



## Feature Article

Jeffrey S. Hebrank and Alemayehu (Ali) Ayanaw  
HeplerBroom LLC, Edwardsville

# Public Act 098-1131—Can it Really “Breathe Life” into a Time-Barred Claim?

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On December 19, 2014 Governor Pat Quinn signed into law Senate Bill 2221, now Public Act 098-1131. Public Act 098-1131 amends section 13-214(b) of the Code of Civil Procedure, 735 ILCS 5/13-214, by removing the 10-year statute of repose for causes of action against construction professionals related to asbestos exposure.

Section 13-214(b), in pertinent part, provides:

No action based upon tort, contract or otherwise may be brought against any person for an act or omission of such person in the design, planning, supervision, observation or management of construction, or construction of an improvement to real property after 10 years have elapsed from the time of such act or omission.

To contravene the time limitation imposed by subsection (b) of section 13-214, Public Act 098-1131 adds subsection (f) to the statute and provides that “Subsection (b) *does not apply to* an action that is based on personal injury, disability, disease, or death resulting from the discharge into the environment of *asbestos*.” (Emphasis added.) Thus, under this provision it is plausible to concede that asbestos exposure claims against construction professionals, with limited exceptions, now have perpetual existence.

Understandably, subsection (f), which takes effect June 1, 2015, has caused a great deal of anxiety for contractors, premises owners, construction professionals, their insurers and their respective attorneys. This apprehension stems from the alarming concern over the unknown. Construction professionals may be concerned about an array of issues, including, but not limited to, the potential for the courts to retroactively apply subsection (f) and/or the potential for the plaintiffs to cause unreasonable delays in filing potential causes of action.

Fortunately for potential construction professional defendants, Illinois precedent may offer guidance and limit the scope of the “unknown.” As such, this article will examine Illinois case law addressing the retroactive application of new statutes to claims predating its effective date and constitutional rights of potential defendants.

## When is a Statute Given Retroactive Effect?

Perhaps the greatest concern for potential defendants arising out of Public Act 098-1131 is the uncertainty as to how the courts will apply this recent amendment. Will this amendment removing the limitation period for filing asbestos related claims revive already time-barred claims? In particular, would the plaintiffs who previously could not file a lawsuit pursuant to the 10-year statute of repose now be permitted to pursue claims? Fortunately for the defendants, it appears that Illinois law answers this question in the negative.



In determining whether a new statute applies to causes of action predating the new statute's effective date, the Illinois Supreme Court has adopted the approach established by the United States Supreme Court in *Landgraf v. USI Film Prods.*, 511 U.S. 244 (1994). See *Commonwealth Edison Co. v. Will Cnty. Collector*, 196 Ill. 2d 27, 39 (2001). According to the Illinois Supreme Court:

Under the *Landgraf* test, if the legislature has clearly indicated what the temporal reach of an amended statute should be, then, *absent a constitutional prohibition*, that expression of legislative intent must be given effect. However, when the legislature has not indicated what the reach of a statute should be, then the court must determine whether applying the statute would have a retroactive impact, *i.e.*, “*whether it would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed.*” [Citation removed.] If there would be no retroactive impact, as that term is defined by the court, then the amended law may be applied. [Citation removed.] If, however, applying the amended version of the law would have a retroactive impact, then the court must presume that the legislature did not intend that it be so applied.

*Commonwealth Edison Co.*, 196 Ill. 2d at 38. (Emphasis added.)

In subsequent decisions following the Illinois Supreme Court's adoption of the *Landgraf* test, Illinois courts considered the interaction of this test with section four of the Statute on Statutes. See *Caveney v. Bower*, 207 Ill. 2d 82, 92-93 (2003); see also *Allegis Realty Investors v. Novak*, 223 Ill. 2d 318, 331-332 (2006). In pertinent part, section four of the Statute on Statutes provides:

No new law shall be construed to repeal a former law, whether such former law is expressly repealed or not, as to any . . . right accrued, or claim arising under the former law, or in any way whatever to affect any such offense or act so committed or done, or any penalty, forfeiture or punishment so incurred, or any right accrued, or claim arising before the new law takes effect, save only that the proceedings thereafter shall conform, so far as practicable, to the laws in force at the time of such proceeding.

5 ILCS 70/4.

In light of section four of the Statute on Statutes, the Illinois Supreme Court concluded that no court needs to ever go beyond the first step of the *Landgraf* test, which is determining whether the legislature has set the statute's temporal reach. *Allegis*, 223 Ill. 2d at 332. The *Allegis* court further elaborated that in every situation the legislature will have “indicated the temporal reach of an amended statute, either expressly in the new legislative enactment or by default in section four of the Statute on Statutes.” *Id.*

Thus, if the legislature has conveyed a clear intent to apply the new amendment of a statute retroactively, courts are obligated to do so unless doing so would undercut a party's constitutional rights. If the legislature has not indicated the temporal reach of the amendatory statute, then courts are directed to plug-in section four of the Statute on Statutes, which permits the retroactive application of “procedural or remedial provisions,” but explicitly “prohibits retroactive application of statutory changes that affect *substantive provisions or vested rights.*” *People v. Glisson*, 202 Ill. 2d 499, 509 (2002) (emphasis added).



## Constitutional Protection of Vested Rights

The topic involving the discord between the retroactive application of legislative acts and the due process rights of individuals burdened by such acts is one that has been voluminously addressed by the Illinois Supreme Court. *See, e.g., Hayashi v. Ill. Dept. of Fin. & Prof'l Reg.*, 2014 IL 116023, (Oct. 17, 2014); *Lazenby v. Mark's Const., Inc.*, 236 Ill. 2d 83 (2010); *M.E.H. v. L.H.*, 177 Ill. 2d 207, 218 (1997); *Sepmeyer v. Holman*, 162 Ill. 2d 249 (1994); *Bd. of Educ. of Normal Sch. Dist. v. Blodgett*, 155 Ill. 441 (1895). It is well established by Illinois precedent that the “legislature lacks the power to reach back and breathe life into a time-barred claim.” *Sepmeyer*, 162 Ill. 2d at 254. This long standing principle is centered upon the view that the defendant has a constitutionally protected right to not be sued after the plaintiff’s claim becomes barred by the applicable statute. *See Blodgett*, 155 Ill. at 446 (holding “when the bar of a statute of limitations has become complete by the running of the full statutory period, the right to plead the statute as a defense is a vested right, which cannot be destroyed by legislation. . . .”) *See also M.E.H.*, 177 Ill. 2d at 218 (finding “a defense based on the expiration of a limitations period is a vested right protected by the constitution and beyond legislative interference.”)

Of note, one decision by the Illinois Supreme Court, *Doe A. v. Diocese of Dallas*, 234 Ill. 2d 393 (2009), may be of great value to potential defendants confronting a claim because of Public Act 098-113. In *Diocese of Dallas* the Illinois Supreme Court held that a statutory amendment which increased the applicable statute of limitation for personal injury claims based on childhood sexual abuse could not be applied retroactively “without running afoul of this state’s constitution.” *Diocese of Dallas*, 234 Ill. 2d at 407.

The facts of *Diocese of Dallas* involve an amendment to section 13-202.2(b) of the Code of Civil Procedure, 735 ILCS 5/13-202.2(b). *Id.* at 401. Prior to its amendment in 2003, section 13-202.2(b) provided that actions for damages for personal injury based on childhood sexual abuse must be commenced within two years of the date the abused person discovers his abuse. *Id.* As described by the *Diocese of Dallas* opinion, the 2003 amendments to section 13-202.2, which became effective on July 24, 2003, added that “actions for damages for personal injury based on childhood sexual abuse must be commenced within 10 years of the abused person’s eighteenth birthday” or within five years from the date the abused person discovers his abuse. *Id.*

After seeking counseling, the plaintiff in this case became aware of his childhood sexual abuse in 1998. *Id.* Under the version of section 13-202.2(b) in effect at that time the plaintiff had until December 2000 to file a claim; but he did not do so until November of 2003. *Id.* The defendants argued that the plaintiff’s claim should be dismissed because it was time-barred under the version of section 13-202.2(b) in effect at the time the plaintiff became aware of his abuse. *Id.* The circuit court agreed and dismissed the case as to all the defendants noting, “the version of section 13-202.2 as amended in 2003 [citation removed] could not be applied to revive plaintiff’s claims.” *Id.* at 402. The plaintiff appealed and the appellate court reversed and remanded, finding that retroactive application of the 2003 version of section 13-202.2 to the defendants “would not offend due process.” *Id.* at 403. The Illinois Supreme Court allowed the defendants’ petition for leave to appeal.

In assessing whether the 2003 version of section 13-202.2 should be applied retroactively, the Illinois Supreme Court conducted the first step of the *Landgraf* test, which is determining whether the legislature has set the statute’s temporal reach. *Id.* at 405. The court concluded that the legislature clearly expressed the intent to give the 2003 version of section 13-202.2 retroactive effect. *Id.* at 406. The court then moved to the next step of the *Landgraf* test, which is determining whether retroactive application of the 2003 version of section 13-202.2 is prohibited by the State’s constitution. *Id.* at



407. The court held that retroactive application of the 2003 version of section 13-202.2 would run afoul of the State's constitution. *Id.* at 407. Specifically, relying on its earlier decision in *M.E.H. v. L.H.*, the Illinois Supreme Court reiterated the long established principle "that once a claim is time-barred, it cannot be revived through subsequent legislative action without offending the due process protections of our state's constitution." *Id.* at 411-12. Thus, pursuant to the laws of Illinois, if a claim is time-barred under a prior statute, it remains time-barred irrespective of any intent to revive such claim with an amended statute.

### Application of Public Act 098-1131 under Illinois Law

As noted above, Public Act 098-1131 takes effect June 1, 2015. In determining whether a new statutory amendment is to be applied retroactively, the Illinois Supreme Court directs us to inquire as to whether the legislature has prescribed the temporal reach of the new amendment. *Commonwealth Edison Co.*, 196 Ill. 2d at 38. In doing such, we must look at the language of the amended statute.

Pub Act 098-1131 does not indicate whether new subsection (f) is to be applied retroactively. Thus, according to the Illinois Supreme Court section four of the Statute on Statutes must be plugged in as the default guide for the temporal reach of a new statute. *Allegis*, 223 Ill. 2d at 332. Section four of the Statute on Statutes permits the retroactive application of "procedural or remedial provisions," but explicitly "prohibits retroactive application of statutory changes that affect substantive provisions or vested rights." *Glisson*, 202 Ill. 2d at 509. (Emphasis added.)

In applying the parameters established by section four of the Statute on Statutes we must first determine the point at which the defendant impacted by Public Act 098-1131 accrues a "vested right." Pursuant to Illinois law, the expiration of a prescribed statutory period for a cause of action creates a vested right protected by the state's constitution. *See Diocese of Dallas*, 234 Ill. 2d at 411-12. *See also M.E.H.*, 177 Ill. 2d at 218; *Sepmeyer*, 162 Ill. 2d at 255; and *Blodgett*, 155 Ill. at 446.

Subsection (b) of section 13-214, which is the law in effect for causes of action arising prior to the effective date of Public Act 098-1131, June 1, 2015, imposes a 10-year statute of repose on any action arising from "an act or omission of such person in the design, planning, supervision, observation or management of construction, or construction of an improvement to real property. . . ." Therefore, generally speaking, any unclaimed cause of action that was time-barred before the effective date of Public Act 098-1131 will continue to be time-barred, because the defendant has accrued a vested right to assert this statute of repose defense.

### About the Authors

**Jeffrey S. Hebrank** is a partner of *HeplerBroom LLC* in Edwardsville. Mr. Hebrank's trial experience covers many areas of personal injury and bodily injury litigation with special emphasis in the areas of asbestos and toxic tort. Mr. Hebrank is licensed to practice law in both Illinois and Missouri and has tried numerous jury cases to verdict throughout the country. He is admitted to practice in Illinois, Missouri, and the Federal District Courts for the Southern, Central and Northern Districts of Illinois as well as the Eastern District of Missouri. He has represented clients before the Illinois Supreme Court. A graduate of the University of Dayton and St. Louis University School of Law, Mr. Hebrank is a past president of the Illinois Association of Defense Trial Counsel and is a member of the Illinois State Bar



Association, Defense Research Institute, Claims and Litigation Management Alliance, Madison County Bar Association and The Missouri Bar.

**Alemayehu (Ali) Ayanaw** is an associate in the Edwardsville office of *HeplerBroom LLC*. Mr. Ayanaw focuses his practice on trials involving complex business litigation matters, including: premise liability, toxic torts and product liability. He is a 2012 graduate of Washington University School of Law.

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