

Ohio Supreme Court Rules on Statute of Repose

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In a flurry of end-of-the-year decisions, the Supreme Court of Ohio handed the medical community a major victory when it decided *Ruther v. Kaiser* and reversed the decision of the Twelfth District Court of Appeals that, if followed, would have allowed medical malpractice claims to be brought decades after the alleged malpractice occurred.

The medical malpractice statute of repose

With some exceptions, the medical malpractice statute of repose, R.C. 2305.113(C), provides an outside time limit for potential liability. Distinct from the one-year statute of limitations for bringing a medical claim, the statute of repose operates to prevent plaintiffs from bringing medical malpractice claims based on underlying acts that occurred more than four years earlier. Claims made on behalf of minors and the mentally incompetent are excepted from the statute, as are claims based on alleged malpractice discovered between the third and fourth year after the alleged malpractice and those involving the discovery of foreign objects left in the body.

The appellate decision

The underlying case involved acts of alleged malpractice that occurred in the 1990s and allegedly caused a patient's death in 2009. *Ruther v. Kaiser*, 12th Dist. No. CA2010-07-066, 2011-Ohio-1723. Timothy Ruther, while a patient of Dr. Kaiser, had lab work done in 1995, 1997, and 1998 that showed significantly elevated liver enzymes. Dr. Kaiser's office did not notify Ruther of these results. In December 2008 — after he had stopped being treated by Dr. Kaiser — Ruther was diagnosed with hepatitis C and liver cancer. In the lawsuit against Dr. Kaiser that followed, Ruther alleged that it was not until the time of his 2008 diagnoses that he became aware of his abnormal lab tests from the 1990s. Ruther died approximately one month later, and his claim was continued by his wife.

Despite falling squarely within the four-year statute of repose, the trial court refused to apply the statute and instead found it unconstitutional as applied to Ruther's medical claim. The Twelfth District Court of Appeals affirmed.

In finding the statute unconstitutional, both lower courts relied on the what is commonly referred to as the right-to-remedy or open-courts provision of the Ohio Constitution. 38. This provision provides that "[a]ll courts shall be open, and every person, for an injury done him in his * * * person * * * shall have remedy by due course of law * * *." Article I, Section 16 of the Ohio Constitution. Giving short shrift to the due-course-of-law clause of this provision, the lower courts simply relied on an earlier Supreme Court case — *Hardy v. VerMeulen*, 32 Ohio St.3d 45 (1987) — which had construed a different version of the statute

of repose and found it to be unconstitutional because it denied a remedy to plaintiffs who were not able to discover that they were injured within four years. Despite acknowledged differences between the two versions of the statute, the lower courts relied on *Hardy* and said the present version of the statute is also unconstitutional.

The Ohio Supreme Court reverses

The Supreme Court granted review and reversed. In doing so, it emphasized the due-course-of-law aspect of the right-to-remedy provision and made clear that this provision "does not prevent the General Assembly from defining a cause of action." *Ruther v. Kaiser*, Slip Opinion No. 2012-Ohio-5686. The General Assembly had every right and authority then "to determine what causes of action the law will recognize," and it could likewise "alter the common law by abolishing the action, by defining the action, or by placing a time limit after which an injury is no longer a legal injury." If it did not have this authority, "medical providers are left with the possibility of unlimited liability indefinitely."

The Court noted strong policy reasons for upholding the statute of repose as enacted: Just as a plaintiff is entitled to a meaningful time and opportunity to pursue a claim, a defendant is entitled to a reasonable time after which he or she can be assured that a defense will not have to be mounted for actions occurring years before.

But even though strong public policy supported the legislation and the Court found no constitutional infirmities, the Court was not finished. It reexamined *Hardy* and overruled it. Relied on repeatedly by plaintiffs as support of the statute's unconstitutionality, the Court found the analysis in *Hardy* fatally flawed and "wrongly decided."

In sum, it was a good day for the medical community when the Ohio Supreme Court decided *Ruther v. Kaiser*. Ohio is now in line with the majority of jurisdictions; 32 states have these statutes in existence. ■

Editor's note: An amicus curiae expressing support for the appellate's position in this case was filed by several medical associations and the Ohio Alliance for Civil Justice (OACJ) — the AMCNO is a longstanding member of the OACJ and supported the appellate position in this case.

AMCNO Convenes Alternative Dispute Resolution Work Group to Discuss Pilot Programs



Members of the ADR work group pose for the camera — left to right, Michael Shroge, Esq., Ed Taber, Esq., Marlene Franklin, Esq., Ohio Chief Justice Maureen O'Connor, Peter Weinberger, Esq., Paul Grieco, Esq., David Valent, Esq., Greg Popovich, Esq., and the Honorable Tim McMonagle.

Last year, the AMCNO convened a work group made up of plaintiff and defense attorneys, as well as AMCNO physician representatives and the Chief Justice of the Ohio Supreme Court. The work group received detailed background on a program operating in New York which was started as a judge-directed negotiation program. The program was directed to expediting the adjudication and early resolution of medical liability cases — in an effort to reduce administration/litigation costs. The work group also discussed the usage of special judges and special courts and the possibility of looking at a pilot program in Northern Ohio.

In April 2012, the AMCNO co-sponsored a seminar with the Cleveland Metropolitan Bar Association which focused on the topic of specialty courts and special dockets. As a follow up to that seminar, the AMCNO medical legal liaison committee discussed the topics covered and noted that based upon feedback from the attendees that it might not be feasible to set up a special medical court in Cuyahoga County, however, the committee agreed that perhaps the work group could consider another initiative, for example a case management order for malpractice cases.

The AMCNO recently reconvened the alternative dispute resolution work group to discuss the case management concept. The federal courts have something like this already where they differentiate case management — a standard track and a complex track. The set of rules that could be used would be similar to those used in the commercial court cases. One rule that might be helpful would be that the judge has to see the parties and the representatives within a certain period of time or number of days after the case is filed. In addition, the judges would have to rule on motions, with the intent to create a list of items that have to occur in a certain timeframe.

The work group plans to meet sometime in the future to consider coming up with a document addressing the possibility of setting up a pilot program which would include a unified case management order with the use of a special master for medical malpractice cases in Cuyahoga County. If this document is prepared and drafted by the work group, the work group would then have to take the document to the judges in Cuyahoga County in order to get input from the judiciary.