

Ambiguity in Pennsylvania's Statute of Repose Finally Cleared up by Superior Court

By: Mark L. Parisi
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In an unpublished opinion from the Pennsylvania Superior Court handed down on August 31, 2023, a long-standing disagreement about the wording of Pennsylvania's Statute of Repose was finally resolved. In Pennsylvania, "a civil action or proceeding brought against any person lawfully performing or furnishing the design, planning, supervision or observation of construction or construction of any improvement to real property must be commenced within 12 years after completion of construction of such improvement" to recover most forms of damages that are sought in these kinds of cases.

A statute of repose is different than a statute of limitations. A statute of repose is a hard line that does not shift. There is no discovery rule with a statute of repose. Most, if not all, states have statutes of repose for construction. The Pennsylvania statute of repose is among the longest in the country. It can be even longer – up to 14 years – if the injury (including property damage) or wrongful death "shall occur more than 10 and within 12 years after completion of construction."

Two parts of the statute of repose in Pennsylvania have become very controversial in approximately the last five years. Firms representing plaintiffs with older claims have made two different arguments to continue to advance old claims in spite of the 12 and 14 year limitation. The first argument is that the word "lawfully" in the prelude to the time restriction means that if construction was not performed according to the building code, it was not lawful and therefore there is no statute of repose application or time limit for suit. The only limitation would be a statute of limitations. The other argument relates to the exception that extends the statute by two years. The argument being made was that where damage may have occurred before the 10-to-12-year window, so long as it also occurred during the 10-to-12-year window, the plaintiff gets the benefit of the extra two years.

Attorneys representing defendants in these cases have pushed back consistently on both of these arguments, but trial courts have mostly given plaintiffs a pass on the issue and refused to dismiss cases on the basis of these two arguments. Up until now, there was no appellate decision directly on point. There is a Right to Farm statute of repose where a similar argument was being made and the Superior Court declared that the word "lawful" also in that statute of repose, only meant that the farming activity was being done permissively not that it was being done legally or correctly. Lawyers representing defendants in construction litigation have pointed to that decision as persuasive but the trial courts deferred.

On August 31, 2023, the Pennsylvania Superior Court handed down a decision in *Johnson v. Toll Brothers* that said that the word "lawfully" does not mean what the attorneys for plaintiffs have been arguing. It was also held that the 10-to-12-year window that provides an extra two years for suit to be filed is only triggered where damage *first occurs* in that 10-to-12-year window, and not if it occurred earlier, even though it may also have occurred between years 10 and 12.

With both of these arguments now eliminated, the statute of repose returns to what defense attorneys have argued is its original meaning as a bright line after which lawsuits can no longer be filed having to do with construction and claims for damages. Attorneys for both sides in the *Johnson* case say that the battle is not over. Attorneys for the defense plan to petition the court to make this a published opinion so that it is precedential. Attorneys for the plaintiffs plan to ask for re-argument and if unsuccessful they plan to appeal to the Pennsylvania Supreme Court. Since this is a very unique and important issue, it is probable that the Supreme Court will take the case. For a copy of the opinion, use this link (and below).

If you have any questions, please contact Mark L. Parisi, Partner (parisim@whiteandwilliams.com; 215.864.7180) or another member of the Construction and Surety Practice Group.

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