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Product Manufacturers and Distributors Finding Limited Respite in Statutes of Repose

By Alan R. Levy

A statute of repose (SOR) is often interchangeably defined as a statute of limitation (SOL) although, in reality, they are two very different concepts, and as this article will show, SOR's have made a significant impact in the realm of products liability law. Generally, an SOL bars a plaintiff from bringing a cause of action if he/she does not invoke their rights within a certain period of time from the date of injury. Simply put, if a plaintiff does not file a lawsuit within a certain period of time laid out by statute (often ranging from 1-6 years), that plaintiff's rights will forever be lost. While an SOR will also extinguish a plaintiff's right to recovery, the time in which it begins to run differs greatly from an SOL. An SOR begins to run from a date typically related to the act of a defendant (i.e. the manufacture and/or sale of a product or the substantial completion of a real estate improvement). Once that date has passed, a defendant may be immune from any civil liability, regardless of their conduct. While, an SOL imposes a limited amount of time in which a plaintiff may enforce their rights, an SOR, very often extinguishes a plaintiff's rights before the injury even occurs. Hence, an injured plaintiff may have had no rights, simply due to the fact that the injury occurred too long after the product was first manufactured, or the real estate improvement was completed. In other words, an SOR very often will create a *damnum absque injuria* ("loss without injury") scenario, whereby, even though a plaintiff may have been injured by a defective product, that plaintiff has no legal right to recovery from the manufacturer or distributor of the product.

Tort reform proponents have long pressed Congress and state legislatures to enact SOR's for the protection of product manufacturers and sellers. Their arguments rely on the inherent disadvantage a manufacturer faces in defending a case where the allegedly offending product was manufactured decades before the incident. As the years pass, factories close, records are destroyed or misplaced and memories fade. Further some courts note that as the years pass, juries will be unable to understand the manufacturing and design standards which were in effect at the time the product was manufactured, thus substituting them with the current technological standards. *See Daily v. New Britain Mach. Co.*, 200 Conn. 562, 583-84, 512 A.2d 893, 904-05 (1986). Furthermore, the insurance industry has repeatedly lobbied for SOR's to allow them to better predict the likelihood of claims and risk allocation with more accuracy.

While tort reform proponents have been active supporters of SOR's, critics, ranging from the plaintiff's bar to members of the judiciary, have been quite strident in their opposition. They argue that it extinguishes a plaintiff's rights to seek relief before they have even been injured, thus SOR's are violative of the state and federal constitution. This scenario has been described with the colorful and provocative words of Judge Jerome Frank, known as one of the founders of the "legal realism" movement as an "Alice in Wonderland" effect:

> Except in topsy-turvy land you can't die before you are conceived, or be divorced before you marry, or harvest a crop never planted, or burn down a house never built, or miss a train running on a non-existent railroad. For substantially similar reasons, it has always heretofore been accepted, as a sort of legal "axiom," that a statute of limitations does not begin to run against a cause of action before that cause of action exists, i.e., before a judicial remedy is available to the plaintiff.

Heath v. Sears, Roebuck & Co., 123 N.H. 512, 526, 464, A.2d 288, 295-96 (1983) (striking down the products SOR as unconstitutional) *quoting Dincher v. Marlin Firearms Co.*, 198 F.2d 821, 823 (2nd Cir. 1952) (J. Frank, *dissenting*).

The battles over the application of SOR's in the products liability realm have been ongoing for nearly 35 years, and the results of these disputes has varied greatly throughout the United States depending on the jurisdiction, and even today, the law continues to remain unsettled and developing.

THE HISTORICAL GENESIS OF PRODUCTS SOR'S

To a large extent, the birth of Product SOR's can be credited to the 1965 publication of the Restatement (Second) of Torts, section 402A, which effectively shattered the fast declining privity requirement in products cases and gave formal credence to the doctrine of "strict liability in tort." In addition, courts also began to accept the "discovery rule" whereby the statute of limitations could be tolled to run not from the date of injury, but the date when plaintiff discovered, or should have discovered the injury. According to several legal commentators and contemporary sources, these doctrinal changes caused a "crisis" of product liability law, whereby more lawsuits were filed against product manufacturers and sellers, reportedly causing insurance premiums to skyrocket. The September 1, 1975 issue of *Forbes Magazine* reported that products liability lawsuits increased from 50,000 in 1960 to 500,000 in 1970 and were set to exceed 1,000,000on in 1975. *See also* U.S. Department of Commerce, *Products Liability Insurance: Assessment of Related Problems and Issues*, March 12, 1976.

As a result of this "crisis" and the uncertainty relating to the costs of product manufacturing and insurance coverage, the U.S. Department of Commerce and White House authorized the creation of an Interagency Task Force on Product Liability, chaired by Prof. Victor E. Schwartz. *See Final Report of the Industry Study: Interagency Task Force on Product Liability*, November 1, 1977. The Task Force's purpose was to identify the problems facing the product manufacturing industry and propose potential remedies. After analyzing the rise in

products' claims and the trends of insurance premiums, the Task Force submitted several remedies appropriate for future study and implementation including: the elimination of 3rd party suits by injured workers against product manufacturers, the development of safety certifications for both industrial and consumer products and the mandatory adoption of product liability prevention programs by manufacturers. *See Id.* at V-1 – V-7.

While these remedies addressed contemporary manufacturing of products, another complaint raised by product manufacturers and their insurers was the concern of the duration of "open ended liability." Insurance and industry advocates argued that once a product has been manufactured and introduced into the stream of commerce, potential liability could exist for all eternity, hence insurance underwriters had no way of predicting the risk of older products. The Task Force acknowledged that manufacturers and insurers were strong proponents of tort reform measures which would create a "Statutory Definition of Useful Product Life," effectively limiting the liability of the manufacturer to the "useful" life of the product. Interestingly, the Task Force's initial opinion was that this remedy "cannot be deemed to be feasible" due to the fact that there was no viable method of calculating the useful life of the vast myriad of products available to industry and the average consumer. *See Id.* at VII-11 – VII-13.

The Model Uniform Product Liability Act

Despite these initial misgivings, on October 31, 1979, the Task Force and Dept. of Commerce published the Model Uniform Product Liability Act ("MUPLA"), which included an SOR (Sec. 110 of the MUPLA). *See* 44 Fed.Reg. 62,714, 62,732-34 (1979) *see also,* 43 Fed.Reg. 14,612, 14,616-17, 14624, 40,438, 40,443 (1978). The Task Force noted that insurers' apprehension about older products might be exaggerated (noting that 97% of product-related accidents occur within six years of purchase); however, it was acknowledged that underwriters' concerns was about the *potential* losses associated with older products. *See* 44 Fed.Reg. 62,714, 62,733.

The MUPLA's SOR was comprised of two basic approaches: first, a product seller would not be liable for harm caused if it was proven by a preponderance of evidence that the product's "useful safe life" (counting down from the "date of delivery") had expired; second, a "statute of repose" would hold that if the injury occurred more than ten (10) years following the date of delivery, there would be a rebuttable presumption that the product's "useful safe life" had expired. *See* 44 Fed.Reg. 62,732. Examples of evidentiary standards in determining a product's useful life were borrowed from Minnesota's recently enacted SOR and included, a) wear and tear, b) the effect of deterioration from natural causes and climate, c) the normal practices of the use with respect to frequency of use, repairs and replacements, d) representations, instructions and warnings made by the seller and e) alterations made by the user or third party. *See Id.*

It is important to note, that under the MUPLA's SOR, a manufacturer/seller would not have the same protection of an SOL. If a plaintiff files a lawsuit past the expiration of an SOL, a defendant can simply file a motion to dismiss on the pleadings before expending significant

resources on discovery. However, under the MUPLA, plaintiff could still be successful on a claim simply by refuting the presumption that the subject product's useful safe life had expired. The drafters of the MUPLA also added exceptions to the rule including: express warranties greater than ten (10) years, intentional concealment or misrepresentation, contribution and indemnity actions, cases of prolonged exposure and if the alleged defect was not reasonably discoverable prior to the expiration of the statutory period. *See Id.* Alas, neither the U.S. Congress nor a single state adopted the MUPLA as it was proposed.

While, MUPLA was left to die on the vine, the late 1970's saw a "frenzy of national product liability reform," whereby over half of the states enacted SORs, which often borrowed statutory language from the MUPLA and other states, and made their own alterations or amendments. *See Oregon Law Commission: A Report to the Statutes of Limitations Work Group regarding statutory time limitations on product liability actions* (July, 2000). These various statutes vary widely from state to state. Many states adopted an SOR whereby a product manufacturer was explicitly immune from civil liability after a specific period of time had passed (ranging from 5 to 15 years) from when the product was first manufactured, sold or distributed. The time-period SOR is far more draconian against plaintiffs than the MUPLA version, which gave plaintiffs an opportunity to rebut the presumption of non-liability on the product seller. Some states adopted the "useful safe life" rebuttable presumption doctrine which was more similar to the MUPLA. Some states adopted a hybrid of these two doctrines. Finally, a small number of states have no statute which provides protection to product manufacturers, but may borrow another state's SOR, if the cause of action arose in a state with an SOR.

(See attached Compendium for a list of each state's statutory product SOR.)

CONGRESSIONAL ATTEMPTS TO ENACT A NATIONAL SOR

There is only one known federal statute of repose, which was enacted nearly 15 years after the initial "frenzy" of product liability reform. The General Aviation Revitalization Act of 1994 ("GARA"), states that manufacturers of certain types of light aviation aircraft are shielded from civil liability for injuries or death caused by the aircraft, its components or other parts if they were delivered at least eighteen (18) years before the accident occurred. *See 49 U.S.C.A. § 40101*. Interestingly, GARA was passed into law by a Democratic-controlled Congress **before** the Republican Congressional takeover of the 1994 mid-term election. The bill was signed into law by President Clinton following a 91-8 vote in the Senate, and voice vote in the House of Representatives, with no recorded objections. (See http://www.govtrack.us/congress/bill.xpd?bill=s103-1458) While the plaintiff's bar continues to challenge the constitutionality of GARA, at least one Circuit Court of Appeals has upheld the federal statute. *See Lyon v. Agusta S.P.A.*, 252 F.3d 1078 (9th Cir. 2001) *certiorari denied* 534 U.S. 1079 (2002).

Although GARA is the only national statute of repose, ever since MUPLA was first proposed in the late 1970's, there have been numerous attempts to pass a uniform products

liability statute of repose in each Congressional session. *See Congressional Record: Proceedings and Debates of the 106th Congress: Second Session – Providing for Consideration of H.R. 2005. Workplace Goods Job Growth and Competitiveness Act of 1999*, Page 461-62. The closest that a national products act came to becoming United States law was when the then Republican-controlled Congress was unable to override President Clinton's veto of the Common Sense Product Liability Legal Reform Act of 1996, which would have imposed a nationwide product liability SOR of 15 years. (The act would have allowed states to maintain repose time limits shorter than 15 years.) *See* Bill Text. 104th Congress (1995-1996) H.R.956.ENR. Notably, this legislation was one of the 10 provisions of the "Contract with America" proposed by the Republican Party on the eve of the 1994 mid-term election. The debate over whether Congress should adopt a national SOR standard continues. *See* Robert L. Rabin, *Federalism and the Tort System*, 50 Rutgers L. Rev. 1, 12-15 (1997) (taking a skeptical position on the need for federal legislation); Victor E. Schwartz & Mark A. Behrens, *A Proposal for Federal Product Liability Reform in the New Millennium*, 4 Tex. Rev. L. & Pol. 261, 267-70 (2000) (arguing for federal legislation). Although, the Task Force initially questioned the feasibility of a product SOR, its chairman, Professor Schwartz remains a vocal proponent of SOR's. *See also* Product Liability Fairness Act, 1993: *Hearings on S.687 before Senate Comm. On Commerce, Science and Trans.*; 103d Cong., 1st Session. 95 (1994) (testimony of Prof. Victor E. Schwartz). Notwithstanding the legal debate, it appears that whether or not a national SOR is ever passed into law will depend greatly on the political composition of the legislative and executive branches.

CURRENT STATUS OF STATE SOR'S (TIME-PERIOD SOR'S VS. REBUTTABLE PRESUMPTION SOR'S)

Since the late 1970's, 29 states have enacted some form of tort reform legislation with an SOR specifically aimed at products. Like fingerprints, no 2 states have identical statutes. Furthermore, many of these statutes have been successfully struck down through constitutional challenges. There are essentially 2 categories of products liability SOR's. First, there is the Time Period SOR, which is, by far the most powerful form of protection for product manufacturers & sellers, and the most draconian for plaintiffs. A Time Period SOR holds that once a specific period of time has passed from the date the product was first manufactured or sold, a plaintiff is completely barred from stating cause of action against the manufacturer or seller. Hence, like an SOL, a quick Motion to Dismiss on the pleadings may end the claim; or a plaintiff's counsel may see no avenue for success and simply choose not to file a cause of action.

The second type of statute, is similar to the form outlined in the MUPLA, and provides a rebuttable presumption of non-liability to a product manufacturer and/or seller that once a certain period of time has passed; i.e., the product's "useful safe life." While the defendant is free to invoke this affirmative defense, the question of the product's "useful safe life" will ultimately be an issue of fact likely considered by a jury. In other words, the plaintiff still has the opportunity to make out a case of liability against the manufacturer and/or seller by rebutting the

presumption. A motion to dismiss on the pleadings has no chance of success, and, assuming the plaintiff's counsel is competent, a summary judgment motion has a small chance of success. One could make a compelling argument that a rebuttable presumption statute is not properly defined as an SOR at all, since it is little comfort to a product manufacturer to have to go through the discovery process and trial, with little more than an evidentiary rebuttable presumption on its side.

Time-Period SOR's

Of the approximately 19 states which have enacted SOR's with time specific periods, about half have been struck down as unconstitutional and/or repealed. *See Lankford v. Sullivan, Long & Hagerty*, 416 So. 2d 996, 1004 (Ala. 1982); *Best v. Taylor Mach. Works*, 689 N.E.2d 1057, 1064 228 Ill.Dec. 636, 179 Ill.2d 367 (Ill. 1997); *Heath v. Sears, Roebuck & Co.*, 464 A.2d 288, 296 (N.H. 1983); *Dickie v. Farmers Union Oil Co.*, 611 N.W.2d 168 (N.D. 2000); *Daugaard v. Baltic Co-op. Bldg. Supply Ass'n.*, 349 N.W.2d 419 (S.D. 1984); *Berry ex rel. Berry v. Beech Aircraft Corp.*, 717 P.2d 670 (Utah 1985). The most common reason cited by the courts is that when an SOR extinguishes a plaintiff's claim prior to the injury, this is violative of the state constitution's "open courts" doctrine. *See* Thomas R. Phillips, *The Constitutional Right to a Remedy*, 78 N.Y.U. Law Rev. 1309 (October, 2003) (stating that despite 40 states having an "open courts" clause in their constitutions, this clause is absent in the federal constitution). Interestingly, if Congress were able to enact a national SOR, there is some doubt whether a constitutional challenge would be successful.

Currently, 11 states have valid time-specific statutes, ranging from 7 to 15 years from the date that the product was first manufactured or sold, although the recent trend is to extend the time periods to 10 years or longer. In 2009, North Carolina amended its SOR time period from 6 years (the shortest in the country) to 12 years. *See NC LEGIS 2009-420* (2009). Oregon's legislature also recently increased its time period from 8 years to 10 years. *See OR LEGIS 485* (2009). It is important to note, that these the statutes vary greatly in their application, and many have very idiosyncratic provisions and exceptions. For example, in Nebraska, the SOR is 10 years from the date of first sale, only if the product is made in Nebraska. For products manufactured outside of Nebraska, the SOR is that of the state of manufacture so long as it is not less than 10 years. If the foreign state of manufacture has no SOR, then no SOR will apply. Also, Colorado as a Time-Period SOR of 7 years, which only applies to "new manufacturing equipment." Connecticut's 10 year SOR will generally only apply to injuries occurring in the course of employment. Finally, Florida's SOR states that there is a 12 year SOR if the useful life of the product is 10 years or less; however, the SOR may be extended up to 20 years depending upon a complex scheme determining the product's useful life.

Nearly all of the states with Time Period SOR's have statutory exceptions which specifically exempt claims of prolonged exposures and products such as asbestos. Iowa and Oregon also specifically exempt breast implants from SOR application. In addition, many states

have statutory exemptions for certain specific claims, ranging from: express warranties longer than the statutory time period, fraud, intentional misrepresentation or gross negligence.

Useful Safe Life Rebuttable Presumption Statutes

Currently, 10 states have some form of Rebuttable Presumption SOR. While Rebuttable Presumption SOR's provide less protection to the product seller, not one of them has been struck down as unconstitutional by the courts. The relative constitutional acceptance of these statutes is likely due to the fact that rather than extinguishing a plaintiff's cause of action, the statute will merely require the plaintiff to rebut the presumption that the product was in its useful safe life when the injury occurred. Sometimes, the statute's language states that the plaintiff does not have a cause of action, if the useful safe life had expired, which sounds very similar to the draconian language found in a Time Period SOR. However, since the question of the product's useful safe life is a question of fact, this is just one more factor that the plaintiff's liability expert must deal with in their testimony. Hence, this will be just another issue at time of trial.

Just like Time Period SOR's, Rebuttable Presumption SOR's are quite varied among the states which have them. While no state adopted the MUPLA word-for-word, Idaho and Kansas enacted nearly identical statutes which provide: 1) that a product seller not subject to liability if the product's "useful safe life" has expired, and 2) there is a rebuttable presumption that a product's "useful safe life" is 10 years following delivery to first purchaser or lessee. Washington's statute is similar except that the useful safe life presumption is 12 years. In Minnesota, the length of a product's useful safe life is not defined, but rather is determined by the factors outlined in the statute (which were borrowed by the drafters of the MUPLA). Arkansas' statute holds that the use of a product beyond its unspecified "anticipated life" may be considered as evidence of fault by the consumer. Finally, Michigan's statute merely states that a plaintiff does not get the benefit of any presumptions if the statute has been in use for more than 10 years.

Hybrids

Three states have enacted statutes which utilize both the Time Period and the Rebuttable Presumption models. First, Colorado has two distinct statutes: 1) a 7-year Time Period SOR for "new manufacturing equipment," and 2) an SOR which creates a rebuttable presumption that 10 years after the product is first sold, the product is not defective, nor is the manufacturer negligent. Connecticut's hybrid SOR states that for injuries occurring in the course of employment, there is a 10 year Time Period SOR from the date the defendant last parted with possession or had control of the product. For claims not occurring in the course of employment, there shall be no SOR, provided the plaintiff shows the injury occurred during the product's useful safe life. Finally, in Tennessee a plaintiff has the shorter of one year after the expiration of a product's anticipated life or ten years from its purchase to bring suit.

REAL ESTATE IMPROVEMENT SOR'S

While, valid Product Liability SOR's currently exist in only a minority of states, SORs which give protection to real estate improvements exist in 48 states plus the District of Columbia. These statutes provide that contractors, architects, engineers, surveyors and other entities involved in the design or construction of an improvement to real property are immune from civil liability once a period of time (ranging from 4 to 20 years) has passed from the date of final or substantial completion of the construction project. (The majority of states have a 10 year SOR). Like the product SOR's, real estate improvement SOR's also vary from state to state, although they have been far more able to withstand constitutional challenge. Currently, only one state (Kentucky) is known to have an invalidated real estate SOR.

(See attached Compendium for a list of each state's statutory real estate improvement SOR.)

The history of real estate SOR's is similar to product SOR's, although it started 10 -20 years earlier. Like product manufacturers and sellers, under the traditional doctrine of law, contractors were shielded by the doctrine of privity from claims of injury from plaintiffs in which no contractual relationship existed. However, in the 1950's and 60's, the privity doctrine was effectively abrogated. *See* W. Prosser, *Law of Torts* § 85 (2d ed. 1955); Margaret A. Cotter, *Comment: Limitation of Action Statutes for Architects and Builders – Blueprints for Non-action*, 18 Cath.U.L.Rev. 361, 362-63 n. 10 (1969). In light of the fact that buildings and real estate improvements can often exist for centuries, the duration of potential liability can be infinite. As a result of this enhanced exposure to liability, the construction industry actively lobbied state and federal legislatures for the enactment of SOR's which would limit their liability once a certain period of time had passed. *See* Cotter, 18 Cath.U.L.Rev. at 361, n. 2. It appears that those lobbying efforts were quite successful as all but 2 states (New York & Vermont) have enacted SOR's relating to real estate improvements.

While the general acceptance of real estate improvement SOR's is a boon to the construction and design industries, it leaves much to be desired for product manufacturers and sellers, especially those entities involved in the manufacture and sale of products relating to the construction and building industries. However, even though product manufacturers were not in mind when these statutes were drafted, depending on how the statutory language, there may be some avenue of relief for product manufacturers.

The majority of real estate SOR's are adopted from some variation of the model statute endorsed by the American Institute of Architects, the National Society of Professional Engineers, and the Associated General Contractors, which states, in pertinent part:

> No action, whether in contract (oral or written, sealed or unsealed),
> in tort or otherwise, to recover damages

> (i) for a deficiency in the design, planning, supervision or observation of construction or construction of an improvement to real property,
>
> (ii) for injury to property, real or personal, arising out of any such deficiency, or
>
> (iii) for injury to the person or for wrongful death arising out of any such deficiency, shall be brought against *any person performing or furnishing the design, planning, supervision or observation of construction, or construction of such an improvement* more than four years after substantial completion of such an improvement.

See Rose v. Fox Pool Corp., 335 Md. 351, 363-64, 643 A.2d 906 (Md. 1994); Cotter, 18 Cath.U.L.Rev. at 365, n. 31. Clearly, a product manufacturer who has "designed" a product used for the purposes of a real estate improvement, will argue that they should also benefit from these statutes as well. The success of these arguments depends on the exact statute enacted by the state legislature. For example, the statutes in Hawaii, Rhode Island and Wyoming specify that some manufacturers have the protection of the real estate SOR. Meanwhile, the statutory language in the District of Columbia, Minnesota and Virginia specifically exempt suppliers and manufacturers of products from benefitting from the real estate SOR. The examples of Minnesota and Virginia are especially curious due to the fact that despite seemingly clear legislative intent to prohibit product manufacturers from benefiting from the SOR, the courts have consistently found in favor of product manufacturers. *See Cape Henry Towers, Inc. v. National Gypsum Co.*, 229 Va. 596, 331 S.E.2d 476 (Va., 1985) (where the court held that manufacturers of "ordinary building materials" do benefit from the state's real estate SOR); *Red Wing Motel Investors v. Red Wing Fire Department*, 552 N.W.2d 295 (Minn. Ct. App. 1996), *rev. denied* (Minn. Oct. 29, 1996) (same). Hence, even if the statute seems to preclude the SOR defense for product distributors, that should not be reason not to make the argument

Nevertheless, the majority of real estate SOR's are silent on whether manufacturers or sellers of products are within the class of entities protected. Hence the question is left up to the courts, and there is great divergence of interpretations in each jurisdiction, although there are some apparent trends. Generally, when the manufacturer or supplier merely designed an off-the-shelf product and did not participate in the design, planning, or construction of the improvement to real property, the courts will hold the manufacturer to be outside of the protection of the SOR. *See Howell v. Burk*, 90 N.M. 688, 568 P.2d 214 (Ct. App. 1977); *Winkel v. Windsor Windows and Doors*, 983 So.2d 1055 (Miss. 2008); *Noll by Noll v. Harrisburg Area YMCA*, 537 Pa. 274, 643 A.2d 81 (Pa., 1994); *but see Rose v. Fox Pool Corp.*, 335 Md. 351, 643 A.2d 906 (Md. 1994). On the other hand, manufacturers who not only produce the product, but also participate in the design, construction or installation of the overall real property improvement tend to be found within the protection of the real property SOR. *See Beall v. Inclinator Co. of America,*

Inc., 182 Ga. App. 664, 356 S.E.2d 899 (1987); McCormick v. Columbus Conveyer Co., 522 Pa. 520, 564 A.2d 907 (1989); *Torres v. Cintas Corp.*, 672 F.Supp.2d 1197 (N.D.Okla., 2009) (applying Oklahoma law).

A case in New Jersey is especially instructive. In *Dziewiecki v. Bakula*, 180 N.J. 528 (2004), plaintiff brought suit arising from an injury sustained from diving into a swimming pool. Because more than 10 years had passed from the installation, there was no question that the installer was immune from liability based on N.J.'s SOR; however, the manufacturer and distributor of the swimming pool kit also attempted to invoke the SOR, which was silent on whether manufacturers and distributors are entitled to its protection. The *Dziewiecki* court conceded that sometimes, a defendant could wear "two hats"; i.e., act as both the fabricator of a product and a designer/installer/contractor related to the real estate improvement. However, the two hats were mutually exclusive, and the court held that the defendant could wear either hat, but not both hats for the purpose of the SOR. As a result, defendant could invoke the SOR insofar as any claims for negligent installation/construction; however, the SOR could not be used to extinguish plaintiff's claims for products liability. (It is interesting to note that despite the state Supreme Court's seemingly explicit closing of the door on product manufacturers, at least one subsequent appellate court has allowed manufacturers to benefit from the state's SOR. *See Miles v. Deluxe Bldg. Systems, Inc.*, 2009 WL 2224258 (App. Div. 2009)).

The "two hat" scenario invoked by New Jersey's supreme court creates a rather troubling dilemma for product manufacturers. Let's assume that a contractor was undoubtedly negligent in the installation of the swimming pool product. Despite the contractor's clear negligence, he is immune from any and all liability once the 10-year SOR has passed from the completion of the construction project. Meanwhile, the manufacturer of the swimming pool kit, has the burden of potential liability lasting for all eternity despite the fact that they had no involvement with its installation or had any control over the contractor. To make this paradox more bizarre, in order for a manufacturer to argue for the immunity granted by the SOR, it would need to argue that it had substantial involvement in the negligent installation and design of its own product. Understandably, this scenario offers little comfort to manufacturers and distributors of products.

CONCLUSION

The law of SOR's has been and continues to exist in a constant state of flux, as both state legislatures and Congress grapple with tort reform efforts being proposed by insurance and industry advocates. Meanwhile, consumer advocates and the plaintiff's bar oppose these efforts. In addition, the appellate courts are ever present in weighing in on the constitutionality of these statutes. For example the attached chart which lays out the current laws for each of the 50 states + D.C. is current as of September, 2010. It is very likely that the laws will have changed in several of the jurisdictions in the months and years that follow its publication. As a result, attorneys must be ever aware of the constant changes in this area of law in the subject jurisdiction and take note of legislative amendments and court rulings. More importantly, as a

practice guide, attorneys should not be afraid to make creative arguments which might expand the state of the law in support of their clients.