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Ohio Supreme Court holds that the construction statute of repose applies to claims sounding in breach and in tort. A summary of *New Riegel Local School District Board of Education, et al. v. The Buehrer Group Architecture & Engineering, Inc., et al.*, 2019-Ohio-2851

On Wednesday, July 17, 2019, the Ohio Supreme Court held that the construction statute of repose, codified at R.C. 2305.131, applies to contract claims as well as tort claims. The decision could have a significant impact limiting liability exposure for designers throughout the state, but the Court refused to rule on an important question which still must be litigated to determine the scope of the decision.

The construction statute of repose states that no claim for damages arising from a defective and unsafe condition to an improvement to real property may accrue more than ten years after the date of substantial completion of the improvement. It is beneficial to designers because it creates a bright line rule as to when the “clock” barring claims begins to run. Prior to the decision in *New Riegel*, however, Ohio law was unclear as to whether the statute applied to both breach of contract claims and tort claims, or if its application was exclusive to tort claims.

Now, with the decision in *New Riegel*, R.C. 2305.131 will act as a bar to claims that have accrued against designers more than 10 years after the date of substantial completion. The scope of the decision, however, is yet to be determined.

One of the questions raised during oral argument by the New Riegel Local School District was whether R.C. 2305.131 applies to claims that accrue during the ten year period of repose but which are not filed until after the ten year period has expired. The question of accrual is important. A claim for breach of contract accrues when a defendant has breached the terms of its contract and a plaintiff has suffered damages. *New Riegel* argued that R.C. 2305.131 does not apply if a claim for breach accrues during the period of repose, based upon the plain language of the statute.

The Court refused to answer this question on the grounds that it went beyond the propositions of law the Court was asked to consider.

The *New Riegel* decision does offer some guidance on this question, however. In an excellent opinion concurring in part and dissenting in part with the majority, Justice Kennedy, joined by Justice DeWine, illustrates why New Riegel’s accrual argument is not necessarily supported by the plain language of the statute, when considered as a whole. Justice Kennedy notes that only applying R.C. 2305.131 to causes of action that accrue after the ten year repose period would render entire sections of the statute meaningless. For example, R.C. 2305.131(A)(2) creates a discovery-rule exception to the statute, where a plaintiff is given an additional two year period to file a claim where a defective and unsafe condition is discovered in the final two years of the ten year repose period. However, if the statute does not apply to claims that accrue during the ten year period, then there is no need to include a discovery rule exception and extension. Because courts must evaluate statutes to give effect to every word and clause where plausible, Justice Kennedy rejects New Riegel’s accrual argument and opines that the statute applies as a bar to all claims filed more than ten years after the date of substantial completion.

Unfortunately, the Court’s refusal to address the question of accrual under R.C. 2305.131 will likely result in the statute being re-litigated and eventually appealed for another Supreme Court decision. For the time being, however, the *New Riegel* decision offers clarity that the ten year bar of the statute applies to claims sounding in breach and in tort, and helps limit what the General Assembly referred to as the “unacceptable burden” of extended liability exposure faced by designers who provided services over a decade before any suit is filed.