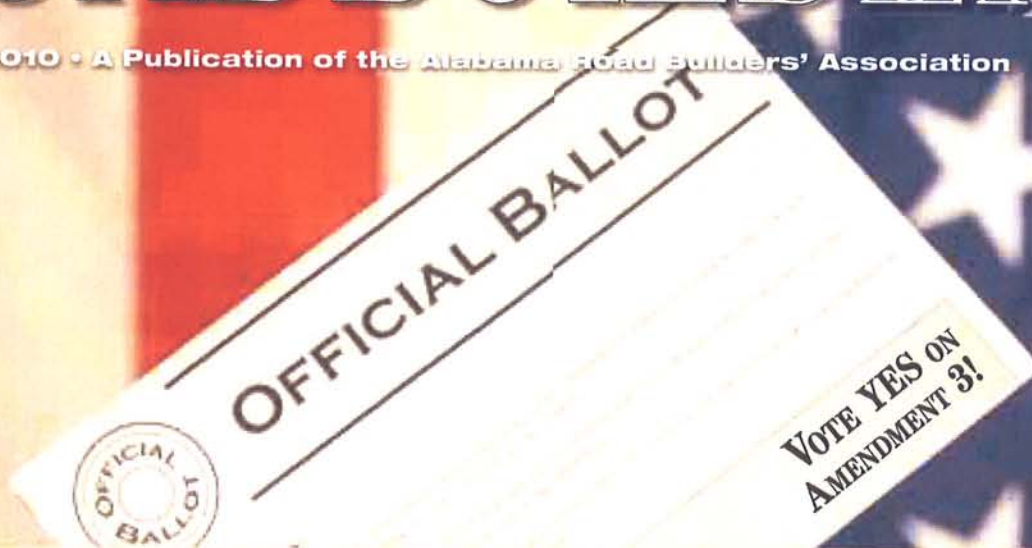


THE ALABAMA ROADBUILDER

Fall 2010 • A Publication of the Alabama Road Builders' Association



Make Your Voice Heard

**Vote for Roads
and Bridges
in November**

Alabama's Contractor Statute of Repose

BY JOE DUNCAN AND WILL DAVIS



Given the expected lifespan of an asphalt road and the time that often passes between resurfacing, road builders ask the question: “How long after my company finishes this project can I legally be liable for the condition of a road?” The general answer is that an action must be brought within 13 years of the substantial completion of the project, however, that point may be subject to additional scrutiny due to recent inconsistent case law pertaining to rules of repose.

Black’s Law Dictionary defines a “statute of repose” as: “A statute that bars a suit a fixed number of years after the defendant acts in some way (as by designing or manufacturing a product), even if this period ends before the plaintiff has suffered any injury.” Section 6-5-221 of the Alabama Code is the legislation that provides architects, contractors and engineers with a 13-year statute of repose.

Alabama’s general Rule of Repose, which carries a 20-year standard, was

initially developed from the idea that claims become stale and difficult, if not impossible, to litigate. For example, claimants and witnesses may pass away or suffer memory loss and evidence may be lost or destroyed.

The Alabama Legislature has also established statutory rules as to various areas of law. For example, in 1979, the Legislature created a 10-year rule to apply to products liability claims, however, the Alabama Supreme Court deemed the limit to be unreasonable

and unconstitutional because it removed the litigant’s common law right to a jury trial. Lankford v. Sullivan, Long & Haggerty, 416 So. 2d 996 (Ala. 1982).

ARCHITECTS, CONTRACTORS & BUILDERS’ STATUTE OF REPOSE

In 1994, the Legislature established the contractor’s statute of repose, which provides that all civil actions relating to construction projects must be brought within 13 years. This is true whether the claim is based in tort, contract or otherwise, and is applicable to all claims against architects, contractors or engineers relating to “design, planning, specifications, testing, supervision, administration, or observation of any construction of any improvement to real property,” including the contractor’s performance or management of the construction activities.

Learning from the earlier constitutional issues with the products liability statute, the Legislature provided explicit legislative findings, setting

out the purpose of the statute. The Legislature provided that the rule “is rationally and reasonably related to the permissible state objective of... preventing suit against these regulated professions and builders which are least likely to be responsible or are at fault for defects or deficiencies which cause injury long after their services or work is completed.”

Additionally, the Legislature included a “savings clause,” meaning simply that the time limitation for a claim would be extended by two years if an injury occurs prior to the expiration of 13 years. In other words, if a person is injured at the midpoint of year 12, then he has until the midpoint of year 14 to bring a claim for personal injury. This provision has substantial importance to support the validity of the provision under the Alabama Constitution.

In 2001, the Alabama Supreme Court analyzed the constitutionality of the statute in Baughner v. Beaver Construction Company, 791 So. 2d 932 (Ala. 2001). The plaintiffs brought claims against a construction company following a 1994 fire that destroyed their property in an apartment complex. The complex was built in 1979. Based on the comments and legislative intent, the Court determined the statute to be constitutional and rational.

RECENT CASE LAW DEVELOPMENTS REGARDING RULES OF REPOSE

In 2009, the Alabama Supreme Court analyzed an almost identical claim relating to a 2004 fire at an apartment complex built in 1982. Collins v. Scenic Homes Inc., 2009 WL 1975575 (Ala. 2009). Notably, the builder did not use an architect to design the apartments, and, similarly, it was unclear whether an engineer reviewed the plans. This is important because an architect or engineer must be involved with the project in order to invoke the 13-year statute.

The Court held that the builder could not invoke the 20-year statute of repose because the justices determined that the date that should be used to compute the starting point for the 20-year period is the date that the

injury occurs, not the date of completion. While most sources provide that the only controlling factor for a rule of repose is the passage of time, the Alabama Supreme Court established that the plaintiff has 20 years following their injury to file a claim regardless of how long ago the defendant’s conduct or completion occurred. Fifty years may pass between the last efforts of the defendant and the injury, but the plaintiff is still entitled to bring a claim. See also Owens-Illinois, Inc. v. Wells, 2010 WL 1640962 (Ala. 2010).

AFFECT ON THE CONTRACTORS’ STATUTE OF REPOSE

Given this change in interpretation, road builders must consider how this new interpretation affects them. At this time, the 13-year statute of repose is still valid and applicable, but the concern is that it may be open to attack based on the new holdings. To quote Justices Harwood and Murdock when discussing this subject, “the law is confounded.”

To some degree, the Legislature foresaw the potential for this issue and included language in the statute to provide that there is an absolute bar to all claims not brought within 13 years, even where the claim has not accrued during the time period. In other words, even if the plaintiff has not yet been

injured before the 13th year, the claim is barred. The uncertain issue, however, is how the Supreme Court will reconcile the potential friction between the case law and the statute.

There is some certainty for road builders and contractors from the prior decisions, however. In the event that a project does not involve the oversight or approval of an architect or engineer, it is clear that there is no operative rule of repose. For such projects, this means that there is no time limit which would extinguish a contractor’s responsibility for defects or omissions on the project. Given that most road projects will involve architects and engineers, this issue should not be of great concern, but the future of the 13-year statute of repose is something that should be considered as the issue develops further. □

Joe Duncan (partner, JRD@hfsllp.com) and Will Davis (associate, WD@hfsllp.com) practice with the law firm of Huie, Fernambucq & Stewart in Birmingham, Alabama. HF&S focuses on assisting clients with legal issues in all phases of litigation and assists in helping clients to control potential areas for exposure and liability. For more information on HF&S’s practice, or if you have comments or questions regarding this article please visit <http://www.hfsllp.com> or call (800) 865-8458.

Responsible Being responsible isn't something we like to talk about. It's actually the reasoning force behind everything we do. Our goal is to provide quality products, every delivery, every day, and to faithfully maintain the surroundings we have with the people and communities where our facilities are located.

Committed We're especially committed to providing our employees with a life-work compromise and our future success starts among the best in our industry. We also do the good things to provide our nation's natural resources. Working closely with the Wildlife Habitat Council, we've helped restore our precious forests, wetland wildlife habitats.

Neighbor As a good neighbor, we help build stronger communities. Each year thousands of students learn about geology and earth science in our "open air classrooms". We support local education projects across the country, from independent programs to school buses. We sponsor scholarships, fund libraries, rest parks and build playgrounds, water parks, golf courses and leisurely gardens.

Vulcan Materials Company, a responsible neighbor, committed to operational excellence in all that we do.

Vulcan
Materials Company