

# FOR WHOM THE STATUTE WILL NOT TOLL: DEFEATING PRODUCT LIABILITY CLAIMS WITH STATUTES OF REPOSE

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## INTRODUCTION

Repose is defined as a state of rest or tranquility, and in many states, a Statute of Repose may offer product manufacturers a similar state of rest or tranquility when a plaintiff brings a claim for product defect many years after the product entered the stream of commerce. Not to be confused with Statutes of Limitations, many states, and even the federal government, enacted repose

statutes that bar a cause of action for product defect before the action even arises. This article explores the history, function, exceptions, and conflict-of-law considerations to little known repose statutes.

## BRIEF HISTORY AND RATIONALE FOR RULE

From the 1960s through 1980s, states began enacting repose statutes and by 1983,

nearly half of all state legislatures had adopted one. These statutes were part of the growing tort reform movement in response to the insurance crisis of the 1970s and 1980s. The rationale for these time-limiting statutes was to address the problem of claims for injuries caused by products manufactured in decades past and the evidentiary issues posed once “evidence has been lost, memories have faded, and witnesses have disappeared.”<sup>1</sup>

## FUNCTION OF THE RULE

Both Statutes of Repose and Statutes of Limitation serve as time-bars. But repose statutes are more venomous because they sever a plaintiff from her claim after a fixed period even if the injury itself happened long after. And while the all-to-familiar grounds for tolling a Statute of Limitation can range from the injury's delayed discovery to the plaintiff's status as an inmate, these are usually inapplicable to statutes of repose. Rather, the grounds for tolling—if even existent—are far more restrictive.

Repose statutes typically fall into two categories: “time-certain” and “useful life.” Both start the repose period when the product was bought, sold, or placed into commerce. Each differs, however, on how it defines the repose period.

Useful life statutes are less common and focus on whether the product caused injury after its “useful life” had expired. That question is left to the factfinder, who first determines “useful life” by deliberating the period someone could reasonably expect to use the product safely. In Kansas, for example, a defendant is generally free from product liability if it proves by a preponderance of evidence that the harm happened after “the product would normally be likely to perform or be stored in a safe manner.”<sup>2</sup>

“Time certain” statutes offer far more potency because plaintiffs cannot usually file the claim after a fixed period—even if the injury itself failed to timely surface. The length for repose periods ranges from five years to nearly two decades. North Carolina, for example, bars claims alleging a defective product 12 years after its initial purchase.<sup>3</sup> If involving products manufactured within its borders, Oregon offers plaintiff's no more than 10 years to file suit.<sup>4</sup> In 1994, the United States Congress passed the General Aviation Revitalization Act of 1994, which shields small plane and parts manufacturers from liability for products they manufactured 18 years prior.<sup>5</sup>

## BE WARY OF EXCEPTIONS TO THE RULE

Some states have exceptions to their repose statute. One example is when a

manufacturer intentionally misrepresents or fraudulently conceals a material fact concerning the product, and that conduct was a substantial cause of the claimant's harm. Another example is where the manufacturer itself creates an exception; for example, if it warrants that the product is safe for a longer period than the applicable repose statute. A third type of exception exists in states that only apply their repose statute to strict liability claims.<sup>6</sup>

Another exception in some states occurs if the manufacturer “revives” a plaintiff's claim or recommences the repose statute. In Indiana, if the manufacturer rebuilds, restructures, or reconditions the product to the point of significantly extending its life and rendering it in like-new condition, the repose statute runs from the time the rebuilt product is delivered into the stream of commerce. Likewise, if a manufacturer incorporates a new but defective component into an old product, the repose statute runs at the time the new component is added, and not from the manufacture of the old product.

## CONFLICT OF LAW

Even lawyers in jurisdictions without repose statutes should familiarize themselves with the rule because nearly every state has a statute permitting one jurisdiction to adopt the time-limiting statute of another. And since goods increasingly move through multiple jurisdictions before reaching consumers, plaintiffs have more choice than ever where to file suit.

In almost every state, defense bars have used the repose statutes of one state to eliminate claims in another. Traditionally, courts apply their own procedural rules to matters before them, and with most considering Statutes of Limitation to be procedural, a claim barred in its native forum could survive in another simply because it has a more generous time-limiting statute. This situation often entices what is commonly disdained—forum shopping. To limit themselves as potential prospects, most states have enacted “borrowing statutes.”

Borrowing statutes vary by jurisdiction but nearly all work the same: a forum looking to the jurisdiction where the cause of action accrued and adopting its time-limiting statute if it will extinguish the claim before it. Little mind is paid to whether the host forum's own procedural rules would save the claim had it arisen in its jurisdiction. In *Wenke v. Gehl Co.*, for example, a plaintiff injured by a baler in Iowa sued its manufacturer in Wisconsin because Iowa's repose statute barred the claim.<sup>7</sup> Wisconsin's did not, but the baler's manufacturer filed for summary judgment anyway based on the state's borrowing statute.<sup>8</sup> It was eventually granted, which the Wisconsin Supreme Court affirmed.<sup>9</sup>

Statutes of Repose may prove fatal even in states with borrowing statutes but no repose statutes themselves. At least one California Appeals Court rejected the notion that the state's borrowing statute was inapplicable to another's repose statute for products simply because California's was inapplicable to products.<sup>10</sup> The court was persuaded in part by a federal court that had applied California law eight years earlier and had concluded the same.<sup>11</sup>

## CONCLUSION

The rush to enact repose statutes has died down since 1983, but they remain a potent weapon for product designers and manufacturers to insulate themselves from claims for older products. However, with the modern rise of planned obsolescence and increase in disposable rather than durable goods, the future effectiveness of repose statutes remains to be seen.



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<sup>1</sup> *CTS Corp. v. Waldburger*, 573 U.S. 1, 134 S. Ct. 2175, 2178 (2014).

<sup>2</sup> K.S.A. § 60-3303.

<sup>3</sup> N.C. Gen. Stat. Section 1-46.1.

<sup>4</sup> ORS § 30.905.

<sup>5</sup> GENERAL AVIATION REVITALIZATION ACT OF 1994, 1994 Enacted S. 1458, 103 Enacted S. 1458, 108 Stat. 1552, 103 P.L. 298, 1994 Enacted S. 1458, 103 Enacted S. 145.

<sup>6</sup> See e.g. *Kellogg v. Willy's Motors*, 140 Ariz. 67, 68, 680 P.2d 203, 204 (Ct. App. 1984); *Galvan v. Krueger Int'l, Inc.*, No. 07 C 607, 2011 U.S. Dist. LEXIS 3443, at \*7 (N.D. Ill. Jan. 13, 2011); *Dintelman v. All. Mach. Co.*, 117 Ill. App. 3d 344, 344, 72 Ill. Dec. 823, 824, 453 N.E.2d 128, 129 (1983).

<sup>7</sup> *Wenke v. Gehl Co.*, 274 Wis.2d 220, 227.

<sup>8</sup> *Id.* at 228.

<sup>9</sup> *Id.* at 231.

<sup>10</sup> *Rash v. Bomatic, Inc.* (Mar. 4, 2005, E034936) \_\_\_Cal.App.4th\_\_\_ [2005 Cal. App. Unpub. LEXIS 1974].)

<sup>11</sup> *Rash v. Bomatic, Inc.* (Mar. 4, 2005, E034936) \_\_\_Cal.App.4th\_\_\_ [2005 Cal. App. Unpub. LEXIS 1974, at \*16].)