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EXPERT ANALYSIS

Fourth Circuit Misconstrues North Carolina's Statute of Repose — And State's High Court Cannot Help

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In March 2016, the U.S. Court of Appeals for the Fourth Circuit held that North Carolina General Statute § 1-52(16)'s ten-year statute of repose does not apply to disease-related claims because, according to the court, a disease is not a "latent injury." *Stahle v. CTS Corp.*, --- F.3d ---, 2016 WL 806087 (Mar. 2, 2016). In reaching that conclusion, the Fourth Circuit relied exclusively on a 30-year-old opinion addressing a different statute of repose. Because North Carolina lacks a procedure to certify questions of state law to the state's highest court, the 4th Circuit predicted how the North Carolina Supreme Court would rule on the question. Including the *Stahle* decision, four federal courts of appeals have now addressed the issue leading to four different results.

STAHLE V. CTS CORP

Kent Stahle grew up in Asheville, North Carolina. His family's property was on a stream known as Dingle Creek. Many years later, Mr. Stahle was diagnosed with Chronic Myelogenous Leukemia. In 2014, he filed a single-count complaint in the Western District of North Carolina alleging that a company called CTS of Asheville negligently dumped toxic chemicals into Dingle Creek causing his leukemia. The district court dismissed Stahle's complaint, holding that the statute of repose in § 1-52(16) barred the action. The 4th Circuit reversed.

At the relevant time, § 1-52(16) provided:

> [F]or personal injury or physical damage to claimant's property, the cause of action, ... shall not accrue until bodily harm to the claimant or physical damage to his property becomes apparent or ought to reasonably have become apparent to the claimant, whichever event first occurs. Provided that no cause of action shall accrue more than 10 years from the last act or omission of the defendant giving rise to the cause of action.

The 4th Circuit noted that, in a 1986 case, "we articulated our understanding that 'the North Carolina Supreme Court does not consider disease to be included within a statute of repose directed at personal injury claims unless the Legislature expressly expands the language to include it.'" *Id.* at *2 (quoting *Hyer v. Pittsburgh Corning Corp.*, 790 F.2d 30, 34 (4th Cir. 1986)). The court continued that "*Hyer* is still the law in this Circuit, and we are bound to follow it here." *Ibid.* Even though the language and scope of the statutes of repose at issue in *Hyer* and *Stahle* were quite different, the court "saw no meaningful distinction" between them and took "a small measure of comfort in the fact that ... neither the North Carolina General Assembly nor the North Carolina courts have taken exception" to *Hyer*. *Id.* at *5.

As Judge Thacker noted in her concurrence, however, "*Hyer* construed a different statute, relied on a North Carolina decision characterizing § 1-52(16) quite broadly, and has not been cited by a reported

North Carolina decision" in the 30 years since it was issued. *Id.* at *13 (Thacker, J., concurring). For those reasons, Judge Thacker concluded that the passage from *Hyer* relied upon by the majority was "non-binding dicta." *Ibid.* Nevertheless, Judge Thacker concurred in the result in *Stahle* based on her agreement with the majority's textual analysis of § 1-52(16). *Id.* at *15-*16.

While purporting to be "guided by the principle of 'plain meaning' when construing statutes," *id.* at *6, the *Stahle* majority improperly read a latent-injury requirement into the statute. According to the court, § 1-52(16) "appears to apply to that set of personal injuries for which 'bodily harm to the claimant ... becomes apparent' at some point in time after the injury, N.C. Gen. Stat. § 1-52(16); that is, it applies to latent injuries." *Id.* at *7. But the word "injury" does not appear in the statute except as a general reference to "personal injury" claims. Instead, § 1-52(16) simply states that a cause of action does "not accrue until bodily harm to the claimant ... becomes apparent." As the Eleventh Circuit recently held in *Bryant v. United States*, "[o]n its face, the text of [§ 1-52(16)] contains no exception for latent diseases, and no other North Carolina statute excepts latent diseases from the statute of repose. The plain text of the statute is unambiguous." 768 F.3d 1378, 1381 (11th Cir. 2014).

Rather than meaningfully address the Eleventh Circuit's decision in *Bryant* and properly interpret the plain language of § 1-52(16), the *Stahle* court hid behind a 30-year-old decision that did not even interpret the same statute. The result, as Judge Thacker noted in her concurrence, is that "after the publication of this decision, four circuits will have addressed this state law question, all with different views of the statute's scope."[1]

The North Carolina General Assembly should consider creating a certification procedure so that a future federal court can certify questions to the state's highest court.

CERTIFIED QUESTIONS OF NORTH CAROLINA LAW

This circuit split on the meaning of the North Carolina statute would likely never have arisen if North Carolina had a procedure permitting a federal appellate court, under appropriate circumstances, to certify a question of state law to the state's highest court. North Carolina is one of only two states (along with Missouri) that does not have such a certification procedure. Judge Thacker, in her concurring opinion in *Stahle*, observed that "maybe the State of North Carolina will likewise act swiftly to create a certified question mechanism, giving its own state courts a chance to influence the interpretation of the laws operating within its borders, rather than leaving it to the federal courts to divine how North Carolina should operate." *Id.* at *16.

One commentator has lauded the significant benefits of state-certification procedures "including avoiding prognostication by the federal courts, promoting comity and federalism, and providing a better alternative to abstention."[2] As was the case in *Stahle*, the most difficult situations arise when there are no state appellate decisions on point, and the court must simply predict how the state's highest court would decide the issue. This situation is unfair to litigants, particularly where (as here) a plaintiff-friendly federal court overrides the plain text of a state law to rule for the plaintiff, when the state supreme court likely would reach a different decision.

CONCLUSION

By misapplying its own precedent and failing to take into account recent decisions from other circuits, the Fourth Circuit has contributed to a state of confusion about how to interpret North Carolina General Statute § 1-52(16)'s statute of repose. To avoid a recurrence of this unfortunate situation, the North Carolina General Assembly should consider creating a certification procedure so that a future federal court can certify questions to the state's highest court. Until then, the answer to whether a disease-related claim is subject to the statute of repose in § 1-52(16) will depend on the jurisdiction in which the case is brought, and other state-law issues may similarly be resolved by the 4th Circuit without guidance from the North Carolina Supreme Court.

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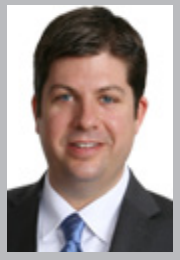
NOTES

[1] *Id.* at *16 (citing I*n re Dow Corning Corp.*, 778 F.3d 545, 552 (6th Cir. 2015); *Bryant v. United States*, 768 F.3d 1378 (11th Cir. 2014); *Klein v. DePuy, Inc.,* 506 F.3d 553, 559 (7th Cir. 2007)).

[2] Jessica Smith, Avoiding Prognostication and Promoting Federalism: The Need for an Inter-Jurisdictional Certification Procedure in North Carolina, 77 N.C. L. Rev. 2123, 2132 (1999).



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