Was it a Design/Construction Defect or a Failure to Maintain?

Appeals Court Decides This Could Make a Big Difference.

Those involved in construction litigation take note – the Appeals Court has clarified that the Statute of Repose, which bars design and construction claims after 6 years, does not apply to claims for failure to maintain equipment. In the recent case of *Penn-America Insurance Company* v. *Bay State Gas Company*, the Court distinguished the plaintiff's claim that defendant failed to maintain the natural gas lines from a claim that the failure was due to design or construction defect at installation.

The case involved an action by Penn-America Insurance against Columbia Gas Company for damages caused when a natural gas line caused a fire in the building of Penn-America's insured during record-setting snowstorms in February 2015. Columbia defended on the basis that, since the lines were installed in 1996, this claim fell well outside the six-year time limit. The lower court agreed and granted summary judgment in favor of Columbia Gas, holding that the claim was barred as it was brought outside of the time period allowed by the Statute of Repose.

However, the Appeals Court determined that Penn America's claim was not based on the design, planning, construction, or general administration of the gas line project. Instead, the gravamen of their claim was based on Columbia's failure to maintain the gas lines that were its own property. Penn-America asserted that it was Columbia's duty to maintain the gas lines, and had plenty of opportunity to do so. Of particular import to the Court was the fact that Columbia spent years maintaining the lines in the building, including as recent gas leak in 2014, but failed to update the lines at that time to meet new Federal and State regulations in place, which arguably could have prevented the fire. As a result, the Appeals Court concluded the plaintiff's claim was one of negligent maintenance, and not one about negligent design or construction. The summary judgement was vacated. This decision is instructive for both sides. First, it should serve as a reminder to regulated entities, like natural gas providers and other utilities, that all equipment should be maintained up to current Federal and State standards. Second, owners and others damaged by regulated entities may want to consider whether claims can be made for negligent failure to maintain as a means to avoid claims being barred by the Statute of Repose.

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