



## The Critical Path

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## A Primer on Ohio's Construction Claim Statute of Repose

by Andrew L. Smith



A statute of repose is a statute that cuts off certain legal rights if they are not acted on by a certain deadline. It is an absolute deadline for a plaintiff to bring a claim. In the world of construction law, a statute of repose provides certainty – after a certain date, contractors, subcontractors, design professionals, and the like cannot be sued for work undertaken and completed on a project.

### Ohio's Statute of Repose (R.C. 2305.131)

Ohio has a 10-year statute of repose for construction claims found at R.C. 2305.131(A)(1):

[N]o 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 and no cause of action for contribution or indemnity for damages sustained as a result of 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. (Emphasis added).

For instance, in *McClure v. Alexander*, 2d Dist. No. 2007 CA 98, 2008-Ohio-1313, a homeowner, Robert McClure, entered into a contract in 1988 with Mike Alexander, of Mike Alexander Construction, for the construction of an addition to his home. The project was completed in June of 1989. In August of 2004, McClure discovered that the walls to his addition had become rotten due to water damage. The extent of the damage required him to demolish the addition. Alexander died January 7, 2007. On August 10, 2007, McClure filed a Complaint against Deborah Alexander, Executor of the Estate of Mike Alexander, formerly DBA Mike Alexander Construction. He sought damages of \$70,000.00, arguing the "rot was caused by siding that had been applied incorrectly directing water in toward the wall instead of away from the wall."

Alexander filed a Motion to Dismiss, arguing the claims were barred by the 10-year statute of repose. The trial court found for Alexander as the damage occurred 15 years after the contract completed. The Second District Court of Appeals agreed, dismissing all claims against Alexander as time-barred.

### Legislative Purpose

The present version of R.C. 2305.131 was passed by the Ohio legislature in Senate Bill 80, and took effect in April 2005.

As part of the basic legislation enacting the provision, the General Assembly promulgated a "statement of findings and intent" providing an explanation as to why the statute of repose had been passed. Under section (B)(2) of the statement, the General Assembly stated that the bill was enacted in recognition of the fact that, once the construction of any improvement to real property has been completed, the person who provided services for the construction will not only lose control over the improvement itself, but also will "lack control over other forces, uses, and intervening causes that may cause stress, strain, or wear and tear to the improvement."

### When Exactly is the Cutoff Date?



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Ohio attempts to resolve the rather complicated issues that result from multiphase construction projects statutorily. Indeed, according to section G of the statute:

“[S]ubstantial completion” means 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.

When considering the time a cause of action “accrues” in construction cases, Ohio courts traditionally use the delayed-damages rule. *Velotta v. Leo Petronzio Landscaping, Inc.*, 69 Ohio St.2d 376, 433 N.E.2d 147 (1982). The delayed-damages rule considers when all elements of a cause of action have come into existence. *Id.* at 379. For instance, “to establish actionable negligence, one must show in addition to the existence of a duty, a breach of that duty and injury resulting proximately therefrom.” *Mussivand v. David*, 45 Ohio St.3d 314, 318, 544 N.E.2d 265 (1989).

In addition, if an alleged defect is discovered during the 10-year period but less than two years before the expiration, the plaintiff may still bring a claim within two years of discovery of the defect. *See R.C. 2305.131(A)(2)*. The statute also provides exceptions if: (1) the defendant engages in fraud; or (2) there is an express warranty beyond the 10-year statute of repose period. *See R.C. 2305.131(C) and (D)*. The remedial nature of the statute is to be construed “to effectuate the legislative purpose.” *Gibson v. State Farm Mut. Ins. Co.*, 123 Ohio App.3d 216, 704 N.E.2d 1 (1997).

Last year the Ohio Supreme Court in *Oaktree Condo. Assn. v. Hallmark Bldg. Co.*, 139 Ohio St. 3d 264, 2014-Ohio-1937, 11 N.E.3d 266, decided a very complicated issue under the statute. The Court held a cause of action that has accrued, but on which no suit has actually been filed by the effective date of a statute of repose (i.e. April 2005), is governed by the relevant statute of limitations for the time of filing that particular type of cause of action.

In the *Oaktree* case, 13 years after construction was completed, the Oaktree Condominium Association discovered there was a defect in the construction of the foundation of their buildings. In 2003 at the time of discovery of the defect, there was no real-property-construction statute of repose in effect in Ohio. However, by the time Oaktree filed a lawsuit against the builder of the condominiums in 2007, the General Assembly had enacted a 10-year statute of repose. As a result, the trial court and court of appeals ruled Oaktree’s claims were time-barred.

The Ohio Supreme Court determined R.C. 2305.131 was unconstitutional as applied to Oaktree in this peculiar situation. Because of the constitutional prohibition on passage of retroactive laws, Oaktree had to be afforded a reasonable time to file its accrued action. Reasonableness should be governed by the relevant statute of limitations, which in this case was four years from accrual of the cause of action (R.C. 2305.09). The Complaint was filed within four years of its accrual, and was therefore timely under the applicable statute of limitations. Therefore, the Court held the claims could proceed even though the construction claims were not technically filed within 10 years after the construction project was completed.

### Scope of Statute

There is also no language in R.C. 2305.131 indicating the statute was only intended to apply to professionals or licensed workers. Rather, the language of subsection (A)(1) is stated in broad terms (i.e. a “person” who provides services for an improvement on real property). *See, e.g., Tutolo v. Young*, 11th Dist. No. 2010-L-118, 2012-Ohio-121, ¶131 (plaintiff unsuccessfully argued defendant could not be covered by the statute of repose because he was never a licensed carpenter or contractor).

In sum, the 10-year statute of repose in Ohio found at R.C. 2305.131 provides an absolute cutoff date for anyone to file suit involving a construction claim of any nature. The statute has been broadly applied by Ohio courts, and should be considered whenever evaluating a construction claim or lawsuit stemming from a past project. If the statute of repose applies, it can operate to eliminate a causes of action early on it suit, as a matter of law.

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