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Massachusetts Statutes of Limitations: A User Guide

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MASSACHUSETTS STATUTES OF LIMITATIONS: A USER'S GUIDE

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I. INTRODUCTION

Statutes of limitations are frequently a crucial issue in litigation. Every jurisdiction has multiple statutes of limitations for different types of claims. A variety of related doctrines – often idiosyncratic – govern such issues as tolling of the limitations period, accrual of claims, application of limitations to claims added to pending litigation, and methods of meeting the limitations period; this article provides a comprehensive discussion of such doctrines under Massachusetts law.

Statutes of limitations provide a statutory limit on the length of time to bring suit on a claim after it accrues. They should be distinguished from related concepts such as notice-of-claim statutes and statutes of repose. Notice-of-claim requirements, almost always by statute, require a party asserting a particular type of claim to notify the intended defendant before filing suit.[2] Such requirements are in addition to the applicable limitations period, not a substitute or a means of satisfying the limitations period. Even if a claimant has provided the required notice of the claim to the putative defendant, she must also file suit within the applicable limitations period.[3]

A statute of repose is distinct from a statute of limitations and more drastic. A statute of repose establishes a fixed period of years from an occurrence – such as the completion of an improvement to real property[4] – for the filing of a lawsuit asserting a claim based on that occurrence. After the repose period has run, no claim may be brought on a claim arising from the event or occurrence. Thus, a plaintiff may find that the statute of repose ran *before her claim arose*, so that her claim was barred even before it accrued.

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[2] *See*, *e.g.*, MASS. GEN. LAWS ch. 84, § 18 (requiring claimant give notice of injury due to defect in public way within thirty days of injury); MASS. GEN. LAWS c. 258, § 4 (requiring party seeking recovery for injury or death due to negligence of public employee to give notice within two years after cause of action arises); MASS. GEN. LAWS ch. 231, § 60L(A) (mandating written notice to health care provider 182 days before filing suit).

[3] *Compare* the notice requirements in note 2 with the limitations periods for the same claims. The limitations period for a claim under MASS. GEN. LAWS ch. 84, §15 is three years. MASS. GEN. LAWS CH. 84, §18. The limitations period for claims under MASS. GEN. LAWS ch. 258, §2 is three years. MASS. GEN. LAWS ch. 258, §4. For a case in which the plaintiff filed suit within the relevant statute of limitations, but was barred for failure to give timely notice, *see* George v. Saugus, 394 Mass. 40, 42 (1985).

[4] *See* MASS. GEN. LAWS ch. 260, § 2B (six year statute of repose for claims "arising out of any deficiency or neglect in the design, planning, construction or general administration of an improvement to real property . . . .").

II. ACCRUAL OF CLAIMS AND MEETING THE LIMITATIONS PERIOD.

A. Accrual of a claim: When does the limitations period begin to run?

A statute of limitations begins to run when the cause of action "accrues."[5] In most cases, this will be at the time of the injury or loss suffered by the plaintiff. In a tort case, for example, if the plaintiff is immediately aware of injuries from the defendant's conduct, the claim will accrue on that date. Thus, the limitations period begins to run, and will expire three years from the date of the accident.[6] Under earlier Massachusetts practice, a tort claim accrued at the time the defendant's conduct injured the plaintiff even if the plaintiff did not know that she had been injured or that she had been injured by the defendant's conduct.[7] However, more recent Massachusetts decisions have recognized the unfairness of allowing the limitations period to run – or even expire – before the plaintiff becomes aware that she may have a tort claim against the defendant.[8] Consequently, the Supreme Judicial Court has held that a tort claim does not accrue for limitations purposes on the date of injury if the plaintiff does not know and reasonably would not know that her injury may have been caused by the defendant's conduct.[9] Instead, the claim accrues when the plaintiff becomes aware, or should reasonably become aware, that she has suffered an injury, and that the defendant was the cause of the injury.[10] This "discovery rule" has been applied to legal malpractice claims,[11] medical malpractice claims,[12] toxic tort claims,[13] actions for deceit by a real estate broker,[14] and sexual abuse claims.[15]

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[5] *See, e.g.*, MASS. GEN. LAWS ch. 260, §2A (requiring action to be brought within three years after it "accrues"). Distinguish the term "arise" from the term "accrue." A claim arises when the event giving rise to the claim takes place. For most types of cases a claim "accrues" for limitations purposes in Massachusetts when the plaintiff discovers or should discover that he has a claim against the defendant. *See* Doe v. Levine, 77 Mass. App. Ct. 117, 119-20 (2010).

[6] Cannon v. Sears, Roebuck & Co., 374 Mass. 739, 740-42 (1978).

[7] Hendrickson v. Sears, 365 Mass. 83, 86 (1974) (discussing prior law).

[8] *See* Bowen v. Eli Lilly & Co., Inc., 408 Mass. 204, 205 (1990)

[9] *Id.* at 210.

[10] *See* Doe v. Creighton, 439 Mass. 281, 283 (2003).

[11] Hendrickson v. Sears, 365 Mass. 83, 88-90 (1974).

[12] *See* Franklin v. Albert, 381 Mass. 611, 619 (1980), *overruling* Pasquale v. Chandler, 350 Mass. 450 (1966) (holding medical malpractice claim accrues at time of act of malpractice).

[13] *See Bowen*, 408 Mass. at 205-08 (1990); Olsen v. Bell Telephone Laboratories, Inc., 388 Mass. 171, 174-75 (1983).

[14] *See* Friedman v. Jablonski, 371 Mass. 482, 485-86 (1976).

[15] *See* Phinney v. Morgan, 39 Mass. App. Ct. 202, 205-06 (1995).

While the discovery rule is well established, it can give rise to close factual questions when applied to the facts of cases. In *Olsen v. Bell Telephone Laboratories, Inc.*,[16] for example, the plaintiff suffered asthma from workplace exposure to chemicals, and argued that his claim accrued for limitations purposes when he first realized that his condition was permanent.[17] The court held, however, that the claim accrued when Olsen "knew or should reasonably have known that he had contracted asthma as a result of conduct of the defendants."[18] Similarly, in *Bowen v. Eli Lilly & Co., Inc.*,[19] the Supreme Judicial Court concluded that the plaintiff, who had received notice that DES was associated with her symptoms and an article implicating DES more than three years before she brought suit, was barred by the tort limitations period.[20]

> Reasonable notice that a particular product or a particular act of another person may have been a cause of harm to a plaintiff creates a duty of inquiry and starts the running of the statute of limitations.[21]

In *Gore v. Daniel O'Connell's Sons, Inc.*,[22] the plaintiff suffered a workplace blow to the head and immediately suffered symptoms of depression.[23] He had a series of exams thereafter, and brought suit after a psychiatrist's report almost three years later connected his depression to the accident.[24] The Appeals Court held that his immediate symptoms after the accident and other medical evidence had put Gore on notice that his depression might have been caused by the blow, triggering a duty of inquiry and causing the claim to accrue for limitations purposes.[25] Similarly, in *Sheila S. v. Commonwealth*,[26] a sexual abuse case, the court considered when the plaintiff should have been aware that the Commonwealth had failed to protect her from abuse in a foster placement.[27] Based on the facts of the case, the court held that the plaintiff's claims "were capable of being

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[16] 388 Mass. 171 (1983).
[17] *Id.* at 174.
[18] *Id.* at 175.
[19] 408 Mass. 204 (1990).
[20] *Id.* at 210.
[21] *Id.* at 208.
[22] 17 Mass. App. Ct. 645 (1984).
[23] *Id.* at 646.
[24] *Id.* at 647.
[25] *Id.* at 648.
[26] 57 Mass. App. Ct. 423 (2003)
[27] *Id.* at 428-27.

discovered though ordinary diligence and were not inherently unknowable, as a matter of law."[28] The plaintiff need not be aware that the defendant was negligent or that each element of a cause of action is met for a claim to accrue under the discovery rule.[29] If the plaintiff has reasonable notice that would lead a person in her circumstances to inquire as to the connection between the defendant's conduct and the injury, the claim accrues and the limitations period begins to run.[30] Despite references in some of the cases suggesting that the existence of a claim must be "inherently unknowable,"[31] the Supreme Judicial Court has equated this phrase with the knew-or-should-have-known standard.[32] The standard is based on what the "benchmark reasonable person" would realize, not on the plaintiff's subjective understanding.[33]

While in the cases reviewed above the discovery rule did not delay accrual of the claim, other cases have found that lack of knowledge might have delayed accrual. In *Friedman v. Jablonski*,[34] for example, the court concluded that the plaintiffs might establish that they were not on notice that representations about a well on the property were false, since it was difficult to verify these representations.[35] By contrast, their claim had accrued with regard to a right of way over neighboring property, since a title search would have revealed the true facts.[36] Similarly, *Franklin v. Albert* [37] held that that the discovery rule might have delayed accrual of the plaintiff's claim, because he did not discover until four and a half years after an X-ray that it had revealed a potentially serious condition.[38] Similarly, in *Joseph A. Fortin Construction, Inc. v. Massachusetts Housing Finance Agency*,[39] the court held that the plaintiff's claim against a public agency

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[28] *Id.* at 428. (footnote omitted).

[29] Malapanis v. Shirazi, 21 Mass. App. Ct. 378, 382-83 (1986).

[30] *Id.*

[31] Williams v. Ely, 423 Mass. 467, 473 n. 7 (1996); *Sheila S.*, 57 Mass. App. Ct. at 428 (2003).

[32] Albrecht v. Clifford, 436 Mass. 706, 714-15 (2002).

[33] Koe v. Mercer, 450 Mass. 97, 106 (2007); Doe v. Creighton, 439 Mass. 281, 284-86 (2003).

[34] 371 Mass. 482 (1976).

[35] *See* Friedman v. Jablonski, 371 Mass. 482, 488-89 (1976); *see also Albrecht*, 436 Mass. at 715 (holding limitations period was running as to defects in fireplaces, where they could have easily been discovered by inspection). *But see* Hendrickson v. Sears, 365 Mass. 83, 90-91 (1974) (holding buyer in legal malpractice case reasonably unaware of title defect, even when ascertainable by repeat title search).

[36] *Friedman*, 371 Mass at 487.

[37] 381 Mass. 611 (1980).

[38] *Id.* at 620 (1980).

[39] 392 Mass. 440 (1984).

for failure to require a surety on a contract did not accrue until the plaintiff learned that it could not enforce its judgment against the primary debtor.[40]

In *Cambridge Plating Co., Inc. v. Napco, Inc.*,[41] the plaintiff purchased a water treatment system that failed to operate as intended.[42] It made reasonable efforts to discover the reason for the problem, but did not.[43] Later, it tried another consultant, who finally traced the problem to negligent installation by the system supplier.[44] Even though the existence of a claim against the supplier *could have been* discovered by reasonable efforts, it was not. [45] The fact that the problem was attributable to the defendant was not "inherently unknowable" – language frequently used in the cases – but it remained undiscovered despite reasonable efforts to find it.[46] The court held that the claim did not accrue until later, when another expert discovered the source of the problem.[47]

If the action is brought more than three years after the injury is sustained, the burden will shift to the plaintiff to establish that she was not aware of either the injury or that the defendant may have caused the injury until a time within three years before filing suit.[48]

> Plaintiffs who assert that their cases should not be barred by the statute of limitations have the burden of demonstrating that they did not know of the defect within the statute of limitations and that 'in the exercise of reasonable diligence, they should not have known.[49]

Often, whether the plaintiff is on notice of a claim will be an issue for the trier of fact.[50] However, in a good many of the reported cases the date of accrual was determined by the court based on facts in the record without a trial.[51]

Most of the cases applying the discovery rule have been tort claims, but the rule has also been applied to other types of claims. In *Can-*

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[40] *Id.* at 443.

[41] 991 F.2d 21 (1st Cir. 1993).

[42] *Id.* at 22-23.

[43] *Id.*

[44] *Id.*

[45] *Napco, Inc.*, 991 F.2d at 26-27.

[46] *Id.*

[47] *Id.*

[48] Albrecht v. Clifford, 436 Mass. 706, 715 (2002).

[49] *Id. quoting* Friedman v. Jablonski, 371 Mass. 482, 487 (1976).

[50] *See* Riley v. Presnell, 409 Mass. 239, 240 (1991).

[51] *See, e.g.*, Doe v. Creighton, 439 Mass. 281, 284 (2003); Phinney v. Morgan, 39 Mass. App. Ct. 202, 209 (1995).

non v. Sears, Roebuck and Co.,[52] the Supreme Judicial Court held that a cause of action for personal injury based on breach of implied warranty arose at the time of injury rather than at the date of manufacture or sale.[53] The court noted that using the date of injury would cause the claim to accrue on the same date as the claim for breach of implied warranty under chapter 106, section 2-318 of the Massachusetts General Laws, which specifies that the limitations period begins to run "after the date the injury and damage occurs."[54] However, the injury in *Cannon* was immediately apparent, so there was no question of delaying accrual until the plaintiff became aware that the defendant had caused the injury.[55] The Supreme Judicial Court has noted that it makes sense, where claims for personal injury are based on different legal theories, to conclude that the claims accrue at the same time.[56] It has also noted a good many older cases based on various theories which have held that the claim accrued when the plaintiff was on notice of a possible claim.[57] Thus, as least where personal injury is involved, the discovery rule is likely to apply no matter what theory of recovery the plaintiff asserts.[58]

However, accrual of actions for breach of contract require a separate analysis. Generally, a cause of action for breach of contract accrues at the time of breach.[59] This applies even if the damages from the breach are unknown or have not been sustained.[60] However, a discovery rule may postpone accrual of a contract claim where the plaintiff *does not know of the breach* at the time it occurs.[61] Yet the contract claim may still accrue at

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[52] 374 Mass. 739 (1978).

[53] *Id.* at 741-42.

[54] *Id.* at 742-43.

[55] Olsen v. Bell Telephone Laboratories, Inc., 388 Mass. 171, 172 (1983). In *Olsen* the Supreme Judicial Court noted, but did not decide, whether the discovery rule applied to a claim for breach of implied warranty. *Id.* at 172.

[56] Hendrickson v. Sears, 365 Mass. 83, 85 (1974).

[57] *Id.* at 89-90.

[58] *See Id.* at 85; International Mobiles Corp. v. Corroon Black/Fairfield & Ellis, Inc., 29 Mass. App. Ct. 215, 221 (1990) (accrual of MASS. GEN. LAWS ch. 93A claim determined by same principles as tort actions); *see also* One Wheeler Road Associates v. Foxboro Co., 843 F. Supp. 792, 798 (D. Mass. 1994) (applying discovery rule to claim for damage to property from contamination under MASS. GEN. LAWS ch. 21E§ 5, based on analogy to "statutory tort").

[59] Berkshire Mutual Ins. Co. v. Burbank, 422 Mass. 659, 661 (1996); Campanella & Cardi Const. Co. v. Commonwealth, 351 Mass. 184, 185 (1966); Boston Towboat Co. v. Medford Nat. Bank, 232 Mass. 38, 41 (1919).

[60] *International Mobiles,* 29 Mass. App. Ct. at 221; DiGregorio v. Commonwealth, 10 Mass. App. Ct. 861, 862 (1980).

[61] *See* Melrose Housing Auth. v. New Hampshire Ins. Co., 24 Mass. App. Ct. 207, 212 (1987), *aff'd*, 402 Mass. 27 (1988) (holding contract limitations period not running while breach not discoverable through reasonable diligence).

a different time than a tort claim arising from the same facts. In *International Mobiles Corp. v. Corroon Black/Fairfield & Ellis, Inc.*, International Mobiles, an insured ice cream vendor, obtained coverage through an insurance broker.[62] It thought that it was insured under the policy for claims arising in Rhode Island, but the policy did not cover Rhode Island claims.[63] It sued the broker in tort and contract for failing to obtain the requested coverage.[64] The Appeals Court held that the tort claim accrued, in 1986, when Mobiles, the insured, was required to contribute to a settlement because it suffered harm from the broker's negligence at that point.[65] However, the *International Mobiles* court held that the breach of contract claim against the broker accrued in 1981, when it learned that the broker had not obtained coverage for Rhode Island claims.[66] The court applied a discovery rule – the contract claim did not accrue until International Mobiles learned that the broker had not obtained Rhode Island coverage – but that rule pointed to the date when the plaintiff learned of the breach, *even though it had suffered no loss from the breach at that point.*[67] The court reasoned that a party to a contract has a claim for at least nominal damages for breach even before it incurs financial loss from the breach, so International Mobiles had a right to sue as soon as it learned that coverage had not been obtained.[68]

A different rule applies to contracts for the sale of goods. Breach of a contract for the sale of goods accrues when breach occurs, "regardless of the aggrieved party's lack of knowledge of the breach." [69] Breach of a warranty occurs when tender of delivery is made.[70] Breach of an express warranty of future performance accrues when the breach is or should be discovered.[71]

The discovery rule has been adopted by statute for assault and bat-

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[62] *International Mobiles*, 29 Mass. App. Ct. at 216.

[63] *Id.* at 217.

[64] *Id.*

[65] *Id.* at 221.

[66] *Id.* at 223.

[67] *International Mobiles*, 29 Mass. App. Ct. at 222-23.

[68] *Id.* at 223. The *International Mobiles* court acknowledged the anomaly of holding that the contract and tort claims accrue at different times, but held that the anomaly reflected the different purposes of contract and tort law. *Id.* The court noted that the contract limitations period is longer, perhaps in part because of this difference in the time of accrual. *Id. But see* City of New Bedford v. Lloyd Inv. Associates, Inc., 363 Mass. 112, 119 (1973) (finding action for mistaken payment of money accrued at time of payment, without regard to time of discovery of mistake).

[69] MASS. GEN. LAWS ch. 106, § 725(2).

[70] *Id.*

[71] *Id.*; *See also* Cambridge Plating Co., Inc. v. Napco, Inc., 991 F. 2d 21, 25-26 (1st Cir. 1993).

tery based on sexual abuse of minors. Under chapter 260, section 4C of the Massachusetts General Laws, such claims may be brought "within three years of the time the victim discovered or reasonably should have discovered the emotional or psychological injury or condition was caused by said act."[72] Section 4C also preserves the separate tolling provision for actions by a minor until the age of eighteen.[73] That statute does not adopt a discovery rule for claims against others arising from child abuse (as for example, against a parent who facilitated or failed to intervene to prevent abuse), but the Appeals Court has adopted the discovery rule in one such case as a matter of common law.[74] The cases have confronted difficult factual questions concerning when a person abused as a child – even if he or she recalls the abuse – becomes aware that "an emotional or psychological injury or condition" was caused by the abuse.[75]

B. Satisfying the limitations period

In Massachusetts, a litigant meets the relevant limitations period on a claim in most cases[76] by one of the acts specified in Rule 3 of the Massachusetts Rules of Civil Procedure:

> A civil action is commenced by (1) mailing to the clerk of the proper court by certified or registered mail a complaint and an entry fee prescribed by law, or (2) filing such complaint and an entry fee with such clerk.

The reporter's notes to Rule 3 makes clear that either of these acts must be done within the limitations period.

> Henceforth, an action is considered commenced, for all purposes, including the applicable statute of limitations, when either the plaintiff mails to the clerk the complaint and any required entry fee, or the clerk receives the complaint and the fee. The requirement of certified or regis-

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[72] MASS. GEN. LAWS ch. 260, § 4C.

[73] MASS. GEN. LAWS ch. 260, § 7; *see* Cannon v. Sears, Roebuck & Co., 374 Mass. 739, 742-43 (1978).

[74] Phinney v. Morgan, 39 Mass. App. Ct. 202, 205 (1995).

[75] *See, e.g.*, Doe v. Harbor Schs., Inc., 446 Mass. 245, 259-60 (2006); Ross v. Garabedian, 433 Mass. 360, 365 (2001); Riley v. Presnell, 409 Mass. 239, 244-45 (1991); *Phinney*, 39 Mass. App. Ct. at 205.

[76] An exception is found in the concluding sentence of Rule 3: "Actions brought pursuant to MASS. GEN. LAWS ch. 185 for registration or confirmation shall be commenced by filing a surveyor's plan and complaint on a form furnished by the Land Court."

> tered mail is calculated to minimize problems of proof. The phrase "proper court" means the court in which requirements of venue and jurisdiction (personal and subject matter) are met.[77]

It appears that a complaint and entry fee may be "filed" by mailing, even by first class mailing.[78] However, if certified or registered mail is not used, the burden will rest on the plaintiff to establish that the papers were actually received by the clerk within the limitations period.[79] The last sentence of the Advisory Committee note suggests a danger counsel should avoid: Filing in the wrong court.[80] However, such misfiling may be remedied in most cases under chapter 260, section 32 of the Massachusetts General Laws, discussed later in Section VI (C) of this article. It may also be possible to transfer a case if venue is improper. Under chapter 223, section 15 of the Massachusetts General Laws, if a case is transferred, "it shall thereupon be entered and prosecuted in the same court for that county as if it had been originally commenced therein, and all prior proceedings otherwise regularly taken shall be valid."[81] The courts will probably hold, under this provision, that the plaintiff satisfies the limitations period by filing, even though in the wrong county.

Once a claim accrues, the limitations period will be calculated from the day after it accrues; the day on which the claim accrues is excluded.[82] If the period is three years, for example, it will expire on the third anniversary of the accident.[83] For example, if the accident is on June 4, 2013, the limitations period will expire on June 4, 2016. Counsel should also be aware of the "Sunday statute," chapter 4, section 9 of the Massachusetts General Laws, which provides:

> when the day or the last day for the performance of any act, including the making of any payment or tender of payment, authorized or required by statute or by contract, falls on Sunday or a legal holiday, the act may, unless it is specifically authorized or required to be performed on Sunday or on a legal holiday, be performed on the next

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[77] Mass. R. Civ. P. 3 reporter's notes.

[78] *See* Mulhall v. Sheraton Needham Hotel, 2003 Mass. App. Div. 192, *2 (2003).

[79] *Id.* at *3.

[80] Mass. R. Civ. P. 3 reporter's notes.

[81] MASS. GEN. LAWS ch. 223 § 15. In addition, transfer of an action filed in the wrong county is not mandatory. *Id.*

[82] *See* McBride v. Duane, 68 Mass. App. Ct. 1103, *1 (2006).

[83] Mahoney v. Dematteo-Flatiron LLP, 66 Mass. App. Ct. 903, 904 (2006).

succeeding business day.[84]

In addition, chapter 220, section 6 of the Massachusetts General Laws provides for the exclusion of Saturdays in some circumstances. The combination of these two statutes has been applied to extend the limitations period in chapter 260, section 2A of the Massachusetts General Laws.[85]

III. TOLLING OF THE LIMITATIONS PERIOD

A. *Meaning of the word "tolling"*

The most frequently intended meaning of the phrase "tolling the statute of limitations" is to suspend its operation, that is, that the limitations period does not begin to run for one reason or another, or that it is temporarily suspended. For example: "When a defendant fraudulently conceals a cause of action from the knowledge of a plaintiff, the statute of limitations is tolled under chapter 260, section 12 of the Massachusetts General Laws, for the period prior to the plaintiff's discovery of the cause of action."[86] This meaning is manifest in a great many cases. However, the term is also used at times to mean that an act satisfies, or meets the limitations period.[87] Perhaps the two uses are consistent, because satisfying the limitations period – doing the act necessary to initiate a claim within the mandated period – suspends the period forever, which prevents it from barring the claim.

However, the Supreme Judicial Court has stated that "a statute of repose cannot be 'tolled.'"[88] Clearly, the court speaks here in terms of the period being *suspended*, not satisfied; certainly, a statute of repose can be complied with by commencement of an action within the repose period.[89]

B. *Tolling of claims during period of minority or incapacity*

Chapter 260, section 7 of the Massachusetts General Laws provides:

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[84] MASS. GEN. LAWS ch. 4, § 9.

[85] *See Mahoney*, 66 Mass. App. Ct. at 904.

[86] Demoulas v. Demoulas Super Mkts., Inc., 424 Mass. 501, 519 (1997); Protective Life Ins. Co. v. Sullivan, 425 Mass. 615, 631-32 (1997).

[87] *See, e.g.*, Commonwealth v. Perella, 464 Mass. 274, 276 (2013); Myers v. Warren, 275 Mass. 531, 534 (1931); Xarras v. McLaughlin, 66 Mass. App. Ct. 799, 800-01 (2006).

[88] Nett v. Bellucci, 437 Mass. 630, 635, 643 (2002).

[89] *See Id.* at 643-644, 644 n. 13 (distinguishing between tolling and commencement of an action).

> If the person entitled thereto is a minor, or is incapacitated by reason of mental illness when a right to bring an action first accrues, the action may be commenced within the time hereinbefore limited after the disability is removed.

If Turner is injured in a motor vehicle accident when she is six, the three-year limitations period for a tort claim under chapter 260, section 2A of the Massachusetts General Laws would run when she was nine. However, the minority tolling provision in chapter 260, section 7 of the Massachusetts General Laws tolls the limitations period until the "disability" of minority is removed, when Turner reaches her eighteenth birthday.[90] The statute will then begin to run, expiring on her twenty-first birthday. The plaintiff may, however, sue before the tolling period runs; she may sue at any time after accrual until her claim is barred at the age of twenty-one.[91]

If chapter 260, section 7 of the Massachusetts General Laws applies, the limitations period is tolled even if a parent or guardian is available to bring suit on the minor's behalf.[92] In *O'Brien v. Massachusetts Bay Transp. Authority*,[93] the court concluded that "the disabilities referred to in the statute, minority and mental incapacity, must actually be 'removed' before a plaintiff loses the protection of the statute."[94] However, if a suit is brought on behalf of the minor plaintiff during minority, and decided on the merits, res judicata will likely bar the minor suing for the injury in her own name after she reaches the age of eighteen.[95]

Defendants have frequently argued that chapter 260, section 7 of the Massachusetts General Laws applies to toll the limitations provisions in Chapter 260, but not to claims for which a special limitations period is provided elsewhere in the General Laws. To support this argument, defendants often cite chapter 260, section 19 of the Massachusetts General Laws, which provides that "[i]f a special provision is otherwise made relative to the limitation of any action, any provision of this chapter inconsistent therewith shall not apply."[96] The courts' response to this argument has depended on the nature and the context of the alternative limitations provision. In *Hernandez v. Boston*,[97] for example, the defendant argued that the

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[90] *See* MASS. GEN. LAWS ch. 231, § 85P (stating age of majority as eighteen.).

[91] DeCosta v. Ye Craftsman Studio, 278 Mass. 315, 320 (1932).

[92] *See* Gaudette v. Webb, 362 Mass. 60, 72 (1972) (holding mother's wrongful death claim barred but children's timely due to minority tolling).

[93] 405 Mass. 439 (1989).

[94] *Id.* at 444.

[95] *See* King v. Bradlees, Inc., 1991 Mass. App. Div. 140, *4 (1991).

[96] MASS. GEN. LAWS ch. 260, § 19.

[97] 394 Mass. 45 (1985).

tolling provision in Chapter 260, section 7 of the Massachusetts General Laws did not apply, because chapter 258, section 4 of the Massachusetts General Laws provides the limitations period for claims against public employers under the Massachusetts Tort Claims Act, rather than the tort limitation period in chapter 260.[98] In *Hernandez*, the Supreme Judicial Court held that Chapter 258 of the Massachusetts General Laws (in contrast to chapter 231, section 60D of the Massachusetts General Laws, which clearly does set limits inconsistent with the general tolling provision in chapter 260, section 7 of the Massachusetts General Laws) does not provide a shortened statute of limitations for minors, but specifies the same limitations period for claims as the general tort statute.[99] Thus, it concluded that chapter 260, section 7 of the Massachusetts General Laws tolls a minor's claim under the Tort Claims Act.[100] The Appeals Court similarly held section 7 applicable to a claim against the Massachusetts Bay Transportation Authority, which was also governed by a limitations period outside of Chapter 260.[101]

Generally, either minority or mental disability tolls the limitations period under chapter 260, section 7 of the Massachusetts General Laws. However, as discussed in more detail in Section IX, the special statute of limitations for medical malpractice claims by minors supersedes section 7 for a minor's medical malpractice claims.[102] Inevitably, the question has arisen whether section 7 applies to toll a minor's medical malpractice claim if the minor also suffers from a mental disability. In *Boudreau v. Landry*,[103] the Supreme Judicial Court held that, which a minor's medical malpractice claim must be brought within three years of accrual, and this period is not tolled by section 7, that "such language does not govern a minor who is also insane."[104] Thus, the plaintiff's claim in *Boudreau* could be tolled due to mental disability, though it would not be tolled due to her mi-

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[98] *Id.* at 46.

[99] *Id.* at 47.

[100] *Id.* at 47-48. The court giveth and the court taketh away, however. As the *Hernandez* court noted, the separate presentment requirement in MASS. GEN. LAWS ch. 258, § 4 is not tolled during a claimant's minority. *See* George v. Saugus, 394 Mass. 40, 42 (1985).

[101] *See* Jomides v. Massachusetts Bay Transp. Authority, 21 Mass. App. Ct. 592, 596 (1986), *aff'd*, 398 Mass. 1009 (1986). The court fairly emphatically stated: "No longer can it be said that the tolling provisions in MASS. GEN. LAWS ch. 260 are, ipso facto, inapplicable to limitations periods other than those set forth in MASS. GEN. LAWS ch. 260 and to claims based upon statutes which include their own limitations periods." *Id.* at 596; *See also* O'Brien v. Massachusetts Bay Transp. Authority, 405 Mass. 439, 444-45 (1989) (holding MASS. GEN. LAWS ch. 260, § 7 applicable to claims against the MBTA).

[102] *See* MASS. GEN. LAWS ch. 231, § 60D.

[103] 404 Mass. 528 (1989).

[104] *Id.* at 531.

nority.[105] This distinction is reaffirmed in *McGuinness v. Cotter*,[106] in which the Supreme Judicial Court recognized that under section 7 mental disability might toll the limitations period beyond the age of majority.[107]

C. Tolling of claims during continuing representation or treatment

Another doctrine sometimes invoked to toll a limitations period – particularly in legal malpractice cases – is "continuing representation."[108]

> The doctrine recognizes that a person seeking professional assistance has a right to repose confidence in the professional's ability and good faith, and realistically cannot be expected to question and assess the techniques employed or the manner in which the services are rendered.[109]

Typically, the plaintiff argues based on the doctrine that the limitations period was tolled until the defendant attorney ceased representing the plaintiff in the underlying matter. While the doctrine is recognized in Massachusetts, many cases in which the argument has been raised have held that it did not apply to toll the limitations period, even though the defendant continued to represent the plaintiff after her claim accrued.

First, it is important to distinguish tolling based on continuing representation from the issue of accrual of the cause of action under the discovery rule. Some of the legal malpractice cases that discuss the continuing representation doctrine are actually decided under the discovery rule. Under that rule, the claim does not accrue, and the limitations period does not begin to run, until the plaintiff realizes, or should realize, that she has been harmed by the defendant's conduct. The discovery rule applies to legal and medical malpractice cases in the same way that it applies to other types of claims.

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[105] *Id.*

[106] 412 Mass. 617 (1992).

[107] *Id.* at 625-26. Prior to 1987, section 7 tolled the period for a person who was "insane" rather than for "mental disability." Chapter 522, section 19 of the Massachusetts General Laws, approved November 24, 1987, substituted "incapacitated by reason of mental illness" for "insane." *Id.* at 625. The Supreme Judicial Court held that the term "insane" in section 7 referred to "any mental condition in which a person is precluded from understanding the nature or effects of his acts and which prevents the person from understanding his legal rights." *See Boudreau*, 404 Mass. at 530.

[108] MASS. GEN. LAWS ch. 260, § 4.

[109] Cantu v. St. Paul Companies, 401 Mass. 53, 58 (1987) *quoting* Greene v. Greene, 56 N.Y.S.2d 86, 93-94 (1982).

Murphy v. Smith[110] illustrates the distinction between accrual and tolling. In *Murphy*, the plaintiffs alleged that the defendant had negligently certified title to a parcel they bought.[111] Later, they received a letter from an attorney for the neighbors claiming that they owned the lot rather than the plaintiff buyers.[112] At that point, the buyers were on notice that they may have suffered injury from the defendant's malpractice, and their claim accrued under the discovery rule.[113] However, the defendant allegedly informed them that he would take care of the problem, and for a period of time the plaintiffs did not bring suit against the lawyer.[114] Later, they sued him for malpractice.[115] The court held that the claim had accrued when they were put on notice of the possible title defect, but also held that, while the defendant represented them to resolve the problem, the limitations period would be tolled "from the beginning of this representation until the defendant's termination [as counsel for plaintiffs]."[116]

In *Murphy*, the plaintiffs were on notice of the negligence and possible harm, so the claim had *accrued* more than three years before they sued.[117] The court's discussion suggests, however, that the lawyers' assurances that he would resolve the issue lulled them into taking no action, which should toll the limitations period.[118] Thus, *Murphy* stands for the proposition that the lawyer's assurances that suit against him would not be needed because he would resolve the problem, will suspend the period. Yet, it would be over reading the case – and inconsistent with several reviewed immediately below – to conclude that it holds that any time the lawyer continues to represent the client that the limitations period is tolled for earlier mistakes.

In many of the limitations cases involving legal malpractice, the issue is when the claim accrued, that is, when the client knew or should have known that she had suffered appreciable harm from the attorney's negligence. In *Cantu v. St. Paul Companies*,[119] for example, a doctor sued for malpractice learned that the excess liability carrier would deny coverage on the claim due to late notice of the claim.[120] More than three years after

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[110] 411 Mass. 133 (1991).
[111] *Id.* at 134.
[112] *Id.* at 135.
[113] *Id.* at 136.
[114] *Murphy*, 411 Mass. at 136.
[115] *Id.* at 137.
[116] *Id.* at 138.
[117] *Id.* at 136.
[118] *Id.* at 137-38.
[119] 401 Mass. 53 (1987).
[120] *Id.* at 55.

this,[121] he sued the lawyers who represented him in the medical malpractice case, alleging malpractice in failing to notify the excess insurer of the claim.[122] The defendants had continued to represent Cantu for some time after he learned of the denial of coverage; he claimed that the limitations period was not running while the representation continued.[123] The Supreme Judicial Court rejected the argument.[124] It held that his claim had accrued when Cantu learned of the failure to notify the insurer.[125] The fact that the defendant lawyers continued to represent him did not toll the limitations period where the plaintiff knew of the negligence and the ensuing harm.[126] The doctrine, the court noted, protects "innocent reliance;" it does not automatically apply simply because the representation continues.[127]

For the limitations period to begin to run, the plaintiff must discover – or reasonably should discover – that the defendant attorney has been negligent, and also must suffer "appreciable harm" as a result.[128] However, the underlying litigation need not end for a plaintiff to suffer harm from the attorney's negligence. In *Frankston v. Denniston*,[129] for example, the court held that the plaintiff's claim accrued when he incurred additional litigation expenses due to his attorney's alleged error.[130] Later, he lost the underlying case due to the error, but because he incurred some harm from it earlier, the limitations period on his malpractice claim against the lawyer began to run at that point, and "activate[d] a duty of inquiry by the client into the issue or problem underlying the potential legal error or omission and to commence the running of the legal malpractice statute of limitations."[131]

The continuous representation doctrine has been held to apply – or

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[121] *Id.*; *See* MASS. GEN. LAWS ch. 260, § 4 (codifying three years statute of limitations for legal malpractice claims).

[122] *Cantu*, 401 Mass. at 55.

[123] *Id.*

[124] *Id.* at 58.

[125] *Id.*

[126] *Id.*

[127] *Cantu,* 401 Mass. at 58; *See* Vinci v. Byers, 65 Mass. App. Ct. 135, 141 (2005) (noting that client "innocently...rel[ied]" on lawyer's advice); *accord* Max-Planck-Gesellschaft Zur Foerderung der Wissenchaften E.V. v. Wolf Greenfield & Sacks P.C., 736 F. Supp. 2d 353, 365-66 (D. Mass. 2010); Lyons v. Nutt, 436 Mass. 244, 250 (2002). *Cf.* Williams v. Ely, 423 Mass. 467, 473-474 (1996), in which the court upheld the trial judge's finding that the plaintiffs' claims had not accrued more than three years before suit was filed, because they had not known, and should not reasonably have known, of a potential gift tax liability due to negligence of the defendants.

[128] Williams v. Ely, 423 Mass. 467, 473 (1996).

[129] 74 Mass. App. Ct. 366 (2009).

[130] *Id.* at 374-75.

[131] *Id.* at 375-76.

to justify further litigation of the facts – in only two cases. In *Hodes v. Sherburne, Powers & Needham, P.C.*,[132] the federal district court, applying Massachusetts law, refused to dismiss an action on limitations grounds, where the facts alleged might support a finding of innocent reliance on counsel.[133] In *Spilios v. Cohen*,[134] the lawyer allegedly was negligent in rejecting a settlement offer before a divorce trial.[135] The client/ plaintiff was immediately aware of the lawyer's conduct, but not that she had been harmed by it.[136] The court held that she did not suffer harm from the conduct until she later recovered a judgment for less than the offered settlement.[137] Thus, the claim actually accrued within three years before filing, and was timely.[138] Alternatively, the court held the continuous representation doctrine would also apply to toll the limitations period, due to the client's election to continue the case with the defendant lawyer.[139] This suggests that, even if she had known that she had suffered harm from the lawyer's advice more than three years earlier, she could still sue.[140]

In *Harlfinger v. Martin*,[141] the plaintiff made a "continuous treatment" argument in a medical malpractice case analogous to the continuing representation doctrine.[142] In dicta, the Supreme Judicial Court discussed the doctrine but did not decide whether to adopt it.[143] The court noted that tolling the limitations period would appear to contradict the repose provisions in chapter 231, section 60D and chapter 260, section 4 of the Massachusetts General Laws, which impose an absolute seven-year limit on claims after the act or omission that gives rise to the claim.[144] Even if the repose provision would preclude extensions under a continuing treatment

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[132] 938 F. Supp. 58 (D. Mass. 1996).

[133] *Id.* at 59.

[134] 38 Mass. App. Ct. 338 (1995).

[135] *Id.* at 339.

[136] *Id.* at 340.

[137] *Id.*

[138] *Id.*

[139] *Spilios*, 38 Mass. App. Ct. at 341.

[140] *Id.* This statement suggests that the limitations period would be tolled if the client chose to continue the representation, even if she was aware of harm from the lawyer's negligence. This dictum seems at odds with the holding in other cases that the limitations period will run once the client is aware of the injury. The case is best viewed as holding that the claim did not accrue until the client suffered injury from the smaller judgment in the underlying divorce case. *See* Lyons v. Nutt, 436 Mass. 244, 251, 251 n. 8 (2002) (endorsing holding in *Spilios* that harm had not accrued until judgment, but refusing to endorse alternative holding that the period was tolled throughout the representation).

[141] 435 Mass. 38 (2001).

[142] *Id.* at 52.

[143] *Id.* at 52-53.

[144] *Id.* at 52 n. 18.

doctrine beyond seven years, the doctrine might still extend the three-year limitations period for some period within the seven-year repose period.[145] However, the Supreme Judicial Court might well hold, by analogy to cases reviewed in this section, that a plaintiff who was aware of grounds for a medical malpractice claim should bring it even though she remained under the treatment of the doctor.

D. Tolling of claims due to fraudulent concealment

Chapter 260, section 12 of the Massachusetts General Laws tolls the limitations period if the defendant fraudulently conceals a cause of action from the plaintiff:

> Fraudulent concealment; commencement of limitations. If a person liable to a personal action fraudulently conceals the cause of such action from the knowledge of the person entitled to bring it, the period prior to the discovery of his cause of action by the person so entitled shall be excluded in determining the time limited for the commencement of the action.

Plaintiffs have frequently invoked this statute to avoid a limitations defense, but the argument has seldom prevailed.

The limitations period may be tolled under chapter 260, section 12 of the Massachusetts General Laws "if the wrongdoer, either through actual fraud or in breach of a fiduciary duty of full disclosure, keeps from the person injured knowledge of the facts giving rise to a cause of action and the means of acquiring knowledge of such facts."[146]

To show fraudulent concealment, the plaintiff must usually prove "positive acts done with the intention to deceive."[147] "Mere silence concerning the cause of action or failure to inform the plaintiff of the facts upon which her cause of action rests is not a fraudulent concealment within the meaning of the statute."[148] Absent a fiduciary duty of full disclosure, mere silence by the defendant cannot constitute fraudulent concealment under chapter 260, section 12.[149] However, if there is a fiduciary duty of

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[145] For example, a plaintiff who was allegedly treated negligently on June 1, 2005, and was still being treated through 2010, might argue that the continuous treatment doctrine tolled the three-year period until 2010, which is still within the seven-year repose period.

[146] Frank Cooke, Inc. v. Hurwitz, 10 Mass. App. Ct. 99, 106 (1980).

[147] Maloney v. Brackett, 275 Mass. 479, 484 (1931).

[148] *Id.*

[149] Szymanski v. Boston Mutual Life Ins. Co., 56 Mass. App. Ct. 367, 381 (2002).

full disclosure, failure to make disclosure would constitute fraudulent concealment.[150] In these cases, the plaintiff could claim fraudulent concealment even if she should have discovered the cause of action through reasonable efforts, as long as she did not have actual knowledge of the claim or the full information needed to detect it.[151] However, a plaintiff who "turns a blind eye to known or readily ascertainable facts" cannot rely on fraudulent concealment to toll the statute.[152]

A plaintiff might assert a claim for fraud, but make no showing of fraudulent concealment. For example, in *Salois v. Dime Savings Bank of New York, FSB*,[153] the plaintiff alleged fraud in the marketing of a mortgage loan program.[154] Even if there was fraud in the promotion of the loan program, the court held that the plaintiff was in full possession of the facts necessary to recognize the cause of action from the time when the plaintiff understood the terms of the loan.[155] Chapter 260, section 12 did not come into play, because there was no affirmative conduct by the defendant that sought to conceal the terms of the loan or a possible cause of action based on it. [156]

For a case that found fraudulent concealment, see *Stolzoff v. Waste Systems Intern., Inc.*,[157] in which the defendant had allegedly concealed the collapse of their "landfill mining" project by affirmative misrepresentations about its progress.[158] The court held that a fact finder could reasonably find that "by means of numerous false representations made about the status of the Fairhaven project and the company's success in landing other lucrative contracts for other landfill projects," the defendant had "affirmatively concealed the true state of affairs" – and, thus, their cause of action for the underlying fraud.[159] Even though the plaintiffs had heard some rumblings about problems with the company, the court concluded that the plaintiffs did not know or have readily ascertainable information that should have made them realize that they had a right to sue.[160]

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[150] *Frank Cooke*, 10 Mass. App. Ct. at 106.

[151] *See* Stolzoff v. Waste Systems Intern. Inc., 58 Mass App. Ct. 747, 757 (2003); Demoulas v. Demoulas Super Markets, Inc., 424 Mass. 501, 519-520 (1997); Brackett v. Perry, 201 Mass. 502, 505 (1909).

[152] *Stolzoff*, 58 Mass. App. Ct. at 758.

[153] 128 F.3d. 20 (1st Cir. 1997).

[154] *Id.* at 23-24.

[155] *Id.* at 27.

[156] *Id.*; *See also Brackett*, 201 Mass. at 505 (holding that where plaintiffs had means of detecting fraud and circumstances "put them upon inquiry," limitations period began to run).

[157] 58 Mass. App. Ct. 747 (2003).

[158] *Id.* at 748.

[159] *Id.* at 757-758.

[160] *Id.* at 758-59.

The fraudulent concealment doctrine was also applied in *Puritan Medical Center, Inc. v. Cashman.*[161] In *Cashman,* the defendant was a director of the plaintiff corporation, and therefore, the court held, owed a fiduciary duty of full disclosure to the corporation.[162] Thus, the court held that the jury could find that fraudulent concealment tolled the limitations period based on non-disclosure of defendants' overcharges to the corporation.[163]

Sometimes the issue of discovery of a cause of action closely resembles the issue of fraudulent concealment. In *Tracerlab, Inc. v. Industrial Nucleounics Corp.*,[164] for example, the issue was when the plaintiffs became aware that the defendants had wrongly appropriated trade secret information.[165] While the plaintiffs phrased the issue in terms of fraudulent concealment under chapter 260, section12 of the Massachusetts General Laws, it appears that the real issue was when the plaintiff reasonably should have recognized that misappropriation had taken place.[166] This is an issue of when its claim *accrued* under the discovery rule, rather than one of fraudulent concealment, which tolls the limitations period due to misconduct that affirmatively conceals the existence of the claim. But the two are closely related, since they both focus on what the plaintiff knew and when it knew it – or why it did not. The *Tracerlab* court's discussion does not clearly differentiate these different issues.

E. Equitable estoppel to plead the statute of limitations

Massachusetts courts have occasionally estopped a defendant from pleading the statute of limitations due to some conduct that has lulled the plaintiff into delaying filing a suit until the limitations period has passed. In *MacKeen v. Kasinskas*,[167] for example, an insurance adjuster repeatedly assured the plaintiff that the claim would be "taken care of" once the plaintiff fully recovered.[168] Consequently, the plaintiff postponed filing a suit until after the limitations period had run, only to be met by a limitations defense.[169] The Supreme Judicial Court held that the defendant was estopped

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[161] 413 Mass. 167 (1992).

[162] *Id.* at 175.

[163] *Id.*

[164] 313 F.2d 97 (1st Cir. 1963)

[165] *Id.* at 98.

[166] *Id.* at 102.

[167] 333 Mass. 695 (1956).

[168] *Id.* at 697. To the same effect, *see* Hayes v. Gessner, 315 Mass. 366, 368 (1944) ("[W]hy don't you let things lie this summer, and then in the fall we can take the matter up.").

[169] *Gessner*, 315 Mass. at 368.

from pleading the limitations period as a defense, because the adjuster had led the plaintiff reasonably to believe that her damages would be paid without suit.[170] *La Bonte v. New York, N. H. & H. R. Co.*,[171] involved more equivocal representations made by an agent of the defendant.[172] The court still held that reasonable jury could find estoppel based on the representations, even though they were last made some four months before the limitations period ran.[173]

Estoppel need not be based on fraud in the traditional sense. "Estoppel in its more modern statement is that 'one is responsible for the word or act which he knows or ought to know will be acted upon by another.'"[174] Thus, estoppel differs from fraudulent concealment; completely honest representations that induce reliance and failure to file within the limitations period may support estoppel. Nor is an express promise to satisfy the claim or waive the limitations defense required, as long as the conduct is such as would lead a reasonable person to rely upon the defendant's statements.[175] In *McLearn v. Hill*, for example, the defendant asked the plaintiff to discontinue an action in one court and refile in another, to consolidate the case with related cases.[176] When the plaintiff complied and refiled, the defendant pleaded the limitations defense, since the period had run before the refiling (but not before the initial filing).[177] The court held that, even though there was no evidence that the defendant had requested the refiling to deceive, equity required that he be estopped from pleading the limitations period after inducing the very act by which the plaintiff missed the limitations period in the second action.[178] Thus, the argument differs from fraudulent inducement (discussed above in Section III, D), which is based on the argument that the limitations period is tolled while the defendant conceals the cause of action from the plaintiff.

However, if the plaintiff ceases to rely on the representations a rea-

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[170] *Id.* at 698.

[171] 341 Mass. 127 (1960) (deciding issue under federal law, but noting Massachusetts law would be substantially same).

[172] *Id.* at 129.

[173] *Id.* at 131-32 (noting federal law applicable, but likely same as Massachusetts law on estoppel). *See also* Knight v. Lawrence, 331 Mass. 293, 294-97 (1954) (holding adjuster's representations that insurer would "take good care" of plaintiff close to the line, but posed a factual issue on estoppel). *Cf.* Ford v. Rogovin, 289 Mass. 549, 552-53 (1935) (holding similar representations by the defendant not sufficient to raise estoppel).

[174] McLearn v. Hill, 276 Mass. 519, 527 (1931) (quoting Stiff v. Ashton, 155 Mass. 130, 133 (1891)).

[175] *McLearn*, 276 Mass. at 526.

[176] *Id.* 521-22

[177] *Id.*

[178] *Id.* at 526-27.

sonable time before the limitations period runs, estoppel will not bar the plea. In *Pagliarini v. Iannaco*,[179] the defendant's statements that he would pay a mortgage deficiency had ceased before the period ran, and the plaintiff had hired an attorney to bring suit, one month before it expired.[180] On these facts the Appeals Court found that the plaintiff had not met the "heavy burden"[181] to show that defendant was estopped to plead the limitations defense, since they had adequate time to do so but did not file in time.[182]

F. Tolling during defendant's absence from the Commonwealth: c. 260, s. 9

Chapter 260, section 9 of the Massachusetts General Laws, entitled "Nonresident defendant; suspension of limitation," provides:

> If, when a cause of action hereinbefore mentioned accrues against a person, he resides out of the commonwealth, the action may be commenced within the time herein limited after he comes into the commonwealth; and if, after a cause of action has accrued, the person against whom it has accrued resides out of the commonwealth, the time of such residence shall be excluded in determining the time limited for the commencement of the action; but no action shall be brought by any person upon a cause of action which was barred by the laws of any state or country while he resided therein.[183]

This mysterious provision has two parts. The first appears to toll the running of the limitations period against a defendant who resides outside Massachusetts, for as long as the defendant continues to do so. The second part – the final clause – appears to be a "borrowing statute" that instructs the Massachusetts courts to apply the statute of limitations of another state in certain circumstances. As explained below, neither part of section 9 has been interpreted literally. Under the courts' construction of section 9, it will rarely apply to toll the limitations period or to bar an action because it is barred in the state of the defendant's residence.

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[179] 57 Mass. App. Ct. 601, *aff'd*, 440 Mass. 1032 (2003).

[180] *Id.* at 602-03.

[181] *Id.* at 603.

[182] *Id.*; *See also* Deisenroth v. Numonics Corp., 997 F. Supp. 153, 157 (D. Mass. 1998) (refusing estoppel where representations ceased one year before limitations period ran).

[183] MASS. GEN. LAWS ch. 260, § 9.

1. The absence from the Commonwealth provision.

This hoary provision has been in the General Laws for at least 150 years.[184] Early cases held that section 9 tolls the running of a statute of limitations if the defendant "resides" outside of the Commonwealth, which was interpreted to mean *domiciled* outside of Massachusetts.[185] The rationale for the statute was that a defendant who was not present or domiciled in Massachusetts was not subject to personal jurisdiction in Massachusetts.[186] Unless the limitations period was tolled, a defendant who was not subject to service of process in the state could defeat the claim by staying outside the state.[187]

The rationale for the statute – as traditionally construed – was undermined by the advent of various types of long-arm jurisdiction, which allow a plaintiff to sue a non-resident defendant even though she cannot be served with process in Massachusetts. In *Walsh v. Ogorzalek*,[188] for example, a Connecticut defendant caused a motor vehicle accident in Massachusetts and left the state.[189] The plaintiff, Walsh, sued beyond the two-year limitations period, but argued that it was tolled by chapter 260, section 9 of the Massachusetts General Laws.[190] However, chapter 90, section 3A of the Massachusetts General Laws allowed service of process on the Registrar of Motor Vehicles, which would subject Ogorzalek to personal jurisdiction for the accident despite his absence from the state.[191] In light of this, the Supreme Judicial Court held that section 9 did not toll the limitations period as to Walsh's claim:

> We construe the words of c. 260, section 9, which refer to a defendant who 'resides out of the commonwealth,' as de-

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[184] *See* Langdon v. Dowd, 6 Allen 423, 424-27 (Mass. 1863) (discussing predecessor statute). For a history of § 9, *see* Wilcox v. Riverside Park Enters., Inc., 399 Mass. 533, 535-39 (1987).

[185] *See* Nichols v. Vaughan, 217 Mass. 548, 550 (1914); *see also Langdon*, 6 Allen at 423-26.

[186] MASS. GEN. LAWS ch. 260, § 9.

[187] *Id.* The statute's purpose is "to prevent a potential defendant from insulating himself from liability by placing himself for a time beyond the reaches of the law for purposes of service." Walsh v. Ogorzalek, 372 Mass. 271, 274 (1977).

[188] 372 Mass. 271 (1977).

[189] *Id.* at 272.

[190] *Id.* at 273.

[191] *Id.* ("[N]onresident motorist exercising the privilege of operating a motor vehicle within the Commonwealth is deemed to have appointed the Registrar of Motor Vehicles as an attorney on whom process may be served for an action growing out of an accident while he is exercising this privilege.").

> scribing a person who by reason of nonresidence is beyond the jurisdiction and process of the court.[192]

Thus, when service of process may be obtained over the absent defendant, "the tolling provisions of chapter 260, section 9 of the Massachusetts General Laws are inapplicable."[193] The court suggested, however, that the statute might toll the limitations period if the name and location of the defendant were not known to the plaintiff.[194]

2. The borrowing provision in the last clause of section 9

The last clause of section 9 provides "but no action shall be brought by any person upon a cause of action which was barred by the laws of any state or country while he resided therein."[195] This appears to mean that, in an action by a plaintiff from another state, the Massachusetts courts will apply the limitations period of the plaintiff's residence, even if the action is for a claim that arose in Massachusetts. The facts of *Wilcox v. Riverside Park Enterprises, Inc.*,[196] provide an example. The plaintiff was a Connecticut resident who was injured at a Massachusetts amusement park.[197] He brought suit against the operator in Massachusetts within the applicable three-year statute of limitations.[198] The defendant argued that the claim was barred under the last clause in section 9, because the plaintiff resided in Connecticut, which had a two-year limitations period for torts.[199] The trial court and the Appeals Court agreed that the borrowing clause barred the suit.[200] However, the Supreme Judicial Court reversed.[201] It held that the final clause in section 9 is a qualification of the prior provisions of the statute, which only apply to a defendant who resides (that is, is

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[192] *Walsh*, 372 Mass. at 274. The holding in *Walsh* was anticipated by the federal district court in *Smith v. Pasqualetto*, 146 F. Supp. 680, 681-82 (D. Mass. 1956).

[193] Woodcock v. American Inv. Co., 376 Mass. 169, 176 n. 8 (1978).

[194] *Walsh*, 372 Mass. at 275; *See also* Doyle v. Shubs, 717 F. Supp. 946, 950 (D. Mass. 1989) (rejecting tolling argument for inability to locate defendant, where no effort made to do so). The *Doyle* court suggested that the Supreme Judicial Court might "place a further gloss on *Walsh* by requiring the plaintiff claiming §9 protection to show that the defendant's name or location could not reasonably have been known within the statutory period." *Doyle*, 717 F. Supp. at 951 n. 4.

[195] MASS. GEN. LAWS ch. 260, § 9.

[196] 399 Mass. 533 (1987).

[197] *Id.* at 534.

[198] *Id.*

[199] *Id.*

[200] *Id.*

[201] *Wilcox*, 399 Mass. at 539.

domiciled) outside of Massachusetts.[202] Thus, the borrowing clause does not apply in an action brought in Massachusetts against a defendant who at all relevant times has resided in Massachusetts.[203] Because the park operator was a Massachusetts corporation, the court held that the clause did not bar suit under the Massachusetts limitations statute.[204]

This clause does apparently apply to a claim between two citizens of another state, however. Suppose that Romero and Marston, two Connecticut residents, drove into Massachusetts and have an accident. Marston, the passenger, sues Romero in a Massachusetts court, after the Connecticut limitations period has run, but before the Massachusetts statute has run. The closing clause of section 9 appears to apply on these facts, despite the narrow construction in *Wilcox*. This makes some sense as a choice of law provision, since the plaintiff has had the full advantage of her home limitations period in which to sue a local resident. It is unclear, however, whether the clause applies to other situations, such as where the plaintiff and defendant both reside outside Massachusetts but in different states, or where the plaintiff resided in Massachusetts for some period after the claim arose but later moved to another state.[205] It hardly seems that the provision could apply if the defendant and the plaintiff resided in different states, as, for example, where the plaintiff from Connecticut has an accident while driving in Massachusetts with a defendant from New York. On these facts, suit in Massachusetts would be appropriate, and there seems little reason to confine the plaintiff to the Connecticut limitations period, especially if, as is possible, the defendant would not be subject to personal jurisdiction in Connecticut for the claim.

Many states have broadly applicable borrowing statutes that provide for the application of the limitations period of another state, usually for cases that arose in that other state.[206] Massachusetts does have at least one other borrowing statute, chapter 190B, section 3-803(c) of the Massachusetts General Laws, which bars certain claims against an estate if they would be barred by the limitations period of the decedent's domicile. Because Massachusetts does not have a general borrowing statute, decisions about the appropriate limitations period to apply in cases with connections to multiple states will be made under common law choice of law analy-

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[202] *Id.*

[203] *Id.* at 539.

[204] *Id.*

[205] The *Wilcox* court noted that, prior to enactment of the borrowing clause, some cases applied the other provisions of § 9 when the parties were from the other state ("their mutual State of residence."). *Id.* at 538.

[206] *See, e.g.*, Tex. Civ. Prac. & Rem. Code §71.031; Ky. Rev. Stat. §413.320; NY CPLR 202.

sis.[207]

IV. ADDING PARTIES OR CLAIMS TO PENDING LITIGATION AFTER THE LIMITATIONS PERIOD HAS RUN

A. Adding defendants after the limitations period has run

Plaintiffs frequently sue one or more defendants within the limitations period and later seek to add or substitute other defendants as they learn more about their cases. Suppose, for example, that Noriega sues Adams in an action for tort, shortly before the running of the three-year limitations period in chapter 260, section 2A of the Massachusetts General Laws. Six months into discovery he learns that the negligence of Perkins may also have contributed to the injury, and moves to amend his complaint to add Perkins as a codefendant. If Noriega brought a separate action against Perkins at this time the claim would be barred by the tort statute of limitations.

However, under Massachusetts practice, if Noriega's motion to amend the complaint to add Perkins as a defendant is granted, the claim against Perkins will "relate back" to the date of filing of the original complaint. That is, it will be treated as though Perkins had been made a defendant at the time the original complaint was filed, which was before the passage of the limitations period. Thus, if the amendment is allowed and relates back, the statute of limitations will not provide a defense for Perkins, *even though he was not sued within the three-year period.* This liberal approach to amendments to add parties is provided in Massachusetts Rule of Civil Procedure 15(c), entitled "Relation back of Amendments." The Rule reads as follows:

> Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment (including an amendment changing a party) relates back to the original pleading.

It is also authorized by chapter 231, section 51 of the Massachusetts General Laws, entitled "Amendments as to parties, process or pleading":

> In all civil proceedings, the court may at any time, allow

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[207] *See* the brief discussion of choice of law principles applicable to limitations issues at Section XII (A) of this article.

> amendments adding a party, discontinuing as to a party or changing the form of the action, and may allow any other amendment in matter of form or substance in any process, pleading or proceeding, which may enable the plaintiff to sustain the action for the cause or for recovery for the injury for which the action was intended to be brought, or enable the defendant to make a legal defense. Any amendment allowed pursuant to this section or pursuant to the Massachusetts Rules of Civil Procedure shall relate to the original pleading.

Under these provisions, Massachusetts courts have approved the addition of defendants after the limitations period[208] and the substitution of a new defendant for the original defendant.[209] After the amendment is allowed:

> the substitution relates back to the date of the writ [the original pleading in the case] and makes the substituted defendant a party from that date. . . We discern no difference in principle between permitting a plaintiff to substitute a defendant and permitting a plaintiff to add a defendant. . . The effect in both cases is that a different defendant is called upon to defend the action.[210]

Massachusetts practice is much more liberal in this regard than practice under the Federal Rules of Civil Procedure. Federal practice only allows an amendment that adds a new party to relate back if several criteria are met which assure that the added defendant was on notice of the action before the running of the time to bring suit.[211] *However*, even in federal court the Massachusetts liberal amendment policy will apply to claims that are based on Massachusetts law. Federal Rule 15(c)(1)(B) provides that a pleading under the Federal Rules will relate back to a prior filing "if the law that provides the applicable statute of limitations allows relation

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[208] *See* Wadsworth v. Boston Gas Co., 352 Mass. 86, 89 (1967).

[209] *See* Peterson v. Cadogan, 313 Mass. 133, 134 (1943). The same authority to substitute a different defendant has been applied to review of an administrative ruling under MASS. GEN. LAWS ch. 30A. *See also* Herrick v. Essex Reg'l Ret. Bd, 68 Mass. App. Ct. 187, 190-92 (2007).

[210] *Wadsworth*, 352 Mass. at 89.

[211] *See* Fed. R. Civ. P. 15(c)(1)(C). Under Federal Rule 15(c), the claim against the new party must arise from the same events as the original pleading, and the added party must have known, before the running of the period for service of process in the original action, that it was meant to be the defendant, but for a mistake concerning the proper party's identity. Fed. R. Civ. P. 15(c)(1)(C)(i)-(ii).

back."[212] So, for example, in a federal diversity case in which Massachusetts law applies (and consequently, the Massachusetts statute of limitations), the federal district court would apply Mass. R. Civ. P. 15(c) and chapter 231, section 51 of the Massachusetts General Laws, as interpreted by the Massachusetts courts, in deciding whether an amendment that adds a defendant will relate back to an earlier filed pleading.[213]

Of course, an amendment to add an additional defendant (or change defendants) will only relate back to the original pleading *if the court allows the amendment*. In most cases the period for amendments as of right[214] will have passed when the amendment to add a new defendant is sought, so the trial judge must grant leave to amend under Mass. R. Civ. P. 15(a). A new party might argue that it is prejudicial to allow the amendment, because it revives a claim that has otherwise lapsed due to passage of the limitations period. However, in *Wadsworth v. Boston Gas Co.*[215] the court stated "[i]t has often been said that the running of the statute of limitations is not a reason for denying an amendment and may furnish a reason for allowing it."[216] This language suggests that the liberal policy toward amendments should prevail over the defendant's repose argument in most cases.

B. Adding additional plaintiffs after the limitations period has run

This liberal approach to changing parties in chapter 231, section 51 of the Massachusetts General Laws and Massachusetts Rule of Civil Procedure 15(c) also allows *the addition of plaintiffs* who did not bring suit before the passage of the limitations period. For example, in *Walsh v. Curcio*,[217] Walsh brought suit against Curcio for injuries in an auto accident within the limitations period.[218] After the period had run, she moved to add John and Veronica McCormick as additional plaintiffs.[219] The Supreme

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[212] *See* Pessotti v. Eagle Mfg. Co., 946 F.2d 974, 980 n. 6 (1st Cir. 1991) (discussing amendment to Federal Rules to address this issue); *See also* Marshall v. Mulrenin, 508 F.2d 39, 44-45 (1st Cir. 1974) (applying Massachusetts relation-back doctrine despite stricter relation-back approach in Federal Rule 15(c) prior to amendment adding Fed. R. Civ. P. 15(c)(1)(B)).

[213] This analysis would similarly apply to a supplemental claim in a federal case that is governed by Massachusetts law. *See* 28 U.S.C. § 1367 (authorizing jurisdiction over state law claims that are part of same case or controversy as claims within original jurisdiction of federal court).

[214] Mass. R. Civ. P. 15(a) reporter's notes.

[215] 352 Mass. 86 (1967).

[216] *Id.* at 88; *see also* Gallagher v. Wheeler, 292 Mass. 547, 552 (1935).

[217] 358 Mass. 819 (1971).

[218] *Id.* at 819.

[219] *Id.*

Judicial Court upheld grant of the amendment.[220]

> The cause of action of the McCormicks was alive when Marjorie Walsh brought her action. The defendants had full knowledge of litigation about the accident during the statutory period. Notwithstanding that the McCormicks as parties plaintiff with a separate cause of action might have been barred by the statute of limitations had they brought a separate action, we hold that there was no abuse of discretion in allowing the amendment in the circumstances of this case, where the claims of all plaintiffs arose out of the same incident. [221]

Clearly, by inference, the court approves relation back of the amended claim to the time of the original complaint as well. Rule 15(c) supports the same result. In such cases, if the "claim" in the amended pleading arises from the same occurrence as the claim in the original pleading, Rule 15(c) provides that it relates back to the filing of that pleading for limitations purposes. Thus, even though the new plaintiff had brought no claim until after the passage of the limitations period, her claim may be added and will relate back to the original complaint.

In *Berkowitz v. Nee*,[222] the Appeals Court refused to extend the relation-back doctrine of chapter 231, section 51 of the Massachusetts General Laws to a claim in which *no plaintiff* had sued within the generally applicable limitations period.[223] In *Berkowitz*, the plaintiff filed suit for injuries in an auto accident on behalf of his minor daughter.[224] The limitations period on the claim had run,[225] but the claim was timely under chapter 260, section 7 of the Massachusetts General Laws, because the plaintiff was a minor.[226] Shortly thereafter, the plaintiff moved to amend to add two adult passengers as co-plaintiffs, arguing that the claim could be added under chapter 231, section 51 of the Massachusetts General Laws to the pending case and avoid the limitations defense.[227] The court upheld the trial

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[220] *Id.*

[221] *Id.*; *See* MASS. GEN. LAWS ch. 231, § 51.

[222] 4 Mass. App. Ct. 834 (1976).

[223] *Id.* at 835.

[224] *Id.* at 834.

[225] *Id.* at 835 (noting at the time of filing, limitations period was two years); *see* MASS. GEN. LAWS ch. 260, §4 as in effect prior to St. 1973, §777 (extending the tort limitations period to three years).

[226] *Berkowitz*, 4 Mass App. Ct. at 835.

[227] *Id.*

judge's denial of the amendment, on the ground that the amendment would be futile, since if the claims were added they would be barred by the statute of limitations.[228] The court distinguished *Walsh v. Curcio* on the ground that in *Walsh* a suit was filed before the running of the regular limitations period, so the defendant was put on notice of the claim before it ran.[229] In *Berkowitz*, by contrast, no suit was brought until after the limitations period lapsed.[230]

C. Adding additional legal claims after the limitations period has run

Chapter 231, section 51 of the Massachusetts General Laws not only allows changes to the parties after passage of the limitations period, but also changes to the legal causes of action or claims that are asserted. That section authorizes "any other amendment in matter of form or substance in any process, pleading or proceeding, which may enable the plaintiff to sustain the action for the cause or for recovery for the injury for which the action was intended to be brought. . ." and provides that such amendments shall relate back to the date of filing of the original pleading.[231] Under this language, amendments will relate back if they concern the same "cause" or "injury" as that originally pleaded, meaning the set of litigation events for which relief was sought in the original complaint.

Mass. Rule 15(c) has similar language, allowing relation back if the amended pleading seeks relief on the "conduct, transaction, or occurrence" relied upon in the original pleading. This would not be met if the plaintiff added a claim based on events unrelated to those pleaded in the original complaint,[232] but does not require that the amended pleading must rely on the same legal theory as the original complaint, only that it seek relief for the same set of litigation events.

Gallagher v. Wheeler[233] provides an example of relation back of a new claim. The plaintiff sued initially on a common law claim for gross negligence, and sought to amend to add a statutory claim under chapter 89, sections 1-5 of the Massachusetts General Laws after the one-year limita-

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[228] *Id.*

[229] *Id.*

[230] *Id.*

[231] MASS. GEN. LAWS. ch. 231, § 51.

[232] For example, if plaintiff sued Jones for injuries in an auto accident before passage of the limitations period, and amended after the limitations period had run to assert an unrelated claim for defamation, the added claim would have to meet the relevant limitations period on its own. MASS. GEN. LAWS ch. 231, § 51 and Rule 15(c) would not allow relation back.

[233] 292 Mass. 547 (1935).

tions period had passed on the statutory claim.[234] The court held that the limitations period did not bar the amended claim.[235]

> The only wrong done to the plaintiffs arose out of the wrongful operation by the defendant of his automobile on a public way. The statement of a different form of liability is not a different cause of action, provided it accrues to the plaintiff in a single capacity, and grows out of the same transaction or act and seeks redress for the same wrong.[236]

The defendant in *Gallagher* tried to distinguish the case on the ground that the one-year limitations period in G. L. c. 89, section 5 of the Massachusetts General Laws was "a condition of the right and not merely a statute of limitations."[237] Apparently, he argued that this limit, which is included in the statute that creates the right (rather than in chapter 260, which governs limitations periods generally), is an absolute time limit, not subject to extension under chapter 231, section 51 of the Massachusetts General Laws.[238] However, the court rejected the argument, applying instead its general approach allowing addition of further claims after the passage of the limitations period, so long as they seek recovery for the same underlying transaction or occurrence.[239]

D. Relation back in cases in which a party has died

A particular relation-back problem arises where a plaintiff brings suit against a party who has died. In *Chandler v. Dunlop*,[240] Chandler sued Dunlop, the driver who had allegedly caused her injury, only to learn later that Dunlop had died before suit was brought.[241] The insurance company's counsel, also unaware that Dunlop had died, filed an answer to the complaint, but later filed a "plea in abatement" on the ground that the suit was a nullity, since Dunlop had died before it was filed.[242] Chandler then moved to amend to assert the claim against Dunlop's administratrix.[243] By the

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[234] *Id.* at 549.
[235] *Id.* at 552.
[236] *Id.* at 551.
[237] *Id.* at 550.
[238] *Gallagher*, 292 Mass. at 550.
[239] *Id.* at 550-51.
[240] 311 Mass. 1 (1942).
[241] *Id.* at 3.
[242] *Id.*
[243] *Id.*

time this motion was made, however, a claim against the administratrix was barred by chapter 197, section 9 of the Massachusetts General Laws, the short statute of limitations for claims against estates.[244]

Chandler argued that this did not defeat the claim against the estate, because the amendment would relate back to the filing of the original writ against the decedent.[245] The Supreme Judicial Court held that the amendment could not save the claim in this case, because no proper suit was filed before the passage of the limitations period.[246] The suit against Harry B. Dunlop was a nullity, and did not constitute an action to which the amended claim against the administratrix would relate back.[247] Thus, the action failed.[248]

The Massachusetts courts have been backtracking from this "nullity doctrine"[249] ever since. In *Holmquist v. Starr*,[250] for example, the court refused to apply the rule on somewhat similar facts.[251] The *Holmquist* court distinguished *Chandler* on the ground that, unlike in that case, an administrator had been appointed at the time suit was brought, had notice of the filing of the suit, and answered on behalf of the estate.[252] *Nutter v. Woodard* [253] involved similar facts: the suit was filed against Woodard, who had died, and an answer was filed by an attorney hired by the insurance company without knowing that Woodard had died.[254] The Appeals Court again distinguished *Chandler* and followed *Holmquist*. [255]

These cases clearly reflect the fact that the "real" defendant in these cases is the insurance company.

> "A complaint could have been brought against the administratrix on Nutters's personal injury claim as a mere formality for bringing in the insurer, the only real party in interest. General Laws c. 197, § 9A, as amended through St. 1974, c. 234, permits suits for personal injuries to be commenced against an administratrix 'provided that such ac-

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[244] *Id.* at 3; *See* MASS. GEN. LAWS ch. 190B, § 3-803.
[245] *Id.* at 2.
[246] *Chandler*, 311 Mass. at 7.
[247] *Id.* at 8-10
[248] *Id.*
[249] *See* Holmquist v. Starr, 402 Mass. 92, 93 (1988).
[250] 402 Mass. 92 (1988).
[251] *Id.* at 95.
[252] *Id.*
[253] 34 Mass. App. Ct. 596 (1993).
[254] *Id.* at 597.
[255] *Id.* at 599-600.

> tion is commenced within three years next after the cause of action accrues, and provided further that any judgment recovered . . . may be satisfied only from the proceeds of a policy of insurance."[256]

An action against the insured puts the insurer on notice of the claim, even though formally the decedent cannot be sued. "For us to rule against Nutter in these circumstances would be to allow the insurer a windfall due to the fortuity that there was but one potentially negligent party for Nutter to sue and due to a mistake shared by both Nutter and the insurer."[257]

The court similarly avoided the nullity doctrine in *Xarras v. McLaughlin*.[258] Here again the plaintiff filed unwittingly against a deceased defendant.[259] No administrator had been appointed when suit was filed.[260] After McLaughlin was appointed administrator, his motion to dismiss under the nullity doctrine was granted.[261] However, the Appeals Court reversed, noting that, while the suit against the decedent may have been a nullity, two other defendants were also sued.[262] Thus, there was a viable suit filed initially, so the relation-back doctrine of chapter 231, section 51 of the Massachusetts General Laws would apply to a later added claim against the decedent's estate.[263]

For yet another twist on this relation-back scenario, see *White v. Helmuth*.[264] In that case Ida E. Helmuth, the party who allegedly caused the injury, died on the day of the accident.[265] White brought suit almost three years later, naming Ronald C. Helmuth, her executor, as the defendant.[266] However, Ronald had died before the action was brought, and the insurer moved to dismiss under the nullity doctrine.[267] The Appeals Court noted that:

> [w]hile the case at hand might, therefore, present an oppor-

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[256] *Id.* at 598.

[257] *Id.* at 600.

[258] 66 Mass. App. Ct. 799 (2006).

[259] *Id.* at 799-800.

[260] *Id.*

[261] *Id.* at 800.

[262] *Id.* at 802 ("As this case was filed against two viable defendants in addition to the decedent, the original complaint was not rendered a nullity.").

[263] *Xarras*, 66 Mass. App. Ct. at 802.

[264] 45 Mass. App. Ct. 634 (1998).

[265] *Id.* at 634.

[266] *Id.*

[267] *Id.* at 635.

> tunity to extend the decisions in *Holmquist v. Starr,* 402 Mass. 92, 95, 521 N.E.2d 721 (1988), and *Nutter v. Woodard, supra,* and to narrow further the nullity doctrine, we need not follow that path."[268]

Instead, the court relied on chapter 197, section 9A of the Massachusetts General Laws, which allowed suit to be brought within three years after the claim accrues against the decedent in her own name where there is no executor.[269] Here again, the court noted that "the real party at interest here is the insurer," and that it did not dispute that it was promptly notified of the action.[270]

A Massachusetts court has also addressed the reverse relation-back problem, in which suit is filed in the name of a *deceased plaintiff.* In *Silva v. McCara*,[271] Silva and Cahill brought suit against McCara, but Cahill had died shortly before the action was filed.[272] The court allowed an amendment to add Cahill's executor (appointed a year and a half after her death) as a plaintiff.[273] Although the defendant argued that the original action by Cahill was a nullity, the court noted that it had been properly filed by Silva, and (under the relation-back rules described above) that action could be amended to add Cahill's executor as an additional plaintiff.[274] "While caselaw dealing with this issue has mainly addressed situations in which the deceased was a defendant, this court finds that the same principle applies to a deceased plaintiff."[275]

While *Holmquist*, *Nutter*, and *Xarras* have certainly weakened the nullity doctrine, it may not be a dead letter. In the cases that have limited *Chandler*, there had been a proper defendant in existence (e.g., an administrator had been appointed) and the administratrix or insurance counsel had notice of the claim before the relevant limitations period has passed. In a case where the claim is brought against a deceased defendant, where no administrator has been appointed, and where there is no available insurance coverage – or the claim exceeds the amount of coverage – the court might

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[268] *Id.* at 635-36.

[269] *Id.*

[270] *Helmuth*, 45 Mass. App. Ct. at 635; *See also* Barkhordarian v. Perri, 19 Mass. L. Rptr. 161, *1 (Mass. Sup. Ct. 2005) (order denying motion to dismiss) (holding where defendant had died and estate had been closed before suit was brought, but insurer had early notice of claim, amendment to name estate would be allowed and would relate back to initial filing of suit).

[271] No. BACV200900653A, 2011 WL 7788011 (Mass. Sup. Ct. April 1, 2011).

[272] *Id.* at *1.

[273] *Id.*

[274] *Id.* at *2.

[275] *Id.* at *1.

still hold that the relation-back doctrine cannot be stretched to rescue a claim filed solely against a deceased defendant.

V. COUNTERCLAIMS IN PENDING LITIGATION

Special limitations problems arise in cases in which defendants assert counterclaims. Suppose that Able and Baker have a motor vehicle accident. Baker is injured but does not bring suit; Able sues Baker for her injuries the day before the three-year tort limitations period runs. Baker will miss the limitations period on his tort claim; he is hardly likely to find a lawyer and file suit, or a counterclaim in Able's suit, within twenty-four hours. Yet, having been sued, he would like to assert his own claims for damages, at least to set off against Able's and perhaps to recover damages from Able.

Chapter 260, section 36 of the Massachusetts General Laws addresses the application of limitations periods to counterclaims. That section provides:

> The provisions of law relative to limitations of actions shall apply to a counterclaim by the defendant. The time of such limitation shall be computed as if an action had been commenced therefore at the time the plaintiff's action was commenced.
>
> Notwithstanding the provisions of the first paragraph of this section, a counterclaim arising out of the same transaction or occurrence that is the subject matter of the plaintiff's claim, to the extent of the plaintiff's claim, may be asserted without regard to the provisions of law relative to limitations of actions.
>
> This section shall apply to actions brought by the commonwealth or for its benefit.

The first sentence of section 36 confirms that claims asserted by counterclaim, like other claims, must generally comply with the applicable limitations period. A tort counterclaim must be commenced within the limitations period in chapter 260 section 2A of the Massachusetts General Laws, a contract counterclaim within the period in chapter 260, section 2 of the Massachusetts General Laws, and so on.

However, the second sentence provides that, in determining whether a counterclaim has been filed within the limitations period, it shall be

deemed "commenced" on the date that the original complaint was filed. So, in Baker's case, his counterclaim will be treated as commenced on the day that Able's suit was commenced, even if the counterclaim is filed weeks or months later. This makes sense; it allows Baker to let his claim go if he is not sued, but assert it if he is sued. Note that section 36 does not say that the counterclaim will satisfy the relevant limitations period; it only says that in deciding whether it was filed on time it will be treated as commenced on the date the plaintiff's suit was commenced. If Able sues on a tort claim with a three-year limitations period, just before the three years runs, and Baker asserts a counterclaim with a two-year limitations period, the first paragraph of section 36 will not save Baker's claim.[276]

Yet the second paragraph may still allow Baker to assert such a counterclaim. It provides that a counterclaim that arises from the same events as the original claim – effectively, a compulsory counterclaim under Massachusetts Rule of Civil Procedure 13(a) – may be asserted *even if the limitations period on that claim has passed* ("without regard to the provisions of law relative to limitations of actions"). However, the claim may only serve to diminish or eliminate the plaintiff's claim, that is, as a set off against the plaintiff's claim. If Able recovers $20,000 on his tort claim against Baker, and the jury awards Baker $50,000 on a compulsory counterclaim that would otherwise be barred by the statute of limitations, Baker's award would fully offset Able's recovery, but Baker would not recover the additional $30,000, since a lapsed counterclaim may only be asserted "to the extent of the plaintiff's claim." If Baker's award on the counterclaim was $7,000, Able would recover $13,000, his award reduced

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[276] Frontiero Brothers, Inc. v. Mortillaro Lobster, LLC, NO. 08-P-582, 74 Mass. App Ct. 1111, 2009 WL 1324116, at *3 (May 14, 2009), has some confusing language on this point.

> Under the first paragraph of G.L. c. 260, § 36, . . . the filing of the plaintiff's cause of action suspends the running of the statute of limitations against counterclaims pleaded in the answer, which have accrued at the time of filing of the complaint or thereafter, but before the answer was filed. (citation omitted). In other words, a counterclaim "speaks for statute of limitations purposes as of the date of the commencement of the action," "[o]r as of the date of accrual of the counterclaim when that claim accrues after commencement of the action." (citation omitted). By operation of G.L. c. 260, § 36, the bank's counterclaim relates back to [the date of the foreclosure sale at issue in the case, which is] the date the cause of action for deficiency accrued, and is therefore timely. As a result, we reverse the grant of summary judgment as to the bank's counterclaim.

Id. (citation omitted) (footnote omitted). This is confusing. The counterclaim does not really "relate back" to the date that the original claim asserted by the plaintiff accrued. It may have accrued before or after that date. But in calculating whether it was timely filed, it will be treated under the second sentence of § 36 as filed on the date the original action was filed. In a sense it "relates back" to that date, but not to the date on which the cause of action arose.

by the award on Baker's counterclaim.

This provision in the second paragraph of section 36 was applied in *Tucker v. Papale-Keefe*,[277] in which the plaintiff sued for his attorney's fee, and the defendant counterclaimed for legal malpractice.[278] Even though the malpractice counterclaim would be treated as commenced at the time that the original action was filed under the second sentence of section 36, it was still filed too late using that date.[279] The court held that it could still be asserted to limit or defeat the plaintiff's recovery on the main claim, under the second paragraph in section 36.[280]

Naturally, there are interpretive problems in applying section 36.[281] The second sentence of section 36 – addressing the date the counterclaim is deemed commenced – makes no distinction between compulsory and permissive counterclaims. Thus, it appears that even an unrelated counterclaim will be treated as "commenced" at the time that the original action was commenced.[282] And, just as this provision makes no distinction between compulsory and permissive counterclaims, it also makes no distinction between counterclaims for damages and those for other forms of relief, suggesting that all claims will be treated as commenced as of the filing of the original action. However, that provision will not allow an untimely permissive counterclaim to be used as a set-off.[283]

It is not clear whether the exception in the second paragraph of section 36 may be used to avoid the limitations defense where the plaintiff's claim is not for monetary damages. In *Howell v. Birnberg*,[284] the court noted that section 36 embodies a right to "recoupment" similar to pre-Rules practice, and held that it would not apply to save a monetary counterclaim in a declaratory judgment action.[285]

Another issue is how the limitations period should apply to a coun-

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[277] 7 Mass. L. Rptr. 558 (Mass. Sup. Ct. 1997).

[278] *Id.* at *1.

[279] *Id.* at *2.

[280] *Id.* at *3; *accord*, Moriarty v. O'Connell, No. 001181, 2005 WL 1812513 (Mass. Sup. Ct. June 30, 2005). *But see* Golden v. General Builders Supply LLC, 441 Mass. 652, 658-61 (2004) (applying section 36 to counterclaim on mechanic's lien would contradict legislative intent to strictly limit time for suing on such liens, therefore section 36 cannot extend period to assert lien).

[281] For helpful background on the treatment of counterclaims under Massachusetts law before the advent of the Massachusetts Rules of Civil Procedure, *see* Bose Corp. v. Consumers Union of United States, 367 Mass. 424 (1975).

[282] *Bose Corp.*, 367 Mass at 430-31.

[283] *See* Tech Plus, Inc. v. Ansel, No. CIV. A. 96-01668-B, 1999 WL 482329, at *1 (Mass. Sup. Ct. March 22, 1999) (granting summary judgment on permissive counterclaim based on limitations defense).

[284] 1 Mass. L. Rptr. 636 (Mass. Sup. Ct. 1994).

[285] *Id* at *4.

terclaim that adds additional parties. In *Elms v. Osgood*,[286] the defendants asserted a counterclaim against the plaintiff and made another person, not originally a party to the action, an additional defendant on the counterclaim.[287] The Superior Court judge concluded that chapter 260, section 36 of the Massachusetts General Laws did not apply to this claim.[288] This conclusion seems at odds with the liberal standards for amendments to add parties to pending litigation under chapter 231, section 51.[289] If an original plaintiff may freely add additional parties to an action after the passage of the limitations period, it is at least arguable that a defendant should have the same right to add parties to a counterclaim – at least to a compulsory counterclaim. Although the defendant did not bring an original action arising out of the litigation events, it is forced to litigate them when sued, and arguably should be able to assert all its claims.[290]

Last, in calculating whether a counterclaim is timely, the various doctrines governing accrual and tolling, such as the discovery rule and fraudulent concealment, should apply equally to counterclaims as to original claims.[291]

VI. THE MASSACHUSETTS SAVING STATUTE: C. 260, S. 32

A "saving" statute preserves a claim if suit was filed on the claim before the relevant limitations period ran, but was dismissed for some procedural reason (often because it was not filed in the proper court). A saving statute provides an additional period of time to refile the claim, even though the underlying limitations period has passed before the dismissed claim is refiled.

The most frequently invoked saving statute in Massachusetts is chapter 260, section 32 of the Massachusetts General Laws, which provides as follows:

> If an action duly commenced within the time limited in this

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[286] No. 961431A, 1998 WL 1284174 (Mass. Sup. Ct. May 13, 1998).

[287] *Id.* at *1

[288] *Id.* at *2.

[289] *See* the discussion of additional parties at Section IV (A) & (B) of this article.

[290] However, in such cases, the claim against the added party on the counterclaim will not serve to reduce or defeat the original claim, because the added defendant on the counterclaim is not asserting a right to damages from the defendant.

[291] *See* Stewart Title Ins. Co. v. Kelley, 30 Mass. L. Rptr. 78, *3-4 (Mass. Sup. Ct. 2012) (order denying motion to dismiss and granting motion to amend counterclaim) (discussing application of discovery rule to limitations issue on counterclaim); Town of Framingham v. Natick Mall LLC, 28 Mass. L. Rptr. 540, *3,*6-*7 (Mass. Sup. Ct. 2011) (same).

> chapter is dismissed for insufficient service of process by reason of an unavoidable accident or of a default or neglect of the officer to whom such process is committed or is dismissed because of the death of a party or for any matter of form, or if, after judgment for the plaintiff, the judgment of any court is vacated or reversed, the plaintiff or any person claiming under him may commence a new action for the same cause within one year after the dismissal or other determination of the original action, or after the reversal of the judgment; and if the cause of action by law survives the executor or administrator or the heir or devisee of the plaintiff may commence such new action within said year.[292]

Under section 32, if an action is brought within the relevant limitations period, but dismissed due to certain service of process problems, death of a party or for "a matter of form," the claim may be refiled within one year after the dismissal. Even if the limitations period has lapsed, the claim will be "saved" from a limitations defense by the extension of time provided in section 32. Suppose, for example, that Maroni sues for a tort claim just before the three-year limitations period runs. Three months after filing, the action is dismissed for a reason that meets the "matter of form" language in section 32. That section gives Maroni a year from the date of dismissal to refile the action.

A. Dismissal for improper service

Many dismissals will not qualify as dismissals "for a matter of form" under section 32, despite counsel's fervent efforts to invoke the statute. Many cases under section 32 emphasize the fact that the defendant did – or did not – receive proper notice of the original action. "What emerges from those decisions as a touchstone for what constitutes dismissal for reasons of matter of form is whether, within the original statute of limitations period, the defendant had actual notice that a court action had been initiated."[293] Where the proper defendant received notice within the original limitations period, the cases liberally construe the statute to save the action.[294]

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[292] There are other narrower saving statutes as well. *See*, MASS. GEN. LAWS ch. 79, § 17 (governing eminent domain proceedings); MASS. GEN. LAWS ch. 212, § 3A(d) (dismissing cases for lack of damages statement). Where a special saving statute with a different term applies, § 32 does not. Tortelli v. O'Callaghan, 2012 Mass. App. Div. 194, *1 (2012).

[293] Liberace v. Conway, 31 Mass. App. Ct. 40, 44 (1991).

[294] For cases emphasizing that service was properly made within the limitations period, *see,*

However, where notice was not proper, most of the cases find the statute inapplicable.[295]

For example, *Krasnow v. Allen* rejected the argument that a dismissal for failure to make proper service satisfied the first two provisions of section 32.[296]

> Two acceptable reasons for [service of process] insufficiency are enumerated: "unavoidable accident" and "default or neglect" of the process server. This specificity suggests that the statute was intended to be applicable to dismissal for insufficient service of process only if attributable to one of the two specified reasons. At the very least, the language suggests that the action would be saved only if there is *some* acceptable reason for the insufficiency of service of process.[297]

The *Krasnow* court also rejected the argument that failure to serve was a "matter of form" under the "catchall phrase in the statute."[298] Similarly, in *Gifford v. Spehr*,[299] the Supreme Judicial Court held the failure to send registered mail notice to the defendant after serving the Registrar of Motor Vehicles was "matter of substance and not matter of form."[300] *Gifford* distinguished several situations in which an action was aborted, but the defendant received notice of it.[301] Similarly, it appears that dismissal for late filing of the original action cannot be saved by a new action.[302] On the other hand, where service was made by a constable who had not been appointed as a special process server (unknown to plaintiff's counsel), the court found "neglect of the officer to whom such process is committed" justified refiling under section 32.[303]

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e.g., Loomer v. Dionne, 338 Mass. 348, 351-52 (1959); Lawrence v. Emma, 56 Mass. App. Ct. 1105, *2 (2002), Liberace v. Conway, 31 Mass. App. Ct. 40, 45 (1991).

[295] Longval v. Young Men's Christian Ass'n of Malden, 79 Mass. App. Ct. 1109, *1 (2011); Velez Negron v. Dozier, 79 Mass. App. Ct. 1113, *1 (2011); Hanson v. Venditelli, 47 Mass. App. Ct. 413, 417-18 (1999); Krasnow v. Allen, 29 Mass. App. Ct. 562, 565-66 (1990); *See also* Hallisey v. Bearse, 60 Mass. App. Ct. 916, 916 (2004) (finding defendant's position as plaintiffs in earlier case insufficient to constitute notice in another case).

[296] *Krasnow*, 29 Mass. App. Ct. at 564-65.

[297] *Id.* at 565-566.

[298] *Id.* at 566.

[299] 358 Mass. 658 (1971).

[300] *Id.* at 663.

[301] *Id.* at 660-61.

[302] Owens v. Amtrak, 8 Mass. L. Rptr. 696, *2 n. 3 (Mass. Sup. Ct. 1998).

[303] Lawrence v. Emma, 56 Mass. App. Ct. 1105, *1 (2002).

B. *Dismissals for lack of jurisdiction*

Loomer v. Dionne[304] upheld the allowance of a new action under chapter 260, 32 of the Massachusetts General Laws after a dismissal for lack of subject matter jurisdiction.[305] *Loomer* emphasizes that the statute should be liberally applied to save valid claims, despite "the plaintiff being defeated by some matter not affecting the merits, some defect or informality, which he can remedy or avoid by a new process." [306] Dismissal for improper venue is also likely curable under section 32.[307] In *Boutiette v. Dickinson*,[308] the court allowed the plaintiff to invoke 32 twice, where his first action was dismissed for lack of personal jurisdiction, and his second for lack of subject matter jurisdiction.[309]

Section 32 can be invoked where a case is timely commenced in federal court but dismissed on discretionary grounds. In *Liberace v. Conway*,[310] the plaintiff sued the United States under the Federal Tort Claims Act in federal court as well as the employee who allegedly caused the injury.[311] The claim against the United States was dismissed, and the federal court declined to exercise jurisdiction over the pendent claim against the employee.[312] The Appeals Court upheld refiling in the Massachusetts court, again emphasizing that the action had been filed within the relevant limitations period and the defendant was notified of the action.[313]

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[304] 338 Mass. 348 (1959); *see also* Chakrabarti v. Marco s. Marinello Assocs., Inc., 377 Mass. 419, 423 (1979) (holding § 32 would protect plaintiff from subject matter jurisdiction dismissal in housing court).

[305] *Loomer*, 338 Mass. at 348.

[306] *Id.* at 351 (quoting Coffin v. Cottle, 16 Pick. 383, 386 (1835)); *See also Loomer*, 338 Mass. at 351 ("[The statute's] broad and liberal purpose is not to be frittered away by any narrow construction.") (quoting Gaines v. City of New York, 215 N.Y. 533, 539-40 (1915)).

[307] *See* Gifford v. Spehr, 358 Mass. 658, 662-63 (1971) (citing cases finding improper venue matter of form under predecessor statute).

[308] 54 Mass. App. Ct. 817 (2002).

[309] *Id.* at 818-19. For another twist, *see* Curtis v. Herb Chambers I-95, Inc., 75 Mass. App. Ct. 662 (2009). In *Curtis*, the federal court purported to transfer a case to the Massachusetts Superior Court. *Id.* at 665. The Superior Court dismissed, since there is no authority for the transfer of federal cases to state court. *Id.* The plaintiff refiled directly in the Superior Court after the limitations period had run. *Id.* The court held that the dismissal of the first Superior Court action was for a matter of form so the second was timely under § 32. *Id.* at 667.

[310] 31 Mass. App. Ct. 40 (1991).

[311] *Id.* at 41-42.

[312] *Id.*

[313] *Id.* at 44-45. *See also infra* discussion at n. 353 of this article.

C. Other applications of section 32

In *Maltz v. Smith Barney, Inc.*,[314] the plaintiffs filed an action to modify an arbitration award in federal court, which was dismissed for failure to join an indispensable party.[315] They later filed a similar application in Massachusetts Superior Court, relying on section 32 despite the 30-day period for applications to modify an arbitration award under chapter 251, sections 12 & 13 of the Massachusetts General Laws.[316] The Supreme Judicial Court held that section 32 did not apply because the original litigation was an arbitration, not a court action.[317] The federal action to modify the award was an action, but it had not been "duly commenced," since it was not filed within the thirty-day appeal period.[318] The *Maltz* court stated that section 32 can be invoked to save claims filed in another jurisdiction, but only if that action was timely filed *under Massachusetts law* in the other jurisdiction.[319] Otherwise, a party who failed to meet the relevant Massachusetts limitation period could "timely file" an action in another state with a longer limitation period, and then refile in a Massachusetts court.[320]

Duff v. Zonis,[321] applied the little-used provision in section 32 allowing refiling where the first action fails "by reason of an unavoidable accident."[322] In *Duff*, the plaintiff withdrew his writ in a first action when he learned that he had, through a reasonable mistake, misnamed a party.[323] The court held that this was an unavoidable accident so that the one-year extension was properly allowed.[324] In *Gifford v. Spehr*,[325] the court suggested that a suit against the wrong defendant could not be saved by section 32 by refiling against the proper defendant, but that misnomer or misstatement of the elements of a claim would support relief under section 32.[326]

Section 32 has not sufficed to save claims where the original claim

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[314] 427 Mass. 560 (1998).

[315] *Id.* at 561.

[316] *Id.*

[317] *Id.* at 563.

[318] *Id.* at 562.

[319] *Maltz*, 427 Mass. at 562.

[320] *Id.* ("To conclude otherwise would permit the plaintiffs to 'forum shop' for jurisdictions with longer periods of limitations after the action had become time barred here.").

[321] 327 Mass. 347 (1951).

[322] *Id.* at 352.

[323] *Id.* at 349-50.

[324] *Id.* at 352.

[325] 358 Mass. 658 (1971).

[326] *Id.* at 663 n. 4 (1971); *see also* Jordan v. Comm'r of Bristol County, 268 Mass. 329, 331-33 (1929) ("plaintiff, cause of action and defendant cannot be regarded as 'form'" under the statute) (decided under predecessor statute).

was voluntarily dismissed,[327] where the original case was dismissed for failure to prosecute,[328] where the plaintiff sued the wrong defendant in the original action,[329] and where a separate statute provided a different period for refiling a claim.[330]

Case law has also rejected application of section 32 in cases where the original action was in Superior Court and the plaintiff refiled before the Labor Relations Commission.[331] Conversely, where an arbitration claim was dismissed for lack of jurisdiction, section 32 did not allow refiling in court within a year, because the arbitration proceeding was not an "action" under section 32.[332] Section 32 also does not apply to extend a limitations period imposed by contract.[333]

D. Application to claims brought under limitations periods outside of Chapter 260

Section 32 applies to claims brought "within the time limited in this chapter [260]." In several cases defendants have argued that the section cannot apply to claims that are governed by limitations periods in other chapters of the General Laws. This argument was accepted by the Appeals Court in *Ciampa v. Beverley Airport Commission*,[334] which held that "the tolling provisions of chapter 260 have no application to actions . . . not having a common law basis but authorized instead by chapter 258, which contains its own limitations period."[335] However, in *Carroll v. City of Worcester*,[336] the Appeals Court reversed course, holding that "where the Legislature has not expressly provided that the limitations period in c. 258, §4 was to be applied without regard to the tolling provision set out in c.

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[327] Cannonball Fund, Ltd. v. Dutchess Capital Mgmt. LLC., 29 Mass. L. Rptr. 305, *6 (Mass. Sup. Ct. 2011) (order granting motion to dismiss), *vacated in part*, 84 Mass.App.Ct. 75 (2013).

[328] King v. Bradlees, Inc., 1991 Mass. App. Div. 140,*1-*2 (Mass. Dist. Ct. 1991).

[329] Thompson v. Am. Arbitration Assn., No. 10-P-516, 78 Mass. App. Ct. 1121, 2011 WL 166624, at *2 (January 20, 2011).

[330] Tortorelli v. O'Callaghan, 2012 Mass. App. Div. 194, *1 (Mass. Dist. Ct. 2012); Velardi v. Givens, 2005 Mass. App. Div. 164, *1 (Mass. Dist. Ct. 2005).

[331] Int'l Ass'n of Firefighters v. Labor Relations Comm'n, No. 02-P-196, 58 Mass. App. Ct. 1112, 2003 WL 21947160, at *2 (August 14, 2003).

[332] Shafnacker v Raymond James & Assocs, 425 Mass. 724, 729 (1997).

[333] Gen. Elec. Co. v. Lexington Contracting Corp., 363 Mass. 122, 124 (1973) ("the statute applies only where the limitation is imposed by statute and not, as in this case, by contract.").

[334] 38 Mass. App. Ct. 974 (1995).

[335] *Id.* at 975 .

[336] 42 Mass. App. Ct. 628 (1997).

260, §32 . . . ." the saving statute applied to extend the time to refile.[337]

This issue reached the Supreme Judicial Court in *Maltz v. Smith Barney, Inc.*[338] The court suggested that section 32 can apply to cases filed under limitations period in other chapters of the General Laws, but if a special statute specified a different limitations period than the analogous period in Chapter 260, then section 32 would not apply.[339] This suggests that if a claim would be governed by the same time period under chapter 260 and under a special statute, then section 32 can be used to extend the time to refile. For example, since the limitations period for common law tort claims under chapter 260, section 2A and that for tort claims under the Massachusetts Tort Claims Act[340] are both three years, section 32 applies. But if a statute outside Chapter 260 specifies a two-year period, it cannot be extended under section 32. It is not clear why this should be true; perhaps the court in *Maltz* did not actually mean that section 32 could not apply if a special statute had a savings provision *specifying a different period for refiling*, such as chapter 218, section 19A(d) of the Massachusetts General Laws.[341] The cases since *Maltz* and *Carroll* do not clearly resolve whether section 32 will apply if the limitations period is provided by another chapter of the General Laws.[342]

E. Application to supplemental claims dismissed from federal court

Claims under Massachusetts law are often filed in federal court as supplemental claims. The federal supplemental jurisdiction statute, 28 U.S.C. § 1367, authorizes federal courts to hear state law claims that arise

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[337] *Id.* at 630.

[338] 427 Mass. 560 (1998).

[339] *Id.* at 563 (relying on MASS. GEN. LAWS ch. 260, § 19, which makes MASS. GEN. LAWS ch. 260, § 32 inapplicable to actions where special limitations period).

[340] MASS. GEN. LAWS ch. 258, § 4.

[341] *See,* Ray v. Besco Plumbing & Heating Sales Corp., No. 12–P–967, 83 Mass. App. Ct. 1121, 2013 WL 1188051, at *1 (March 25, 2013) (holding section 32 did not apply because separate statute required refiling within thirty days).

[342] *See* Gallagher v. Bougioukas, 19 Mass. L. Rptr. 475, *1 (Mass. Sup. Ct. 2005) (order granting motion for reconsideration) (holding § 32 applies to chapter 258 claim); Providence Washington Ins. Co. v. City of Gardiner, No. 200400610A, 2004 WL 3152354, at *1 (Mass. Sup. Ct. December 14, 2004) (reading *Maltz* to reject application of § 32 outside Chapter 260); Ferris v. Commonwealth, 20 Mass. L. Rptr. 554, *1 n. 1 (Mass. Sup. Ct. 2006) (order denying motion to dismiss) (declaring earlier decision in *Providence Washington* wrong, applying § 32 to a Chapter 258 case); Chaney v. Boston, 24 Mass. L. Rptr. 328, *1 (Mass. Supp. Ct. 2008) (order denying motion to dismiss) (applying § 32 to Chapter 258 action); Mountain Peaks Fin. Servs., Inc. v. Dobbs, No. 04–P–1199, 66 Mass. App. Ct 1102, 2006 WL 1006385, at *2 (April 18, 2006) (holding § 32 is limited to actions brought under Chapter 260). This case is the most confusing and made its decision without discussing *Maltz*. *Mountain Peaks*, 66 Mass. App. Ct. at *3.

from the same case or controversy as another claim properly before the federal court.[343] For example, a plaintiff might file suit in federal court in Massachusetts under the Federal Age Discrimination in Employment Act,[344] and assert a claim for breach of contract, based on the same acts, along with the federal statutory claim. Under § 1367(a), the court will have supplemental jurisdiction over this state law claim, since it arises from the same events as the claim that provides federal subject matter jurisdiction.

However, the exercise of supplemental jurisdiction under § 1367 is discretionary; the federal court has the authority to dismiss related state law claims even though they arise from the same set of facts, and even though it proceeds to hear the federal claims.[345] Such dismissals do not bar refiling in state court, but the plaintiff may face a problem if the statute of limitations has run on the state law claim before the federal court dismisses it. In such cases two provisions may apply to extend the limitations period on the claim. First, § 1367(d) of the supplemental jurisdiction statute provides as follows:

> (d) The period of limitations for any claim asserted under subsection (a), and for any other claim in the same action that is voluntarily dismissed at the same time as or after the dismissal of the claim under subsection (a), shall be tolled while the claim is pending and for a period of 30 days after it is dismissed unless State law provides for a longer tolling period.[346]

Under this subsection, the statute of limitations is tolled while the claim is pending in federal court, and for 30 days after it is dismissed by the federal court.[347] Suppose, for example, that a supplemental tort claim, governed by the three-year statute of limitations in chapter 260, section 4 of the Massachusetts General Laws, is filed a week before the three years runs, and remains pending for six months in federal court. At that point, the federal court dismisses it under its discretionary authority to decline to hear such related state law claims. Subsection (d) provides thirty days from

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[343] 28 U.S.C. § 1367(a).

[344] 29 U.S.C. §§ 621-634.

[345] 28 U.S.C. § 1367(c) (specifying permissible grounds for declining to exercise supplemental jurisdiction).

[346] 28 U.S.C. § 1367(d).

[347] *Id.* A Superior Court case has held that the thirty-day period had not begun to run in a case dismissed by the federal district court but pending on appeal in the First Circuit. *See* Lucas v. Muro Pharmaceutical, Inc., 3 Mass. L. Rptr. 113, *2-*3 (Mass. Sup. Ct. 1994).

the date of dismissal for the plaintiff to refile the claim in state court.[348]

However, § 1367(d) provides that the limitations period on the dismissed supplemental claims will be tolled for 30 days "unless State law provides for a longer tolling period." Chapter 260, section 32 of the Massachusetts General Laws, the saving statute, almost certainly does provide a longer period to refile many such claims in the Massachusetts court. Section 32 allows actions dismissed "for any matter of form" to be refiled within one year of dismissal. That section does not expressly apply to cases dismissed from federal court or to dismissal of discretionary claims, but will likely be read to apply to such dismissals. In *Liberace v. Conway*,[349] the plaintiff had filed a Federal Tort Claims Act suit in federal court, with a related claim against Conway.[350] After the FTCA claim was dismissed, the federal court declined to exercise pendent jurisdiction over the related common law claim against Conway.[351] After it was dismissed, Liberace refiled it in Massachusetts Superior Court, and argued that it was timely under chapter 260, section 32 of the Massachusetts General Laws.[352] The Appeals Court agreed, concluding that section 32 applies to claims dismissed from federal court and that the federal court's discretionary dismissal of the pendent claim was for a "matter of form," so that section 32 extended the limitations period applicable to it.[353]

Note that section 1367(d) operates to extend the limitations period for other claims the plaintiff chooses to voluntarily dismiss from federal court as well. This could include *federal law claims* as well as state law claims, if the plaintiff elects, after the federal court dismisses the state law claims, to take a voluntary dismissal and refile the entire action, including the claims under federal law, in state court. *However*, it is at least questionable whether chapter 260, section 32 of the Massachusetts General Laws would extend the limitations period for claims *voluntarily dismissed* from another court. The plaintiff's choice to voluntarily dismiss might not be read to satisfy the "any matter of form" language in chapter 260, section

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[348] 28 U.S.C. § 1367(d). This federal statute, which extends the state limitations period on supplemental claims in state court, has been held constitutional. *See* Jinks v. Richland County, S.C., 538 U.S. 456, 465-66 (2003).

[349] 31 Mass. App. Ct. 40 (1991).

[350] *Id.* at 41.

[351] *Id.* at 42.

[352] *Id.*

[353] *Liberace*, 31 Mass. App. Ct. at 43-45. The dismissal in *Liberace* was under the common law doctrine of pendent jurisdiction in place before 28 U.S.C. § 1367 was adopted. *Id.* at 43. However, its reasoning seems equally applicable to discretionary dismissals under § 1367(c). *Id.* Prior to *Liberace*, it was "not free from doubt" whether § 32 applied to pendent claims dismissed from federal court. *See* Granahan v. Commonwealth, 19 Mass. App. Ct. 617, 620 n. 6 (1985).

32 of the Massachusetts General Laws. In such cases, the safer course is to refile the entire action within 30 days after dismissal. Section 1367(d), which extends the limitations period for "any other claim in the same action that is voluntarily dismissed at the same time as or after the dismissal of the claim under subsection (a)," is clearly intended to extend the limitations period where the plaintiff makes the choice to lodge the entire action, including the federal law claims, in the state court.

VII. STATUTES OF REPOSE: GENERAL PRINCIPLES

A. *Operation of a statute of repose*

A statute of repose provides a categorically different type of limit on the ability to sue for an injury. "A statute of repose . . . limits the time within which an action may be brought and is not related to the accrual of any cause of action."[354] Chapter 260, section 2B of the Massachusetts General Laws provides an example of a statute of repose. Section 2B provides in part:

> [a]ctions of tort for damages arising out of any deficiency or neglect in the design, planning, construction or general administration of an improvement to real property . . . shall be commenced only within three years next after the cause of action accrues; provided, however, 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 statute of repose dictates that an architect or builder cannot be sued for tort damages arising from an improvement to real property more than six years after the provider's services were provided as part of that work. Suppose that Acme Construction Company builds a commercial building for Gupta. The building is completed in January, 2001 and accepted by Gupta. In August, 2008, a glass door shatters, injuring Marcotte. Although chapter 260, section 2B of the Massachusetts General Laws specifies a three-year limitations period for the claim, Marcotte cannot sue Acme for his injury. Chapter 260, section 2B of the Massachusetts General Laws *eliminated Marcotte's right to sue* before it ever arose, because more than six years elapsed from the completion of the building before he was injured. "[T]he statute completely eliminates a cause of action against cer-

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[354] Klein v. Catalano, 386 Mass. 701, 702 (1982).

tain persons in the construction industry [once the repose period has run]."[355] It "place[s] an absolute outer limit on the duration of this liability."[356] This is strong medicine, appropriately referred to by the Appeals Court as "markedly unforgiving."[357]

Despite the drastic effect of this statute, the Supreme Judicial Court upheld it against constitutional challenges in *Klein v. Catalano*.[358] It also held in *Klein* that the statute applies retroactively, that is, it protects providers who completed improvements to real property before its enactment, once six years from completion have run.[359]

The other commonly litigated statute of repose in Massachusetts limits medical malpractice claims. Chapter 260, section 4 of the Massachusetts General Laws provides in part:

> Actions of contract or tort for malpractice, error or mistake against physicians, surgeons, dentists, optometrists, hospitals and sanitoria shall be commenced only within three years after the cause of action accrues, but in no event shall any such action be commenced more than seven years after occurrence of the act or omission which is the alleged cause of the injury upon which such action is based except where the action is based upon the leaving of a foreign object in the body.

Again, an example. Suppose that, in 2012, Rivera experiences numbness in his arms and legs. His doctors conclude that these symptoms are a delayed result of a medication inappropriately prescribed to him by Dr. Chasen from 2000 to 2002. Because more than seven years have elapsed since the treatment Rivera has no claim against Dr. Chasen. It is eliminated by chapter 260, section 4 of the Massachusetts General Laws, even though Rivera had no knowledge that he had suffered injury from the treatment until after the repose period had run. Chapter 231 section 60D of the Massachusetts General Laws provides a similar statute of repose for medical malpractice claims by minors.

Note that a claim that arises before the repose period runs will still be barred if the repose period ends before suit is brought. Suppose that Carson suffers a delayed side effect of medication prescribed for her by Dr.

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[355] *Id.*

[356] *Id.* at 709 (footnote omitted).

[357] Gengel C & S Builders Inc. v. Land Planning, Inc., No. 10–P–1138, 79 Mass. App. Ct. 1120, 2011 WL 1938308, at *2 (May 23, 2011).

[358] *Klein*, 386 Mass. at 717.

[359] *Id.* at 703.

Pereira. She suffers the side effect six years after she took the medication. Although the limitations period for tort claims is three years,[360] Carson will lose her claim unless she sues within one year, because chapter 260, section 4 of the Massachusetts General Laws provides "in no event shall any action be commenced more than seven years after occurrence of the act or omission which is the alleged cause of the injury upon which such action is based . . . ." Thus the statute will bar claims *that arose within the repose period*, as well as claims that arise after it has run. Even though the statute of limitations has two more years to run on Carson's claim, her suit will be barred if it is commenced after the seven years elapse.

B. Distinguishing statutes of limitation from statutes of repose

Given the crucial difference between a statute of limitations and a statute of repose, counsel should always be careful to determine which category a statute inhabits. Curiously, *none* of the Massachusetts statutes of repose located in preparing this article expressly use that term.[361] For example, the following provision governs suits against home inspectors for claims arising from their home inspections: "Any action arising from a home inspection shall be commenced only within three years after the date of a completed written report of a home inspection by a home inspector."[362] While this provision does not use the phrase "statute of repose," and reads like a statute of limitations, it has been described in the Superior Court as "[t]he Statute of Repose for Home Inspectors."[363] Whether a statute is a statute of repose or of limitations depends on the language of the statute. Statutes that require suit within a period "after the cause of action accrues" are generally held to create statutes of limitations.[364] Statutes that require suit within a period after "some definitely established event"[365] are usually interpreted as statutes of repose. The home inspector statute, for example, which keys the period to the date of the written report, has been held a stat-

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[360] MASS. GEN. LAWS ch. 260, § 4, par. 2.

[361] *See* Commonwealth v. Owens-Corning Fiberglas Corp., 38 Mass. App. Ct. 600, 602 (1995) (noting that phrase is not used in statutes, "the phrase is a convenient one, added to the vocabulary of the law by judicial opinions").

[362] MASS. GEN. LAWS ch. 112, § 225 par. 4.

[363] LaFranchise v. Fontaine, 25 Mass. L. Rptr. 55, *2 (Mass. Sup. Ct. 2008), *aff'd*, 84 Mass. App. Ct. 1115 (2013); *see also* Rafuse v. Stryker, No. 090107, 2010 WL 2431921, *5-*6 (Mass. Sup. Ct. April 21, 2010) (holding MASS. GEN. LAWS ch.109A, § 10(b), or the Uniform Fraudulent Transfers Act, operates as statute of repose); Kelly v. Ayer, 20 Mass. L. Rptr. 644, *2 (Mass. Sup. Ct. 2006) (order granting summary judgment) ("[t]his language constitutes a statute of repose.").

[364] McGuinness v. Cotter, 412 Mass. 617, 621-22 (1992).

[365] Nissan v. Comm'r of Revenue, 407 Mass. 153, 158 (1990).

ute of repose. Similarly, chapter 40A, section 7 of the Massachusetts General Laws, which sets a six-year limit on certain zoning claims "after the commencement of the alleged violation of law"[366] has been characterized as a statute of repose.[367]

VIII. THE STATUTE OF REPOSE FOR IMPROVEMENTS TO REAL PROPERTY

Chapter 260, section 2B of the Massachusetts General Laws[368] was enacted in 1968, after cases from other states had held that a statute of limitations may be tolled until a plaintiff discovers an injury. These cases greatly increased the liability of architects, contractors, and others involved in the construction industry. "The architect or contractor was confronted not only with an unlimited class of potential claimants, but also, in many instances, with an extension in duration of the liability for negligence."[369] 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

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[366] MASS. GEN. LAWS ch. 40A, § 7.

[367] Danny Bell's LLC v. Zoning Bd. of Appeals of Great Barrington, No. 12–P–280, 2013 WL 868615, at *2 (Mass. App. Ct. March 11, 2013). *But see* Post v. Belmont Country Club, Inc., 60 Mass. App. Ct. 645, 653-54 (2004) (holding MASS. GEN. LAWS ch. 197, § 9 is a statute of limitations, where within one year after date of death of the deceased, action must be filed). The *Post* court did not explain why section 9 should be viewed as a statute of limitations, even though it does key the period to a specific event. *Post*, 60 Mass. App. Ct. at 654. It relied instead on a reference to the statute in an Supreme Judicial Court case as a statute of limitations. *Post*, 60 Mass. App. Ct. at 654 (citing Flannery v. Flannery, 429 Mass. 55, 57 (1999)). Conversely, MASS. GEN. LAWS ch. 175, § 181, which limits claims on life insurance policies, has been held a statute of repose because it mandates suit within two years of the date of issue. *See* Passatempo v. McMenimen, 20 Mass. L. Rptr. 593, *3 (Mass. Sup. Ct. 2006) (order denying motion to dismiss). Some other statutes that have been called statutes of repose in the case law include MASS. GEN. LAWS ch. 60, § 80C, which related to the municipal recording of instruments conveying real property. *See* Homer v. Town of Yarmouth, 40 Mass. App. Ct. 916, 917 (1996). MASS. GEN. LAWS ch. 175, § 81, relates to claims arising out of misrepresentations made to induce the purchase of insurance policies. *See Passatempo*, 20 Mass. L. Rptr. at *3 (Mass. Sup. Ct. 2006). MASS. GEN. LAWS ch. 109A, § 10(b), which relates to the Uniform Fraudulent Conveyances Act. *See* Rafuse v. Stryker, No. 090107, 2010 WL 2431921, *5 (Mass. Sup. Ct. April 21, 2010). MASS. GEN. LAWS ch. 175, § 110B, which relates to claims arising out of the lapse of insurance policies for non-payment. *See* Matza v. Grant, 17 Mass. L. Rptr. 565, *3 (Mass. Sup. Ct. 2004). MASS. GEN. LAWS ch. 62C, § 37 which limits the time for filing for tax abatement. *See Nissan*, 407 Mass. at 157-58 (1990). *Cf.* Brimage v. City of Boston, 13 Mass. L. Rptr. 4, *4 (Mass. Sup. Ct. 2001) (confusingly referring to chapter 151B § 5 of Massachusetts General Laws as "a statute of repose subject to limitations of waiver, estoppel, and equitable tolling").

[368] MASS. GEN. LAWS ch. 260, § 2B, app'x 3.

[369] Comment, *Limitation of Action Statutes for Architects and Builders*, 18 CATH.U.L.REV. 361, 363 (1969).

> 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.[370]

The effect of section 2B is that no cause of action may be brought after the six-year period runs. Even if the plaintiff suffers injury from the condition after the repose period has run, she cannot bring a claim. "Unlike a statute of limitations . . . a statute of repose prevents a cause of action from arising after a certain period."[371] The Supreme Judicial Court emphasized in *Klein v. Cataldo* that, absent a statute of repose, the work of architects, engineers and contractors could give rise to claims many years after completion of the work,

> [o]therwise, those engaged in the design and construction of real property may have to mount a defense when "[a]rchitectural plans may have been discarded, copies of building codes in force at the time of construction may no longer be in existence, persons individually involved in the construction project may be deceased or may not be located."[372]

In *Klein*, the court upheld section 2B against both state and federal constitutional challenges.[373]

Section 2B actually includes two time periods for claims arising from improvements to real property. It provides a three-year statute of limitations *and* a six-year statute of repose for such claims. Thus, the period of limitations for tort claims arising from these activities is provided by section 2B, not by the general limitations period for torts in chapter 260, section 2A of the Massachusetts General Laws. Counsel should be careful to analyze various doctrines that may affect the running of a limitations period, such as tolling, relation back, and accrual, separately under the *limitations* provision in section 2B and under the *repose* provision.

Evidently, most states have similar statutes,[374] which may be useful

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[370] Klein v. Catalano, 386 Mass. 701, 708-09 (1982).

[371] James Ferrera & Sons, Inc. v. Samuels, 21 Mass. App. Ct. 170, 173 (1985).

[372] *Klein*, 386 Mass. at 709-10 (quoting Howell v. Burk, 568 P.2d 214, 220 (N.M. Ct. App. 1977)).

[373] *Id.* at 710-17.

[374] Milligan v. Tibbetts Eng'g Corp., 391 Mass. 364, 367 n. 7 (1984) (noting that in 1981 all

sources of research in making arguments about the scope of section 2B.

A. *The acts and actors covered by chapter 260, section 2B of the Massachusetts General Laws*

Chapter 260, section 2B of the Massachusetts General Laws limits the time for bringing "[a]ctions of tort for damages arising out of any deficiency or neglect in the design, planning, construction or general administration of an improvement to real property." The Supreme Judicial Court has emphasized that this language draws a distinction between suppliers of construction goods and those who provide particularized services in construction activities:

> Because the inspection, supervision and observation of construction by architects and contractors involves *individual expertise* not susceptible of the quality control standards of the factory (emphasis supplied), . . . we think that the Legislature, by enacting section 2B, meant to protect providers of "individual expertise" in the business of designing, planning, constructing, and administering improvements to real estate. We reiterate that section 2B was intended not to apply to mere suppliers of standardized products, but only to the kinds of economic actors who perform acts of "individual expertise" akin to those commonly thought to be performed by architects and contractors—that is to say, to parties who render particularized services for the design and construction of particular improvements to particular pieces of real property.[375]

Under this analysis, the *Dighton* court held that section 2B did not apply to the supplier of a circuit breaker panel.[376] Courts applying section 2B have "distinguished mere installers of ready-made goods from those who assemble finished products out of raw materials."[377]

> In making this determination, we "must consider the motivation of the actor in producing the improvement. If the ac-

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but six states had similar statutes).

[375] Dighton v. Fed. Pac. Elec. Co., 399 Mass 687, 695-96 (1987).

[376] *Id.* at 696.

[377] Shiner-Spagone v. Fabroski, 22 Mass. L. Rptr. 630, *2 (Mass. Sup. Ct. 2007) (order granting motion for summary judgment). Claims against suppliers not covered by § 2B will be governed by the Uniform Commercial Code. *See Dighton*, 399 Mass. at 698.

> tor designed the improvement for public sale or for general use, then the actor is not protected because the actor is engaged in the activity of creating a fungible product. If, however, the improvement is produced for a particular project and to the specifications of an architect or an engineer, [G.L.] c. 260, section 2B[,] may protect the actor as someone engaged in the activity of designing a particularized improvement."[378]

One court described an improvement to real property as "a permanent addition to or betterment of real property that enhances its capital value and that involves the expenditure of labor or money and is designed to make the property more useful or valuable as distinguished from ordinary repairs."[379]

Based on these distinctions, the statute has been held to protect a fence installer,[380] an installer of foam insulation,[381] installation of a septic system,[382] roofing,[383] construction of a house,[384] roadways[385] and roadway railings,[386] installation of an electrical distribution panel,[387] provision of a lift for a supermarket,[388] installation of window caulking,[389] installation of bleachers in a skating rink,[390] and the mooring of ship to the seabed in Boston harbor.[391]

The courts have construed the term "improvements to real proper-

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[378] Kurker v. Winchester Realty Assocs., No. 09–P–2030, 2011 WL 4056109, at *3 (Mass. App. Ct. September 14, 2011) (quoting Rosario v. M.D. Knowlton Co., 54 Mass. App. Ct. 796, 801(2002)).

[379] Conley v. Scott Prods., 401 Mass. 645, 647 (1988) (quoting Webster's Third International Dictionary 1138 (1961)).

[380] Shiner-Spagone v. Fabroski, 22 Mass. L. Rptr. 630, *3 (Mass. Sup. Ct. 2007).

[381] *Conley*, 401 Mass. at 647.

[382] Gengel C & S Builders, Inc. v. Land Planning, Inc., No. 10–P–1138, 2011 WL 1938308, at *2 (Mass. App. Ct. May 23, 2011).

[383] Berish v. Bornstein, 437 Mass. 252, 264 n. 25 (2002).

[384] Kelley v. Iantosca, 78 Mass. App. Ct. 147, 150-51 (2010).

[385] Milligan v. Tibbetts Eng'g Corp., 391 Mass. 364, 368 (1984).

[386] Hicks v. Bechtel Corp., 29 Mass. L. Rptr. 192, *1 (Mass. Sup. Ct. 2011) (order granting motion to dismiss).

[387] Parent v. Stone & Webster Eng'g Corp., 408 Mass. 108, 110-12 (1990).

[388] Kurker v. Winchester Realty Assocs, No. 09–P–2030, 2011 WL 4056109, at *4 (Mass. App. Ct. September 14, 2011).

[389] City of New Bedford v. Monsanto Co., 28 Mass. L. Rptr. 604, *1-*2 (Mass. Sup. Ct. 2011) (order granting motion to dismiss).

[390] McDonough v Marr Scaffolding Co., 412 Mass. 636, 641-42 (1992).

[391] Anthony's Pier Four, Inc. v. Crandall Dry Dock Engs., Inc., 396 Mass. 818, 823 n. 8 (1986).

ty" to include activities that do not involve building construction. For example, installation of a fence[392] and a utility pole,[393] road design,[394] and construction of coastal revetments[395] have all been held within the purview of section 2B. However, conducting a survey and laying out lots, without any related construction or site work, is not design or planning under section 2B.[396]

If the defendant provides the types of services described above, the statute of repose in section 2B will apply, even though the defendant never worked at the site of the improvement. In *Rosario v. M.D. Knowlton Co.*,[397] the defendant custom designed and manufactured a hydraulic lift, to the specifications of its distributor, for installation on the buyer's premises.[398] Because it was custom designed, and installed to facilitate use of the building, the Appeals Court held that it constituted an improvement to real property under section 2B.[399] *Fine v. Huygens, DiMella, Shaffer & Associates*,[400] hewed to a similar line. It held that section 2B protected one defendant, who manufactured wall panels "custom-manufactured specifically for the St. George project pursuant to the specifications of architects and engineers[.]"[401] But it held the statute inapplicable to a supplier of stock windows for the project, even though the accompanying sill receptors for the windows were custom made to fit the project.[402]

> Many products that are mass produced may also be produced to order, or cut to fit the needs of a particular project, but this alone is not sufficient to bring a supplier within the purview of § 2B.[403]

Even though the supplier had provided some custom sizing, it was "not acting in the capacity of a design professional."[404]

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[392] Shiner-Spagone v. Fabroski, 22 Mass. L. Rptr. 630, *3 (Mass. Sup. Ct. 2007) (order granting motion for summary judgment).

[393] Hansbury v. National Grid (USA), Inc., 30 Mass. L. Rptr. 261, *3 (Mass. Sup. Ct. 2012).

[394] Milligan v. Tibbetts Eng'g Corp., 391 Mass. 364, 366-68 (1984).

[395] Woods v. Brimm, 27 Mass. L. Rptr. 389, *8 (Mass. Sup. Ct. 2010).

[396] Raffel v. Perley, 14 Mass. App. Ct. 242, 245-46 (1982).

[397] 54 Mass. App. Ct. 796 (2002).

[398] *Id.* at 798.

[399] *Id.* at 800.

[400] 57 Mass. App. Ct. 397 (2003).

[401] *Id.* at 403.

[402] *Id.* 403-04.

[403] *Id.* at 403.

[404] *Id.* at 404; *See also* Purcell v. Norco Mfg. Corp., 17 Mass. L. Rptr. 177, *3 (Mass. Sup. Ct. 2003) (holding statute of repose inapplicable to manufacturer receiving measurements to con-

The *Fine* decision suggests that suppliers of fungible products cannot rely on section 2B merely because their products are incorporated into an improvement to real property. Similarly, in *McMillan v. Sears Roebuck & Co., Inc.*,[405] the court stated that "the statute of repose does not protect suppliers, vendors and salespersons."[406] Nor does replacement of elements of a property qualify. In *Colomba v. Fulchini Plumbing*, the Appeals Court held that the replacement of a boiler in a two-family home did not constitute the type of design or construction services within the scope of section 2B.[407] In *Merchants Mut. Ins. Co. v. Face Place, Inc.*,[408] the court also held that section 2B did not apply to installation of light fixtures, because the work did not involve design or planning of the installation.[409] By contrast (but difficult to distinguish) a Superior Court case applied chapter 260 section 2B of the Massachusetts General Laws to installation of water heaters but suggested that *replacement* of the heater, as "an ordinary repair," would not be covered.[410]

Chapter 260, section 2B of the Massachusetts General Laws applies to "any deficiency or neglect in the design, planning, construction or general administration of an improvement to real property." This language will not reach claims against sellers of real property[411] or owner and occupiers[412] that are based on the fact of sale or ownership. However, claims against an owner or seller are within the ambit of the repose statute if they are based on the seller or owner's work in the design or construction of an

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struct hangar door). "[S]ome service other than merely receiving measurements and supplying a product is needed to fall within the protection of G.L. c. 260 § 2B." *Purcell*, 17 Mass. L. Rptr. at *4. *See* Klein v. Catalano, 386 Mass. 701, 716 (1982) (suggesting logic for distinguishing builders from suppliers and manufacturers).

[405] No. 00-P-783, 55 Mass. App. Ct. 1110, 2002 WL 1676365 (July 23, 2002).

[406] *Id.* at *1; *See* Apex Computer Co. v. Nally Plumbing and Heating, 14 Mass. L. Rptr. 270, *2 (Mass. Sup. Ct. 2002) (holding plumbing company that installed five water heaters in commercial property protected by section 2B, but replacement of the heaters would not be within the scope of § 2B); *See also* Fine v. Huygens, DiMella, Shaffer & Assocs., 57 Mass. App. Ct. 397, 402-03 (2003) (holding suppliers within 2B "only where the role of supplier was incidental and the actor's primary function was to provide individual expertise and particularized service relating to design and construction").

[407] Colomba v. Fulchini Plumbing, 58 Mass. App. Ct. 901, 901 (2003) (finding defendant "did no structural work, designed nothing, and did no customization work of any kind").

[408] 20 Mass. L Rptr. 511 (Mass. Sup. Ct. 2006).

[409] *Id.* at *7.

[410] Apex Computer Co. v. Nally Plumbing and Heating, 14 Mass. L. Rptr. 270, *2 (Mass. Sup. Ct. 2002); *See also* Pereira v. Rheem Mfg. Co., 5 Mass. L. Rptr. 477, *2 (Mass. Sup. Ct. 1996).

[411] Sullivan v. Iantosca, 409 Mass. 796, 799 (1991); McMillan v. Sears Roebuck & Co., No. 00-P-783, 2002 WL 1676365, at *1 (Mass. App. Ct. July 23, 2002).

[412] Quinn v. Morganelli, 73 Mass. App. Ct. 50, 53 n. 3 (2008).

improvement to real property.[413] In addition, while the Supreme Judicial Court has recognized an implied warranty of habitability in new home sales[414] and condo sales,[415] it has indicated that section 2B's six-year limit applies to such claims, since the warranty is one imposed by law and independent of contractual obligations.[416]

B. Types of claims that are within the scope of chapter 260, section 2B of the Massachusetts General Laws

Section 2B applies to "[a]ctions of tort for damages." Cases applying the statute have had to sort out which types of legal theories satisfy this language. Clearly, it applies to negligence claims.[417] It will also bar claims based on heightened levels of fault. "The fact that a defendant caused the deficiency by gross negligence, wanton conduct, or even knowing and intentional wrongdoing makes no difference as section 2B is written." [418] Very likely, the statute bars claims based on trespass or nuisance as well, as "common law torts to property."[419] Claiming that a party involved in the improvement "misused" a product will not evade the six-year period.[420] A claim under chapter 21E for release of hazardous materials has also been held a tort claim subject to the section 2B repose provision.[421]

The Supreme Judicial Court held in *Klein v. Catalano* that rephrasing a negligence claim as a claim for breach of implied warranty will not avoid the bar of section 2B.[422] Because the elements of the two claims are "essentially the same," they are both within the purview of section 2B.[423] However, contract claims are not affected by section 2B.[424] In *Klein* the

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[413] Sonin v. Mass. Tpk. Auth., 61 Mass. App. Ct. 287, 290 (2004).

[414] Albrecht v. Clifford, 436 Mass. 706, 710-11 (2002).

[415] Berish v. Bornstein, 437 Mass. 252, 264 (2002).

[416] *Albrecht*, 436 Mass. at 711-12.

[417] Kelley v. Iantosca, 78 Mass. App. Ct. 147, 150-51 (2010).

[418] Sullivan v. Iantosca, 409 Mass. 796, 798-99 (1991).

[419] Woods v. Brimm, 27 Mass. L. Rptr. 389, *7 n. 22 (Mass. Sup. Ct. 2010).

[420] Dighton v. Fed. Pac. Elec. Co., 399 Mass. 687, 692 (1987).

[421] City of New Bedford v. Monsanto Co., 28 Mass. L. Rptr. 604, *2 (Mass. Sup. Ct. 2011); White v. Superior Oil, Inc., No. Civ. A. 05-0120C, 2005 WL 1667439, at *2 (Mass. Sup. Ct. June 9, 2005); *cf.* Town of Weymouth v. Welch & Co., Inc., 6 Mass. L. Rptr. 197, *5 (Mass. Sup. Ct. 1996) (holding § 2B should not apply to ch. 21E claims, and that, in the alternative, it does not bar such claims predicated on breach of contract).

[422] Klein v. Catalano, 386 Mass. 701, 717 (1982); *accord* Anthony's Pier Four, Inc. v. Crandall Dry Dock Engineers, Inc., 396 Mass. 818, 823 (1986); Massachusetts Hous. Opportunities Corp. v. Whitman & Bingham Assocs., P.C., 83 Mass. App. Ct. 325, 330 (2013); Rosario v. M.D. Knowlton Co., 54 Mass App. Ct. 796, 802-03 (2002).

[423] *Klein*, 386 Mass. at 719.

[424] Gengel C & S Builders, Inc. v. Land Planning, Inc., No. 10–P–1138, 2011 WL 1938308,

Supreme Judicial Court distinguished a claim for express warranty from implied warranty,[425] and the Supreme Judicial Court later held that claims for breach of an express warranty falls outside the scope of the statute of repose.[426] Because claims for breach of an express warranty are based on the promise itself, not imposed by law, they are not within the "action of tort" language in section 2B.[427] Nor does it apply to a third party claim for indemnification based on an express contract for indemnification, since it "'provides a limitation only for actions of tort' and 'does not apply to contract actions.'"[428] One case held section 2B inapplicable to claims against condominium trustees for failure to correct defects in the property, on the theory that such claims "are not based on negligence in the design, planning, construction or administration of construction of these improvements."[429]

The repose statute in section 2B does not protect an owner of premises from a claim for injury based on a negligent condition of the premises, even if the owner served as the general contractor in the course of construction.[430] Similarly, it does not protect a seller of real property from a claim based on deceit in a real estate transaction.[431]

Dighton v. Federal Pacific Electric Co.,[432] considered whether a party could implead an architecture firm, otherwise protected by chapter 260, section 2B of the Massachusetts General Laws, after the six-year repose period had run, in order to seek contribution from the architect.[433] Under the Massachusetts Contribution among Tortfeasors statute, chapter 231B, a separate statute of limitations applies to contribution claims.[434] The primary defendant in such a case may argue that a cause of action for contribution is a new claim, limited by the statute of limitations on contri-

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at *2 (Mass. App. Ct. May 23, 2011).

[425] *Klein*, 386 Mass. at 720; *See* McMillan v. Sears Roebuck & Co., No. 00-P-783, 2002 WL 1676365, at *2 (Mass. App. Ct. July 23, 2002) (discussing distinction between express and implied warranty).

[426] *Klein*, 386 Mass. at 719.

[427] *Anthony's Pier Four Inc.*, 396 Mass. at 823.

[428] Gomes v. Pan Am. Assocs., 406 Mass. 647, 648 (1990) (quoting *Anthony's Pier Four, Inc.*, 396 Mass. at 822 (1986)).

[429] Pederzani v Guerriere, No. 930502A, 1995 WL 1146832, at *3 (Mass. Sup. Ct. August 11, 1995).

[430] Quinn v. Morganelli, 73 Mass. App. Ct. 50, 53 n. 3 (2008).

[431] Sullivan v. Iantosca, 409 Mass. 796, 799 (1991).

[432] 399 Mass. 687 (1987).

[433] *Id.* at 690-91.

[434] MASS. GEN. LAWS ch. 231B, § 3(c) and (d) (stating action for contribution must be commenced within one year of judgment or settlement of underlying action).

bution claims, rather than the statute of repose.[435] In *Dighton*, however, the court held that the architect could not be impleaded after the repose period had run.[436] Because it was protected from liability to the plaintiff, it was also immune from suit for contribution for the same protected conduct.[437]

Plaintiffs frequently pursue claims under chapter 93A along with other claims in suits against architects and contractors. If a chapter 93A claim is based on acts that are within the scope of the statute of repose in chapter 260, section 2B, then it will be barred after six years.[438] However, a chapter 93A claim is based on deceit in the sale of property would not be within section 2B.[439]

In *McDonough v. Marr Scaffolding Co.*,[440] the Supreme Judicial Court held that actions for wrongful death caused by acts covered by chapter 260, section 2B of the Massachusetts General Laws are "actions of tort" which are limited by the six-year statute of repose.[441]

C. Commencement and satisfaction of the statute of repose in section 2B

Given the rigid nature of a statute of repose, it is important to be clear about when the repose period begins and what act by a plaintiff properly commences an action within the repose period. Section 2B states as follows:

> A claim is barred six years after the earlier of the 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. For improvements to the real property of a public agency, the action will be barred by the earlier of the dates of: (1) official acceptance of the project by the public agency; (2) the opening of the real property to public use; (3) the acceptance by the con-

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435 *Dighton*, 399 Mass. at 692-93.

436 *Id.* at 691.

437 *Id.* Note that the same argument does not protect a party from contribution after a statute of limitations has run on the primary plaintiff's claim. Instead, an action for contribution must be brought within the one-year limitations period in MASS. GEN. LAWS ch. 231B, § 3(c) or (d), even if the contribution action is brought after the limitations period has run on the original plaintiff's claim.

438 Kelley v. Iantosca, 78 Mass. App. Ct. 147, 154 (2010).

439 *Id.*

440 412 Mass. 636 (1992).

441 *Id.* at 643.

> tractor of a final estimate prepared by the public agency pursuant to chapter thirty, section thirty-nine G; or (4) substantial completion of the work and the taking possession for occupancy by the awarding authority.

In *Mosesian v. Franki Foundation Corp.*,[442] some units of a condominium complex opened, but a full occupancy permit did not issue for three months thereafter.[443] The court held that the complex was "open to use" when the first units opened, so that the plaintiff's claims, filed more than six years after that, were barred.[444] In *Coca-Cola Bottling Co. of Cape Cod v. Weston & Sampson Engineers, Inc.*,[445] the defendant constructed a wastewater treatment plant for the plaintiff, which never did work as required.[446] It was first put into use more than six years before suit was brought, but the plaintiff claimed it was never "substantially completed" under the statute because it never functioned properly.[447] The court held that, regardless of whether it was completed, it was "opened to use" when it first operated, so section 2B barred the claim.[448]

In many cases, a supplier or contractor will be involved in part of a project but not the entire improvement. In *Shiner-Spagone v. Fabroski*,[449] the defendant installed a fence as part of a larger swimming pool installation.[450] The action was filed more than six years after the fence was completed, but less than six after the completion of the entire project.[451] The court held that repose period began to run against the fence installer when it completed the installation and the owner took possession of the improvement.[452] Clearly, the court focused on the completion and acceptance of the particular improvement supplied by the defendant rather than the entire project. [453] The court also articulated this point in *Parent v. Stone & Web-*

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[442] No. 946682, 1998 WL 1284196 (Mass. Sup. Ct. June 24, 1998).

[443] *Id.* at *2

[444] *Id.* at *4

[445] 45 Mass. App. Ct. 120 (1998).

[446] *Id.* at 122-23.

[447] *Id.* at 125

[448] *Id.* at 126; *See also* Cusolito v. Care Free Homes, Inc., 24 Mass. L. Rptr. 521, *2 (Mass. Sup. Ct. 2007) (order granting summary judgment) (finding although contractors returned for minor repairs after installing siding, they "substantially completed" the work, more than six years before suit was brought); *Accord* McMillan v. Sears Roebuck & Co., Inc., No. 00-P-783, 55 Mass. App. Ct. 1110, 2002 WL 1676365, at *3 (2002).

[449] 22 Mass. L. Rptr. 630 (Mass. Sup. Ct. 2007) (order granting summary judgment).

[450] *Id.* at *1.

[451] *Id.* at *3.

[452] *Id.*

[453] *Id.*

ster Eng'g Corp.,[454] which states that "if the property owner takes possession of the substantially completed improvement prior to putting it to actual use, the six-year period begins to run on the earlier date."[455]

For many cases against the general contractor or builder of a building, the issuance of a certificate of occupancy is likely to trigger the running of the limitations period, on the reasoning that this opens the improvement to use. In *Oates v. Larkin*,[456] the facility received two temporary occupancy permits and the court held that these triggered the running of the section 2B repose period.[457]

D. Arguments to avoid application of chapter 260, section 2B

Given the drastic effect of the statute of repose for improvements to real property, it is not surprising that plaintiffs' lawyers have deployed a variety of creative arguments to evade them. The courts, cognizant of the wide scope of protection intended by the legislature, have rejected most of these.

Plaintiffs have repeatedly argued that the doctrine of relation back of amendments should avoid the strict time limit of the statute of repose. In *James Ferrara & Sons, Inc. v. Samuels*,[458] for example, the plaintiffs amended their complaint to add a defendant protected by section 2B, and argued that the claim should be treated as filed within the six-year repose period, since it related back to the filing of the original complaint (which was filed within the repose period).[459] The Appeals Court rejected the argument:

> Any application of the relation-back doctrine in the instant case would have the effect of reactivating a cause of action that the Legislature obviously intended to eliminate. We will not . . . construe [Mass. R. Civ. P. 15(c)] so as to abrogate the effect of the statute.[460]

In *Casco v. Warley Electric Co., Inc.*,[461] the court rejected applica-

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[454] 408 Mass. 108 (1990).

[455] *Id.* at 110 n. 3.

[456] 23 Mass. L. Rptr. 390 (Mass Sup. Ct. 2007).

[457] *Id.* at *6; *See also* Woods v. Brimm, 27 Mass L. Rptr. 389, *10 (Mass. Sup. Ct. 2010) (holding certificate issued more than six years prior to action, § 2B barred the claim).

[458] 21 Mass. App. Ct. 170 (1985)

[459] *Id.* at 171-72.

[460] *Id.* at 173-174; *accord* Tindol v. Boston Hous. Auth., 396 Mass. 515, 519 (1986).

[461] 37 Mass. App. Ct 701 (1994).

tion of the relation back doctrine even though the party against whom the claim was asserted was already a party to the litigation.[462] In that case, Casco had sued other parties, which impleaded Warley Electric before the repose period ran.[463] After the repose period had run Casco amended his complaint to make Warley a direct defendant.[464] Warley raised the statute of repose as a defense and the court agreed that section 2B barred the claim.[465]

However, where a section 2B defendant *has* been sued within the repose period, there is a strong argument that the relation-back doctrine should apply to changes in the legal theories asserted against it. Section 2B requires that the "action[] be commenced" within six years. If it is, changes in the claims ought to be governed by chapter 231, section 51 of the Massachusetts General Laws, which allows later assertion of new claims arising from the same underlying transaction or occurrence. The courts have repeatedly noted that "statutes of limitations are subject to tolling and the effect of amendments to a complaint that relate back; the bar of the statute of repose in section 2B is absolute once the six-year period has run."[466] However, because the purpose of the section 2B statute of repose is to provide notice of the claim within six years, it seems appropriate to allow amendments that change a legal theory if suit was commenced within the six-year period.

An analogous issue arose in *Sisson v. Lhowe*.[467] In *Sisson*, the plaintiff brought a personal injury action for medical malpractice within the seven-year repose period in chapter 260 section 4.[468] The plaintiff died after the period had run, allegedly due to consequences of the malpractice, and the estate sought to add a claim for wrongful death to the complaint.[469] The Supreme Judicial Court held that this was permissible, even though the cause of action for malpractice did not accrue until the plaintiff died, so that any "action" for wrongful death brought after her death would have been barred by section 4 of chapter 260.[470] The court noted that the defendant had already been sued for the events that underlay the wrongful death claim, all based on the same operative facts.[471] The *Sisson* court did

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[462] *Id.* at 704.
[463] *Id.* at 701.
[464] *Id.* at 702.
[465] *Id.*
[466] Commonwealth v. Owens-Corning Fiberglas Corp., 38 Mass. App. Ct. 600, 602 (1995).
[467] 460 Mass. 705 (2011).
[468] *Id.* at 706.
[469] *Id.* at 707.
[470] *Id.* at 714.
[471] *Id.* at 711-12.

not rely on chapter 231, section 51 – as noted by Judge Spina's dissent[472] – but the reasoning of the opinion would seem to support a similar result under the repose statute for building improvements or for medical malpractice, if a plaintiff sues for an occurrence before the repose period runs and seeks to recast her legal claims by amendment after that period has run.

Massachusetts courts have rejected arguments that the statute of repose may be tolled. In *Tindol v. Boston Housing Authority*,[473] the plaintiff argued that the statute was tolled during minority, but the court rejected the claim on logic that should apply generally to tolling doctrines:

> A statute of limitations normally governs the time within which legal proceedings must be commenced after the cause of action accrues . . . A statute of repose, however, limits the time within which an action may be brought and is not related to the accrual of any cause of action. The injury need not have occurred, much less have been discovered . . . As a statute of repose, G.L. c. 260, § 2B,, precludes recovery against those within the protection of the statute for any injury which occurs more than six years after the performance or furnishing of the design, planning, construction, or general administration of an improvement to real property.[474]

Similarly, in *Sullivan v. Iantosca*,[475] the plaintiff alleged that the defendant had built his house on inadequate fill.[476] Since the fill was covered up, the plaintiff argued that it had been fraudulently concealed, so that chapter 260, section 12 tolled the statute of repose.[477] The court rejected the argument, noting that the claim of fraudulent concealment was based on the same act as the negligence that was barred under section 2B, using inadequate fill that was concealed from view.[478] However, the court noted that cases from other jurisdictions are in conflict on whether later conduct, apart from the challenged work on the property (such as defendant's later

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[472] *Sisson*, at 721. As Judge Spina notes, the cases have uniformly stated that the relation-back principle does not apply to statutes of repose. *Id.* However, these statements have not been in the context of an amendment to change legal theories rather than add a new defendant to an action. *Id.*

[473] 396 Mass. 515 (1986).

[474] *Id.* at 517.

[475] 409 Mass. 796 (1991).

[476] *Id.* at 797.

[477] *Id.* at 797-98.

[478] *Id.* at 798-99. *See also* Kingston Housing Authority v. Sandonato Bogue, Inc., 31 Mass. App. Ct. 270, 273-74 (1991).

concealment of relevant information) may toll the repose period.[479]

Efforts to apply the discovery rule, under which a limitations period does not begin to run until the plaintiff becomes aware or should become aware that she has suffered injury due to the defendant's conduct, have similarly failed.[480] Note here again that chapter 260, section 2B contains two separate time periods, a three-year statute of limitations and a six-year statute of repose. The discovery rule quite likely does apply to the limitations provision,[481] but does not apply to the repose provision.[482] Thus, suppose that the plaintiff discovers, five years after the completion of an improvement to real property, that a defect in the work has caused damage to the premises. The limitations period on her claim would begin to run from the discovery, but she would have *only one year* within which to bring suit, due to the statute of repose.

Although claims of negligence in design or construction will be barred by the statute of repose, a plaintiff may in some circumstances base a claim on negligent maintenance, where the defendant has an on-going obligation to maintain the premises. In *Sonin v. Masschusetts Turnpike Authority*,[483] for example, the plaintiff's claim based on negligent design of a roadway without a breakdown lane was barred by section 2B, but his claim based on failure to warn that there was none went to the jury.[484] However, the plaintiff was unsuccessful with this argument in *Hansbury v. National Grid (USA), Inc.*[485] The plaintiff's claim was based on the design and placement of a utility pole.[486] He argued that the defendant had failed to remedy the situation over later years, but the court held that the claim was still based on the installation of the pole, which had happened thirteen years before the complaint was filed.[487] Similarly, in *Parent v. Stone & Webster Engineering Corp.*,[488] the Supreme Judicial Court rejected the argument that the on-going failure to warn of a dangerous condition created by the defendant's work on an improvement to real property prevented the repose

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[479] *Sullivan*, 409 Mass. at 798, n. 3.

[480] *Id.* at 798.

[481] *See* Klein v. Catalano, 386 Mass. 701, 705 (1982) (holding limitations period normally requires commencement within period after claim accrues, but repose statute not tied to accrual).

[482] Sullivan v. Iantosca, 409 Mass. 796, 798 (1991).

[483] 61 Mass. App. Ct. 287 (2004).

[484] *Id.* at 290.

[485] 30 Mass. L. Rptr. 261 (Mass. Sup. Ct. 2012). *See also* Napolitano v. Massachusetts Turnpike Authority, No. 03-1642, 2007 WL 4993434, at *2 (Mass. Sup. Ct. Oct. 23, 2007) (distinguishing a claim for negligent design from one for negligent maintenance).

[486] *Hansbury*, 30 Mass. L. Rptr. at *1.

[487] *Id.* at *3.

[488] 408 Mass. 108 (1990).

period from running.[489]

IX. THE STATUTES OF REPOSE FOR MEDICAL MALPRACTICE CLAIMS

A. The two statutes of repose for medical malpractice claims

Massachusetts has both a general statute of repose for medical malpractice cases and a statute of repose applicable to claims by minors. Both statutes provide a statute of limitations and a statute of repose for such claims.[490] The general statute, chapter 260, section 4 of the Massachusetts General Laws provides in part,

> Actions of contract or tort for malpractice, error or mistake against physicians, surgeons, dentists, optometrists, hospitals and sanitoria shall be commenced only within three years after the cause of action accrues, but in no event shall any such action be commenced more than seven years after occurrence of the act or omission which is the alleged cause of the injury upon which such action is based except where the action is based upon the leaving of a foreign object in the body.[491]

This statute creates a three-year statute of limitations and a seven-year statute of repose for medical malpractice claims. Chapter 231, section 60D of the Massachusetts General Laws specifies similar periods for malpractice claims on behalf of minors:

> Notwithstanding the provisions of section seven of chapter two hundred and sixty, any claim by a minor against a health care provider stemming from professional services or health care rendered, whether in contract or tort, based on an alleged act, omission or neglect shall be commenced within three years from the date the cause of action accrues, except that a minor under the full age of six years shall have until his ninth birthday in which the action may

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[489] *Id.* at 112, n. 6.

[490] *See* Harlfinger v. Martin, 435 Mass. 38, 41-45 (2001) (highlighting the background of these statutes, both adopted in 1986). In *Harlfinger* the court upheld MASS. GEN. LAWS ch. 231, § 60D against constitutional challenges. *Id. See also* Plummer v. Gillieson, 44 Mass. App. Ct. 578, 581-83 (1998) (upholding constitutionality of MASS. GEN. LAWS ch. 231, § 60D).

[491] MASS. GEN. LAWS ch. 260, § 4 para. 2.

> be commenced, but in no event shall any such action be commenced more than seven years after occurrence of the act or omission which is the alleged cause of the injury upon which such action is based except where the action is based upon the leaving of a foreign object in the body.[492]

The actors protected by these two statutes appear to be different. Section 4 applies to six categories of health care providers, while section 60D applies generally to all "health care providers." Nurses, physical therapists and occupational therapists, for example, would appear to be covered by section 60D but not by section 4. One Superior Court case has read section 4 to encompass nurses anyway,[493] but this issue has not been decided by the appellate courts.[494]

Note that chapter 231, section 60D of the Massachusetts General Laws contains two "absolute" limits on minors' malpractice claims. It provides that a minor under the age of six shall have until his or her ninth birthday to bring suit. A child who suffers a malpractice injury at age five, for example, may sue up until her ninth birthday, even though the limitations period is ordinarily three years. In *McGuinness v. Cotter,*[495] the defendants argued that this creates a statute of repose for claims by minors under the age of six.[496] However, the Supreme Judicial Court held that this provision is a statute of limitations, not a statute of repose.[497] Thus, if a minor suffers an injury before the age of six, but the claim does not accrue until later, the claim remains viable for three years after accrual. For example, if a minor suffered a malpractice injury at the age of five, but did not discover that the injury may have resulted from malpractice until the age of eight, she would have three years from the date of discovery to file suit. The provision allowing suit until the child's ninth birthday was meant to *extend* the limitations period for children under six, not to set a repose limit on their right to sue.

The second "absolute" limit in chapter 231, section 60D of the

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[492] MASS. GEN. LAWS ch. 231, § 60D.

[493] Chace v. Curran M.D., 2004-02290, 2005 WL 1668431, *6 (Mass. Sup. Ct. June 14, 2005), *aff'd, on other grounds*, 71 Mass. App. Ct. 258 (2008).

[494] *Cf.* Blaney v. Lowell General Hospital, 76 Mass. App. Ct. 910, 911 (2010). In *Blaney*, the court held that the statute of repose barred an amendment to add nurses to the action after seven years had run. *Id.* The court did not discuss the fact that § 4 does not explicitly apply to nurses. *Id.*

[495] 412 Mass. 617 (1992).

[496] *Id.* at 621 n. 6. The seven year statute of repose in § 60D, which took effect in 1986, did not apply to the claim. *Id.*

[497] *Id.* at 621.

Massachusetts General Laws is the provision that "in no event shall any such action be commenced more than seven years after occurrence of the act or omission which is the alleged cause of the injury upon which such action is based."[498] This provision is a statute of repose, because it specifies a "definitely established event"[499] after which the cause of action ceases to exist. Several examples may help to illustrate the interaction of the various limits in chapter 231 section 60D of the Massachusetts General Laws.

- Jane suffers injury due to surgery at age one. Her family does not have reason to know of the injury until Jane is ten.

Jane's claim is barred by the repose provision in Section 60D. No claim can be brought more than seven years after the act or omission on which the claim is based, and this period has passed.

- Jane is injured due to surgery on the day she turns one. Six months after she turns eight years old her family discovers that the injury may result from malpractice and brings suit against the surgeon.

Jane's claim is barred. As in the last example, more than seven years have elapsed since the act or omission on which the claim is based. Even though Section 60D provides that "a minor under the full age of six years shall have until his ninth birthday in which the action may be commenced," the seven-year repose provision prevails, because that provision specifies that "in no event shall any such action be commenced more than seven years after occurrence of the act or omission which is the alleged cause of the injury upon which such action is based [except for foreign objects left in the body.]"[500]

- Jane is born on May 11, 2000 and injured due to surgery on May 11, 2003, when she is three years of age. On July 20, 2008, her family discovers that the injury may result from malpractice.

Under the limitations period for medical malpractice claims in chapter 231,

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[498] MASS. GEN. LAWS ch. 231, § 60D

[499] *McGuinness*, 412 Mass. at 622 (quoting Nissan Motor Corp. v. Comm'r of Revenue, 407 Mass. 153, 158 (1982)).

[500] MASS. GEN. LAWS ch. 231 § 60D.

section 60D of the Massachusetts General Laws, Jane would have three years from the discovery of the malpractice, until July 20, 2011, to bring suit, because the claim does not "accrue" until she learns or should have learned that she may have been injured by the treatment. However, the repose period will run on May 11, 2010, seven years after the date of the surgery.

- Same facts, except that Jane's family realizes that Jane may have been injured due to malpractice immediately after the surgery.

Although the general three-year limitations period would run on May 11, 2006, suit may be brought up until Jane's ninth birthday, because section 60D extends the three-year period, which applies "except that a minor under the full age of six years shall have until his ninth birthday in which the action may be commenced. . ."[501] The seven-year statute of repose will not have run by Jane's ninth birthday, so it does not shorten the period.

- Jane is injured one month before she turns seven. Her family does not receive information sufficient to put them on notice that the injury may be caused by malpractice until the day she turns eleven.

Jane has two years and eleven months to bring suit. The claim accrues upon discovery, triggering the three-year provision chapter 231, section 60D of the Massachusetts General Laws. This would run on Jane's 14th birthday. The repose period will run seven years from Jane's seventh birthday, one month before her 14th birthday. The age-nine provision in section 60D is irrelevant; it extends the limitations period until the age of nine, but does not end it in a case such as this where it would run longer.[502]

B. Commencement and satisfaction of the repose period in medical malpractice cases

As with chapter 260, section 2B of the Massachusetts General Laws, the courts have applied different analyses to the limitations provision in section 4 and section 60D and to the repose provisions. Most important-

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[501] *Id.*

[502] *See* McGuinness v. Cotter, 412 Mass. 617, 620-23 (1992) (holding age-nine provision does not bar suit after age nine if limitations and repose periods met).

ly, the limitations provision in both statutes runs from the date of accrual of the cause of action, which occurs when the patient learns, or reasonably should have learned, that he has been harmed as a result of his physician's conduct.[503] However, the repose period runs from the "act or omission which is the alleged cause of the injury upon which such action is based." [504]

To meet the repose period, the plaintiff must "commence" her action within seven years after the act or omission on which the claim is based.[505] Typically, commencement will be met by filing suit.[506] In *Nett v. Bellucci*,[507] the Supreme Judicial Court considered when an action is "commenced" under the two malpractice repose provisions when a party is added by amendment.[508] The plaintiff in *Nett* alleged that misreading of an ultrasound by Dr. Gross on March 26, 1992 led to injury to a child during birth.[509] The plaintiffs did not obtain a copy of the ultrasound until shortly before the repose period would run.[510] On March 10, 1999, they filed a motion to amend the complaint to add Dr. Gross as a defendant.[511] The motion did not comply with federal court filing procedures,[512] but was accepted by the clerk's office and served on Dr. Gross.[513] The plaintiffs, after discovering the procedural snafu, reserved the motion on Dr. Gross and refiled it on March 29, 1999 which was less than six years after the child's birth, but more than six years after the alleged negligence by Dr. Gross.[514] Dr. Gross moved to dismiss for failure to comply with the statute of repose.[515]

The Supreme Judicial Court held that the action was "commenced" for purposes of the statute of repose[516] when the motion to amend was filed

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[503] Harlfinger v. Martin, 435 Mass. 38, 41 n. 3 (2001).

[504] MASS. GEN. LAWS ch. 231, § 60D; MASS. GEN. LAWS ch. 260, § 4.

[505] MASS. GEN. LAWS ch. 231, § 60D.

[506] Mass. R. Civ. P. 3; s*ee* Nett v. Bellucci, 437 Mass. 630, 637-38 (2002) (contrasting commencement under Rule 3 with commencement of claim by later amendment).

[507] 437 Mass. 630 (2002).

[508] *Id.* at 635.

[509] *Id.* at 631.

[510] *Id.* at 632.

[511] *Id.*

[512] *Nett*, 437 Mass. at 630. The underlying litigation was in federal district court for the District of Massachusetts. The Supreme Judicial Court addressed the repose issue on questions certified to it by the United States Court of Appeals for the First Circuit. *Id.*

[513] *Id.* at 633.

[514] *Id.* at 633-34.

[515] *Id.*

[516] *Nett*, 437 Mass. at 637. Actually, for two statutes of repose: The child's claim was governed by MASS. GEN. LAWS ch. 231, § 60D, and MASS. GEN. LAWS ch. 260, § 4. *Id.*

with the federal court.[517] The court noted that the plaintiff can control the date of filing of the motion, but not the date that the motion is allowed.[518] The court reached this conclusion even though the proposed amended complaint was not attached to the motion to amend.[519] The court noted that attachment of the proposed amended complaint is "customary," but held that a description of the proposed amendment in the motion or accompanying memorandum sufficed.[520]

The *Nett* court distinguished the requirement of notice of the action – via service of process – to the defendant. The medical malpractice repose statutes require that the action be "commenced" within the repose period, not that the defendant receive notice within the period. In *Nett*, the defendant to be added did receive notice (based on service of the motion to amend) within the repose period. The court reserved the question whether the repose period would be satisfied if the motion had been filed within the period but not served.[521] While the court's emphasis on "commencement" rather than notice suggests that it would find filing sufficient, even if service took place after the repose period had run, plaintiff's counsel would be well advised to serve early to avoid the argument that the added defendant must have actual notice within the repose period.[522]

In *Blaney v. Lowell General Hospital*,[523] the plaintiffs served motions to amend on the defendant, whose counsel advised plaintiff's counsel that no opposition would be filed until further discussions.[524] Thus, no motion to amend was filed within the repose period.[525] On these facts the Ap-

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[517] *Nett,* 437 Mass. at 636-37.

[518] *Id.* at 637-38.

[519] *Id.* at 646-47.

[520] *Id.* at 645. Suppose, however, that the amended complaint subsequently filed does not track the description in the motion or memorandum? Would the actual complaint filed be deemed commenced within the repose period? The Supreme Judicial Court reserved this question in *Nett*. *Id.* at 646 n. 18.

[521] *Nett*, 437 Mass. at 641 n. 9. Note that a defendant may not learn of an original action filed against her within the repose period. *See* Mass. R. Civ. P. 4(j) (requiring service within ninety days of filing). The reasoning of *Nett* suggests that, if a case is filed within the repose period and the defendant is served after it runs, the action would be "commenced" within the repose period. *See Nett*, 437 Mass. at 640 (distinguishing commencement from service of process).

[522] *Nett*, 437 Mass. at 641-42. The *Nett* court also held that the filing of the original motion to amend constituted commencement, even though it was technically deficient for failure to comply with a local rule of the federal district court. *Id.* However, the opinion suggests that, had the clerk refused to accept the filing for this reason, that it would not be considered commenced on the date counsel attempted to file it. *Id.* at 647 ("if the filing is accepted and not struck, the filing date remains as the operative date for purposes of compliance with a statute of repose.")

[523] 76 Mass. App. Ct. 910 (2010).

[524] *Id.* at 910.

[525] *Id.*

peals Court held, citing *Nett,* that the repose period barred the claim.[526]

C. Arguments to avoid the medical malpractice statutes of repose

As with the improvements to real property provision, plaintiffs' lawyers have deployed a variety of creative arguments to evade the fatal effect of the two medical malpractice statutes of repose. Most have failed, as the courts have recognized that:

> identification of any specific, ascertainable endpoint [for bringing suit] is 'in some manner arbitrary but the drawing of the line . . . is a task to be exercised at the discretion of the appropriate branch of government, the Legislature. We cannot introduce an equitable exception when the Legislature has fashioned an iron clad rule.[527]

Thus, under chapter 231, section 60D and chapter 260, section 4 of the Massachusetts General Laws, medical malpractice claims by adults or minors can be barred before they are discovered or before they arise. In *Joslyn v. Chang*,[528] for example, ten years elapsed before the plaintiffs learned that their daughter's death may have resulted from surgical malpractice.[529] Although they alleged that the doctors had fraudulently concealed the facts from them, the Supreme Judicial Court held that the statute of repose barred the claim.[530]

1. Tolling of claims during minority

The general tolling statute for minors, chapter 260, section 7 of the Massachusetts General Laws, tolls the statute of limitations until "the disability is removed," that is, until the age of eighteen.[531] Thus, a child injured at the age of three would have until her twenty-first birthday to bring suit. However, while the *limitations period* is tolled under section 7, the repose period in chapter 231, section 60D of the Massachusetts General Laws is not. Thus, the child's claim would be barred seven years after the injury.[532]

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[526] *Id.* at 911.

[527] Joslyn v. Chang, 445 Mass. 344, 351 (2005) (quoting Zayre Corp. v. Attorney Gen., 372 Mass. 423, 433-34 (1977)).

[528] 445 Mass. 344 (2005).

[529] *Id.* at 344.

[530] *Id.* at 351-53.

[531] MASS. GEN. LAWS ch. 260, § 7.

[532] *See* MASS. GEN. LAWS ch. 231, § 60D (beginning with language, "Notwithstanding the

However, counsel should be aware that several Supreme Judicial Court cases have distinguished tolling for minors under section 7 from tolling for minors who suffer from a mental disability. In *McGuinness v. Cotter*,[533] the Supreme Judicial Court held that, despite the reference to chapter 260, section 7 at the beginning of section 60D, section 7 of the Massachusetts General Laws still tolled the claim of a minor who is also mentally incapacitated.[534] *McGuinness* was decided after the enactment of the seven-year repose provision in section 60D, but that section did not apply because the treatment predated the enactment.[535] Thus, it is not clear whether the exception tolling claims by mentally incapacitated minors applies to the repose provision, but the logic of the *McGuinness* decision would support that result.

2. Fraudulent concealment under chapter 260, section 12 of the Massachusetts General Laws

In *Joslyn v. Chang*,[536] the Supreme Judicial Court refused to estop the defendant from relying on the repose provision in chapter 260, section 4 of the Massachusetts General Laws based on alleged fraudulent concealment of the negligent acts that might support malpractice recovery.[537] Similarly, the *Joslyn* court held that chapter 260, section 12 of the Massachusetts General Laws, which tolls the limitations period if the defendant fraudulently conceals a cause of action from the plaintiff, did not apply to the statute of repose in section 4.[538]

However, a subsequent Appeals Court case muddies the waters a good deal. In *Chace v. Curran*,[539] the plaintiffs in a medical malpractice

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provisions of section seven of chapter two hundred and sixty . . ."). *See also* Plummer v. Gillieson, 44 Mass. App. Ct. 578, 580-81 (1998) (noting the effect of 1986 amendment to add statute of repose to § 60D).

[533] 412 Mass. 617 (1992).

[534] *Id.* at 624-26; *see also* Boudreau v. Landry, 404 Mass. 528, 531 (1989) ("In § 60D, the Legislature seems to be referring only to minority and not to insanity and imprisonment, because it targets expressly only 'any claim by a minor against a health care provider . . . .' In this case, there is evidence of an insane minor, and § 7 provides for a tolling of an action by an insane person. No mention is made of insanity in § 60D, and hence, we may conclude that § 60D affects only minors, not insane minors. The meaning of § 60D is that a minor's medical malpractice action must be brought within three years from the accrual date, but such language does not govern a minor who is also insane.").

[535] *McGuinness*, 412 Mass. at 621.

[536] 445 Mass. 344 (2005).

[537] *Id.* at 352.

[538] *Id.* at 350.

[539] 71 Mass. App. Ct. 258 (2008).

case amended their complaint to allege two claims, that the defendants had made intentional omissions and misstatements in the patient's medical records to conceal a failure to properly resuscitate the patient shortly after birth.[540] The Appeals Court held that "a fair reading of the amended complaint indicates that the allegations state viable causes of action for which the medical malpractice statutes of repose do not apply . . . ."[541] The court concluded that the amended claims "sound in fraud and allege the existence of a fiduciary relationship that gave rise to a duty on the defendants' part to disclose adequately to the plaintiffs facts that would give rise to knowledge of a cause of action for substandard care in resuscitating Andrew."[542] These claims are not directly based on the malpractice, but on subsequent conduct as part of an alleged cover-up.[543] The *Chace* court suggested that such claims are apart from the underlying medical events, and would not be claims for a medical malpractice tribunal.[544] On this basis, the court allowed amended claims against two new defendants in the action to proceed although they were asserted nine years after the underlying medical events in suit.[545] While this distinction (which the court acknowledged to be "subtle"[546]) may be valid, plaintiffs in many cases will likely allege failure to disclose that borders on fraudulent concealment, in an effort to avoid the bar of the statute of repose.

3. Continuing care by the medical provider

In several cases plaintiffs have argued that the plaintiff remained under the defendant doctor's care, and that the statute of repose should not run due to this continuing care of the patient. The argument is reminiscent of the continuous representation doctrine in legal malpractice cases, which has been held to toll the statute of limitations in some cases.[547]

In *Rudenauer v. Zafiropoulos*,[548] for example, the defendant treated the decedent for the condition in 1990 and 1992 and again in 1995, when further tests determined that he had a kidney tumor.[549] Although the kid-

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[540] *Id.* at 259.

[541] *Id.* at 263.

[542] *Id.* at 264.

[543] *Id.* at 267.

[544] *Chace*, 71 Mass. App. Ct. at 267-68.

[545] *Id.* at 264.

[546] *Id.* at 265.

[547] *See* Murphy v. Smith, 411 Mass. 133, 137-38 (1991) (applying continuous representation doctrine to legal malpractice claim, and citing several cases doing same).

[548] 445 Mass. 353 (2005).

[549] *Id.* at 355.

ney was removed, Rudenauer died of metastatic cancer in 2000.[550] His widow sued Zafiropoulos in 2001, alleging negligence in his treatment in 1990-1991 and in 1995.[551] Any recovery based on treatment in 1990-1991 would ordinarily be barred by the statute of repose in chapter 260, section 4 of the Massachusetts General Laws. However, Rudenauer argued that the statute should run from the end of the period during which the defendant treated the decedent, which would make the action timely.[552] The Supreme Judicial Court refused to create a "continuing treatment" exception to the statute of repose, reiterating that "[o]ur cases have consistently held that statutes of repose are not subject to any form of tolling."[553] Thus, any claim based on the treatment in 1990-1991 was barred.[554]

Consider a slightly different scenario, however. Suppose that Doctor Kildare sees a patient annually from 2008-2012 and at no time orders a test which would be required by good medical care based on the plaintiff's symptoms. In this case Kildare has "omitted" to provide reasonable treatment at each yearly visit. Because the repose statutes begin to run from the "act or omission which is the alleged cause of the injury," they should not bar recovery for the negligent omission in 2012 until seven years after that visit. If the failure to order the test in 2012 caused injury to the patient, it should be actionable, even though it is one in a series of such failures during a continuous course of treatment.[555]

In *Harlfinger v. Martin*,[556] the plaintiff argued that the doctor had a continuing duty to follow up on the minor's condition, and that failure to do so continued into the seven-year repose period.[557] The argument failed on the facts in that case, because the court concluded that Dr. Martin had no on-going treatment relationship with the minor.[558] However, plaintiffs should consider this scenario in appropriate cases. If there is proof that the doctor has an on-going duty to do affirmative acts, such as to order follow-up tests, and omits to do so during the repose period, it can be argued that a

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[550] *Id.*

[551] *Id.*

[552] *Id.* at 357.

[553] *Rudenauer,* 445 Mass. at 357-58.

[554] *Id.* at 360; *See also* Toas v. Shapiro, 23 Mass. L. Rptr. 194, *3 (Mass. Sup. Ct. 2007) (order granting summary judgment) (holding continuing treatment doctrine not viable mechanism for tolling medical malpractice period).

[555] In *Rudenauer*, the plaintiff argued that Dr. Zafiropoulos was negligent right up through 1995. *Rudenauer*, 445 Mass. at 356. The court noted that the claim based on malpractice in that year would not be barred by the statute of repose, but that there was no evidence that any malpractice at that time harmed the patient. *Id.* at 360.

[556] 435 Mass. 38 (2001).

[557] *Id.* at 39.

[558] *Id.* at 52-53.

claim based on this omission would not be barred.[559]

4. Relation back to a previously filed action

Like cases under the improvements-to-real-property statute of repose, cases under chapter 231, section 60D and chapter 260, section 4 of the Massachusetts General Laws have rejected the argument that an amendment adding a new defendant can relate back to earlier filed claims. However, if the plaintiff sues within the repose period, it seems likely that any amendments to the action allowed by the court, if against the same defendants, would relate back to the time of filing, under the principles discussed in Section IV of this article.

5. Rephrasing allegations as breach of contract

Because the repose provisions of chapter 231, section 60D and chapter 260, section 4 of the Massachusetts General Laws expressly apply to claims grounded in both contract and tort, plaintiffs will not be able to avoid the repose bar by restating malpractice claims as breach of contract claims. At least one case has dismissed breach of contract claims based on medical malpractice, on the ground that such claims "are more appropriately expressed in terms of the physician's tort duty."[560]

X. STATUTES OF LIMITATIONS FOR SURVIVAL CLAIMS AND CLAIMS FOR WRONGFUL DEATH

Several types of claims arise in cases in which a claimant dies before bringing a claim for personal injuries. If the claimant dies of her injuries caused by the alleged tortfeasor, chapter 229, section 2 of the Massachusetts General Laws provides a right of the decedent's survivors to recover for wrongful death.[561] If the injured party incurs damages due to tortious injury *before death*, but dies without recovering for those damages, chapter 228, section 1 of the Massachusetts General Laws provides that the right to recover for such damages *survives* and may be enforced by the de-

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[559] *But see* Lee v. Lahey Clinic Med. Ctr., 21 Mass. L. Rptr. 553, *3 (Mass. Sup. Ct. 2006) (order on motion for summary judgment). In *Lee*, the plaintiff alleged that one defendant "failed to ensure that [the patient] received follow-up care on or after the date [she was evaluated]." *Id.* at *3. Despite this allegation the court held that the repose period ran from the date of the evaluation. *Id.*

[560] *Lee*, 21 Mass. L. Rptr. at *4 (2006).

[561] MASS. GEN. LAWS ch. 229, § 2.

cedent's personal representative.[562]

A survival claim may be independent of an action for wrongful death. For example, Elkins might be injured in an accident with Maloney, incur pain & suffering and medical bills, and die from an unrelated illness. His claim for pre-death tort damages would survive, but he would have no claim for wrongful death against Maloney, since he died of natural causes. If, on the other hand, he was injured in an accident, suffered pain & suffering and medical bills, and died of his injuries, his representative would have both a survival claim for his pre-death damages from the tort and a claim for wrongful death, since the accident led to Elkins' death.[563]

A. Actions for wrongful death

Chapter 229, section 2 of the Massachusetts General Laws provides in part:

> [a]n action to recover damages under this section shall be commenced within three years from the date of death, or within three years from the date when the deceased's executor or administrator knew, or in the exercise of reasonable diligence, should have known of the factual basis for a cause of action, or within such time thereafter as is provided by section four, four B, nine or ten of chapter two hundred and sixty.[564]

Thus, the statute of limitations is three years, which runs from the date of the decedent's death, not from the date he or she incurred the injury.[565] However, the discovery rule applies to wrongful death claims; if the factual basis for bringing a claim only becomes known at some date after the decedent's death, the three-year period will run from the date when the executor or administrator learns, or should realize, that there is a basis for bringing such a claim.[566] In addition, chapter 260, section 7 of the Massachusetts General Laws, the tolling statute for minors, applies to wrongful

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[562] MASS. GEN. LAWS ch. 228, § 1.

[563] Klairmont v. Gainsboro Restaurant, Inc., 465 Mass. 165, 180 n. 21 (2013).

[564] MASS. GEN. LAWS ch. 229, § 2.

[565] Ellis v. Ford Motor Co., 628 F. Supp. 849, 854 (D. Mass. 1986).

[566] MASS. GEN. LAWS ch. 229, § 2. The quoted language allowing suit within three years after the factual basis for a cause of action becomes known was added to MASS. GEN. LAWS ch. 229, §2 in 1989, after the Supreme Judicial Court held, in *Pobiego v. Mansanto Co.*, 402 Mass. 112, 119-20 (1988), that the discovery rule did not apply to wrongful death claims.

death claims.[567] In *Ellis v. Ford Motor Co.*,[568] a claim for wrongful death brought on behalf of minors more than ten years after the death on which they based their claim was held timely.[569]

The statutes of repose for medical malpractice claims apply in wrongful death cases.[570] Thus, in a wrongful death case based on medical malpractice, any claim will be barred seven years after the act or omission that forms the basis of the claim, regardless of the discovery rule or the date of death. The statute of repose for improvements to real property has also been applied in wrongful death cases.[571] The various repose statutes presumably also apply to survival claims as well.

Sisson v. Lhowe[572] involved both the wrongful death statute and the medical malpractice statute of repose.[573] In *Sisson* the plaintiff, her husband and members of her family brought a timely suit for malpractice.[574] Mrs. Sisson then died of her injuries and the plaintiffs amended to add her administrator as an additional plaintiff, asserting a claim for wrongful death.[575] However, the seven-year repose period ran before the administrator was added, and the defendants argued that the claim for wrongful death was a new cause of action that could not be asserted after the repose period elapsed.[576] Although the plaintiff on the wrongful death claim (the administrator rather than the injured party) is different, and the damages somewhat different as well, the Supreme Judicial Court held that the wrongful death claim was not barred, since the decedent had sued the defendant for the underlying acts or omissions within the repose period.[577]

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[567] Gaudette v. Webb, 362 Mass. 60, 70-72 (1972). In *Gaudette*, the mother was the nominal plaintiff under MASS. GEN. LAWS ch. 229, § 2. *Id.* at 72. Her claim on behalf of herself was held barred by the limitations period, but the claim on behalf of the children was not. *Id.* at 73-74. The court held that she acted "as a representative or conduit for the children's recovery, much like a next friend for a minor plaintiff," so that the claim was "in a very real sense . . . the children's cause of action," making the tolling provision applicable. *Id.* at 72.

[568] 628 F. Supp. 849 (D. Mass. 1986).

[569] *Id.* at 860.

[570] Rudenauer v. Zafiropoulos, 445 Mass. 353, 357 (2005); Joslyn v. Chang, 445 Mass. 344, 347 n. 6 (2005); Riley v. Bensson, No. 10–P–1906, 2011 WL 5515305, at *1 (Mass. App. Ct. Nov. 14, 2011).

[571] McDonough v. Marr Scaffolding Co., 412 Mass. 636, 643 (1992); Dighton v. Fed. Pac. Elec. Co., 399 Mass. 687, 698-99 (1987).

[572] 460 Mass. 705 (2011).

[573] *Id.* at 706.

[574] *Id.* at 707-08.

[575] *Id.* at 707.

[576] *Id.*

[577] *Sisson*, 460 Mass at 709-14.

B. Survival claims for personal injury prior to death

In Massachusetts, claims for personal injury survive to the injured party's estate.[578] Suppose that Elkins is injured in an accident in 2011 due to negligence of Chang, and dies in 2013 of unrelated causes without having filed suit against Chang.[579] Elkins' executor or administrator may bring an action for the pre-death injury. This is not a wrongful death action, but a claim for damages the decedent could have recovered himself had he lived. The limitations period on such claims is provided by chapter 260, section 2A of the Massachusetts General Laws, the general statute of limitations for tort actions.[580] Thus, if Elkins were injured in 2008, and died in 2013, the limitations period would have passed, and a survival claim brought by the executor or administrator would be barred. However, if Elkins dies *before the limitations period has run* (e.g., in 2011 in the example), chapter 260, section 10 of the Massachusetts General Laws governs the time within which the claim may be brought by the personal representative:

> If a person entitled to bring or liable to any action before mentioned dies before the expiration of the time hereinbefore limited, or within thirty days after the expiration of said time, and the cause of action by law survives, the action may be commenced by the executor or administrator at any time within the period within which the deceased might have brought the action or within two years after his giving bond for the discharge of his trust . . . .[581]

Thus, if Elkins dies two years after the accident, section 10 gives his representative two years from giving bond to bring suit. Had Elkins lived, he would have had one more year to file, but his death triggers the alternative in chapter 260, section 10 of the Massachusetts General Laws. If Elkins dies one month after the accident his representative would have two years and eleven months to file suit, the remaining time under the limitations period for torts.

In another variation, suppose that Elkins suffers injury due to exposure to a chemical, but does not realize the connection between the exposure and his disability. He dies of unrelated causes, and four years after his

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[578] MASS. GEN. LAWS ch. 228, § 1.

[579] If Elkins had sued Chang within the limitations period in MASS GEN. LAWS ch. 260, § 2A, his executor or administrator would be substituted as the plaintiff and continue the action. Mass. R. Civ. P. 25(a).

[580] MASS GEN. LAWS ch. 260, § 2A.

[581] MASS. GEN. LAWS ch. 260, § 10.

death studies link that disability to the chemical Elkins was exposed to. This claim survives under chapter 228, section 1 of the Massachusetts General Laws, and under the second paragraph of chapter 260, section 10 of the Massachusetts General Laws,[582] the claim did not accrue until he or his survivors are on notice of the link between the chemical and his pre-death disability. Thus, it appears that Elkins' administrator will have three years from the discovery of that link to bring suit for Elkins' pre-death disability, under chapter 260, section 10 of the Massachusetts General Laws.[583]

In cases in which the injured party dies from the injuries caused by the tortfeasor, the survival claim for pre-death injuries will be asserted along with a claim for wrongful death.[584] In such cases, it is not clear what limitations period will apply – presumably the general tort limitations period in chapter 260, section 2A of the Massachusetts General Laws. Suppose that Elkins is injured in 2006, but does not sue. He dies of his injuries from the accident in 2013. A wrongful death claim for his death is distinct from the survival claim for pre-death injuries. It is a claim for the death itself, and the damages are those suffered by close relatives, not those of Elkins.[585] Even though Elkins could have sued for his pre-death injuries while alive, and did not, his personal representative has three years from the date of death to bring suit for wrongful death.[586] However, the cause of action for pre-death pain and suffering should be barred, since Elkins did not sue on it within the three-year tort limitations period.[587] Conversely, if

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[582] MASS GEN. LAWS ch. 260, § 10 ("Notwithstanding the provisions of the preceding paragraph, any action pursuant to this section may be commenced by the executor or administrator within three years from the date when the executor or administrator knew, or in the exercise of reasonable diligence, should have known of the factual basis for a cause of action.").

[583] *Cf.* Pobieglo v. Monsanto Co., 402 Mass. 112, 126-28 (1988) (O'Connor, J., dissenting) (arguing for application of discovery rule to claims for pre-death pain and suffering under MASS. GEN. LAWS ch. 229, § 6). The year after *Pobliego* was decided, Chapter 260 section 10 was amended to add the second paragraph, adopting the discovery rule for survival claims. *See* MASS. GEN. LAWS ch. 260, § 10. The same result should pertain if Elkins dies of his injuries due to the exposure.

[584] MASS. GEN. LAWS ch. 229, § 6.

[585] *See* MASS. GEN. LAWS ch. 229, § 2 (specifying recoverable damages on behalf of eligible survivors).

[586] MASS. GEN. LAWS ch. 260, § 10 (stating no extension of time for filing wrongful death claim); *See* Gaudette v. Webb, 362 Mass. 60, 64 (1972) (applying only to actions the deceased may have brought); Noon v. Beford, 349 Mass. 537, 539 (1965) (differing from any cause of action deceased may have had in lifetime).

[587] MASS. GEN. LAWS ch. 260, § 2A. If Elkins had died before the limitations period ran, the time for bringing the survival claim would have been governed by MASS. GEN. LAWS ch. 260, § 10, discussed earlier in this Section. *See* Pobieglo v. Monsanto Co., 402 Mass. 112, 118 (1988) (reasoning that if decedent survived, discovery rule would apply to conscious pain and suffering). If Elkins had been reasonably unaware of the grounds to sue for his injury before death, the claim would not accrue until his executor or administrator reasonably should be aware of it. MASS.

Elkins *had* sued for his personal injuries while alive, the claim for wrongful death could still be brought separately after his death.[588]

Counsel should also be aware of chapter 190B, section 3-109 of the Massachusetts General Laws, which is part of the Uniform Probate Code adopted in Massachusetts in 2008. That section provides:

> No statute of limitation running on a cause of action belonging to a decedent which had not been barred as of the date of death, shall apply to bar a cause of action surviving the decedent's death sooner than 4 months after death. A cause of action which, but for this section, would have been barred less than 4 months after death, is barred after 4 months unless tolled.[589]

This specifies that a claim that would be barred within 4 months after death will be barred after the four month period "unless tolled." It appears that chapter 260, section 10 if the Massachusetts General Laws does toll the limitations period in such cases, so that its provisions will apply instead of the four-month period in section 3-109.

Suppose that Elkins *had* sued for his personal injuries while alive, and recovered – or lost. The claim for wrongful death could still be brought separately after his death, since it is for the death itself, and the beneficiaries are the survivors. However, issues decided in the personal injury case might well foreclose relitigation. If, for example, the decedent had been adjudged at fault in the prior case, that finding would very likely apply in the wrongful death case on behalf of the survivors.[590]

XI. STATUTES OF LIMITATIONS GOVERNING CLAIMS AGAINST DECEDENTS AND ESTATES

The requirements for bringing actions against estates is a quagmire, into which even an experienced probate practitioner treads with care. A mere academic might best keep his distance. Thus, only some basics are covered in this section. For detailed exploration of this true arcana – made more arcane by Massachusetts' adoption of the Uniform Probate Code in

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GEN. LAWS ch. 260, § 10, ¶ 2. In that case it would "survive" even though the decedent died without suing on the claim herself. *Id.*

[588] *See* Ellis v. Ford Motor Co., 628 F. Supp. 849, 860 (D. Mass. 1986) (finding wrongful death claim proper though decedent had sued on personal injury claim while alive).

[589] MASS. GEN. LAWS ch. 190B, § 3-109.

[590] *Ellis*, 628 F. Supp. at 854-56 (D. Mass. 1986).

2008 – refer to Guy Newhall's treatise on the subject.[591]

The Massachusetts General Laws have long included a special statute of limitations for claims that arise against a party who dies before suit is brought on the claim. For many decades, such claims were governed by chapter 197, section 9 of the Massachusetts General Laws, which required creditors' claims against estates to be commenced within one year after the death of the decedent. This section was replaced by new chapter 190B, section 3-803(a) of the Massachusetts General Laws, enacted as part of the Uniform Probate Code in Massachusetts.[592] The new section provides:

> (a) Except as provided in this chapter, a personal representative shall not be held to answer to an action by a creditor of the deceased unless such action is commenced within 1 year after the date of death of the deceased and unless, before the expiration of such period, the process in such action has been served by delivery in hand upon such personal representative or service thereof accepted by him or a notice stating the name of the estate, the name and address of the creditor, the amount of the claim and the court in which the action has been brought has been filed with the register.

This section very closely tracks prior chapter 197, section 9 of the Massachusetts General Laws, so that most case law under chapter 197, section 9 should continue to govern issues in interpreting section 3-803(a). Prior to the enactment of section 3-803(a), the term "creditor" in section 9 was held to include a tort claimant.[593] However, case law under prior section 9 held that the one-year limitations period did not apply to parties seeking to enforce equitable interests in property.[594] If an executor or administrator has not been appointed, a creditor may apply for the appointment of an administrator.[595]

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[591] St. 2008, c. 521. The bulk of the new statute was made effective March 31, 2012. St. 2011, ch. 224. *See* GUY NEWHALL, SETTLEMENT OF ESTATES AND FIDUCIARY LAW IN MASSACHUSETTS, sec. 17.11-17.19 (5th ed. 1994 & Supp. 2013).

[592] MASS. GEN. LAWS ch. 190B, § 3-803.

[593] *See* In re Estate of Grabowski, 444 Mass. 715, 718 n. 6 (2005); Pelletier v. Chouinard, 27 Mass. App. Ct. 92, 93 n. 1 (1989).

[594] Howe v. Johnston, 39 Mass. App. Ct. 651, 653-54 (1996); New England Trust Co. v. Spaulding, 310 Mass. 424, 429-30 (1941); Troyanker v. Kamkina, No. 02-P-28, 02-P-29, 02-P-30, 2003 WL 22533189, at *3 (Mass. App. Ct. Nov. 7, 2003).

[595] Massachusetts General Hospital v. Funches, No. CIV. A. 98-2602-E, 1999 WL 218448, at *2 (Mass. Sup. Ct. Apr. 14, 1999).

Note the distinction between filing a claim with the executor of an estate and filing suit on a claim. Section 3-803(a) requires that an "action" be filed and service of process "in such action" be made on the representative. Thus, filing a claim in the probate proceeding does not satisfy the limitations period.[596]

The Probate Code carries over from prior law several provisions that provide escapes from the short limitations period in section 3-803(a). First, chapter 190B, section 3-803(e) of the Massachusetts General Laws (replacing chapter 197, section 10 of the Massachusetts General Laws) allows a complaint in equity to enforce creditors' claims against an estate that are not timely filed. The provision states:

> If the supreme judicial court, upon a complaint in equity filed by a creditor whose claim has not been prosecuted within the time limited by subsections (a) or (b), deems that justice and equity require it and that such creditor is not chargeable with culpable neglect in not prosecuting his claim within the time so limited, it may give him judgment for the amount of his claim against the estate of the deceased person, provided forthwith upon the filing of the complaint a notice such as provided in subsection (a) has been filed in the proper registry of probate; but such judgment shall not affect any payment or distribution made before the filing of such complaint and notice.[597]

This section authorizes the court to allow a claim to go forward against the estate, even though the one-year limitations period and in hand service requirements in chapter 190B, section 3-803(a) of the Massachusetts General Laws have not been met. The plaintiff must show that "justice and equity" require recognition of the claim, and that she has not been guilty of "culpable neglect."[598] Recovery in such action may not be satisfied from assets distributed prior the assertion of the claim. The statute has been invoked to save claims even where the creditor had hired an attorney who missed the one-year limitations period.[599]

Second, chapter 190B, section 3-803(d)(2) of the Massachusetts

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[596] *See* Gates v. Riley, 453 Mass. 460, 464 (2009) (noting claim was filed within year but suit brought after it had run).

[597] MASS. GEN. LAWS ch. 190B, § 3-803(e).

[598] *Id.*

[599] *See, e.g.*, Mullins v. Garthwait, 875 F.Supp. 14, 23-24 (D. Mass. 1994); Gates v. Reilly, 453 Mass. 460, 471-73 (2009); Downey v. Union Trust Co. of Springfield, 312 Mass. 405, 408-09 (1942); Hastoupis v. Gargas, 9 Mass. App. Ct. 27, 31-34 (1980).

General Laws provides an important escape from the one-year limitations period if a plaintiff's claim may be covered by insurance or bond. This escape states:

> (d) Nothing in this section affects or prevents:
>
> > (2) an action for personal injuries or death, if commenced more than one year after the date of death of the deceased, brought against the personal representative, provided that such action is commenced within three years next after the cause of action accrues, and provided further that any judgment recovered in any action so brought may be satisfied only from the proceeds of a policy of insurance or bond, if any, and not from the general assets of the estate.

Under this provision (which closely tracks former chapter 197, section 9A of the Massachusetts General Laws) a tort claimant may bring suit on a tort claim more than a year after the death of the tortfeasor, but may only satisfy the judgment in the case against the insurance or bond available to satisfy the claim. This allows recovery in cases in which the decedent had insurance for the claim, without interfering with the settlement and distribution of the assets of the decedent's estate.

If a decedent dies before the statute of limitations runs on a claim, it appears that the claim may be brought within one year of the date of death, even if the one-year period expires after the otherwise applicable statute of limitations would have run. Suppose, for example, that Stein has a claim against Willard that arose on January 1, 2011. Willard dies on November 1, 2013, several months before the three-year limitation period on the claim would run if Willard were still alive. Stein may apparently bring the claim against Willard's estate at any time up to November 1, 2014, a year from Willard's death. *Hatley v. Killion*[600] held that chapter 197, section 9 of the Massachusetts General Laws gives a claimant a year to file against the estate, even if the limitations period would have expired before that if the tortfeasor remained alive.[601] Assuming that chapter 190B, section 3-803(a) of the Massachusetts General Laws, the successor provision to chapter 197, section 9 of the Massachusetts General Laws is similarly interpreted, the same result should apply under the new provision. Howev-

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[600] 311 Mass. 293, 294 (1942) (interpreting MASS. GEN. LAWS ch. 197, § 9); *accord* Sherblom v. Brigham, 10 Mass. L. Rptr. 616, *2 (1999).

[601] *Hatley*, 311 Mass. at 294.

er, if the claim against the decedent is barred *before the decedent dies*, it should not be "revived" to allow suit within one year after the decedent's death.

In some cases a claim may not accrue until after the death of the decedent. For example, a promissory note might be due after her death. In other cases, a claim might not accrue because the plaintiff does not discover that she has a tort claim until after the potential defendant on that claim dies.[602] Or, a tolling provision may postpone the date of accrual, as for claimants who are minors at the time of the decedent's death.[603] Under the law prior to the adoption of the Uniform Probate Code, such claims were governed by chapter 197, section 13 of the Massachusetts General Laws. That section authorized a creditor whose claim had not accrued within a year of the decedent's death to present the claim in the probate court "at any time before the estate was fully administered." If the court found that the claim might be valid, it would order the executor or administrator to retain funds to satisfy the claim.[604] This was not a statute of limitations, however. It was a means of providing for the retention of assets in the estate. Presumably, the limitations period would be governed by ordinary limitations principles applicable to the particular claim in suit. It appears that preserving assets to satisfy such claims is now addressed under chapter 190B, section 3-810 of the Massachusetts General Laws.[605]

Before the adoption of the Uniform Probate Code, another provision addressed situations in which a claim accrued after the estate had been fully administered. Chapter 197, section 29 of the Massachusetts General Laws provided:

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[602] *See* Guertin v. McAvoy, 19 Mass. L. Rptr. 194, *5-*7 (Mass. Sup. Ct. 2005) (order denying motion to dismiss) (discussing accrual of sexual abuse claims brought against defendants who died years before suit brought). *But see* Crosslight Org., Inc. v. Williams, 13 Mass. L. Rptr. 363, *4-*5 (Mass. Sup. Ct. 2001) (order on motion for summary judgment) (holding no discovery rule under MASS. GEN. LAWS ch. 197, § 9(a)).

[603] *See* Drooz-Yoffie v. Baker, 14 Mass. L. Rptr. 472, *1 (Mass. Sup. Ct. 2002) (holding limitations period tolled by MASS. GEN. LAWS ch. 260 § 7 despite one-year limit in MASS. GEN. LAWS ch.197, § 9). *Cf. Guertin*, 19 Mass. L. Rptr. at *7 (holding that claim may be tolled until after death under MASS. GEN. LAWS ch. 260, § 7 due to mental incapacity).

[604] The first sentence of Chapter 197, section 13 of the Massachusetts General Laws provided:

> A creditor of the deceased, whose right of action shall not accrue within one year after the date of death of the deceased, may present his claim to the probate court at any time before the estate is fully administered; and if, upon examination thereof, the court shall find that such claim is or may become justly due from the estate, it shall order the executor or administrator to retain in his hands sufficient assets to satisfy the same.

[605] MASS. GEN. LAWS ch. 190B, § 3-810(a). Section 3-810(a) authorizes payment of such claims "if the claim has been allowed or established by a proceeding . . . ."

> A creditor whose right of action accrues after the expiration of said time of limitation, and whose claim could not legally be presented to the probate court . . . may, by action commenced within one year next after the time when such right of action accrues, recover such claim against the heirs and next of kin of the deceased or against the devisees and legatees under his will, each of whom shall be liable to the creditor to an amount not exceeding the value of the real or personal property which he has received from the estate of the deceased.

Although there is no successor provision for this section listed in the disposition table for chapter 190B of the Massachusetts General Laws,[606] it appears that a party asserting a claim after distribution should now proceed under chapter 190B, section 3-1004 of the Massachusetts General Laws, which authorizes recovery from distributees of the estate.

Under chapter 197, section 9 of the Massachusetts General Laws, it was held that principles of relation back of amendments apply to claims against an estate.[607] Thus, in *Xarras v. McLaughlin*[608], the plaintiff missed the one-year period in the former section 9 for bringing a claim against the administrator, but sued other defendants within that time.[609] The court held that the claim against the estate related back to the date of filing of the complaint against other parties, and was timely.[610] In addition, a Superior Court case holds a minor's claim timely, though filed after the expiration of the one-year period in former section 9, due to the tolling provision in chapter 260, section 7 of the Massachusetts General Laws.[611]

A separate limitations period governs claims by a plaintiff against an executor or administrator of an estate for their acts in administering the estate. Such claims must be brought within one year after *accrual*.[612] Thus, the discovery rule will apply to such claims, although it probably does not apply to claims against an estate that arose before the decedent's death.[613]

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[606] *See* MASS. GEN. LAWS ch. 197, References and Annotations, *available at* goo.gl/Vo5xYk (web address is case-sensitive).

[607] See *supra* Section IV discussing relation back of amendments.

[608] 66 Mass. App. Ct. 799 (2006).

[609] *Id.* at 799.

[610] *Id.* at 801-02 .

[611] Drooz-Yoffie v. Baker, 14 Mass. L. Rptr. 472, *1 (Mass. Sup. Ct. 2002).

[612] MASS. GEN. LAWS ch. 260, § 11

[613] *See* Crosslight Org., Inc. v. Williams, 13 Mass. L. Rptr. 363, *5 (2001) (holding discovery rule inapplicable to claims governed by MASS. GEN. LAWS ch. 197, § 9(a)).

XII. OTHER ISSUES IN LITIGATING STATUTES OF LIMITATIONS

A. Conflict of laws problems

A detailed discussion of the conflict of laws principles applicable to limitations questions is beyond the scope of this (already lengthy) article.[614] Massachusetts has adopted Section 142 of the Second Restatement of Conflict of Laws,[615] which provides a framework for deciding, in a case with connections to multiple states, how to select the applicable limitations period. Generally speaking, that section supports application of the Massachusetts limitations period to claims arising elsewhere, whether that period is longer or shorter than that of another state with connections to the case. If choice of law analysis points to the application of a foreign statute of limitations, it is very likely that the court will analyze related issues, such as tolling rules, under the law of the chosen state.[616]

B. Contractual changes to limitations periods

The Supreme Judicial Court has consistently upheld contractual provisions that shorten an applicable statute of limitations. Most recently, in *Creative Playthings Franchising Corp. v. Reiser*,[617] the court considered the following two-part contractual limitation on the time for bringing claims pursuant to a limitations provision in a franchise agreement:

> Notwithstanding any provision of law which provides for a longer limitations period, we agree that neither will bring, commence or maintain an action or claim of any kind, in connection with any liability or obligation of the other party arising in connection with this Agreement or the relationship created hereby, or otherwise, unless brought before the expiration of the earlier of (i) one (1) year after the date of discovery of the facts resulting in such alleged liability or obligation, or if earlier, the date such facts should

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[614] *See* J. Glannon & G. Teninbaum, *Conflict of Laws in Massachusetts: Part II: Related Problems in Selecting the Applicable Law*, 92 MASS. L. REV. 87, 97-90 (2009) (giving detailed discussion to conflict of laws questions applicable to limitations)

[615] RESTATEMENT (SECOND) OF CONFLICT OF LAWS, § 142 (1988 Revisions); *see* New England Telephone & Telegraph Co. v. Gourdeau Construction Co., Inc., 419 Mass. 658, 660-64 (1995) (applying section 142).

[616] *Id.*, cmt a. (commenting that law selected under § 142 "also determines all matters involving the application of the statute of limitations.").

[617] 463 Mass. 758 (2012).

> or could have been discovered with reasonable diligence; or (ii) eighteen (18) months after the date of the first act or omission giving rise to such alleged liability or obligation. Actions and claims brought or asserted after expiration of the applicable limitations period shall be barred.[618]

The *Creative Playthings* court held that a contractual shortening of the limitations period will be upheld "if the claim arises under the contract, and the agreed-upon limitations period is subject to negotiation by the parties, is not otherwise limited by controlling statute, is reasonable, is not a statute of repose, and is not contrary to public policy."[619]

C. Civil rights cases

There is no federal statute of limitations for actions under 42 U.S.C. § 1983; generally, the court borrows the statute of limitations for claims for personal injury of the state where the action is filed.[620] For § 1983 claims arising in Massachusetts the three-year period in chapter 260, section 2A applies.[621] Determining the time of accrual may be construed under federal law rather than under section 2A,[622] but tolling issues are governed by applicable state limitations law,[623] so Massachusetts counsel should look to the various tolling doctrines covered in this article in analyzing limitations issues in § 1983 cases. However, for civil rights claims created by Congress after 1990, 28 U.S.C. § 1658 provides a four-year limitations period.

Claims under the Massachusetts Civil Rights Act, which is codified at chapter 12, sections 11H & I of the Massachusetts General Laws, are governed by the three-year limitations period in chapter 260, section 5B of the Massachusetts General Laws.[624]

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[618] *Id.* at 760-61.

[619] *Id.* at 766. *See also* Albrecht v. Clifford, 436 Mass. 706, 717-18 (2002) (holding parties' contractual limitations period on express warranty claim, barring claim); Gen. Elec. Co. v. Lexington Contracting Corp., 363 Mass. 122, 124 (1973) (holding claim barred by one-year provision in surety bond).

[620] Wilson v. Garcia, 471 U.S. 261, 278-79 (1985), *superseded by statute* as *stated in* Jones v. R.R. Donnelley & Sons Co., 541 U.S. 369 (2004); Pagliuca v. City of Bos., 35 Mass. App. Ct. 820, 822 (1994); *see also* Owens v. Okure, 488 U.S. 235, 250 (1989) (holding court should borrow state's general or residual limitations period for personal injury actions).

[621] Johnson v. Rodriguez, 943 F.2d 104, 107 (1st Cir. 1991).

[622] *See* Rodriguez Narvaez v. Nazario, 895 F.2d 38, 41 n. 5 (1st Cir. 1990).

[623] *Pagliuca*, 35 Mass. App. Ct. at 822.

[624] *Id.* at 822-23.

D. Some quick procedural points

Expiration of the statute of limitations is an affirmative defense that must be raised by the defendant. If not raised, it is waived.[625] However, there is some authority for the proposition that a statute of repose, because it prevents a cause of action from accruing, cannot be waived.[626]

In theory, a limitations defense is not the proper subject of a Rule 12(b)(6) motion to dismiss, because an untimely claim is still valid until the defense is raised in a defendant's answer.[627] Consequently, a Rule 12(c) motion for judgment on the pleadings is often the appropriate motion, if the defense has been pleaded and no facts need be decided to address the motion.[628] However, it is not unusual for defendants to raise the defense by a Rule 12(b)(6) motion, particularly where the facts alleged in the complaint themselves demonstrate that the action is barred.[629]

In many cases, whether the limitations period has passed will depend upon facts – such as when the plaintiff reasonably should have been aware of her claim in a tort case. In such cases, the issue is best addressed through a motion for summary judgment under Mass. R. Civ. P. 56. If there are contested issues of fact, the defense will have to be determined at trial.

If a limitations defense is raised, and the governing limitations period has passed, the burden falls on the plaintiff to plead facts that would avoid the defense, such as fraudulent concealment, estoppel, or other tolling doctrines discussed in Section III of this article.[630]

XIII. CONCLUSION

As the length of this article suggests, limitations defenses arise frequently, raise many complex issues in litigation in the Massachusetts courts, and threaten to terminate litigation without reaching the merits. Hopefully this article will provide a resource for litigators who confront these issues in the practice of law.

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[625] McLearn v. Hill, 276 Mass. 519, 522-23 (1931).

[626] Riley v Bensson, No. 10–P–1906, 2011 WL 5515305, at *1 (Mass. App. Ct. Nov. 14, 2011).

[627] *See* Chandler v. Dunlop, 311 Mass. 1, 4 (1942) (holding case determined on plea in abatement not motion to dismiss).

[628] Springfield Library & Museum Assoc., Inc. v. Knoedler Archivum, Inc., 341 F. Supp. 2d 32, 36 (D. Mass. 2004).

[629] Babco Indus. Inc. v. New England Merch. Nat'l Bank, 6 Mass. App. Ct. 929, 929-30 (1978).

[630] Friedman v. Jablonski, 371 Mass 482, 487 (1976).

APPENDIX ONE: A POTPOURRI OF COMMONLY APPLICABLE MASSACHUSETTS STATUTES OF LIMITATIONS

[The citations below are to limitations provisions the author and his very able research assistant have encountered in researching this article. It is included for whatever help it may be to practitioners. It does not purport to be a complete list of limitations provisions in the Massachusetts General Laws.]

G.L. c. 15C, § 22A - Civil actions; liability, losses, expenses; insurance; limitation of actions (Massachusetts College Student Loan Authority)

GL c. 40A, § 7 – Enforcement of zoning regulations; violations; penalties; jurisdiction of superior court

G.L. c. 79, § 16 - Time for filing petition [Eminent Domain]

G.L. c. 84, § 18 - Notice of injury; contents; limitation of action [Defects in public ways]

G.L. c. 106, § 2-318 - Lack of Privity in Actions Against a Manufacturer, Seller, Lessor or Supplier of Goods

G.L. c. 106, § 2-725 - Statute of Limitations in Contracts For Sale

G.L. c. 112, § 225 - Complaints against licensed home inspectors; proof of errors and omissions insurance policy; time limitation; liability

G.L. c. 143, § 71P- Actions Against Ski Area Operators; Limitations

G.L. 149, § 105A - Discrimination in payment of wages on basis of sex of employee prohibited; damages; actions in general; assignment of claim; limitations

G.L. c. 149, § 150 – Complaint for violation of certain sections; defenses; payment after complaint; assignments; loan of wages to employer; civil action [Certain wage claims]

GL c. 151, § 20A – Limitation period for criminal or civil action [Certain wage claims]

G.L. c. 151B, § 5 - Complaints; procedure; limitations; bar to proceeding; award of damages [Employment Discrimination]

G.L. c. 183B, § 48 - Limitation of actions for breach of warranties [Real Estate Time- Share Agreements]

G.L. c. 184, § 24 – Defects, irregularities or omissions in deeds; curative period

G.L. c. 190B, § 3-803 - Limitations on presentation of claims [Claims against decedents]

G.L. c. 229, § 2 - Actions for Wrongful Death

G.L. c. 231B, § 3 - Enforcement of contribution; limitation; effect of judgment against one tortfeasor; judgment determining liability

G.L. c. 244, § 17A - Limitation of actions [Deficiencies Following Foreclosure]

G.L. c. 253, § 4 - Overflow or injury to land; action for compensation; limitation; venue

GL c. 254, § 11 – Action to enforce lien; time to commence; validity of lien [Mechanic's liens]

G.L. c. 258, § 4 - Instituting claims; final denial; limitation of actions [Massachusetts Tort Claims Act]

G.L. c. 260, § 1 - Actions requiring commencement within twenty years

G.L c. 260, § 2 - Contract actions; actions upon judgments or decrees of courts of record

G.L. c. 260, §2A - Tort, contract to recover for personal injuries, and replevin actions

G.L. c. 260, § 2B - Tort actions arising from improvements to real property

G.L. c. 260, § 2C - Actions for damages, etc. for physical alteration or destruction of fine art

G.L. c. 260, § 2D - Actions to recover costs of asbestos related corrective actions

G.L. c. 260, § 2E – Actions Against the Dalkon Shield Claimants Trust

G.L. c. 260, § 3 - Misconduct or negligence of deputies; actions against sheriffs

G.L. c. 260, § 3A - Claims against commonwealth

G.L. c. 260, § 4 - Certain tort or contract actions for malpractice, error or mistake

G.L. c. 260, § 4A – Back wages, action to recover

G.L. c. 260, § 4B - Hit and run accidents

G.L. c. 260, § 4C - Sexual abuse of minors

G.L. c. 260, § 4D - Civil remedies for victims of trafficking of persons for sexual servitude; damages; time for actions; representation of victim's rights by others

G.L. c. 260, § 5 – Penalties and forfeitures

G.L. c. 260, § 5A – Consumer protection actions

G.L. c. 260, § 5B – Civil Rights Actions

G.L. c. 260, § 7 - Minors and incapacitated persons [Tolling]

G.L. c. 260, § 8 - Citizens of enemy country; suspension of limitation [Tolling]

G.L. c. 260, § 9 - Nonresident defendant; suspension of limitation [Tolling]

G.L. c. 260, § 10 – Death of a party; effect

G.L. c. 260, § 11 – Contracts or acts of fiduciaries

G.L. c. 260, § 12 - Fraudulent concealment; commencement of limitations [Tolling]

G.L. c. 260, § 18 - Actions by state; laws applicable

G.L. c. 260, § 19 - Special limitations [outside of chapter 260]

G.L. c. 260, § 21 - Recovery of land

G.L. c. 260, § 22 - Accrual of right or title to land; limitation

G.L. c. 260, § 28 - Possession of land; requisites

G.L. c. 260, § 29 - Estates tail; barring remainders and reversions

G.L. c. 260, § 30 - Estates tail; death of tenant; effect

G.L. c. 260, §31 - Actions by commonwealth

G.L. c. 260, §31a - Right of entry for condition broken or possibility of reverter; procedure

G.L. c. 260, §32. Dismissal of action or reversal or vacation of judgment; commencement of new action. [Saving statute]

G.L. c. 260, § 33 - Obsolete mortgages

G.L. c. 260, § 35 - Mortgage defined; commencement of proceedings, prerequisites; application of Secs. 33 to 35

G.L. c. 260, § 36 - Application; computation [Counterclaims]

APPENDIX TWO: TEXT OF MOST FREQUENTLY APPLICABLE MASSACHUSETTS STATUTES OF LIMITATIONS

G.L. c. 229, § 2. Actions for Wrongful Death

. . . An action to recover damages under this section shall be commenced within three years from the date of death, or within three years from the date when the deceased's executor or administrator knew, or in the exercise of reasonable diligence, should have known of the factual basis for a cause of action, or within such time thereafter as is provided by section four, four B, nine or ten of chapter two hundred and sixty.

G.L. c. 260, § 2. Contract actions; actions upon judgments or decrees of courts of record

Actions of contract, other than those to recover for personal injuries, founded upon contracts or liabilities, express or implied, except actions limited by section one or actions upon judgments or decrees of courts of record of the United States or of this or of any other state of the United States, shall, except as otherwise provided, be commenced only within six years next after the cause of action accrues.

G.L. c. 260, §2A. Tort, contract to recover for personal injuries, and replevin actions

Except as otherwise provided, actions of tort, actions of contract to recover for personal injuries, and actions of replevin, shall be commenced only within three years next after the cause of action accrues.

G.L. c. 260, §4. Certain tort or contract actions for malpractice, error or mistake

Actions of contract or tort for malpractice, error or mistake against attorneys, certified public accountants and public accountants, actions for assault and battery, false imprisonment, slander, libel, actions against sheriffs, deputy sheriffs, constables or assignees in insolvency for the taking or conversion of personal property, actions of tort for injuries to the person against counties, cities and towns, and actions of contract or tort for malpractice, error or mistake against hairdressers, operators and shops registered under sections eighty-seven T to eighty-seven JJ, inclusive of chapter one hundred and twelve, actions of tort for bodily injuries or for death the payment of judgments in which is required to be secured by chapter ninety and also actions of tort for bodily injuries or for death or for damage to

property against officers and employees of the commonwealth, and of any county, city or town, arising out of the operation of motor or other vehicles owned by the commonwealth, including those under the control of said commission, or by any such county, city or town, suits by judgment creditors in such actions of tort under section one hundred and thirteen of chapter one hundred and seventy-five and clause (9) of section three of chapter two hundred and fourteen and suits on motor vehicle liability bonds under section thirty-four G of said chapter ninety shall be commenced only within three years next after the cause of action accrues.

Actions of contract or tort for malpractice, error or mistake against physicians, surgeons, dentists, optometrists, hospitals and sanitoria shall be commenced only within three years after the cause of action accrues, but in no event shall any such action be commenced more than seven years after occurrence of the act or omission which is the alleged cause of the injury upon which such action is based except where the action is based upon the leaving of a foreign object in the body.

For the purposes only of this section, an officer or soldier of the military forces of the commonwealth, as defined in chapter thirty-three, shall while performing any lawfully ordered military duty be deemed to be an officer or employee of the commonwealth.

G.L. c. 260, § 5A. Consumer protection actions

Actions arising on account of violations of any law intended for the protection of consumers, including but not limited to the following: chapter seventy-five C; chapter seventy-five D; section seven N of chapter ninety; sections twenty-one, twenty-one D, twenty-eight, forty-eight, forty-nine, sixty-nine, and seventy of chapter ninety-three; chapter ninety-three A; sections forty-six A to forty-six R, inclusive, and sections ninety-six to one hundred and fourteen B, inclusive, of chapter one hundred and forty; chapter one hundred and forty D; section one hundred and twenty-seven A of chapter one hundred and sixty-four; chapter one hundred and seventy-six D; sections fourteen, fifteen B, fifteen C, and eighteen of chapter one hundred and eighty-six; sections thirteen I, thirteen J, and thirteen K of chapter two hundred and fifty-five; chapter two hundred and fifty-five B; chapter two hundred and fifty-five C; and chapter two hundred and fifty-five D; whether for damages, penalties or other relief and brought by any person, including the attorney general shall be commenced only within four years next after the cause of action accrues.

G.L. c. 260, § 5B. Civil rights actions

Actions arising on account of violations of any law intended for the

protection of civil rights, including but not limited to actions alleging employment, housing and other discrimination on the basis of race, color, creed, national origin, sex, age, ancestry or handicap shall be commenced only within three years next after the cause of action accrues.

G.L. c. 260, §10. Death of a party; effect

If a person entitled to bring or liable to any action before mentioned dies before the expiration of the time hereinbefore limited, or within thirty days after the expiration of said time, and the cause of action by law survives, the action may be commenced by the executor or administrator at any time within the period within which the deceased might have brought the action or within two years after his giving bond for the discharge of his trust and against the executor or administrator in accordance with the limitations provided by chapter one hundred and ninety-seven, relative to the limitation of actions against the executor or administrator by creditors of the deceased. If a person, liable to an action for death the payment of the judgment in which is required to be secured by chapter ninety, dies before the expiration of the time limited in section four, or within thirty days after the expiration of said time, the action may be commenced against the executor or administrator subject to the pertinent limitations in chapter one hundred and ninety-seven, relative to the limitation of actions against the executor or administrator by creditors of the deceased.

Notwithstanding the provisions of the preceding paragraph, any action pursuant to this section may be commenced by the executor or administrator within three years from the date when the executor or administrator knew, or in the exercise of reasonable diligence, should have known of the factual basis for a cause of action.

G.L. c. 260, §32. Dismissal of action or reversal or vacation of judgment; commencement of new action.

If an action duly commenced within the time limited in this chapter is dismissed for insufficient service of process by reason of an unavoidable accident or of a default or neglect of the officer to whom such process is committed or is dismissed because of the death of a party or for any matter of form, or if, after judgment for the plaintiff, the judgment of any court is vacated or reversed, the plaintiff or any person claiming under him may commence a new action for the same cause within one year after the dismissal or other determination of the original action, or after the reversal of the judgment; and if the cause of action by law survives the executor or administrator or the heir or devisee of the plaintiff may commence such new action within said year.

G.L. c. 260, § 36. Application; computation

The provisions of law relative to limitations of actions shall apply to a counterclaim by the defendant. The time of such limitation shall be computed as if an action had been commenced therefor at the time the plaintiff's action was commenced.

Notwithstanding the provisions of the first paragraph of this section, a counterclaim arising out of the same transaction or occurrence that is the subject matter of the plaintiff's claim, to the extent of the plaintiff's claim, may be asserted without regard to the provisions of law relative to limitations of actions.

This section shall apply to actions brought by the commonwealth or for its benefit.