Ohio Tort Reform & Its Impact On Property Subrogation Claims

by David M. Matejczyk, Esq. and Glenna M. Roberts, Esq.
Roberts, Matejczyk & Ita Co. L.P.A., Cleveland, Ohio

Over one year has passed since enactment of the Ohio Tort Reform Act. All told, 58 separate code sections of Ohio law were modified by the new law. Several of these changes to Ohio law impact property subrogation claims.

In enacting Ohio’s Tort Reform Act, the legislature made several “statement of findings” which constituted the need for reform. Among the legislature’s findings were the following: there was a need to curb the amount of frivolous lawsuits that “stifle innovation;” a need to protect jobs; reform punitive damages; and to enact new statutes of repose to add “closure and piece of mind” for manufacturers, suppliers, architects and builders. In this article, the new tort reform act is viewed as it impacts property claims in the state.

Statutes Of Limitations And Statutes Of Repose

Previously, Ohio subrogation litigants were limited by only a statute of limitations in their initial analysis of a timely filing of a suit. The statute of limitations in Ohio is two years from the date of damage to personal property and four years from the date of damage to real property. Ohio previously had no “statute of repose.” A statute of repose is not based on the date of injury or damage. Instead, a statute of repose places an additional time limit that bars recovery beyond a certain period of time from when the product was first delivered to the purchaser. In the event of a construction claim, a new statute of repose begins to accrue after “substantial completion” of the project.

The Ohio legislature, in its enactment of two new statutes of repose, made the following legislative findings: 1) after delivery of a product, the manufacturer or supplier lacks control over the product, over the use of the product and the conditions under which it is used; 2) in the event of a lawsuit, witnesses as to the product’s design and manufacturing are no longer available and presumably, this results in an unfair advantage to plaintiffs; and 3) as to construction projects, the legislature noted that 47 other states had statutes of repose to protect architects, engineers and contractors.

Product Liability Claims - 10 Year Statute Of Repose

Under the new law, no cause of action may accrue against a manufacturer or supplier of a product later than 10 years from the date that the product was delivered to the first purchaser or first lessee who was not engaged in a business in which the product was used as a component in the production, construction, creation, assembly or rebuilding of another product. (O.R.C. 2305.10). The statute of limitations remains the same: for personal property, two years from the date the cause of action accrues. Four years for damage to real property. Date of accrual is when damage to property occurs.

Construction Related Claims - 10 Years From “Substantial Completion”

The new statute places a repose date for all involved in the design, planning and construction of improvements to real property (buildings). The statute of repose runs 10 years from the date of “substantial completion” of the project.

Substantial completion is defined as the date when the property is first used by the owner or tenant; or when the real property is available for use after having the improvement completed in accordance with the contract or agreement covering the improvement, including any agreed change to the contract agreement.
The new statutes of repose apply to any civil actions commenced on or after April 7, 2005, regardless of when the action accrued. As to Ohio’s savings statute, the new law is silent as to actions filed prior to April 7, 2005, dismissed without prejudice and refiled. There have been no reported cases to date in Ohio on this issue.

**Exceptions To Statute Of Repose And Borrower’s Statute**

The new tort reform act has several exceptions to the 10-year repose period. The statute of repose is inapplicable if: 1) the defendant engaged in fraud; 2) the defendant provided an express warranty and the warranty period has yet to expire; or 3) the defendant is the owner, tenant, landlord or other person who was in actual possession and control of the improvement to real property. In addition, the defective and unsafe condition must constitute the proximate cause of loss.

The law also has a “Borrower’s Statute” (O.R.C. 2305.03). This includes a conflict of laws provision prohibiting a plaintiff from bringing a claim in Ohio if the plaintiff’s claim is time barred in his or her state.

**Product Liability Claims**

Ohio’s new tort reform act has several changes that modify Ohio product liability law. First, the new law specifically states that Ohio’s product liability law abrogates all common law product liability causes of action. The act specifically declares its intent to supersede the Ohio Supreme Court’s holding in *Carrell v. Allied Products Corporation* (1997), 78 Ohio St. 3d 284, that the common law “negligent design” cause of action survives enactment of the Ohio Product Liability Act.

The new law modifies the Ohio Product Liability Act regarding design defects. The law specifies that a product is defective only if, at the time it left the control of the manufacturer, the foreseeable risks exceeded the benefits associated with the design or formulation of the product. Removed from the previous statute is the provision that a product may be defective in design or formulation if it is more dangerous than expected when used in an intended or reasonable manner.

The statute provides that one factor in determining foreseeable risks associated with the design or formulation of a product will be to the extent to which the design or formulation is more dangerous than a “reasonably prudent consumer” would expect when used in an intended or reasonably foreseeable manner. The law essentially eliminates the “consumer expectation test” as a separate stand alone test for design defect cases. The risk utility test in the Act now includes the consumer expectation test and also requires the plaintiff to prove a “reasonable alternative design.”

**Assumption Of Risk And Contributory Fault As Defenses**

The statute also allows “assumption of risk” as an affirmative defense to a product liability claim. The law permits the defense of express or implied assumption of risk to be asserted by a manufacturer or supplier of a product.

As to contributory negligence, the law remains the same in that contributory fault does not bar a plaintiff from recovering damages. In order to prevail, Ohio law requires the contributory fault of the plaintiff not be greater than the conduct of all other parties in the action and of all parties who could have been parties in the action. In a bench trial, the court must issue findings of fact in this regard. In a jury trial, the jury must answer specific interrogatories as to the percentage of fault of the parties.

**Collateral Source Benefits**
Defendants in tort actions for recovery of damage to property may introduce evidence of the plaintiff’s receipt of collateral benefits. However, there is an exception to this provision if the source of the benefits has: 1) a mandatory federal right of subrogation; 2) a contractual right of subrogation; or 3) a statutory right of subrogation.

If evidence of a collateral benefit is introduced, the plaintiff may introduce evidence of the amounts paid to secure the benefits (i.e., premiums).

The provision further provides that if the trial court permits introduction of collateral benefits, “the source of the collateral benefits . . . shall not recover any amount against the plaintiff nor shall it be subrogated to the rights of the plaintiff against a defendant.” (O.R.C. 2315.20).

This provision of the law reinforces the need for insurers to include proper and clear subrogation and reimbursement provisions in their insurance policies. Ohio law recognizes the right of “equitable subrogation.” However, under the tort reform act, proceeding on an equitable right is in jeopardy if the insurance payments had been previously disclosed as a collateral source in an earlier suit brought by an insured.

**Miscellaneous Provisions**

Subrogation actions do not involve the award of punitive damages. It is interesting, however, to note that in actions brought by an insured seeking punitive damages, there is now a limit of recovering two times the amount of compensatory damages. If the defendant is a “small employer” (less than 100 employees) the limit is the lesser of two times the compensatory damages or 10% of the company’s net worth.

The law also prohibits punitive damage awards if the defendant already was assessed punitive damages in a previous suit (different litigants) for the “same act or course of conduct.”

Finally, the act created the “Ohio Subrogation Rights Commission.” The commission, however, is charged with reviewing health care subrogation issues (not property claims) involving the Ohio Supreme Court decision in *Northern Buckeye Educ. Council Group Benefits Plan v. Lawson* (2004), 103 Ohio St. 3d 188.

Litigants need to be aware of the changes in Ohio law. All told, the new statute places more hurdles for property subrogation claims in the state.

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