For Product Manufacturers and Distributors

Limited Respite Is Found in Statutes of Repose

By Alan R. Levy

Attorneys must stay abreast of the constant changes in this area of law in their jurisdictions of practice and take note of legislative amendments and court rulings.

A statute of repose (SOR) is often interchangeably defined as a statute of limitation (SOL). In reality, they are two very different concepts, and as this article will show, SORs have a significant impact in the realm of product liability law.

Generally, an SOL bars a plaintiff from bringing a cause of action if he or she does not invoke his or her right within a certain period of time beginning with the date of injury. Simply put, if a plaintiff does not file a lawsuit within a certain period of time as specified by a statute, which often ranges from one to six years, that plaintiff will forever lose that right. While an SOR will also extinguish a plaintiff's right to recovery, the time in which a repose period begins to run differs greatly from that of an SOL. An SOR begins to run from a date typically related to the act of a defendant, such as the manufacture or sale of a product or the substantial completion of a real estate improvement. Once the SOR period has passed, a defendant may be immune from civil liability, regardless of its conduct. While an SOL limits the amount of time that a plaintiff has to enforce his or her right, an SOR very often extinguishes a plaintiff's right before an injury even occurs. Hence, an injured plaintiff may have had no right simply because an injury occurred too long after a product was first manufactured or a real estate improvement was completed. In other words, an SOR very often will create a *damnum absque injuria*, a "loss without injury" scenario whereby even though a plaintiff may have been injured by a defective product that plaintiff has no legal right to recover from the manufacturer or distributor of the product.

Tort reform proponents have long pressed Congress and state legislatures to enact SORs for the protection of product manufacturers and sellers. Their arguments rely on the inherent disadvantage that a manufacturer faces in defending a case when an allegedly offending product was manufactured decades before an incident. As the years pass, factories close, records are destroyed or misplaced, and memories fade. Some courts note that as the years pass, juries will be unable to understand the manufacturing and design standards that were in effect at the time products were manufactured, and they may substitute old standards with current technological standards. *See Daily v. New Britain Mach. Co.*, 512 A.2d 893, 904–05 (Conn. 1986). Furthermore, the insurance industry has repeatedly lobbied for

■ Alan R. Levy is a partner with Buckley & Curtis in New York City. His practice focuses on a wide variety of civil litigation ranging from products liability, motor vehicle defense, premises liability and complex corporate disputes. Mr. Levy is the publications chair of DRI's Product Liability Committee Building Products SLG. He offers special thanks to Grace Lee at Mendik Library, New York Law School, for assistance in the research of this article.

SORs to allow it to better predict the likelihood of claims and risk allocation with more accuracy.

While tort reform proponents have been active supporters of SORs, critics, ranging from the plaintiffs' bar to members of the judiciary, have been quite strident in their opposition. They argue that an SOR extinguishes a plaintiff's right to seek relief before he or she has even been injured, and thus, SORs are unconstitutional. 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., 464 A.2d 288, 295–96 (N.H. 1983) (striking down the products SOR as unconstitutional) (quoting *Dincher v. Marlin Firearms Co.*, 198 F.2d 821, 823 (2d Cir. 1952) (J. Frank, dissenting)).

The battles over the application of SORs in the product liability realm have persisted for nearly 35 years, and the outcomes of these disputes have varied greatly throughout the United States. Even today, the law remains unsettled and continues to develop.

The Historical Genesis of Product Statutes of Repose

To a large extent, the birth of product SORs can be credited to the 1965 publication of the *Restatement (Second) of Torts*, §402A, which effectively shattered the fast-declining privity requirement in product cases and gave formal credence to the doctrine of "strict liability in tort." In addition, courts also began to accept the "discovery rule" whereby a statute of limitations could be tolled so that it began to run not on the date of injury but on the date when a plaintiff discovered, or should have discovered, an injury. According to several legal commentators and contemporary sources, these doctrinal changes caused a "crisis" in product liability law. 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 product liability lawsuits increased from 50,000 in 1960 to 500,000 in 1970 and were expected to exceed 1,000,000 in 1975. *See also* U.S. Dep't of Commerce, *Products Liability Insurance: Assessment of Related Problems and Issues* (Mar. 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 the White House created the 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* (Nov. 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 product claims and insurance premium trends, the task force submitted several remedies appropriate for future study and implementation, including eliminating third-party suits by injured workers against product manufacturers, developing safety certifications for both industrial and consumer products, and mandating that manufacturers adopt product liability prevention programs. *See id.* at V-1–V-7.

Another concern raised by product manufacturers and their insurers, in addition to manufacturing and insurance costs, was "open-ended liability." Insurance and industry advocates argued that once a product had been manufactured and introduced into the stream of commerce, potential liability seemed to exist for all eternity, and thus insurance underwriters had no way of predicting the risk associated with older products. The task force acknowledged that manufacturers and insurers were strong proponents of tort reform measures that would create a "statutory definition of useful product life," effectively limiting the liability of a manufacturer to the "useful" life of a product. Interestingly, the task force's initial opinion was that this remedy "cannot be deemed to be feasible" because there was no viable method of calculating the useful life of the myriad of products available to industry and the average consumer. *See id.* at VII-11–VII-13.

The Model Uniform Product Liability Act

Despite initial misgivings, on October 31, 1979, the Interagency Task Force on Product Liability and the U.S. Department of Commerce published the Model Uniform Product Liability Act ("MUPLA"), which included an SOR, section 110. *See* 44 Fed. Reg. 62,714, 62,732–34 (1979); *see also* 43 Fed. Reg. 14,612, 14,616–17, 14,624, 40,438, 40,443 (1978). The task force noted that insurers' apprehension about older products might be exaggerated (noting that 97 percent of product-related accidents occurred within six years of purchase. But the task force did acknowledge that underwriters' concerns were about the *potential* losses associated with older products. *See* 44 Fed. Reg. 62,714, 62,733.

The MUPLA's SOR took two basic approaches. First, a product seller would not be liable for harm that it 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 10 years after the date of delivery, a rebuttable presumption that the product's "useful safe life" had expired would apply. *See* 44 Fed. Reg. 62,732. Examples of evidentiary standards used to determine a product's "useful safe life" were borrowed from Minnesota's recently enacted SOR and included (1) wear and tear; (2) the effect of deterioration from natural causes and climate; (3) the normal practices of use with respect to frequency of use, repairs, and replacements; (4) representations, instructions, and warnings made by a seller; and (5) alterations made by a user or third party. *See id.*

It is important to note that under the MUPLA's SOR a manufacturer or seller would not have had the same protection as under an SOL. If a plaintiff files a lawsuit after an SOL expires, a defendant can simply file a motion to dismiss on the pleadings before expending significant resources on discovery. However, under the MUPLA, a plaintiff could still succeed simply by refuting the presumption that a product's

useful safe life had expired. The drafters of the MUPLA also added exceptions to the rule for express warranties of greater than 10 years, intentional concealment or misrepresentation, contribution and indemnity actions, cases of prolonged exposure, or defects reasonably undiscoverable before the statutory period expired. *See id.* Alas, neither the U.S. Congress nor a single state adopted the MUPLA as it was proposed.

While a statute of repose will also extinguish a plaintiff's right to recovery, the time in which a repose period begins to run differs greatly from that of a statute of limitation.

While the MUPLA was left to die on the vine, in late 1970s over half of the states enacted SORs during a "frenzy of national product liability reform" that borrowed statutory language from the MUPLA and other states, which also frequently did neither. *See* Oregon Law Commission, *A Report to the Statutes of Limitations Work Group regarding statutory time limitations on product liability actions* (July 2000). These statutes vary widely from state to state. Many states adopted SORs explicitly immunizing a product manufacturer from civil liability after a specific period of time had passed, ranging from five to 15 years, which began when the product was first manufactured, sold, or distributed. Some states adopted a "useful safe life" rebuttable-presumption doctrine with similarities to the MUPLA's rebuttable presumption. Some states adopted a hybrid of the two. Finally, a small number of states did not adopt statutes protecting product manufacturers, but they have borrowed another state's SOR if a cause of action arose in a state with an SOR. A table listing product SOR information state by state appears on pp. 68–70.

Congressional Attempts to Enact National Legislation

There is only one federal statute of repose, 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 aircrafts are shielded from civil liability for injuries or death caused by the aircrafts, the aircraft components, or other parts, if the aircrafts or parts were delivered at least 18 years before accidents 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 elections. The bill was signed into law by President Clinton following a 91–8 vote in the Senate and a voice vote in the House of Representatives with no recorded objections. *See* http://www.govtrack.us/congress/bill.xpd?bill=s103-1458. While the plaintiffs' bar continues to challenge the constitutionality of GARA, at least one circuit court of appeals has upheld it. *See Lyon v. Agusta S.P.A.*, 252 F.3d 1078 (9th Cir. 2001), *cert. denied*, 534 U.S. 1079 (2002).

Although GARA is the only national SOR, ever since the MUPLA was first proposed in the late 1970s, there have been numerous attempts to pass a uniform product liability SOR 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*, at 461–62. The closest that a national products act came to becoming U.S. 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 of less than 15 years. *See* H.R. 956, 104th Cong. (1996). 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 elections.

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 1979 Interagency Task Force on Product Liability initially questioned the feasibility of a national product SOR, its chair, Victor Schwartz, remains a vocal proponent of SORs. *See also Product Liability Fairness Act, 1993: Hearings on S. 687 Before the Senate Comm. on Commerce, Science and Trans.*, 103d Cong., 95 (1994) (testimony of Prof. Victor E. Schwartz). Notwithstanding the continuing legal debate, it appears that whether 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 Statutes of Repose

Since the late 1970s, 29 states have enacted some form of tort reform legislation with an SOR specifically for products. As with fingerprints, no two states have identical statutes. Furthermore, many of these statutes have been successfully challenged and struck down as unconstitutional. There are essentially two categories of product liability SORs, the "time-period" SOR and the "rebuttable-presumption" SOR.

The time-period SOR is by far the most powerful form of protection for product manufacturers and sellers, and it is the most draconian for plaintiffs. A time-period SOR holds that once a specific period of time after the product's manufacture or sale date has passed, a plaintiff is completely barred from suing the manufacturer or seller, so, as with an SOL, a quick motion to dismiss on the pleadings may end a claim. Or, a plaintiff's counsel acquainted with such a time-period SOR may see no avenue for success and simply choose not to file an action in the first place.

The second type of SOR, the rebuttable-presumption SOR, is similar to that outlined in the MUPLA and provides a rebuttable presumption of non-liability to a product manufacturer or seller once a certain period of time has passed, that is, the product's "useful safe life." While a defendant is free to invoke this affirma-

tive defense, determining a product's "useful safe life" likely will become an issue of fact considered by a jury. In other words, a plaintiff still has the opportunity to make a case for liability against a manufacturer or seller by rebutting the presumption. A motion to dismiss on the pleadings has no real chance of success, and assuming that a plaintiff's counsel is competent, a summary judgment motion has only a small chance of success. Someone could make a compelling argument that a rebuttable-presumption SOR is not a proper 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 Statues of Repose

Of the 19 states that have enacted SORs with time-specific limits, about one-third have had their SORs either struck down as unconstitutional 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 (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 courts deciding that SORs have been unconstitutional has been that when an SOR extinguished a plaintiff's claim prior to an injury it violated that particular state's constitution's "open courts" doctrine. *See* Thomas R. Phillips, *The Constitutional Right to a Remedy*, 78 N.Y.U. Law Rev. 1309 (Oct. 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 did enact a national SOR, there is some doubt whether a constitutional challenge would be successful.

Currently, 11 states have valid, time-specific statutes with limits ranging from seven to 15 years from the date that the product first was manufactured or sold, although recent trends have extended time periods to 10 or more years. In 2009, North Carolina amended the state's SOR time period from six years, the shortest in the country, to 12 years. *See* N.C. Legis. 2009-420 (2009). Oregon's legislature also recently increased the time period from eight years to 10 years. *See* 2009 Or. Legis. Serv. 485.

It is important to note that these statutes vary greatly, 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 was made in Nebraska. For products manufactured outside of Nebraska, the SOR is that of the state of manufacture as long as the SOR is no less than 10 years. If a state of manufacture has no SOR, then no SOR will apply. Also, Colorado has a time-period SOR of seven 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 a 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 SORs have statutory exceptions that 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 specific claims, such as 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 SORs provide less protection to a product seller, not one has been struck down as unconstitutional by the courts. The courts likely accept these statutes as constitutional because rather than extinguishing a plaintiff's cause of action, they will merely require a plaintiff to rebut the presumption that a product's useful safe life had expired when an injury occurred. Sometimes a statute's language states that a plaintiff does not have a cause of action if a product's useful safe life had expired when an injury occurred, which sounds very similar to the draconian language found in a time-period SOR. However, since the question of a product's useful safe life is a question of fact, it becomes just one more factor that a plaintiff's liability expert must deal with in his or her testimony and just another issue at the time of trial.

Just as with time-period SORs, rebuttable-presumption SORs vary quite a bit among states. While no state has adopted the MUPLA word for word, Idaho and Kansas enacted nearly identical statutes that provide (1) a product seller is not subject to liability if the product's "useful safe life" has expired, and (2) a rebuttable presumption applies that a product's "useful safe life" is 10 years following delivery to the first purchaser or the first 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 it 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 receive the benefit of any presumptions if a product has been used for more than 10 years.

Critics… argue that an SOR extinguishes a plaintiff's right to seek relief before he or she has even been injured, and thus, SORs are unconstitutional.

Hybrid Statutes

Three states have enacted statutes that use both the time-period and the rebuttable-presumption models. First, Colorado has two distinct statutes: (1) a seven-year time-period SOR for "new manufacturing equipment," and (2) an SOR that creates a rebuttable presumption that 10 years after a

product is first sold, the product is not considered defective, nor is the manufacturer considered negligent. Connecticut's hybrid SOR states that for injuries occurring in the course of employment, a 10-year, time-period SOR applies beginning with the date that a defendant last parted with or had control of a product. For claims that do not occur in the course of employment, however, if a plaintiff shows that an injury occurred during the product's useful safe life, no SOR applies to the product. Finally, in Tennessee, a plaintiff has the lesser of one year after the expiration of a product's anticipated life or 10 years from its purchase to sue.

Since the late 1970s, 29 states have enacted some form of tort reform legislation with an SOR specifically for products [and] many of these statutes have been… struck down as unconstitutional.

Real Estate Improvement SORs

While valid product SORs currently exist in only a minority of states, SORs that protect real estate improvements exist in 48 states and the District of Columbia. These statutes immunize contractors, architects, engineers, surveyors, and other entities involved in the design or construction of an improvement to real property from civil liability once a period of time, ranging from four to 20 years, has passed after they have finally or substantially completed construction projects. The majority of states have a 10-year SOR. As with product SORs, real estate improvement SORs also vary from state to state, although they have withstood constitutional challenge far more succesfully. Currently, only one state, Kentucky, has an invalidated real estate SOR. The table accompanying this article on pp. 68–70 lists each state's statutory real estate improvement SOR.

The history of real estate SORs is similar to the history of product SORs, although it started 20 years earlier. As with product manufacturers and sellers, contractors were traditionally shielded by the doctrine of privity from claims of injury from plaintiffs with whom contractors did not have contractual relationships. However, in the 1950s and 60s, 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). Given that buildings and real estate improvements can often exist for centuries, the liability duration could be infinite. As a result of enhanced exposure to liability, the construction industry actively lobbied state and federal legislatures for the enactment of SORs that would limit their liability once a certain period of time had passed. *See* Cotter, 18 CATH. U. L. REV. at 361, n.2. Those lobbying efforts were quite successful. All but two states, New York and Vermont, have enacted real estate improvement SORs.

While general acceptance of real estate improvement SORs has been a boon to the construction and design industries, it has left much to be desired to product manufacturers and sellers, especially those involved in manufacturing and selling constructing and building industry products. However, even though product manufacturers were not in mind when these statutes were drafted, depending on the statutory language, product manufacturers may have some avenue of relief.

The majority of real estate improvement SORs have adapted 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:

> 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 that has "designed" a product used for the purposes of a real estate improvement will argue that it should also benefit from an available real estate improvement SOR. Whether that argument will succeed depends on the exact state statute. For example, the Hawaii, Rhode Island, and Wyoming statutes specify that some manufacturers have the protection of the real estate improvement SOR. Meanwhile, the statutory language in the District of Columbia, Minnesota, and Virginia specifically exempts suppliers and manufacturers of products from benefitting from the real estate improvement SOR. The examples of Minnesota and Virginia are especially curious because, despite seemingly clear legislative intent to prohibit product manufacturers from benefiting from those states' real estate improvement SORs, 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) (holding that manufacturers of "ordinary building materials" do benefit from the state's real estate improvement 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). Thus, even if a statute seems to preclude the SOR defense for product distributors, you should still consider making a contrary argument.

Nevertheless, the majority of real estate improvement SORs are silent on whether manufacturers or sellers of products fall within the class of protected entities. Hence the question is left up to the courts, and each jurisdiction's interpreta-

tion diverges greatly, although some trends have appeared as well. Generally, when a manufacturer 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 that the state's real estate improvement SOR does not protect the manufacturer. *See Howell v. Burk*, 568 P.2d 214 (N.M. Ct. App. 1977); *Winkel v. Windsor Windows and Doors*, 983 So. 2d 1055 (Miss. 2008); *Noll by Noll v. Harrisburg Area YMCA*, 643 A.2d 81 (Pa. 1994); *but see Rose v. Fox Pool Corp.*, 643 A.2d 906 (Md. 1994). On the other hand, courts tend to find that state real estate improvement SORs protect manufacturers that not only produce products but that also participate in the design, construction, or installation of overall, real property improvements. *See Beall v. Inclinator Co. of America, Inc.*, 356 S.E.2d 899 (Ga. Ct. App. 1987); *McCormick v. Columbus Conveyer Co.*, 564 A.2d 907 (Pa. 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), the plaintiff sued an installer, manufacturer, and distributor of a swimming pool for an injury sustained from diving into a swimming pool. Because more than 10 years had passed from the installation, the installer was immune from liability under New Jersey's real estate improvement 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," that is, act as both the fabricator of a product and a designer, installer, or contractor for a real estate improvement. However, the two hats were mutually exclusive, and the court held that the defendant could wear either but not both hats for the purpose of the New Jersey real estate improvement SOR. As a result, the defendant could invoke the SOR for claims for negligent installation or construction, but the SOR could not extinguish the plaintiff's claims for product liability. It is interesting to note, however, that although the state Supreme Court seems to have explicitly closed the door on product manufacturers, at least one subsequent appellate court has allowed manufacturers to benefit from the New Jersey real estate improvement SOR. *See Miles v. Deluxe Bldg. Systems, Inc.*, 2009 WL 2224258 (N.J. Sup. Ct. App. Div. July 28, 2009).

The "two hat" scenario invoked by the New Jersey Supreme Court creates a rather troubling dilemma for product manufacturers. Assume that a contractor was undoubtedly negligent when it installed a swimming pool product. Despite the contractor's clear negligence, it is immune from all liability once the 10-year, real estate improvement SOR has expired, which began on completion of the construction project. Meanwhile, the swimming pool kit manufacturer has potential liability that lasts for all eternity even though it had nothing to do with the installation and had no control over the contractor. To make this paradox more bizarre, for the manufacturer to argue that the immunity granted by the SOR should apply to it, the manufacturer would need to argue that it had been substantially involved in the negligent installation and design of its product. Understandably, this scenario offers little comfort to product manufacturers and distributors.

Conclusion

The law of SORs continues to exist in a constant state of flux as both state legislatures and Congress grapple with tort reform efforts proposed by insurance and industry advocates.

Meanwhile, consumer advocates and the plaintiffs' bar oppose insurance and industry advocates' efforts. In addition, the appellate courts are ever-present, weighing in on the constitutionality of these statutes. For example, the table on pp. 68–70 that briefly describes the current laws for each of the 50 states and the District of Columbia 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 this publication. As a result, attorneys must stay abreast of the constant changes in this area of law in their jurisdictions of practice and take note of legislative amendments and court rulings. More importantly, attorneys should not be afraid to make creative arguments that might expand the state of the law in support of their clients. FD

Table of State Statutes of Repose for Product Liability and Real Estate Improvement

Strikethrough indicates that a statute has been held unconstitutional by the state's highest court of appeals but has not been repealed by the legislature. Example: ~~Ala. Code §6-5-502~~. "MUPLA" refers to the Model Uniform Product Liability Act. *See* 44 Fed. Reg. 62,714, 62,732–34 (1979).

Notes: This chart is current as of September 1, 2010. It does not exhaustively list the characteristics of each jurisdiction's statutes. These statutes are subject to amendment by the legislatures and constitutional review by the courts. The reader is advised to conduct independent research on the current status of the law in the applicable jurisdiction.

State	Product Liability Statutes of Repose	Real Estate Improvement Statutes of Repose*
Alabama	~~Ala. Code §6-5-502~~ (10-year SOR struck down as unconstitutional by *Lankford v. Sullivan, Long & Hagerty*, 416 So. 2d 996 (Ala. 1982).)	Ala. Code §6-5-221 (13 years)
Alaska	None	Alaska Stat. §09.10.055 (10 years)
Arizona	~~Ariz. Rev. Stat. §12-251~~ (12-year SOR struck down as unconstitutional by *Hazine v. Montgomery Elevator Co.*, 861 P.2d 625 (Ariz. 1993).)	Ariz. Rev. Stat. §12-252 (Eight years)
Arkansas	Ark. Code Ann. §16-116-105 (Use of a product beyond its unspecified "anticipated life" may be considered as evidence of fault by the consumer.)	Ark. Code Ann. §16-56-112 (Four years)
California	None	Cal. Code Civ. Proc. §337.15 (10 years) (Only applicable to claims of property damage. Not applicable to personal injury claims.)
Colorado	Colo. Rev. Stat. Ann. §13-80-107 (Seven-year SOR for "new manufacturing equipment" after equipment was first used for its intended purpose) Colo. Rev. Stat. Ann. §13-21-403 (10-year rebuttable presumption from date of first sale.)	Colo. Rev. Stat. Ann. §13-80-104 (Six years)
Connecticut	Conn. Gen. Stat. §52-577a (10-year SOR from date party last parted with possession or control of the product, only for injuries occurring in the course of employment. If injury did not occur in the course of employment and the plaintiff shows that the injury occurred during the product's useful safe life, no SOR applies.)	Conn. Gen. Stat. §52-584a (Seven years)
Delaware	None	10 Del. Code §8127 (Six years)
District of Columbia	None	D.C. Code §12-310 (10 years)
Florida	Fla. Stat. §95.031(2) (12-year SOR if the product's useful life is 10 years or less. The SOR may be extended up to 20 years depending upon a complex scheme determining the product's useful life.)	Fla. Stat. §95.11(3) (Four years, or 10 years in cases of latent defect.)
Georgia	Ga. Code. Ann. §51-1-11 (10-year SOR from first sale for use or consumption.)	Ga. Code. Ann. §9-3-51 (Eight years, or 10 years in cases of wrongful death.)
Hawaii	None	Haw. Rev. Stat. §657-8 (10 years)
Idaho	Idaho Code §6-1403 (10-year rebuttable presumption similar to the MUPLA. Product seller not subject to liability if the product's "useful safe life" has expired. Rebuttable presumption that a product's "useful safe life" is 10 years following delivery to first purchaser or lessee.)	Idaho Code §5-241 (Six years)
Illinois	735 Ill. Ann. Stat. 5/13-213 (12-year SOR from date of first sale or 10 years from date of sale to first user, whichever is less. The constitutionality of this statute is unclear. A 1995 statutory amendment that replaced the application of "strict liability in tort" to "any theory of liability" against a product manufacturer was held unconstitutional, thus leaving the prior statute in effect. *See Best v. Taylor Mach. Works*, 689 N.E.2d 1057, (Ill. 1997); 8 *Nichols Ill. Civ. Prac.* §143:10, n.2.)	735 Ill. Ann. Stat. 5/13-214 (10 years)

*Time generally runs from "substantial completion."

State	Product Liability Statutes of Repose	Real Estate Improvement Statutes of Repose*
Indiana	Ind. Code Ann. §34-20-3-1 (10-year SOR from delivery of the product to initial user or consumer unless the injury occurs at least eight years from date of delivery, then a claim may be brought at any time within two years of the incident date.)	Ind. Code Ann. §32-30-1-5 (10 years or 12 years in cases of alleged design deficiency, unless injury occurs with less than two years remaining in SOR; then a plaintiff may sue anytime within two years of the incident date.)
Iowa	Iowa Code Ann. §614.1 (15-year SOR beginning when the product was first purchased, leased, bailed, or installed for use or consumption.)	Iowa Code Ann. §614.1 (15 years)
Kansas	Kan. Stat. Ann. §60-3303 (10-year rebuttable presumption similar to the MUPLA. Product seller not subject to liability if the product's "useful safe life" has expired. Rebuttable presumption that a product's "useful safe life" is 10 years following delivery to first purchaser or lessee.)	Kan. Stat. Ann. §60-513 (10 years)
Kentucky	Ky. Rev. Stat. Ann §411.310 (Five-year rebuttable presumption from date of first sale, or eight-year rebuttable presumption from date of manufacture.)	~~Ky. Rev. Stat. Ann §413.135~~ (Seven years, held unconstitutional by *Perkins v. Northeastern Log Homes*, 808 S.W.2d 809 (Ky. 1991).)
Louisiana	None	La. Stat. Ann.—R.S. §9:2772 (Five years)
Maine	None	14 Me. Rev. Stat. Ann. §752A (10 years, but only applicable to design professionals, architects, and engineers.)
Maryland	Md. Code Ann. Cts. & Jud. Proc. §5-115 (No SOR for claims arising in Maryland, but the "borrowing statute" will apply another state's SOR for claims arising in that state as long as the plaintiff is not a Maryland resident.)	Md. Code Ann. Cts. & Jud. Proc. §5-108 (20 years for all actions, but 10 years for claims against architects, professional engineers, or contractors.)
Massachusetts	None	Mass. Gen. Laws Ann. 260 §2B (6 years)
Michigan	Mich. Stat. Ann. §600.5805 (If a product has been in use for 10 years, a plaintiff must prove a prima facie case without benefit of any presumption.)	Mich. Stat. Ann. §600.5839 (10 years for all actions, but six years for claims against architects, professional engineers, or contractors.)
Minnesota	Minn. Stat. Ann. §604.03 (West) (Use of a product following the expiration of its unspecified "ordinary useful life" is a defense to liability.)	Minn. Stat. Ann. (West) §541.051 (10 years)
Mississippi	None	Miss. Code Ann. §15-1-41 (Six years)
Missouri	None	Mo. Ann. Stat. §516.097 (West) (10 years)
Montana	None	Mont. Code Ann. §27-2-208 (10 years, unless injury occurs with less than one year remaining in the SOR; then a plaintiff may sue anytime within one year of the incident date.)
Nebraska	Neb. Rev. Stat. §25-224 (10-year SOR from the date of first sale for products manufactured in Nebraska. For products manufactured outside of Nebraska, the SOR shall be that of the state of manufacture as long as it is not less than 10 years. If the foreign state of manufacture has no SOR, then no SOR will apply.)	Neb. Rev. Stat. §25-223 (10 years for all actions, but four years for claims alleging deficiency in the design, planning or construction.)
Nevada	None	Nev. Rev. Stat. Ann. §11.203, 11.204, 11.205 (Six years for claims involving patent deficiencies, eight years for claims involving known deficiencies, 10 years for claims involving latent deficiencies, unless injury occurs with less than two years remaining in the SOR; then a plaintiff may sue anytime within two years of the incident date.)
New Hampshire	~~N.H. Rev. Stat. Ann. §507-D:2~~ (12-year SOR struck down as unconstitutional by *Lankford v. Sullivan, Long & Hagerty*, 416 So. 2d 996 (N.H. 1982).)	N.H. Rev. Stat. Ann. §508:4-b (Eight years)
New Jersey	None	N.J. Stat. Ann. §2A:14-1.1 (West) (10 years)
New Mexico	None	N.M. Stat. Ann. §37-1-27 (10 years)

*Time generally runs from "substantial completion."

State	Product Liability Statutes of Repose	Real Estate Improvement Statutes of Repose*
New York	None	None
North Carolina	N.C. Gen. Stat. Ann. §1-46.1 (West) (12-year SOR from date of initial purchase for use or consumption)	N.C. Gen. Stat. Ann. §1-50 (West) (Six years)
North Dakota	~~N.D. Cent. Code §28-01.3-08~~ (10-year SOR struck down as unconstitutional by *Dickie v. Farmers Union Oil Co.*, 611 N.W.2d 168 (N.D. 2000).)	N.D. Cent. Code §28-01-44 (10 years)
Ohio	Ohio Rev. Code Ann. §2125.02 and 2305.10 (10-year SOR from date of delivery to first purchaser or lessee unless the injury occurs with less than two years of the SOR remaining; then a plaintiff may sue anytime within two years of the incident date. Note: while the statute was held to be facially constitutional, retroactive application has been held to be unconstitutional. *See Groch v. Gen. Motors Corp.*, 883 N.E.2d 377 (Ohio 2008).)	Ohio Rev. Code Ann. §2305.131 (10 years unless injury occurs with less than two years remaining in the SOR; then a plaintiff may sue anytime within two years of the incident date.)
Oklahoma	None	12 Okla. Stat. Ann. §109 (10 years)
Oregon	Or. Rev. Stat. §30.905 (10-year SOR from date of purchase for first use or consumption, or for products manufactured outside of Oregon, the SOR shall be of that state.)	Or. Rev. Stat. 12.135 (10 years)
Pennsylvania	None	42 Pa. Cons. Stat. Ann. §5536 (West) (12 years unless injury occurs with less than two years remaining in the SOR; then a plaintiff may sue anytime within two years of the incident date.)
Rhode Island	~~R.I. Gen. Laws §9-1-13~~ (10 year SOR struck down as unconstitutional by *Kennedy v. Cumberland Eng. Co.*, 471 A.2d 195 (R.I. 1984).)	R.I. Gen. Laws §9-1-29 (10 years)
South Carolina	None	S.C. Code Ann. §15-3-640 (Eight years)
South Dakota	None (~~S.D. Codified Laws §15-2-12.1~~ struck down as unconstitutional by *Daugaard v. Baltic Co-op. Bldg. Supply Ass'n*, 349 N.W.2d 419 (S.D. 1984). Later repealed by the legislature. *See* S.D. Sess. Laws 1985 ch. 157 §2).)	S.D. Codified Laws §15-2A-1 (10 years)
Tennessee	Tenn. Code Ann. §29-28-103 (10-year SOR from date product was first purchased for use or consumptions, or within one year of expiration of the anticipated life of the product, whichever is less.)	Tenn. Code Ann. §28-3-202 (Four years)
Texas	Tex. Civ. Prac. & Rem. Code Ann. §16.012 (15 year SOR from date of the product's sale by the defendant.)	Tex. Civ. Prac. & Rem. Code Ann. §16.008 (10 years)
Utah	None (~~Utah Code Ann. §78-15-3~~ struck down as unconstitutional by *Berry ex rel. Berry v. Beech Aircraft Corp.*, 717 P.2d 670 (Utah 1985). Later repealed by the legislature, reworded as a statute of limitations, and renumbered as Utah Code Ann §78B-6-706. *See* Act of Feb. 20, 1989, ch. 119, §1, 1989 Utah Laws 268.)	Utah Code Ann. §78B-2-225 (Nine years unless injury occurs with less than two years remaining in the SOR; then a plaintiff may sue anytime within two years of the incident date.)
Vermont	None	None
Virginia	None	Va. Code Ann. §8.01-250 (Five years)
Washington	Wash. Rev. Code §7.72.060 (12-year rebuttable presumption similar to the MUPLA. Product seller not subject to liability if the product's "useful safe life" has expired. Rebuttable presumption that a product's "useful safe life" is 12 years following delivery to first purchaser or lessee.)	Wash. Rev. Code §4.16.310 (Six years)
West Virginia	None	W. Va. Code §55-2-6a (10 years)
Wisconsin	None	Wis. Stat. Ann. §893.89 (West) (10 years)
Wyoming	None	Wyo. Stat. Ann. §1-3-111 (10 years)

*Time generally runs from "substantial completion."