



The Critical Path

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Playing Defense – The Varying Applicability of Statutes of Repose for Product Manufacturers in Construction Defect Actions

by Mark D. Shifton



Defending a building product manufacturer in a complex construction defect action invariably presents an interesting situation. Whether such an action takes the form of a small, direct action involving a single homeowner, or a large development consisting of dozens of separate buildings housing thousands of residents, claims of products liability alleged within the context of a construction defect action often involve their own unique theories of

liability, defenses, and strategies. One significant issue which occasionally arises in construction defect actions is when the passage of time implicates the statute of repose – potentially barring the claim in its entirety, and providing the defendant with a complete defense to the action. In construction defect actions brought long after construction has been completed, a statute of repose may provide a defendant with a complete defense against any claims of alleged negligence or breach of contract. States vary, however, as to whether the manufacturers of building components used during construction are entitled to the benefits of the statute of repose.

All fifty states have statutes of repose on their books (and forty-six of those statutes of repose apply to the construction or improvement of real property). The scope of those forty-six statutes of repose, however, vary considerably – out of the forty-six statutes of repose applying to construction or improvements to real property, only nineteen of them apply their protections to bar products liability claims. Accordingly, while in the vast majority of jurisdictions those parties intimately involved in the design and construction process (such as architects, engineers, and contractors) will enjoy the benefit of a statute of repose, in only a minority of jurisdictions will such benefits be enjoyed by the manufacturers of components used in the construction of those improvements.

A. Statutes of Repose – Purpose and Effect

Statutes of repose generally serve as a complete bar to all claims relating to the design or construction of real property once the period of repose has expired. As a threshold matter, it is important to understand the difference between a statute of limitations and statute of repose, as while the legislative intent behind them may be similar, they operate very differently (and independently from each other).

A statute of limitations defines the time period within which an action must be commenced once the claim has accrued. Generally, the limitations period begins running on the date the claim accrues – whether by the occurrence of an injury, the discovery of that injury, or some other mechanism – and once the claim accrues, the limitations period commences. In cases where a plaintiff lacks actual knowledge of its injury within the limitations period (and could not reasonably discover the injury within that period), many courts will turn to principles of equity to toll the running of the limitations period. Accordingly, within any statute of limitations analysis, the date the claim accrued is of paramount importance (and, by extension, the date the plaintiff first gained knowledge that it had an actionable claim).

The date a plaintiff's claim accrued, however, is irrelevant to a statute of repose analysis. Rather than defining the period within which an action must be filed to be timely, a statute of repose effectively defines when a claim "dies" – statutes of repose serve to "cut off" liability past a certain point, and (generally) are never subject to equitable tolling. Rather, once the statutory period of repose has run – regardless of when (or even if) – a plaintiff gains knowledge of its injury, all potential claims are extinguished. From a metaphysical perspective, it is like the



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claim simply never existed. The legislative intent behind most statutes of repose is to prevent the possibility of “perpetual liability” in a way that statutes of limitation cannot, because even if a statute of limitations would might foreclose a defendant’s liability, equitable tolling principles could (theoretically) expose that defendant to liability in perpetuity – such as in the case of a latent defect, where a plaintiff may not discover the defect for years, if not decades (thus possibly tolling the statute of limitations until the plaintiff discovers the injury). Accordingly, statutes of repose act as a type of “backstop” to statutes of limitation, and operate to extinguish all liability upon a certain date, even if a plaintiff’s claim has not yet accrued (or the relevant statute of limitations has not yet expired).

B. Statutes of Repose Applicable to Product Manufacturers

Of the forty-six states with statutes of repose applying to improvements to real property, only nineteen state statutes of repose apply to claims of product liability. Accordingly, in those states, building product manufacturers receive the benefit of a statute of repose, and can rest secure in the knowledge that as of a particular date, there can be no liability for its products installed in an improvement to real property.

By way of example, Connecticut’s statute of repose, C.G.S.A. § 52-584a provides for a seven year repose period for claims against real professionals involved in improvements to real property. A separate statute, C.G.S.A. § 52-577(a) applies claims of defective products, and provides a repose period of ten years (although this period may be extended by warranty, and, unlike most statutes of repose, may be equitably tolled on the basis of fraudulent concealment or misrepresentation, provided that such concealment or misrepresentation is the proximate cause of the plaintiff’s injury). Florida’s statute of repose, in contrast, provides a ten year repose period for design professionals and contractors, but extends the period of repose for product manufacturers to twenty years (twelve years if the product has a useful life of ten years or less). F.S.A. §§ 95.11, 95.031. Indiana’s statute of repose, I.C. § 34-20-3-1, is more favorable to product manufacturers, in providing a repose period of ten years (which is extended by two years if the claim accrues within the last two years of the repose period). Indiana has a separate statute of repose, I.C. § 32-30-1-5 applying to design professionals and contractors, which provides a ten year repose period (although as to professional negligence claims against design professionals, the repose period is twelve years, measured from the completion and submission of design plans and specifications to the owner).

C. Statutes of Repose Inapplicable to Product Manufacturers

A significant majority of state statutes of repose, however, do not apply to claims of product liability claims. In the context of construction or improvements to real property, therefore, those states’ statutes of repose will extinguish all potential to the design professionals and contractors involved in construction once the repose period has expired, while the manufacturers of building products installed during construction receive no such benefit.

State v. Perini, a relatively recent decision from the New Jersey Supreme Court, is instructive (and also provides a solid discussion on various issues relating to statutes of repose, such as when the repose period begins to run, and how a statute of repose applies when a project is completed in phases, issues which are beyond the scope of this article). 113 A.3d 1199 (N.J. 2015). In *Perini*, the State of New Jersey filed a construction defect action against various contractors and design professionals involved in the design and construction of a prison (as well as the manufacturer of piping installed during construction). Ultimately, the New Jersey Supreme Court held the State’s claims against all of the contractors and design professionals involved in the project to be under New Jersey’s statute of repose – although those defendants still enjoyed the protections of the statute of repose, the unique facts of the action caused the Court to hold that the project was not “substantially complete” until less than ten years before the ten year repose period had expired. The piping manufacturer, however, fared even worse, as the Supreme Court held New Jersey’s statute of repose did not even apply to bar claims against manufacturers of standardized building products. Accordingly, given even slight changes to the underlying facts, the result could have been very different – the contractors and design professionals might have been entitled to a complete defense against the plaintiff’s claims, while the manufacturer of the building components used during construction left as the only viable defendant.

D. Analysis

Affording design professionals and contractors the benefits of a statute of repose serves a laudable goal – the relief that is afforded from having to defend against stale claims relating to construction projects finished long ago, where important documents have likely been destroyed, and witnesses have moved away



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(compromising the defendants' abilities to mount an effective defense against the claim). Denying the benefits of a statute of repose to building product manufacturers, however, creates an artificial dichotomy between those defendants who were (likely) intimately involved with the actual design and construction process, and those who were not (manufacturers of building products). This dichotomy may lead to absurd results, where the parties who are closest to the construction project (and, arguably, those in the position to best protect against any deficiencies, either from defectively-designed or manufactured products) enjoy complete immunity from a property owner's claims, while the manufacturer of a building component installed during construction, is not.

Denying manufacturers of building products the benefits of a statute of repose, however, creates an artificial distinction that simply fails to comport with reality, as it advances the idea that building products are discrete "components" of an improvement to real property that can be easily separated from the structure itself. Reality, however, is not so simple – many building products are complex components that will work as designed only if their integration into a project was the product of a thoughtful design process, and the component was installed in a workmanlike fashion, pursuant to good industry practices and in accordance with the manufacturer's specifications. Those states with statutes of repose not applicable to the manufacturers of building products place those defendants at a distinct strategic disadvantage in litigation, and such a distinction ignores the public policy reasoning behind the purpose of the statute of repose, and ultimately operates to shift the exposure to a party that – from a technical perspective – may be the least culpable for the plaintiff's alleged damages.

The New Jersey Supreme Court's decision in *State v. Perini* illustrates this dichotomy perfectly. While the Court was clearly bound by the scope of New Jersey's statute of repose (which, by its very text, clearly reveals a legislative intent to protect only design professionals and contractors), the statute's application could have led to a paradoxical result – the complete bar of the plaintiff's claims against the design professionals and contractors involved in design and construction process, while leaving the manufacturer of a building component exposed to liability. In states such as New Jersey, where manufacturers of building products receive no respite from the statute of repose, a set of facts such as presented in *State v. Perini* may result in two absurdities, the results of which fly in the face of the legislative purpose behind statutes of repose. First, the parties who are "closest" to the construction project (and thus in the best position to guard against the owner's claims, by ensuring sound design and quality workmanship), are absolved from liability, while the manufacturers of building products installed during construction (parties who likely had no input into how its components were being installed, nor exercised any measure of control over the course of construction) are not. Second, in cases where a plaintiff's claims against the design professionals and contractors have been extinguished due to the expiration of a repose period, the plaintiff will be forced to turn its aim against the manufacturer of the building product, as it may be the only defendant against whom a viable claim may be asserted. In so doing, the plaintiff will likely point to the premature degradation of building components as evidence that the product failed to perform as intended. Such a theory of liability, however, often creates a "chicken or the egg" scenario, as in many instances, premature degradation to building components is not the cause of the plaintiff's injury, but rather another victim, as poor design choices and deficient workmanship will often lead to the premature failure of perfectly-good building products.

Ultimately, in any construction defect action, a plaintiff is alleging claims of property damage due to the deficient design and/or construction of an improvement to real property. Creating such improvements necessarily involve decisions made by design professionals (in selecting certain components and determining how they are to be installed), as well as the work of those contractors who are putting the decisions of design professionals' into practice during the course of construction. Most states' statutes of repose provide absolute protection to those design professionals and contractors from any claims asserted after the repose period has expired, as the legislative intent behind statutes of repose is to protect defendants from "limitless" liability; over time, memories fade, documents are discarded, and witnesses move on with their lives. As the inexorable passage of time causes a claim to go "stale," forcing a party to defend against such a claim is unfair. By extending the protections of the statute of repose to design professionals and contractors, yet not to the manufacturers of building products used by those design professionals and contractors, these states create an artificial legal distinction where – from a practical perspective – none is warranted.

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