

## **Afarian Brief offers comments on Statute of Repose**

**J. Michael Conley**

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Stan Helinski's summary of General Laws c. 260 § 2B. Section 2B, correctly points out that the Appeals Court's decision in *Sonin v. Massachusetts Turnpike Auth.* 61 Mass. App. Ct. 287 (2004) applies the statute of repose in favor of entities with continuing ownership, possession and control of premises containing dangerous defects traceable to design and construction activities in which the owner participated. MATA has opposed this interpretation expressed its opposition in an amicus curiae brief filed with the Supreme Judicial Court early this year in *Afarian v. Massachusetts Electric Co.*, 449 Mass. 257. In its resulting decision, the Supreme Judicial Court did not reach the statute of repose issue. Consequently, this remains an of significant concern which the Court should eventually address. The Court, however, will never deal with the issue unless plaintiffs' lawyers preserve and advance the argument. The following excerpt from MATA's Afarian amicus brief (revised for context) is provided to encourage and facilitate the preservation and argument of the issue in appropriate cases.

G.L. C. 260 § 2B Does Not Extinguish The Liability Of Owners Or Others With Continuing Control Over An Improvement.

In *Sonin v. Massachusetts Turnpike Auth.*<sup>1</sup>, the Appeals Court held that the protection of § 2B applies to *anyone* who provides individualized expertise and engages in design and construction activities relating to an improvement to real property, regardless of whether that person and continues to own, control and maintain the property and can remedy any defective condition that causes injury to others.

In *Sonin*, the plaintiff brought a personal injury claim arising from the alleged negligent design (omission of a breakdown lane) of a portion of the Massachusetts Turnpike. The Massachusetts Turnpike Authority defended in part on the basis that the defendant itself had designed the allegedly defective stretch of highway. Affirming the trial court's dismissal of the negligent design claim, the Appeals Court ruled:

By its clear and express terms, § 2B limits the period for bringing any claim arising from negligent design without regard to whether the owner or another party has committed the alleged negligence. Put another way, an owner that participates in the design of improvements to real property is as entitled to the protection of § 2B as any other actor involved in such design or construction -- but only with respect to a claim for negligence in the design.

The *Sonin* Court did not address or distinguish the duty of an owner or possessor of property to correct or repair premises that are defective and dangerous by virtue of negligent design. (The Court did, however, agree that a claim against the owner based on failure to warn was properly submitted to the jury).

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<sup>1</sup> 61 Mass. App. Ct. 287 (2004).

The *Sonin* decision was incorrect. Nothing in the statutory language, the legislative purpose, or sound public policy supports application of the statute to immunize the owner of an improvement or the possessor of improved land so as to eviscerate such persons' safety responsibility for conditions under their present and continuing control. The *Sonin* decision gives rise to the indefensible result that a possessor of property containing a dangerous or defective improvement over six years old would be relieved of liability by virtue of having actively contributed to the creation of the dangerous condition, while a similarly situated possessor who played no role in creating the danger would be exposed to liability. The legislature could not have intended such an illogical construction of the statute.

The *Sonin* decision is contrary to the statute's legislative history and purpose as well as the Supreme Judicial Court's holding in *Klein v. Catalano*.<sup>2</sup> In *Klein*, the SJC identified the purpose of the statute of repose, G.L. c. 260, §2B, as intended to bar all claims against contractors, architects, and others involved in the construction of improvements to real property six years after the these actors relinquish control of the improvement to the owner of the real property on which the improvement was constructed. This protection was deemed necessary by the Legislature because, after the acceptance by the owner, the architect or contractor ordinarily has neither control of the improvement nor the right to enter or inspect the improvement and, therefore, is helpless to remedy any dangerous condition.<sup>3</sup>

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<sup>2</sup> 386 Mass. 701, 715-716 (1982).

<sup>3</sup> *Id.*

The *Klein* Court observed, “[s]imply put, after six years, the statute completely eliminates a cause of action against certain persons in the construction industry.” In particular, the Court referred to “a time limit on the liability of architects and contractors”, stating that the statute “was enacted in response to case law abolishing the rule that once an architect or builder had completed his work and it had been accepted by the owner, absent privity with the owner, there was no liability as a matter of law.”<sup>4</sup>

Referring to the case law that the statute was meant to counter and legislative history, the Court in *Klein* explained that recent decisions:

“greatly increased the liability of architects, contractors, and others involved in the construction industry. . . . An injury could occur many years after the architect or contractor had completed his work. Since an ordinary statute of limitations did not begin to run until either the date of the injury or its discovery, those involved in construction were subject to possible liability throughout their professional lives and into retirement. At the urging of those involved in the construction industry, the Legislature placed an absolute outer limit on the duration of this liability.”<sup>5</sup>

When considering an equal protection challenge to §2B, the Court “agree[d] with the plaintiff that [§ 2B] has the effect of granting immunity from suit only to architects, engineers, contractors, and others involved in the design, planning, construction, or general administration of improvements to real property and of **denying that protection to suppliers, owners, tenants, and others in possession or control.**”<sup>6</sup>

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<sup>4</sup> *Id.* at 702, 708.

<sup>5</sup> *Id.* at 708-09 [emphasis added].

<sup>6</sup> 386 Mass. at 715 (emphasis added). *See Milligan v. Tibbetts Eng’g Corp.*, 391 Mass. 364, 368 (1984) (Legislature concerned “that the liability of engineers

In ruling that the “Legislature could have rationally concluded that it was proper to place different time limits on the liability of builders from those placed on persons in possession or control as owner, tenant, or otherwise”, the Court quoted with approval the following discussion from a Louisiana case:

“[T]here is a valid distinction between persons performing or furnishing the design, planning, supervision, inspection or observation of construction or the construction of an improvement to immovable property and a person in possession or control, as owner, lessor, tenant or otherwise, of such improvement at the time of the incident giving rise to the cause of action. After the date of registry in the mortgage office of acceptance of the work by the owner, there exists the possibility of neglect, abuse, poor maintenance, mishandling, improper modification, or unskilled repair of an improvement to immovable property by the owner, lessor or tenant. It is difficult for the architect or contractor to guard against such occurrences because, after the acceptance by the owner, the architect or contractor ordinarily has neither control of the improvement nor the right to enter or inspect the improvement.”<sup>7</sup>

The essential purpose of the statute of repose is to shift all of the liability for injuries due to dangerous conditions on the premises to the person or entity who takes control over the improvement “six years after the earlier dates of: (1) the opening of the improvement to use; or (2) substantial completion of the improvement and the taking of possession for occupancy by the owner.”<sup>8</sup> The

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and contractors not be infinite in duration”); *Cournoyer v. Massachusetts Bay Transp. Auth.*, 744 F.2d 208, 211 (1<sup>st</sup> Cir. 1984).

<sup>7</sup> 386 Mass. at 715-16, quoting *Burmaster v. Gravity Drainage Dist. No. 2 of the Parish of St. Charles*, 366 So.2d 1381, 1385-86 (La. 1978), *See 1519-1525 Lakeview Blvd. Condominium Ass’n v. Apartment Sales Corp.*, 144 Wash.2d 570, 579-80, 29 P.3d 1249 (2001) (exclusion of state’s statute of repose protection to owners or others in possession held not in violation of equal protection); *Snavelly v. Perpetual Fed. Savings Bk.*, 306 S.C. 348, 351-52, 412 S.E.2d 382 (1991)(same).

<sup>8</sup> G.L. c. 260, § 2B. *See Jacob v. Albuquerque*, 138 N.M. 184, 191-92 (2005)(interpreting a statute of repose identical in substance to § 2B, court held that it was never intended to apply to owners who construct their own improvement to property; rather, the purpose of the statute was “to shift liability

Legislature’s decision to make the date of “the substantial completion of the improvement and the taking of possession for occupancy by the owner” one of the trigger dates envisions a transfer of the improvement from the builder to the owner of real property.<sup>9</sup>

Recently, in *Winnisquam Regional School Dist. v. Levine*,<sup>10</sup> the Supreme Court of New Hampshire, in the context of an equal protection challenge, interpreted that state’s statute of repose as not protecting owners directly involved in the construction and design of improvement to their own property. The court held that it was reasonable to distinguish between contractors involved in the construction business and owners who construct their own improvements to their property:

Such reasonable distinctions include the ability of owners to inspect and maintain; the ability of owners to restrict and control those who come on the property; the ability of owners to insure at a lower rate; and the greater likelihood that an owner who participated in construction activities will have retained records relating to the project, and will be better able to identify natural forces or third parties who might have contributed to an injury. In addition, when an owner both constructs and controls an improvement, it is more difficult for a court to determine when

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from builders to property owners for dangerous conditions arising out of improvements to real property ten years after the completion of the project”).

<sup>9</sup> See *Stone v. United Engineering*, 197 W.Va. 347, 356, 475 S.E.2d 439, 448 (1996)(statute of repose “contemplates that someone other than the owner . . . has performed the enumerated activities or services”).

When the *Klein* Court considered the scope of § 2B the statute provided that “in no event shall such actions be commenced more than six years after the performance or furnishing of such design, planning, construction, or general administration.” This language likewise indicates performance by a contractor or other person in the construction business and the furnishing of the completed construction project to the owner. See *Klein v. Catalano*, *supra* at 705.

<sup>10</sup> 152 N.H. 537 (2005).

construction activities were actually completed. Thus, it was reasonable for the legislature to have excluded owners and possessors from the protection of RSA 508: 4-b.<sup>11</sup>

As explained by the Supreme Judicial Court in *Klein* and the New Hampshire Supreme Court in *Winnisquam*, the statute of repose was enacted to address the unique liability problem encountered by architects, designers, and contractors when they construct or design improvements to real property and turn the property over to the owner, thereby relinquishing control of over the property and, with it, the opportunity to remedy any dangerous condition.<sup>12</sup>

The Legislative history plainly reveals that § 2B was not intended to protect persons and entities that retain control over an improvement to real property. The task of the Court “is to interpret the statute according to the intent of the Legislature ascertained from all its words construed by the ordinary and approved usage of the language, considered in connection with the cause of its enactment, the mischief or imperfection to be remedied and the main object to be accomplished, to the end that the purpose of its framers may be effectuated.” As the Supreme Judicial Court commented in *Dighton v. Federal Pac. Elect. Co.*:

[T]he legislative history of § 2B is replete with references to classes of actors, such as architects, engineers, contractors, and surveyors. See 1967 House Doc. No. 2603; 1967 House Doc. No. 4815; Report of the Legislative Research Council Relative to a Statute of Limitations for

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<sup>11</sup> *Id.* at 541. The New Hampshire statute provides:

Except as otherwise provided in this section, all actions to recover damages for injury to property, injury to the person, wrongful death or economic loss arising out of any deficiency in the creation of an improvement to real property, including without limitation the design, labor, materials, engineering, planning, surveying, construction, observation, supervision or inspection of that improvement, shall be brought within 8 years from the date of substantial completion of the improvement, and not thereafter.

<sup>12</sup> *Klein v. Catalano, supra* at 715-716.

Malpractice Against Architects, Engineers and Surveyors, 1968 Senate Doc. No. 1050; 1968 Senate Doc. No. 339. None of these sources refers at all to problems of repose encountered by manufacturers or suppliers of construction components, although the problems anticipated by architects and engineers were understood to result from the decline of the “privity” doctrine.”<sup>13</sup>

These Legislative materials do not refer to liability problems of entities retaining ownership or control of improved property.

The Supreme Judicial Court’s decision in *Sullivan v. Iantosca*,<sup>14</sup> where the defendant, who was the former owner, builder, and seller of a house, was held to be protected by the statute, does not stand for the broad proposition that any owner, even one in possession and control, that participates in the design or construction of an improvement to real property, is entitled to protection. In *Sullivan*, the defendant owner was the builder and vendor of a house that was built on improper foundation material and then sold to the plaintiff. Many years later, the plaintiff noticed problems with the foundation and sued the vendor. The Court held that the claim of negligent construction was barred by § 2B. In *Sullivan* the owner-vendor was not only an economic actor in the business of providing individual expertise; it also ceased to be in possession or control of the improvement upon the sale of the property. *Sullivan*, therefore, does not govern the outcome of the present issue. In fact, it is the distinction between the *Sullivan*

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<sup>13</sup> 399 Mass. 687, 694, n.10 (1987). In *Dighton*, the Court did not resort to legislative history because the plain language of the statute clearly indicated that material men who provided fungible products installed on real property were not protected. *Id.* at 694 n.10. It would seem the issue of whether the statute extends to protect an entity that constructs an improvement to property and retains control over the property is equally clear, but the *Sonin* court’s incorrect conclusion may signal an ambiguity warranting resort to legislative history.

<sup>14</sup> 409 Mass. 796, 799 (1991)

defendant and an owner with continuing possession and control that highlights why the latter should not be entitled to the protection of the statute of repose.

Significantly, in *Parent v. Stone & Webster Engineering Corp.*,<sup>15</sup> the Supreme Judicial Court held that a defendant who had allegedly been negligent in construction of an electrical distribution panel by omitting a warning label and who was by passage of time entitled to the protection of the statute of repose as to the original construction, could nonetheless be held liable for the same failure to warn based on a duty of care arising from a post-construction contractual undertaking. Similar reasoning would preclude application of the statute to claims against owners and possessors of property who necessarily have an ongoing common law duty of reasonable care regardless of their participation in the design or construction of an allegedly dangerous condition.

Courts in other jurisdictions have consistently interpreted similar statutes of repose as *excluding* owners and others in possession or control of a particular improvement from protection, even where the individual or entity *also* performed or participated in a protected activity.<sup>16</sup> “The continuing control over the property allows these individuals to maintain and repair the improvements to the property.

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<sup>15</sup> 408 Mass. 108, 112-116 (1990).

<sup>16</sup> See, e.g., *Stone v. United Engineering, supra* (interpreting similar statute of repose as excluding owners and occupiers, even where owner was also involved in construction, planning, design, and/or supervision of improvement to real property); *1519-1525 Lake Boulevard Condominium Assoc. v. Apartment Sales Corp.*, 144 Wash.2d 570, 29 P.3d 1249 (2001)(holding that statute of repose does not protect owner in possession of property at time of accident, even though owner was also involved in design and construction).

Logically, when an individual has control over the property in this manner there is no need to have a time limit for filing causes of action relating to the continuing conditions of the property. On the other hand, the rationale is clear for having such a time limit for [those] who relinquish control over the property and have no ability or opportunity to remedy any wrongs which may exist.”<sup>17</sup>

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<sup>17</sup> *Stone v. United Engineering, supra* (citation omitted). See also *Ali v. Detroit*, 218 Mich.App. 581, 587-588, 554 N.W.2d 384, 387 (1996)(holding that statute of repose is not designed to protect owners of property since repose period begins to run upon occupancy, use, or acceptance of the improvement); *Alsenz v. Twins Lake Village, Inc.*, 108 Nev. 1117, 843 P.2d 834, 836 (1992)(holding that statute of repose was intended to protect persons involved in planning, design, and construction of improvements to real property after they have given up control over maintenance of the improvement); *Hopkins v. Fox & Lazo Realtors*, 242 N.J. Super. 320, 326-328, 576 A.2d 921, 924-925 (1990) (ruling that statute of repose does not preclude suit against those presently in possession of or responsible for property where injury occurs).