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RAWLE'S REPORTS

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Reversing Course: Application of the Statute of Repose

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Since asbestos litigation began in Cambria County in the late 1980s, the jurisdiction has been a formidable one for defendants. Most of these lawsuits have involved retired steelworkers who previously worked at the Bethlehem Steel facility in Johnstown, Pennsylvania, and who have alleged exposure to asbestos from a variety of suppliers, outside contractors and products allegedly present at that former work site, including asbestos-containing pipe covering, gaskets, packing, protective clothing, pumps, valves, turbines, motors, and large overhead cranes, among others.

On behalf of our clients we have vigorously challenged the courts to apply the statute of repose in asbestos cases. For many years, the Cambria Court routinely denied motions for summary judgment filed by various equipment manufacturers, including manufacturers of large, immobile overhead cranes. However, in February and April of this year, we presented motions for summary judgment based upon the statute of repose and successfully reversed the long-standing course of denial orders in Cambria County.

In February 2015, the Court granted motions for summary judgment argued by Natalie Kreter based upon the statute of repose. The Court again heard arguments on this issue for a new set of cases in April 2015, and again entered a favorable decision granting motions for summary based upon repose. These recent rulings indicate an important shift by that Court.

The Pennsylvania Statute of Repose, 42 Pa.C.S.A. § 5536, provides that one must bring a civil action against a person or entity who has been involved in the construction of any improvement

to real property within twelve years after completion of that construction. A defendant seeking protection under the Statute of Repose must demonstrate the following: "1) what is supplied is an improvement to real property; 2) more than twelve years have elapsed between the completion of the improvements to the real estate and the injury; and 3) the activity of the moving party is within the class of activities designated in the statute." (*Noll v. Harrisburg Area YMCA*, 643 A.2d 81, 84-85 (Pa. 1994) (internal citations omitted)).

While the Pennsylvania Supreme Court has held that an improvement to real property includes "everything that permanently enhances the value of real property," it has also defined three elements in which to determine whether a fixture qualifies as an improvement. *Id*. at 87. Those elements are "1) the relative permanence of attachment to realty; 2) the extent to which the chattel is necessary or essential to the use of the realty; and 3) the intention of the parties to make a permanent addition to the realty." (*Id*.).

In the case of our client, its predecessor was a designer, engineer and manufacturer of industrial-sized overhead cranes. Many of these large, metal, custom-built overhead cranes were present in former industrial sites. Overhead cranes were an indispensable part of the these large industrial facilities and were the only practical method for efficiently moving large heavy materials within a mill. Without overhead cranes, these industrial facilities could not have made or processed steel, the very product they were in business to make, in an economical or efficient manner.

In order for these cranes to effectively lift and move heavy materials, they had to be attached to the structural girders of the buildings in which they were installed. They were connected to various electrical systems and had ramps, catwalks, and ladders that enabled them to be made a valuable and necessary part of the mill. In essence, these cranes were permanent improvements to the properties in which they were installed.

In the cases that were argued in 2015 in Cambria County, there was evidence that the overhead cranes were permanent and necessary structures such that they qualified as "improvement[s] to real property." The evidence established that more than twelve years had elapsed between the completion of any installation of an overhead crane and any injury alleged by the various plaintiffs at issue. Finally, as a designer and manufacturer of custom-built overhead cranes, our client qualified as a member of the class of activities designed to be protected by this statute.

Despite the evidence in favor of applying the statute of repose, plaintiffs' counsel had argued that the Pennsylvania Supreme Court's opinion in *Abrams v. Pneumo Abex Corp.*, 981 A.2d 198 (Pa. 2009), held "no statutory right of repose exists with respect to asbestos cases." *Id*. at 212. Notwithstanding defendants' arguments that that opinion did not even address the applicability of the Construction Project Statute of Repose in cases involving allegations of asbestos exposure and should therefore be considered *dicta*, this argument was sufficient to defeat summary judgment.

In 2014, the Superior Court issued an Opinion in *Graver v. Foster Wheeler Corp*., 2014 PA Super 132, and held that the statute of repose for improvements to real property set forth in 42 Pa.Cons.Stat.Ann. § 5536 was applicable to actions involving claims of asbestos exposure and barred the asbestos personal injury claims against a boiler manufacturer.

The Superior Court addressed the argument set forth by plaintiffs from the *Abrams* opinion and found that the defendants in *Abrams* were not involved in the design

and construction of improvement to real property and that there was no discussion of the statute of repose for improvements to real estate. The Superior Court also found that a declaration that no statutory right of repose exists with respect to asbestos cases was *dicta* and in conflict with the plain meaning of the statute. After examining all of the evidence of record, the *Graver* Court determined that the boiler in question constituted an improvement to real property and thus qualified for protection under the statute of repose.

There was a pending Petition for Allowance of Appeal in the *Graver* case until February 4, 2015, when the Pennsylvania Supreme Court issued an Order denying that petition. Subsequently, the Court in Cambria County has continued to apply the statute of repose to asbestos cases and specifically granted motions for manufacturing of overhead cranes and other qualifying equipment.

John C. McMeekin II represents clients as local, national and trial counsel in environmental, toxic and mass torts product and related class actions, products liability, insurance coverage and aviation litigation. He graduated *magna cum laude* from the University of Baltimore School of Law. John is admitted to practice in Pennsylvania, New Jersey and Maryland and related U.S. District Courts. John is a former firefighter and emergency medical technician, and is Hazmat certified. He has been published in professional and law review journals on a variety of topics related to toxic tort and environmental litigation. His significant cases can be found in the *BNA Law Reports* and *Law 360*. He is a past Chair of the ABA TIPS Toxic Tort & Environmental Law Committee and International Law Committee, Chair of the Philadelphia Bar Association Environmental and Toxic Tort Law Committee, and serves as Revenue Officer and a member of the ABA TIPS Council. He is a member of the firm's Executive Committee.

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Julie Nord Friedman concentrates her practice on the defense of manufacturers, suppliers and contractors in mass and toxic tort litigation, with an emphasis on asbestos litigation. Her clients range from Fortune 500 companies to regional contractors and suppliers. She is a National Coordinating Counsel for one client and she also acts as trial counsel in the defense of claims in mass tort and toxic tort litigation and regularly handles matters for multiple clients in Pennsylvania and West Virginia. Julie is active in the Defense Research Institute. She earned her J.D. in 1995 from the University of Pittsburgh School of Law and her B.A. in 1992 from the American University in Washington, D.C.

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Natalie M. Kreter focuses her practice on products liability, toxic torts and environmental law litigation. She received her J.D. in 2004 from the University of Pittsburgh School of Law and her B.S. in 2000 from the University of North Carolina at Greensboro, majoring in biology and chemistry. She received a full NCAA Athletic Scholarship in Women's Basketball. She is admitted to practice in Pennsylvania and West Virginia, as well as the U.S. District Court for the Eastern District of Pennsylvania, the U.S. District Court for the Western District of Pennsylvania, and the U.S. District Court for the Southern District of West Virginia.

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NATIONAL ASSOCIATION OF DISTINGUISHED COUNSEL

John T. Donovan

John T. Donovan, a partner in the Philadelphia office, has been selected as a 2015 member of the Nation's Top One Percent by the National Association of Distinguished Counsel. NADC is dedicated to promoting the highest standards of legal excellence. Its mission is to objectively recognize attorneys who elevate the standards of the Bar and provide a benchmark for other lawyers to emulate. Members are thoroughly vetted by a research team, selected by a blue ribbon panel of attorneys with podium status from independently neutral organizations, and approved by a judicial review board as exhibiting virtue in the practice of law. Due to the selectivity of the appointment process, only the top one percent of attorneys in the U.S. are awarded membership in NADC.

John concentrates his practice on premises liability, product liability, catastrophic injury, toxic tort and construction law matters. He is admitted to practice in Pennsylvania and New Jersey and the Third Circuit Court of Appeals. He has tried dozens of cases to verdict in both Pennsylvania and New Jersey. He has been designated Liability Catastrophic Injury Counsel (LCIC) for a major international insurance carrier. He graduated *cum laude* from Lafayette College and received a J.D. from the University of Pittsburgh School of Law, where he was elected Vice President of his class. John has taught at Rutgers University School of Law (Camden) and currently serves on the adjunct faculty at Villanova School of Law. In addition, he volunteers on behalf of the Support Center for Child Advocates and chairs the firm's Child Advocacy Practice Group. He has repeatedly been selected as a Pennsylvania Super Lawyer by *Law & Politics* Magazine.

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2015 KOMEN RACE FOR THE CURE

Rawle & Henderson LLP kicked off its fund-raising campaign for the **2015 Philadelphia Komen Race for the Cure** by sponsoring a "Pretty in Pig" campaign at the Widener Building, 1339 Chestnut Street, Philadelphia, from April 13 through April 17. The "Pretty in Pig" campaign features a larger-than-life piggy bank to generate awareness and encourage donations to save lives and end breast cancer forever for the breast cancer movement. Donations raised funds for the law firm's 2015 Susan G. Komen for the Cure Race Team. Over the last seven years, Rawle & Henderson's team has raised over $54,000. Rawle & Henderson's 2015 team is **"HARVAN'S HEROES"** and will be participating in the Race for the Cure on Sunday, May 10. We will honor for the eighth year in a row the firm's former partner, **Ann-Michele Higgins**, who lost her struggle with breast cancer in September 2007. For the second year in a row, Rawle & Henderson will honor **Nancy J. Sabo**, wife of partner Michael G. Sabo, Esq., who lost her courageous fight against breast cancer in January 2014.

Christine Harvan (far left), the firm's law librarian, lost her battle with breast cancer in March 2015. The firm will honor her this year at the Komen Race for the Cure. Also pictured above (l.-r.): Mary Ann Capriotti, Michael Sabo, Kitty Fung, and Kendell Gubler.

This year, the firm will also honor **Christine Harvan**, Rawle & Henderson's long-time law librarian, who lost her battle against breast cancer in March 2015. **HARVAN'S HEROES** will also be participating in Komen's 2015 race category "Law Firms for the Fight." Rawle & Henderson's team won this race category in 2014 by raising more funds than any other participating law firm. Donations to Rawle & Henderson's Susan G. Komen for the Cure Race Team can also be submitted online at **http://rfcphl.convio.net/goto/strutsforthesabos**

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