Can I Use the Delayed-Damage Rule? The Bullet Point: Volume 2, Issue 4

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LGR Realty, Inc. v. Frank & London Ins. Agency, Slip. Op. 2018-Ohio-334.

This appeal to the Ohio Supreme Court involved the question of "whether the delayed-damage rule, which modifies the general rule for when a cause of action accrues, is applicable to this cause of action alleging negligence related to the procuring of a professional-liability insurance policy." The Supreme Court found that it was not applicable and reversed the trial court's decision.

The Bullet Point: Every claim must be brought within a certain amount of time (called the statute of limitations). The general rule is that a "[s]tatute of limitations commences to run so soon as the injurious act complained of is perpetrated, although the actual injury is subsequent." As the Supreme Court noted in this case, there are two primary exceptions to this rule. One of these exceptions is the delayed-damage rule "where the wrongful conduct complained of is not presently harmful, the cause of action does not accrue until actual damage occurs." However, the exceptions only apply in very narrow circumstances. Because exceptions to statute of limitations only apply in limited circumstances, it is important to consult counsel as soon as practical after an injury has been sustained, to ensure that any potential claims to redress the injury are brought in a timely manner.

Gonakis v. Medmarc Casualty Ins. Co., 6th Cir. No. 17-3463.

This was an appeal of a district court's decision to grant summary judgment to a malpractice carrier in a coverage dispute. Specifically, plaintiff had represented a company in a real estate deal. Four years later, he received a letter from his former client that it was thinking about suing him and others for issues with the deal. At the time that he received the letter, plaintiff had switched malpractice carriers. The new insurance policy precluded coverage for preexisting claims when the insured "had knowledge of facts that might reasonably be expected to result in a claim." Plaintiff didn't think the claims had merit but was eventually sued and tendered the matter to his insurance company. They denied coverage and he ultimately brought a declaratory judgment

action against them. Eventually the malpractice carrier moved for summary judgment, and the motion was granted. Plaintiff then appealed.

On appeal the Sixth Circuit Court of Appeals reversed, finding that the malpractice claim against the plaintiff was not "reasonably foreseeable" and thus not exempted from coverage under the policy.

The Bullet Point: Like all contracts, terms in insurance policies are given their plain and ordinary meaning and will be strictly construed against the insurer and in favor of the insured. To that end, exceptions are to be narrowly construed. As the court found in this case, when the clause is ambiguous, "Like a runner in baseball, the tie here goes to the insured," it said. Because ambiguities in insurance policies are construed against the drafter, it is important to make all terms and phrases in insurance policies, and any exceptions contained in them, as specific and unambiguous as possible.

Cintas Corp. v. Findlay Chrysler Dodge, 3d Dist. Hancock No. 5-17-14, 2018-Ohio-455.

This was an appeal of a judgment in favor of the plaintiff in a breach of contract dispute. Cintas provides uniforms for businesses and had contacted the defendant dealership about a uniform service contract. At the time, the dealership had an agreement with a different entity for various supplies and uniforms. Eventually the parties entered into a 60 month agreement for uniforms. Thereafter, the prior uniform provider found out about the deal and threatened to sue. As a result, the dealership unilaterally terminated the agreement. Subsequently, Cintas obtained judgment in excess of $21,000 based on a liquidated damages clause in the contract. The dealership appealed.

On appeal, the Third Appellate District affirmed the trial court's judgment. It specifically found that the liquidated damages clause was enforceable because it did not constitute a penalty.

The Bullet Point: Liquidated damage clauses are not enforceable if they constitute a penalty. Whether a liquidated damages clause is enforceable requires consideration of a three prong test: Where the parties have agreed on the amount of damages, ascertained by estimation and adjustment, and have expressed this agreement in clear and unambiguous terms, the amount so fixed should be treated as liquidated damages and not as a penalty, if the damages would be (1) uncertain as to amount and difficult to prove, and if (2) the contract as a whole is not so manifestly unconscionable, unreasonable, and disproportionate in amount as to justify the conclusion that it does not express the true intention of the parties, and if (3) the contract is consistent with the conclusion that it was the intention of the parties that damages in the amount stated should follow the breach thereof. While courts are loathe to enforce liquidated damages clauses, to ensure that they are enforced, contracts should contain support for each of the three foregoing elements.

Safran Family Trust v. Hughes Property Management, 6th Dist. Ottawa No. OT-17-20, 2018-Ohio-438.

This was an appeal of the trial court's judgment to grant an easement over the trust's family farm. The trust had purchased a number of plots of land, some of which were landlocked. As part of that purchase, they were granted an easement for ingress and egress as well as where they could run a water line. The recorded

easement, however, included the wrong description. Nonetheless, the trust continued to use the driveway they thought they had obtained an easement for. Thereafter, the appellant purchased the land which the family trust believed it had an easement on. The paperwork related to the sale referenced easements but not the correct ones recorded with the county recorder. Likewise, the appellant claimed that a title search was done but didn't reveal the easements. Eventually, a dispute arose as to whether an easement existed and, if so, where it existed, and a lawsuit was filed.

Eventually, the trial court granted the trust an easement, and appellant appealed. On appeal the Sixth District Court of Appeals affirmed, finding that the evidence supported an easement by implication.

The Bullet Point: "[A]n easement may be created by specific grant, prescription, or implication which may arise from the particular set of facts and circumstances …. An implied easement is based upon the theory that whenever one conveys property, he or she includes in the conveyance whatever is necessary for its beneficial use and enjoyment and retains whatever is necessary for the use and enjoyment of the land retained." In order to establish an easement by implication, a party must establish the following: (1) a severance of the unity of ownership in an estate; (2) that before the separation takes place, the use which gives rise to the easement shall have been so long continued and obvious or manifest as to show that it was meant to be permanent; (3) that the easement shall be reasonably necessary to the beneficial enjoyment of the land granted or retained; and (4) that the servitude shall be continuous as distinguished from a temporary or occasional use only. Likewise, an implied easement can be found either by prior use or necessity. While the law will find that an implied easement exists in certain situations, it is much easier and beneficial to ensure that an express easement exists that contains the will and agreement of the parties, spells out the contents of the easement in detail, and is properly recorded to ensure notice is given to the world about the existence of the easement.

Petroskey v. Martin, 9th Dist. Lorain No. 17CA011098, 2018-Ohio-445.

This case involved a real estate purchase gone bad. The plaintiff purchased a house from the defendants. The defendants had noted on various disclosure forms that there were no water issues on the property. Despite this, the plaintiffs had the property inspected before purchasing. The inspector found various water related issues and evidence of past leakage. Despite this, the plaintiffs decided to go forward with the purchase, albeit at a lower price. After purchasing the home, substantial water damage occurred, and plaintiffs eventually sued the defendants for fraud and misrepresentation. The trial court eventually granted the defendants summary judgment, and plaintiffs appealed.

The Ninth District Court of Appeals affirmed, finding that under the doctrine of caveat emptor, plaintiffs were provided ample notice of the water damage and assumed the risk by purchasing the property notwithstanding the defendants' failure to disclose the damage on various forms.

The Bullet Point: Caveat Emptor basically means "buyer beware." "Under the defense of caveat emptor, a seller will prevail against the injured buyer where (1) the defect to the premises was open to observation or [discoverable] upon reasonable inspection, (2) the buyer had unimpeded access to inspect the premises and (3) there was no fraud." Similarly, a litigant cannot prevail on a fraud claim based on a misrepresentation in a disclosure form if they are later put on notice of the potential defect. Rather, "[o]nce alerted to a possible

defect, * * * the buyer has a duty to either (1) make further inquiry of the owner, who is under a duty not to engage in fraud, or (2) seek the advice of someone with sufficient knowledge to appraise the defect." Caveat Emptor puts some duty on a buyer to follow up on a potential defect in real property. It is important that a potential buyer immediately obtain counsel if he or she is unsure of what to do when a defect is uncovered, to avoid the outcome that happened in this particular case