

Avoiding Stale Products Liability Claims: Why NJ Should Enact a Statute of Repose

Natalie H. Mantell, Jason J. Redd, and Randy A. Gray

New Jersey Law Journal, December 12, 2016

Nothing should last forever, especially lawsuits and stale claims. But a stale claim is exactly what New Jersey permits in products liability litigation.

New Jersey law requires all personal injury and products liability actions to be brought within two years of the date of accrual of the cause of action. See N.J.S.A. 2A:14-2(a). To determine the date of accrual, courts apply a "discovery rule"; thus, a person has two years from the date he or she knew or reasonably should have known that he or she might have a basis for a claim. See *Lopez v. Swyer*, 62 N.J. 267, 273-74 (1973).

Although statute of limitations remains a defense, under New Jersey's current law, plaintiffs can, and do, bring claims many years after using a product and/or suffering an injury. As our Supreme Court recognized in *Lopez*, such stale claims present tremendous challenges for defendants, including faded plaintiff and witness memories, potentially deceased key witnesses, and lost evidence. See 62 N.J. at 274. In addition, since the court's decision in 1973, document and data retention policies have become the norm, leading to critical medical records and relevant corporate documents often being discarded or destroyed in the normal course of business after seven years.

There is a simple solution to bring an end to stale claims: enacting a statute of repose as an ultimate time bar.

Statutes of Limitations vs. Repose

Before going further, it is helpful to distinguish between a statute of limitations and a statute of repose. As the United States Supreme Court recently stated:

Statutes of limitations and statutes of repose both are mechanisms used to limit the temporal extent or duration of liability for tortious acts. Both types of statute can operate to bar a plaintiff's suit, and in each instance time is the controlling factor. There is considerable common ground in

the policies underlying the two types of statute. But the time periods specified are measured from different points, and the statutes seek to attain different purposes and objectives.

CTS Corp. v. Waldburger, 134 S.Ct. 2175, 2182 (2014).

The difference between the two statutory periods is the date from which each is measured. A limitations period begins at the time a claim accrues, i.e., in a products liability claim, the date a plaintiff can file a lawsuit and obtain relief. See *Heimeshoff v. Hartford Life & Accident Ins. Co.*, 134 S.Ct. 604, 610 (2013). A repose period, however, is generally measured from the "date of the [alleged] last culpable act or omission of the defendant," and bars recovery despite when a claim accrues or an injury manifests. *CTS Corp.*, 134 S.Ct. at 2182. Some states with statutes of repose, however, begin the repose period for products liability claims as of the date of injury (more on this below).

Other Jurisdictions

There are many different types of statutes of repose, and the statutes enacted in other jurisdictions can provide guidance to New Jersey in deciding the best approach for our state.

For example, Tennessee employs a hybrid system of statutes of limitations and repose. There, under the statute of limitations, a cause of action accrues "on the date of the personal injury, not the date of the negligence of the sale of a product," and plaintiffs have "one (1) year from the date of the injury" to file a claim. Tenn. Code Ann. §28-3-104(a). Like New Jersey, Tennessee has a discovery rule. See *Wyatt v. ACandS*, 910 S.W.2d 851 (Tenn. 1995); *McCroskey v. Bryant Air Conditioning Co.*, 524 S.W.2d 487 (Tenn. 1975). However, this one-year statute of limitations with a discovery rule is also subject to an ultimate repose period:

Any action against a manufacturer or seller of a product for injury to person or property caused by its defective or unreasonably dangerous condition must be brought within the period fixed by §[] 28-3-104, ... but notwithstanding any exceptions to these provisions, it must be brought within six (6) years of the date of injury, in any event, the action must be brought within ten (10) years from the date on which the product was first purchased for use or consumption, or within one (1) year after the expiration of the anticipated life of the product, whichever is the shorter, except in the case of injury to minors whose action must be brought within a period of one (1) year after attaining the age of majority, whichever occurs sooner.

Tenn. Code Ann. §29-28-103(a). This means that an adult plaintiff must file a claim within six years of an injury allegedly caused by the use of a defendant's product, within ten years of purchasing the product for use or consumption, or within one year after expiration of the product's anticipated life. Key to Tennessee's hybrid system, the statute of limitations does not extend the life of the claim beyond the statute of repose. See *Montgomery v. Wyeth*, 580 F.3d 455, 458 (6th Cir. 2009), cert. denied, 559 U.S. 1031 (2010) (holding plaintiff's claim time barred when she began taking medicine in 1997 with packaging indicating product expired three years after date of sale, but did not file claim until 2005, six months after diagnosis of the alleged injury).

Texas also employs a repose period for products liability claims. Texas law time-bars a claim unless the plaintiff commences the cause of action within 15 years from the date of sale of the product. Tex. Civ. Prac. & Rem. Code §16.012(b). Texas' repose statute contains two main exceptions. First, the statute does not apply if the product manufacturer or seller warrants in writing that the safe, useful life of the product is more than 15 years. Tex. Civ. Prac. & Rem. Code §16.012(c). The second exception applies to personal injury or wrongful death claims where: 1) product exposure occurred within the 15-year repose period; 2) exposure to the product allegedly caused the harm that forms the basis of the action; and 3) the symptoms did not "manifest themselves to a degree and for a duration that would put a reasonable person on notice that the person suffered some injury" until after the 15-year period expired. Tex. Civ. Prac. & Rem. Code § 16.012(d).

A proposal for a statute of repose for a products liability action is not without precedent even under New Jersey law. Notably, New Jersey has enacted a statute of repose for other types of claims, such as those related to construction of real property. See N.J.S.A. 2A:14-1.1 (enacting a 10-year statute of repose against any contract or tort action for a claim alleging a deficiency in the design, plan, survey, supervision or construction of real property); see also N.J.S.A. 2A:14-1.3 (similarly imposing a 10-year statute of repose for a contract or tort claim regarding a survey of real property with an accrual of such a cause of action at the time the survey was performed or furnished).

A Statute of Repose is Good Public Policy

Although statutes of limitation are enacted to bar stale claims, it is unfair to force a defendant to defend a claim many years after the events underlying that claim unfolded. Memories of

important witnesses fade. Once witnesses, including the parties, are unable to recall information central to disputed claims, that evidence is wholly lost. It is not hard to imagine a situation where a plaintiff files a complaint for events that unfolded years prior and claims to have excellent recollection of the relevant facts, as contrasted against a defendant's employees who do not have personal recollection of the facts. Without more, the defendant is placed in the unfair position of defending against a claim based on one-sided facts.

Such prejudice is exacerbated where companies properly implement and use document retention policies. Federal and state agencies require document retention for prescribed time periods for certain types of records. See, e.g., <https://www.irs.gov/businesses/small-businesses-self-employed/how-long-should-i-keep-records> (last visited Nov. 22, 2016). Even where law does not require record retention, companies equally need to implement record retention policies to adequately safeguard trade secrets, personnel information and customer privacy. Keeping records for an indefinite amount of time may put each of these at risk. In addition, large and small companies, including physicians' offices, often implement such policies to contain costs associated with storage of an ever-increasing amount of data and documents. If a company must defend a lawsuit based on events that occurred many years ago, the company is placed in a position of deciding whether to keep records indefinitely to defend against litigation that may never occur, or to employ reasonably-timed record retention policies.

While there is a strong public policy interest in encouraging certainty and reasonable time frames for legislative action, the New Jersey Legislature has not taken up the issue of enacting a statute of repose. A review of legislation introduced in the last 20 years yielded no bills proposing a statute of repose.

Conclusion

There exists a simple solution to the above challenges facing the legal marketplace: enacting a statute of repose. There is no need to eliminate the current system, but the two-year, discovery rule-based statute of limitations permits litigation far beyond what a reasonable party can defend. Enacting a statute of repose as an outer limit on the two-year statute of limitations with a discovery rule ensures that stale claims will eventually come to an end, while balancing the important interest of permitting injured parties to file within a reasonable amount of time. Mechanisms to preserve important evidence—testimony and records—do not exist for an indefinite amount of time. However, an ultimate repose period would put a true end date on a claim and inject some level of predictability into claims companies may face.