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ONE OF THESE THINGS IS NOT LIKE THE OTHERS

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Litigation of Construction Defect claims often brings together an admixture of product manufacturers, product sellers/distributors, and product installers. While these groups may coordinate and work together in the field, the joint-interests and common ground can be challenged in the context of a lawsuit.

The divergence of interest among these parties arises from several factors:

1. The statutory and common-law framework governing liability to the Owners may differ in ways that create finger-pointing and differing critical interests to protect (“hills to die on”). For example:
 - a. The elements of proof for construction defects versus product liability may create a conflict of interest among the defendants.
 - b. The reporting and regulatory schemes that affect manufacturers of consumer products may motivate a defense strategy that implicates installation and “proves the Plaintiff’s case.”
 - c. The differing applications of joint-and-several liability influence cooperation.
 - d. The potential of inconsistencies between governing building codes, adopted industry standards and manufacturer’s installations instructions may create chaos that increases the overall value of the claim.
2. Contractual relationships between the parties may attempt to shift or allocate risk and responsibility in ways that are contrary to joint interest of the group.
3. On-going business relationships may over-ride legal positions and put limits on defense strategies.

This Reference Guide is intended to provide a tool for anyone who manages claims and risk in the context of construction—whether a general contractor, trade/installer, seller or manufacturer. Specifically, this will provide a state-by-state summary of three questions:

1. When is a contractor, particularly a sub-contractor or installer, a “seller” of a product and, thus, exposed to strict product liability or other product-related liability?
2. Under what circumstances can an installer seek indemnity against the manufacturer of a defective product?
3. What are the Statutes of Limitations and Statutes of Repose for products manufacturers and product installers?

While these are not all of the considerations that will inform legal strategy in a construction/product defect lawsuit, these are legal foundations from which an effective strategy can be developed.

NATIONWIDE COMPARATIVE STUDY

WHEN A CONTRACTOR IS A SELLER

WHEN A SELLER IS ENTITLED TO IMPLIED
(EQUITABLE) INDEMNITY AGAINST THE
MANUFACTURER OF A DEFECTIVE PRODUCT

STATUTES OF LIMITATIONS AND REPOSE



Generally, not allowed among joint tortfeasors

Party seeking indemnity can do so if its liability is vicarious and derivative

Where one party's negligence is "passive" and the other's is "active," the former may seek indemnity against the latter

Harley Davidson of Mobile, Inc. for Use and Ben. Of Universal Underwriters Ins. Co. v. Goodyear, 435 So.2d 1308 (1983) - factors for seller's indemnity claim - 1) indemnitee must be without fault; 2) manufacturer must be responsible or primarily liable; 3) indemnitee has been required to pay by judgment of a court

What is a seller? - Rutledge v. Arrow Aluminum, 733 So.2d 412 (1998) - court applied Alabama Extended Manufacturers Liability Doctrine, found that a builder was not a seller

In 2011, Alabama amended its statute of repose for suits against architects, engineers, and builders from 13 years to 7

All actions in tort, contract, or otherwise for design or construction defects must be brought within 2 years of accrual

SOL is two years for product cases



Non-negligent party may recover against the party primarily responsible

Seller may only obtain indemnity when it is liable in strict product liability, not negligence Koehring Mfg. Co. v. Earthmovers of Fairbanks, Inc., 763 P.2d 499 (1988)

Even though seller is liable under strict liability statute, its indemnity claim against manufacturer is not barred - Ross Laboratories, Div. of Abbott Laboratories v. Thies, 725 P.2d 1076 (1986)

Palmer G. Lewis Co. v. ARCO Chem. Co., 904 P.2d 1221(1995) - "supplier entitles to indemnity may be a retailer, lessor, or other manufacturer"

Statute of Limitations for tort - 2 years - recognizes the discovery rule

SOL for breach of contract - 3 years before August 1997, 6 years after August 1997

4-year SOL for contracts that fall under UCC

4-year SOL for breach of warranty claims

2-year SOL for product cases

10-year statute of repose for construction claims



Seller indemnity is expressly provided by statute - Rev. Stat. Ann 12-683 (1)

Under statute, manufacturer must reimburse seller for costs associated with defending the case as well, unless 1) seller knew about the defect or 2) the seller altered, modified, or installed the product, and that was a substantial cause of the incident, was not authorized by manufacturer and was not performed in compliance with directions from manufacturer

Bridgestone/Firestone North America Title, LLC v. A.P.S. Rent-A-Car & Leasing, 88 P.3d 572 (Ariz. App. 2 Div. 2004) applies statute

No case law applying a seller's right to indemnity to a contractor

Statute of repose is 8 years - after the project is substantially completed

If defect is discovered in 8th year after completion, claim may be made in 9th year.

6-year SOL for breach of contract and warranty

2-year SOL for tort

2-year SOL for product cases

STATE

EQUITTABLE INDEMNITY THEORY/APPLICABLE LAW AND CONSIDERATIONS

STATUTE OF LIMITATIONS/REPOSE



Statute provides that seller of defective product shall have cause of action against manufacturer - Ark. Code Ann. 16-116-107

No statute or decision treats a contractor as a seller

Statute of repose for construction defects arising out of tort is 4 years

Statute of repose for construction/design defects arising out of contract is 5 years

SOL is 5 years for written contract

SOL is 3 years for tort

SOL is 5 years for any action not specifically addresses by statute

SOL is 3 years for product cases



There is an implied right to immunity in favor of a retailer of a defective product against the manufacturer of the product - Uniroyal Chem. Co. v. Am. Vanguard Corp., 203 Cal. App.3d 285 (Cal. Ct. App.1998)

·CA supreme court held that right to indemnity exists, but it does not survive settlement - Far West Fin. Corp. v. D&S Co., 46 Cal.3d 796 (1988)

Builders and subcontractors are service providers but can still be strictly liable under a product liability theory - this means that they likely are “sellers” for purposes of indemnification - Jiminez v. Superior Court, 58 P.3d 450 (2002)

All construction defect claims (patent or latent) have 10-year Statute of Repose

4-year SOL for breach of written agreement

3-year SOL for damage to real property and other tort claims

2-year SOL for PI caused by construction defect breach of contract

SOL is 2 years for product cases



Court recognized a seller's common law right to indemnification from a manufacturer - Frazier v. Kysor Indus. Corp., 607 P.2d 1296 (Colo. Ct. App. 1979)

Contractors entitled to indemnity from manufacturer when manufacturer is actively liable (in this case 100%) - McKinley v. Willow Const. Co., 693 P.2d 1023 (Colo. Ct. App. 1984)

SOL for claims in contract is 3 years

SOL for claims in tort is 2 years

CO enacted 13-80-104 covering construction defect claims - 2-year SOL for all actions related to construction defects/ 6 year Statute of repose

If accrual occurs in year 5 or 6, action may be brought within 2 years of that date

13-80-104 does not apply to claims for breach of warranty to “repair or replace” even when the defendant is within the class of professionals that 13-80-104 covers - general SOL for contracts (3 years) applies

SOL is 2 years for product cases

There is a presumption that product is not defective after 10 years

STATE

EQUITTABLE INDEMNITY THEORY/APPLICABLE LAW AND CONSIDERATIONS

STATUTE OF LIMITATIONS/REPOSE



A product seller may implead any third party who is liable for all or part of claimant's claim - Conn. Gen. Stat. Ann. 52-577a(b)

Act defines a "product seller" for purposes of product liability and the right to indemnification from manufacturer

Contractor likely not a "product seller" under the statute and thus not entitled to indemnity from manufacturer - Paul v. McPhee Elec. Contractors, 698 A.2d 354 (Conn. Ct. App. 1997)

7-year statute of repose for any claim for construction/design defect

10-year statute of repose for actions brought by the state
SOL for contract action is 6 years
SOL for negligence action is 2 years
SOL is 3 years for product cases

Statute for product defect claim is 10 years - Conn. Gen. Stat. 52-577a



Arises out of a specific duty owed to a third party - Myco, Inc. v. Super Concrete Co., 565 A.2d 293 (1989)

Must be a special relationship between the tortfeasors - Id.

In East Penn Mfg. Co. v. Pineda, 578 A.2d 1113 (D.C. Ct. App. 1990), the D.C. Court of Appeals found that this sort of relationship exists between a manufacturer and a seller, giving rise to an implied duty to indemnify the seller in circumstances where the seller relies on manufacturers skill and knowledge and is only negligent in that it did not find the failure in the product

Where tortfeasors are both actively negligent, neither is entitled to indemnity from the other - R & G Orthopedic Appliances v. Curtin, 596 A.2d 530 (1991)
Unclear whether a contractor is a seller

Statute of repose is 10 years for construction claims

SOL for contract claims is 3 years
SOL for negligence claims is 3 years.
SOL for breach of warranty claims is 4 years
SOL for product claims is 3 years



No authority addressing seller's right to indemnity

Unclear whether a contractor is a seller

SOL for breach of warranty and negligence is 3 years

10 Del. C. 8127 serves as statute as repose - bars constructions suits in contract or tort after 6 years from one of 8 listed events

SOL is 2 years for product claims



Innocent seller has an implied right to indemnity from a manufacturer but action for indemnity "is not available against intermediate sellers who are without fault" - Costco Wholesale Corp. v. Tampa Wholesale Liquor Co., 573 So.2d 347 (Fla. App. 2 Dist. 1990)

2 pronged test in FL for common law indemnity: 1) Plaintiff is wholly without fault and party indemnity is sought from is liable; 2) party who seeks indemnity must e obligated to pay another party or entity only because of some vicarious, constructive, derivative, or technical liability - Fid. & Guar. Ins. Co. v. Ford, 707 F. Supp.2d 1300 (2010)

SOL for all claims arising out of construction defects is 4 years
SOL for product liability claims is 4 years

Statute of repose is 10 years from several dates listed in statute

Statute of repose in product cases is 12 years

STATE

EQUITTABLE INDEMNITY THEORY/APPLICABLE LAW AND CONSIDERATIONS

STATUTE OF LIMITATIONS/REPOSE



Statute outright precludes strict product suits against sellers. - Ga. Code Ann. 51-1-11.1

No court has applied product liability statute in builder context

However, “product seller” includes anyone who sells, markets, or assembles. Id.

SOL for breach of contract or warranty is 6 years

Negligence based causes of actions subject to 4-year SOL

SOL is 2 years for product cases for PI/ 4 years for product cases for property damage

8-year statute of repose for construction defect claims

Statute of repose for strict product liability claims is 10 years



Hawaii Court of Appeals stated in dicta that a party is entitled to indemnification where it is strictly liable by virtue of its position in the stream of commerce between manufacturer and end-user - Boudreaux v. Gen Elec. Co., 625 P.2d 384, 389 (Haw. Ct. App. 1981)

No indication as to whether a contractor is included in that net

Statute of repose is 10 years

SOL for actions in contract is 6 years

SOL for actions arising out of negligence is 2 years

SOL for product claims is 2 years



Has product liability statute - Idaho Code Ann. 6-1407(2)

Court interpreted it to mean that a retailer has right of indemnity against the manufacturer where the product was defective because of manufacturer’s culpability - Borchard v. Wefco, Inc., 733 P.2d 776, 778-9 (Idaho 1987)

Nothing on whether a contractor is a “retailer” in this context

Tort actions shall accrue, and SOL shall begin to run 6 years after completion/improvement of property

Contract actions shall accrue, and SOL begins to run at time of completion
Thus, for tort claims, liability terminated after 8 years (6 year statute of repose, 2 year SOL)

And liability terminated after 5 years for contract claims (5 year SOL)

SOL for product claims is 2 years

Statute of repose for product claims is 10 years (rebuttable presumption that product is not defective after that point)



Seller of a defective product is responsible in strict products claim- Carollo v. Al Warren Oil Co., 820 N.E.2d 994, 1000 (Ill. App. Ct. 2004)

Manufacturer ultimately bears loss because the seller is entitled to indemnification, so long as the product was not altered before reaching the customer - Hinojosa v. Automatic Elevator Co., 416 N.E.2d 45 (Ill. App. 1980)

A contractor is not automatically a seller because he is an installer of a product.
To qualify as “seller,” installer must be in the business of selling the product - Hinojosa v. Automatic Elevator Co., 416 N.E.2d 45, 47-48 (Ill. App. Ct. 1980).

10-year statute of repose

4-year statute of limitations for all actions related to construction defect

SOL is 2 years for product claims

Statute of repose is 10 years from first sale, lease, delivery of possession to non-seller; 12 years from first sale, lease, delivery of usage by seller - whichever is earlier

STATE

EQUITTABLE INDEMNITY THEORY/APPLICABLE LAW AND CONSIDERATIONS

STATUTE OF LIMITATIONS/REPOSE



Implied indemnity in favor of one whose liability to a third person in derivative

Indiana statute sets forth the cause of action for strict product liability against a seller

In case interpreting statute, both seller and installer could be strictly liable -Old Town Dev. Co. v. Langford, 349 N.E.2d 744, 762 (Ind. Ct. App. 1976).

10-year statute of repose for construction defect

If claim relates to deficiency of design (against engineer or architect) - 12 year statute of repose

SOL is 10 years for actions in contract

SOL is 2 years for negligence claims

SOL is 6 years for implied warranty of habitability

SOL is 2 years for product claims

Statute of repose is 10 years for product claims



There exists a right of indemnity. Holding that a right to indemnity exists where innocent party is vicariously liable - Iowa Elec. Light & Power Co. v. General Elec. Co., 352 N.W.2d 231, 238 (Iowa 1984).

Nothing on whether contractor is a seller

SOL for breach of written contract is 10 years

SOL for breach of oral contracts, injuries to property, or fraud is 5 years

SOL is two years for any claim related to injury to a person

Statute of repose is 10 years for improvement/construction of residential property

Statute of repose is 8 years for all other property

Statute of repose covers all claims "in tort and implied warranty." It may not cover claims such as express warranty

SOL is 2 years for product claims

Statute of repose is 15 years for product claims



Seller is liable for damages to purchaser and may seek indemnity from the manufacturer- Black v. Don Schmid Motor, Inc., 657 P.2d 517, 529 (Kan. 1

SOL is 5 years for express contracts and warranties

SOL is 2 years for negligence and fraud actions

SOL is 3 years for breach of implied warranty of workmanlike construction

SOL is 1 year for civil penalties claims brought under Kansas's consumer protection act/ 3 years for claims for actual damages under the Act

10-year statute of repose for construction claims

SOL is 2 years for product claims

Statute of repose for product claims: rebuttable presumption that product's useful safe life expires after 10 years

STATE

EQUITTABLE INDEMNITY THEORY/APPLICABLE LAW AND CONSIDERATIONS

STATUTE OF LIMITATIONS/REPOSE



Sellers/dealers are entitled to indemnification from the manufacturer was a matter of law where the dealer incurred liability solely due to the manufacturer's defective product - Volvo of America Corp. v. Wells, 551 S.W.2d 826, 829 (Ky. Ct. App. 1977).

KY has adopted 2d Restatement of Torts 402 - defines seller for purposes of strict liability claim under product liability theory-Compex Intern Co. v. Taylor, 209 S.W.3d 462, 464 (Ky. 2006).

To qualify as a seller for strict liability, person must be in the regular business of selling the product, not simply that the sale of the product was incidental to service

Griffin Indus. Inc. v. Jones, 975 S.W.2d 100, 102 (Ky. 1998).

Contractor who installed asbestos was a seller under the product liability statute - Cardinal Indust. Insulation Co. v. Norris, 2006 W.L. 1360293 (Ky. Ct. App. 2006)

SOL for breach of contract is 10 years for contracts executed after July 2014; 15 years for contracts executed before that date

For contracts, action accrues either when: (1) contract is breached or (2) time for performance arrives

SOL for breach of oral agreement is 5 years

SOL for PI claims based in negligence is 1 year

Statute of Repose is 7 years for construction defect claims

SOL is 1 year for product claims

Statute of repose for product claims: rebuttable presumption that product was not defective if claim is brought more than 5 years after sale or 8 years after manufacture



Innocent seller has a right to indemnity against a manufacturer- La. Rev. Stat. Ann. 9:2800.51-4 (2007). Builder is entitled to recover from manufacturer for liability against owner - Schamens v. Crow, 326 So.2d 621, 625 (La. Ct. App. 1975).

SOL is 1 year for actions in tort

SOL is 10 years for actions in contract

SOL is 1 year in product claims

Statute of repose is generally 5 years for contract, tort, etc.

Statute of repose is 10 years for actions against contractors or architects



Not much on contractor/manufacturer indemnity in Maine

Emory v. Hussey Seating Co., 697 A.2d 1284 (1987), acknowledged indemnity between contractor and manufacturer and laid out requirements

Adopts passive v. active tortfeasor language the manufacturer of a defective product must indemnify a seller when: (1) the seller reasonably relies upon the manufacturer's knowledge and skill in making the product free from defects; and (2) any negligence on the seller's part consists of, at most, a failure to discover the defect.

If a seller markets the goods as his own product, loses indemnity protection

SOL is generally 6 years for both contracts and tort - no discovery rule, accrual happens either when the contract is breached or on the date of the injury

A claim under the Home Construction Act must take place within 2 years after violation

Special SOL for licensed contractors and engineers - 4 years; also, a 10 year statute of repose against contractors and engineers

Special 4-year SOL and 10 year Statute of repose for land surveyors, too
SOL is 6 years for product claims

STATE

EQUITTABLE INDEMNITY THEORY/APPLICABLE LAW AND CONSIDERATIONS

STATUTE OF LIMITATIONS/REPOSE

Relies on active/passive negligence analysis

Party may only receive indemnity when its negligence is secondary to a primary tortfeasor's actions

Commonly occurring situations: vicarious liability; failure to discover defect in chattel or work product provided by another; failing to discover dangerous condition - Max's of Camden Yards v. A.C. Beverage, 913 A.2d 654, 659.

Requirements for a seller's right to indemnity set forth by statute - Md. Code Ann., Cts. & Jud. Proc. §5-4051 (West 2007).

Statute of repose for construction claims generally is 20 years

Statute of repose for construction claims against architects, professional engineers, and contractors is 10 years

SOL for all construction defect claims is 3 years

SOL is 3 years for product claims



MASSACHUSETTS

Recognizes common law indemnity in situations involving derivative or vicarious liability - where the person seeking it does not join in the negligent act - Fireside Motors, Inc. v Nissan Motors Corp in USA, 395 Mass. 366 (1985)

SOL is 6 years for contract claims

Can be tolled if party can show that its claims were "unknowable" - many courts have limited this principle in the construction context

SOL for tort claims is 3 years

SOL for unfair and deceptive trade act claims is 4 years

SOL is 3 years for product claims



Sellers of defective products are not liable in product liability actions - Mich. Comp. Laws 600.2947 (6)

Construction company held liable under product liability statute - Fenton Area Public Schools v. Sorensen - Gross Const. Co., 335 N.W.2d 221 (Mich. App. 1983) for installation of roof

No U.S. Law Construction Compendium for Michigan

Statute of repose for tort liability is 6 years from (1) opening of the improvement to use; or (2) substantial completion of the improvement and the taking possession for occupancy by owner

SOL for tort action against contractor for PI, property damage, wrongful death, etc. is 6 years after occupancy of completed improvement, use or acceptance of improvement, or 1 year after the defect is discovered

SOL is 6 years for contract disputes

SOL is 6 years for claims brought pursuant to Michigan Consumer Protection Act

SOL is 3 years for product claims

Statute of repose for product claims: Plaintiff must make prima facie without benefit of any presumption if product is in use for 10 or more years

Statute of repose is 10 years

STATE

EQUITTABLE INDEMNITY THEORY/APPLICABLE LAW AND CONSIDERATIONS

STATUTE OF LIMITATIONS/REPOSE



Common law right to indemnity from a manufacturer in product liability actions - *Sorenson v. Safety Flate, Inc.*, 216 N.W. 2d 589 (Minn. 1974)

Innocent installer had right to indemnity against a manufacturer that furnished defective product - *Tolbert v. Gerber Indus., Inc.*, 255 N.W.2d 362 (Minn. 1974).

Not extended where the installer is a joint tortfeasor - failure to inspect or detect the problem was not "passive" negligence, indemnity therefore not available

SOL is 2 years for claims involving improvement to real property

SOL for contract claims is 6 years

SOL for strict product liability claims is 4 years

SOL for product claims based in negligence is 6 years

Statute of repose is 10 years



Seller may have indemnity action against manufacturer for defective products

MS statute requires manufacturer to indemnify for costs of litigation, attorneys' fees, and damages awarded - Miss. Code Ann. 11-1-63(g)

Courts have held that contractors have valid indemnity claim against a manufacturer - *Anchor Coatings, Inc. v. Marine Indus. Residential Insulation, Inc.*, 490 So. 2d 1210 (1986)

Statute of Repose is 6 years from acceptance or occupancy, whichever is first

SOL is 3 years for contract and tort claims

SOL is 3 years for product claims



Suppliers and distributors are entitled to indemnity from manufacturer of defective product

A seller who has no actual or constructive knowledge as to defective nature of a product and has no duty to inspect the product is entitled to indemnity against a manufacturer. - *Welkener v. Kirkwood Drug Store*, 734 S.W.2d 233 (Mo. Ct. App. 1987)

SOL is 5 years for contracts and torts

SOL is 5 years for product defect claims

Statute of repose for claims arising out of improvement to real property is 10 years from the date the improvement was completed

Adopts active/passive framework

General rule is that negligent party may not seek indemnity from another at-fault party - *Poulson v. Treasure State Industries, Inc.*, 192 Mont. 69

Statute does not specifically include indemnity for sellers

Defines sellers as manufacturers, wholesalers, or retailers - Mont. Code. Ann. 27-1-19

Court has held that manufacturer could seek indemnification from another manufacturer who assembled the defective portion of the product - *Jones v. Aero Chem. Corp.*, 680 F.Supp. 338 (D. Mont. 1987)

Statute of repose is 10 years for construction defects

SOL for written contracts is 8 years

SOL for general negligence claims is 3 years

SOL for claims related to real/personal property is 2 years

SOL is 3 years for product claims



STATE

EQUITTABLE INDEMNITY THEORY/APPLICABLE LAW AND CONSIDERATIONS

STATUTE OF LIMITATIONS/REPOSE



Recognizes common law indemnity right when party is liable by virtue of relationship with negligent actor

Failure to discover or remedy danger to a plaintiff does not defeat indemnity - Hiway 20 Terminal Inc. v. Tri-County Agri-Supply, Inc., 232 Neb. 763 (1989)

Special SOL applicable to builders and contractors making improvements to real property - 4 years for breach of warranty or design defect; 2 years from occurrence for professional negligence, if defect is latent, get 1 year from discovery

SOL is 4 years for product claims

Statute of repose for product claims is 10 years when the product is manufactured in-state; if out of state, that state's statute of repose governs



Innocent sellers entitled to indemnity from manufacturers

May recover attorneys' fees and costs of defending the suit only for arguments not directed toward rebutting charges of active negligence - Piedmont Equip. Co. v. Eberhard Mfg. Co., 665 P.2d 256 (1983)

Statute of Repose is 6 years from substantial completion - there is no extension for claims brought in year 5/6 - NRS 111.202

U.S. law compendium suggests that SOL for all construction claims may be 4 years from discovery pursuant to NRS 11.20

SOL for product claims is 2 years (I think), See Nev. Rev. Stat. 11.190(4)(e)



Right to indemnity at common law exists where one has been compelled to pay an injured party for injuries caused by the active fault of another - Morrisett v. Sears, Roebuck & Co., 322 A.2d 7 (1994)

Right to indemnification is rarely implied in New Hampshire - Johnson v. Capital Offset Co., WL 5406619 (D.N.H Sept. 25, 2013)

Statute of repose is 8 years from date of substantial completion

SOL for breach of written or verbal contracts is 3 years

SOL for tort actions is 3 years

SOL for actions related to property damage is 3 years

SOL for product claims is 3 years



Innocent sellers entitled to immunity from manufacturers - Anderson v. Somberg, 386 A.2d 413 (1978)

Product seller is person who sells, distributes, leases, installs, prepares, or assembles a manufacturer's product - N.J. Stat. Ann. 2A:58C-8

An individual performing professional services in any case where the sale or use of product is incidental to the transaction is not a product seller. Id.

SOL for bodily injury is 2 years

SOL for trespass to property and breach of contract is 6 years

SOL for damage to real or personal property is 6 years

SOL is 2 years for product claims

Statute of repose is 10 years from performance or furnishing of services



When a manufacturer and retailer are both strictly liable in tort and the retailer is liable only because the manufacturer's product is defective, retailer may be entitled to common law indemnity - Trujillo v. Berry, 738 P.2d 1331 (N.M. Ct. App. 1987)

Statute of repose is 10 years from substantial completion of physical improvement to real property

SOL for negligence claims is 4 years from discovery

SOL for breach of contract or express warranty is 6 years

SOL is 3 years for product claims

STATE

EQUITTABLE INDEMNITY THEORY/APPLICABLE LAW AND CONSIDERATIONS

STATUTE OF LIMITATIONS/REPOSE



Distributor or seller of defective product has implied right of indemnification against manufacturer of that product - *Godoy v. ABA Master of Miami, Inc.*, 754 N.Y.S. 2d 301(N.Y. App. Div. 2003)

Party who has participated in the wrongdoing to some degree may not receive the benefit of indemnification - *SSDW Co. v. Feldman - Mithopoulos Associates*, 151 A.D.2d 293(N.Y. App. Div. 1989)

SOL for bodily injury, property damage, and malpractice is 3 years - CPLR 214

SOL for any action against design professional is 3 years

SOL is 3 years for product claims

Statute of repose is 10 years



There is no strict liability in tort in products liability actions - N.C. Gen. Stat. Ann. 99B-1.1

Follows active/passive negligence framework - but because no strict liability, seller would have to be negligent to share liability - depending on degree of negligence, probably won't be entitled to indemnity

Nothing in NC sets forth whether contractor is considered seller

SOL for breach of contract, breach of warranty, and negligence is 3 years - N.C. Gen Stat. 1-52

SOL is 3 years for product claims

Statute of repose is 6 years

Statute of repose is 12 years after initial purchase for use or consumption for products claims



Implied indemnity available if the evidence establishes an implied contract or if one party is exposed to liability as a result of the other party's actions.

By statute, manufacturer must indemnify a seller - N.D. Cent. Code 28-01.3-05

Statute of repose is 10 years plus an additional 2 if the injury occurs in the 10th year

SOL for breach of contract/warranty and fraud is 6 years - N.D. Cent. Code Ann. 28-01-16

SOL for professional malpractice and bodily injury claims is 2 years --N.D. Cent. Code Ann 28-01-18

SOL is 6 years for product claims



Contractor may claim for indemnification against a manufacturer of defective materials if contractor was the ultimate user of the materials - *Board of Education of Columbus City School Dist. v. Fry, Inc.*, 489 N.E.2d 294 (Ohio Ct. App. 1984)

Under product liability stature, a supplier is a person who installs, repairs of maintains a product that causes harm - Ohio Rev. Code Ann. 2307.71(15)(a)

Where the product is incidental to the transaction, the furnisher of skill, judgment, or services is not a supplier - (15)(b)

SOL for written contract is 8 years

SOL for most breach of warranty claims is 4 years

Claims falling under Ohio Consumer Sales Practices Act must be brought within 2 years of accrual

SOL is 2 years for product claims

Statute of repose in Ohio is 10 years for construction and product claims

STATE

EQUITTABLE INDEMNITY THEORY/APPLICABLE LAW AND CONSIDERATIONS

STATUTE OF LIMITATIONS/REPOSE



Manufacturer must indemnify a seller arising from a strict product liability action - Okla. Stat. tit. 12, 832.1

Indemnity claims may arise from an action in strict liability or breach of implied warranty of fitness - Daughterty v. Farmers Coop. Ass'n, 790 P.2d 1118 (Okla. Civ. App. 1989)

Nothing discerning whether a contractor is a seller for purpose of products liability statute

SOL for actions in contract (written) is 5 years from when the work is completed

SOL for actions arising in tort is 2 years from discovery

SOL is 2 years for product claims

Statute of repose for any action in tort is 10 years from substantial completion of the improvement



Retailer found liable to purchaser in strict liability action may be entitled to indemnity against manufacturer - Irwin Yacht Sales v. Carver Boat Corp., 778 P.2d 982 (Or. Ct. App. 1989)

Elements of Oregon common law indemnity claim: claimant discharged legal obligation to 3d party; defendant was also liable to 3d party; and as between claimant and defendant, defendant ought to pay. - Maurmann v. Del Morrow Construction, Inc., 182 Or. App. 171(2002)

Common law indemnity incompatible with a comparative fault system where claimant is assigned a portion of fault -applicable only in strict liability cases

Plaintiff was not required to prove a contractor/installer's negligence because contractor-installer was deemed a seller and liable under Oregon's strict liability statute - Brokenshire v. Rivas & Rivas, Ltd., 922 P.2d 696 (Or. Ct. App. 1996)

SOL for contract actions is 6 years from the date of breach

SOL for tort claims alleging property damage/ any claims against design professionals from negligent construction is 2 years

SOL is 2 years for product claims

Statute of repose is 10 years from substantial completion for residential and small commercial real property

Statute of repose is 6 years for large commercial property

Statute of repose for product claims is 10 years after product's first purchase or the expiration of statute of repose in state of manufacture, whichever is later



Seller of defective product entitled to indemnification from manufacturer who is primarily liable for product defect - Walasavage v. Marinelli, 483 A.2d 509, 518 (Pa. Super. Ct. 1984)

SOL for contracts is 4 years

SOL for injury to person or property arising out of tort is 2 years

SOL is 2 years in product cases

Statute of repose is 12 years



Party exposed to liability solely because of a wrongful act of another should obtain indemnification - Muldowney v. Weather King Prod., Inc., 509 A.2d 441(1986)

To prove indemnity in Rhode Island, must show: (1) party seeking indemnity must be 3d party; (2) prospective indemnitor must be liable to the third party; (3) as between the prospective indemnitee, the obligation ought to be discharged by the indemnitor

Indemnity generally preserved by statute in Rhode Island - R.I. Gen. Laws 10-6-9

SOL for contract claims is 10 years

SOL for fraud is 10 years

SOL for personal injury is 3 years

SOL is 10 years for property damage claims

SOL is 3 years for product claims

Statute of repose is 10 years for actions related to constructors of improvements to real property

STATE

EQUITTABLE INDEMNITY THEORY/APPLICABLE LAW AND CONSIDERATIONS

STATUTE OF LIMITATIONS/REPOSE



Based on specific relation of the indemnitee to the indemnitor

Proper where an individual is exposed to liability by the wrongful act of another in which he does not join

SC recognizes seller's right to indemnity against a manufacturer - Vermeer Carolinas, Inc. v. Wood/Chuck Chipper Corp., 518 S.E.2d 301(S.C. Ct. App. 1999)
Unclear whether a contractor is a seller in SC

Statute of repose is 8 years: 13 years for improvements to real property for which certificates of occupancy by a county or municipality or completion of final inspection by building official

SOL is 3 years for most tort and contractual actions
SOL is 3 years in product claims



Implied indemnity allowed in 4 situations in SD: (1) derivative or vicarious liability; (2) action at direction of, and for, another; (3) breach of duty to indemnify; (4) failure to discover negligence of another - Ebert v. Fort Pierre Moose Lodge No. 1813, 312 N.W.2d 119 (S.D. 1981) (adopting rule espoused by MN Supreme Court in Hendrickson v. Minnesota Power & Light Co., 104 N.W.2d 843 (1960)).

To be eligible for indemnity, party must demonstrate a complete lack contributing fault with respect to the liability- producing conduct - Hartford Acc. and Indem. Co. v. Stauffer Chemical Co., 741 F.2d 1142 (8th Cir. 1984).

Statute of repose is 10 years

SOL for breach of contract is 6 years

SOL for PI actions is 3 years

SOL is 3 years for product claims



A distributor is entitled to indemnity from manufacturer for defective product

In Tennessee, a builder/seller can be liable under its strict product liability only to the extent he designs, produces, makes, fabricates, constructs, or remanufactures the product before sale - Rollins v. Cherokee Warehouse, Inc., 635 F.Supp. 136, 139 (E.D. Tenn 1986)

SOL for PI claims is 1 year

SOL for injury to property - real or personal- is 3 years

SOL for breach of contract claims is 6 years

SOL is 1 year for product claims

Statute of repose is 4 years for construction claims

Statute of repose for product claims is either: (a) 6 years from date of injury; (b) 10 years from date of first purchase; or (3) 1 year after expiration of anticipated product life, whichever is shorter.



Section 82.002 of Texas Civil Practice & Remedies Code entitles a seller of a defective product to seek indemnity from the manufacturer

Texas Supreme Court held that one is only a seller for purposes of Texas products liability statute if he is "engaged in the business" of selling whatever product he is selling - Centerpoint Builders GP, LLC v. Trussway, Ltd., 496 S.W.3d 33 (Tex. 2016)

Court in that case found that one is not in the business of selling a product if providing that product is incidental to the selling services

Thus, in that case, the truss installer was not a seller
States have emulated this understanding of when a contractor may be a seller

SOL for claims arising out of negligence is 2 years

SOL for breach of contract/warranty is 4 years from breach

SOL is 2 years for product claims

Statute of repose for claims against construction actors (planner, designer, inspector, engineer, etc.) is 10 years

Statute of repose for claims against product manufacturers is 15 years or the life of the product if warranted by manufacturer

STATE

EQUITTABLE INDEMNITY THEORY/APPLICABLE LAW AND CONSIDERATIONS

STATUTE OF LIMITATIONS/REPOSE



Retailers in product liability may recover, even absent an express indemnity agreement, from manufacturers when a defective product caused the judgment against them - *Hanover, Ltd. V. Cessna Aircraft Co.*, 758 P.2d 443, 446 (Utah Ct. App. 1988)

In *Maack v. Resource Design & Const., Inc.*, 875 P.2d 570 (Utah Ct. App. 1994), the Utah Court of Appeals found that a contractor was not a seller and couldn't be held strictly liable under products liability theory (and thus wouldn't be able to seek indemnity) because using the product did not mean he was engaged in business of selling the product.

SOL for breach of contract claims is 6 years from the date of completion

SOL for any claim other than breach of contract is 2 years from accrual date

SOL is 2 years for product claims

Statute of repose is 9 years with potential 2-year extension for claims filed in year 8 or 9



No compendium for Vermont

Retailer may seek indemnity from a wholesaler - *DiGregorio v. Chaplain Valley Fruit Co.*, 255 A.2d 183 (Vt. 1969)

"One is not entitled to indemnity from a joint tortfeasor merely because one may be free from negligence, or another is more at fault." *Hiltz v. John Deere Indus. Equip Co.*, 497 A.2d 748, 751 (Vt. 1985)

Indemnity may be allowed when a party is passively at fault - has been recognized where manufacturer of defective component of a product was entirely at fault; other manufacturer could seek indemnity from it

Does not have a specific statute of repose for construction claims - general statute of repose for civil actions is 6 years

SOL for breach of contract claims is 6 years

SOL for general tort actions and negligence in construction defect is 3 years

SOL for product claim is 3 years



Implied indemnity arises between parties from equitable considerations - actual cause of injury to the third party must have been the act of the indemnitor - *Bd. of Dirs. Of Birdneck Villas Condo. Ass'n. v. Birdneck Villas, LLC*, 73 Va. Cir. 175 (Va. Beach Cir. Ct. 2007)

In Virginia, "implied indemnify must grow out of some contractual relationship" - *RML Corp. v. Lincoln Window Products, Inc.*, 67 Va. Cir. 545, 572 (Norfolk Cir. Ct. 2004).

In *Pulte Home Corp. v. Parex, Inc.*, 579 S.E.2d 188 (Va. 2003), the Supreme Court of VA found that a contractor was not entitled to indemnity because (1) he was not in a contractual relationship with the manufacturer and (2) other manufacturer was not itself negligent

SOL for breach of written contract claims is 5 years

SOL for PI claims is 2 years after accrual

SOL for property damage - rooted in contract or tort- is 5 years after accrual

SOL for product claims is 2 years

Statute of repose is 5 years for all actions against design professionals, contractors, subcontractors, suppliers, etc.

STATE

EQUITTABLE INDEMNITY THEORY/APPLICABLE LAW AND CONSIDERATIONS

STATUTE OF LIMITATIONS/REPOSE



Washington recognizes indemnity for sellers under an implied warranty of merchantability - *Zamori v. Mobil Oil Corp.*, 704 P.2d 591 (Wash.1985)

A builder that used prefabricated products to construct a storage building was deemed a service provider, not a product seller for purposes of Washington Product Liability Act -

Construction contracts are not governed by the UCC so implied indemnity is not available - does not apply to seller/manufacturer relationship

SOL for written contracts is 6 years; oral is 3

SOL for claims based in tort is 3 years

SOL for claims under Washington's Condominium Act is 4 years

SOL is 3 years for product claims

In VA, discovery rule applies to breach of contract cases where there is a latent defect - typically accrual occurs on date of breach

Statute of repose is 6 years from substantial completion

Statute of repose for product claims: Rebuttable presumption that an injury occurring more than 12 year safter delivery occurred after the expiration of product's useful life



West Virginia recognizes common law indemnity actions for builders against product manufacturers - *Basham v. General Shale*, 180 W.Va. 536 (W.Va. 1988)

SOL for written contracts is 10 years from when the work is completed

SOL for negligence claims is 2 years

SOL is 2 years for product claims

Statute of repose is 10 years for 4 classes of claims: (1) damages for deficiency in planning, surveying, design, observation, or supervision of any construction or from the actual construction of any improvement to real property; (2) damages arising from actual surveying of real property; (3) injury to real or personal property; and (4) PI/wrongful death



Wisconsin courts have established a seller's common law right to indemnity against a manufacturer of a defective product

Nothing about whether a contractor is a seller

SOL for PI/ wrongful death claims is 3 years after accrual

SOL for real or personal property damage claims is 6 years after accrual

SOL for breach of contract claims is 6 years from date of the breach

·SOL is 3 years for product claims

Statute of repose for injuries to person or property resulting from construction defects is 7 years

Statute of repose for product claims is 15 years

WYOMING

Recognizes partial equitable indemnity - similar to a comparative fault system - *Schneider Nat., Inc. v. Holland Hitch Co.*, 843 P.2d 561 (Wy. 1992).

Do not have to be faultless to seek indemnity

No indication as to whether a contractor is a seller or whether a seller may seek indemnity from a manufacturer - I assume so based on the nature of the relationship

SOL for PI/ wrongful death claims is 3 years after accrual

SOL for real or personal property damage claims is 6 years after accrual

SOL for breach of contract claims is 6 years from date of the breach

SOL is 3 years for product claims

Statute of repose for injuries to person or property resulting from construction defects is 7 years

Statute of repose for product claims is 15 years

SOL for written contract is 10 years; 8 years for implied contract

SOL for negligent construction is 2 years

SOL for product claims is 4 years

Statute of repose for all claims related to construction is ten years from substantial completion - manufacturers included in this