

OAJ Product Liability Section Article October 2015

Ohio's Product Liability Statute of Repose – Ten Years Later

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In 2005 the Ohio General Assembly passed legislation enacting a ten year statute of repose on product liability claims. Generally, a statute of repose places an artificial time period within which a claim for a specific type of tort may be brought. In the case of product liability, that time period is ten years from the date in which the product is delivered to the first purchaser. A consumer who suffers injury caused by a defective product occurring more than ten years from the date of delivery is barred from pursuing a claim.ⁱ The statute does not take into account the date of injury or the date on which the defect could reasonably have been discovered.ⁱⁱ

For example, assume a car equipped with a defective airbag is involved in a frontal collision for the first time in that vehicle's life. The airbag fails to inflate and the driver is killed as a result. Further assume the collision occurred ten years and one day after the vehicle was first purchased. Having never been involved in a frontal collision there would be no way for the ordinary consumer to know the airbag would malfunction. Under this scenario, the manufacturer responsible for the defect would be completely insulated from liability even if it knew the airbag was defective, yet nevertheless made the conscious decision to sell the car.

Back in 2005, Ohio's legislators in support of the statute would have argued that this is an unrealistic scenario that cannot reasonably guide policy. They would argue that manufacturers should not be required to defend against "stale claims based on faded memories, destroyed records, lost evidence or witnesses who have died or disappeared."ⁱⁱⁱ Indeed, as set forth in the official Statement of Findings and Intent, the following was offered:

"It is more appropriate for the party or parties who have had control over the product during the intervening time period to be responsible for any harm caused by the product."

"More than ten years after a product has been delivered it is very difficult for a manufacturer or supplier to locate reliable evidence and witnesses regarding the design, production, or marketing of the product, thus severely disadvantaging manufacturers or suppliers in their efforts to defend actions based on a product liability claim."

"To recognize that a statute of repose for product liability claims would enhance the competitiveness of Ohio manufacturers by reducing their exposure to disruptive and protracted liability with respect to products long out of their

control, by increasing finality in commercial transactions, and by allowing manufacturers to conduct their affairs with increased certainty.”

“To strike a rational balance between the rights of prospective claimants and the rights of product manufacturers and suppliers and to declare that the ten-year statutes of repose prescribed in those sections are rational periods intended to preclude the problems of stale litigation but not to affect civil actions against those in actual control and possession of a product at the time that the product causes an injury to real or personal property, bodily injury, or wrongful death.”^{iv}

Seeing as how the General Assembly placed the statute of repose at ten years, it is perhaps *apropos* to examine whether the “rights of prospective claimants have been appropriately balanced against the rights of product manufacturers,” now that it has been ten years since the statute was passed.

Today’s product liability news is being dominated by the case of the General Motors defective ignition-switch. To date, over 100 deaths and countless serious injuries have been related to GM’s ignition-switches, which powers off causing vehicles to lose control while at the same time disabling airbag systems. GM reportedly first noticed the problem in 2001, and customers began complaining about it in 2003. It was not until 2014, however, that GM began recalling vehicles equipped with the ignition-switch. For many Ohioans injured by these vehicles this was too late for them to act on GM’s *mea culpa*.

GM’s conduct has been so egregious, in fact, that the Department of Justice is reportedly weighing whether to charge GM with criminal wire fraud stemming from the company’s delay in issuing a recall. Federal prosecutors are focusing on the charge after determining GM likely made misleading statements and concealed information about the faulty switch. “Lost evidence, destroyed records, faded memories” --- indeed.

A report written by former U.S. Attorney Anton Valukas found that GM failed for more than a decade to recall millions of vehicles with the defective ignition-switch even though it had internal evidence of the safety problem. In 2014, the company paid a record \$35 million regulatory fine and signed a consent order acknowledging it failed to alert the National Highway Traffic Safety Administration to the ignition-switch safety defect in a timely manner as required by federal law.

Ten years later, as we review this legislation, which was part of the larger “tort reform” effort to curb what the General Assembly perceived to be a crisis in Ohio’s civil justice system, one can only wonder how the people of Ohio would feel about their elected officials if they had a better understanding of how they feel about their personal safety. All one has to do is read the

statements of findings and intents on the tort legislation they pass to gain an understanding of where their loyalties lie.

No one would reasonably dispute that frivolous lawsuits have no place in our legal system. But who should be permitted to decide what constitutes “frivolous?” Politicians or a jury of your peers? Ohio’s statute of repose has been described as a victory for manufacturers. If manufacturers won, guess who lost?

ⁱ Some narrow exceptions exist that may serve to toll the statute in limited circumstances.

ⁱⁱ O.R.C. 2125.02 and O.R.C. 2305.10.

ⁱⁱⁱ Proponent Testimony on SB-80 before the House Judiciary Committee. Mark F. McCarthy – Tucker Ellis & west LLP, July 15, 2004.

^{iv} As reported by the Senate Judiciary – Civil Justice Committee, 125th General Assembly, Regular Session, 2003-2004, Sub. S.B. No. 80.