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Asbestos Litigation: Accrual of the Cause of Action

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ASBESTOS LITIGATION: ACCRUAL OF THE CAUSE OF ACTION

Kansas City v. W.R. Grace & Co.[1]

For decades, asbestos has been used in industry, ships, schools, and homes.[2] It is used for insulation, cement products, roofing and flooring products, and brake linings.[3] This fibrous mineral is strong and flexible.[4] An important reason for its extensive use is its resistance to heat, fire, and corrosion.[5] Unfortunately, asbestos also causes disease. Asbestos fibers inhaled into the lungs may cause asbestosis (scarring of the lungs which reduces breathing capacity) and various forms of cancer including mesothelioma (fatal cancer of the lining of the chest and abdomen).[6]

For this reason, there has been a widespread movement on the part of building owners and schools to remove asbestos from their property. This has resulted in a large amount of litigation to recover the costs of containment or removal of the asbestos.[7] Property damage caused by asbestos raises some complicated legal questions. One of the most complex issues faced by the courts is when the cause of action accrues for purposes of the statute of limitations.[8]

Kansas City v. W.R. Grace & Co.[9] focused on the accrual of a claim for property damage caused by the presence of asbestos. The Missouri Court of Appeals found that the cause of action did not accrue until the asbestos fibers had contaminated the air to the extent that it became a

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1. 778 S.W.2d 264 (Mo. Ct. App. 1989).

2. D. HENSLER, W. FELSTINER, M. SELVIN & P. EBENER, ASBESTOS IN THE COURTS: THE CHALLENGE OF MASS TOXIC TORTS 1 (1985) [hereinafter D. HENSLER].

3. J. KAKALIK, P. EBENER, W. FELSTINER, G. HAGGSTROM & M. SHANLEY, VARIATION IN ASBESTOS LITIGATION COMPENSATION AND EXPENSES 3 (1984) [hereinafter J. KAKALIK].

4. *Id.*

5. *Id.*

6. *Id.*

7. *See id.* at 4.

8. *See* D. HENSLER, *supra* note 2, at 37-41.

9. 778 S.W.2d 264 (Mo. Ct. App. 1989).

potential health hazard to the occupants.[10] In *W.R. Grace & Co.*, the court determined there "were genuine issues of material fact as to when" the release of fibers reached an unacceptable level—a level that would pose a health risk. Evidence had been introduced which indicated that a risk had not been present until approximately 1985. Because of this evidence, the court held that summary judgment should not have been granted on the issues of negligence and strict liability.[11]

I. THE FACTS

Kansas City, a municipal corporation, filed suit against ten respondents who were in the business of manufacturing, selling, or installing construction materials which contained asbestos.[12] Kansas City alleged property damage caused by the asbestos-containing products manufactured and installed by the respondents at Kansas City International Airport (KCI) and Kansas City Downtown Airport (Downtown Airport).[13]

The Downtown Airport was constructed between 1958 and 1964.[14] KCI was under construction from 1969 to 1972.[15] The respondents allegedly installed acoustical fireproofing and thermal insulation materials in the airport buildings during construction.[16]

Kansas City sought $20,000,000 in damages based upon the following six theories of recovery: negligence, strict liability, breach of implied warranty, breach of express warranty, fraud, and civil conspiracy.[17]

Kansas City based its claim for negligence upon the respondents' failure to warn the petitioners of the dangers of products containing asbestos.[18] In addition, the petitioners alleged that the asbestos in the respondents' product represented a concealed defect.[19]

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10. *Id.* at 269.
11. *Id.*
12. *Id.* at 267. The following respondents were named: Keene Corporation, U.S. Gypsum Company, Asbestospray Corporation, Fibreboard Corporation, Armstrong World Industries, Inc., ACandS, Inc., H & A Construction Corporation, Asbestos Product Manufacturing Corporation and The Celotex Corporation. Kansas City settled with W.R. Grace & Co. and stipulated to the dismissal of other parties. *Id.*
13. *Id.* at 267.
14. *Id.*
15. *Id.*
16. *Id.*
17. *Id.*
18. *Id.* at 268.
19. *Id.*

Kansas City alleged a breach of both express and implied warranties.[20] Kansas City claimed the respondents breached the implied warranty of merchantability at the Downtown Airport because the goods were not fit for their ordinary purpose.[21] Kansas City also alleged breach of express warranties of future performance at KCI.[22] This claim was based upon respondents' representations that the products were "safe, suitable for use, fully tested, and easy to maintain."[23] Kansas City argued that these representations extended to future performance.[24]

Kansas City also alleged fraudulent misrepresentation by the respondents.[25] The claim for fraud was based upon the material representations made by the respondents that the products had been fully tested, that they were safe, suitable for use in a public building, and that very little maintenance would be required to keep the products in a suitable condition.[26]

The final claim asserted by the petitioners was based upon civil conspiracy.[27] The petitioners alleged that the respondents acted in concert to cause the damage.

Kansas City filed suit on August 12, 1986.[28] On September 25, 1987, however, respondents both jointly and as individuals moved for summary judgement based upon the expiration of the statute of limitations.[29]

Delineating the applicable law, the court stated that a cause of action in tort for asbestos contamination does not accrue until the presence of the asbestos particles has created an unreasonable risk of harm.[30] The court noted that there must be "contamination" of the environment before the cause of action could accrue because prior to that event, damage would not have been sustained.[31] The petitioner asserted there was no contamination prior to 1981; thus, the statute of limitations should not bar its claims.[32]

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20. *Id.* at 267.
21. *Id.* at 271.
22. *Id.*
23. *Id.*
24. *Id.*
25. *Id.* at 273.
26. *Id.*
27. *Id.* at 273-74.
28. *Id.* at 267.
29. *Id.*
30. *Id.* at 268.
31. *Id.*
32. *See id.*

The respondents urged that Kansas City's knowledge of the harmful effects of asbestos for many years prior to filing suit caused its claim for damages to be barred by the statute of limitations.[33] The respondents charged that the petitioners had actual knowledge of the hazards of asbestos based upon seven sources of information.[34] These sources were as follows: Concerns during construction of KCI, National Emissions Standards for Hazardous Air Pollutants (NESHAPS) Report, Terminal A problems, The McCrone Report, National Institute of Occupational Safety and Health (NIOSH) Report, the City Health Department, and scientific knowledge.[35]

During the construction of KCI in 1972, a representative of the Occupational Safety and Health Administration (OSHA) recommended the use of products which did not contain asbestos rather than the asbestos-containing products actually used.[36] The substitute material would have complied with OSHA regulations concerning asbestos exposure.[37]

In addition, the respondents directed the court's attention to an article in the Kansas City Star on April 14, 1972.[38] The article focused on concerns that the construction workers at the airport were being exposed to asbestos dust.[39]

The NESHAPS Report also was cited as proof of Kansas City's knowledge of its claim.[40] These regulations were developed and published by the Environmental Protection Agency on April 6, 1973.[41] The regulations banned the use of building materials that contained greater than one percent asbestos.[42] They also required the use of certain methods for removal of the materials to prevent the release of asbestos into the environment upon renovation or demolition of the buildings.[43]

Respondents argued that Kansas City knew that asbestos was flaking off coated beams in Terminal A at KCI as early as April of 1975.[44] OSHA'S analysis of the situation, however, showed that the

33. *See id.*
34. *Id.* at 268-71.
35. *Id.* at 268-69.
36. *Id.* at 269.
37. *Id.*
38. *Id.*
39. *Id.*
40. *Id.*, 778 S.W.2d at 267.
41. *Id.*
42. *Id.*
43. *Id.*
44. *Id.* at 269.

level of asbestos fibers released were not above the specific limits set forth under the federal regulations.[45]

Next, the respondents urged the court to find Kansas City had the requisite knowledge for their claims to accrue based upon the McCrone Report in 1976.[46] Walter C. McCrone Associates tested the fireproofing in Terminals B and C at KCI.[47] This report, however, determined only that asbestos was present in the terminals.[48]

The respondents presented the results of an evaluation of the health hazards in Terminal B at KCI in 1977.[49] This test was conducted by NIOSH.[50] The results demonstrated a potential exposure to asbestos.[51] But the results also indicated that the hazard of asbestos was not immediate.[52] The report recommended a plan to either replace the asbestos-containing products with a safer product or seal the surfaces coated with asbestos to prevent the release of fibers into the environment.[53] This was presented as part of the regular maintenance of the building.[54]

The respondents further claimed the city had knowledge based upon the recommendation of the City Health Department.[55] The manager of the Environmental Hazards Section of Kansas City's Public Health Department believed that, by August of 1980, the asbestos posed a risk of serious health problems for the building's occupants.[56]

The final source of knowledge the respondents asserted was the scientific community which had established, prior to 1981, that exposure to asbestos presented a substantial and unreasonable risk.[57] As the court pointed out, however, public health officials still believed there was an acceptable level of asbestos to which one could be exposed without harm.[58]

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45. *Id.*
46. *Id.* at 270.
47. *Id.*
48. *Id.*
49. *Id.*
50. *Id.*
51. *Id.*
52. *Id.*
53. *Id.*
54. *Id.*
55. *Id.*
56. *Id.* Thomas Myslinski was the manager of the Environmental Hazards Section of the Kansas City Public Health Department. *Id.*
57. *Id.*
58. *Id.*

In 1985, Kansas City retained Hygienetics, Inc. to evaluate the hazards of asbestos at KCI.[59] The company was hired to inspect the premises and assess the levels of asbestos in the environment.[60] The evaluation stated there were no hazardous levels of asbestos in any of the buildings.[61] The report did recommend that the asbestos-containing products be removed to eliminate the concern that the level of asbestos in the air might increase in the future.[62] Kansas City filed suit against the respondents within one year of receiving this report.

The trial court granted summary judgement in favor of the respondents.[63] Following the reasoning of the respondents, the court declared that the cause of action had accrued prior to 1981. The trial court cited the NESHAPS Report as proof of Kansas City's knowledge of its claim.[64] Then, the trial court cited several cases for the proposition that everyone is charged with notice of the contents of federal regulations.[65] Thus, the trial court held that Kansas City was put on notice of its cause of action[66] and the claim was barred by the statute of limitations.[67]

Kansas City appealed the decision to the Western District of the Missouri Court of Appeals, arguing that the trial court had erred in entering summary judgement for the respondents.[68] The court of appeals reversed the decision of the trial court, stating there were genuine issues of material facts concerning accrual of the cause of action.[69]

The court stated that the petitioner's cause of action did not accrue until toxic asbestos fibers were released into the environment and created an unreasonable risk of harm.[70] According to the appellate court, the seven sources of knowledge urged by the respondents did not cause Kansas City's claim to accrue.[71] The court concluded that

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59. *Id.*
60. *Id.*
61. *Id.* at 270-71.
62. *Id.* at 271.
63. *Id.* at 267.
64. *Id.*
65. *Id.* (citing Federal Crop Ins. Corp. v. Merrill, 332 U.S. 380 (1947); United States v. Marksgraf, 736 F.2d 1179 (7th Cir.), *cert. denied*, 469 U.S. 1199 (1984)).
66. *Id.* at 269.
67. *Id.* at 268.
68. *Id.*
69. *Id.* at 268-75.
70. *Id.* at 268.
71. *Id.* at 275.

summary judgement was improper and should not have been granted.[72] The basis of the court's decision was that until asbestos fibers have contaminated the environment and created an unreasonable risk of harm, a cause of action in tort has not accrued because the injured party has not yet sustained damage that is capable of ascertainment.

II. LEGAL BACKGROUND

Statutes of limitations are favored in the law.[73] Limiting the time in which to bring an action is based upon sound reasons of public policy.[74] The most important purpose is to prevent the assertion of stale claims. This policy is supposed to safeguard defendants against fraud or the memory loss of witnesses.[75] In turn, it promotes the welfare and peace of society.[76]

One of the most difficult aspects of applying a statute of limitation is the starting point. The statute begins to run when the cause of action accrues. This concept is much more difficult to apply than it appears. There are different statutes of limitations for each cause of action.[77] In addition, accrual may occur at different times for each claim.[78]

In Missouri, the causes of action in negligence and strict liability are governed by section 516.120 of the Missouri Revised Statutes.[79] This statute allows a petitioner to file suit up to five years from the date of accrual.[80]

In section 516.100 of the Missouri Revised Statutes, the Missouri legislature provided some guidance for determining when a cause of

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72. *Id.*

73. *See, e.g.*, Hunter v. Hunter, 237 S.W.2d 100, 104 (Mo. 1951); Neal v. Laclede Gas Co., 517 S.W.2d 716, 719 (Mo. Ct. App. 1974).

74. *See* Baron v. Kurn, 164 S.W.2d 310, 317 (Mo. 1942); Williams v. Malone, 592 S.W.2d 879, 882 (Mo. Ct. App. 1956).

75. *Baron*, 164 S.W.2d at 317.

76. *Id.*

77. *See* MO. REV. STAT. § 516.120 (1986) (five year statute of limitation); MO. REV. STAT. § 400.2-725 (1986) (four year statute of limitation).

78. *See* MO. REV. STAT. §§ 400.2-725, 516.120 (1986).

79. MO. REV. STAT. § 516.120(4) (1986). The statute provides five years from the date of accrual in which to bring the following actions:

> An action for taking, detaining or injuring any goods or chattels, including actions for the recovery of specific personal property, or for any other injury to the person or rights of another, not arising on contract and not herein otherwise enumerated.

Id.

80. *Id.*

action accrues.[81] This statute sets the time for accrual of a claim when the "damage resulting therefrom is sustained and is capable of ascertainment."[82] In many cases the extent of the damage will depend on uncertain future events.[83] This uncertainty does not prevent the plaintiff from filing suit, nor does it delay accrual of the cause of action.[84] The courts simply require that "some damages have been sustained, so that the claimants know that they have a claim for some amount."[85]

Some plaintiffs have tried to avoid the bar of the statute of limitations by arguing that the claim did not accrue until they discovered the specific cause of the damage.[86] Missouri courts have rejected this argument except in limited circumstances.[87] The cause of action is said to accrue when the plaintiff first becomes aware that damage is occurring.[88]

The word "ascertainment" always has been interpreted to mean that some damage exists.[89] As stated by the courts, knowledge of the precise amount has never been a requirement to file suit.[90]

School District of Independence v. U.S. Gypsum[91] was the most recent case in Missouri dealing with property damage caused by the presence of asbestos. Although this court did not address, specifically,

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81. MO. REV. STAT. § 516.100 (1986). This statute provides:

> Civil actions, other than those for the recovery of real property, can only be commenced within the periods prescribed in the following sections, after the causes of action shall have accrued; provided, that for the purposes of sections 516.100 to 516.370, the cause of action shall not be deemed to accrue when the wrong is done or the technical breach of contract or duty occurs, but when the damage resulting therefrom is sustained and capable of ascertainment, and, if more than one item of damage, then the last item, so that all resulting damage may be recovered, and full and complete relief obtained.

Id.

82. *Id.*

83. Dixon v. Shafton, 649 S.W.2d 435, 439 (Mo. 1983) (en banc); Lato v. Concord Homes, Inc., 659 S.W.2d 593, 595 (Mo. Ct. App. 1983).

84. *Dixon,* 649 S.W.2d at 439.

85. *Id.*

86. *See* Jepson v. Stubbs, 555 S.W.2d 307, 312-13 (Mo. 1977) (en banc); *Lato,* 659 S.W.2d at 594.

87. The legislature adopted the "discovery" concept for fraud, MO. REV. STAT. § 516.120(5) (1986), and medical malpractice, MO. REV. STAT. § 516.105 (1986).

88. *Lato,* 659 S.W.2d at 595.

89. *Id.*

90. *Dixon,* 649 S.W.2d at 439.

91. 750 S.W.2d 442 (Mo. Ct. App. 1988).

the issue of accrual, the court focused on the necessity of damage to create a cause of action.[92] The school district sued for the cost of removing asbestos from the school buildings.[93] The defendant argued that the damage claimed was only for an injury to the product itself, thus, it was not compensable.[94] The court rejected this contention.[95]

The school district stated a claim for present property damage.[96] Although the injury, through contamination, was related to the future risk of harm, the damages sought were the actual costs incurred to abate the hazards of the product.[97] This is a present injury which is ascertainable.

The school district claimed that the asbestos-containing product had released fibers which contaminated the school buildings and their contents.[98] This contamination endangered the life and health of the building's occupants.[99] Although none of the school's occupants had developed a disease, the plaintiffs were allowed to pursue their cause of action.[100] The Supreme Court specifically stated that the school district "should not be forced to wait until disease manifests itself before being permitted to maintain an action in tort."[101]

In *W.R. Grace & Co.*, the petitioners claimed that the respondents breached both the implied and express warranties.[102] The statute of limitations governing the implied warranty claim at the Downtown Airport is codified at section 516.120 of the Missouri Revised Statutes.[103] This statute is applicable because the goods were purchased prior to 1965.[104] The petitioners were given five years from accrual to commence an action against the respondents.[105] As noted above, accrual of the cause of action occurs "when the damage resulting therefrom is sustained and is capable of ascertainment."[106]

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92. *Id.* at 454-55.
93. *Id.* at 444.
94. *Id.* at 454. The Missouri Supreme Court denied recovery in tort where the only damage was to the product itself in Sharp Bros. v. American Hoist & Derrick Co., 703 S.W.2d 901, 903 (Mo. 1986) (en banc).
95. *School Dist. of Independence*, 750 S.W.2d at 455.
96. *Id.* at 454.
97. *Id.* at 454-55.
98. *Id.* at 456.
99. *Id.*
100. *Id.* at 457.
101. *Id.*
102. *W.R. Grace & Co.*, 778 S.W.2d at 267.
103. MO. REV. STAT. § 516.120(4) (1986) is set forth in full *supra* note 78.
104. *W.R. Grace & Co.*, 778 S.W.2d at 271.
105. MO. REV. STAT. § 516.120 (1986).
106. *Id.* § 516.100.

The express warranties concerning KCI are governed by section 400.2-725[107] of the Missouri Revised Statutes since the products were purchased after 1965.[108] This statute allows a petitioner four years from accrual in which to bring a cause of action.[109] This statute also provides that a claim accrues when the breach occurs regardless of the buyer's lack of knowledge of the breach.[110]

In addition, the statute carves out an exception for warranties of future performance. If an express warranty extends to the future performance of the goods and the breach cannot be discovered until such performance, accrual occurs when "the breach is or should have been discovered."[111]

Missouri courts consider certain factors in deciding whether a warranty extends to future performance.[112] The statute requires that the warranty "explicitly" refer to future performance.[113] Courts have interpreted this provision to mean the warranty of future performance must be "unambiguous, clearly stated, or distinctly set forth."[114] In addition, the warranty language must guarantee the future performance of the goods for a specified period of time.[115] Some courts have held

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107. *Id.* § 400.2-725.

108. *W.R. Grace & Co.*, 778 S.W.2d at 272.

109. MO. REV. STAT. § 400.2-725(1) (1986). Section 400.2-725(1) provides:

> An action for breach of any contract for sale must be commenced within four years after the cause of action has accrued. By the original agreement the parties may reduce the period of limitation to not less than one year but may not extend it.

Id.

110. MO. REV. STAT. § 400.2-725(2) (1986). This statute provides in pertinent part:

> A cause of action accrues when the breach occurs, regardless of the aggrieved party's lack of knowledge of the breach. A breach of warranty occurs when tender of delivery is made, except that where a warranty explicitly extends to future performance of the goods and discovery of the breach must await the time of such performance the cause of action accrues when the breach is or should have been discovered.

Id.

111. *Id.*

112. *See, e.g.*, R.W. Murray Co. v. Shatterproof Glass Corp., 697 F.2d 818, 822 (8th Cir. 1983); Black Leaf Prods. Co. v. Chemsico, Inc., 678 S.W.2d 827, 830 (Mo. Ct. App. 1984).

113. MO. REV. STAT. § 400.2-725(2) (1986).

114. *R.W. Murray Co.*, 697 F.2d at 822.

115. *Id.*

that a warranty stating a product is free from defect in quality or workmanship is a warranty of future performance.[116]

If an express warranty extends to future performance, the cause of action accrues when the breach is or should have been discovered.[117] In order to determine when the breach should have been discovered, the courts have looked to the standard for an action in fraud.[118] The fraud standard has been interpreted as the time when the plaintiff knew or should have known the "controlling facts."[119] The Missouri Supreme Court has held that if the petitioner could have discovered the facts with the exercise of reasonable diligence, then he will be deemed to have discovered them.[120]

For fraudulent misrepresentation the governing statute is section 516.120(5) of the Missouri Revised Statutes.[121] Under this section, the applicable statute of limitations is five years from the accrual of the cause of action.[122] Missouri courts have deemed that accrual does not occur until the "discovery by the aggrieved party, at any time within ten years, of the facts constituting fraud."[123] The plaintiff is then given an additional five years in which to file suit. This statute has been interpreted to mean that a plaintiff has fifteen years to bring an action for fraud.[124] If a party acts to conceal the fraud, however, the statute is tolled until discovery of the fraud.[125]

As noted before, this statute places a duty on the plaintiff to make an inquiry to discover the facts concerning the fraud.[126] If the facts are discoverable, the plaintiff will be deemed to know of the fraud and the statute of limitations will begin to run against the claim.[127]

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116. *E.g., Black Leaf Products*, 678 S.W.2d at 830.

117. MO. REV. STAT. § 400.2-725(2) (1986).

118. *E.g., Black Leaf Products*, 678 S.W.2d at 830-31.

119. *Id.* at 830.

120. *Id.* at 831 (citing Brown v. Irving-Pitt Mfg. Co., 292 S.W.2d 1023, 1025 (Mo. 1927)).

121. *W.R. Grace & Co.*, 778 S.W.2d at 273.

122. MO. REV. STAT. § 516.120(5) (1986). Section 516.120(5) grants a party five years from the date of accrual. It provides:

> An action for relief on the ground of fraud, the cause of action in such case to be deemed not to have accrued until the discovery by the aggrieved party, at any time within ten years, of the facts constituting the fraud.

Id.

123. *Id.*

124. *See* Anderson v. Dyer, 456 S.W.2d 808, 811-12 (Mo. Ct. App. 1970).

125. *See* Obermeyer v. Kirshner, 38 S.W.2d 510, 514 (Mo. Ct. App. 1931).

126. Burr v. National Life & Accident Ins. Co., 667 S.W.2d 5, 7 (Mo. Ct. App. 1984).

127. *Id.* at 7.

The final claim made by the petitioners in *W.R. Grace & Co.* was based upon civil conspiracy.[128] This cause of action is also governed by section 516.120 of the Missouri Revised Statutes.[129] Thus, petitioners were given five years from accrual to file an action.[130] Accrual occurs when the "damage is sustained and capable of ascertainment."[131] Courts have interpreted the cause of action to begin upon the occurrence of the last overt act charged that results in damage to the plaintiff.[132]

III. THE INSTANT DECISION

In deciding the case at hand, the Missouri Court of Appeals considered the accrual statutes and their implications. The Court decided that petitioner's cause of action had not accrued prior to 1981.

The court of appeals found that the cause of action did not accrue until the fibers actually contaminated the environment and the damage was ascertainable.[133] Each claim was analyzed with respect to the accrual statutes based on the seven sources of knowledge asserted by the respondents.[134] Because the accrual statutes require either that the damage is sustained and "capable of ascertainment" or that the plaintiff has "discovered" the facts surrounding the claim, the court focused on the knowledge of the petitioners. The court determined that the statutes of limitations had not lapsed for any of the petitioner's claims.[135]

The court found that the concerns about the construction workers at KCI being exposed to asbestos were not sufficient to establish that Kansas City knew the product presented a health hazard that required removal of the products.[136]

The court also rejected the argument that the NESHAPS Report gave Kansas City the requisite knowledge for their claims to accrue.[137] The NESHAPS Report neither required removal of the asbestos,[138] nor

128. *W.R. Grace & Co.*, 778 S.W.2d at 273.
129. MO. REV. STAT. § 516.120 (1986).
130. *Id.*
131. *Id.* § 516.100.
132. Rippe v. Sutter, 292 S.W.2d 86, 90 (Mo. 1956).
133. *W.R. Grace & Co.*, 778 S.W.2d at 268.
134. *Id.* at 269-71.
135. *Id.* at 275. The Court did affirm the grant of summary judgment for the breach of express warranty claim with respect to Asbestospray. *Id.*
136. *Id.* at 269.
137. *Id.*
138. *Id.*

addressed whether undisturbed asbestos would be a health hazard.[139] Thus, the court found that these regulations were limited to certain circumstances which were not present in this case.

The problems experienced in Terminal A were also insufficient to cause the petitioner's claims to accrue.[140] The evidence showed that Kansas City was aware that asbestos fibers were released from coated beams in Terminal A.[141] An OSHA Report was filed at the time, however, which concluded that the level of fibers in the air did not exceed the limit permitted by federal standards.[142] Thus, Kansas City was aware of the problems with the asbestos-containing products but this did not establish knowledge that the asbestos presented an unreasonable risk of harm.[143] Therefore, the court found that the cause of action did not accrue.

The McCrone Report, relied upon by the respondents, merely found that asbestos was present in Terminals B and C.[144] The court believed that this could not by itself cause the statute of limitations to begin to run.[145]

The court also rejected the argument that the NIOSH Report demonstrated knowledge on the part of Kansas City with respect to the potential health hazard presented.[146] Because the report declared that an immediate problem did not exist, the court found that environmental contamination had not been established and that an unreasonable risk of harm was not capable of ascertainment.[147]

Another source of knowledge urged by the respondents was the belief of the City Health Department Manager that the asbestos posed a serious health risk to the building's occupants.[148] The removal of asbestos was encouraged by several individuals. Again the court found no proof that the fibers had contaminated the air and that an unreasonable risk of harm was present.[149]

The final assertion made by the respondents was based on the knowledge of the scientific community.[150] The court rejected this argument because some public health officials in the 1970's still believed

139. *Id.*
140. *Id.* at 269-70.
141. *Id.* at 269.
142. *Id.*
143. *Id.* at 269-70.
144. *Id.* at 270.
145. *Id.*
146. *Id.*
147. *Id.*
148. *Id.*
149. *Id.*
150. *Id.*

there was a safe lower level of exposure.[151] It was not until 1983 that OSHA explicitly declared that there was not a safe level of exposure to asbestos.[152]

The court believed there were genuine issues of material facts concerning when the cause of action accrued for all claims governed by the five year statute, section 516.120.[153] Thus, the court reversed summary judgement on the negligence, strict liability, fraud, and the civil conspiracy claims.

The breach of express warranty claims were examined in greater detail because the petitioners claimed that the warranty extended to future performance.[154] Defendant Asbestospray Corporation represented that its product was "easy to maintain," and it "provides a permanent surface that will not crack, dust or flake."[155] Defendant Keene Corporation represented that their product was tested and found to have "resistance to air erosion and nondusting properties," which assured "the safety of application."[156]

The problems experienced in Terminal A with cracking, dusting, and flaking of the product along with the NIOSH Report established damage from maintenance and the petitioner's ability to ascertain the damage.[157] Thus, the appeals court affirmed the grant of summary judgement for this claim against Asbestospray Corporation because the statute of limitations barred the claim.

Because the Keene Corporation made representations about the safety of its product, the court found that summary judgement was improper.[158] The court concluded that there were genuine issues of material facts with respect to the petitioner's knowledge of the hazards of the product and its ability to ascertain the damage.

The court determined that genuine issues of material facts existed for all of the causes of action pleaded by the petitioners except the breach of the express warranty of future performance by Asbestospray.[159] The court determined that a cause of action in tort does not accrue until asbestos fibers are released into the environment, creating an unreasonable risk of harm, because damage has not been sustained that is capable of ascertainment.

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151. *Id.*
152. *Id.*
153. *Id.* at 271.
154. *Id.*
155. *Id.* at 272.
156. *Id.*
157. *Id.*
158. *Id.* at 272-73.
159. *Id.* at 275.

IV. LEGAL ANALYSIS

Kansas City v. W.R. Grace & Co. will affect many pending asbestos cases. The court's determination that contamination is required to cause a claim to accrue will place many asbestos manufacturers in danger of liability even though they believed the statute of limitations had run.

In addition, the court's decision will affect the accrual of a cause of action in many other cases. This decision may cause confusion and disparate results in different courts. The standard set forth by the court does not clearly state when the damage was sustained or even when the damage is capable of ascertainment. The seven sources of knowledge set forth by the respondents were rejected by the court. The rationale behind this determination is unclear.

The court focused on the discussion of contamination in *School District of Independence v. U.S. Gypsum.*[160] This particular case did not address the accrual issue. Because Missouri courts do not permit recovery in tort when the product sold is the only thing damaged, the plaintiffs argued "contamination" had damaged the fixtures, curtains and rugs, and other similar property.[161] The court accepted this argument of contamination of the school's environment as sufficient to allow a strict liability claim. The court reasoned that there was property damage rather than just damage to the product itself.[162] *U.S. Gypsum,* however, does not stand for the proposition that a cause of action in tort for property damage due to asbestos does not accrue until asbestos fibers are released into the environment and the plaintiff is able to ascertain an unreasonable risk of harm.

If *School District of Independence v. U.S. Gypsum*[163] stood for this proposition, Kansas City's claims would not have accrued yet. The Hygienetics Report which was completed in 1985 did not establish that an unreasonably dangerous level of asbestos fibers was released into the environment.[164] The Report did recommend that the products be removed and replaced, but only as part of the regular maintenance of the building.[165] Thus, if the court accepted the plaintiff's argument that accrual requires "contamination," the present case would have to have been dismissed because the cause of action had yet to accrue.

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160. 750 S.W.2d 442 (Mo. Ct. App. 1988).

161. *See* Sharp Bros. Contracting Co. v. American Hoist & Derrick Co., 703 S.W.2d 901, 903 (Mo. 1986) (en banc).

162. *School Dist. of Independence,* 750 S.W.2d at 456.

163. 750 S.W.2d 442 (Mo. Ct. App. 1988).

164. *W.R. Grace & Co.,* 778 S.W.2d at 270-71.

165. *Id.* at 271.

The Hygienetics report does not differ substantially from the NIOSH Report of 1977. If the court believes the Hygienetics Report caused the claims to accrue, it is not clear why the NIOSH Report would not have done so at an earlier date.

There were some competing policy issues involved in this decision. The courts must have wrestled with the deprivation of the plaintiff's day in court. It seems unjust to deny an injured party the opportunity to recover for its losses which were caused by the defendant. The asbestos-containing products will either have to be removed or sealed—either one at a great cost to Kansas City. It would seem fair to force the companies who sold the products to face the consequences of having placed the product on the market since they benefitted from the sales.

Statutes of limitations, however, are favored in the law.[166] They were enacted to prevent the institution of stale claims. It seems inequitable to allow the plaintiff to benefit from its unwarranted delay in filing suit. It would make more sense to require the plaintiff to investigate a possible claim for damage. Facts existed which would have put a reasonable person on notice that he may have had a possible cause of action against the defendant. It would not be unjust to make the petitioner suffer for its own lack of diligence.

Accrual of a cause of action generally is measured at one of three times: when the original act causing the damage is completed, when the plaintiff becomes aware or should have become aware of the possibility of an injury, or when the harm is fully manifested. In order to illustrate these more clearly, an analogy can be drawn. If a contractor installs faulty wiring in a home, when does the cause of action accrue?

The first possible moment from which to measure the statute would be when the original act of installing the faulty wiring was completed. This might produce unjust results if the defect was latent and the plaintiff was unaware of a problem. The second possible time from which to measure accrual would be when the homeowner discovers the faulty wiring. This seems logical since the plaintiff now is aware of a claim for damages and can pursue his cause of action. This measuring point would be much more consistent with the important economic concept of mitigating damages. The third time from which to measure accrual would be when harm results from the damage. This may occur when the house catches on fire due to the faulty wiring. Clearly, this would seem to be the most illogical measure. Why should we require plaintiffs to suffer harm beyond the initial damage in order to cause their claims to accrue? Yet, this seems to be the one the court is advocating in the present case.

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166. Neal v. Laclede Gas Co., 517 S.W.2d 716, 719 (Mo. Ct. App. 1974); Hunter v. Hunter, 237 S.W.2d 100, 104 (Mo. 1951).

The Missouri statute provides that the cause of action accrues when "damage . . . is sustained and is capable of ascertainment."[167] This would seem to embody the second measure of time illustrated above—when the plaintiff becomes aware or should have become aware of the possibility of injury. The damage was sustained when the wrong was done. The cause of action should accrue when the plaintiff learns of his damage.

Missouri's adoption of the "capable of ascertainment" test represents the legislature's recognition that the act which triggers the accrual of a cause of action should not refer to the "technical" breach of duty but to a practical remedy.[168] Missouri case law indicates this language has been interpreted to refer to the time when the plaintiffs first became aware that they may have a possible claim for damage.[169]

Most other jurisdictions follow an approach which requires that the plaintiff have some degree of knowledge for the cause of action to accrue.[170] For example, one state marks accrual when the property is "first visibly affected" which seems to indicate that the plaintiffs were put on notice of a potential claim.[171] Other states start the statute running at the earliest time mentioned—at the time of installation.[172] All of these different measuring points indicate either the first or the second possible measure of my illustration, not the third. This is because it is illogical to require the damage to be fully manifested in order for accrual to occur.

As stated previously, however, the third measure seems to be what the court is advocating in this asbestos case. The damage was capable of ascertainment prior to 1981. This is demonstrated by the seven sources of knowledge that the defendants presented to the court. Thus, the plaintiffs were put on notice that they had a potential claim prior to 1981.

Other jurisdictions have addressed specifically the accrual of a cause of action for asbestos abatement. Recently, the Florida District

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167. MO. REV. STAT. § 516.100 (1986).

168. Note, *Developments in the Law—Statutes of Limitations*, 63 HARV. L. REV. 1177, 1205 (1950).

169. *See* Dixon v. Shafton, 649 S.W.2d 435 (Mo. 1983) (en banc); Lato v. Concord Homes, Inc., 659 S.W.2d 593 (Mo. Ct. App. 1983).

170. *See, e.g.*, City of Omaha v. Hellmuth, Obata & Kassabaum, Inc., 767 F.2d 457 (8th Cir. 1985); Almand Constr. Co. v. Evans, 547 So. 2d 626 (Fla. 1989).

171. Hickman v. North Sterling Irrigation Dist., 748 P.2d 1349 (Colo. Ct. App. 1987).

172. Boyd v. Orkin Exterminating Co., 381 S.E.2d 295 (Ga. Ct. App. 1989).

Court of Appeal addressed this issue.[173] The owner of a building brought suit against the seller of asbestos-containing material which was used in the building.[174] The court found that the cause of action was barred by the statute of limitations because the plaintiff could have discovered the presence of the asbestos in the building prior to the expiration of the statute of limitations.[175] Thus, the court did not even require knowledge on the part of the plaintiff, only that they could have discovered the problem through due diligence.

The Supreme Court of Vermont also faced this same issue. The University of Vermont filed suit for property damage against a chemical manufacturer of asbestos-containing products.[176] The court denied summary judgement based on the statute of limitations because Vermont case law provides that a cause of action does not accrue "until the plaintiff discovers or, in the exercise of reasonable diligence, should have discovered both the fact of his injury and the cause thereof."[177] In this case, the cause of action was not deemed to accrue until the school officials had determined which product contained the asbestos and, thus, which product had caused the harm.[178] This case can be distinguished from the present case because the plaintiff knew which products contained the asbestos.

In addition, the Eleventh Circuit addressed the issue in two recent cases applying Georgia law.[179] In answer to a certified question from the Court of Appeals, the Georgia Supreme Court found that the "discovery" rule applied only to cases of bodily injury.[180] Georgia commences the running of the statute of limitations when the asbestos-containing material is installed, rather than when it is discovered that the material poses a health hazard.[181]

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173. Times Publishing Co. v. W.R. Grace & Co.-Conn., 552 So. 2d 314 (Fla. Dist. Ct. App. 1989).

174. *Id.* at 315.

175. *Id.*

176. University of Vt. v. W.R. Grace & Co., 565 A.2d 1354 (Vt. 1989).

177. *Id.* at 1357 (quoting Cavanaugh v. Abbott Laboratories, 145 Vt. 516, 521-26, 496 A.2d 154, 160-61 (1985)).

178. *University of Vt.*, 565 A.2d at 1357-58.

179. Corporation of Mercer Univ. v. National Gypsum Co., 877 F.2d 35 (11th Cir. 1989); St. Joseph Hosp. v. Celotex Corp., 874 F.2d 764 (11th Cir. 1989).

180. Mercer Univ. v. National Gypsum Co., 258 Ga. 365, 368 S.E.2d 732 (1988).

181. *Corporation of Mercer Univ.*, 877 F.2d at 36; *St. Joseph Hosp.*, 874 F.2d at 765.

The most recent case which denied summary judgement to the defendants was in the United States District Court of Connecticut.[182] The Connecticut statute provides that the cause of action does not accrue "until the property damage is first sustained or discovered or in the exercise of reasonable care should have been discovered."[183] The defendants did not present enough evidence to establish when the plaintiff had the requisite knowledge to commence the running of the statute of limitations.[184] This case may be distinguished on this fact alone. The Connecticut court made a clear statement that it did not intend to comment about whether the action was timely filed but only that summary judgement was improper.[185]

It seems clear that Missouri's decision is contrary to the majority of jurisdictions. The other courts have focused on the plaintiff's knowledge of the damage. They did not require "contamination" to start the statute of limitations running.

V. CONCLUSION

Kansas City sustained damage that was capable of ascertainment prior to 1981. The damage was sustained when the asbestos was installed in the building. When the damage became ascertainable, Kansas City should have filed suit. It would seem logical that the damage was capable of ascertainment when the petitioner became aware that asbestos presented an unreasonable health hazard. The seven sources of knowledge alleged by the respondents seem to favor the inference that Kansas City did have the requisite knowledge to cause their claims to accrue.

In deciding as it did, the Missouri Court of Appeals has acted contrary to public policy and the apparent wishes of the Missouri Legislature. Statutes of limitations set expectations of when a party is open to suit. By its decision, the court has created uncertainty in an area of the law that requires stability.

SANDRA J. COULTER

182. West Haven School Dist. v. Owens-Corning Fiberglass Corp., 721 F. Supp. 1547 (D. Conn. 1988).

183. CONN. GEN. STAT. § 52-577(a) (1977).

184. *West Haven School Dist.*, 721 F. Supp. at 1556.

185. *Id.*