Ohio Surveying News

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HOW LONG AM I ON THE HOOK?[1]

By Thomas R. Schuck, Esq.

Your potential liability for land surveys lasts forever, right? No. Throughout the United States, state law typically determines the amount of time a person has to file a lawsuit. This varies depending on the reason for the suit. In Ohio, these time limitations are governed by statute.

The Ohio Revised Code contains statutes of limitation for a variety of claims for injury to person or property and other civil wrongs. A statute of limitations determines the time a person has to bring suit after a claim arises. The law also contains statutes of repose, which extinguish claims after a fixed period of time, usually measured from a determinable event such as the completion of the assignment to which the claim relates, regardless of when the cause of action accrued. In other words, a statute of limitations governs the time within which an action may be filed after it accrues, while a statute of repose provides an absolute bar to a cause of action filed after a specified period of time. [2]

When there is no time limitation provided for a particular claim, it is covered by a general limitation statute or the courts must determine the most analogous limitation period to apply. In the case of professional negligence, sometimes known as malpractice, the time limitation applicable to claims against professionals other than medical personnel and lawyers has been determined by the courts. Since 1989, Ohio courts have applied a four-year limitation period to claims of professional negligence against non-medical and non-legal professionals.[3] In *Bell v. Holden Survey, Inc.,*[4] the Ohio Court of Appeals considered a claim against a registered land surveyor and his company for allegedly mis-surveying a boundary line, resulting in an overlap of adjacent parcels. The court applied the four-year general statute of limitations to the claim of professional negligence against the surveyor and his company, but allowed a claim for fraud against them in connection with events subsequent to the performance of the survey to proceed. The court applied a "discovery rule" to the fraud claim, meaning that because the defect in the 1991 survey was not discovered until 1995, the fraud claim was still timely when it was asserted in 1996, although the negligence claim based on the survey itself was subject to an absolute four-year limitation and was therefore time-barred. Subsequently, another Ohio court of appeals followed the four-year rule for a claim against surveyors for professional negligence and also rejected the application of the discovery rule or "delayed damages" theory to claims of professional negligence in a property damage case.[5] The court held that the time to assert a claim for professional negligence starts to run when the allegedly negligent survey is completed, not when the injury is discovered. In 2005, the federal court in Cincinnati applied the four-year statute to claims for professional negligence against an environmental engineer.[6]

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[2] 66 Ohio Jurisprudence 3d, § 5 (Thomson Rueters 2009).

[3] *Investors REIT One v. Jacobs*, 46 Ohio St. 3d 176, 546 N.E.2d 206 (1989).

[4] 2000 WL 1506494 (Ct. App. Carroll Co. 2000).

[5] *James v. Partin*, 2002 WL 1058152 (Ct. App. Clermont Co. 2002).

[6] *Scott Hutchison Enterprises, Inc. v. Rhodes, Inc.*, No. C-1-01-776 (S.D. Ohio August 18, 2005).

In 2011, the Ohio Supreme Court confirmed that claims for professional negligence subject to the four-year statute run from when the allegedly negligent act was committed, not from when it was discovered or when damages were supposedly sustained.[7]

In 2014, the Ohio General Assembly passed Amended Substitute House Bill 483, which contained a new provision requiring that a claim for professional negligence against a registered surveyor in Ohio be commenced within four years after the completion of the engagement on which the cause of action is based. This statute went into effect on September 15, 2014.

For this new statute to apply, the claim at issue must arise out of professional negligence, that is, the alleged failure to perform a surveying engagement according to the applicable standards in Ohio; and the claim must be brought within four years after the completion of the engagement, a point in time that may or may not be clear based on the relationship of the parties.

A registered land surveyor who does a "one off" and sends a bill at the end of the job saying "I'm through" has a much easier time demonstrating when the clock begins to run than does a surveyor who has a continuing relationship with a client or does a series of jobs and fails to document when each job starts and finishes. The new statute suggests the importance of doing something that lawyers routinely do in Ohio – sending an "engagement letter." This can be as simple as a note describing the job and quoting an hourly rate or price for its completion, or as sophisticated as a description as all of the services to be rendered, the personnel concerned, hourly rates, etc. The engagement letter establishes the scope of the work to be performed and the terms of the engagement. Ideally, it should be counter-signed by the client and a copy returned to the surveyor for the file.

If the job is cancelled for any reason, the surveyor may also want to send what lawyers call a "disengagement letter." This is written notification that the job has been terminated. It should outline whether any further action is expected and the amount due the surveyor for the work that has been performed.

When a job is completed, the surveyor should promptly send an invoice that indicates that the engagement is over. Ideally, the date of the invoice will provide the point of commencement of the four-year period during which claims based on the engagement may be brought in Ohio. If there is a continuing relationship consisting of a series of jobs, periodic invoices or other written evidence of the completion of individual engagements within the continuing relationship can evidence when claims based upon the work covered by the invoice or engagement letter may be brought.

Having this information in the file will not only protect registered land surveyors but is valuable to the surveyors' insurers, because it will allow them to determine when a particular claim arose and when it may be brought. This is important because different insurers cover claims of professional negligence for different periods of time. It is in everyone's interest to know whether a particular claim is insured or not, and if so, by whom.

If all of this seems like too much formality, chalk it up to the increasing complexity of commercial relationships and the escalating cost of resolving disputes. The new statute of limitations makes it clear that the four- year rule applied by Ohio courts to claims of

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[7] *Flagstar Bank, F.S.B v Airline Union's Mortgage Co.*, 128 Ohio St. 3d 529, 947 N.E.2d 672 (2011).

professional negligence applies to registered land surveyors. However, it does not resolve the question of who may assert a claim – the client; the client's successor; a subsequent landowner; another party to the transaction; etc. It has long been the law in Ohio that a contract may be enforced by a person who is not a party to it if the contract was made and entered into directly or primarily for the benefit of the third person.[8] It is sufficient if the third person is within the contemplation of the parties to the contract.[9] The Ohio Supreme Court has developed a test to determine whether a person is a third party beneficiary of a contract: if the evidence shows that the parties to the contract intended someone else to benefit from it, then that person is an intended beneficiary who has enforceable rights under the contract; but if the parties had no intent to benefit the third person, then he or she is an incidental beneficiary of the contract and has no enforceable rights under it.[10] This question must be answered in each case based on the evidence. In the federal court case mentioned above, claims were asserted against the environmental engineer not only by its customer, developer Scott Hutchison Enterprises, but also by the seller of the land in question. The dispute concerned the mislocation of a federally designated wetlands, which turned out to include the subject property and precluded its development. The court found that both the engineer's customer and the customer's seller were intended beneficiaries of the engineer's work, and therefore held that both could maintain claims of professional negligence against the engineer for mislocating the wetlands. The key to protecting yourself against such claims is to limit the terms of your engagement – make it clear to whom you owe your duty as a registered land surveyor; and what a job entails. The better you document your engagement, the fewer open questions will arise and the less likely it will be that you will find yourself involved in an expensive and time-consuming court case.

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Mr. Schuck is a long-time member of the Federal Bar Association and a former Barrister of the Potter Stewart American Inn of Court in Cincinnati. He is a life member of the Judicial Conference of the Sixth Circuit and has chaired its Life Members Committee and its Merit Selection Panel for a vacant bankruptcy judgeship. He is also a member of the Ohio State Bar Association.

Mr. Schuck was an integral contributor, researcher and author of the language for the Surveying Statute of Limitations in Ohio, along with Sen. Bill Seitz, as a courtesy to the members of the Southwest Ohio and Cincinnati Chapters of PLSO.

[8] *Cleveland Metal Roofing & Ceiling Co. v. Gaspard*, 89 Ohio St. 185, 106 N.E. 9 (1914).
[9] *Layman Corp. v. Piggly-Wiggly Corp.*, 90 Ohio App. 506, 103 N.E.2d 399 (Ct. App. Hamilton Co. 1951); *Hines v. Amole*, 4 Ohio App. 3d 263, 448 N.E.2d 473 (Ct. App. Greene Co. 1982); *Alexander Grant & Co. v. Windsor House, Inc.*, 1989 WL 122538 (Ct. App. Mahoning Co. 1989).
[10] *Visintine & Co. v. New York, Chicago & St. Louis Rd. Co.*, 169 Ohio St. 505, 160 N.E.2d 311 (1959).