FEATURE

The Statute of Repose – A "Two-Edged Sword"?

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The wave of "tort reform" legislation that has swept the United States in the last decade has resulted in virtually every jurisdiction enacting a Statute of Repose in one form or another. While such statutes are generally considered necessary protection for manufacturers, professionals like architects and engineers, and their liability insurers, in some instances those statutes can actually serve to shift liability to entities that ordinarily would bear little if any responsibility for the claims.

Statues of repose are similar to statutes of limitation in that they preclude the prosecution of a lawsuit after the passage of a certain defined period of time. However, while both types of statutes "are designed to prevent the trial of stale claims because evidence gathering is usually made more difficult by the passage of time",[1] unlike a true statute of limitations, which limits the time in which a plaintiff may bring suit after the cause of action accrues, a statute of repose establishes a firm date (keyed to the time of sale) after which the designer or manufacturer can no longer be held responsible for the performance its product.[2] The proponents of such statutes maintain that they represent a necessary legal recognition that products will eventually fail to perform as they did when they were new, and that therefore designers and manufacturers should not be held responsible for the performance of those products ad infinitum. However, the practical effect of a statute of repose is not only to potentially bar a plaintiff's suit before the cause of action arises[3] but, in the area of products liability, to transfer responsibility to an owner or supplier who (absent the statute) would likely

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have little if any liability and who, in turn, is left with no recourse against the manufacturer. While such "transferred liability" may have been an unintended consequence of the legislation, it has the potential to become a significant problem for both businesses and their insurers.

The initial passage of statutes of repose occurred in the late 1950s and early 1960s in response to the expansion of common-law liability of architects and builders to third parties who lacked privity of contract.[4] Generally, the only contracts involved in this context were between the architect and the owner and/or between the contractor and the owner,[5] and historically courts strictly applied the doctrine of privity to deny recovery to a third party who, after a structure had been completed and accepted by an owner, sued the architect or builder for injuries allegedly sustained as a result of a defective or unsafe condition of such structure.[6] However, by the early 1960's, more and more courts "relaxed" the privity requirement and allowed claims by third parties injured by design or construction defects, even though the parties had no "contractual relationship" whatsoever with the architect or builder.[7]

In response to this extension of liability, a number of states enacted statutes of repose. The Ohio Supreme Court explained the rationale behind the legislation in Sedar v. Knowlton Construction Company, (1990), 49 Ohio St. 3d 193, 199: 551 N.E. 2d 938, 945:

* * * Given this expanded group of potential claimants and the lengthy anticipated useful life of an improvement to real property, designers and builders were confronted with the threat of defending claims when evidence was no longer available. * * * [The Ohio Statute of Repose] attempt[s] to mitigate this situation by limiting the duration of liability and the attendant risks of stale litigation, a public purpose recognized as permissible under due process analysis. * * * (citations omitted.) Because extended liability engenders faded memories, lost evidence, the disappearance of witnesses, and the increased likelihood of intervening negligence, (citations omitted), the General Assembly, as a matter of policy, limited architects' and builders' exposure to liability by barring suits brought more than ten years after the performance of their services in the design or construction of improvements to real property.

The courts and legislatures also rationalized that such statutes did not actually extinguish any "vested" right, since ". . . the existence of an actionable claim in the owner of a structure does not portend a contemporaneous claim in all foreseeable occupants of the structure - as a construction-related defect may never physically injure anyone. "The plaintiff sues in * * * [his] own right for a wrong personal to * * * [him], and not as the vicarious beneficiary of a breach of duty to another."[8]

Significantly, however, most of the enacted statutes of repose either specifically or impliedly limited their protections to individuals or companies that supplied services, as opposed to materials. The Ohio Supreme Court explained this distinction by noting that "work conditions" provide a rational basis for limiting the liability of architects and builders, but not materialmen, and commented that such statutory limitations were not appropriate for product claims because:

* * * [s]uppliers and manufacturers, who typically supply and produce components in large quantities, make standard goods and develop standard processes. They can thus maintain high quality control standards in the controlled environment of the factory. On the other hand, the architect or contractor can pre-test and standardize construction designs and plans only in a limited fashion. In addition, the inspection, supervision and observation of construction by architects and contractors involv[e] individual expertise not susceptible of the quality control standards of the factory.[9]

Accordingly, product liability claims were generally not covered by statutes of repose, and no matter how many years elapsed between the date that a product was sold and an injury, manufacturers could still be held liable at common law for damages caused by their defective products.

This all changed with the advent of tort reform. Based on a similar rationale that claims should not be permitted after a product has "outlived it's useful life",[10] more than 30 states have enacted statutes of repose covering products liability claims.[11] Virtually all of those statutes have been the subject of constitutional challenges, but most have been upheld. In upholding Ohio's ten- year statute,[12] the Ohio Supreme Court referred to the statute's "legislative purpose", and specifically "recognized", among other things, that:

- subsequent to delivery, the manufacturer or supplier of a product lacks control over the product, over the uses made of the product, and over the conditions under which the product is used;
- more than ten years after a product has been delivered, it is very difficult for a manufacturer or supplier to locate reliable evidence and witnesses regarding the design, production, or marketing of the product, thus severely damaging their efforts to defend actions based on a product liability claim;
- it is inappropriate to apply current legal and technological standards to products manufactured many

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years prior to the commencement of a products liability claim;

– statutes of repose "enhance the competitiveness of manufacturers" by reducing their exposure to disruptive and protracted liability and permitting them to "conduct their affairs with increased certainty";

– and finally, such statutes "strike a rational balance" between the rights of prospective claimants and the rights of product manufacturers, and "do not affect" civil actions against those in actual possession and control of the product at the time of the injury.[13]

While this legislation was clearly supported by the business and insurance community and is generally favorable to their interests, the Ohio Court's final point, explained further in the following comment, demonstrates how, in some instances, these statues can become a "two-edged sword". The Court noted:

Although R.C. 2305.10(C) may prevent some suits against manufacturers, in many situations an injured party may be able to seek recovery against other parties. . . . The General Assembly specifically recognized . . . that after a product is delivered . . it is more appropriate for the party that controls the product to be responsible for any harm caused.[14]

Especially in cases resulting from latent defects, for those other parties and their insurers, the products liability statute of repose is not such a good thing.

The following two scenarios, (based on actual cases) illustrate the problem:

1) John Smith owns a small propane distributorship. Although his annual sales are only slightly over a million dollars, due to the nature of his business he carries a five million dollar excess policy. To facilitate his propane deliveries, John purchases a ten-year old delivery truck, with relatively low mileage and a documented maintenance record. Shortly after the purchase, however, and during the course of one of his deliveries, the steering linkage fails causing the truck to cross the center line and collide head-on with a car carrying four teenage girls, all of whom are killed instantly. When the accident is investigated, it is determined that the linkage was defectively manufactured, one of the experts testifying that it was a "ticking time bomb" and that it was a "miracle" that the steering had not failed long before the accident. However, when John attempted to join the manufacturer of the defective vehicle (a multi-billion dollar corporation) in the lawsuit, he was met with the statute of repose. Although it was clear that John and his company could not have discovered the defect, and that he otherwise was not negligent, he and his insurer were forced to pay a large seven figure verdict, with no recourse against the manufacturer who actually caused the accident.

2) XYZ Corporation is a chemical company that manufactures a wide variety of chemicals for various national customers. The customer provides them with the formulation, XYZ manufactures the chemical, and then ships it (by truck, rail, or ship) to locations designated by the customer. As part of an "asset purchase", XYZ acquires 16 railroad tankcars that it, in turn, uses to transport its customer's product. Since XYZ knows nothing about railroad cars, it contracts with ABC Railroad Maintenance Company to repair and maintain the cars, and there is no question that the railcars are maintained in accordance with all AAR regulations.

While one of the cars (carrying a non-volatile and completely benign chemical) is being unloaded under pressure, the manway assembly on the top of the car "blows off", causing a catastrophic head injury to the twenty-five year old father of three who is unloading the car. Once again, all experts agree that the separation of the manway assembly was caused by a defective weld, which failed to conform to both AAR and the manufacturer's own specifications in numerous respects, which should have been discovered by even the most cursory quality control inspection, but which, because of the car's configuration,[15] was not discoverable after manufacture. Nevertheless, the court dismissed all claims against the manufacturer on the basis of the statute of repose, since the railcar, (although affirmatively represented to have a useful life of 40 years) was originally sold 15 years prior to the accident. The case has yet to be tried, but the remaining defendants, XYZ, ABC and their insurers[16], who essentially did nothing wrong, are faced with the specter of three young children and a comatose father, with no recourse against the clearly culpable manufacturer.

Presumably, cases such as these examples represent the exception rather than the rule. Statutes of repose clearly strike a balance between the interests of injured parties and the need for potential defendants to be protected from the heavy burdens that arise from unlimited liability such as lost evidence and faded memories. Furthermore, commonsense experience indicates that if a product has performed as intended for over a decade and harm occurs, the most likely explanation is that the product wore out, was not properly maintained, or was misused. However, in those cases when the cause was clearly a product defect, and the owner, supplier, maintenance contractor, etc. and their insurers are left holding the bag, the products liability statute of repose is clearly a "two-edged sword". ⏮

1 Fisher v. McCrary-Rost Clinic, P.C. 580 N.W. 2d 723,725 (Iowa, 1998)

2 Black's Law Dictionary, 7th Ed. At 1143.

3 Comment, The Constitutionality of Statutes of Repose: Federalism Reigns (1985), 38 Vand.L.Rev. 627, 629; Hartford Fire Ins. Co. v. Lawrence, Dykes, Goodenberger, Bower & Clancy (C.A. 6, 1984), 740 F.2d 1362, 1367; Hardy v. VerMeulen (1987), 32 Ohio St.3d 45, 46, 512 N.E.2d 626, 627, fn. 2

4 Hartford Fire Ins. Co., supra, at 1368; Kocisko v. Charles Shutrump & Sons Co. (1986), 21 Ohio St.3d 98, 101, 21 OBR 392, 394, 488 N.E.2d 171, 174 (Wright, J., dissenting). See also, generally, Comment, Limitation of Action Statutes for Architects and Builders-Blueprints for Non-action (1969), 18 Cath.U.L.Rev. 361; Annotation (1979), 93 A.L.R.3d 1242, 1245-1247. By 1978, at least forty-three states and the District of Columbia had enacted statutes limiting the time within which suits against architects must be brought. Collins, Limitations of Action Statutes for Architects and Builders-An Examination of Constitutionality (1978), 29 Fedn.Ins.Counsel Q. 41, 45.

5 Note, The Crumbling Tower of Architectural Immunity: Evolution and Expansion of the Liability to Third Parties (1984), 45 Ohio St.L.J. 217, 219

6 Annotation (1979), 93 A.L.R.3d 1242, 1245-1246; Winterbottom v. Wright (1842), 10 M & W 109, 152 Eng.Reprint 402.

7 See, e.g., Yarbro v. Hilton Hotels Corp. (Colo.1983), 655 P.2d 822, 825, and cases cited therein; Hartford Fire Ins. Co., supra, at 1368, and cases cited therein; accord Elizabeth Gamble Deaconess Home Assn. v. Turner Constr. Co. (1984), 14 Ohio App.3d 281, 287, 14 OBR 337, 344, 470 N.E.2d 950, 958

8 Sedar v Knowlton Construction Company, supra, at 198-199, citing Palsgraf v. Long Island RR. Co. (1928), 248 N.Y. 339, 341, 162 N.E. 99.

9 Sedar v. Knowlton Construction Company, supra, at 204. See also Burmaster v. Gravity Drainage Dist. No. 2. (La., 1978) 366 So. 2d 1381,1386; Klein v. Catalano, (Mass.,1982) 437 N.E. 2d 514, 524; and Hartford Fire Ins. Co., supra, at 1372.

10 2008 National Association of Manufacturers, FLAG.

11 Id.

12 R.C. Section 2305.10(C)

13 Groch v. General Motors Corp., (2008), 117 Ohio St. 3d 192, 221.

14 Id. at 219. (emphasis added).

15 There was also testimony that the railcar was "defective designed".

16 Both primary and excess.

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Robert E. (Bob) Tait is the President-Elect of the Association of Defense Trial Attorneys. He is a partner in the Columbus office of Vorys, Sater, Seymour and Pease LLP and a member of their litigation practice. Bob has completed over 100 jury trials and served as lead counsel in numerous toxic tort class actions, specifically radiation and chemical exposures. He has also been involved in employer intentional tort and products liability. In addition, he has briefed and argued numerous cases before the Supreme Court of Ohio, the Sixth Circuit Court of Appeals, and has argued before the United States Supreme Court.

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Bob received his J.D. cum laude from the University of Michigan Law School and his B.A. cum laude from Kenyon College, and is a frequent speaker in the areas of trial practice, employer liability, toxic tort liability, and professionalism.

PROFESSIONAL AND COMMUNITY ACTIVITIES

Association of Defense Trial Attorneys: Currently President-Elect, Vice-President, Treasurer, 2002-2007; Executive Council, 1991-1994

Columbus Country Club, Board of Trustees, 2007-present

North Hanna Foundation, Trustee, 1996-2005

HONORS AND AWARDS

Fellow of the Ohio State Bar Foundation since 2006

Fellow of the Columbus Bar Foundation since 1990

Ohio Super Lawyers, Civil Litigation Defense, 2004-2008