



# Hernia Mesh:

## Litigating a New Mass Product Defect

By Ted Leopold and Nicholas Johnson

The day time and late night television commercials are still soliciting individuals who have been implanted with the now infamous transvaginal mesh. Just type the word “transvaginal” in Google and a majority of the search results will include information on either pending or resolved lawsuits involving transvaginal mesh products. A less publicized, but equally dangerous product, has now made its way into the well of the courtroom: Hernia mesh. There are currently 13 hernia mesh cases filed in New Jersey state court which are actively being litigated. The manifestation of the harm this product poses may take significant time to develop, and a careful reading and interpretation of Florida’s statute of limitations in conjunction with the statute of repose is necessary to identify clients who still have viable claims despite protracted periods of time.

A hernia is the bulging of an organ through an opening in the muscle or tissue which holds it in place. Most hernias are either inguinal (located in the lower abdomen, near or adjacent to the pubic area), or ventral (located in the abdomen), and affect men, women, and children. Hernia repair is one of the most common surgical procedures, with more than a million patients per year undergoing some type of hernia-related surgery. Patients undergoing either laparoscopic or open surgery are commonly implanted with a mesh, which is meant to reinforce the abdominal wall after the hernia is pushed back into place.

Many of the mesh products available to doctors for hernia repair surgeries are comprised of heavyweight polypropylene material, which has been linked directly with long term chronic pain. This type of mesh was first used five decades ago in the 1960’s, and its design has remained virtually unchanged. Heavyweight polypropylene mesh is comprised of knitted thread-like structures which contain tiny pores.

Since this mesh is a foreign body, it causes an inflammatory response when implanted. Its tensile strength, which vastly exceeds the degree of strength needed to protect against naturally occurring intra-abdominal pressures, along with the composition of these tiny pores, increase the inflammatory response. This results in the gradual shrinking of the mesh, which becomes brittle and sharp, pushing against organs and causing chronic, debilitating pain.

This development can take significant time to develop, pushing (no pun intended) against both Florida’s 4-year statute of limitations and 12-year statute of repose. The statute of limitations period begins to run “from the date that the facts giving rise to the cause of action were discovered, or should have been discovered with the exercise of due diligence.” *Fla. Stat. § 95.031 (2) (b)* (2014). The statute of repose bars any suits “[i]f the harm was caused more than 12 years after the sale of the product to the first purchaser.” *Kravitz v. Evans Medical Ltd.*, 741 F. Supp. 1299, 1304 (S.D. Fla. 2010).

Florida’s prior statute of repose, repealed in 1986, barred products liability suits filed more than 12 years after the product was sold to the first purchaser. Despite its repeal, defendants continue to argue that any suit beyond 12 years of the purchase of the product is time-barred. *See Id.* Unfortunately, Florida state courts have not sufficiently weighed in on this issue to afford us valuable precedent. However, the U.S. District Court of the Southern District of Florida has provided some guidance on this issue. *See Kravitz v. Evans Medical Ltd.*, 741 F. Supp. 1299 (S.D. Fla. 2010)

Unlike traditional statutes of repose, Florida’s current statute of repose includes somewhat subjective language regarding the manifestation of

the harm caused by the product, which should give claimants an avenue to the court's entrance. "The repose period . . . does not apply if the claimant was exposed to or used the product within the repose period, but an injury caused by such exposure or use did not manifest itself until after expiration of the repose period." *See Fla. Stat. § 95.031 (2) (c)* (2014). For example, a claimant who was implanted with a heavyweight polypropylene mesh in 2000 would be barred from suit under the previous statute of repose if he/she tried to bring suit today. However, it can be argued that the current statute of repose would certainly not preclude suit today, as long as the injury manifested itself within the 12-year statute of repose, and the claimant would have sufficient time left under the four-year statute of limitations to file suit.

In other words, the current statute of repose language "if the harm was caused", distinguishes Florida's statute of repose from other jurisdictions' respective statutes, giving potential claimants access to the courts which would not have been granted under Florida's previous products liability statute of repose. Hypothetically speaking, if a potential claimant was implanted with heavyweight polypropylene mesh in 2000, and the harm caused by the mesh presented itself in 2011, the current statute of repose, in operation with the statute of limitations, would give this individual four years from the date he/she discovered the harm to file suit. *See Kravitz*, 741 F. Supp. at 1304 (S.D. Fla. 2010) ("If the harm was caused more than 12 years after the sale of the product to the first purchaser, the statute of repose constitutes an absolute bar. If not, then the applicable statute of limitations determines whether the claim is timely.")

With the vast number of hernia repair surgeries having taken place over the years, we can expect to face situations in which traditional statutes of repose would normally bar suit. Five simple words, "if the harm was caused", separates Florida's current statute of repose from traditional statutes of repose. Bear in mind, "[l]egislators do not always draft correctly or carefully, and statutory construction focuses primarily on the text, and not on the supposed unexpressed motives of lawmakers." *Id.* Notwithstanding traditional statutes of repose which set forth an absolute deadline to the filing of a lawsuit, the text of Florida's current statute of repose opens a new door. ■




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