



Raising the Bar

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Young Lawyers Committee

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Articles of Note

Considerations of Using the Statute of Repose Defense in Latent Disease Cases

By Denis F. Alia



Defending product liability cases requires the identification of specific legal issues at stake for your client. When a complaint is filed and discovery is underway, we develop a picture of what the case is about, the extent of allegations, and what legal defenses we plan on advancing to obtain the best outcome. We envision the final result, whether it is an outright dismissal or summary judgment, and calibrate the best approach to achieve that objective. While it may be easier to focus on more straightforward legal defenses, such as lack of product identification, lack of causation, or de-minimis exposure to a client's products, other defenses should not be overlooked.

For instance, when utilized under the right circumstances, the Statute of Repose ("SOR") defense is highly effective and a mechanism which could completely bar plaintiff's claims. A closer look at the interpretation of the SOR in various jurisdictions is helpful to bring some perspective to this legal defense. Equally important, recognizing some of the nuances in its application will help us understand why the defense could be a "hit or miss." In March 2019, in *Stearns v. Metro Life Ins. Co.*, 481 Mass. 529, 117 N.E. 3d 694 (2019), the Supreme Judicial Court of Massachusetts held that the Massachusetts SOR "completely eliminates all tort claims arising out of any deficiency or neglect in the design, planning, construction, or general administration of an improvement to real property after the established time period has run, even if the cause of action arises from a disease with an extended latency period and even if a defendant had knowing control of the instrumentality of injury at the time of exposure." *Id.* at 702. Under Mass. Gen. Laws Ch. 260, §2B, the SOR provides a six (6) year window from the opening or substantial completion of the improvement in which a Plaintiff can bring suit against the product manufacturer. Under *Stearns*, upon the expiration of the six (6) year repose period, the SOR imposes a bar to Plaintiff's claims, even in latent disease cases, when the Plaintiff did not know of his injury until after the repose period had expired. The SOR is a swift mechanism in Massachusetts, which could give your client an excellent opportunity to dispose of a case, or at the very least, secure some bargaining power in settlement negotiations.

The opposite is true in Indiana. In 2016, in *Myers v. Crouse-Hinds Div. of Cooper Industries, Inc.*, 53 N.E.3d 1160 (Ind. 2016), the Indiana Supreme Court essentially eliminated the safe haven provisions set forth in the Indiana Product Liability Act ("IPLA"), as codified at §34-20-3-1, which barred actions against product manufacturers brought more than ten (10) years after the delivery of the product to the initial user or consumer. The *Myers* court addressed whether "disparate treatment constituted a constitutionally prohibited disparate privilege" by comparing the effect of the IPLA on two classes of Plaintiffs: (1) those who were exposed to asbestos by Defendants who mined and sold raw asbestos products and (2) those who were exposed to asbestos by Defendants who incorporated asbestos into their products. The *Myers* court held that Section 2 of the IPLA is unconstitutional as it creates a preference and establishes inequality because all Plaintiffs were suffering from a latent disease yet only those with claims against Defendants who mined and sold raw asbestos could proceed with their claims. Such a distinction violated case precedent and the Equal Privileges and Immunities Clause of Article I, Section 23 of the Indiana Constitution. The *Myers* decision eliminated an important layer of defense for product manufacturers who can no longer argue Plaintiffs' actions are barred since their product was installed more than ten (10) years prior to commencement of the litigation. The Indiana Contractor Statute of Repose, IC 32-30-1.5 remains untouched by *Myers* and can be utilized by defendants, however, the rationale of *Myers* may be extended to combat such assertions. With the SOR argument essentially eliminated, Defendants are now left with fewer arguments in their arsenal, including the lack of product identification as the main defense along with related causation issues.

In other jurisdictions, the decision to utilize the SOR requires a different type of analysis, one that is not based on whether the statute is constitutional, but rather factual details. The decedent in *Kinseth v. Weil-McLain*, 913 N.W.2d 55 (Iowa 2018), worked for the family's plumbing business and alleged exposure to Defendant's product when *installing, repairing and ripping out* boilers. The court held that any liability for *repair or removal* work on boilers was

extinguished based on the Iowa SOR which bars causes of action “arising out of the unsafe or defective conditions of an improvement to real property” after fifteen (15) years. 2 Iowa Code §614.1(11) (2007). However, the Iowa SOR provided an exception, which allowed the jury to consider the decedent’s exposure from *installing* the Defendant’s boilers. As a result, the analysis of whether the SOR can be successfully utilized may depend on the extent of Plaintiff’s work on your client’s product. In jurisdictions like Iowa, the SOR will not bar Plaintiff’s claims if the alleged exposure took place during the initial installation of the product. If the exposure took place at a later time during subsequent repair or removal work, the SOR is an available defense.

Some jurisdictions distinguish between *products* and *construction* SOR. As discussed above, although Indiana invalidated its products SOR, its contractor counterpart remains intact. In New Hampshire, the SOR is broken up into construction (§508:4-b) and products (§507-D:2). The twelve-year products SOR was held unconstitutional by *Heath v. Sears, Roebuck & Co.*, 123 N.H. 512 (1983), while the New Hampshire Supreme Court has consistently held that the application of the eight-year construction SOR is constitutional, and provides a complete bar to plaintiffs’ suits when applicable. For instance, in *Phaneuf Funeral Home v. Little Giant Pump Co.*, 163 N.H. 727 (2012), a funeral home brought an action arising out of a fire allegedly caused by a water fountain. The suit was filed against four defendants: (1) the manufacturer of the water fountain; (2) the manufacturer of a pump incorporated in the water fountain; (3) the manufacturer of the fountain’s power cord; and (4) a contractor who customized the water fountain, converting it from a generic product to a specialized improvement by adding a back plate and making it a permanent fixture. The Court held that the construction

SOR did not apply to the first three defendants because they manufactured products which were not intended to be permanent improvements to real property and were not specific to a particular building. However, the statute barred plaintiff’s claim against the last defendant, the contractor, because they customized the water fountain from a generic product to a specialized permanent improvement to real property.

The SOR is constantly in flux, as the plaintiffs’ bar regularly seeks to modify or eliminate the protections provided to companies that design, engineer and construct improvements to real property, particularly in cases involving latent diseases. In some jurisdictions, the courts have expressly recognized a defendant’s involvement in the design process of improvements to real property, and the subsequent applicability of the SOR to latent disease cases. In other jurisdictions, the fate of the SOR depends on the trial court’s interpretation of the law, which routinely departs from the plain language of the statute. Still other jurisdictions have limited the scope of the SOR by adding clearly defined exceptions to its application, and in other jurisdictions, the statute has been held unconstitutional. The lesson derived is that when available the SOR is an effective defense, which could result in either an outright dismissal for your client, or a favorable settlement resolution.

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