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Recent Developments: Trimper v. Porter-Hayden: Statute of Limitations in Asbestos-Related Wrongful Death Actions

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Leasing, Inc., 416 U.S. 663 (1974). The court then ordered the forfeiture of the Beechcraft to the United States.

Both Total Time and Sundance appealed the forfeitures by protesting that they were improperly denied a jury trial, that airplanes do not constitute forfeiture property and that there was insufficient evidence to allow the forfeiture.

The court of appeals concluded that Total Time and Sundance, despite making timely requests for a trial by jury in their answers to the complaint, waived this right by failing to object to the district court's decision to try the case without a jury. Both defendants "vigorously participated" in the trial without mentioning their earlier request for a jury trial. *Id.* at 951. The court relied on its ruling in *Milner v. Norfolk & Western Railway Co.*, 643 F.2d 1005 (1981), which, according to the court, stood for the proposition that basic equitable principles did not "mandate a jury trial if the plaintiff was on notice that the trial court was planning to adjudicate the dispositive issues of fact in the case and did not object." *U.S. v. 1966 Beechcraft*, 777 F.2d at 951, *citing Miller*, 643 F.2d at 1011, n.1. Since Total Time and Sundance were aware of the court's plan, to allow the defendants to request a jury and then "ambush the trial judge" on appeal would be unfair. 777 F.2d at 951, *citing Palmer v. United States*, 652 F.2d 893, 897 (9th Cir. 1981).

Total Time next asserted that as an "innocent owner" it was exempt from the "broad sweep" of the forfeiture statutes. In *Calero*, the Supreme Court determined that an owner would not be subject to the forfeiture statutes where it was shown the owner was "not only uninvolved in and unaware of any wrongful activity, but that he had done all that could reasonably be expected to prevent the proscribed use of his property." 777 F.2d at 951. Seeright's behavior in the case at bar was determined to be unbusinesslike as well as unwise, particularly in an area "such as South Florida where drug trafficking through the use of private aircraft flourishes." The "conscious indifference" on the part of Seeright established that Total Time failed to do "all that it reasonably could to avoid having its property put to unlawful use." 777 F.2d at 952. Therefore, the Fourth Circuit concluded that the district court did not err in determining that Total Time was not an innocent owner.

The final argument on appeal involved the sufficiency of evidence produced at the trial by the government to support the forfeiture orders. Based on the testimony of Montgomery that the Beechcraft carried coconspirators Gerant and Coddington, as well as the cocaine, the court upheld the forfeiture of the Beechcraft. The Government argued that the Aerostar, while not involved in carrying cocaine, facilitated the drug conspiracy by transporting two of the conspirators to the site of the deal and, therefore, it was forfeitable under the statute.

The circuits are divided over whether 21 U.S.C. §881(a)(4), which subjects to forfeiture "all conveyances, including aircraft, vehicles, or vessels to transport, or in any manner to facilitate the transportation, sale, receipt, possession or concealment" of controlled substances, may reach aircraft only carrying the conspirators to the transaction site. The First, Ninth, and Tenth Circuits have held that §881(a)(4) lays down a per se forfeiture of certain items of contraband but not of vehicles used in the mere transportation of suspected conspirators. However, the Second, Fifth and Eleventh Circuits have resolved that forfeiture is proper when a vehicle only transports the drug dealer to the exchange site.

In aligning itself with the latter viewpoint, the court looked to the legislative history of the statute, which directed that the intent of the provision was to allow forfeiture of property "only if there is a substantial connection between the property and the underlying criminal activity." 777 F.2d at 952. The Fourth Circuit concluded that transporting conspirators to an exchange site establishes a "substantial connection between the conveyance and the criminal activity sufficient to justify an order of forfeiture." 777 F.2d at 953. It was further noted that the private airplane has become an important tool to drug traffickers, particularly by allowing for quick arrivals and departures, and makes their apprehension all the more difficult.

The court's decision regarding the waiver of a jury trial shows a total disregard for the Federal Rules of Civil Procedure. Rule 38(d) states that after a proper request for a trial by jury has been made, all the parties involved must consent before it can be withdrawn. Furthermore, Rule 39(a)(1) stipulates that a withdrawal must be in writing or by verbal consent in open court and entered in the record. Some courts hold that these rules are to be held in strict compliance and any waiver cannot occur unless within the precise terms of the rules. *Palmer*, 652 F.2d at 896. While some courts hold that these rules are not to be strictly construed, *see e.g.*, *Bass v. Hoagland*, 172 F.2d 205, 209 (5th Cir. 1949) *cert. denied*, 388 U.S. 816 (1949), these courts, including the Fourth Circuit, seem to be ignoring the spirit of the rules. A right to a jury trial "occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to jury trial should be scrutinized with the utmost care." *Dimick v. Schiedt*, 293 U.S. 474, 485 (1934).

How far the Fourth Circuit is willing to go to enforce 28 U.S.C. §881 remains to be seen. For now, owners of private vehicles need to establish steps to ensure their property is not being used for illegal purposes or else risk being subject to forfeiture. A lack of knowledge of the criminal activity is not sufficient under this recent decision. In addition, allowing ones property to be used only by the conspirators of crimes clearly jeopardizes that property.

–Patricia A. Grace

Trimper v. Porter-Hayden: STATUTE OF LIMITATIONS IN ASBESTOS-RELATED WRONGFUL DEATH ACTIONS

In an attempt to deal with the unique character of asbestos-related deaths and its effect on wrongful death and survival actions, the Court of Appeals of Maryland in *Trimper v. Porter-Hayden*, 305 Md. 31, 501 A.2d 446 (1985), held that wrongful death actions for asbestos-related deaths accrue either upon the discovery of the link between death and exposure to asbestos or upon the date of death, whichever occurs first.

In *Trimper* two widows, Charlotte M. Trimper and Sylvia Sandberg, filed separate actions under the survival statutes for the wrongful deaths of their respective husbands alleging that the deaths of their husbands resulted from their exposure to asbestos and asbestos dust. Both women filed their claims within three years from the discovery of the connection between asbestos exposure and the deaths of their husbands. The Circuit Court for Baltimore City dismissed both actions finding that the claims were time barred and each widow appealed to the court of special appeals where the cases were consolidated. Writ of Certiorari was issued by the court of appeals before the court of special appeals had the opportunity to consider the matter. The question before the court was whether wrongful death and survival actions for asbestos-related deaths are time barred when instituted more than three years after death or whether a discovery rule applies. The court considered the wrongful death claims apart from the survival claims as they are dealt with in separate statutes.

MD. CTS & JUD. PROC. CODE ANN. §3-904(g) (1984) deals with wrongful death and provides that an action for wrongful

death shall be brought within three years after the death of the injured person.

The appellants argued that where the decedent died not knowing that he was a victim of a wrong and that the wrong had caused his demise, the beneficiaries should have up to three years from the time they knew or should have known the cause of death, within which to bring an action for wrongful death. Just such a discovery rule was established in *Harig v. Johns-Manville Products Corp.*, 284 Md. 70, 394 A.2d 299 (1978), a latent disease case.

The *Trimper* court distinguished the *Harig* case from *Trimper*, as the former was brought under MD. CTS. & JUD. PROC. CODE ANN. §5-101 (1984) which is the general statute of limitations and which provides that an action shall be filed within three years from the date of accrual of the cause of action. The court in *Harig* defined "accrual" as when a plaintiff, "ascertains or through the exercise of reasonable care and diligence should have ascertained the nature and cause of his injury." 284 Md. at 83, 394 A.2d at 306. The court's definition of accrual was restricted to latent disease cases.

The *Trimper* court contended that precedent precluded the court from applying a discovery rule to wrongful death actions.

> The rule in Maryland is, that since the wrongful death statute created a new liability not existing at common law, compliance with the period of limitations for such actions is a condition precedent to the right to maintain the action. The period of limitations is part of the substantive right of action.

305 Md. at 35, citing *State v. Zitomer*, 275 Md. 534, 542, 341 A.2d 789, 794 (1975), cert. denied, 423 U.S. 1076 (1976), citing *Smith v. Westinghouse Electric Corp.*, 266 Md. 52, 55-56, 291 A.2d 452, 454 (1972); *Dunnigan v. Coburn*, 171 Md. 23, 25-26, 187 A. 881, 884 (1936); and *State v. Parks*, 148 Md. 477, 479-82, 129 A. 793, 795 (1925).

The legislative intent behind the creation of the wrongful death statute is absolutely clear and "there is no room for judicial interpretation." *Trimper*, 305 Md. at 36.

Conversely, the survival statutes do not create a new cause of action unknown to common law, but merely alter the common law under which certain actions may be brought on behalf of decedents. The statute provides that a cause of action at law, except slander, survives the death of either party. MD. CTS. & JUD. PROC. CODE ANN. §6-401(a) (1984). Limitations on survival actions are provided by the general statute of limitations.

Appellants, as personal representatives, relying on *Poffenberger v. Risser*, 290 Md. 631, 431 A.2d 677 (1981), which established discovery as the general test for accrual, argued to the court that the survival claims did not accrue until each woman knew or should have known of the condition between her husband's exposure to asbestos and the resulting diseases suffered by the decedents.

In response to this argument, appellees argued that if no cause of action accrued until it was discovered after the decedents' respective deaths, then the decedents had no cause of action at the time of death and therefore no action may be brought on behalf of the decedents under the survival statutes.

The court distinguished *Poffenberger* from the case at bar in that the former never dealt with an injured person who subsequently died either from the injury complained of or from other causes without having instituted a right of action for the injury. Rather, *Poffenberger* focused upon the injured person who discovered the wrong inflicted upon him while living but after the prescribed three years had expired.

The court also rejected appellees' argument that appellants' claims necessarily fail if a discovery rule is applied. An injured party need not know that he has suffered a legally recognized wrong which has resulted in harm in order to have a complete cause of action. The court further contended that the discovery rule limits the period of time in which an injured plaintiff may bring an action for the wrong committed, "but it does not change the time when a cause of action becomes conceptually complete." *Trimper*, 305 Md. at 42. Accordingly, the court held that the decedents in these cases have a cause of action which survive their deaths. The court then turned to the question of how long the causes of action exist.

Upon considering a series of case law dealing with statutory time bars to wrongful death and survival actions, from which no general principle regarding the same could be drawn, the court held that survival actions must be brought within three years of the discovery of a link between the fatal disease and the exposure to asbestos. The court explicitly limited the application of the discovery rule in survival actions to latent disease cases which are instituted initially as survival actions rather than wrongful death actions. The court supported its decision by referring to the workers compensation statute dealing specifically with latent occupational diseases. The statute contains a provision whereby an action for disability or death from pulmonary dust disease must be brought within three years from the date of disablement or death or the date on which the employee or his dependent discovered the link between the disablement or death and his employment. MD. ANN. CODE art. 101, §26(a)(4) (1985).

Thus considering the legislative intent of the wrongful death statute, the discovery rule established in *Harig*, and the workers compensation statute, the *Trimper* court concluded that in situations involving the latent development of disease, a cause of action accrues either when a person discovers or reasonably should have discovered the nature and cause of the injury, or at death whichever first occurs. Judgments of the Circuit Court for Baltimore City were affirmed.

—Patricia Dart Brooks

Mayor and City Council of Baltimore v. Indianapolis Colts, Inc.: THE DEMISE OF THE PUBLIC USE DOCTRINE

In 1982, California acknowledged a sovereign's latent power to condemn a professional sports franchise through eminent domain. *City of Oakland v. Oakland Raiders*, 32 Cal. 3d 60, 183 Cal. Rptr. 673, 646 P.2d 835 (1982). Recently in *Mayor and City Council of Baltimore v. Indianapolis Colts, Inc.*, 624 F. Supp. 278 (D.Md. 1985), the City of Baltimore sought to test this power in an attempt to enjoin the Colts football franchise from relocating to Indianapolis.

Prompted by ailing negotiations between the City and Colt's owner Robert Irsay, the Maryland Senate on March 27, 1984 passed emergency legislation authorizing the City of Baltimore to condemn the Colt's NFL franchise. In response, Mr. Irsay immediately began shipping all of the team's physical possessions to Indianapolis. Crews worked throughout the night of March 28, and by early morning the loaded Mayflower vans had left Maryland.

On March 30, 1984, the Maryland Legislature finalized Emergency Bill No. 1042, 1984 Md. Laws Ch. 6. Emergency Ordinance No. 32 was thereafter enacted by the city authorizing the condemnation of sport franchises. A condemnation petition was immediately filed in the Circuit Court for Baltimore City seeking to acquire the Colts by eminent domain. On April 2, 1984 the Colts removed the case to the federal district court on the basis of diversity jurisdiction.

The law of eminent domain authorizes a sovereign to take property for public use without the owner's consent upon making just compensation. Nichol's on Eminent Domain (3rd ed. 1980) §1.11 pp. 1-10. The majority of the case law defining the