Cincinnati Law Library News

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The Constitutionality of Ohio's Statute of Repose for Claims Involving Improvements to Real Property System

By Katrina R. Atkins, Dinsmore & Shohl
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The Ohio General Assembly enacted Senate Bill 80 as part of its effort to implement tort reform, adding a ten-year statute of repose to claims involving improvements to real property. Section 2305.131 essentially abolishes claims against construction professionals for injuries occurring more than ten-years after completion of work on the improvement that gave rise to the injury.

A prior, similar provision was held unconstitutional by the Ohio Supreme Court in *Brennaman v. R.M.I. Co.*,[1] because it "closed the courthouse doors" to injured persons before they even knew of their injuries, violating the Ohio Constitution's Right to a Remedy clause. As a result, the usefulness of § 2305.131 to protect builders, engineers, and architects has been in question.

The construction bar awaited the Ohio Supreme Court's decision in *Groch v. Gen. Motors Corp.*[2] for a prediction (or perhaps an outright answer) regarding the constitutionality of § 2305.131. In *Groch,* the Court was asked, upon certified questions of law from the United States District Court for the Northern District of Ohio, to review the constitutionality of Ohio's ten-year *products liability* statute of repose, R.C. § 2305.10(C)(1).

Since *Brennaman* was the primary basis for the *Groch* plaintiff's argument against the products liability statute's constitutionality, the Court in *Groch* might give an indication of whether § 2305.131 would be upheld, or whether *Brennaman* would likely be applied to strike it down. But the Court's *Groch* opinion left open this question. While criticizing *Brennaman*, the Court expressly declined to overrule it.

Subsequently, however, in *McClure v. Alexander*,[3] the Ohio Court of Appeals, following the Supreme Court's lead in *Groch*, has resolved the constitutionality of the improvement statute. This article reviews the *Groch* and *McClure* opinions and concludes that, despite the Supreme Court's refusal to expressly overrule *Brennaman*, the Court will, if presented with the opportunity, follow *Groch* and *McClure* in upholding § 2305.131.

II. *Groch*: Examining *Sedar* and *Brennaman*

Injured while operating a thirty-year old hydraulic drill press, Groch brought a products liability action against the press manufacturer.[4] Groch argued, based on

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Space is limited, so please contact Madonna Stoneking to register at 513.946.5300 or mstoneki@cms.hamilton-co.org Nonmembers are welcome to attend, too. The registration fee is $35 for non-members.

Lexis I: Basics of Searching & Navigating Lexis
This class covers all of the basics of searching and navigating Lexis.COM, including get a document by cite and by party name, table of contents searching, basic term and connector searching, reviewing search results for relevancy and Shepardizing.
Wednesday, August 20th at 9:00 a.m.

Total Litigator & Shepard's BriefCheck
Shepard's BriefCheck: This class covers how to use the Shepard's BriefCheck feature, which provides automated cite-checking for your briefs, motions or other pleading documents. BriefCheck will pull the cites from your electronic document, Shepardize them, check them for accuracy and check any quotes in the document for accuracy... all in a matter of minutes!
Total Litigator: Total Litigator is a new access interface for searching the Lexis materials. It is set up to mirror the litigation process and therefore, some say, is a little more intuitive when it comes to locating all of the sources you need. During this introduction, you will see a demonstration of how to access the Lexis materials via Total Litigator.
Wednesday, September 17th at 9:00 a.m.

Basics of Searching & Navigating Lexis
This class covers all of the basics of searching and navigating Lexis.COM, including get a document by cite and by party name, table of contents searching, basic term and connector searching, reviewing search results for relevancy and Shepardizing.
Friday, October 10th at 9:00 a.m.

Lexis for Solo Attorneys
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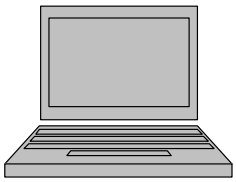

Constitutionality, continued from page 1

Brennaman, that the statute of repose violated his right to a remedy under the Ohio Constitution, and therefore, did not bar his claims.[5] The *Groch* Court disagreed and held that the new version of the products liability statute of repose was facially constitutional.[6] In doing so, the Court undertook an extensive analysis of two opinions that examined prior versions of the improvement statute: (1) S*edar*,[7] which previously upheld the state of repose applicable to improvements; and (2) *Brennaman*, which overruled *Sedar* and held the prior improvement statute unconstitutional.

In *Groch*, the Supreme Court first set forth the general principles that (1) the legislature is the "ultimate arbiter of public policy" whose enactments are entitled to a presumption of constitutionality; and (2) *stare decisis* only applies to "substantially similar" legislation. The Court then praised the soundness of the reasoning in *Sedar*, which focused primarily on the differences between statutes of limitation (which bar an action after it accrues) and statutes of repose (which prevent the right of an action from ever vesting).[8] The Court also noted *Sedar's* acknowledgment of the lack of privity between improvement professionals, and the legislature's intent to shift safety responsibility to owners or others actually in control of the premises.[9]

Brennaman "summarily declared that the statute, …deprived the plaintiffs of the right to sue…and failed to accord proper respect to the principle of *stare decisis*";[10] and calling the opinion a "classic example of the 'arbitrary administration of justice…'"[11]

The *Groch c*ourt then analyzed *Brennaman's* specific defects, most notably its "sweeping repudiation of all forms of statutes of repose."[12] The Court noted that *Brennaman* (1) failed to consider the presumption of constitutionality and "accorded no deference to the General Assembly's determination of public policy as expressed in the statute under review;" (2) failed to consider the fundamental differences between a statute of repose and a statute of limitation; (3) failed to explain why the plaintiff's right to a remedy was violated even though other avenues of recovery may have been available; and (4) "ignored the predicament of builders, who have no legal right to enter an owner's property to correct a defect that is discovered after the builder's work is completed and turned over to the owner."[13]

Based on these deficiencies, *Groch* confined *Brennaman's* precedential value to its holding that the ***prior version*** of § 2305.131 was unconstitutional.[14] The Court held, "[t]o the extent *Brennaman* stands for the proposition that all statutes of repose are repugnant to Section 16, Article I, we expressly reject that conclusion…..we do not overrule *Brennaman* we simply decline to follow its unreasoned rule in contexts in which it is not directly controlling….we therefore decline respondents' invitation to overrule ; *Brennaman*."[15]

Applying *Sedar* to the products liability statute of repose, the Supreme Court held that, unlike a statute of limitations, the products liability statute of repose does not violate the right to a remedy in that it does not deprive a plaintiff of his right to pursue a vested cause of action. Rather, it prevents a cause of action from ever vesting at all.[16]

III. *McClure v. Alexander*: § 2305.131 is Constitutional

Groch's use of the *Sedar* rationale and its strong criticism of *Brennaman* make the likely direction of the Supreme Court on the constitutionality of the improvement statute fairly clear. In *McClure v. Alexander*,[17] the Ohio Court of Appeals for

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the Second District followed the Court's lead, holding that § 2305.131 is constitutional.

Fifteen years after the construction of an addition to his home, McClure brought claims against the building contractor's estate for faulty construction.[18] Relying on *Brennaman*, McClure claimed that current § 2305.131 violated his right to a remedy.[19]

At the outset, the Court of Appeals rejected the automatic application of *Brennaman* to § 2305.131; it quoted *Groch*: "We will not apply stare decisis to strike down legislation enacted by the General Assembly merely because it is similar to previous enactments that we have deemed unconstitutional."[20] It then went on to hold that the current version of R.C. § 2305.131 "recognizes that a true statute of repose prevents a cause of action from accruing rather than preventing a plaintiff from bringing an action after accrual, like a statute of limitation," and that the legislature is free to abolish actions in which the plaintiff does not have a vested right.[21] Just as the *Groch* court noted with respect to the products liability statute, the *McClure* court wrote that the General Assembly had tailored the wording in § 2305.131 to address the holding of *Brennaman*. The prior version provided, "no action…shall be brought," while the current version, "'like the constitutional statute of repose in *Groch*, provides instead that 'no cause of action…shall accrue.'"[22] Thus, the current statute is sufficiently different from the *Brennaman* statute such that *Brennaman* is not controlling.[23]

In addition, the *McClure* court held that the exceptions[24] to the improvement statute and the availability of alternative remedies removed *McClure* from the prohibitions of the Right to a Remedy clause.[25] The Court also quoted the comments to § 2305.131, which spell out in great detail the intent of the statute to strike a balance between the rights of claimants against those who provide services for the improvement of real property and to limit the risks inherent with stale litigation.[26]

In its final comment, the Court of Appeals noted that, "[w]hile the *Groch* Court expressly declined to overrule *Brennaman*,… the majority in effect accomplished a 'de facto overruling' of a decision which 'has morphed from a

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case worthy of citation as part of this court's well settled jurisprudence to an object of derision…"[27] In short, *McClure* answered these questions not conclusively answered by *Groch*:

1. R.C. § 2305.131 is sufficiently different from the *Brennaman* statute, such that *Brennaman* is devoid of any precedential value in the constitutional analysis if § 2305.131; and

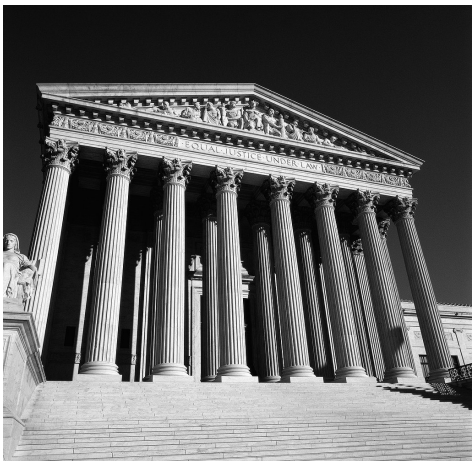
2. R.C. § 2305.131 is constitutional.

IV. Conclusion

The practical result of the *Groch* and *McClure* opinions is twofold. First, they give a very strong and clear indication, just short of a directive to trial courts, that the Ohio Supreme Court will uphold the constitutionality of § 2305.131. Second, the construction bar can now manage its cases more effectively, by addressing in a common sense manner and in the infancy of its cases the threshold issue of the *substantive* applicability of the statute of repose to improvement cases.

[1] 70 Ohio St. 3d 460 (1994).
[2] 117 Ohio St.3d 192 (2008).
[3] 2008 Ohio 1313 (2nd Dist. Ct. of Appeals, 2008).
[4] *Groch*, 117 Ohio St.3d at 194.
[5] *Id.* at 210.
[6] *Id.* at 218.
[7] *Sedar v. Knowlton Construction Co.,* 49 Ohio St.3d 193 (1990).
[8] *Groch*, 117 Ohio St.3d at 211.
[9] *Id.*
[10] *Id.* at 216.
[11] *Id.*
[12] *Id.*
[13] *Id.* at 218.
[14] *Id.*
[15] *Id.*
[16] *Id.* at 219.
[17] 2008 Ohio 1313.
[18] *Id.*
[19] *Id.* at 53.
[20] *Groch*, 117 Ohio St.3d at 210.
[21] *McClure*, 2008 Ohio 1313 at 51.
[22] *Id.*
[23] *Id.*
[24] *Id.* at 52.
[25] *Id.* If a defect is discovered less than two years before the expiration of the ten-year period, a claim may be brought within two years of discovery. Additional exceptions are made for cases of fraud and where an express warranty exceeding the ten-year period has been given.
[26] *Id.* at 47.
[27] *Id.* at 53. *Quoting Groch*, 117 Ohio St.3d at 237 (Pfeifer, J. concurring in part and dissenting in part).

Katrina R. Atkins is a member of the Product Liability Practice Group at Dinsmore & Shohl. Katrina's practice focuses on product liability, health insurance litigation, and trust litigation.



Legislation Affecting County Law Libraries

Mary Jenkins, Law Librarian & Director

The Past: HB66 and HB363

You may recall discussion of House Bill 66 and House Bill 363, legislation creating a significant financial impact on Ohio county law libraries. As reported in previous newsletters, these bills changed the language of O.R.C. § 3375.49, requiring county law libraries to pay an increasing percentage of librarians' compensation each year beginning in 2007 and an increasing portion of the expense of space, utilities, and fixtures, effective 2008. The net effect: As revenue is devoted increasingly to compensation and rent, funds available for materials and services are reduced. Here is the latest development:

The Present: Task Force and SB345

The Law Library Task Force continued to meet in an attempt to eliminate the impact of the expenses created by HB66 and HB363 and to maintain the state's county law libraries while acknowledging the County Commissioners of Ohio strongly held position that county agencies must be created to oversee the law libraries and to approve county-wide purchases and licensing of legal information. The Task Force met repeatedly with various stakeholders, including representatives of the law library community, and issued several drafts for review and comment. In late May 2008, Senator David Goodman and eleven members of the Senate introduced S.B. 345 http://www.legislature.state.oh.us/bills.cfm?ID=127_SB_345, a stand-alone bill on county law libraries. Senate leadership has tagged it a priority item and the Senate Finance Committee is expected to take it up in the fall session.

The Intent

The stated intent of SB345 is to:

- Create county law library resources boards (CLLRB)
- Make CLLRBs responsible for the provision of legal research, resources, and library services
- Make CLLRBs responsible for coordination of county purchases of legal materials
- Create a statewide consortium of CLLRBs
- Create a county law library resource fund
- Reconstitute the task force on law library associations

In a nutshell, the legislation moves responsibility for the county law libraries from the nonprofit associations to the counties, effective January 1, 2010. The new board will include five members, to be appointed by the prosecuting attorney (1), the presiding judges of municipal and county courts (1), the presiding judge of the court of common pleas (1), and the county commissioners (2). Cincinnati Law Library Association, providing for the legal information needs of Hamilton County for more than 160 years, would provide representation through a transition period.

The Function of a County Board

The board responsible for the law library in each county would have authority for budgeting and approving spending of the statutory income (except for 2% to help fund a statewide consortium), any gifts and fees for services, and any monies approved by the commissioners from the general fund. It would also have approval/veto power over all legal information licenses and acquisitions by any county office. Association employees could shift to the county payroll with recognition of years of service and credit for accrued benefits. Additionally, the county board overseeing the law library would adopt rules regarding public access and fees for services and, should it choose to do so, it could contract with a private association (ours, for example) to manage the library. Counties could enter into regional and statewide agreements for the provision of library services, materials, and database access.

The Future: We'll Invent It

Noted computer scientist Alan Kay said "The best way to predict the future is to invent it." SB345 is expected to pass because the OSBA, the CCAO, law library groups, and members of the General Assembly came to consensus on the bill's language. That's the easy prediction.

The unknown: how it will shape Hamilton County's law library. As I have heard dozens of times since becoming Law Librarian last fall, "There are 88 counties in Ohio and there will be 88 different ways of implementing this law." The Board of Trustees of the Cincinnati Law Library Association and I are researching various options for the future. Our commitment to the Law Library's mission of providing professional, practical legal research services, relevant information and education to all its users is strong, as is its dedication to its members as a nonprofit subscription law library.

CLLA Plays Host to International Library Visitors

The Cincinnati Law Library welcomed guests from Egypt, Nigeria, Kenya, Macedonia, Turkey, and the Slovak Republic on July 3. Librarians Mary Jenkins, Glenna Herald, Akram Pari, and Julie Koehne met with the group of distinguished librarians to discuss our library's services, resources, systems, processes, and patrons. The visit to the U.S. was sponsored by the International Visitor Leadership Program (IVLP) of the U.S. Department of State's Bureau of Educational and Cultural Affairs. The goal of the IVLP is to build mutual understanding between the U.S. and other countries through carefully designed visits that reflect the participants' professional interests and support U.S. foreign policy goals. Participants are selected by American embassies abroad. The program seeks to:

- To promote a better understanding of the role and function of libraries and information specialists in U.S. Society;
- To provide information on a wide variety of U.S. libraries and information management systems;
- To demonstrate the diversity of library services and to study technology and its use in library systems, including online and digital services.

The Global Center of Greater Cincinnati made local arrangements with libraries including the Public Library of Cincinnati and Hamilton County, the Mercantile Library, University of Cincinnati Libraries, and others. The vision of two dynamic organizations: The International Visitors Council and the World Affairs Council, the Global Center is a non-profit, non-partisan organization with a new vision: to be Cincinnati's bridge to the world.

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ADDRESS CORRECTION REQUESTED

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