

Product Liability

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When Does the Modification of a Product Trigger an Exception to the Statute of Repose?

Can a product liability claim that would otherwise be time barred by the statute of repose proceed when the product was modified after the statutory time limit? The Court of Appeals for the Seventh Circuit recently evaluated the application of the statute of repose after the plaintiff was injured using a 14-year-old muzzleloading rifle. The question presented in *Hartman v. EBSCO Indus. Inc.*, 758 F.3d 810 (7th Cir. 2014), was whether the addition of a conversion kit 14 years after the rifle was purchased could trigger an exception to the statute of repose in Indiana.

In 1994, the plaintiff, Adam Hartman, received a LK-93Wolverine brand muzzleloading rifle from his father. *Hartman*, 758 F.3d at 813. At that time, the Hartman’s muzzleloader was designed to use black powder, which propels the projectile after the black powder is struck by the gun’s hammer. *Id.* As technology evolved, newer muzzleloader rifles employed synthetic pellets as a propellant, which required a much higher temperature for ignition. When used in the Wolverine, the pellets did not always ignite because of the higher temperatures needed for ignition. *Id.* at 814.

To alleviate the issues LK-93 Wolverine users had igniting the newer synthetic pellets, KR Warranty manufactured a conversion kit that was designed to deliver a hotter spark to ignite the pellets “more reliably.” *Id.* The plaintiff installed the conversion kit on November 28, 2008. *Id.* The following day, the plaintiff and a few friends went to a gravel pit to “sight the rifle.” *Id.* The plaintiff fired the rifle twice without swabbing the barrel. *Id.* Prior to his third shot, the plaintiff loaded pellets into the barrel and then placed patched round balls into the barrel. *Id.* The manufacturer of the pellets warns against using patched round balls with their synthetic pellets because doing so creates an increased risk of accidental discharge. *Id.* After placing the balls in the barrel, the plaintiff attempted to seat the balls with a ramrod, which caused the gun to unexpectedly discharge, causing the ramrod and round ball to pass through the plaintiff’s hands and arms. *Id.*

The plaintiff filed suit sounding in product liability. The action was subsequently removed and the United States District Court granted summary judgment on the ground that the applicable statute of repose in Indiana, 10 years, barred Mr. Hartman’s recovery because the rifle was 14 years old at the time of the incident. *Id.*

The plaintiff’s appeal focused on the two exceptions to application of the statute of repose: “(1) where a manufacturer refurbishes a product to extend its useful life, or (2) where a defective new component is incorporated into the old product.” *Id.* at 815 (citing *Richardson v. Gallo Equip. Co.*, 990 F.2d 330, 331 (7th Cir. 1993)). These two exceptions are not apparent in Indiana’s statute of repose, but instead, derive from case law. IND. CODE ANN. § 34-20-3-1 (LexisNexis 2014); *Richardson*, 990 F.2d at 331.

Hartman argued that the first exception applied because the modification kit extended the useful life of the muzzleloader. *Hartman*, 758 F.3d at 815. Hartman presented an expert, who opined that the conversion kit

made the rifle more accurate, gave it higher velocity, and essentially made it a new rifle. *Id.* In response, KR Warranty's expert stated that the only way to measure a muzzleloader's lifespan is the barrel and bore, which the conversion kit did not alter. *Id.* The court, in dismissing the plaintiff's argument, likened the conversion kit to an upgraded processor in an old laptop computer versus installing a new battery into the computer when the old battery was on its last leg. *Id.* A new processor increases the functionality of the computer, but does not lengthen its lifespan, whereas adding a new battery to the old computer would lengthen its lifespan. Therefore, the rifle's conversion kit made the rifle more accurate and powerful but did not enhance its lifespan. *Id.*

Additionally, according to the district court, the extended life exception was not applicable because the exception typically applies when the manufacturer of the original product refurbishes the product to extend its useful life. *Id.* The alleged defect lay in the addition of a component installed by the user, and would therefore fall under the second exception, if anything.

The second exception that resets the statute of repose is when a defective new component is incorporated into the old product. The district court explains that this exception can arise in two scenarios: (1) when a manufacturer issues a new, non-defective component for an old product and the addition of the new component renders the old product defective or, (2) when the new component is itself defective and it renders the entire product defective. *Id.* at 816. Hartman proposed two defects, one sounding in a failure to warn that not swabbing the barrel between shots could increase the likelihood of accidental discharge and two, that the conversion kit was defective. *Id.*

Despite the plaintiff's two-fold defect scenario, the court clarified that the only issue was whether the inclusion of the conversion kit increased the likelihood of latent embers or unexpected discharge. *Id.* at 817. For this proposition, Hartman presented expert testimony to show that a modified cleaning jag, a tool that is screwed to the end of the ramrod and used to clean the barrel of the rifle between shots to clear debris and latent embers, should have been included in the conversion kit. *Id.* at 816. Hartman's gunsmith expert claimed that the breech plug used as part of the modification required a specially designed jag. *Id.* The court, however, excluded Hartman's expert because the modified jag proposed by the expert was "incomplete, inoperable, and unlike those used by KR Warranty or its competitors." *Id.* at 819. Furthermore, since Hartman did not clean the barrel before it discharged, the usage of the jag was of no consequence. Because Hartman could not find shelter in either of the statute of repose exceptions, the court affirmed the district court's grant of summary judgment. *Id.*

Illinois' Statute of Repose

While not authoritative in Illinois state courts, *Hartman v. EBSCO* sheds light on some of the issues that arise in cases involving the use and maintenance of older products. Illinois has an exception where the statute of repose resets 10 years from the date the product was altered if the plaintiff's injury derives from the alteration. 735 ILCS 5/13-213(c)(2). This section of the repose statute is closely related to Indiana's second statute of repose exception.

In Illinois, 735 ILCS 5/13-213 states the limitations in product liability actions. It provides that no action may commence against the manufacturer sounding in strict product liability within 12 years from the date of first sale to the initial seller or 10 years from the date of first sale to the initial consumer. 735 ILCS 5/3-213(c).

Illinois courts have had several opportunities to interpret the meaning of alteration and whether certain alterations reset the statute of repose timeline. In *Masters v. Hesston Corp.*, 291 F.3d 985 (7th Cir. 2002), the Seventh Circuit found that the plaintiff did not satisfy the alteration exception. The plaintiff injured himself on a 22-year-old hay baler because of a problem with the "twine tube" and a problem turning the hay bale after the power was turned off. *Masters*, 291 F.3d at 988. It was determined that this condition was caused as a consequence of the machine having been re-welded at some time. *Id.* at 989. The court, in ruling that the

exception did not apply, held that the plaintiff had not met his burden in showing first, that the manufacturer of the hay baler “rewelded the tube, authorized the rewelding, or furnished materials for its accomplishment” and second, that the alteration occurred within 10 years of the alteration. *Id.* at 990-91.

The Northern District found that the statute of repose exception applied where an elevator maintenance worker was killed while fixing an elevator component that had previously been added to fix previous issues in the elevator. In *Wilson v. Otis Elevator Co.*, 454 F. Supp. 2d 749 (N.D. Ill. 2002) the plaintiff’s decedent was working on an elevator initially installed in 1967. *Wilson*, 454 F. Supp. 2d at 751. As part of a maintenance agreement with the property owner, Otis installed a new car gate and cable system at some time in 1995. *Id.* at 750. Employees of the property reported having problems with the alterations made by Otis and consequently, Mr. Wilson was attempting to fix the problem when he entered the shaft and was killed. *Id.* at 751. The court ruled that the alteration exception applied because the alteration, which occurred within the statutory period, could have been the proximate cause of the decedent’s injuries.

Practice Tips

Proximate Cause:

When dealing with a statute of repose defense, the alteration itself must have proximately caused the injuries. The court in *Wilson* left that determination for the fact finder. To assert the defense, the facts must be established to prevent any question about whether absent the alteration, the incident would not have occurred.

Internal Recordkeeping:

For national counsel or counsel with advisory influence over corporate recordkeeping and risk management policies, the maintenance practices on machinery to which the company is aware should be discussed to alert the company when a statute of repose exception may apply.

Expert Testimony:

The court in *Hartman* refused to permit an expert to testify about whether the alteration was defective because his alternative design assertions were baseless. The credibility of expert testimony should be sufficiently developed to give the court an adequate basis in which to grant a dismissal based on a statute of repose defense. From a practical standpoint, however, this should be evaluated with the client in a case pending in Illinois because the plaintiff can still proceed on a negligence basis.

About the Authors

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