convicted of child sexual abuse against the victim. If a claim is brought more than seven years after the alleged sexual assault against a person or governmental entity who is not the perpetrator, the plaintiff must prove that the person or governmental entity "owed a duty of care to the victim," employed or otherwise exercised control over the perpetrator, and acted with gross negligence. §5-117(c). At the same time, the General Assembly added §5-117(d), which provides that *"[i]n no event may an action for damages arising out of an alleged incident or incidents of sexual abuse that occurred while the victim was a minor be filed against a person or governmental entity that is not the alleged perpetrator more than 20 years after the date on which the victim reaches the age of majority*."

In uncodified language, the General Assembly added that "*the statute of repose under §5-117(d) . . . shall be construed to apply both prospectively and retroactively to provide repose to defendants regarding actions that were barred by the application of the period of limitations applicable before October 1, 2017*." The fundamental question that must be answered to determine the constitutionality of House Bill 1 is whether §5-117[1] creates a vested right deserving constitutional protection.

Maryland courts have struggled to cleanly define statute of repose and to distinguish between statutes of repose and statutes of limitations. Close reading of Maryland case law reveals judicial disfavor of statutes of repose. Examination of two Maryland statutes—one found to be a constitutional statute of repose and another found to be a statute of limitations—elucidates the distinction between the two and the narrowness of what constitutes a statute of repose. Moreover, even if §5-117 is a statute of repose, retroactive expansion of the limitations period may be constitutional. Indeed, the General Assembly has previously expanded a statute of repose, Courts and Judicial Proceedings §5-108 applicable to improvements to real property, with retroactive application.

STATUTES OF REPOSE AND STATUTES OF LIMITATION GENERALLY

The functional difference between a statute of repose and a statute of limitations is that the trigger that starts a repose period is unrelated to injury; it sets a fixed date by which all claims are extinguished. By contrast, the period set in a statute of limitations does not begin to run until the plaintiff is injured by the defendant, meaning that when a claim has accrued, the statute begins to run.

A statute of limitations sets a date by which an injured person must file a civil cause of action against the individual or entity that caused the harm. The trigger that starts the clock is the injury; once a person is aware or should be aware of an injury, they have a set time by which to file a claim. For example, if a person is injured in a vehicle crash due to the negligence of another driver, the statute of limitations for bringing a negligence claim, 3 years in Maryland, begins to run at the time of the crash. Statutes of limitations exist for all civil claims and are typically tolled, or paused, under certain circumstances, such as while the injured party is a minor or under some disability. For example, if a child was injured in the vehicle crash, the 3-year limitations period is tolled until the child reaches age 18. Claims filed by age 21 would be timely. The purpose of a statute of limitations is "to spare the courts from litigating stale claims" and to protect against cases involving lost evidence and faded memories. *Chase Sec. Corp. v. Donaldson*, 325 U.S. 304, 314 (1945). Because statutes of limitations exist only for the public policy purpose of encouraging plaintiffs to file timely claims, they do not create vested rights. *Id*. Generally, statutes of limitations are procedural and may be changed with retroactive effect without invoking constitutional inquiry.

A statute of repose establishes a time after which a defendant is free from liability for a civil claim regardless of whether a claim has accrued. The limitations period in a statute of repose is triggered not by an injury but by some other act. There are only a couple of types of

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[1] Hereafter when referring to §5-117, I mean to include the uncodified language added in 2017 as Section 3 in House Bill 642 (Chapter 12, 2017); Senate Bill 505 (Chapter 56, 2017).

statutes of repose; they are unusual and most states have only one or two such provisions. The two most common statutes of repose nationally are those relating to real property improvements and those relating to product liability. For real property improvements, completion of the building triggers the running of the limitations clock, setting a date certain by which architects, engineers, and builders are free of liability. If an individual suffers injury caused by a building design defect after the limitations period expires, they may not bring a claim against the architect or engineer for negligent design. In product liability statutes of repose, the limitations clock is triggered when the product enters the stream of commerce, likewise setting a date certain by which a manufacturer may not be subject to certain claims. Statutes of repose typically do not contain tolling provisions; all claims are extinguished on the set date. The purpose of a statute of repose is to prevent unpredictability for industry and professionals engaged in certain trades and to protect insurers' ability to predict future claims in those industries. These protections allow for stability in the marketplace from which we all benefit. In Maryland, the General Assembly uses statutes of repose in "consideration[] of the economic best interests of the public." *SVF Riva Annapolis v. Gilroy*, 459 Md. 632 (2018). Changing a statute of repose retroactively and reviving extinguished claims raises the constitutional question of whether the statute created a vested right and whether revival of claims unreasonably interferes with that right.

MARYLAND COURTS ON STATUTES OF REPOSE

Maryland courts "look holistically at [a] statute and its history to determine whether it is akin to a statute of limitation or a statute of repose." *Anderson v. United States*, 427 Md. 99, 124 (2012). Relevant in this inquiry are: 1) what triggers the running of the statutory period; 2) whether the statute eliminates claims that have not yet accrued; 3) the purpose behind the statute; and 4) the legislative history surrounding passage of the statute. *Id.*

Prongs one and two of the analysis are related because the determination of what triggers the running of a time period determines whether claims that have not yet accrued are extinguished by the statute. "Statutes of repose differ from statutes of limitation in that the trigger for a statute of repose period is unrelated to when the injury . . . occurs. . . . Thus, a statute of repose may extinguish a potential plaintiff's right to bring a claim before the cause of action accrues." *Id*. at 118-19. Similarly, prongs two and three of the analysis are related because courts typically determine the purpose of the statute using the language of the statute and the legislative history behind its adoption.

Within this framework, Maryland courts have exhibited reluctance to interpret legislation as creating a statute of repose and have narrowly interpreted the one statute of repose in the Maryland Code. The Supreme Court of Maryland had variously referred to Courts and Judicial Proceedings §5-109 as a statute of repose and a statute of limitations. *See id.* at 127.[2] This section provides that a medical malpractice action must be filed the earlier of 1) within 5 years of the "time the injury was committed" or 2) within 3 years of when the injury was discovered. In either case, an injury has occurred prior to running of the period set.

[2] The court discusses a series of cases analyzing §5-109 in which the statute is referred to as a statute of limitations and a statute of repose; the court appears apologetic about its contribution to confusion about the substantive impact of §5-109 as a result of the changing terminology used to describe the statute. *Anderson v. United States*, 427 Md. 99, 113-17 (1985).

In 2012, the *Anderson* court held that §5-109 is a statute of limitations, creating no vested rights. In reaching this conclusion, the *Anderson* court relied on the fact that the trigger for the running of the time period in the statute is when the injury occurred, not an unrelated event, and that §5-109 did not extinguish claims that had not yet accrued because injury was necessary to start the running of the time period. 427 Md. at 125-26.

The court was also persuaded by the fact that §5-109 contains tolling provisions, meaning the statute provides for conditions under which the running of the period for filing a claim is paused, or tolled. *Id*. at 126 (noting tolling during the plaintiff's age of minority or if the defendant engaged in fraudulent concealment). Tolling is the hallmark of a statute of limitations and antithetical to a statute of repose.

And the *Anderson* court compared the language in §5-109 with the language in §5-108 relating to claims of faulty building design or construction, a provision previously held to be a statute of repose. *See, e.g., Whiting-Turner Contracting Company v. Coupard*, 304 Md. 340 (1985)(applying §5-108 to bar a claim that had not accrued prior to the expiration of the time period set in the statute, identified as a statute of repose). The *Anderson* court explained that the General Assembly was aware of how to create a statute of repose—as it did so in §5-108 with language clearly indicating a cause of action "does not accrue" if the injury that would give rise to a cause of action occurs after the time period set in §5-108 runs. Moreover, the court reached its conclusion despite finding that §5-109 was adopted for the purpose of balancing economic interests and providing market stability for medical malpractice insurers and their insureds. *Anderson*, 327 Md. at 124-25. That fact alone was unpersuasive. Section 5-109, with injury as the triggering event to begin the running of the established time period, not extinguishing claims that have not accrued, and with certain conditions tolling the running of the period, was found to be a statute of limitations. Note that while the *Anderson* court set out prongs 3 and 4—statutory language and legislative intent—as relevant, the inquiry turned almost exclusively on prong 1 and 2—the trigger and extinguishing claims before injury occurred.

MARYLAND'S STATUTE OF REPOSE, COURTS AND JUDICIAL PROCEEDINGS §5-108

The statute of repose used as a comparator in *Anderson* is §5-108, limiting claims against property owners, construction companies, engineers, and architects for injuries sustained as a result of negligence in building design and construction. Section 5-108 operates to extinguish claims at year 20 (building owners) or year 10 (architects, engineers, and builders), even if no injury has occurred. The triggering event for the start of the running of the clock is the date the building "became available for its intended use," an event wholly unrelated to any injury. For example, in *Whiting-Turner*, the court found that the builder-defendant could not be held liable for the plaintiff's injury even if the builder had been negligent because the plaintiff was injured more than 10 years after the building was available for its intended use.

Maryland courts are loathe to construe that statute broadly, revealing the disfavor for statutes of repose hinted at in *Anderson*. Statutes of repose are extraordinary and unusual provisions. Because they may be construed as creating vested rights, such provisions should

be narrowly construed. In *SVF Riva Annapolis*, 495 Md. 632 (2018), the Supreme Court of Maryland broadly construed an exception in §5-108 so that the statute of repose does not prevent a cause of action against an owner who remains in possession of the property for the full period in the statute. And in *Carven v. Hickman*, 135 Md. App. 645 (2000), the Appellate Court of Maryland found §5-108 inapplicable to a case concerning the use of real property. Maryland's only statute of repose is narrowly construed, limiting the negative impact of this extraordinary provision.

In addition to the judiciary's disposition against broad application of statutes of repose, the General Assembly has been conservative in creating statutes of repose and has determined that statutes of repose may be changed with retroactive impact reviving claims. As noted, Maryland has only one statute of repose, §5-108. That statute contains an exception that allows certain claims related to asbestos to be made after expiration of the repose period. Claims of personal injury related to asbestos exposure are excepted from the statute of repose. Certain claims of property damage due to the presence of asbestos are also excepted. When the asbestos exception was added to §5-108 in 1991, the exceptions applied retroactively to revive claims that had been extinguished. For the claims of property damage, claims related to buildings constructed as far back as 1953 were revived; those revived claims had to be filed within a two-year period of the effective date of the bill containing the asbestos exceptions. The Attorney General advised that retroactive application of the asbestos exception was constitutional. For a thorough explanation of the 1991 amendments, the General Assembly's revival of expired claims, and the Attorney General's 1990 advice confirming the constitutionality of the amendments, *see* Letter to Chairman Will Smith from Kathleen Hoke, dated January 25, 2023 (attached; the 1990 letter from the Attorney General's Office is attached to the Smith letter).

Not only are statutes of repose rare and disfavored in Maryland, they can be repealed with retroactive application.

IS §5-117 A STATUTE OF REPOSE OR OF LIMITATIONS? MAY THE TIME BAR SET IN THAT SECTION, WHETHER REPOSE OR LIMITATIONS, BE REPEALED WITH RETROACTIVE APPLICATION?

Applying the *Anderson* test, §5-117 should not be considered a statute of repose. First, one must look to determine the triggering event for the running of the 20-year time period and whether the statute extinguishes claims that have not yet accrued. Like in §5-109, the medical malpractice statute found not to be a statute of repose, claims subject to §5-117 arise as a result of a perpetrator's actions that cause injury; the period of time does not begin to run until there has been an injury. Moreover, §5-117 does not extinguish claims that have not yet accrued. The *Anderson* court found this persuasive in finding §5-109 to be a statute of limitations; a court would likely find this point similarly persuasive for §5-117. Additionally, §5-117 contains a tolling provision like §5-109, suspending the running of the period during the victim's period of minority. As a result, there is no date certain on which an act of sexual assault automatically expires like the actions that expire as a result of the application of the statute of repose in §5-108. As noted in *Anderson*, tolling the period during an injured person's period of minority is a trait found in statutes of limitations, not statutes of repose.

The language of the statute is likewise helpful in determining whether §5-117 is a statute of repose or limitations. The *Anderson* court notes that the Maryland General Assembly is aware of the language and conditions necessary to create a statute of repose as the legislature did so in §5-108 by using particular language that clearly extinguishes claims before they have accrued. 304 Md. at 126; §5-108 (relevant causes of action "do not accrue" if the period of time has passed). No such language or substantive provision exists in §5-117; again, pushing to the conclusion that §5-117 is not a statute of repose. The mere fact that the term "repose" is used in §5-117(d) and in the uncodified language passed in 2017 does not alter this analysis. *See Kaczorowski v. City of Baltimore*, 309 Md. 505, 514-15 (1987)(courts are not limited to the words of the statute when discerning meaning).

The *Anderson* court considered the intent of the legislature with respect to §5-108 and found validity to the assertion that the statute was adopted in response to a perceived crisis related to medical malpractice litigation that caused skyrocketing malpractice insurance rates and increasing numbers of malpractice actions against Maryland physicians. The legislature had considered the economic best interests of the public when passing §5-108. *Anderson,* 304 Md. at 124-25; *see also SVF Riva Annapolis*, 459 Md. at 636 n.1 (legislature creates a statute of repose in "consideration[] of the economic best interests of the public"); *Carven*, 135 Md. App. at 652 (statute of repose reflects a "legislative balanc[ing]of economic considerations affecting the general public and the respective rights of the plaintiffs and defendants"). But this was not enough to support a finding that the statute was one of repose rather than of limitations. No such legislative history related to a consideration of the economic interests of the public exists for the 2017 changes. In fact, there appears to be no legislative history regarding the so-called repose provisions that were added via amendment. Sufficient, clear evidence of legislative intent is expected for an extraordinary provision like a statute of repose.

Applying the appropriate analysis to §5-117 results in finding the provision to be a statute of limitations, not a statute of repose. The period of limitations runs as a result of an injury, is tolled during the victim's period of minority, and does not extinguish claims before they have accrued.

Moreover, public policy weighs heavily against finding §5-117 to be a statute of repose. The State has just one statute of repose; §5-108 protects property owners, contractors, and design professionals from negligence claims for 10 or 20 years after a building is completed and available for its intended use. Protecting those engaged in designing and constructing buildings does support economic stability for these professionals and their insurers, perhaps an appropriate use of the extraordinary statute of repose given that real property improvements are a significant driver of the Maryland economy. But allowing a statute of repose for those who sheltered child predators is quite a different matter. To be sure, private and public entities that may be liable for child sexual assault committed by people employed or supervised by the entities could benefit from the stability of knowing that at some point a child's claim is extinguished. That would be true for any tortfeasor. Public policy cuts against such protection for those who harbor offenders who commit atrocious acts of violence against children.

Even if §5-117 is a statute of repose, repeal of the statute with retroactive application should survive constitutional scrutiny. The best support for this conclusion is that the General Assembly has repealed a portion of the one statute of repose in Maryland and explicitly revived previously extinguished claims in doing so. As explained briefly above and more fully in the attached letter to Chairman Smith, in 1991, the General Assembly created an exception in §5-108 that applied retroactively to revive personal injury and property damage claims related to asbestos. Attached to the letter to Chairman Smith is the 1990 advice from the Attorney General that repeal with retroactive application was constitutional. The Attorney General confirmed this conclusion when he submitted the letter of constitutional sufficiency on the 1991 bill that created the asbestos exception with retroactive application.

Opponents argue that Maryland courts do not permit retroactive provisions like those in House Bill 1, regardless of whether §5-117 is a statute of repose or limitations. They rely on two primary cases in making that argument. First, opponents suggest that *Dua v. Comcast Cable*, 370 Md. 604 (2002) found that the Maryland Constitution prohibits legislation reviving an expired cause of action. While *Dua* did hold that "retroactively abolishing an accrued cause of action, depriving the plaintiff of a vested right," violates the Maryland Constitution, the issue of reviving an extinguished claim was not presented to the court. *Dua* involved two statutes: 1) a statute that allowed cable companies to impose late fees that would apply retroactively to terminate cases filed by customers who had paid late fees paid before such fees were lawful; and 2) a statute that allowed HMOs to seek subrogation against funds paid to insureds by others who caused the injury for which the HMO covered medical expenses, terminating cases that insureds had or could file seeking return of monies they had paid in subrogation before HMOs were permitted to seek subrogation. The *Dua* court found that both statutes abolished claims in violation of the Maryland Constitution. Although the court noted that revival of extinguished claims may be unconstitutional, that language is dicta as the case involved terminating claims rather than reviving them.

Second, opponents rely on *Smith v. Westinghouse*, 266 Md. 52 (1972), which involved expansion of the statute of limitations for wrongful death cases to be applied retroactively. Although the *Smith* court found the retroactive application unconstitutional, it did so principally on the basis that the statute at issue was not an ordinary statute of limitations but one that established filing a claim as a condition precedent to the cause of action. This was because the statute of limitations was created at the same time as the cause of action for wrongful death. Frankly, the case is muddled and difficult to comprehend and hardly a clear statement by the court that any revival of an expired civil claim in unconstitutional. Note also that in determining that the 1991 retroactive changes to §5-108 were constitutional, the Attorney General considered the *Smith* case and dismissed its applicability. In the letter of advice, the Attorney General's Office concluded that the Maryland courts had not extended the rationale of *Smith* beyond the narrow circumstance of the creation of a cause of action for wrongful death. *See* Letter to Chairman Smith from Kathleen Hoke, dated January 25, 2023 (attaching Attorney General letter from 1990).

CONCLUSION

Section 5-117 of the Courts and Judicial Proceedings Article does not meet the criteria necessary to be considered a statute of repose; rather, it should be considered a statute of limitations. Regardless, statutes of repose in Maryland may be subject to change with retroactive impact reviving expired claims. The General Assembly took such action with the statute of repose in §5-108 in 1991, with the Attorney General advising that the legislative change was constitutional. Moreover, there is no case law in Maryland establishing that a statute of repose or a statute of limitations may not be changed to revive extinguished claims. As a result, legislators should feel confident that voting favorably on House Bill 1 does not equate to voting for an unconstitutional bill and does equate to voting for effective, fair, and compassionate public policy.

This testimony is submitted by Professor Kathleen Hoke and may not represent the position of the University of Maryland Carey School of Law; the University of Maryland, Baltimore; or the University of Maryland System.

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The Honorable William C. Smith, Jr.
Chair, Maryland Senate Judicial Proceedings Committee
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January 25, 2023

Re: Child Victims Act of 2023: House Bill 1/Senate Bill (to-be-determined)

Chairman Smith:

I am writing in follow up to the Briefing on Child Sexual Abuse Prevention and Civil Statute of Limitations held in the Judicial Proceedings Committee on January 19, 2023. At the briefing, you asked whether the asbestos-related exception added to §5-108 of the Courts and Judicial Proceedings Article in 1991 had retroactive impact when passed. In short, the answer is yes. I reviewed the language of §5-108, the legislative file from 1991 when the exception was added through Senate Bill 335, and a letter of advice from the Office of the Attorney General related to Senate Bill 500 from 1990 that sought to add a similar exception. That research makes abundantly clear that: 1) the exception in §5-108 applies retroactively; 2) the General Assembly intended that retroactive application; and 3) the Office of the Attorney General advised that the change was constitutional in 1990 and 1991.

The language of §5-108 makes clear that the asbestos-related exception added in 1991 was to be applied retroactively. Section 5-108 creates a statute of repose applicable to improvements to real property. First passed in 1970, the legislation has been amended several times, most recently in 1991 to add an asbestos-related exception. Section 5-108(d)(2) provides that the time limitations set out in §5-108(a)(20 years for property owners) and (b)(10 years for architects, engineers, and builders) do not apply:

> (ii) In a cause of action against a manufacturer or supplier for damages for personal injury or death caused by asbestos or a product that contains asbestos, the injury or death results from exposure to asbestos dust or fibers which are shed or emitted prior to or in the course of the affixation, application, or installation of the asbestos or the product that contains asbestos to an improvement to real property;
> (iii) In other causes of action for damages for personal injury or death caused by asbestos or a product that contains asbestos, the defendant is a manufacturer of a product that contains asbestos; or

(iv) In a cause of action for damages for injury to real property that results from a defective and unsafe condition of an improvement to real property:

1. The defendant is a manufacturer of a product that contains asbestos;
2. The damages to an improvement to real property are caused by asbestos or a product that contains asbestos;
3. The improvement first became available for its intended use after July 1, 1953;
4. The improvement:
   A. Is owned by a governmental entity and used for a public purpose; or
   B. Is a public or private institution of elementary, secondary, or higher education; and
5. The complaint is filed by July 1, 1993.

This language makes clear that when this exception became effective on July 1, 1991, claims for personal damages due to asbestos exposure are not subject to the limitations in subsections (a) and (b). §5-108(d)(2)(ii) and (iii).[1] Claims for property damages due to the presence of asbestos in a building[2] could be brought as to any structure made available for use after July 1, 1953. §5-108(d)(2)(iv)(3).[3] While the limitations set out in §5-108(a) and (b) would only allow claims for buildings made available 20 or 10 years prior, the new exception applied to buildings made available 38 years prior. There would be no reason to allow claims for 38-year-old buildings if the 20- or 10-year limitation applied. Moreover, in §5-108(d)(2)(iv)(5), the General Assembly set a 2-year deadline by which claims under this exception must be filed. This is a lookback window designed to allow expired claims to be brought within the two-year period after the effective date of the legislation. There would be no reason to establish a filing deadline if stale claims were not revived by the 1991 changes.

The uncodified language and legislative history of the 1991 changes likewise make evident that the changes were to apply retroactively, meaning reviving certain property damage claims that had been extinguished solely due to the passage of the 20- or 10-year limitation period. In fact, a close review of the uncodified language and the bill file reveals that there was little to no concern about allowing expired claims to be brought consistent with the 1991 changes. Rather, the aspect of retroactivity discussed was whether cases that had been finalized could be reopened as a result of the

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[1] In late 1990, Maryland courts had determined that §5-108 did not apply to the vast majority of personal injury claims for asbestos exposure, those brought by workers who were exposure during building construction and renovation. Thus, the personal injury claim exclusion here became less important and was not the focus of the legislative discussion of Senate Bill 335 (1991) that created the exception. See Testimony of David Ianucci, Chief Legislative Officer to Governor William Donald Schaefer in bill file for Senate Bill 335 (1991).

[2] These damages are the cost of removal or remediation of asbestos.

[3] This exception was limited to buildings owned and used by the government and buildings used as public or private institutions for education, including higher education. The bill file reflects testimony related only to those types of property.

exception. The General Assembly rejected that aspect of retroactivity as is evident in uncodified section 2 of Senate Bill 335 (1991):

> [T]his Act does not apply to and may not be construed to revive property damage claims in any action for which a final judgment has been rendered and for which appeals, if any, have been exhausted before July 1, 1991, to any property damage claim precluded by a partial summary judgment or court imposed deadline before July 1, 1991, or to any settlement or agreement between parties to the litigation negotiated before July 1, 1991.

The Floor Report accompanying Senate Bill 335 (1991) explains that the bill "excludes certain manufacturers and suppliers of asbestos products from the protection of the statute of repose" in §5-108. That Report likewise explains the restrictions on the retroactivity, noting that finalized claims could not be reopened; inherent in this is that claims that had not been filed or that had not been finalized would benefit from the changes. A document titled Committee Amendments explains that trial court cases in 1988 and 1989 held that the limitations in §5-108 precluded recovery for personal injury from asbestos exposure or property damage due to the presence of asbestos and that the 1991 amendments were designed to change those holdings. The Fiscal Note for Senate Bill 335 (1991) likewise makes clear that the changes would apply retroactively to cases that then pending and those yet-to-be filed:

> This bill, in essence, eliminates the applicable statute of limitations (10-year and 20-year time period) and allows not only those current cases to continue their legal course of action absent a statutory time limit but subsequent cases filed as well.

Senate Bill 335 was an Administration Bill, requested by then-Governor Schaefer, and his Chief Legislative Officer, David Ianucci, submitted testimony that similarly explained the impact of the bill. Mr. Ianucci noted that during the two-year period of July 1, 1991 to July 1, 1993, the statute of repose was waived and recovery would be available for claims except those that had been finalized before July 1, 1993.

In addition to these formal documents revealing the intended retroactive impact of Senate Bill 335 (1991), the bill fill contains written testimony from many entities and organizations that would benefit from the retroactive application of the exception. For example, testimony from the Archdiocese of Baltimore and the Archdiocese of Washington (with Maryland-based parochial schools) described the significant expenses associated with asbestos remediation in their school buildings, identifying the dates of construction of those buildings going back to the 1950s. In fact, those organizations and the Maryland Catholic Conference requested that the changes be even further retroactive, asking that the changes apply to buildings made available from 1950 forward, not just those from 1953 forward, arguing that many of their school buildings were constructed between 1950 and 1952. Likewise, support for the legislation from the Maryland Association of Boards of Education and individual county

boards of education and school systems explains the profoundly negative fiscal impact if they are not permitted to bring claims that would be revived by the 1991 exception.

Many of the documents in the bill file provide context that makes clear that the 1991 amendments were to apply retroactively. Asbestos was used prolifically in construction throughout the United States for more than 70 years, with the devastating health impact of exposure unknown. By the time individuals became aware of the connection between asbestos exposure and long-term health consequences, their claims were likely barred by §5-108. This is also the case for entities that became aware of the harms and the need to remediate properties that contain asbestos. Because §5-108 is a statute of repose that begins to run upon availability of the property, personal injury and property damage claims were terminated before individuals and entities could have brought suit. The balance of equities at the time dictated a lifting of the statute of repose to revive those claims. Consistent with the context, unambiguous and thorough documents in the bill file for Senate Bill 335 (1991) lead to the conclusion that the 1991 amendments were to be applied in a manner that would revive stale claims.

The inescapable conclusion is that the 1991 changes to §5-108 were applied retroactively, reviving asbestos-related personal injury and property damage claims that had been extinguished by the statute of repose. And the Office of the Attorney General found the revival constitutional. In the letter of review for constitutional sufficiency on Senate Bill 335 (1991), then-Attorney General J. Joseph Curran, Jr., explained: "We have previously advised that the statute of repose may be altered retroactively without violating due process. See letter to Delegate David. B. Shapiro from Kathryn M. Rowe dated February 15, 1990." That letter is found in the bill file for Senate Bill 500 (1990), a predecessor to Senate Bill 335 (1991) that was passed and then vetoed by then-Governor Schaefer. I have attached it here as well. Although full analysis of the constitutionality of the revival of claims by lifting or expanding a statute of limitations or repose is beyond the scope of this letter, the 1990 Rowe letter is direct and clear: "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 this letter answers your question on the retroactivity of the 1991 changes to §5-108. Please let me know how I can further support your work on this issue.

Very truly yours,

cc: Chairman C. T. Wilson

Sen. Stone

J. JOSEPH CURRAN, JR.
ATTORNEY GENERAL

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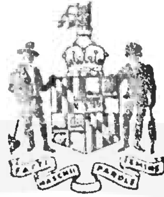

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February 15, 1990

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

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.
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> (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.
>
> (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.

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.

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).

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:

> "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.

Vested rights

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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:

> "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.

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.

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

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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

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