Legal Backgrounder

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RECENT OHIO HIGH COURT RULINGS REFLECT RESPECT FOR LEGISLATURE'S ROLE IN MAKING TORT LAW

by

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On October 22, 2008, the Ohio Supreme Court held in *DiCenzo v. A-Best Products Company, Inc., et al*, 120 Ohio St. 3d 149, that its seminal decision in *Temple v. Wean United, Inc.*, 50 Ohio St.2d 317 (1977), which for the first time found suppliers (non-manufacturers) liable in common law strict tort liability, could *not* be applied retroactively to conduct which occurred prior to *Temple*. The *DiCenzo* decision undermined the ability of plaintiffs, particularly in asbestos litigation, to sue non-manufacturer (supplier/installer/distributor) defendants, whose underlying sale or installation of products predated the 1977 decision in *Temple*.

DiCenzo was the most recent in a string of Ohio Supreme Court decisions since 2002 which have demonstrated a change from an aggressive Court, deemed a "super-legislature on several major public policy issues in Ohio",[1] to a Court which has restored a reasonable balance of power between itself and the Ohio Legislature. No longer in the business of expanding tort liability and striking down tort reform, the Court has now shown deference to legislative tort reform efforts, intended to reign in further expansion of tort liability.[2]

The following discussion of recent Ohio legislative enactments and corresponding Ohio Supreme Court rulings illustrates this judicial restraint and cessation of tort liability expansion.

Tort Reform. Between 1975 and 2002, the Ohio Legislature enacted numerous tort reform measures, all of which were found unconstitutional or otherwise invalidated by the Ohio Supreme Court. *See, e.g., Morris v. Savoy*, 61 Ohio St.3d 684 (1991); *State ex. rel. Ohio Academy of Trial Lawyers v. Sheward*, 86 Ohio St. 3d 451 (1999).[3] However, since *Sheward*, the Ohio legislature has undertaken a host of new tort reform measures which have, thus far, withstood constitutional scrutiny.

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[1] *See* David J. Owsiany, *The Ohio Supreme Court: A Court at the Crossroads* (Federalist Society for Law & Public Policy, Oct. 2004 at 1-2), available at http://www.fed-soc.org/doclib/20070325_ohio.pdf.

[2] For a detailed discussion of the changes in the Ohio Supreme Court's personnel and philosophy, *see* Jonathan H. Adler and Christina M. Adler, "*A More Modest Court: The Ohio Supreme Court's New Found Judicial Restraint*" (Federalist Society for Law & Public Policy Studies, Oct. 2008 at 3).

[3] For a more complete discussion of this tort reform history, *see* Tunnel, Sferra & Motter, "*Ohio High Court Upholds Law Limiting Tort Damages*", 23 LGL. BACKGROUNDER 6 (Wash. Legal Fndt.), Feb. 2008.

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Apportioned Liability. The newest tort reform measures largely began with Senate Bill 120 ("S.B. 120"),[4] which became effective April 9, 2003. S.B. 120 largely eliminated "joint and several liability" in Ohio, and in its stead, introduced apportioned liability. S.B. 120 provides that if a defendant's liability is 50% or less of the tortious conduct, that defendant is essentially liable only for its proportionate share of damages.[5] Moreover, O.R.C. § 2307.011 defines broadly the persons or entities against whom apportioned shares may be attributable.[6]

The Legislature adopted a further tort reform act, Amended Substitute Senate Bill 80 ("S.B. 80"), which became effective on April 7, 2005. S.B. 80 imposed caps on damages, and reintroduced Statutes of Repose, after they had previously been held unconstitutional.

Damage Caps. S.B. 80 capped non-economic (pain and suffering) loss in non-catastrophic injury cases to the greater of $250,000 or three times the amount of economic damages up to $350,000 per plaintiff and $500,000 per occurrence. O.R.C. § 2315.18. Punitive damages were capped at two times the amount of compensatory damages awarded, or even less if the defendant is deemed a "small employer" as defined in the statute. O.R.C. § 2315.21. These limitations on damages were constitutionally attacked. However, after years of the Ohio Supreme Court undermining such legislation, the Court in *Arbino v. Johnson & Johnson*, 116 Ohio St.3d 468 (2007), 2007-Ohio-6948, upheld the statutory limitations discussed above.

Statutes of Repose. S.B. 80 also included ten year Statutes of Repose for products (O.R.C. § 2305.10(C))[7] and for improvements to real property (O.R.C. § 2305.131). These new Statutes of Repose expressly provide that they are superior to any applicable statute of limitations.[8] The Ohio Legislature had enacted prior Statutes of Repose, but they were found unconstitutional by the Ohio Supreme Court. *See, e.g.*, *Brennaman v R.M.I. Co.*, 70 Ohio St. 3d 460 (1994). However, a constitutional challenge to the new Statute of Repose for products was recently rejected and the statute upheld in *Groch v. General Motors Corp.*, 117 Ohio St.3d 192 (2008).

In *Groch*, the Ohio Supreme Court discussed its earlier decision in *Brennaman v. R.M.I. Co.*, 70 Ohio St.3d 460 (1994), which had overruled an earlier case, *Sedar v. Knowlton Construction Co.*, 49 Ohio St.3d 193 (1990). *Sedar* had upheld a prior Statute of Repose dealing with improvements to real property. In *Groch*, the Ohio Supreme Court recognized the deficiency in its reasoning in *Brennaman*. While not expressly overruling *Brennanman*, it declined "to follow its unreasoned rule in contexts in which it is not directly controlling." *Groch* at ¶147. The Court proceeded to uphold the constitutionality of this Statute of Repose for products and presumably would do so for the new Statute of Repose for improvements to real property. *See McClure v. Alexander*, 2008 Ohio 1313 (2d Dist. 2008).

Asbestos Medical Impairment Legislation/Court Challenges. The Ohio Legislature passed a medical impairment asbestos statute (Amended Substitute House Bill 292 ["H.B. 292"]) which became effective on September 2, 2004.[9] The purpose of H.B. 292 was to limit the glut of medically questionable asbestos cases clogging the dockets in Ohio. It essentially placed in administrative dismissal virtually all non-malignant cases unless those claimants meet the medical criteria establishing legitimate disease. H.B. 292 also created legislative hurdles for any asbestos lung cancer claimant who had been a significant cigarette smoker. Plaintiffs attacked the new asbestos legislation largely on the basis of its retroactive effect, but the Ohio Supreme Court upheld H.B. 292's constitutionality in two cases: *Norfolk v. Bogle*, 115 Ohio St.3d 455 (2007) and *Ackison v. Anchor Packing Company*, 2008 Ohio 5243.

In *Bogle*, the Ohio Supreme Court held, in the context of an asbestos claim brought under the Federal Employer's Liability Act and the Locomotive Boiler Inspection Act, that the Ohio asbestos tort reforms in H.B.

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[4]Enacted as Ohio Revised Code (O.R.C.) §§ 2307.22, 2307.23 and related § 2307.11.

[5]Where it is determined that more than 50% of tortious conduct is attributable to a defendant, then that defendant is jointly and severally liable for the entire economic loss. *See* O.R.C. § 2307.22(A)(1) and § 2307.011.

[6]As defined by the Trial Judges who administer the special asbestos docket in Cleveland, this includes non-parties such as the approximately 85 former manufacturers of asbestos products who have filed for bankruptcy protection.

[7]The Statute of Repose for products expressly exempts claims based upon exposure to asbestos.

[8]Ohio has a two year statute of limitation for general tort actions (O.R.C. § 2305.10(A)). A "discovery rule" applies to claims based on asbestos exposures (O.R.C. § 2305.10(B)(5)), as well as other toxic exposures (O.R.C. § 2305.10(B)(1-4)). This "discovery rule" is dependent upon when the claimant knew or should have known that they have an injury related to the exposure.

[9]The Legislature contemporaneously promulgated a similar medical impairment statute for silica cases (H.B. 342), but without a provision explicitly deeming it retroactive, like in the asbestos statute.

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292 did not violate the Supremacy Clause of the United States Constitution since H.B. 292's filing requirements were *procedural* in nature, and thus could be imposed with retroactive effect on the plaintiffs. The Court stated:

> [S]ubstantive laws or rules are those that 'relate[] to rights and duties which give rise to a cause of action.' By contrast, procedural rules concern 'the machinery for carrying on the suit.' *Id*. A review of the statutes reveals that they do not grant a right or impose a duty that 'give[s] rise to a cause of action.' *Id*. . . . Simply put, these statutes create a procedure to prioritize the administration and resolution of a cause of action that already exists. *Id*. at ¶16.

Bogle was a precursor to the October 2008 Ohio Supreme Court decision in *Ackison* which upheld the constitutionality of the retroactivity provisions in H.B. 292, rendering the statute applicable to the tens of thousands of Ohio claims pending as of the effective date of the statute. Relying upon *Bogle*, the Court in *Ackison* held that: "The requirements in R.C. 2307.91, 2307.92, and 2307.93 are remedial and procedural and may be applied without offending the Retroactivity Clause of the Ohio constitution . . . " *Ackison* at syllabus.

The plaintiff in *Ackison* argued that the legislation had an unconstitutionally retroactive impact because it barred claims like those of her decedent for pleural thickening which had previously been classified as a compensable injury under common law. The Court rejected this argument, finding instead that there was no common law definition of injury. Accordingly, the legislature was free to establish that definition by means of H.B. 292. Thus, the Court found that plaintiff had no vested right in earlier court definitions of asbestos-related injury. Moreover, the Ohio Supreme Court held that the legislation did not extinguish the right to recovery, but merely "caused a hold to be placed on the claim…." *Ackison*, ¶27.

The Court in *Ackison* also rejected plaintiff's argument that the statute, by defining the term "competent medical authority" and mandating that such medical authority be used to prove medical impairment, impermissibly altered the burden of proof placed upon a claimant. Again, the Court found that there was no prior established definition of this term. The legislature was, therefore, free to establish this definition in the same manner that it could establish a rule of competency governing an expert witness. This again fell into the realm of procedural, rather than substantive issues, and thus was a permissible exercise of legislative power. *Ackison*, ¶29.

The plaintiff also asserted that H.B. 292 altered the requirements of causation by defining "substantial contributing factor," and including a requirement that "[E]xposure to asbestos is the predominate cause of the physical impairment alleged in the asbestos claim." O.R.C. § 2307.91(FF) (1). Plaintiff argued that this contravened the Court's earlier decision in *Horton v. Harwick Chem. Corp*., 73 Ohio St.3d 679 (1995), which established the "substantial factor" test for causation. The Court wrestled with the term "predominate cause," but ultimately interpreted it as a "but for" test of causation – which was consistent with previous court decisions – so as to uphold the constitutionality of the legislation. *Ackison*, ¶49 and ¶51.

Finally, the court rejected plaintiff's view that the definition of "substantial occupational exposure" in O.R.C. § 2307.91(GG) was an impermissible attempt to introduce the so-called *Lohrmann* criteria[10] and apply them retroactively in contravention of the Court's previous decision in *Horton, supra* which had expressly rejected these criteria. The Court in *Ackison* again held that the new statutory criteria were simply a means of "procedural prioritization," and did not alter the burden of proof for existing claims. The Court noted that the adoption and application of the *Lohrmann* criteria in a different statute was explicitly prospective, and thus the entire scheme was constitutional. *Ackison,* ¶61.

Rejection of Strict Liability Against Suppliers. During the same week *Ackison* was decided, the Ohio Supreme Court decided the *DiCenzo* case, holding that non-manufacturer defendant suppliers, installers and distributors of asbestos-containing products prior to 1977 could not be sued under *common law* principles of strict liability. Since most asbestos products were sold or installed prior to 1973, this effectively undermined the ability of most asbestos plaintiffs to sue non-manufacturers in Ohio in common law strict tort liability, relegating them to claims of negligence.

[10]These criteria were adopted in the case of *Lohrmann v. Pittsburgh Corning Corp.*, 782 F.2d 1156 (4th Cir.1986), in which the Court required a plaintiff to establish "exposure to a specific product on a regular basis over some extended period of time in proximity to where the plaintiff actually worked." *Id*. at 1162-1163.

Previously, in *Potts v. 3M Company, et al.*, 2007 Ohio 1144; 2007 Ohio App. Lexis 1057, the Ohio 8th District Court of Appeals rejected a plaintiff's attempt, under Ohio's Product Liability Act,[11] to utilize *statutory* strict liability claims against suppliers. The Court of Appeals held that statutory strict liability was not available against a supplier under the two commonly proffered elements of the statute in asbestos litigation. *See* O.R.C. § 2307.78(B)(1) and (2). First was "insolvency" of the manufacturer. The Court rejected plaintiff's claim that bankruptcy was the equivalent of insolvency and held that if any Trust from the numerous asbestos manufacturer bankruptcies paid monies to claimants, that manufacturer could not be deemed "insolvent" for purposes of the statute. Second, the Court held that claimed "lack of judicial process" as to the manufacturer, did not apply to currently bankrupt entities which had previously been subject to long arm jurisdiction in Ohio.[12]

When the Ohio Supreme Court rejected the *Potts* appeal and let stand the favorable rulings by the lower Courts severely limiting *statutory* strict liability claims in Ohio against non-manufacturers, the plaintiffs' bar then attempted to assert *common law* strict liability claims which resulted in the recent *DiCenzo* opinion.

DiCenzo addressed the supplier defendants' liability for selling or installing asbestos-containing products from the 1950s to the early 1970s. By the 1990s, most of the major manufacturers of those products had filed for bankruptcy and thus could not be sued by plaintiffs, whose disease took decades to manifest. Accordingly, the plaintiffs' bar pointed their guns at mere suppliers/installers of asbestos products. They sued suppliers based upon the 1977 *Temple v. Wean* decision, which first adopted common law strict liability against non-manufacturers. These claims of common law strict tort liability would, in effect, force the suppliers to defend a product manufactured by another. However, by disallowing strict tort liability against the suppliers, the Court would relegate plaintiffs to negligence claims against the suppliers. As these negligence claims would be based upon the suppliers' knowledge of the alleged product hazards, they would be more defensible than claims for strict tort liability, which are based upon the allegedly defective product.

The inquiry in *DiCenzo* was whether *Temple v. Wean* could be applied retroactively to impose common law strict liability upon suppliers. To decide the retroactivity issue, the Ohio Supreme Court in *DiCenzo* looked to the United States Supreme Court decision in *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971). The first issue was whether *Harper v. Virginia Dept. of Taxation*, 509 U.S. 86 (1993) overruled *Chevron Oil*. The Ohio Supreme Court decided that *Harper* did overrule *Chevron Oil* but only when applying Federal law. According to the *DiCenzo* Court, *Chevron Oil* remains viable for purposes of analyzing State law. The Ohio Supreme Court then adopted *Chevron's* analytical framework for purposes of determining the retroactive or prospective application of a Court decision.

The Ohio Supreme Court determined that it would be inequitable to impose *Temple* on non-manufacturing suppliers of asbestos products that sold or installed those products prior to the *Temple* decision, holding: "Imposing such a potential financial burden on these nonmanufacturing suppliers years after the fact for an obligation that was not foreseeable at the time would result in a great inequity." *DiCenzo*, at ¶47.

The ramifications of *DiCenzo* are likely not limited only to suppliers of asbestos products. Common law strict liability claims should also be obviated against pre-1977 sellers of other products (such as benzene, silica and lead paint) that may have contributed to a latent disease. Similarly, suppliers of materials and components that became parts of buildings more than thirty years ago may also be protected from common law strict tort liability claims, should those materials eventually be deemed defective.

Conclusion. The foregoing decisions by the Ohio Supreme Court demonstrate the substantial change in what had been an "activist" Court – constantly striking down legislative attempts at tort reform and expanding tort liability – to a Court with a more reasoned, fair, and legislatively respectful approach. As a result, the landscape in Ohio for businesses and product liability defendants has improved considerably.

[11]O.R.C. § 2307.78(B) set forth the limited bases upon which suppliers could be subject to strict liability as if a manufacturer.

[12]Plaintiff claimed that "lack of judicial process" was the equivalent of "lack of service" but the Court disagreed, siding with the supplier defendant in defining "lack of judicial process" as "lack of jurisdiction". Since the bankrupt manufacturers had done business in Ohio, they had been subject to long arm jurisdiction, and thus there was no "lack of judicial process".