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Limitations on Workers Bringing Third Party Actions Under Section 58 of the Workers' Compensation Act

by Matthew I. Lynn

The Court of Appeals of Maryland in *Smith v. Bethlehem Steel Corporation*,[1] addressed the effect of the statute of limitations, regarding claims of employees against third parties, on the employer/employee relationship under § 58 of the Workers' Compensation Act.[2]

The plaintiff, Smith, was a brick layer employed by Bethlehem Steel Corporation (Bethlehem) at its Sparrows Point, Maryland plant from 1948 to 1981. Smith discovered in March of 1979 that he had contracted asbestosis.[3] Mr. Smith had been exposed to asbestos and products containing asbestos during his employment with Bethlehem. Seeking recovery for injuries, Smith and his wife filed suit in the United States District Court for the District of Maryland in August 1981.[4] The Smiths named fifteen defendants in their complaint including distributors and manufacturers of asbestos products, three physicians, and Bethlehem itself. Mr. Smith contended that his asbestosis was caused by "the deliberate intention of [Bethlehem] to produce such injury. . . ."[5]

In March of 1982, Smith filed a claim with the Maryland Workers' Compensation Commission (Commission)[6] requesting benefits alleging occupational disease. Smith then filed a request for a stay of the proceedings in the workers' compensation claim on June 8, 1982, on the ground that the claim could be rendered moot depending on the outcome of the suit filed previously in federal court.[7]

In September of 1982, pursuant to a discovery order by the federal court, Bethlehem produced records which revealed the involvement of Quigley Company, Kaiser Aluminum and Chemical Corporation, and International Minerals and Chemical Corporation. These additional companies were thought to have supplied products to Bethlehem which might have contained asbestos.

In November 1983, Smith amended his federal court complaint to include the aforementioned suppliers as additional defendants.[8] The newly named defendants subsequently moved for summary judgment. They contended that the time within which to file suit had expired with regard to Smith's cause of action as against them.[9] Smith responded by contending that the amended claims were not time barred, citing to the second paragraph of § 58 of the Workers' Compensation Act.[10] The federal court, relying on the Uniform Certification of Questions of Law Act, certified a question to the Court of Appeals of Maryland to ascertain how paragraph two of § 58 affected limitations in third party actions.[11]

The first paragraph of § 58 of the Workers' Compensation Act provides that where injury or death is caused under circumstances creating a legal liability in a third party to pay damages, the employee may proceed against that third party to recover damages, or against the employer for compensation, or both in the case of joint tortfeasors. If compensation is claimed, awarded, or paid under this article, an employer may enforce, for its benefit, the liability of such other person. If an employer does not start proceedings to enforce the liability of such other person within two months from the passage of an award by the Commission, the injured employee may enforce the liability.[12]

The second paragraph of § 58, as amended in 1985, addresses the tolling of the limitations period.[13] Unfortunately, there is no legislative history which would assist in ascertaining the legislative intent of the second paragraph.[14] The paragraph provides:

> When any employee has a right of action under this section against a third party, the period of limitations for such action, as to such employee, shall not begin to run until two months after the first award of compensation made to such employee under this article, and this section shall apply to past and future rights of action under this section.[15]

The *Smith* court held that this amendment to § 58 tolled the unexpired period of limitations against a third party tortfeasor, during the two month period following an award of workers' compensation benefits, during which time the employer has the exclusive right to file a civil action against the third-party tortfeasor.[16] However, it is not clear whether the court's decision in *Smith* gives the plaintiff two additional months beyond the statutorily defined three-year period[17] during which he may file suit. The court did not indicate under what circumstances the two month extension period would apply. This author believes that the most reasonable interpretation of *Smith* is that § 58 extends the limitation period for an additional two month period only in two instances. They are:

1) when the award of workers' compen-

sation benefits is made during the last two months before the statute of limitations runs out under § 5-101, and

2) during the two-month period within which the employer still has the exclusive right to bring such an action.[18]

It is important to note that an action brought by an employer under § 58 can only be brought as a derivative action. The employer's right to participate in such a suit arises only when the injured employee brings a workers' compensation claim. The court's interpretation of § 58 requires that the benefits be both "claimed and awarded or paid"[19] before the claimant's employer had standing to bring an action under that statute. In addition, the employee has no independent standing to bring a third party action against the negligent tortfeasor.[20]

Statutes of limitations have been described as remedial legislation that rest on sound public policy.[21] The reasoning behind the policy decision to limit the time period within which a party may bring legal action for an injury is to balance the competing interests of the potential adversarial parties in addition to certain societal interests.[22] On the one hand, there is a desire to grant to the potential plaintiff an adequate period of time within which he may, using reasonable diligence, pursue a claim. On the other hand, a limitation period assures a potential defendant that there shall be a period of time beyond which he will no longer be subject to the uncertainty and risk which accompanies potential liability.

> [O]ne of the purposes of such statutes is to assure fairness to a potential defendant by providing a certain degree of repose. This is accomplished by encouraging promptness in prosecuting actions; suppressing stale or fraudulent claims; avoiding inconvenience that may stem from delay, such as loss of evidence, fading of memories, and disappearance of witnesses; and . . . to promote judicial economy.[23]

The courts have held that statutes of limitations should be strictly construed to further the public policy which serves as the basis for their enactment.[24] The courts have refused to give such statutes a strained construction which would result in evading their effect.[25] In addition, it has been held that statutes of limitations have "[t]heir justification in necessity and convenience rather than logic. They represent expedients, rather than principles."[26]

Section 5-101 provides that "[a] civil action at law shall be filed within three years from the date it accrues unless another provision of the Code provides a different period of time within which an action shall be commenced."[27] Therefore, unless there is another applicable provision of the Code which provides a different period of limitation, one who attempts to file a civil action at law more than three years from the date it accrues will be barred.[28]

While § 5-101 provides that the statute of limitation period expires three years from the date when the cause of action accrues, one must look to case law to determine when a cause of action actually accrues.[29] In Maryland, the general rule is that a cause of action "accrues" upon the occurrence of the alleged wrongful conduct of the tortfeasor.[30] However, several legislative and judicial exceptions to this rule have been carved out; the most notable is the "discovery rule" which is applicable to all cases involving professional malpractice, latent diseases, faulty construction and certain defamation actions.[31]

"First, it will further the primary purpose of the statute of limitations, namely protecting potential defendants from stale claims . . ."

The decision of the court of appeals in *Smith* implies that the second paragraph of § 58 would affect the period of limitations governed by § 5-101 in an action brought by an employee against a third party tortfeasor. This would occur only in instances where the three year limitation period mandated by § 5-101 would expire during the two month period following the first award of workers' compensation benefits. During this period the employer has the exclusive right to bring an action against the negligent tortfeasor.[32] If such factual circumstances are not present, then under *Smith* there would be no reason for tolling the statute of limitations for a two month period after the award of workers' compensation benefits to the claimant.[33] In such instances, limitations of actions would be governed exclusively by § 5-101, and the plaintiff would not have the additional two month grace period within which to file a claim under § 58.

After *Smith* an employee can no longer file a workers' compensation claim immediately prior to the running of the limitations period and after receiving an award, expect to have an additional three year limitations period before filing a § 58 action. Article 101, § 39 operates concurrently with the three-year statute of limitations in any personal injury case as set forth in § 5-101. After *Smith*, the injured employee will be unsuccessful in contending that the statute of limitations as set forth in § 5-101 does not commence running until after the Workers' Compensation Commission has made the first award of compensation to such employee.

Under the ruling in *Smith*, notwithstanding the language of paragraph two of § 58, whenever a third-party cause of action arises out of an employee's work-related injury, the three-year statute of limitations on such a claim begins to run from the date the tortious conduct accrues. This is generally upon the occurrence of the alleged wrong unless the discovery rule applies. In situations similar to that in *Smith* where a claimant discovers a latent development of disease, the cause of action accrues under § 5-101 when the injury is discovered, or through the exercise of reasonable care and diligence should have discovered the nature and cause of the injury.

The effect of *Smith* will be twofold. First, it will further the primary purpose of the statute of limitations, namely, protecting potential defendants against stale claims brought after the expiration of the time in which a person of ordinary diligence would have brought an action. The rationale for this objective is to give assurance to the defendant that he will not be liable for an indeterminable length of time for any tortious conduct he may have committed. The second effect of *Smith* will be to promote judicial economy by encouraging promptness in instituting § 58 claims.

It appears that the court in *Smith* intended the statute of limitations for the filing of an action against a third-party defendant to be tolled for only the two month period following an award of workers' compensation benefits to an injured worker and only if the three year statute of limitations expired during that two month period. The court will no doubt have to clarify *Smith* further in the future.

Notes

[1]303 Md. 213, 492 A.2d 1286 (1985).
[2]MD. ANN. CODE art. 101 § 58 (1985).
[3]*Id.* at 217, 492 A.2d at 1288.
[4]*Id.*
[5]*Id.*
[6]*Id.*
[7]*Id.* at 218, 492 A.2d at 1288.
[8]*Id.* at 217, 18, 492 A.2d at 1288.

[9]*Id.* at 218, 492 A.2d at 1288.
[10]*Id.*
[11]*Id.* at 216, 492 A.2d at 1287.
[12]MD. ANN. CODE art. 101 § 58 (1985).
[13]1955 Md. Laws 588.
[14]303 Md. 213 at 219, 492 A.2d at 1289.
[15]1955 Md. Laws 588.
[16]303 Md. 213, 229, 492 A.2d 1286, 1294.
[17]MD. CTS. & JUD. PROC. CODE ANN. § 5-101 (1984).
[18]*Waldhauser, et al. v. Baltimore Gas & Electric Co., et al.*, No. 830L8062/L-738 (Balto. City Cir. Ct. ____) (Bothe, J.) (on appeal to Md. Ct. Spec. App.) recently determined that only such circumstances would warrant the extension period for an additional two months.
[19]303 Md. 213 at 222, 492 A.2d at 1290.
[20]303 Md. 213 at 221-22, 492 A.2d at 1290. The court stated that the employer's claim against the third party is based upon the employer's Right of subrogation. *See, e.g. Baltimore Transit Co. v. State ex rel. Schiefer*, 183 Md. 674, 678, 39 A.2d 858, 860 (1944); *Western Maryland Ry. Co. v. Employers' Liability Assurance Corp.*, 163 Md. 97, 102, 161 A. 5, 7 (1932).
[21]*McMahan v. Dorchester Fertilizer Co.*, 184 Md. 155, 40 A.2d 313 (1944). At common law, there were no statutes of limitation fixing the time for bringing an action.
[22]*Pierce v. Johns-Manville Sales Corp.*, 296 Md. 656, 665, 464 A.2d 1020, 1026 (1983).
[23]*Pierce v. Johns-Manville Sales Corp.*, 296 Md. 656, 665, 464 A.2d, 1020, 1026 (1983), citing *Goldstein v. Potomac Elec. Power Co.*, 285 Md. 673, 684, 404 A.2d 1064, 1069 (1979), and *Harig v. Johns-Manville Products*, 284 Md. 70, 75-76, 394 A.2d 299, 302 (1978). *See Also, Developments in the Law—Statute of Limitations*, 63 Harv. L. Rev. 1177, 1185 (1950); *Feldman v. Granger*, 255 Md. 288, 297, 257 A.2d 421, 426 (1969).
[24]*Decker v. Fink*, 47 Md. App. 202, 422 A.2d 389 (1980); *Lehigh Chemical Co. v. Celanese Corp. of America*, 278 F. Supp. 894 (D.Md. 1968); *McMahan v. Dorchester Fertilizer Co.*, 184 Md. 155, 40 A.2d 313 (1944). *See also* 20 MD. L. REV. 170, 171 (1960).
[25]*Id.*
[26]*Pierce v. Johns-Manville Sales Corp.*, 296 Md. 656, 664-65, 464 A.2d 1020, 1025 (1983) (quoting *Chase Securities Corp. v. Donaldson*, 325 U.S. 304, 314, 65 S.Ct. 1137, 1142 (1945)).
[27]MD. CTS. & JUD. PROC. CODE ANN. § 5-101 (1984).
[28]*Id.*
[29]*Pierce v. Johns-Manville Sales Corp.*, 464 A.2d 1020, 1025 (1983), citing *Poffenberger v. Risser*, 290 Md. 631, 636, 431 A.2d 677, 680 (1981), *Harig v. Johns-Manville Products Corp.*, 284 Md. 70, 83, 394 A.2d 299, 306 (1978).
[30]*Watson v. Dorsey*, 265 Md. 509 (1972), 290 A.2d 530; *Jones v. Sugar*, 18 Md. App. 99, 305 A.2d 219 (1973); *DelCostello v. International Brotherhood of Teamsters*, 588 F.Supp. 902 (D. Md. 1984), *aff'd.* 762 F.2d 1219 (4th Cir.1984); *Smith v. Sherwood*, 308 F.Supp. 895 (D. Md. 1970).
[31]*Feldman v. Granger* (*Medical malpractice*), 255 Md. 208, 257 A.2d 421 (1969); *Steelworkers Holding Co. v. Menefee* (*faulty construction and professional malpractice*), 255 Md. App.440, 258, A.2d 177 (1969); *Smith v. Sherwood*, 308 F.Supp. 895 (D. Md. 1970); *Poffenberger v. Risser* (*latent disease*), 290 Md. 631, 431 A.2d 677 (1981); *Harig v. Johns-Manville Products Corp.*, 284 Md. 70, 394 A.2d 299 (1978).
[32]303 Md. 213, 229, 494 A.2d 1286, 1294, (1985).
[33]*Id.*
[33]MD. ANN. CODE art. 101 § 39 (1985) provides for an employee to file a claim for workmen's compensation within two years from the date of his accidental injury. Under § 26(a), which governs occupational disease claims, a claim must be filed with the Workers' Compensation Commission within three years from the date of disablement in pulmonary disease cases and within two years from the date of disablement in other occupational disease cases.

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