

Statutes of repose: A new defense to product liability?

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32 **U**nder a curious line of Texas decisions, a product liability action against a manufacturer may be barred by one of Texas' statutes of repose¹ if the defective product in question has become an improvement to real property. This statute of repose, Section 16.009 of the Texas Civil Practices and Remedies Code, protects persons who "construct or repair an improvement to real property." Causes of action based on defective or unsafe conditions of real property, or deficiencies in the construction or repair of an improvement, are barred if brought more than ten years after substantial completion of the improvement. As such, the statute protects construction professionals such as building contractors who perform services on the job site.

However, based on the notion that the word "construction" in this statute may mean "manufacture," many Texas courts of appeals have held that the statute of repose protects off-site manufacturers of products that later become improvements. Under this line of Texas authority, courts have protected the manufacturers of garage door openers,² furnaces,³ elevators,⁴ gasoline storage tanks,⁵ electrical products,⁶ and even asbestos fireproofing material.⁷

These decisions have been questioned and criticized,⁸ and some recent Texas decisions have found this construction of the statute to be erroneous.⁹ Nonetheless, this peculiar defense is being asserted more and more frequently by defendants in product liability suits. This article will attempt to demonstrate that some Texas courts may have incorrectly construed this statute, producing a chain reaction of misinterpretations of prior holdings.

WHAT ARE STATUTES OF REPOSE?

In the late sixties many states began to enact statutes of repose in response to a series of decisions that abolished the lack of privity defense against design professionals.¹⁰ Architects and engineers were being held liable for defective designs, even decades after a project had been completed.¹¹ Following this trend, in 1969 the Texas Legislature enacted a statute of repose applicable to architects and engineers who furnish design, planning, or inspec-

tion of the construction of improvements to real property.¹² This statute, now codified at Texas Civil Practices & Remedies Code Annotated, Section 16.008 (Vernon 1986), protected only registered or licensed architects and engineers. Other construction professionals remained open to potentially unlimited liability.

But in 1975, the legislature added a statute of repose applicable to persons who perform or furnish construction or repair of improvements to real property.¹³ This provision, currently codified at Section 16.009 of the Texas Civil Practices and Remedies Code, provides that:

[a] claimant must bring suit for damages . . . against a person who constructs or repairs an improvement to real property not later than 10 years after the substantial completion of the improvement in an action arising out of a defective or unsafe condition of the real property or a deficiency in the construction or repair of the improvement.¹⁴

Unlike statutes of limitations that limit the time for bringing suit after a cause of action accrues, statutes of repose apply retroactively to prohibit the bringing of suit after a stated time, regardless of when the breach or injury occurs or becomes discoverable.¹⁵ That is, an injured plaintiff's cause of action may be extinguished before the injury occurs. For example, in 1982 a building contractor negligently constructs an apartment balcony, and in 1994 the plaintiff is injured when a hidden defect in the construction of the balcony causes her to fall. Because more than ten years have elapsed since the construction was completed, the builder's motion for summary judgment under Section 16.009 would be granted, even though the injury has occurred only recently and the defect was not discoverable until then.

Section 16.009's language protecting "a person who constructs or repairs an improvement to real property" clearly includes construction and building professionals who provide construction services on the job site. However, Section 16.009 has been judicially interpreted to bar product liability suits against manufacturers of mass-produced products, even though the manufacture of the

improvement occurs in a factory and the manufacturer never actually sets foot on the property where the product is installed. As will become apparent, this result was most likely never intended by the legislature.

THE TEXAS CASES: THE CONFUSION BEGINS

The extension of Section 16.009 to protect manufacturers can be traced to *Ellerbe v Otis Elevator Company*,¹⁶ which was the first appellate case to apply this statute of repose.¹⁷ In *Ellerbe* the plaintiff's decedent died when he fell down an elevator shaft in a multistory building. The plaintiff sued, alleging defective design of the elevator that had been manufactured, but not installed, by the defendant. In determining whether the elevator manufacturer was entitled to employ the statute of repose as a defense, the court engaged in a two-part analysis, but did so in only two sentences and without explaining its reasoning.

First, the court held that an elevator is "obviously" an improvement on real property.¹⁸ Then, without analyzing the legislative history or any other authority, the First Court of Appeals stated that "the manufacture[r] of the elevator would be a person performing or furnishing construction of the elevator even though it did not install it in the building."¹⁹ Thus, by casually holding that *manufacture of an improvement constitutes "construction" of an improvement* for purposes of the statute of repose, the First Court of Appeals seemingly established a defense for manufacturers of defective products that happen to become affixed to real property. By the court's waving its wand over the semantics of the statute, and without the benefit of the legislative history of the statute, a new defense to product liability was born, and a confusing litany of cases began.

The next case to deal with Section 16.009 was *Reddix v Eaton Corporation*,²⁰ in which the San Antonio Court of Appeals held that manufacturers of component parts of improvements to real property are not protected by the statute of repose. The plaintiff was injured when the outdoor elevator in which he was riding fell thirty feet to the ground. Although the defendant manufactured the hoist mechanism, it had not manufactured the entire elevator unit and had not actually installed any part of the elevator on the premises.²¹ The manufacturer relied on *Ellerbe* for the proposition that the statute of repose protects manufacturers of improvements to real property. The court distinguished *Ellerbe* based on that court's statement, "[w]e do not determine whether materialmen come within the statutory language."²² The *Reddix* court found this statement to indicate that *Ellerbe* left open the ques-

tion of whether manufacturers of component parts are protected. The court then defined a "materialman" as:

a person who does not engage in the business of building or contracting to build homes for others, but who manufactures, purchases, or keeps for sale materials which enter into buildings, and who sells or furnishes such material without performing any of the work or labor in installing or putting them in place.²³

From this definition of "materialman," the court deduced (somewhat mysteriously) that one who manufactures a component part is a materialman. The defendant was a materialman because it did no more than manufacture the electric hoist, a component part of the elevator installed on the premises. Therefore, the court held that manufacturers of component parts of improvements to real property are mere materialmen who are not covered by the statute of repose, whereas manufacturers of an entire improvement, like the elevator unit in *Ellerbe*, are protected.²⁴

At first blush, the *Reddix* court seems to have made a useful distinction between manufacturers of improvements, who are protected, and materialmen, who are not. However, the problem with this holding is that the definition of "materialman" adopted by *Reddix* squarely includes the elevator manufacturer in *Ellerbe*.²⁵ The definition defines materialmen as those who do not engage in building or construction but merely manufacture or sell materials, without performing any of the work of installing or putting such materials in place. This is exactly what Otis Elevator had done in *Ellerbe*! There is nothing in Section 16.009 or in the definition of "materialman" to justify a distinction between a manufacturer of an entire improvement and the manufacturer of a component part.

The proper index of who is a "materialman" according to the definition chosen by the *Reddix* court is whether the person did "any of the work or labor in installing or putting [the materials] in place"; i.e., whether the person is "engaged in the business of building or contracting."²⁶ If the *Reddix* court had addressed the fact that *Ellerbe* might be mistaken in its interpretation of "construction" to include "manufacture," it would have disapproved *Ellerbe* as inconsistent with the definition of "materialman" under Texas law. But because it chose only to distinguish *Ellerbe*, the *Reddix* court sidestepped the issue of whether the manufacturer had furnished "construction," and thereby compounded the error of *Ellerbe*. This judicial slight-of-hand shifted the focus from whether the

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person seeking repose had engaged in protected construction activity, to whether the item involved constituted an improvement or a component part of an improvement. As the product-focused approach replaced the more appropriate activity-focused approach, Texas courts continued the chain of confusion.²⁷

The Supreme Court of Texas analyzed Section 16.009 for the first time in *Conkle v Builders Concrete Products Manufacturing Company*.²⁸ In this wrongful death case the parents of a worker who was killed in a concrete batch plant sued the decedent's employer and the plant manufacturer. The trial court granted the manufacturer's motion for summary judgment based on the statute of repose. The subject plant consisted of many component bins and hoppers that joined with a concrete mixing apparatus to form the entire plant. There was evidence that the defendant had manufactured only the bins and hoppers and not the mixing apparatus. As such, there was evidence that the defendant had manufactured only component parts.²⁹ In addition, there was evidence that the manufacturer had originally sold the plant to a third company, but it was later purchased by the decedent's employer and moved to the premises. Thus, there was also evidence that the plant was portable.³⁰

The Supreme Court found that summary judgment should have been denied on both the "improvement" issue and the "component part" (i.e., materialman) issue. By relying on *Reddix*, the Supreme Court also side-stepped (possibly inadvertently) the question of whether furnishing "construction" under the statute includes the off-site manufacture of a product. The result is the Supreme Court's apparent perpetuation of the *Ellerbe* logic that "construction" includes manufacturing activity. In addition, it is an apparent approval of the *Reddix* holding that a manufacturer of component parts of an improvement (a materialman) is not protected, while the manufacturer of an entire improvement is protected.

Texas courts continued spreading the contagium that began with *Ellerbe*. In *Rodarte v Carrier Corporation*³¹ a man was electrocuted while attempting to repair a heater/air conditioner unit. The heirs brought suit against the manufacturer, and the trial court granted the defendant's motion for summary judgment based on the statute of repose. On appeal the plaintiffs argued that Section 16.009 did not apply because Carrier had no role in installing or servicing the unit. The court summarily rejected this argument stating, "[t]he statute only requires that the particular item in question be 'an improvement to real property.'"³² This is curious because the statute's plain language requires that the person seeking repose must also have furnished construction or repair of an improvement.³³ The court went on to reject the plaintiff's component part argument, holding that the heater/air conditioner unit was an improvement under the statute.³⁴

FEDERAL COURTS APPLYING TEXAS LAW: THE VIRUS SPREADS

The first federal court to pass upon Section 16.009 was *Dedmon v Stewart-Warner Corporation*,³⁵ in which a mother sued the manufacturer of a defective furnace that caused the death of her son. The manufacturer supplied the furnace boxed and fully assembled for installation in the plaintiff's home as part of an overall heating/air conditioning system that included fuel lines, flues, and ducts.³⁶ The manufacturer did not install the furnace and

was not involved with the design or construction of the overall heating system in the home.³⁷ The plaintiff argued that the furnace was not an improvement but merely a component part of an improvement and, alternatively, that the defendant was a materialman not entitled to protection from the statute of repose.³⁸

The Fifth Circuit found it difficult to apply the improvement-versus-component-part distinction of *Reddix* and *Conkle*, remarking, "if only systems can be improvements, there is no principled way to tell whether an item is a system or a part of one."³⁹ The court also criticized the fact that the *Conkle* decision does not explain which characteristic of component-part manufacturers strips them of protection.⁴⁰ The Texas courts had "skirted this conundrum," twice applying the statute to off-site manufacturers of home heating furnaces, holding that such heating units are not component parts of improvements.⁴¹ The Fifth Circuit also observed that the Texas cases focused on which *products*, rather than which *actors*, merit protection.⁴²

Despite its criticisms of this approach, the Fifth Circuit felt compelled to rely on the Texas courts that had

A cause of action can be extinguished before the injury occurs.

applied Section 16.009 to a class of products rather than a class of actors. Following *Dubin I*, *Dubin II*, and *Rodarte*, the court held that the furnace in question was an improvement, not a component part of the overall heating system.⁴³ However, it noted that a correct analysis of the legislative intent behind Section 16.009 would likely exclude manufacturers or suppliers of standardized goods such as circuit breakers, garage door openers, and mass-produced heating units.⁴⁴ The court suspected that the intent of the Texas Legislature was to protect construction industry professionals who perform certain functions, but not manufacturers.⁴⁵

Until now, no court had analyzed the legislative history of Section 16.009 or the intended meaning and scope of the word "construction" used in the statute. *Dayton Independent School District v United States Mineral Products Company*⁴⁶ (hereinafter *Dayton I*) was the first case to hold that Section 16.009 does not apply to manufacturers who do not actually install the improvement. The case was decided a month after the Fifth Circuit's decision in *Dedmon* but without knowledge of that decision. In *Dayton I* the manufacturers of asbestos products used in a school building were sued by the school district, and the manufacturer moved for summary judgment based on Section 16.009. The asbestos materials manufactured by the defendants were delivered to the job site in bags, then mixed with water and other additives, and

sprayed or trowelled onto the building.⁴⁷ Thus, they were “standardized, off-the-shelf, mass-produced products, manufactured in an environment with ample opportunity for quality control and pretesting.”⁴⁸

The court’s thorough review of the legislative history indicated that the legislature that enacted the predecessor statute to Section 16.009 intended it to apply only to construction contractors and repairers.⁴⁹ The court stated: “If the legislature had sought to afford immunity to manufacturers of products, it could have easily done so. However, the legislative history and the language employed by the statute indicate there was no such intent.”⁵⁰

Several weeks after its decision in *Dayton I*, the court reconsidered the defendant’s motion for summary judgment in light of the Fifth Circuit’s pronouncement in *Dedmon*. In *Dayton II*⁵¹ the Beaumont District Court reversed itself, stating that *Dedmon* is controlling precedent until it is overruled.⁵² The court was forced to hold that manufacturers are in the class of persons potentially protected by Section 16.009 but urged the Fifth Circuit to consider the legislative history.⁵³ The court also restated

The plaintiff was injured when the elevator . . . fell 30 feet.

its belief that the statute was intended only to protect construction industry professionals, and further stated that the Texas Supreme Court had approved this classification.⁵⁴

Other courts also felt compelled to follow *Dedmon*, perpetuating the bastardization of the statute begun by *Ellerbe*.⁵⁵

Several subsequent decisions appear to sidestep altogether the issue of whether the statute was intended to protect manufacturers of products installed on real property. Instead, perhaps believing that the issue had finally been put to rest, plaintiffs arguing against application of the statute of repose concentrated on the component part argument, with varying degrees of success. The products involved in these cases included an electrical bus duct,⁵⁶ a heat exchanger at a hydrogen refinery,⁵⁷ underground gasoline storage tanks,⁵⁸ and powdered asbestos material.⁵⁹ These cases did not discuss the propriety of the statute’s protecting manufacturers of products, and *Dedmon* appeared to be the definitive authority on the subject.

A TEXAS COURT OF APPEALS SEES THE LIGHT

In *Williams v U.S. Natural Resources, Inc.*⁶⁰ the Waco Court of Appeals examined the legislative history of Section 16.009 and held that Section 16.009 does not protect a manufacturer that does not actually install the

product on the property. More than ten years after installation, the plaintiffs filed suit against the manufacturer of a furnace that had caused a house fire. The manufacturer had nothing to do with the installation.⁶¹ The court found that the legislature did not intend to protect manufacturers who do not install the product on the real property.⁶² Instead, the intent was to extend protection only to constructors or repairers of improvements to real property.

The court interpreted *Reddix* to hold that materialmen are not protected because they do not install their products, not because they construct only component parts.⁶³ They believed the definition of materialman adopted in *Reddix* conflicted with that court’s inexplicable statement, “component part manufacturers are not protected . . .”⁶⁴ The Waco court therefore interpreted *Reddix* to give meaning to the definition of materialman; otherwise, its inclusion in the case would be superfluous. The court felt that, given the definition of materialman, the only rationale for disqualifying the manufacturer in *Reddix* was its failure to install the product on the realty, not because it had only manufactured a component part.⁶⁵

In addition, the Waco Court of Appeals explained and harmonized its holding with the Supreme Court’s holding in *Conkle*. Based on what it considered the true rationale of *Reddix*, the court believed the *Conkle* court’s choosing of the component part rationale from *Reddix* left an impression that the *Conkle* court denied the defendant repose because it had not manufactured the entire improvement.⁶⁶ The *Williams* court believed that the alternative rationale for *Conkle*—that the product did not qualify as an improvement because it was portable—was sufficient to decide the case.⁶⁷ The *Williams* court did not believe *Conkle* represented an explicit or implicit holding that off-site manufacturers of products are protected.⁶⁸ And it did not accept the *Dedmon* court’s view that the Supreme Court had adopted the so-called “product-oriented approach.”⁶⁹

The *Williams* court refused to follow *Ellerbe*, *Dubin I*, *Dubin II*, and *Rodarte*, which it found contrary to the legislative intent.⁷⁰ It criticized those cases for providing protection to manufacturers that do nothing more than construct personalty.⁷¹ The court believed that the definition of materialman in *Reddix* provided the correct basis for determining coverage under Section 16.009. Clearing up years of confusion, the court in *Williams* summarized its opinion by stating that a manufacturer is a materialman unless it actually installs the product on realty, and whether it manufactures a component part of a product is immaterial.⁷²

LOOKING BACK AT ELLERBE V OTIS ELEVATOR CO.

With the hindsight of *Williams v U.S. Natural Resources Inc.*, it is interesting to look back at the case that began all the confusion. *Ellerbe* clearly recognized a distinction between construction professionals and manufacturers of mass-produced products that just happened to be installed on real property. This begs the question of whether the *Ellerbe* court intended to extend protection to all manufacturers of mass-produced products that become improvements. The court in *Ellerbe* stated, “we do not determine whether materialmen come within the statutory language.”⁷³ The court also cited with approval several cases from other jurisdictions that have recognized a distinction between construction professionals covered by the statute of repose and manufacturers of

mass-produced products who are not.⁷⁴

In one of those cases, *Burmester v Gravity Drainage District No. 2*,⁷⁵ the Louisiana Supreme Court stated:

Suppliers and manufacturers, who typically supply and produce components in large quantities, make standard goods and develop standard processes. They can thus maintain high quality control standards in the controlled environment of the factory. On the other hand, the architect or contractor can pretest and standardize construction designs and plans only in a limited fashion. In addition, the inspection, supervision and observation of construction by architects and contractors involves individual expertise not susceptible of the quality control standards of the factory.⁷⁶

Burmester's rationale for the exclusion of manufacturers contradicts *Ellerbe's* apparent pronouncement that all off-site manufacturers of improvements are protected. The court in *Dayton I* agreed and felt that the *Ellerbe* court's use of the phrase "the manufacture[r] of the elevator would be a person performing or furnishing construction" was not intended to extend repose to all manufacturers.⁷⁷ One way to explain this may be that Otis Elevator probably did not "mass-produce" elevators. It may be that the particular elevator in question was designed and built by Otis Elevator to fit into the particular building involved, which may be more like professional construction than mass production of a fungible good. However, even if true, these facts were not apparent from the opinion, and the *Ellerbe* court did not explain its rationale. Therefore, the courts and litigants reading *Ellerbe* could see only that it held that the manufacture of a product was "construction" under the statute.

CONCLUSION

The final word on this issue has yet to come from the Texas Supreme Court. Some indication of how the justices will respond to this issue has come from a case construing the statute of repose applicable to architects and engineers. In the context of a recent equal protection attack on Section 16.008, the Supreme Court, in *Trinity River Authority v URS Consultants, Incorporated*,⁷⁸ stated its belief that the legislature enacting that statute had rationally distinguished between designers and materialmen who supply manufactured goods for use in construction.⁷⁹ Though the court was not addressing Section 16.009, the statement may indicate the court's approval of the distinction between construction professionals and remote manufacturers.

Should the Supreme Court of Texas adopt the views of *Dayton I*, and *Williams*, it would bring Texas law in line with most other states on statutes of repose. In *Brown v Overhead Door Corporation*⁸⁰ the Western District of Arkansas recently observed that "the majority and clear trend" is to construe similar statutes of repose in such a way that manufacturers of mass-produced fungible goods are not protected.⁸¹ Construing Arkansas' similar statute of repose, the Western District disapproved the reasoning of the Texas courts as articulated in *Dedmon* and agreed with the reasoning of *Dayton I* and *Williams*.⁸² It may be that the judicial chain reaction of confusion initiated by *Ellerbe* may be self-destructing just shy of reaching critical mass.

NOTES

1. TEX. CIV. PRAC. & REM. CODE ANN. § 16.009 (Vernon 1986).
2. See, e.g., *Ablin v Morton Southwest Co.*, 802 S.W.2d 788 (Tex. App.—San Antonio 1990, writ denied).
3. *Dedmon v Stewart-Warner Corp.*, 950 F.2d 244, 247 (5th Cir. 1992); *Dubin v Carrier Corp.*, 731 S.W.2d 651, 653 (Tex. App.—Houston [1st Dist.] 1987), on remand, 798 S.W.2d 1 (Tex. App.—Houston [14th Dist.] 1990, writ dismissed by agr.); see also *Rodarte v Carrier Corp.*, 786 S.W.2d 94 (Tex. App.—El Paso 1990, writ dismissed by agr.).
4. *Ellerbe v Otis Elevator Co.*, 618 S.W.2d 870 (Tex. Civ. App.—Houston [1st Dist.] 1981, writ refused n.r.e.), appeal dismissed, 459 U.S. 802 (1982).
5. *Big West Oil Co. v Willborn Bros. Co.*, 836 S.W.2d 800 (Tex. App.—Amarillo 1992, no writ).
6. *Barnes v Westinghouse Elect. Corp.*, 962 F.2d 513 (5th Cir. 1992).
7. *Marshall Indep. School Dist. v U.S. Gypsum Co.*, 790 F. Supp. 1291 (E.D. Tex. 1992) (Tyler Div.).
8. Bryon D. Shannon, *The Reach for Repose: Have the Texas Courts Gone Awry?*, 24 TEX. TECH. L. REV. 195 (1993) [hereinafter Shannon]. *Dedmon* at 249–250.
9. *Williams v U.S. Natural Resources, Inc.*, 865 S.W.2d 203 (Tex. App.—Waco 1993, n.w.b.); *Dayton Indep. School Dist. v U.S. Mineral Prods.*, 800 F. Supp. 1430, 1434–1438, mod., 789 F. Supp. 819, (E.D. Tex. 1992) (Beaumont Div.).
10. John D. Sours and Jane L. Warren, *Statutes of Repose, CONSTRUCTION LAW*, Nov. 1992, at 36; *Dedmon v Stewart-Warner Corp.*, 950 F.2d 244, 246 (5th Cir. 1992).
11. Sours and Warren, *supra*, note 10, at 36; *Dedmon*, 950 F.2d at 246.
12. Act of May 27, 1969, 61st Leg., R.S. ch. 418, § 1, 1969 TEX. GEN. LAWS 1379 (amended 1985), now codified at TEX. CIV. PRAC. & REM. CODE ANN. § 16.008 (Vernon 1986).
13. Act of May 14, 1975, 64th Leg., R.S., ch. 269, § 1, 1975 TEX. GEN. LAWS 649 (amended 1985), now codified at TEX. CIV. PRAC. & REM. CODE ANN. § 16.009 (Vernon 1986).
14. TEX. CIV. PRAC. & REM. CODE ANN. § 16.009 (Vernon 1986).
15. John D. Sours and Jane L. Warren, *Statutes of Repose, CONSTRUCTION LAW*, Nov. 1992, at 36.
16. *Ellerbe v Otis Elevator Co.*, 618 S.W.2d 870, 872 (Tex. Civ. App.—Houston [1st Dist.] 1981, writ refused n.r.e.), appeal dismissed, 459 U.S. 802 (1982).
17. Then TEX. REV. CIV. STAT. ANN., art. 5536a § 2 (Vernon 1980), now codified at § 16.009.
18. *Ellerbe*, 618 S.W.2d at 871.
19. *Id.*
20. 662 S.W.2d 720, 724 (Tex. App.—San Antonio 1983, writ refused n.r.e.).
21. *Id.* at 721–722.
22. *Reddix*, 662 S.W.2d at 724.
23. *Reddix*, 662 S.W.2d at 724, (emphasis in original) (citing *Huddleston v Nislar*, 72 S.W.2d 959, 962 (Tex. Civ. App.—Amarillo 1934, writ refused)).
24. *Id.*
25. See *Dedmon v Stewart Warner Corp.*, 950 F.2d 244, 249 (5th Cir. 1992).
26. *Reddix*, at 724.
27. *Dubin v Carrier Corp.*, 731 S.W.2d 651 (Tex. App.—Houston [1st Dist.] 1987), on remand, 798 S.W.2d 1 (Tex. App.—Houston [14th Dist.] 1990, writ dismissed by agr.) (manufacturer and distributor of defective wall heater sued for wrongful death. Heating unit was held to be a "improvement to real property" and manufacturer was protected by statute of repose because it had "furnished construction of an improvement. . . ." Distributor of wall heater functioned as a manufacturer of an improvement and was also given protection. Nonetheless, the defendant's summary judgment was denied, and the case was remanded because of lack of proof that the heater was installed ten years prior to the incident.).

28. 749 S.W.2d 489 (Tex. 1988).
29. *Id.* at 491.
30. *Id.*
31. 786 S.W.2d 94 (Tex. App.—El Paso 1990, *writ dismissed by agr.*).
32. *Id.* at 95.
33. TEX. CIV. PRAC. & REM. CODE ANN. § 16.009 (Vernon 1986); *see* *Dedmon v Stewart-Warner Corp.*, 950 F.2d 244, 247 (5th Cir. 1992).
34. *Rodarte*, 786 S.W.2d at 96.
35. 950 F.2d 244 (5th Cir. 1992).
36. *Id.* at 245.
37. *Id.*
38. *Id.*
39. *Dedmon*, 950 F.2d at 248.
40. *Id.* at 249.
41. *Id.* at 248.
42. *Id.* at 246.
43. *Id.* at 249.
44. *Id.* at 250.
45. *Id.* at 249.
46. 800 F. Supp. 1430, *mod.*, 789 F. Supp. 819, (E.D. Tex. 1992) (Beaumont Div.).
47. *Id.* at 1439.
48. *Id.*
49. *Id.* at 1433–1434; *See* Debate on Tex. H.B. 1105 on the Floor of the House of Representatives, 64th Leg., R.S. (April 22, 1975); Debate on Tex. H.B. 1105 in the Committee of the Judiciary, 64th Leg., R.S. (April 1, 1975) (transcripts available through the Office of the House Committee Coordinator).
50. *Dayton I*, 800 F. Supp. at 1438.
51. *Dayton Indep. School Dist. v U.S. Mineral Prods.*, 789 F. Supp. 819 (E.D. Tex. 1992) (Beaumont Div.).
52. *Id.* at 821.
53. *Id.*
54. *Id.* n.1.
55. *Marshall Indep. School Dist. v U.S. Gypsum Co.*, 790 F. Supp. 1291 (E.D. Tex. 1992) (Tyler Div.) (In this asbestos case factually similar to *Dayton*, the court felt compelled to follow *Dedmon*. The court felt that *Dedmon* in fact did address the legislative intent despite the *Dedmon*'s court finding itself constrained by "the unbroken line of Texas authority to the contrary").
56. *Barnes v Westinghouse Elect. Corp.*, 962 F.2d 513 (5th Cir. 1992) (Plaintiff did not even argue that defendant was excluded from protection because it was merely the manufacturer of a product).
57. *Karisch v Allied-Signal, Inc.*, 837 S.W.2d 679 (Tex. App.—Corpus Christi 1992, *no writ*) (Plaintiff argued only that heat exchanger was a component part).
58. *Big West Oil Co. v Willborn Bros. Co.*, 836 S.W.2d 800 (Tex. App.—Amarillo 1992, *no writ*) (Plaintiff argued only that underground gasoline storage tanks were component parts).
59. *Corbally v W.R. Grace & Co.*, 993 F.2d 4092 (5th Cir. 1993) (Asbestos powder held not protected by statute because it was a component part. Court found it unnecessary to "re-examine the troubling question whether the statutes would apply to materialmen [sic] if he could 'construct an improvement' because in this case the manufacturer did not").
60. 865 S.W.2d 203 (Tex. App.—Waco 1993, *n.w.b.*) (Opinion by the Chief Justice).
61. *Id.* at 204.
62. *Id.* at 206.
63. *Id.* at 207–208.
64. *Id.* (quoting *Reddix*, 662 S.W.2d at 724).
65. *Id.* at 208.
66. *Id.*
67. *Williams*, 865 S.W.2d at 208.
68. *Id.* at 209.
69. *Id.*
70. *Id.* at 209.
71. *Id.*
72. *Williams*, 865 S.W.2d at 209.
73. 618 S.W.2d at 873.
74. *Burmaster v Gravity Drainage Dist. No. 2*, 366 So.2d 1381 (La. 1978); *Carter v Hartenstein*, 455 S.W.2d 918 (Ark. 1970) ("a vital distinction . . . exists between owners or suppliers and those engaged in the professions and occupations of design and building"); *Howell v Burk*, 568 P.2d 214 (N.M. App. 1977) (if defendant were sued as manufacturer or seller, it would not be covered by repose).
75. 366 So.2d 1381 (La. 1978).
76. *Id.* at 1386. This language was recently cited with approval by the Texas Supreme Court in *Trinity River Authority v URS Consultants, Inc.*, — S.W.2d —, 37 Tex. Sup. Ct. J. 742, 746 (1994). *Trinity* involved an equal protection attack on TEX. CIV. PRAC. & REM. CODE, § 16.008. *See* notes 104–105 *et seq.* and accompanying text.
77. 800 F. Supp. at 1435.
78. — S.W.2d —, 37 Tex. Sup. Ct. J. 742 (1994).
79. 37 Tex. Sup. Ct. J. at 746.
80. 843 F. Supp. 482 (W.D. Ark. 1994).
81. *Id.* (citing *Uricam Corp., N.V. v W.R. Grace & Co.*, 739 F. Supp. 1493 (W.D. Okla. 1990)); *see also* *Dighton v Federal Pacific Elect. Co.*, 506 N.E.2d 509 (Mass. 1987); *Reeves v Ille Elect. Co.*, 551 P.2d 647 (Mont. 1976); *Blaske v Smith & Entzeroth, Inc.*, 821 S.W.2d 822 (Mo. 1991) (en banc); *Murphy v Spelts-Schultz Lumber Co.*, 481 N.W.2d 422 (Neb. 1992); *Basham v General Shale*, 377 S.E.2d 830 (W.Va. 1988); *but see* *Fleck v KDI Sylvan Pools, Inc.*, 981 F.2d 107 (3d Cir. 1992) (Pennsylvania law); *Catanzaro v Wasco Prod., Inc.*, 489 A.2d 262 (Pa.Super. 1985).
82. *Brown*, 843 F. Supp. at 490.