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Lowell Celebrates too Soon in Landfill Lawsuit

Statute of Limitations Defense Fails in Environmental Case

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SPECIAL TO BANKER & TRADESMAN

Statutes of limitations are a defendant's best friend. If plaintiffs do not timely file suit under these statutes, even the most dastardly and negligent defendant can avoid liability.



The city of Lowell had been celebrating the dismissal of an environmental contamination claim against it on statute of limitations grounds in *Grand Manor Condominium v. Lowell*,

until last month, when the Supreme Judicial Court cut short the celebration.

Lowell operated a landfill in the 1940s and 1950s. Like many mid-20th century city dumps, the landfill accepted toxic waste without concern. The landfill site was developed into condominiums in the 1980s. Decades later, the condominium association discovered contamination while installing a drainage system. The association's contractor tried to remove the contamination in March 2009 but a month later reported that its efforts had failed.

The association disclosed the problem to the Department of Environmental Protection (DEP), which notified the city

in May 2009 of its potential responsibility under the Massachusetts Oil and Hazardous Material Release Prevention Act (Chapter 21E). The association sent the city a letter on Oct. 13, 2009, demanding payment of the association's response costs.

After an investigation, the city issued reports in June 2012 acknowledging releases of over 1.5 million cubic feet of hazardous material at the site, with estimated removal costs at \$11.7 million. The reports concluded that full remediation was impractical and recommended capping the contamination with pavement. An activity and use limitation would be imposed upon the site, to prevent exposure to contamination. The reports disclosed that damage from the hazardous material was permanent.

The condominium association sued the city on Oct. 10, 2012. It sought to recover its response costs related to the contamination under Section 4A of Chapter 21E. The suit included a separate claim under Section 5 of Chapter 21E, seeking compensation for permanent damage from the contamination, such as lost property values. The statute of limitations for claims under Section 5 is three years, which begins to run on the date when the plaintiff first sustains damage or discovers or should have discovered the damage and

the person responsible, whichever is later.

The city argued that the association's Section 5 claims was time barred, because the association had not filed suit within three years after discovering the contamination and the city's responsibility. A jury awarded response costs to the association under Section 4A, but found that the statute of limitations barred the association's claim under Section 5 for permanent damage. The superior court entered judgment for the city on the Section 5 claim.

A Setback from the SJC

The Supreme Judicial Court overturned the superior court's judgment last month. The SJC noted that the permanent damages claim under Section 5 would be barred if the limitations period started before Oct. 10, 2009, three years before the association filed suit. The SJC listed the relevant dates; namely, March 2009, when the association's contractor tried to remove the contamination; April 2009, when the contractor reported its failure; May 2009, when DEP notified the city of its responsibility; October 2009, when the association demanded reimbursement of response costs from the city; and June 2012, when the city reported that all contamination could not be removed and the site needed a pavement cap and a permanent activity and use limitation.

The SJC differentiated the association's claims under Section 4A and Section 5 of Chapter 21E. Section 4A is intended to compensate plaintiffs for response costs in containing and removing hazardous material. In contrast, Section 5 addresses permanent property damage sustained when a site cannot be restored to its pre-contamination condition. Such permanent

damage can take the form of decreased market value, lost rents and use limitations. The SJC ruled that because Section 5 provides a remedy for permanent damage from contamination, the three-year statute does not begin to run until the date when plaintiffs learn of such permanent damage. As to the Grand Manor Condominium, that date did not occur until

June 2012, when the city reported the extent of contamination and that full remediation was impractical. Based on this reasoning, the SJC held that the statute of limitations did not bar the association's claim under Section 5, filed in October of 2012.

The SJC vacated the superior court's judgment and remanded the case for fur-

ther proceedings. In light of the SJC's decision, Chapter 21E's statute of limitations affords much less protection to defendants in environmental contamination litigation than they might have hoped. ◀

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