

PRODUCT LIABILITY

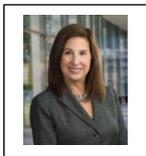
DECEMBER 2018

IN THIS ISSUE

Ohio Courts are undecided as to whether the state's product liability statute of repose divests a court of jurisdiction or serves as an affirmative defense. This article explains the confusion and suggests steps practitioners should take to ensure their manufacturer clients are protected, regardless of the court's interpretation.

The Product Liability Statute of Repose: Jurisdictional or Affirmative Defense?

ABOUT THE AUTHORS



Joyce Edelman is a member of IADC and chairs the life science subgroup of Porter Wright Morris & Arthur, LLP's Product Liability Practice Group. Joyce has over 30 years of experience representing clients in high exposure product liability, pharmaceutical and medical device litigation. She also chairs the firm's Women's Leadership Initiative and can be reached at jedelman@porterwright.com.



C. Darcy Jalandoni is a Senior Associate in the Litigation Department at Porter Wright. Darcy's practice focuses on mass tort and commercial litigation. Darcy has extensive experience in the litigation process including discovery, expert witnesses and trial preparation. She can be reached at djalandoni@porterwright.com.



Abigail Chin is an Associate in Porter Wright's Litigation Department and Sports Law Practice Group. Her practice focuses on tort and commercial litigation. Abby also assists individual athletes with professional career opportunities. She can be reached at achin@porterwright.com.

ABOUT THE COMMITTEE

The Product Liability Committee serves all members who defend manufacturers, product sellers and product designers. Committee members publish newsletters and *Journal* articles and present educational seminars for the IADC membership at large and mini-seminars for the committee membership. Opportunities for networking and business referral are plentiful. With one listserv message post, members can obtain information on experts from the entire Committee membership. Learn more about the Committee at www.iadclaw.org. To contribute a newsletter article, contact:



Whitney Frazier Watt
Vice Chair of Newsletter
Stites & Harbison PLLC
wwatt@stites.com

The International Association of Defense Counsel serves a distinguished, invitation-only membership of corporate and insurance defense lawyers. The IADC dedicates itself to enhancing the development of skills, professionalism and camaraderie in the practice of law in order to serve and benefit the civil justice system, the legal profession, society and our members.

A plaintiff files suit against your manufacturer client, alleging that the client's product caused an accident six months ago. As you begin your investigation, however, you learn that your client first sold the product eleven years ago. How do you proceed?

If available, Ohio's product liability statute of repose, R.C. 2305.10(C), can be a valuable tool for defense counsel to obtain early dismissal of claims against manufacturers and suppliers. The statute prevents a plaintiff from bringing suit against a manufacturer or supplier of a product more than ten years after the product was delivered to its first purchaser or lessee, thereby removing the product from the manufacturer or supplier's control.¹ The statute's status as a procedural vehicle, however, is unclear: although the Supreme Court of Ohio has indicated that the product liability statute of repose implicates subject matter jurisdiction, it has made no express ruling on the topic and, in the absence of explicit guidance, many courts continue to view the statute of repose as an affirmative defense, like the statute of limitations. This distinction informs which party has the burden of proving the elements of the statute, as well as whether the defense can be waived. This article will discuss these differing perspectives and offer practice pointers to protect manufacturer and supplier defendants from liability beyond the statute of repose period.

Statute of Repose as a Jurisdictional Vehicle

Ohio's product liability statute of repose provides, subject to certain exceptions that are not the subject of this article:

[N]o cause of action based on product liability **shall accrue** against the manufacturer or supplier of a product later than ten years from the date that the product was delivered to its first purchaser or 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.²

The body of case law interpreting Ohio's product liability statute of repose is not large; however, the Supreme Court of Ohio upheld the statute as constitutional in 2008 in *Groch v. GMC*.³ In so doing, the Supreme Court found that R.C. 2305.10(C), like other statutes of repose, "operates to potentially bar a plaintiff's suit before a cause of action arises. Thus, the statute can prevent claims from ever vesting if the product that allegedly caused an injury was delivered to an end user more than ten years before the injury occurred."⁴ The Court went further, suggesting that when the injury occurs beyond a statute of repose time period, the "injured party literally has no cause of action."⁵ The Court's language indicates, without explicitly holding, that a court is divested of subject matter jurisdiction over

¹ R.C. 2305.10(C).

² *Id.* (emphasis added).

³ *Groch v. GMC*, 117 Ohio St. 3d 192, 2008-Ohio-546, 883 N.E.2d 377, ¶¶ 5-8 (2008).

⁴ *Id.* at ¶ 149.

⁵ *Id.* at ¶ 116 (citing *Sedar v. Knowlton Const. Co.*, 49 Ohio St.3d 193, 201-202, 551 N.E.2d 938 (1990) (upholding construction contract statute of repose as constitutional)).

claims that arise more than ten years after a product's delivery to its first purchaser or lessee.⁶

The Supreme Court's logic in *Groch* is consistent with other courts' treatment of statutes of repose generally, both in Ohio and in sister jurisdictions: statutes of repose operate to divest courts of jurisdiction by eliminating causes of action altogether after a certain amount of time has elapsed.⁷ In *State v. Brown*, for example, the defendant appealed his guilty plea to aggravated robbery on grounds that it was time-barred.⁸ The question at issue was whether a statute barring prosecutions of felonies unless commenced within six years was "a statute of repose so that a court has no jurisdiction over the prosecution of a felony six years after it was committed, or a statute setting forth limitations of time within which a prosecution must be commenced, the effect of which can be waived by a defendant by a plea of guilty."⁹ In its analysis, the First

District Court of Appeals discussed the differences between the structure of a statute of limitation and a statute of repose.¹⁰ While statutes of limitation contain provisions for the lifting and extending of time—thus, making them waivable—statutes of repose are "entirely different in structure and design."¹¹ Statutes of repose eliminate claims, disallow for any continuance of time, and nullify all actions.¹² Thus, because statutes of repose are an absolute bar and can nullify all claims, they divest a court of subject matter jurisdiction.¹³

Statute of Repose as an Affirmative Defense

Despite the case law distinguishing between statutes of limitation and statutes of repose, Ohio courts still confuse the two concepts, thereby complicating the procedural role of the product liability statute of repose. In his opinion dissenting in part and concurring in part with the majority in *Groch*, Justice

⁶ See also *Legge v. Nucor Steel Marion, Inc.*, N.D. Ohio No. 3:08 CV 255, 2008 U.S. Dist. LEXIS 96473, *5 (Nov. 25, 2008) ("if the statute of repose for products liability is ten years from the date of delivery of the product to the end user, and the injury occurs eleven years after the delivery, then the end user's products liability claim will never arise").

⁷ See, e.g., *Acierno v. New Castle Cty.*, Civil Action No. 1173-N, 2006 Del. Ch. LEXIS 114, at *24 (Del. Ch. June 8, 2006) (granting the defendants' motion to dismiss for lack of subject matter jurisdiction on the grounds that the applicable statute of repose barred plaintiff's claims); *Angersola v. Radiologic Assocs. of Middletown, P.C.*, Case No. MMXCV146012179, 2015 Conn. Super. LEXIS 2198, at *8-11, 27 (Conn. Super. Ct. Aug. 20, 2015) (same); *Daniel v. United States*, 977 F. Supp. 2d 777, 779 (N.D. Ohio 2013) (considering a motion to dismiss for lack of subject matter jurisdiction on statute of repose grounds, among others); *Kennedy v. United States VA*, Case

No. 2:11-cv-150, 2011 U.S. Dist. LEXIS 145173, at *12-13 (S.D. Ohio Dec. 16, 2011) (granting motion to dismiss for lack of subject matter jurisdiction on statute of repose grounds), *rev'd on other grounds* 526 Fed. App'x 450 (6th Cir. 2013).

⁸ *State v. Brown*, 43 Ohio App. 3d 39, 40, 539 N.E.2d 1159 (1st Dist. 1988).

⁹ *Id.* at 39.

¹⁰ *Id.* at 42.

¹¹ *Id.* at 42.

¹² *Id.* at 42-43 (comparing language of statutes of repose for medical malpractice and construction improvements to statutes of limitation, noting how statutes of repose use language such as "no action...shall be brought" and "in no event shall any...claim").

¹³ *Id.* at 40, 43. The Supreme Court of Ohio cited favorably to *Brown* in *Daniel v. State*, 98 Ohio St. 3d 467, 2003-Ohio-1916, ¶ 17, noting that a violation of a statute of limitations, unlike a statute of repose, does not affect the jurisdiction of the court.

Pfeifer plainly characterized the product liability statute of repose as an affirmative defense on which the manufacturer has the burden of proof: “the expiration of the statute of repose is an affirmative defense. Thus, the burden will sit on the manufacturer to produce records showing that the product in question has been out of its hands for a period of more than ten years. In the absence of such a showing, there can be no affirmative defense.”¹⁴ At least one appellate court—the Eighth District Court of Appeals in *Fazio v. Gruttadauria*—has cited Justice Pfeifer’s language in summarily overruling an appellant’s assignment of error that the claims against him were barred by the statute of repose on the grounds that the statute of repose was an affirmative defense and had been waived.¹⁵ As observed by Justice Pfeifer and by the *Fazio* court, when characterized as an affirmative defense, the statute of repose can be waived and the manufacturer bears the burden of proving its elements.

Practice Pointers

Given the unclear procedural status of the product liability statute of repose under Ohio law, defense counsel should exercise caution and take the following measures to preserve all arguments in favor of a manufacturer or supplier client:

1. Assert both subject matter jurisdiction and the statute of repose as affirmative defenses in the answer to the complaint.

2. If the manufacturer or supplier client has available information showing the product at issue was delivered to its first purchaser or lessee more than ten years before the claim arose, file an early motion to dismiss for lack of subject matter jurisdiction pursuant to Ohio Rule of Civil Procedure 12(B)(1). Unlike a motion to dismiss under Rule 12(B)(6), courts may consider evidence outside the pleadings when ruling on Rule 12(B)(1) motions, allowing parties to attach as exhibits any evidence of the product’s first date of delivery.
3. If the manufacturer does not have the evidence in its possession to support a Rule 12(B)(1) motion, serve early discovery requests including, if necessary, third party subpoenas directed at obtaining the information needed to establish the first date of delivery. Make sure to obtain information about the chain of title, warranty, and repairs made to the product, as the plaintiff may attempt to raise arguments related to these issues to modify the repose period.
4. Assuming the court has not granted an earlier motion to dismiss, move simultaneously to dismiss for lack of subject matter jurisdiction under Rule 12(B)(1) (treating the statute of repose as jurisdictional) and, in the alternative, for summary judgment (treating the statute of repose as an affirmative defense). Emphasize that if the statute of repose implicates

¹⁴ *Groch*, 2008-Ohio-546, ¶¶ 251 (Pfeifer, J., concurring in part and dissenting in part).

¹⁵ *Fazio v. Gruttadauria*, 8th Dist. Cuyahoga No. 90562, 2008-Ohio-4586, ¶ 23 (“A statute of

limitations is an affirmative defense that is waived unless pled in a timely manner. The statute of repose is likewise considered an affirmative defense.”) (internal citations omitted).

subject matter jurisdiction, the *plaintiff* bears the burden of proving the court's jurisdiction—not the manufacturer defendant.

5. If there appear to be factual questions regarding the product's first date of delivery, request an evidentiary hearing to resolve this dispositive and/or jurisdictional issue in advance of trial.

Past Committee Newsletters

Visit the Committee's newsletter archive online at www.iadclaw.org to read other articles published by the Committee. Prior articles include:

NOVEMBER 2018

[Australian Class Action Reform: Reigning in the Effects of Commercialization](#)

Peter O'Donahoo, Kate Austin and Shmuel Loebenstein

OCTOBER 2018

[Introduction to AI and IoT Issues in Product Liability Litigation](#)

Jonathan T. Barton

[Legal Regime Applicable to Robots and AI – What do Europeans Think?](#)

Sylvie Gallage-Alwis

SEPTEMBER 2018

[A Three Year Retrospection on West Virginia's 2015 Asbestos Litigation Reform](#)

Jon B. Orndorff, Edward A. Smallwood, Kelly Calder Mowen and Josh M. Brick

JULY 2018

[Impeachment of a Corporate Employee by Evidence of the Corporation's Unrelated Criminal Conviction or Consent Agreement](#)

David T. Schaefer

JUNE 2018

[An Analysis Under Kentucky Law Regarding Ex-Parte Communications with Treating Physicians and Compliance with the Health Insurance Portability and Accountability Act of 1996](#)

Richard W. Edwards

APRIL 2018

[Missouri Supreme Court Weighs in on Venue: Finds Prejudice is not Implicit to Litigation Hotspots](#)

Mark A. Prost and Tim Tevlin

MARCH 2018

[Updating Objections Under Revised FRCP 34](#)

John L. Tate and Kristen K. Orr

FEBRUARY 2018

[#UpdateJuryInstructions- Improving Jury Instructions in the Age of Smartphone Communication](#)

Wendy West Feinstein and Thomas E. Sanchez