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## Court Ruling Will Lead to Increased Risk and Litigation

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In a March 2002 decision in *Taygeta Corporation v. Varian Associates, Inc.* (SJC-08566 slip op. Mass. Mar. 7, 2002), the Massachusetts Supreme Judicial Court (SJC) rewrote the discovery rule which triggers the statute of limitations for property damage claims under Chapter 21E (the state mini superfund statute) and substantially expanded the definition of “continuing nuisance.” The decision is likely to have immediate and long-term effects on a number of property damage cases initiated in Massachusetts, and is likely to reopen many cases which the owners of contaminated property believed were time-barred.

### **The Facts**

Post operations of Varian Associates, Inc. (Varian) resulted in groundwater contamination, which flowed onto the property of Taygeta Corporation (Taygeta). Varian discovered the contamination in 1985, and by 1990, had demonstrated in documents filed with the Department of Environmental Protection (DEP) that the groundwater flow was towards the southwest, where the Taygeta property was located. By the early 1990s, other nearby property owners identified Varian as the source of contamination beneath their properties.

In 1993, Taygeta decided to investigate the status of its property in connection with a possible refinancing. Taygeta retained a consultant in April, drew samples in May, and its consultant transmitted the results to

Taygeta in June of 1993. Because of a tolling agreement between the parties, Taygeta's complaint against Varian was deemed to have been filed on May 24, 1996. A trial court granted summary judgment in favor of Varian, on counts alleging liability pursuant to Chapter 21E as well as a count alleging a continuing nuisance. The SJC vacated the lower court decision on both issues.

### **Chapter 21E — Discovery Rule**

Parties previously had interpreted Chapter 21E consistently with the words chosen by the state legislature. The statute requires parties wishing to bring a claim for property damage to do so “within three years after the date the person seeking recovery of such damage discovers *or reasonably should have discovered* that the person against whom the action is being brought is a person liable pursuant to this chapter for the release or threat of release that caused the damage, whichever is later” (emphasis added). Despite that statutory language, the SJC analysis focused almost exclusively on the obligations placed on a responsible party by Chapter 21E and the Massachusetts Contingency Plan (Chapter 21E's implementing regulations). In language likely to revive many claims that potential plaintiffs heretofore believed were no longer available to them, the SJC also appears to have relieved the owners of property contaminated because of conduct that occurred elsewhere of virtually all responsibility to investigate the condition of their property. In its decision, the SJC stated that “[t]he clear import of this statutory and regulatory scheme is that the burdens of notification, investigation, assessment and remediation falls squarely on the owner, operator, or respondent whose property *is the source of potential contamination*, not on other landowners whose property may be affected by such contamination” (slip op. at 4, emphasis added).

### **Continuing Nuisance Claim**

The SJC opinion also expanded the common law concept of “continuing nuisance” in a way that will create claims where none previously were

believed to exist. The trial court's reasoning with respect to this issue was relatively sparse. In vacating the trial court's grant of summary judgment in favor of the Varian, the SJC stated that "Taygeta's nuisance claim is based on the continuing seepage of pollutants that is still occurring within the statute of limitations" (slip op. at 6). The SJC reasoned that the condition that created the harmful activity (here, the existence of a source of contamination flowing onto the injured property) continued to exist, therefore subjecting the up-gradient property owner to liability for a nuisance based on the fact that the harm continued because the contamination continued to migrate to the injured property. The SJC recognized that Varian had stopped releasing chemicals decades earlier but stated that "the remaining presence of the hazardous material on the Varian property is an ongoing source of groundwater contamination that continues to flow unabated onto the site. In light of this ongoing seepage, a condition caused and maintained by Varian, we concluded that Taygeta has stated a claim for a continuing nuisance that is not barred by the three year statute of limitations" (slip op. at 6).

## **Conclusion**

The full implication of the SJC's decision will not be known for some time. Clearly, by fashioning a new discovery rule under Chapter 21E, the Court may have resuscitated many causes of action previously believed to have expired under the plain language of the statute. By simultaneously expanding the definition of continuing nuisance, the decision will spur added litigation on that theory as well. Both legal changes have potentially significant implications for Massachusetts property owners and their insurers. Equally important may be the unintended consequences which will flow from the SJC's decision. By focusing on the obligations of the owner of the source of contamination, the SJC has all but excused down-gradient property owners from responsibility to act pursuant to Chapter 21E. It is not likely that DEP would publicly espouse such an interpretation of its

regulatory program. However, in light of the *Taygeta* decision, DEP may find the process of identifying and tracking the extent of groundwater contamination to be far more complicated and resource intensive than it was previously.

Rob Kirsch

[rob.kirsch@haldorr.com](mailto:rob.kirsch@haldorr.com)

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## *Authors*



**Robert C. Kirsch**

SENIOR COUNSEL

✉ [rob.kirsch@wilmerhale.com](mailto:rob.kirsch@wilmerhale.com)

☎ +1 617 526 6779