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Statutes of Limitations and Repose

Over the next year I would like to devote a few articles in *The American Surveyor* to the defenses that may be available to a land surveyor when someone sees fit to allege some wrong on that surveyor's part. The first rule, however, when you first hear of a threat of litigation, or when the sheriff hands you a subpoena summoning you to appear in court on account of an alleged faulty survey, is to immediately notify your liability insurance carrier and your attorney. There could be many defenses that could be pled on behalf of the surveyor; this article addresses two of those defenses: the statute of limitations and the statute of repose.

The one caveat that I must first express, as with all of my discussions on the law, is that you, the reader, must always take into account the law of the jurisdiction where your survey work is being performed. This being the case, many of the issues that I write about must therefore be in somewhat general terms.

The "Discovery Rule"

To begin with, a statute of limitations limits the time in which a plaintiff may bring a lawsuit after a cause of action accrues. That is, once the plaintiff (probably your former client) is damaged in some way by an alleged wrongful act by you, there is a set period of time in which that suit must be filed.

I presume that most states can trace their respective statutes of limitations back

to the *Statute of 32 Hen VIII*, as superseded by the *Statute 21 James I, Chap. 16*, which imposed a three-year time period for claims to be filed, its purpose being to correct abuses from stale demands when they became unendurable. (Yes, that reference is to King Henry VIII of England, the one with the large appetite.) But whatever period of time the statute of limitations is in your particular jurisdiction, the ever-looming question is: So many years from when? And to always confuse things, there are different periods of limitations for different kinds of actions!

sue, if the error has yet to be discovered. This discovery rule was first developed in the medical malpractice area, and later adopted to land survey situations.

The leading case in Maryland on the "discovery rule" as it applies to land surveyors, is *Mattingly v. Hopkins*, 254 Md. 88, 253 A.2d 904 (1969). In this case Mattingly, the property owners (one of them being an attorney, if that matters), contracted with a well-established civil engineering/ land surveying firm ("Hopkins"), to resubdivide their property. However, Hopkins failed to stake the property corners of each lot in the proper places as shown on the recorded plats of resubdivision. Mattingly alleged, *inter alia* (for you Latin students, this phrase means "among other things"), that they did not know that the markers

were not properly placed, and that the markers designated more land than they had intended to convey.

As with any case dealing with the statute of limitations, the dates are very important. In this

Mattingly case, the plats of resubdivision were recorded on April 8 and December 30 of 1953. The last lot in the subdivision was sold by Mattingly in February of 1959. Mattingly retained one of the lots in the subdivision on which they built their own home. In the summer of 1959, while attempting to lay out a tennis court on their retained lot, Mattingly found what appeared to be a discrepancy between the plats and the physical markers on the lot upon which their home was built. Mattingly called the Hopkins firm and informed them of the apparent discrepancy and requested that their survey be



Before the development of the so-called "discovery rule," a surveyor could always argue that under the common law statute of limitations (which could have been modified by a particular state code), if an error was made in a survey, the surveyor would be free of liability after three years from the survey. But what has developed in the law is the concept that it is unfair for a potential plaintiff to lose a right to

rechecked. It was not until May or June of 1960 that one of the Hopkins' "teams of surveyors" appeared on the premises and proceeded to remove the iron pipes, which were found to be incorrectly placed, and drove in new iron pipes where they should have been placed originally.

In December of 1962, a series of lawsuits were filed against Mattingly by various lot owners that Mattingly had sold to. They filed suit in order to have their deeds reformed, claiming certain portions of the land between where the old boundary "pegs" were to where the new stakes were located. (On a side note, it has always been interesting to me how certain words in the surveyor's lexicon are used interchangeably to describe certain artificial monuments; in this case, for example, the judges frequently interchange the words "markers," "pegs," "iron pipes," "stakes," and so on. We surveyors have quite a vocabulary, but not understood by all!)

It was not, however, until October of 1964 that Mattingly filed their action in tort against Hopkins, which sounded in tort (another one of those Latin words, this one meaning a civil wrong for which the court provides a remedy). Hopkins defended this suit with the statute of limitations, which in Maryland is the codified common law period of three years. Mattingly lost their case against Hopkins in the trial court, with a similar result in the Maryland Court of Appeals.

The Appeals Court in applying the reasoning behind certain medical malpractice cases, adopted the "discovery rule" in survey cases, meaning that a plaintiff has three years from the **date of discovery** of the error in which to bring a law suit alleging damages occasioned by a faulty land survey. What the Appeals Court wrote was that the plaintiff's cause of action accrued when Mr. Mattingly discovered the discrepancy in the placing of the iron pipes serving as boundary markers in the ground, as compared to their location on the plats. This event occurred in the summer of 1959, and the statute of limitations ran from that date. Inasmuch as the plaintiffs filed their lawsuit against Hopkins more than five years after the discovery of the error, their suit was barred as a matter of law. Or, giving

Mattingly some benefit of the doubt, they certainly should have known that they had been harmed when Hopkins correctly replaced the iron pipes in May or June of 1960. In this later situation, it was still more than three years before the Mattingly suit was filed.

In looking at prior cases, the Maryland Court of Appeals adopted the discovery rule (which has been probably adopted by all of the states in our nation), in stating that:

... the statute of limitations commences to run from the moment of discovery, the moment he [the plaintiff] knows or should know he has a cause of action, within which to sue.

"...the modern trend in tort actions appears to be that the lack of a direct contractual relationship between the parties is not a defense."

The Statute of Repose

Another similar available defense for surveyors in cases involving a faulty survey, may be the legislatively enacted "statute of repose." The difference between a "statute of limitations," and a "statute of repose" is that a statute of limitations merely limits the time in which a plaintiff may bring suit after a cause of action accrues (*i.e.*, from the moment of discovery of the error), whereas a statute of repose extinguishes a cause of action after a fixed period of time, regardless of when the cause of action accrued.

The policy behind a statute of repose is that the traditional statute of limitations subjects the surveyor to an unreasonable potential liability. A fixed period of time from the ultimate discovery of an error in a survey – plus, let's say three years – could be a very long time indeed.

Both the statute of limitations and the statute of repose are designed primarily to assure fairness to defendants on the theory that claims – asserted after evidence is gone, memories have faded, and witnesses have disappeared – are so stale as to be unjust. The policy of the law is that there should come a time when a potential defendant ought to be secure in knowing that the slate has been wiped clean of ancient obligations.

Legally and technically speaking, the statute of limitations is generally considered to be procedural, and extinguishes the remedy rather than the right, but a statute of repose is generally considered to be substantive and extinguishes both the remedy and the actual action.

Without a statute of repose a surveyor could commit an alleged tortious wrong in the preparation of a land survey and be called upon at a time when the surveyor may be in retirement (or dead), with much of the evidence having been lost, liability insurance policies having been long cancelled and memories having faded.

A further policy reason for a statute of repose is that the modern trend in tort

actions throughout the nation appears to be that the lack of a direct contractual relationship between the parties is not a defense. That is, the only person the surveyor once feared who might sue for a faulty survey was the client, the per-

son who contracted with the surveyor and the one who paid for the surveyor's services. However, under this modern trend, a surveyor could commit an error and possibly become liable to a third party stranger – one with whom the surveyor never dealt – who relied upon the faulty survey, but who did not discover the error until long after the surveyor's retirement, with the defensive evidence probably having been discarded.

I understand that one of first statutes of repose to be enacted was by the Tennessee Legislature was in 1980, in which surveyors in that state were released from any liability resulting from a survey four years from the date of the survey. Again, I remind readers that each state has its own particular (and sometimes peculiar), laws on every subject.

In future articles I plan to write on other defenses that a land surveyor may be able to use when faced with the threat of litigation. This column is designed for all of you who enjoy reading about how the law interacts with land surveying. If there is a particular legal topic that you may wish that I discuss on these pages, please forward your suggestions via the "Contact Us" section at www.theamericansurveyor.com. 