AVOIDING THE STATUTE OF REPOSE

COZEN AND O'CONNOR

Atlanta, GA
Charlotte, NC
Cherry Hill, NJ
Chicago, IL
Dallas, TX
Denver, CO
Las Vegas, NV
London, England
Los Angeles, CA
New York, NY
Newark, NJ
Philadelphia, PA
San Diego, CA
San Francisco, CA
Seattle, WA
Trenton, NJ
Washington, D.C.
W. Conshohocken, PA
Wilmington, DE
Wichita, KS

I. Introduction

Beginning in the 1950's, in response to increased numbers of civil actions filed to recover damages for personal injuries, the builders' and architects' lobby and insurance carriers mounted a successful campaign throughout the United States to have state legislatures adopt statutes of repose. These statutes prevent persons from bringing actions for injuries caused by improvements to real property after a certain period of time has passed from the date of construction of the improvement. More recently, in conjunction with the "tort reform" movement, an increasing number of states (24 to date) have adopted statues of repose for products liability and cases.

The purpose of this presentation is to focus on the issues presented in cases where a statute of repose may apply for the purpose of determining whether a statute of repose can be avoided in a particular case or jurisdiction.

II. Statute of Repose For Improvements To Real Property

A. Determining Whether the Product is "Improvement to Real Property"

As a general rule, the standard for determining whether a particular defective article is a "fixture" or "improvement to real property" is similar from state to state and is driven by the facts. In Pennsylvania, a four-part test is set forth in Noll v. Harrisburg Area YMCA, 643 A.2d 81 (Pa. 1994). In Noll, the issue was whether a manufacturer of diving blocks which were attached to the edge of a pool was protected by the statute of repose. Initially, the court noted that the determination of whether an item is a fixture depends upon the "objective intent of the parties" to permanently attach the product to the realestate and not the "subjective intent" of the party at the time that the product is installed.

The factors which must be considered in determining whether an article is a fixture include the following:

1) the manner in which the object is attached to the real property;

2) how long the object has been attached to the real property;

3) whether the object is essential to the use of the real property; and

4) whether the conduct of the parties involved evidenced an intent to permanently attach the article.

Id at p. 88. In Noll , the Pennsylvania Supreme Court determined that the diving blocks did not constitute an improvement to real property because they could easily be screwed and unscrewed without the use of any tools, removing the blocks was often done by persons who used the pool, the blocks were advertised as easily removable, and removing the starting blocks did not cause any damage to the pool.

In contrast to the holding in Noll, in New Jersey, a diving block which was not moved by the owner after it was attached was determined to be an "improvement to real property" and was subject to the statute of repose for improvements to real property. Lewis v. Hopewell Valley Racquet Club, 269 N.J. Super 71, 634 A. 2d 568 (A.D. 1993).

Obviously, the analysis of whether a particular article is an improvement to real property is extremely fact intensive and it is the job of the attorneys to develop those facts in the case which relate to the factors set for above and which tend to show that the article is not a fixture or improvement to real property.

The most recent Pennsylvania Supreme Court decision on the issue of whether a particular article is an improvement to real property is Vargo v. Koppers Company, Inc., 552 Pa. 371, 715 A. 2d 423. In Vargo, the machine at issue was a door machine which operated alongside a series of coke ovens at a steel plant. The function of the machine was to run along a

rail system in front of the coke ovens and to remove and replace coke oven doors, each of which weighed five tons. The door machines were 30 feet long, 15 to 16 feet high, and 7 to 8 feet wide. The equipment was installed at the plant in the 1950's. On September 14, 1988, an accident occurred which resulted in the death of an employee who was operating the machine. In determining whether this machine was a fixture, the Superior Court focused on the sheer size of the machine, the fact that the rails upon which the machine was run were bolted to the ground, and that the function of the machine was essential to the operation of the plant. However, the Supreme Court reversed the decision of this Superior Court. In its opinion, the court noted that the door machine was one of several at the plant that moved around on the rail system and that a spare door machine was maintained in case one of the operational door machines had to be removed for service or maintenance. Thus, the court concluded that while some minimal number of door machines were essential to the operation of the plant, any individual door machine could be removed without disrupting the use of the real property. Based upon these facts, the Supreme Court concluded that the door machine did not constitute an improvement to real property. For a similar case in New Jersey, see McCalla v. Harnischfeger Corp., 215 N.J. Super. 160, 521 A.2d 851 (A.D. 1987) (An overhead crane installed in a building which could conceivably be removed and put to other uses was not an improvement to real property.)

The Vargo case demonstrates that size is not dispositive on the issue of whether an item is a fixture, and that the statute of repose may be avoided if the plaintiff can focus on a particular movable or interchangeable part of a machine or system.

B. Potential Defendants Who Are Not Protected by the Statute of Repose.

Where a particular defective article is an improvement to real property, the next step is to look back to the statue to see if there is some defendant who is not protected by the statute. In

some states, the owner of the property at the time of the construction is explicitly not protected by the statute. Also, in many states, including Pennsylvania, manufacturers of articles who do not directly participate in the design or construction on the property are not protected by the Statute of repose.

The leading case in Pennsylvania on whether a manufacturer is protected by the statute of repose is McConnaughey v. Building Components, Inc., 637 A. 2d. 1331 (Pa. 1994). McConnaughey involves a roof collapse in a barn causing substantial property damage including the death of 37 cows. The accident occurred in 1986 and the barn was constructed in 1970. The plaintiff sued two defendants, the manufacturer of prefabricated wooden roof trusses, as well as the manufacturer of metal gusset plates which were used to connect the individual wooden beams at the stress points of the trusses. Because the accident occurred 16 years after the date of construction, each of these defendants filed motions for summary judgment claiming that they were protected by Pennsylvania's statute of repose. Motions were granted by the trial court as to each defendant and affirmed by the Superior Court. However, the Supreme Court reversed this decision, holding that manufacturers and suppliers of component parts who are not involved in the design, planning, supervision, construction, supervision or observation of the construction are not protected by the Statute of repose:

> "We find that the clear an unambiguous language of the statute of repose establishes that a manufacturer who does nothing other than supply a defective product which later is incorporated into an improvement to real property by others is not within the purview of the statute. While roof trusses may be considered improvements to real property according to the definition of fixtures, the statute only protects the acts of those persons involved in the design, planning, supervision, construction, or observation of the construction of an improvement to real property itself. When a manufacturer does nothing more than supply the component products for an improvement to real property, the manufacturer is not protected by the statute. The fact that a manufacturer designs

> and plans the component products which later are incorporated into an improvement to real property is irrelevant under the statute. The Pennsylvania statute of repose was not intended to apply to manufacturers and suppliers of products but only to the kinds of economic actors who perform acts of "individual expertise" akin to those commonly thought to be performed by builders.

Id. at 1334. Based upon this holding, the manufacturer of the prefabricated roof trusses and the manufacture of the metal plates incorporated in the trusses, were not protected by the statute of repose. Consistent with the court's opinion in McConnaughey, in Ferricks v. Ryan Homes, 578 A. 2d. 441 (Pa. Super. 1990), the Pennsylvania Superior Court held that a supplier of allegedly defective plywood to a construction project was not protected by the statute of repose.

Several months after the McConnaughey decision, the court's ruling was refined in Noll v. Harrisburg Area YMCA, 643 A. 2d. 81, 86 (Pa. 1994). As noted above, the court in Noll ultimately found that the diving blocks at issue were not improvements to real property and therefore not subject to the statute of repose. However, because of the recent decision in McConnaughey, the majority of the Supreme Court felt compelled to reaffirm the plurality opinion in McConnaughey and to further clarify when a manufacturer is not protected by the statute of repose. In Noll, the plaintiff argued that because the diving blocks at issue were a standard mass manufactured product of the defendant, the defendant was not subject to the Statute of repose. However, in reviewing the record, the court noted that, in conjunction with the sale of the diving blocks, the manufacturer was provided with copies of plans for the swimming pool which had an unusual deck height and the manufacturer was requested by the contractor to examine the drawings and determine whether its standard diving block was appropriate. Ultimately, the manufacturer did determine that its standard diving blocks were appropriate and that special diving blocks need not be constructed. In the invoice provided with these diving

blocks, the manufacturer wrote the words "per the drawing". According to the Pennsylvania Supreme Court, because the manufacturer was asked for individual expertise in evaluating whether its product was appropriate as a larger part of the improvement to real property, the manufacturer was protected by the Statute of repose. Id. at 86. Thus, the Noll case highlights that the determination of whether a manufacturer is subject to the Statute of repose is also a fact-sensitive issue.

Also, it should be noted that the McConnaughey, holding suggests that a manufacturer who "observes" the construction is protected by the statute of repose. In a Tennesee case, Pridemark Custom Plating, Inc. v. Upjohn Co., 702 S.W.2d 566 (Tenn. 1985), the Court of Appeals held that a manufacturer of foam insulation would be protected by the statute of repose if it could prove that its representative was present on the construction site to observe the installation of the insulation.

As noted above, many other jurisdictions follow the same rule that a manufacturer of mass produced products who does not participate in the construction is not protected by the Statute of repose. See e.g. Cinnaminson Township Board of Education v. U. S. Gypsum Co., 552 F. Supp. 8055 (1982) (manufacturer of acoustical plaster boards installed in schools were not protected by New Jersey statute of repose); Corbally v. W.R. Grace & Co., 993 F.2d 492 (5th Cir. 1993) (under Texas law, the manufacturer of a component part is not protected by the staute of repose); Windley v. Potts Welding & Boiler Repair Co., 88 F. Supp. 610 (D. Del. 1995) (a supplier of raw materials is not protected by the Delaware statute of repose); Forsyth Mem. Hosp. V. Armstrong World Indus. Inc., 336 N.C. 438, 444 S.E.2d 423 (1994) (although the statute of repose applies to "material men", this protection does not extend to manufacturers who merely place products in the stream of commerce without the specific intent to deliver the

product to a particular job site). In the last of these cases, it was the defendant which argued that it was not subject to the statute of repose for improvements to real property, because the defendant in that case preferred the protection of North Carolina's statute of repose for products liability cases.

It is important to note that the McConnaughey case also provides a cautionary lesson concerning pleadings in an action with a potential Statute of repose issue. At footnote 5 on page 1335, the court noted that, in the Complaint, the plaintiff alleged that the manufacturer of the roof trusses "assisted in the design and plan of the construction of the roof trusses into the real property." Fortunately for the plaintiff, these allegations were denied by the defendant in its answer. However, the court ruled that the plaintiffs were estopped from submitting affidavits stating that the defendants did not participate in the design, planning and construction of the roof trusses into the real property to support their motion for summary judgment because the affidavit contradicted the allegation set forth in the Complaint. However, because the defendant denied the allegation, there remained an issue of fact as to whether the defendants did participate in the design, planning and construction of the roof trusses into the real property and therefore, defendants could not obtain summary judgment. This same situation arose in Wolfe v. Dal Tile Corp., 876 F.Supp. 116 (S.D. Miss. 1995), where the parties were forced to contradict their pleadings in their arguments on defendant's motion for summary judgment. Thus, if you have a potential statute of repose issue, it is important to pay close attention to the allegations set forth in the pleadings.

C. Challenges to the Constitutionality of the Statute of Repose

In a majority of states, the constitutionality of the statute of repose for improvements to real property has been challenged. However, these challenges have been successful in only a

small minority of states. In most cases, where the statute has been held to be unconstitutional, it is with reference to the constitution of the particular state.

1. Successful Constitutional Challenges

The most successful challenges to the statute of repose for improvements to real property are based upon the claim that the statute violates either a federal or state equal protection provision, or it violates a "special law" provision in the state constitution. Many states have constitutional provisions which prohibit legislature from making a "special law" or "local law". This provision is designed to prevent legislatures from drafting laws which give special treatment to an isolated group of people without a substantial rational basis for benefiting the one group over others. For cases involving a statute of repose, the argument is essentially the same whether it is an equal protection provision or a special laws provision. Typically, this argument is advanced in states where the statute of repose is limited to architects, engineers and contractors. The argument is that it is unconstitutional to single out architects, engineers and contractors for special treatment, while leaving the remainder of the people involved in the project, owners and material suppliers, unprotected. The net effect of these statutes is that the burden of compensating those who are injured is shifted from architects, engineers and contractors who may have been primarily responsible onto property owners and manufacturers who are not similarly protected. See e.g. Shibuya v. Architects Hawaii, Ltd., 65 Haw. 26, 647 P. 2d. 276 (1982) (equal protection); Skinner v. Anderson, 38 Ill. 2d. 455, 234 Ne. 2d. 588 (1967) (special law); Henderson Clay Products, Inc. v. Edgar Wood and Associates, Inc., 451 A.2d 174 (1982) (equal protection); Loyal Order of Moose, Lodge 1785 v. Caveness, 563 P.2d.143 (Oklahoma 1977) (equal protection); Broome v. Truluck, 270 Sc. 277, 241 Se.2d 739 (1978);

Kallas Millwork Corp. v. Square D Co., 66 Wis. 2d. 382, 225 Nw. 2d. 454 (1975) (equal protection).

A second successful challenge to the constitutionality of the statute of repose is based upon a state's "open courts" constitutional provision. Thirty eight states have open courts provisions in their constitutions which, in substance, provide that the legislature shall not pass laws which deprive a individual of access to a remedy previously available by state law. The argument is that, by completely distinguishing the right of action for those individuals who are injured outside of the statute of repose, the courts have deprived the plaintiff of a remedy previously recognized by state law. See e.g. Kallas Millwork Corp. Supra.; Daugaard v. Baltic Cooperative Building Supply Association, 349 N.W.2d. 419 (South Dakota 1984); Overland Construction Company v. Sirmons, 369 So.2d. 572 (Florida 1979).

Another constitutional argument advanced in some jurisdictions was that the statute violated the constitutional guarantee of due process in certain circumstances. These are circumstances where an injury has occurred within days, or before the end of the repose period, such that the plaintiff has an unreasonably small amount of time between the date of injury and the date that the plaintiff must initiate a legal action. The argument is that the plaintiff was denied due process by not having a reasonable period of time following the injury to take action to protect their rights. In many states, this due process problem has been directly addressed by revised statutes which provide for an extension of the period in which an action may be brought for those cases where the injury occurred within the last year or two before the statute of repose limit.

2. Legislative Response to Constitutional Challenges: From the Frying Pan into The Fire

In many cases, where the statute of repose was successfully challenged on the basis that it violated the equal protection or special law provisions, the new law drafted in response to the court's holding left plaintiffs worse off. For example, in Minnesota, the original version of the Statute of repose for improvements to real property was declared unconstitutional in Pacific Indemnity Co. v. Thompson-Yaeger, Inc., 260 N.W. 2d. 548, 55 (Minn. 1977). In response to this holding, the legislature redrafted the statute and expanded the scope of those who were covered by the statute of repose to include the owner of the property at the time of construction as well as manufacturers of component parts which were used in the construction. Based upon these changes, the Supreme Court of Minnesota determined that the new statute did not violate the equal protection clause of the state's constitution. Calder v. City of Crystal, 318 N.W. 2d. 838 (Minn. 1982). Note, however, that this new statute of repose does not bar actions against the property owner for negligent inspection or maintenance after the date the construction was completed. Sartori v. Harnischfeger Corporation, 432 N.W. 2d. 488 (Minn. 1988).

3. The Ten Year Standard For Overcoming Constitutional Barriers

In many states, legislatures have responded to determinations that a statute is unconstitutional by drafting revised statutes which afford a longer period of time within which an action may be commenced. For example, in Utah, a seven year statute of repose was initially determined to violate the state's open court provision in Horton v. Goldminer's Daughter, 785 P. 2d. 1087 (Utah 1989). Subsequently, the statute of repose was extended by the legislature to 12 years. This change in the timing of the statute of repose was determined by the Utah Supreme Court to satisfy the Constitutional concerns raised in its prior decisions. In Horton, the court noted that the seven year statute of repose violated the "open courts" provision because the likelihood that legitimate claims would be barred was high. In evaluating the new twelve year

limit, the court relied upon a study which found that less than 1% of all claims arising out of defects in construction are brought after 10 years from the date of the construction. Accepting this statistic to be correct, the court concluded that "a one percent chance of injury and damage is sufficiently remote to survive an open courts challenge." Craftsman Builder's Supply, Inc. v. Butler Manufacturing Company, 974 P. 2d. 1194, 1200 (Utah 1999). This same study is also relied upon by courts in other jurisdictions, giving rise to some consensus that a statute of repose for improvements to real property which has a limit of 10 years or more is constitutionally palatable.

4. Current Status of Constitutional Challenges

There are several examples of states, such as those noted above, where a statute of repose was found unconstitutional, was rewritten, and was then determined to be constitutional. With the usual qualifications that the law is constantly subject to change, the following is an attempt to describe the current status of the law in states where the statute of repose was once declared unconstitutional and was subsequently rewritten.

In Alabama, the initial statute of repose was found unconstitutional in Plant v. R. L. Reid, Inc., 294 Ala. 155, 313 So. 2d. 518 (1975). After a new statute was passed, it was again found to be unconstitutional in Jackson v. Mannesmann Demag Corp., 435 So.2d 725 (Ala. 1983). Since the Jackson decision, the statute has not be re-drafted. Therefore, it is safe to conclude that Alabama does not currently have an enforceable statute of repose on the books.

In the following states, the state's appellate courts have not evaluated a subsequent statute of repose since the initial statute of repose was found to be unconstitutional:

Alaska - Turner Construction Company Inc. v. Scales, 752 P.2d 467 (AK 1988),

Colorado - McClanhan v. The American Gilsonita Co., 494 F. Supp. 1334 (D.Col. 1980),

Florida - Overland Construction Company v. Cirmones, 369 So. 2d. 572 (Fla. 1979),

Hawaii - Shibuya v. Architects Hawaii, Ltd., 65 Hawaii 26, 647 P. 2d 276 (1982)[1],

Kentucky - Tabley v. Wallace, 704 Sw. 2d. 179.; Perkins v. Northeastern Log Homes, 808 S.W.2d 809 (KY 1991),

New Hampshire - Henderson Clay Products, Inc. v. Edgar Wood and Associates, Inc., 451 A. 2d. 174 (N.H. 1982),

South Dakota - Daugaard v. Baltic Cooperative Building Supply Associates, 349 NW.2d. 419 (Sd. 1984), and

Wisconsin - Kallas Millwork Corp. v. Square D Co., 66 Wis.2d 382, 225 NW2d 454 (1975).

In Kentucky, the statute is actually in its third form, after the Kentucky Supreme Court in Perkins, found the legislature's response to its decision in Tabley to be insufficient.

III. Products Liability Statute of Repose

A. Constitutional Challenges to the Products Liability Statute of Repose

Roughly half of the state legislatures have passed either a products liability statute of repose or a products liability "presumption of useful life" statute. In many of these states, the constitutionality of the products liability statute of repose has been challenged. In the following ten states, the courts have held that the products liability statute of repose is **constitutional**:

Colorado - Eaton v. Jarvis Products Corp., 965 F. 2d. 922 (C.A. Colo. 1992),

Connecticut - Daily v. New Britain Machine Company, 200 Comm. 5632, 512 A. 2d. 893 (1986),

Florida - Pullum v. Cincinnati, Inc., 476 So. 2d. 657 (Fla. 1985),

Idaho - Olsen v. J. A. Freeman Co., 117 Idaho 706, 791 P. 2d. 1285,

Illinois - McMahon v. Eli Lilly and Co., 774 F. 2d. 830 (Ca. 7 1985); Delnick v. Upward Marine Corp., 197 Ill. App. 3rd 770, 55 Ne. 2d. 84 (1990),

[1] Although the Hawaii Courts have not addressed the constitutionality of the new statute, in In Re: Asbestos School Litigation, 1991 U.S. Dist. Lexis 405 (E.D. Pa. 1991), the court held that the new statute was sufficient to overcome constitutional challenges.

Indiana - Bowman v. Niagara Machine and Tool Works, Inc., 832 F. 2d. 1052 (Ca. 1987),

Nebraska - Groth v. Sandoz, Inc., 601 F. Supp. 453 (D.C. Neb. 1984); Spiklar v. Lincoln, 238 Neb. 188, 469 N.W. 2d. 546 (1991),

North Carolina - Tetterton v. Long Manufacturing Co., 314 NC 44, 332 S.E.2d 67 (1985),

Oregon - Celsealey v. Hicks, 309 Or. 387, 788 P. 2d. 435 (1990), and

Tennessee - Wayne v. Tennessee Valley Authority, 730 F. 2d. 392 (Ca. 1984); Kochins v. Linden - Alimak, Inc., 799 F. 2d. 1128 (Ca. 1986).

In the following eight states, the products liability Statute of repose has been stricken as **unconstitutional**:

Alabama - Lankford v. Sullivan, Long and Haggerty, 416 So. 2d. 996 (Ala. 1982),

Arizona - Hazine v. Montgomery Elevator Company, 176 Arz. 340, 861 P. 2d. 625 (1993),

Ohio - The State Rol Ohio Academy of Trial Lawyers et al v. Shewar, 86 Ohio St. 3d 451 (1999); Brennaman v. R. M. I. Co., 70 Ohio St. 3d. 460, 639 N. E. 2d. 425 (1994),

Rhode Island - Kennedy v. Cumberland Engineering Company, 471 A. 2d. 195 (RI 1984),

South Dakota - Daugaard v. Baltic Coop Building Supply Association, 349 NW. 2d. 419 (SD 1984), and

Utah - Berry v. Beech Aircraft Corp., 25 Utah Adv. Rep. 30, 717 P. 2d. 670 (1985).

In Hanson v. Williams County, 389 NW 2d. 319 (ND 1986), the North Dakota Supreme Court struck down an earlier version of a products liability statute of repose. In August of 1995, the legislature passed a new products liability statute of repose which has not yet been reviewed by an appellate court.

In virtually all the cases set forth above, where the products liability statute is found to violate a state constitution, the violation concerned some form of the state's "open courts" clause. For example, Hazine v. Montgomery Elevator Company, the Arizona court held that the

products liability Statute of repose violated this constitutional provision that the right of action to recover damages for injuries should never be abrogated (Arizona Constitution, Art. 18 Section 6). Similarly, in the New Hampshire case, Heath v. Sears Roebuck and Co., the products liability Statute of repose violated a state constitutional provision providing that a citizen of the state was entitled to a complete and certain remedy for injuries suffered. The Ohio, Rhode Island, South Dakota, and Utah courts also held that the statues were in denial of their states open courts provisions.

In Lankford, the Alabama Supreme Court also held that the statute violated the Due Process clause because, in the case where a claim arises just before the statue runs, the plaintiff would not be afforded a sufficient period of time to initiate an action.

IV. Forum Shopping

In In Re: Asbestos School Litigation, 1991 U.S. Dist. LEXIS 405 (E.D. Pa. 1991), the District Court held that the choice of law analysis in cases involving a statute of repose are treated the same as those cases involving a statute of limitations. Specifically, the choice of law analysis of the forum state is applied to determine which statute of repose applies. In the particular circumstance of this case, the court held that for improvements to real property located in Hawaii, Pennsylvania's choice of law analysis would favor the application of Hawaii's statute of repose. In this analysis, the court placed great weight upon the location of the improvements in balancing the relative state interests involved.

In Ferens v John Deere Co., 494 U.S. 516, 110 S.Ct. 1274 (1990)[2] plaintiffs from Pennsylvania who were injured in Pennsylvania filed a negligence action in Mississippi against a Delaware manufacturer in order to avail themselves of the more generous Mississippi statute of

limitations. Subsequently, the plaintiff moved to transfer the action to the Western District of Pennsylvania pursuant to 28 U.S.C. §1404(a) which permits an action to be transferred for the convenience of the parties and witnesses involved. After the action was transferred to Pennsylvania, the defendant filed a motion to dismiss based upon Pennsylvania's statute of limitations. The plaintiff argued that Mississippi's choice of law rules applied and that the Mississippi choice of law analysis would mandate the application of the Mississippi statute of limitation. Both the District Court and the Court of Appeals for the Third Circuit sided with the defendant and applied Pennsylvania's two year statute of limitations. However, the Supreme Court held that its prior ruling in Van Dusen v. Barrack, 376 U.S.612, controlled. The Van Dusen rule is that when an action is transferred pursuant to §1404, the transferee court must follow the choice of law rules prevailing in the transferor court. Therefore, the plaintiff 's negligence action would be controlled by the Mississippi statute of limitations and the dismissal of the plaintiff's negligence claims was reversed.

Although, the Ferens case involves a statute of limitations and not a statute of repose, it follows that, based upon the rulings set forth above, a plaintiff my be able to avoid a statute of repose, particularly a products liability statue of repose, by shopping for an appropriate forum.

PHILA1\1253709\1 099995.000

---

2 Thanks to Dan Harrington and Scott Waldman for bringing this case to my attention.