

Gause, John P

From: Gause, John P
Sent: Thursday, June 11, 2009 1:07 PM
To: [REDACTED]
Subject: RE: LD 1108

Hi [REDACTED]

Here's my thinking on the effective date of Public Law 235 (formerly LD 1108).

As you know, it becomes effective 90 days after adjournment, but that does not answer the bigger question of whether and how it will apply to cases that are pending before the Commission on the effective date. Generally, the Law Court has held that "procedural changes apply to preexisting, inchoate interests and that substantive changes do not." *Riley v. Bath Iron Works Corp.*, 639 A.2d 626, 628-629 (Me. 1994). All of the changes in PL 235 are procedural in nature. 1 MRSA § 302, however, says that "[a]ctions and proceedings pending at the time of the passage, amendment or repeal of an Act or ordinance are not affected thereby." In deciding whether PL 235 will apply to complaints that are pending before the Commission on its effective date, the question is thus whether the Commission process is an "action" or "proceeding" within the meaning of § 302. The Commission investigation is certainly not an "action," which is limited to court actions. See *Dickinson v. Maine Public Service Co.*, 223 A.2d 435, 436 (Me. 1966) (citing *Webster v. County Commissioners*, (1874) 63 Me. 27, 3). Section 302 defines "proceeding" as follows: "For the purposes of this section, a proceeding shall include but not be limited to petitions or applications for licenses or permits required by law at the time of their filing." This has been applied to proceedings of the Department of Environmental Protection, the Workers' Compensation Commission, and the Public Utilities Commission, among others. *DeMello v. Department of Environmental Protection*, 611 A.2d 985, 987 (Me. 1992) (Department of Environmental Protection proceeding); *Tompkins v. Wade & Searway Const. Corp.*, 612 A.2d 874, 878 (Me. 1992) (Workers' Compensation Commission proceedings); *Dickinson v. Maine Public Service Co.*, 244 A.2d 549, 552 (Me. 1968) (Public Utilities Commission proceedings). From what I can tell, all of the proceedings that the Law Court has held are within § 302 are adjudicatory proceedings. The one potential caveat to this is that, in *Beneficial Finance Co. v. State, Bureau of Banks and Banking*, 393 A.2d 171, 174 (Me. 1978), the Law Court assumed, without deciding, that an investigation by the Superintendent of the Bureau of Banks and Banking was an "Action or Proceeding." I could not tell whether the Superintendent's investigation at issue in *Beneficial Finance Co.* was adjudicatory. One Maine Superior Court opinion by Justice Nancy Mills held, without discussion, that the Maine Human Rights Commission's proceedings do fall within § 302. See *Penobscot Shoe Co. v. Maine Human Rights Comm'n*, 1994 Me. Super. LEXIS 104 (Me. Super. Ct. Mar. 19, 1994). A Maine U.S. District Court case held, without discussion, that the medical malpractice pre-litigation screening panel is not a proceedings within § 302. See *Feighery v. York Hosp.*, 38 F.Supp.2d 142, 156 n.5 (D.Me. 1999). I think our investigations have more in common with the med-mal process than those of the DEP, Workers' Comp., or the PUC. Given the fact that the Commission process is not similar in nature to an application for a license or permit (in the definition in § 302), that the Law Court holdings on point all involve adjudicatory proceedings, and that the Commission does not conduct "adjudicatory proceedings" within the meaning of the Maine APA, 5 MRSA § 8002(1), I think the Commission investigative process is not a covered "proceeding" within the meaning of § 302. I also cannot think of a policy reason for not applying the new law to open cases.

Accordingly, when PL 235 takes effect, I think the changes will all apply to both our open inventory of

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cases as well as new cases going forward. Nevertheless, to be safe, and in light of the potential argument that ours is a "proceeding" within the meaning of § 302, we are going to process the cases that are pending on the effective date under the old system (meaning, try to wrap them up sufficiently in advance of the old 2-yr SOL to give the parties time to file in court by the old 2-yr SOL). This will ensure that our complaint processing is timely even if a court were to interpret PL 235 as only applying to complaints filed after the effective date. Of course, complainants can decide on their own how they want to treat the statute of limitations for purposes of when they file in court.

Let me know if you have any other questions. Feel free to circulate this to anyone who you think would be interested.

John

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From: [REDACTED]
Sent: Friday, June 05, 2009 1:27 PM
To: Gause, John P
Subject: LD 1108

John,

Wondering if you have prepared any practical guidance on when the new statutory deadlines in LD 1108, eg, when the law is effective and how it will be applied. I would like to share it with attorneys at MELA.

Thanks,
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[REDACTED]