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Statute of Limitation in All Asbestos Cases (Including Wrongful Death Actions) Commences at the Time of Diagnosis



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Your client whose loved one has died of an asbestos-related disease may not have a wrongful death claim. The well-established two-year Statute of Limitations applicable to Wrongful Death actions in Pennsylvania does not apply to every matter. Specifically, in Pennsylvania, the applicable law is 42 Pa. C.S. §5524, which holds that an individual only has two years from the date that he or she is diagnosed with an asbestos-related disease to bring forth a claim.

The General Assembly previously recognized that 42 Pa. C.S. §5524 was problematic and enacted Act 152 in 2004. Among other things, Act 152 amended the statute issue by extending the Statute of Limitations for deaths caused by asbestos related injuries to two years. Act 152 was a casualty of the Supreme Court's decision in *Commonwealth v. Neiman*, 84 A.3d

603 (Pa. 2013). The Court in *Neiman* struck down Act 152 and its Statute of Limitations for asbestos matters, specifically, 42 Pa. C.S. §5524.1, as violative of the Single Subject Rule. This was then affirmed by the Superior Court in *Wygant*. The Pennsylvania Superior Court held in *Wygant* that the statute commences when the person is diagnosed with an asbestos-related disease. *Wygant v. General Electric Co.*, 113 A.3d 310 (Pa.Super. 2015), appeal denied, 126 A.3d 1286 (Pa. 2015). On behalf of the decedent's estate, Elizabeth Wygant filed wrongful death and survival actions over two years after the decedent's mesothelioma diagnosis but **less than** two years after the date of death. The trial court dismissed both actions in her case as time-barred under 42 Pa. C.S. §5524(8). Judge Bowes wrote the decision on behalf of the unanimous panel and addressed the law in light of the Supreme Court's decision in *Commonwealth v. Neiman*, 84 A.3d 603 (Pa. 2013).

The court held: "With respect to asbestos-related wrongful death actions, the passage of 42 Pa.C.S. §5524(8) changed prior law. Before the enactment of §5524(8), asbestos-related wrongful death actions were treated no differently than any other wrongful death

claims; the Statute of Limitations on wrongful death claims commenced when the action accrued upon the death of the decedent. For non-asbestos-related wrongful death claims, that remains the law. However, in enacting 42 Pa.C.S. §5524(8), the legislature provided that, in all actions for injury or death related to asbestos specifically, the two-year Statute of Limitations would commence to run either when the afflicted person was formally diagnosed with asbestos-related disease, or, with reasonable diligence, should have been diagnosed. No exception was made for wrongful death actions."

The Superior Court decision noted that voiding Act 152 actually revived the original statute of limitations at 42 Pa. C.S. §5524(8), which Act 152 had deleted and accordingly the two-year statute applied. "Since Act 152 is void, and renders invalid 42 Pa.C.S. § 5524.1, Act 152's deletion of § 5524(8) is also void. The deletion and re-enactment occurred in the same unconstitutional statute. Thus, 42 Pa.C.S. §5524(8) remains operative and supplies the applicable Statute of Limitations in an asbestos case." *Wygant, supra*, 113 A.3d at 313.

The Court held that 42 Pa. C.S. 5524(8) unambiguously states that,

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in all actions for injury or death related to asbestos, the two-year Statute of Limitations begins to run either when the afflicted person was formally diagnosed with the asbestos-related disease, or, with reasonable diligence, should have been diagnosed. Importantly as a practitioner, it should be recognized that this may result in wrongful death actions being time-barred before they can be instituted. The Court acknowledged that this rule could appear harsh, however, the Court reiterated that the subject statute is unambiguous and stated that "it is the prerogative of the legislature to set limitations on actions."

Asbestos actions differ from typical product liability cases because of

the long latency periods associated with asbestos-related diseases, and typically the date of injury cannot be traced back to one particular moment. The injury may have been caused by a long period of asbestos exposure, usually several years. Because asbestos-related diseases' latency periods are significantly longer than Pennsylvania's Statute of Limitations (or almost any state statute), courts have been willing to make exceptions for asbestos claimants. The *Wygant* court noted that the Pennsylvania legislature, in enacting 42 Pa.C.S. §5524(8), provided that in all actions for injury or death related to asbestos specifically, that the two-year Statute of Limitations would commence either when the afflicted person was formally diagnosed

with asbestos-related disease, or, with reasonable diligence, should have been diagnosed. The harsh reality is that this defective statute that the General Assembly tried to correct is now our current law. We do not yet know what the long term effect of this statute will be. What we do know is that there is no exception for wrongful death actions. ▶

Editor's Note: Priscilla Jimenez sits on the Editorial Board of the *Verdict* and is an associate at the law firm of Kline & Specter, P.C., where she concentrates her practice on mass torts and personal injury litigation. You may contact Ms. Jimenez at: priscilla.jimenez@klinespecter.com.