



# PRODUCTS LIABILITY: BETTER KNOW YOUR REPOSE

The first and most important thing to know about products liability law in Tennessee is that it is largely statutory. Claims for injuries caused by the “manufacture, construction, design, formula, preparation, assembly, testing, service, warning, instruction, marketing, packaging or labeling of any product” are governed by the Tennessee Products Liability Act (“TPLA”), Tenn. Code Ann. § 29-28-101, *et seq.*<sup>1</sup> This includes claims for personal injury, death, and damage to property (unless the product has only damaged itself).<sup>2</sup> The TPLA subsumes and supersedes all claims for such injuries “under any . . . substantive legal theory in tort or contract whatsoever.”<sup>3</sup> It does not matter whether the plaintiff designates her claim as one for product liability, negligence, breach of warranty, strict liability, or something else – the TPLA controls.

When considering whether to file (or how to defend) a TPLA claim, the statute of repose set forth in § 29-28-103(a) is paramount. Subject to limited exceptions (discussed below), a plaintiff must file suit (a) within six years of the date of injury *and* (b) within the shorter of: ten years after the date the product was first purchased for use or consumption *or* one year after the expiration of the anticipated life of the product.

As a practical matter, the anticipated life aspect of the statute of repose is greatly restricted by § 29-28-102(1), which explains that “[t]he anticipated life of a product shall be determined by the expiration date placed on the product by the manufacturer when required by law but shall not commence until the date the product was first purchased for use or consumption.”<sup>4</sup> This effectively limits the “anticipated life” provision to products that are legally required to bear expiration dates. At first blush, the commencement language may cause some head-scratching, but it is rather straightforward in practice. Courts have looked to the *timeframe* used to calculate the expiration date (e.g., two years from the date of manufacture) and added that to the commencement date to determine the end of the anticipated life of the product.<sup>5</sup> For example, assume that a product was manufactured on July 1, 2016, had an expiration date of July 1, 2020, and was first purchased for use or consumption on January 1, 2017. Under the TPLA, its anticipated life began on January 1, 2017 and ended on January 1, 2021. It does not matter whether the plaintiff had knowledge of the expiration date.

As noted above, there are limited statutory exceptions to the statute of repose. There is an exception to the ten-year cap for “injury to minors whose action must be brought within a period of one (1) year after attaining the age of majority.”<sup>6</sup> Federal courts have held that the minors’ exception also applies to the six-year repose period,<sup>7</sup> but it does not appear that Tennessee appellate courts have ruled on this issue. It bears noting that the words “whichever occurs sooner” appear – somewhat confusingly – at the end of this exception in § 29-28-103(a). Federal

courts have expressly held that the inclusion of this language was a legislative oversight and it should be disregarded.<sup>8</sup> Tennessee courts have not addressed this issue specifically.

The other statutory exceptions to the repose periods pertain to specific products associated with health problems that have long latency periods – asbestos and silicone gel breast implants.<sup>9</sup> Pursuant to a 1979 amendment to the TPLA, there is no statute of repose for claims for exposure to asbestos-containing products that were first purchased for use or consumption *on or after* July 1, 1969. Claims for exposure to asbestos-containing products that were first purchased for use or consumption before July 1, 1969, are subject to – and barred by – the original ten-year cap. In 1993, the legislature exempted silicone gel breast implant claims from the § 29-28-103(a) repose periods, requiring instead that such claims must be brought within 25 years of implantation and within four years from the date the plaintiff had actual or constructive knowledge of the injury.

These statutory exceptions are the only exceptions Tennessee courts have recognized to the TPLA’s statute of repose. Tennessee courts have repeatedly rejected arguments that would have created exceptions for things like fraudulent concealment, mental incompetency, and latent disease. Constitutional challenges have also been unsuccessful. Nevertheless, the federal court for the Eastern District of Tennessee has applied a limited exception for products that are substantially rebuilt or reconditioned and then resold, holding that the statute of repose runs anew from the date of sale.<sup>10</sup>

Tennessee courts’ strict enforcement of the statute of repose is consistent with the stated purposes of the TPLA, which include limiting the time for commencement of an action “to a specific period of time for which product liability insurance premiums can be reasonably and accurately calculated.”<sup>11</sup> It is critical for any lawyer prosecuting or defending a product liability matter to be aware of the repose periods and, to a lesser extent, the limited applications in which federal courts may provide more plaintiff-friendly rulings on this issue.

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<sup>1</sup> Tenn. Code Ann. § 29-28-102(6).

<sup>2</sup> *Lincoln Gen. Ins. Co. v. Detroit Diesel Corp.*, 293 S.W.3d 487, 492 (Tenn. 2009).

<sup>3</sup> See Tenn. Code Ann. § 29-28-102(6).

<sup>4</sup> Tenn. Code Ann. § 29-28-102(1).

<sup>5</sup> See, e.g., *Montgomery v. Wyeth*, 580 F.3d 455, 467 (6th Cir. 2009).

<sup>6</sup> Tenn. Code Ann. § 29-28-103(a); *Penley v. Honda Motor Co.*, 31 S.W.3d 181, 185 (Tenn. 2000) (“[T]he ten-year statute of repose does not strictly apply in the case of minors, who may still bring an action within one year of attaining majority even if the initial ten-year period has long since expired.”).

<sup>7</sup> *Holt by Holt v. Hypro, a Div. of Lear Siegler, Inc.*, 746 F.2d 353, 355 (6th Cir. 1984).

<sup>8</sup> *Id.* at 354–55; see also *Tate v. Eli Lilly & Co.*, 522 F. Supp. 1048, 1050–51 (M.D. Tenn. 1981).

<sup>9</sup> See Tenn. Code Ann. § 29-28-103(b)–(c)(1).

<sup>10</sup> See *Fugate v. AAA Mach. & Equip. Co.*, 593 F. Supp. 392, 393 (E.D. Tenn. 1984).

<sup>11</sup> *Penley*, 31 S.W.3d at 187 (quoting 1978 Tenn. Pub. Acts ch. 703 preamble).