

9-1-1988

## CIVIL PRACTICE Asbestos: Provide Specific Action for Injury to Real Property for a Limited Time

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### Recommended Citation

Haney, A. (1988) "CIVIL PRACTICE Asbestos: Provide Specific Action for Injury to Real Property for a Limited Time," *Georgia State University Law Review*: Vol. 5 : Iss. 1 , Article 3.

Available at: <http://readingroom.law.gsu.edu/gsulr/vol5/iss1/3>

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## CIVIL PRACTICE

### *Asbestos: Provide Specific Action for Injury to Real Property for a Limited Time*

CODE SECTION:	O.C.G.A. § 9-3-30.1 (new)
BILL NUMBER:	SB 649
ACT NUMBER:	1480
SUMMARY:	The Act creates a cause of action against manufacturers or suppliers of asbestos for damage to real property. It also extends the statute of limitations for bringing such actions to July 1, 1990 but bars commencement of claims after that date.
EFFECTIVE DATE:	July 1, 1988

#### *History*

In 1986, the General Assembly passed the Asbestos Safety Act<sup>1</sup> to “protect the public health, safety, and environment . . . by establishing an Asbestos Licensing Board.”<sup>2</sup> This board administers a program to control asbestos removal and encapsulation in buildings.<sup>3</sup> Georgia law, however, did not explicitly address suits brought to obtain relief for asbestos-related damage to real or personal property. Relief for damage to real property could be obtained by bringing an action for trespass.<sup>4</sup> The statute of limitations for trespass allows a plaintiff four years to bring an action.<sup>5</sup>

The sponsor of SB 649 considered the lack of a specific remedy for asbestos-related damage to real property a serious problem and was also concerned that potential plaintiffs procrastinate in bringing suit.<sup>6</sup> According to the sponsor, potential plaintiffs “drag their feet” in discovering whether their buildings contain dangerous asbestos.<sup>7</sup> Presumably, the delays are due to either a lack of knowledge regarding the existence of asbestos or a desire to avoid costly removal procedures.<sup>8</sup> After delaying,

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1. O.C.G.A. §§ 12-12-1 to -26 (1988), enacted by 1986 Ga. Laws 1157.
  2. O.C.G.A. § 12-12-2 (1988).
  3. *Id.*
  4. Telephone interview with Senator Eugene Walker, Senate District No. 43 (Apr. 6, 1988) [hereinafter Walker Interview].
  5. O.C.G.A. § 9-3-30 (1982). With respect to injuries to personal property, O.C.G.A. § 9-3-31 (1982) also provides a four-year statute of limitations.
  6. Walker Interview, *supra* note 4.
  7. *Id.*
  8. *Id.*

these plaintiffs relied on the four-year statute of limitations to file a claim based on the time of discovery.<sup>9</sup> The General Assembly passed SB 649 to encourage potential plaintiffs to remedy this health hazard expeditiously.<sup>10</sup>

### SB 649

The Act creates a specific cause of action against manufacturers and suppliers of asbestos.<sup>11</sup> The Act allows claimants to recover damages for asbestos removal or for other measures taken to correct asbestos-related problems in buildings.<sup>12</sup> Recovery may also include reimbursement for the previous removal of asbestos.<sup>13</sup> In addition, the Act does not bar causes of action that existed prior to the Act.<sup>14</sup>

The sponsor's original concern was the removal of asbestos from public buildings, particularly from public schools, as quickly as possible.<sup>15</sup> As introduced, the bill reflected that concern and named as potential plaintiffs any state agency, department, political subdivision, authority, board, school board or district, commission, or any municipality, county, or local school board or district.<sup>16</sup>

The House Committee on Judiciary offered a substitute adding "any person or entity, public or private" to those entitled to bring suit under this Code section.<sup>17</sup> The House committee substitute also included an ad-

9. *Id.* Georgia adopted this "discovery rule" to ascertain the accrual date of actions for personal injury under O.C.G.A. § 9-3-33 (1982); that statute provides a two-year statute of limitations upon discovery. Until recently, Georgia also extended the rule to apply to actions for injury to real property under O.C.G.A. § 9-3-30 (1982). *Lumbermen's Mut. Casualty Co. v. Patillo Constr. Co.*, 254 Ga. 461, 330 S.E.2d 344 (1985) ("cause of action does not accrue until the injured party becomes aware, or in the exercise of reasonable diligence should have become aware, of his injury or damage"). However, the Supreme Court of Georgia has overruled *Lumbermen's*, holding that the discovery rule is confined "to cases of bodily injury which develop only over an extended period of time." *Corporation of Mercer Univ. v. National Gypsum Co.*, 258 Ga. 365, 366, 368 S.E.2d 732, 733 (1988) (quoting Justice Weltner's dissent in *Lumbermen's*). Now, any action under O.C.G.A. § 9-3-30 "must be brought within four years of substantial completion." *Id.* at 366, 368 S.E.2d at 733. The decision specifically excludes situations in which there is a statute of repose. In a special concurrence, Justice Bell only agreed with the result because there exists no applicable statute of repose. *Id.* at 366, 368 S.E.2d at 733.

10. Walker Interview, *supra* note 4.

11. O.C.G.A. § 9-3-30.1(a) (Supp. 1988).

12. O.C.G.A. § 9-3-30.1(a)(1), (2) (Supp. 1988).

13. O.C.G.A. § 9-3-30.1(a)(3) (Supp. 1988).

14. O.C.G.A. § 9-3-30.1(a) (Supp. 1988).

15. Walker Interview, *supra* note 4. Senator Walker originally focused on the public sector because he believed that sector was responsible for the continued presence of asbestos in public buildings. Senator Walker wanted the public sector to take responsibility for removal of asbestos since that sector most likely had notice of the problem.

16. SB 649, as introduced, 1988 Ga. Gen. Assem.

17. SB 649 (HCS), 1988 Ga. Gen. Assem. This addition was adopted in the final

ditional cause of action for "[a]ny other claim for damage to real property allowed by law relating to asbestos in such building."<sup>18</sup> The House committee also added a section to clarify that the Act does not apply to actions for personal injury but only to those affecting real property.<sup>19</sup> Although this new cause of action originally expired on July 1, 1992, the House substitute changed the time limit to July 1, 1990.<sup>20</sup> Presumably, this provision would force the asbestos problems to be discovered, litigated, and remedied as quickly as possible. The section specifically stated, however, that any action otherwise barred by an expired statute of limitations prior to July 1, 1992, was revived and extended if commenced before July 1, 1990.<sup>21</sup> A House floor amendment changed the July 1, 1992 date to July 1, 1990.<sup>22</sup> This change, again, was intended to speed up the asbestos removal process by forcing potential litigants to discover immediately any problems.<sup>23</sup> The final version was the House committee substitute with this one modification.

The Act specifies that it "shall not be construed to imply that any action against a manufacturer or supplier of asbestos . . . is now barred by an existing limitations period."<sup>24</sup> The Act also provides that there is no change to the applicable statute of limitations for persons or entities not mentioned in the Act.<sup>25</sup>

The purpose of the Act is to provide a cause of action against manufacturers or suppliers for asbestos injury to real property while at the same

version of the bill.

18. *Id.* This section probably is intended to ensure that no cause of action will slip through the cracks.

19. *Id.* If one suffers personal injury, the action must be brought under O.C.G.A. § 9-3-33 (1982). This statute allows a claim to be brought two years after the right of action accrues. The discovery rule is applicable to this Code section. *See supra* note 9.

20. Compare SB 649, as introduced, with SB 649 (HCS), 1988 Ga. Gen. Assem.

21. SB 649 (HCS), 1988 Ga. Gen. Assem.

22. SB 649 (HCSFA), 1988 Ga. Gen. Assem. While the Act revives all currently barred actions and allows new ones until July 1, 1990, it apparently prohibits them after that date unless the statute is construed as a statute of repose. If so, the discovery rule may still apply. *See supra* note 9.

23. Walker Interview, *supra* note 4. A problem may arise, however, with the application of an absolute date before which suit must be brought. While the Act revives all currently barred actions and allows new ones until July 1, 1990, it apparently prohibits them all after that date, even though the discovery rule applies to this type of action. *See supra* note 9. In essence, it appears the legislature has passed a statute of repose which benefits the defendants in these cases by providing them with a substantive right to repose and by prohibiting the plaintiff's action before it accrues. There is little doubt that this issue will be litigated by a plaintiff who discovers the asbestos damage to his property after July 1, 1990, and realizes his action is barred. For a full discussion of statutes of repose and their constitutional implications, see Note, *Statutes of Limitations and Repose: The Decline and Rise of Statutes of Repose* — Witherspoon v. Sides Construction Co., 19 CREIGHTON L. REV. 509 (1986).

24. O.C.G.A. § 9-3-30.1(b) (Supp. 1988).

25. O.C.G.A. § 9-3-30.1(c) (Supp. 1988).

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time forcing those affected by these injuries to take rapid steps to discover and alleviate the problem. The Act's sponsor hopes the "use it or lose it" posture of the Act will eradicate a serious public health hazard.<sup>26</sup>

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26. Walker Interview, *supra* note 4.