

THE SUPREME COURT OF OHIO PROVIDES SOME CLARIFICATION ON THE CONSTRUCTION STATUTE OF REPOSE

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As construction season marches on, the industry should take note of a recent Supreme Court of Ohio decision clarifying the scope of Ohio's construction statute of repose. In the highly anticipated decision in *New Riegel Local School District Board of Education v. Buehrer Group Architecture & Engineering, Inc.*, Slip Opinion No. 2019-Ohio-2851, issued July 17, 2019, the Court held that the current version of Ohio's 10-year construction statute of repose is not limited to tort actions, but also applies to contract actions that meet the requirements of the statute, R.C. 2305.131. This ruling has a tremendous effect on the construction industry, as the majority of construction litigation involves breach of contract claims. Thus, owners are likely foreclosed from filing breach of contract claims arising from allegedly defective construction or design more than 10 years after substantial completion of the construction project. However, the Court declined to rule on the owner's argument that the statute of repose does not apply if the claim accrued (i.e., the breach occurred) within the 10-year repose period, which, as explained below, could create an exception that swallows the rule.

CASE BACKGROUND

In 2000, the New Riegel School District (the "District") entered into contracts for the construction of a school building. After the District occupied the building in 2002, it began to experience moisture and water intrusion that continued over the next 13 years. The District filed an action against the architect, general contractor, its roofing contractor, and their respective sureties alleging breach of the applicable standards of care. The defendants raised several defenses, including Ohio's statute of repose. While the trial court dismissed the action based on the statute of repose, the Third District Court of Appeals reversed, holding the statute applies only to tort – and not contract – actions.

STATUTES OF REPOSE

Like statutes of limitation, statutes of repose place strict time limits on when a plaintiff can file a lawsuit, but statutes of repose differ in an important way: there is no "discovery rule" for tolling the time period. This means that once the applicable repose period starts (i.e., after substantial completion), a claimant has a specific time period to file its claim regardless of when the claimant learns of or otherwise discovers the claim. If a lawsuit is not filed within the repose period, the claimant's lawsuit is barred.

Ohio's statute, which was enacted in 2004, states that "no cause of action to recover damages for bodily injury, an injury to real or personal property, or wrongful death that arises out of a defective and unsafe condition of an improvement to real property * * * shall accrue against a person who performed services for the improvement to real property or a person who furnished the design, planning, supervision of construction, or construction of the improvement to real property later than ten years from the date of substantial completion of such improvement." R.C. 2305.131(A)(1) (emphasis added). Substantial completion is defined as "the date the improvement to real property is first used by the owner or tenant of the real property or when the real property is first available for use after having the improvement completed in accordance with the contract or agreement covering the improvement, including any agreed changes to the contract or agreement, whichever occurs first." R.C. 2305.131(G). In other words, except for specific statutory exceptions, no claims may be filed more than 10 years after substantial completion of a construction project.¹ As explained below, however, the statute's use of the term "accrue" instead of "commence" has left some uncertainty regarding the effectiveness of the statute of repose.

¹ The primary statutory exception to this rule is that if a claim is discovered within the 10-year repose period but less than two years prior to its expiration, the claimant may file suit within two years of discovering the claim. R.C. 2305.131(A)(2).

THE ACCRUAL QUESTION LEFT UNRESOLVED

In *New Riegel*, the Supreme Court of Ohio ruled only on whether breach of contract claims are generally covered by the statute of repose – leaving open the District’s argument that because the breach of contract itself accrued within 10 years of substantial completion, the statute of repose does not apply. *New Riegel*, 2019-Ohio-2851, ¶ 31. This is significant because any breach would almost certainly occur within 10 years of substantial completion. Thus, if the District’s argument is eventually accepted, the statute of repose would be largely ineffective. Although this result may seem unlikely because it would undermine the intent of the statute and, specifically, its application to breach of contract claims, such arguments will continue to make their way to the Court until the issue is resolved.²

TAKEAWAYS

While further clarification from the Supreme Court of Ohio is still needed on the District’s accrual argument, the Court did clarify the biggest issue before it by holding that breach of contract claims are subject to the statute of repose. It also reinforced the legislature’s intent to prevent stale claims from being litigated beyond the time periods of most reasonable document retention policies. Ultimately, because the Court has provided certainty that contracts will indeed be subject to the statute, contractors, insurers, and owners alike need to be mindful of when defects become apparent and immediately consult legal counsel to determine the best course of action.

ADDITIONAL INFORMATION

For additional information, please contact:

- [Patricia Seifert](mailto:patricia.seifert@tuckerellis.com) | 216.696.5361 | patricia.seifert@tuckerellis.com
- [Seth Wamelink](mailto:seth.wamelink@tuckerellis.com) | 216.696.3791 | seth.wamelink@tuckerellis.com
- [Frederick Cruz](mailto:frederick.cruz@tuckerellis.com) | 216.696.5039 | frederick.cruz@tuckerellis.com

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² Although the majority declined to rule on this issue, Justice Kennedy, joined by Justice DeWine, issued a concurring opinion that provides some guidance on its eventual resolution. Justices Kennedy and DeWine would have held that the statute completely extinguishes liability for those claims within its scope 10 years after substantial completion, subject only to the limited time extensions set forth within the statute itself. *Id.* at ¶ 44 (J. Kennedy concurring). This interpretation is more in line with the typical application of statutes of repose and would indeed provide clear guidance if adopted.