



## Alerts

### Indiana Product Liability Act's Statute of Repose Found Unconstitutional For Asbestos Cases

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*Hinshaw Alert*

On March 2, 2016, Justice Brent E. Dickson of the Indiana Supreme Court ruled on three appeals involving the constitutionality of the Indiana Product Liability Act statute of repose. *Myers v. Crouse-Hinds Division of Cooper Industries, Inc.* 2016 WL 825111 (Ind. 2016). Plaintiffs were exposed to materials containing asbestos while working as electricians for multiple decades, and they brought suit against several defendants after developing mesothelioma. In a 3-2 decision, the majority found Section 2 of Chapter 3 of the Indiana Product Liability Act unconstitutional and that the statute of repose did not bar the plaintiffs' claims.

The principal issue was whether plaintiffs' claims were barred under *AlliedSignal, Inc. v. Ott*, 785 N.E.2d 1068 (Ind. 2003), in which the Indiana Supreme Court interpreted Sections 1 and 2 of the Indiana Product Liability Act's Chapter 3. Section 1 applies to product liability actions generally and contains a statute of repose, while Section 2 applies to asbestos-related actions and does not contain a statute of repose. *Ott* held that Section 2 applies only to asbestos claims against defendants who both mined and sold raw asbestos, leaving those who only sell asbestos-containing products within the ambit of Section 1. Plaintiffs urged the court to abandon that interpretation and follow the interpretation presented by the *Ott* dissent. The court, however, declined to alter *Ott*'s holdings with respect to statutory construction, finding it settled under the doctrines of *stare decisis* and legislative acquiescence.

Plaintiffs' key argument was that the statute of repose provisions, as explicated in *Ott*, violated two provisions of the Indiana Constitution: its Rights to Remedy Clause, Article 1, Section 12, and its Equal Privileges and Immunities Clause, Article 1, Section 23. The court primarily addressed the Equal Privileges and Immunities Clause challenge.

In *Ott*, the court upheld Section 1 and Section 2 against this challenge, finding that the statutory distinction between asbestos victims and other victims under the product liability act did not harm asbestos victims because they are either subject to the same Section 1 statute of repose as non-asbestos victims, or have an exception under Section 2. Based on its finding that "asbestos plaintiffs do not suffer any cognizable harm" as compared to non-asbestos plaintiffs, the *Ott* court declined relief without addressing whether the disparate treatment constituted a constitutionally prohibited disparate privilege.

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The court acknowledged that while the case at bar was factually similar to *Ott*, plaintiffs' claim was a different constitutional challenge that required new analysis. Instead of comparing asbestos victims to non-asbestos victims, plaintiffs compared two separate types of asbestos victims. They argued that, given *Ott*'s statutory interpretation, Section 2 draws a constitutionally impermissible distinction between asbestos plaintiffs who were injured by defendants who both mined and sold raw asbestos and asbestos plaintiffs who were injured by defendants outside that category.

The court stated that, in analyzing an Equal Privileges and Immunities Clause challenge, a disparate classification alleged by a challenger warrants review as long as the alleged classes have a sufficient basis in the challenged legislation. The court stated that the classifications identified by plaintiffs had such a legislative basis. Section 2 is titled "Asbestos-related actions" and governs those actions brought by asbestos victims. Because the legislation "applies only to product liability actions against...persons who mined and sold commercial asbestos," Section 2 is prescribing disparate treatment for the classes at issue. Those asbestos victims who are injured by defendants who did not both mine and sell raw asbestos must sue those defendants under Section 1, where they may be barred by the statute of repose, while the asbestos victims who are injured by defendants who did both mine and sell raw asbestos may sue those defendants under Section 2, where no statute of repose applies.

The court quoted its decision in *Collins v. Day*, 644 N.E.2d 72 (Ind. 1994), to articulate the standard for determining whether a statute complies with Indiana's Equal Privileges and Immunities Clause. To satisfy the constitutional requirement: (1) the disparate treatment accorded by the legislation must be reasonably related to inherent characteristics which distinguish the unequally treated classes, and (2) the preferential treatment must be uniformly applicable and equally available to all persons similarly situated.

Under the first element, the disparate treatment must be reasonably related to the inherent differences that distinguish the unequally treated classes. The court found that no such characteristic existed in this case. The disparately treated classes were identically comprised of asbestos victims, and Section 2 did not differentiate between them based on any single characteristic of theirs – inherent or otherwise. Thus, because the disparate treatment was not reasonably related to an inherent difference of the unequally treated classes, the court found that the statute violates the first *Collins* factor.

The court then continued its analysis under the second element, which requires any preferential treatment to be uniformly applicable and equally available to all persons similarly situated. The court found that the two classes of asbestos victims were similarly situated (both being victims of asbestos illness or disease), yet only one of them (the class seeking damages from defendants who both mined and sold raw asbestos) was completely excepted from the statute of repose. Thus, the court found that Section 2 created a preference and established an inequality among a class of citizens whom are equally meritorious, violating the second *Collins* factor. Therefore, the court held that the unequal treatment under Section 2 violates the Equal Privileges and Immunities Clause of Article 1, Section 23 of the Indiana Constitution on two separate and independent bases.

The court noted that, in crafting Section 2, the General Assembly expressly included a non-severability clause, and because it found Section 2 partially unconstitutional, it must invalidate all of Section 2. Therefore plaintiffs' claims all fell under the statute of repose provision in Section 1.

The court stated that it interpreted Section 1 in *Covalt v. Carey Canada, Inc.*, 543 N.E.2d 382 (Ind. 1989), and held that a plaintiff may bring suit within two years after discovering a disease and its cause, notwithstanding that the discovery was made more than ten years after the last exposure to the product that caused the disease. This holding, however, was limited to cases where an injury to a plaintiff is caused by a disease which may have been contracted as a result of protracted exposure to a foreign substance. As stated in *Covalt*, the "statute of repose [is] inapplicable to cases involving protracted exposure to an inherently dangerous foreign substance which is visited into the body."

The court acknowledged that *Ott* had partially overruled *Covalt*, but the overruling was predicated on the intervening enactment of Section 2. Because it was finding Section 2 void due to its partial unconstitutionality, the court held that *Covalt* is restored as the controlling precedent, and as a result, the Product Liability Act statute of repose does not apply to cases involving protracted exposure to an inherently dangerous foreign substance. Thus, applying this standard, the court found that the Indiana Product Liability Act's statute of repose provision did not apply to bar plaintiff's claims for asbestos injury and illness.



For more information, please contact [Craig T. Liljestrand](#) or your regular [Hinshaw attorney](#).

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