

CLIENT ALERT

Ohio Court of Appeals Confirms Applicability of Statute of Repose to Contract Claims and Sureties

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Hahn Loeser's Construction Team is a proud leader in a major victory for Ohio contractors and their sureties. The Fifth District Court of Appeals of Ohio issued a recent decision confirming that Ohio's construction statute of repose, R.C. 2305.131, applies to breach of contract claims. It also confirmed that sureties are entitled to rely on the statute of repose as a defense to claims under the bond.

The Fifth District affirmed the Stark County Court of Common Pleas' decision to grant motions to dismiss filed by a contractor, its surety, and the project architect. The complaint asserted breach of contract claims against each defendant, alleging that the architect and contractor breached their respective contractual duties by improperly designing and constructing a school. Relying on a statutory public works bond form, the school district claimed that the contractor's surety was liable for all damages arising from the contractor's default.

As counsel for the surety and co-counsel for the contractor, Hahn Loeser & Parks LLP filed motions to dismiss the complaint pursuant to the statute of repose because the complaint was filed more than ten years after substantial completion of the project. Relying on dated Supreme Court precedent applying a prior version of the statute of repose, the plaintiff countered that the statute of repose applies only to tort claims and not to breach of contract claims. The plaintiff also claimed that the surety was not permitted to use the statute of repose as a defense, despite long-standing Ohio law which generally allows a surety to argue any defense available to the principal (other than certain personal defenses such as bankruptcy).

The trial court rejected the plaintiff's arguments and granted each defendant's motion to dismiss. On appeal, the Fifth District saw no reason to disturb the trial court's judgment. As the unanimous opinion noted, just over a year ago the Fifth District held the current version of the statute of repose applied to breach of contract claims in *State by and through Wray v. Karl R. Rohrer Associates, Inc.*, No. 2017AP030008, 2018-Ohio-65. The *Rohrer* decision was based on the plain language of the statute of repose as well as uncoded law which plainly demonstrated the General Assembly's broad intent when it amended the statute of repose. In the recent opinion, the Fifth District correctly recognized that there was no need to "overrule or re-visit" its decision in *Rohrer*.

The Fifth District also affirmed the trial court's rejection of the plaintiff's novel theory that sureties are not protected by the statute of repose. The opinion recited and approved the well-settled principles of Ohio suretyship law allowing sureties to argue defenses available to their principals. Lastly, the court noted that the plaintiff itself alleged in the complaint that the surety was only liable

“to the same extent as” the contractor, so if the claim was barred as to the contractor then it must likewise be barred as to the surety.

Bottom Line

This decision is an important confirmation of the broad applicability of Ohio’s construction statute of repose—not only that it applies to breach of contract claims as well as tort claims, but also that it applies to sureties. The Ohio Supreme Court will issue its decision addressing the scope of the construction statute of repose in *New Riegel Local School District Board of Education et al. v. The Buehrer Group Architecture & Engineering, Inc.*, No. 2019-0189. The parties in the *New Riegel* case presented many of the same arguments presented in the appeal. The court conducted oral argument in the *New Riegel* case on March 5, 2019, and a decision is expected this summer or early fall. Watch this space...

This opinion confirms the importance of maintaining complete project files in order to properly defend against claims. Without proper project documentation, contractors and sureties may have to go through costly and time-consuming discovery practice in order to get the information needed to support a statute of repose argument. By maintaining proper project documentation confirming the date of substantial completion, contractors and sureties can save significant time and expense in litigation.



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