From: Donald Drinko
Sent: Wed Mar 03 16:11:38 2010
Gallagher Sharp Shop Talk: Workers' Compensation

Question: **What statute of limitations applies when a self-insured employer seeks to enforce its subrogation interest with a direct action against a tortfeasor?**

Workers' compensation subrogation is a "creature of statute." This was evident when the Supreme Court of Ohio struck down R.C. 4123.93 as unconstitutional in *Holeton v. Crouse Cartage Co.* (2001), 92 Ohio St.3d 115. The "revised" version of the statute, effective for claims arising on or after April 9, 2003, has thus far been deemed constitutional, but many issues remain to be decided, including the appropriate statute of limitations which should apply to self-insured employers who seek to bring a direct action against a tortfeasor. Does the two-year statute applicable to personal injury actions brought by employees apply to their employers?

Corn v. Whitmere, 183 Ohio App.3d 204, 2008-Ohio-2737, concerned an employee of AT&T, who was injured in an August, 2004 motor vehicle accident. A workers' compensation claim was filed, and benefits paid by AT&T. Corn filed suit against the tortfeasor on August 23, 2006, and subsequently amended his complaint to include AT&T, reflecting its subrogation interest. AT&T filed an answer and a cross-claim against the tortfeasor on September 10, 2007. At that point, there was a question as to whether service was ever perfected on the tortfeasor, which culminated in a motion by the tortfeasor claiming that AT&T's cross-claim was barred by the two-year statute of limitations applicable to personal injury actions. Eventually, the trial court agreed, granting the tortfeasor's motion, and dismissing AT&T's cross-claim with prejudice. (Essentially, the trial court held that AT&T's subrogation claim remained, and that it could recover from Corn, but only to the extent that Corn could recover from Whitmere.) AT&T filed a timely appeal to the Second District Court of Appeals.

The Second District reversed the trial court and reinstated AT&T's cross-claim, holding that the correct statute of limitations applicable to these causes of action is the six-year statute contained in R.C. 2307.07. The Court's opinion, which begins with a lengthy discussion of the origins of Ohio's workers' compensation statutes, considered and distinguished a prior case, *New Artesion v. Stiefel* (Feb. 14, 2000), Stark App. No. 1999 CA00163, because it construed the 1993 statute. The Court noted that R.C. 4123.931 confers an "automatic statutory right" to a direct action, and concludes by stating that workers' compensation subrogation is a cause of action that "would not exist but for the statute." The statute applicable to such causes of action is the six-year statute found in R.C. 2307.07.

Corn is a lengthy opinion, and its procedural twists and turns serve to confuse a fairly simple concept. When causes of action are created by, and exist solely because of statutes, the applicable limitation period is six-years. Representatives of self-insured employers (and those tortfeasors who injure their employees) should not rely on the two-year statute applicable to personal injury claimants to bar direct action by those employers.

Donald G. Drinko, Esq.
Certified Workers' Compensation Specialist,
Ohio State Bar Association
Gallagher Sharp
1501 Euclid Avenue
Cleveland, OH 44115
Direct: 216.522.1326
ddrinko@gallaghersharp.com
www.gallaghersharp.com