SMU | Dedman School of Law

SMU Law Review

Volume 37 | Issue 3 Article 5

1983

Statutes of Repose in Products Liability: Death Before Conception

Laurie L. Kratky

STATUTES OF REPOSE IN PRODUCTS LIABILITY: DEATH BEFORE CONCEPTION?

by Laurie L. Kratky

STATUTES of limitation are legislatively prescribed time limits on the assertion of otherwise valid legal claims.[1] The statutes are procedural devices intended to protect courts and defendants from the difficulties of resolving stale claims.[2] By penalizing a plaintiff for delay in asserting his rights, statutes of limitation treat the ability to pursue a cause of action as a privilege instead of a right. The statutes focus on the conduct of the plaintiff, not on the merits of his claim.[3] Traditionally they have been recognized as procedural, rather than substantive, statutes; because they are matters of remedy rather than right, they are subject to a large degree of legislative discretion and corresponding judicial deference.[4]

Statutes of limitation may, however, be more than mere procedural devices intended to effect administrative convenience. The application and operation of such limitations often raise important philosophical, economic, political, and constitutional issues.[5] These issues become especially pronounced in the context of products liability actions, where a plaintiff injured by a product may be barred from seeking recovery due to the operation of a statute of limitation.[6] In that sense the statutes have played a

1. *See generally* Comment, *Developments in the Law—Statutes of Limitation*, 63 HARV. L. REV. 1177, 1185 (1950) (discussion of variety and purpose of statutes of limitation).

2. The United States Supreme Court has voiced this justification many times. *See* Chase Sec. Corp. v. Donaldson, 325 U.S. 304, 314 (1945); Order of R.R. Telegraphers v. Railway Express Agency, Inc., 321 U.S. 342, 348-49 (1944). *But see* Burnett v. New York Cent. R.R., 380 U.S. 424, 428 (1965), where the court stated that the "policy of repose, designed to protect defendants, is frequently outweighed . . . where the interests of justice require vindication of the plaintiff's rights."

3. Massery, *Date-of-Sale Statutes of Limitations—A New Immunity for Product Suppliers*, 1977 INS. L.J. 535, 537.

4. *See* Chase Sec. Corp. v. Donaldson, 325 U.S. 304, 314 (1945); *see also* Comment, *Statutes of Limitations: Their Selection and Application in Products Liability Cases*, 23 VAND. L. REV. 775 (1970) (discussion of theoretical and pragmatic issues involved when statutes of limitation are applied in products actions).

5. *See* McGovern, *The Variety, Policy and Constitutionality of Product Liability Statutes of Repose*, 30 AM. U.L. REV. 579, 581 (1981), for an in-depth examination of the sometimes "non-legal" issues surrounding statutes of limitation.

6. *See, e.g.*, Citizens Casualty Co. v. Aeroquip Corp., 10 Mich. App. 244, 159 N.W.2d 223, 225 (1968) (negligence and warranty action against manufacturer of tank truck barred by three-year statute of limitation); Heavner v. Uniroyal, Inc., 118 N.J. Super. 116, 286 A.2d 718, 720 (Super. Ct. App. Div. 1972) (action by tires purchaser injured in blowout barred by

role in preventing manufacturers from becoming absolute insurers of their products.[7] These limitations, however, have done little to alleviate what manufacturers perceive as their susceptibility to perpetual liability. This concern by manufacturers has led to a legislative backlash in recent years resulting in the enactment of products liability statutes of repose.

Statutes of repose usually provide a maximum limitation period running from the date of manufacture or sale during which an action must be brought. Once that time period has elapsed an action is completely barred.[8] Thus, while a statute of limitation bars a cause of action sometime after injury, a statute of repose can bar a cause of action before it ever accrues, that is, before the injury occurs. In this sense statutes of repose can be thought of as affecting substantive rights. This characteristic distinguishes statutes of repose from purely procedural statutes of limitation.[9] Repose statutes are therefore considered different in degree, if not in kind, from statutes of limitation.[10] This Comment analyzes the operation, variety, and constitutionality of various statutes of repose, and explores the probability of the enactment and efficacy of a similar products liability statute of repose in Texas. This Comment concludes that statutes of repose for products actions are contrary to the philosophy behind strict products liability because such statutes deprive the injured consumer of his right of action.

I. PRODUCTS LIABILITY: THEORY AND POLICY

Products liability involves the liability of a manufacturer of a product[11]

---

two-year statute of limitation), *aff'd*, 63 N.J. 130, 305 A.2d 412 (1973); *see also infra* notes 51-85 and accompanying text (statutes of limitation in products liability actions).

7. Although the liability in a strict products liability action is indeed often strict, it is not absolute. Courts have never gone so far as to hold manufacturers absolute insurers of their products. *See infra* notes 11-13 and accompanying text.

8. *See* Comment, *Statutes of Repose in Products Liability: The Assault Upon the Citadel of Strict Liability*, 23 S.D.L. REV. 149 (1978) (overview of such statutes).

9. *See* Comment, *supra* note 1, at 1186-88, for a discussion of the substantive and procedural characteristics of statutes of limitation. These characteristics become crucial in choice of law questions. Traditional statutes of limitation are classified as procedural; thus the law of the forum state applies. If statutes of repose are characterized as more substantive than procedural, the law of the place where the cause of action arose would apply. The multistate character of most products actions makes this distinction increasingly important and complex. *See* Note, *Date-of-Sale Statutes of Limitation: An Effective Means of Implementing Change in Products Liability Law?*, 30 CASE W. RES. L. REV. 123, 130 (1979) (choice of law problems involving statutes of repose); *see also* Vernon, *Statutes of Limitation in Conflict of Laws: Borrowing Statutes*, 32 ROCKY MTN. L. REV. 287 (1960).

10. A great deal of confusion exists as to whether a statute of repose is really a statute of limitation as opposed to an entirely separate statutory entity. *See* Hawkins v. D. & J. Press Co., 527 F. Supp. 386, 388 (E.D. Tenn. 1981) (Tennessee's statute of repose not conventional statute of limitation); Buckner v. GAF Corp., 495 F. Supp. 351, 355 (E.D. Tenn. 1979) (Tennessee's repose statute not normal limitation statute).

11. In this Comment the term "manufacturer" will be used to describe all persons regularly engaged in the business of supplying or marketing a product. This liability extends not only to manufacturers as defined by the layman, but also to retailers of the product, Vandermarck v. Ford, 61 Cal. 2d 256, 391 P.2d 168, 171, 37 Cal. Rptr. 896, 899 (1964) (retailer an "integral part of . . . marketing enterprise"); lessors, Galluccio v. Hertz Corp., 1 Ill. App. 3d 272, 274 N.E.2d 178, 182-83 (1971) (lessor of van strictly liable for injuries

for the harm to person or property caused by a defect in that product.[12] For an injured consumer to recover in any products liability action, he must show that the manufacturer was the maker or seller of the product that caused his injuries, and that the product was somehow foreseeably dangerous or defective at the time it left the manufacturer's hands.[13] Considerable confusion presently surrounds products liability actions, however, because a consumer can proceed upon one or more of three possible theories of recovery—negligence, warranty, or strict liability[14]—each involving potentially differing standards of conduct and liability, and subject to differing statutes of limitation.[15]

A. Negligence

At early common law a person injured by a negligently manufactured product could not recover unless he could prove that the manufacturer had breached a contractual duty owed to him.[16] Thus, if a manufacturer sold a product to a retailer, and the retailer subsequently sold it to a consumer, the consumer could not recover from the manufacturer for negligence because no contractual relationship existed between them.[17] The requirement of a contractual relationship, or privity, between manufacturers and

---

caused by defective brakes); assemblers of component parts, Pender Constr. Co. v. Finley, 485 S.W.2d 244, 250 (Ky. 1972) (assembler of skid shovel part proved defective, held strictly liable); franchisors, Kosters v. Seven-Up Co., 595 F.2d 347, 352-53 (6th Cir. 1979) (franchisor who retained control over franchisee's behavior held liable for defective product); and potentially any other person in the chain of manufacture. A discussion of the apportionment of liability between these possible defendants is beyond the scope of this Comment. For a proposed statutory mechanism of apportionment, see MODEL UNIFORM PRODUCT LIABILITY ACT § 105, 44 Fed. Reg. 62,714, 62,726 (1979) [hereinafter cited as UPLA].

12. For a comprehensive overview of the historical development of products liability actions, see D. NOEL & J. PHILLIPS, PRODUCTS LIABILITY IN A NUTSHELL 1-12 (1974); W. PROSSER, HANDBOOK OF THE LAW OF TORTS §§ 96-98 (4th ed. 1971); Prosser, *The Assault upon the Citadel*, 69 YALE L.J. 1099 (1960) [hereinafter cited as Prosser, *The Assault*]; Prosser, *The Fall of the Citadel*, 50 MINN. L. REV. 791 (1966) [hereinafter cited as Prosser, *The Fall*].

13. RESTATEMENT (SECOND) OF TORTS § 402A (1965); *see also* Comment, *supra* note 8, at 150 (discussing plaintiff's burden of proof in products liability action).

14. For practical considerations of which a plaintiff should be aware in choosing a theory of recovery, see generally W. KIMBLE & R. LESHER, PRODUCTS LIABILITY § 11 (1979); P. SHERMAN, PRODUCTS LIABILITY FOR THE GENERAL PRACTITIONER § 12.11 (1981). Cases illustrating differing results under different theories of recovery include Grenno v. Clark Equip. Co., 237 F. Supp. 427 (N.D. Ind. 1965) (complaint against truck manufacturer for injuries sustained sufficient to state claim for relief based on strict liability); Seely v. White Motor Co., 63 Cal. 2d 9, 403 P.2d 145, 45 Cal. Rptr. 17 (1965) (purchaser recovered from manufacturer for truck defect in breach of warranty action); Santa v. A. & M. Karagheusian, Inc., 44 N.J. 52, 207 A.2d 305 (1965) (plaintiff allowed breach of implied warranty action directly against manufacturer, despite lack of privity).

15. *See infra* notes 51-85 and accompanying text.

16. Winterbottom v. Wright, 10 M. & W. 109, 152 Eng. Rep. 402 (1842).

17. The first cases deviating from the privity requirement involved food and products with inherently dangerous characteristics. *See, e.g.*, Pillars v. R.J. Reynolds Tobacco Co., 117 Miss. 490, 78 So. 365 (1918) (chewing tobacco); Tomlinson v. Armour & Co., 75 N.J.L. 748, 70 A. 314 (1908) (food); Loop v. Litchfield, 42 N.Y. 351 (1870) (saw); Boyd v. Coca Cola Bottling Works, 132 Tenn. 23, 177 S.W. 80 (1914) (drink).

consumers was abandoned in *MacPherson v. Buick Motor Co.*[18] and liability for ordinary negligence was imposed on the manufacturer.[19] The *MacPherson* court reasoned that manufacturers were in a better position than consumers to anticipate the potential uses and dangers of their products.[20] The court therefore imposed a duty upon manufacturers to exercise ordinary care in the manufacture of their products and to guard against reasonably foreseeable injuries resulting from the use of those products.[21] Proving that a manufacturer has failed to exercise reasonable care is no easy task,[22] however, and may be further complicated by the availability of affirmative defenses such as assumption of risk, contributory negligence, and misuse.[23]

B. Warranty

An injured consumer may also seek to hold a manufacturer liable for breach of an express or implied warranty if the product sold is unfit for its foreseeable use or below its represented quality.[24] Actions in warranty may be grounded on express contract or affirmation of fact,[25] or on a legally implied warranty that the product is safe for normal use.[26] The liability imposed in warranty actions is strict in the sense that it is imposed without regard to whether the manufacturer exercised due care or was in any way at fault.[27] In this way an injured plaintiff may sidestep the often impossible burden of proof associated with negligence actions.[28] Recovery

18. 217 N.Y. 382, 111 N.E. 1050 (1916) (manufacturer of automobile with defective wheel found negligent for failing to inspect).

19. 111 N.E. at 1053.

20. *Id.* In imposing the affirmative duty to inspect, Justice Cardozo stated: "The more probable the danger the greater the need of caution. . . . Reliance on the skill of the manufacturer was proper and almost inevitable." *Id.* at 1055.

21. *Id.* at 1054. For a discussion of *MacPherson* and its impact on products liability law, see W. PROSSER, *supra* note 12, § 96, at 642-43; Comment, *supra* note 8, at 152-53. *See also* Peck, *Negligence and Liability without Fault in Tort Law*, 46 WASH. L. REV. 225 (1971) (survey of tort law showing development of liability without fault).

22. *See infra* notes 102-03, 113-14 and accompanying text (problems both manufacturers and consumers often encounter in proving and defending products liability action).

23. *See* D. NOEL & J. PHILLIPS, *supra* note 12, at 219-43; W. PROSSER, *supra* note 12, §§ 65-68; Comment, *supra* note 8, at 159-63.

24. *See, e.g.*, Baxter v. Ford Motor Co., 179 Wash. 123, 35 P.2d 1090 (1934), where the manufacturer of an automobile with a defective windshield was held strictly liable. Although the action was based on express warranty, the *Baxter* court held that a manufacturer should be strictly liable for all representations upon which consumers must rely, regardless of the type of contractual relationship between parties. 35 P.2d at 1091; *see also* W. PROSSER, *supra* note 12, § 97 (discussing warranty liability based on express representations); P. SHERMAN, *supra* note 14, § 3 (discussion of warranty actions in products liability).

25. *See* U.C.C. § 2-313 (1978) (express warranties defined).

26. Cases in which an implied warranty was imposed as a matter of social policy as opposed to as a matter of contract or tort law include Schley v. Zalis, 172 Md. 336, 191 A. 563 (1937) (frozen tomatoes); Spence v. Three Rivers Builders & Masonry Supply, Inc., 353 Mich. 120, 90 N.W.2d 873 (1958) (cinder building blocks); Jacob E. Decker & Sons v. Capp, 139 Tex. 609, 164 S.W.2d 828 (1942) (food). Implied warranties have been codified in the Uniform Commercial Code. U.C.C. § 2-314 (1978) (Implied Warranty of Merchantability); *id.* § 2-315 (1978) (Implied Warranty of Fitness for a Particular Use).

27. W. PROSSER, *supra* note 12, § 97, at 650-51; Comment, *supra* note 8, at 153.

28. Not only does the burden of proof differ in negligence and warranty actions, but so

in warranty, however, is often confusing due to the hybrid character of the action, which originated in both tort and contract.[29] Because warranty was traditionally viewed as a contract action, courts usually required the existence of privity between buyer and seller.[30] In *Henningsen v. Bloomfield Motors, Inc.*[31] this privity requirement was abandoned and a form of strict liability was imposed upon a manufacturer in a warranty action.[32] *Henningsen* extended the protection of an implied warranty not only to the ultimate consumer, but to all foreseeable users.[33] Actions in warranty, like those in negligence, are subject to a number of procedural defenses, including notice requirements,[34] disclaimers,[35] and statutes of limitation.[36]

C. Strict Liability

Because of the difficulties involved in bringing products actions under negligence or warranty theories, some commentators began to suggest that manufacturers of defective products should be held strictly liable as a matter of public policy.[37] In the landmark case of *Greenman v. Yuba Power Products*[38] this suggestion became law. The California Supreme Court abrogated privity and standard of care requirements and imposed strict tort liability on manufacturers whose defective products caused injury to users or consumers.[39] This theory of recovery was codified in section 402A of

---

does the type of recoverable damages. Generally, if a plaintiff suffers economic injury along with personal or property injury, he can recover for the economic losses under any theory. When only economic loss is involved, however, the manufacturer may not be liable under negligence, but may be liable under warranty. D. NOEL & J. PHILLIPS, *supra* note 12, at 107-14.

29. For a discussion of the hybrid character of products liability warranty actions and the problems arising from warranty's origin in both tort and contract, see D. NOEL & J. PHILLIPS, *supra* note 12, at 13-15; Prosser, *The Assault*, *supra* note 12, at 1127-34; Prosser, *The Fall*, *supra* note 12, at 800-05.

30. R. HURSH & H. BAILEY, American Law of Products Liability § 10:8 (2d ed. 1974).

31. 32 N.J. 358, 161 A.2d 69 (1960) (breach of warranty action against manufacturer of auto that caused injury to purchaser's wife).

32. 161 A.2d at 100-01. The *Henningsen* court enunciated what soon came to be known as the inherently dangerous doctrine:

> [W]here the commodities sold are such that if defectively manufactured they will be dangerous to life and limb, then society's interests can only be protected by eliminating the requirement of privity between the maker and his dealers and the reasonably expected ultimate consumer. In that way the burden of losses consequent upon use of defective articles is borne by those who are in a position to either control the danger or make an equitable distribution of the losses when they do occur.

Id. at 81.

33. *Id.* at 100.

34. U.C.C. § 2-607(3) (1978).

35. *Id.* § 2-316.

36. *See infra* notes 59-69 and accompanying text.

37. *See, e.g.*, Escola v. Coca Cola Bottling Co., 24 Cal. 2d 453, 461, 150 P.2d 436, 440 (1944) (Traynor, J., concurring): "[I]t should now be recognized that a manufacturer incurs an absolute liability when an article that he has placed on the market, knowing that it is to be used without inspection, proves to have a defect that causes injury to human beings."

38. 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1962).

39. 377 P.2d at 900, 27 Cal. Rptr. at 700.

the *Restatement (Second) of Torts*[40] and ultimately adopted by statute or judicial decision in a majority of states.[41] In order to recover under a theory of strict tort liability, an injured consumer must prove that the product causing injury, because of its defective condition, was "unreasonably dangerous to the user or consumer" when it left the manufacturer's hands.[42] No contractual relationship or lack of care on the part of the manufacturer need be shown.[43] The category of available defenses to strict liability has been reduced to include only misuse,[44] assumption of risk,[45] and statutes of limitation.[46] Contributory negligence or disclaimers of liability will not defeat recovery.[47] The policy reasons advanced to justify this increased liability are many and varied.[48] Aside from the protection of human life and compensation of injured parties, many have argued that the manufacturer is in a better economic position to control the risks and spread the losses associated with defective products.[49] Others contend that strict liability provides the incentive necessary for the production of safe products.[50] Against this background of broad manufacturer liability legislative reforms such as statutes of repose have evolved and must be analyzed. Before these statutes can be explored, however, it is first necessary to examine the role played and confusion engendered by traditional statutes of limitation in products liability actions.

---

40. (1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if (a) the seller is engaged in the business of selling such a product, and (b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.

(2) The rule stated in Subsection (1) applies although (a) the seller has exercised all possible care in the preparation and sale of his product, and (b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

RESTATEMENT (SECOND) OF TORTS § 402A (1965). The key factor is finding the product "defective." Hence, the liability of manufacturers is not absolute.

41. For the present status of strict liability in the various states, see 2 L. FRUMER & M. FRIEDMAN, PRODUCTS LIABILITY § 16A[3] n.2 (1983).

42. RESTATEMENT (SECOND) OF TORTS § 402A (1965).

43. *Id.*

44. Misuse occurs when a user or consumer of a product uses or mishandles it in an unusual and unforeseeable way. *See* W. PROSSER, *supra* note 12, § 102, at 668-69.

45. In order to prove the assumption of the risk defense a manufacturer must show that the consumer knew and appreciated the risk attending a defective product, but nevertheless voluntarily proceeded to encounter it. RESTATEMENT (SECOND) OF TORTS § 402A comment n (1965).

46. *See, e.g.*, TEX. REV. CIV. STAT. ANN. art. 5526 (Vernon Supp. 1982-1983) (plaintiff has two years after cause of action accrues in which to bring products liability claim).

47. *See* Comment, *supra* note 8, at 159-64 (defenses available in products liability action).

48. *See generally* Owen, *Rethinking the Policies of Strict Products Liability*, 33 VAND. L. REV. 681 (1980) (discussion of traditional policies behind strict liability and their applicability in light of modern realities).

49. *See* Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 161 A.2d 69, 81 (1960). *But see* Calabresi, *Product Liability: Curse or Bulwark of Free Enterprise*, 27 CLEV. ST. L. REV. 313 (1978) (questioning risk allocation rationale in a free market society).

50. McGovern, *supra* note 5, at 590.

II. STATUTES OF LIMITATION AND PRODUCTS LIABILITY: VARIETY AND CONFUSION

The problem of determining which statute of limitation applies, and when that statute begins to run, becomes complicated in the context of products liability actions. At present several possible statutes of limitation, with differing limitation periods and accrual points, may apply depending on whether the action is brought in negligence, warranty, or strict liability, whether the injury is to person or property, and whether a contract, if involved, is written or oral. Hence, a plaintiff may effectively choose among several statutes of limitation depending upon how he pleads his case.[51] The ability to plead alternative theories of recovery can lead to the anomaly of having several statutes of limitation applicable to the same underlying cause of action.[52]

Negligence. Most state courts treat products liability suits grounded in negligence as subject to the state's general tort or negligence statutes.[53] These vary in length from one to six years,[54] with two years the most common period.[55] The majority of jurisdictions have held that a products liability cause of action founded on a manufacturer's failure to exercise due care accrues at the time of injury.[56] In addition, courts often apply a "discovery rule" to products actions, holding that a cause of action accrues at the time the plaintiff discovers, or in the exercise of reasonable care should have discovered, his injury.[57] This accrual date may be further postponed until the plaintiff discovers the causal relationship between his injury and

---

51. *See* D. NOEL & J. PHILLIPS, *supra* note 12, at 320-25; McGovern, *The Status of Statutes of Limitations and Statutes of Repose in Product Liability Actions: Present and Future*, 16 FORUM 416, 420 (1981); Phillips, *An Analysis of Proposed Reform of Products Liability Statutes of Limitations*, 56 N.C.L. REV. 663, 665-66 (1978); Note, *supra* note 9, at 130.

52. Matlack, Inc. v. Butler Mfg. Co., 253 F. Supp. 972, 975-76 (E.D. Pa. 1966) (warranty actions controlled by UCC period, and negligence action governed by personal injury statute); Layman v. Keller Ladders, Inc., 224 Tenn. 396, 455 S.W.2d 594, 596 (1970) (UCC governs warranty part of action, while tort statute governs personal injury part).

53. *See, e.g.*, Boans v. Lasar Mfg. Co., 330 F. Supp. 1134 (D. Conn. 1971); Rodibaugh v. Caterpillar Tractor Co., 225 Cal. App. 2d 570, 37 Cal. Rptr. 646 (1964); Blessington v. McCrory Stores Corp., 305 N.Y. 140, 111 N.E.2d 421 (1953).

54. W. KIMBLE & R. LESHER, *supra* note 14, § 292, at 318. Some jurisdictions may also have different limitation periods for personal and property damage. *Id.*

55. *See, e.g.*, TEX. REV. CIV. STAT. ANN. art. 5526 (Vernon Supp. 1982-1983).

56. *See, e.g.*, Rodibaugh v. Caterpillar Tractor Co., 225 Cal. App. 2d 570, 37 Cal. Rptr. 646, 647-48 (1964) (accrual when plaintiff injured by bulldozer); Canon v. Sears, Roebuck & Co., 374 Mass. 739, 374 N.E.2d 582, 584 (1978) (cause of action for ladder collapse accrued at date of injury). Some jurisdictions hold that products liability actions in negligence accrue at the date of sale. Such date-of-sale treatment typically results from peculiarly worded negligence statutes. *See* Dincher v. Marlin Firearms Co., 198 F.2d 821, 823 (2d Cir. 1952) (personal injury statute barring actions brought more than one year after date of "act or omission complained of" held to accrue at time defective rifle was put on market by manufacturer).

57. 3A L. FRUMER & M. FRIEDMAN, *supra* note 41, § 39.01[3]; *see also* Birnbaum, *"First Breath's" Last Gasp: The Discovery Rule in Product Liability Cases*, 13 FORUM 279 (1977) (review of application of discovery rule versus date-of-injury decisions in products liability actions).

the defendant's conduct.[58] Thus, statutes of limitation in negligence actions have historically been liberally construed to allow an injured plaintiff to seek judicial redress.

Warranty. Establishing when a cause of action accrues in warranty is a perplexing task, due to the contract and tort origins of warranty, as well as the enactment of the Uniform Commercial Code (UCC), which contains its own statute of limitation in warranty actions. The UCC requires that the cause of action be brought within four years of the date on which the breach occurs.[59] A breach of warranty is generally held to accrue at the time of delivery or sale, unless the warranty explicitly extends to future performance.[60] The warranty limitation applies regardless of the plaintiff's knowledge of breach or injury.[61] Thus, there is no discovery rule in UCC warranty statutes of limitation.

Before the widespread adoption of the Uniform Commercial Code, most states took the position that the tort statute of limitation applied in products liability actions regardless of whether the action was brought under an implied warranty theory.[62] After widespread enactment of the UCC, however, a considerable split of authority developed, and still exists, on the issue of whether the contract or tort statute of limitation applies in products actions.[63] A minority of jurisdictions retain the common law rule that implied warranty actions are essentially tort actions and therefore apply the personal injury statute of limitation.[64] Most jurisdictions, on the other

58. *See, e.g.*, Roman v. A.H. Robins Co., 518 F.2d 970, 971 (5th Cir. 1975) (plaintiff injured by drug barred from bringing action because she discovered injury five years before suit); Sindell v. Abbott Laboratories, 85 Cal. App. 3d 1, 149 Cal. Rptr. 138, 151 (1978) (DES and prenatal injury; statute begins at discovery), *rev'd on other grounds*, 26 Cal. 3d 588, 607 P.2d 924, 163 Cal. Rptr. 132, *cert. denied*, 449 U.S. 912 (1980); Louisville Trust Co. v. Johns-Manville Prods. Corp., 580 S.W.2d 497, 500-01 (Ky. 1979) (lung cancer caused by asbestos; statute commences at discovery).

59. U.C.C. § 2-725(1) (1978). Section 2-725(2) sets the date of accrual, providing:

> A cause of action accrues when the breach occurs, regardless of the aggrieved party's lack of knowledge of the breach. A breach of warranty occurs when the tender of delivery is made, except that where a warranty explicitly extends to future performance of the goods and discovery of the breach must await the time of such performance the cause of action accrues when the breach is or should have been discovered.

Id. § 2-725(2). Thus, the UCC has no discovery rule except where the warranty deals with future performance.

60. A warranty of future performance is breached at the time the breach is or should have been discovered. Such a warranty must be explicit, however, and is found only if the buyer must wait until some future event occurs before he can determine whether the warranty was breached. R. HURSH & H. BAILEY, AMERICAN LAW OF PRODUCTS LIABILITY 54 (2d ed. 1975 & Supp. 1981).

61. *Id.* The rule in Texas appears contrary to this general rule. *See infra* note 225 and accompanying text; *see also* Comment, *supra* note 8, at 169-70 (operation of statutes of limitation in breach of warranty cases).

62. R. HURSH & H. BAILEY, *supra* note 60, at 83-84. The confusion as to which statute of limitations is applicable in warranty is generally confined to implied warranty actions. A state's contract or UCC statute of limitation is usually held to govern express warranty actions, which have their historical basis in contract.

63. *Id.* at 69.

64. *See, e.g.*, Maynard v. General Elec. Co., 486 F.2d 538, 540 (4th Cir. 1973) (West

hand, stress the contractual nature of warranty and hold that the four-year UCC limitation applies.[65] These jurisdictions usually require the injured plaintiff to be in privity with the manufacturer.[66] A third group of jurisdictions, however, allows an action to be maintained under the UCC four-year statute even in the absence of privity.[67] If the UCC or contract statute is held applicable to a products action, it generally will be deemed to run from date of sale, delivery, or installation.[68] A plaintiff who is injured after the expiration of that time, therefore, may be barred from recovery before he is even injured.[69]

Strict Liability. The authorities are fairly uniform in holding that when an action is brought in strict liability, a tort-like statute of limitation controls,[70] and that the statute is triggered at the date of injury or discovery of injury, rather than at the date of sale.[71] In *Victorson v. Bock Laundry Machine Co.*,[72] for example, a plaintiff brought a strict liability action against the manufacturer of a defective centrifuge extractor. The machine had been sold in 1948 but the injury did not occur until 1969. The court in *Victorson* initially recognized that a products liability claim may be predicated on express or implied warranty, negligence, or strict liability,[73] and that when an action is brought in strict liability, it sounds in tort rather than contract.[74] Because the suit had been brought in strict liability, the court held that the statute of limitation for personal injury and property

---

Virginia); Natale v. Upjohn Co., 356 F.2d 590, 591 (3d Cir. 1966) (Delaware); Tyler v. R.R. Street & Co., 322 F. Supp. 541, 542 (E.D. Va. 1971).

65. *See, e.g.*, Redfield v. Mead, Johnson & Co., 266 Or. 273, 512 P.2d 776, 777-78 (1973).

66. *See, e.g.*, *id.*, 512 P.2d at 780-81.

67. *See, e.g.*, Simmons v. Clemco Indus., 368 So. 2d 509, 513 (Ala. 1979); Commercial Truck & Trailer Sales, Inc. v. McCampbell, 580 S.W.2d 765, 773 (Tenn. 1979); Garcia v. Texas Instruments, Inc., 610 S.W.2d 456, 465 (Tex. 1980). For a discussion of statutes of limitation in warranty products actions, and the three different approaches, see W. KIMBLE & R. LESHER, *supra* note 14, at 321-25.

68. Harvey v. Sears, Roebuck & Co., 315 A.2d 599, 601 (Del. 1973) (breach occurred, and statute of limitation ran, when aluminum stepladder was sold, not when it collapsed); Kakargo v. Grange Silo Co., 11 A.D.2d 796, 204 N.Y.S.2d 1010, 1011-12 (1960) (cause of action for breach of warranty accrued when silo erected, not at time of accident).

69. *See* Mendel v. Pittsburgh Plate Glass Co., 25 N.Y.2d 340, 344, 253 N.E.2d 207, 210, 305 N.Y.S.2d 490, 493 (1969), where the court in a pre-UCC implied warranty action held that the six-year contract statute of limitation, running from time of sale, rather than the three-year tort limitation running from date of injury, barred plaintiff's claim. *Mendel* was subsequently overruled in Victorson v. Bock Laundry Mach. Co., 37 N.Y.2d 395, 335 N.E.2d 275, 373 N.Y.S.2d 39 (1975). For a discussion of *Victorson*, see *infra* notes 72-78 and accompanying text.

70. Note, *supra* note 9, at 135; *see* Nelson v. Volkswagen of Am., Inc., 315 F. Supp. 1120, 1123 (D.N.H. 1970); Sevilla v. Stearns-Roger, Inc., 101 Cal. App. 3d 608, 610, 161 Cal. Rptr. 700, 702 (1980); Williams v. Brown Mfg. Co., 93 Ill. App. 2d 334, 236 N.E.2d 125, 131 (1968), *rev'd on other grounds*, 45 Ill. 2d 418, 261 N.E.2d 305 (1970).

71. *See, e.g.*, Sides v. Richard Mach. Works, Inc., 406 F.2d 445, 448 (4th Cir. 1969); Ford Motor Co. v. Broadway, 374 So. 2d 207, 209 (Miss. 1979); Romano v. Westinghouse Elec. Co., 114 R.I. 451, 336 A.2d 555, 559-60 (1975).

72. 37 N.Y.2d 395, 335 N.E.2d 275, 373 N.Y.S.2d 39 (1975).

73. *Id.* at 400, 335 N.E.2d at 276-77, 373 N.Y.S.2d at 41.

74. *Id.* at 402, 335 N.E.2d at 278, 373 N.Y.S.2d at 43.

damage applied.[75] The *Victorson* court further concluded that this limitation period commenced, not at the time of sale,[76] but at the date of injury.[77] In so holding the court rejected the defendant's argument that the decision would subject manufacturers to unreasonable liability.[78]

Another defendant advanced the same argument in *Romano v. Westinghouse Electric Co.*,[79] a products liability action involving property damage caused when a television set exploded and set fire to the plaintiff's home. The defendant argued that, at least as to property damage, the six-year statute of limitation should commence at the date of sale, not the date of injury. The Rhode Island Supreme Court rejected this rationale and held that an indefinite date of accrual did not conflict with the purpose underlying the statute of limitation.[80]

Property damage was also the subject of the claim in *Rosenau v. City of New Brunswick*,[81] where a homeowner brought a strict liability action against a water meter manufacturer for damage caused by the breaking of the meter. The manufacturer in *Rosenau* advanced arguments similar to those made in *Romano*. The *Rosenau* court held that the action accrued at the time of damage, even though the damage occurred fourteen years after the meter had been installed and twenty-two years after the original sale.[82] To hold otherwise, the court reasoned, would defeat the liberal spirit of strict products liability.[83] Since the manufacturer had placed the defective product in the stream of commerce, it had a duty to protect against and distribute the risk of loss attendant to that defective product. According to the court, the strict liability plaintiff would still have to prove that the product was defective, a burden that was intensified by the lapse of time.[84] The manufacturer, however, argued that such reasoning meant that it could be held liable, without any proof of negligence, for injury occurring many decades after the product left its control. Indeed, a manufacturer could be held liable even if the product had outlived its anticipated life or

75. *Id.* at 404, 335 N.E.2d at 279, 373 N.Y.S.2d at 44.

76. *Id.* at 403, 335 N.E.2d at 279, 373 N.Y.S.2d at 44. *Victorson* overruled the previous New York rule set out in Mendel v. Pittsburgh Plate Glass Co., 25 N.Y.2d 340, 344, 253 N.E.2d 207, 209, 305 N.Y.S.2d 490, 493 (1969), that the contract statute of limitation running from date of sale governed similar actions.

77. 37 N.Y.2d at 403, 335 N.E.2d at 279, 373 N.Y.S.2d at 44. The court noted that while the passage of time may have worked a "deterioration of the manufacturer's capability to defend, by similar token it can be expected to complicate the plaintiff's problem of proving . . . that the alleged defect existed at the time the product left the manufacturer's plant." *Id.* at 404, 335 N.E.2d at 279, 373 N.Y.S.2d at 44.

78. *Id.*

79. 114 R.I. 451, 336 A.2d 555, 560 (1975).

80. 336 A.2d at 560. The court stated that the policy behind a statute of limitation was to prevent a plaintiff from intentionally sleeping on his rights, thereby gaining an unfair advantage over the defendant, and not to create a finite period of potential liability for the tortfeasor. The injustice of barring a plaintiff's action before it could reasonably be brought outweighed any unfairness to the defendant in requiring it to defend the action. *Id.* at 560-61.

81. 51 N.J. 130, 238 A.2d 169 (1968).

82. 238 A.2d at 172.

83. *Id.* at 176.

84. *Id.*

if it had not been properly maintained by the plaintiff, assuming it was defective when it left the manufacturer. Nevertheless, the court found the defendant-manufacturer liable.[85] The courts have therefore been consistent in holding that in the absence of statutes to the contrary a cause of action in strict products liability accrues at the date of injury, and not before, despite the seeming unfairness to defendants, particularly in suits involving very old products.

III. PERPETUAL LIABILITY AND STATUTES OF REPOSE

A. The Products Liability Crisis

Because the statute of limitation in strict products liability actions begins to run at the time of injury,[86] a manufacturer may find itself subject to a form of open-ended liability, especially with respect to longer-lasting products.[87] This perpetual liability may be further accentuated when the discovery rule is applicable and the injury is cumulative or slow to develop.[88] Tolling provisions[89] and indemnity exceptions[90] to many statutes of limitation may add even more years to a manufacturer's potential liability.[91] This "long tail" problem[92] has led many manufacturers to declare that a crisis now exists in the area of products liability.[93]

These manufacturers contend that current products liability law is markedly consumer-biased. The litigation process itself, they say, is a primary factor in perpetuating this bias.[94] For example, juries have undue sympathy for severely injured plaintiffs, and the distribution of loss policy ignores traditional notions of fault and ability to compensate injured con-

85. *Id.* at 177; *see* Nelson v. Volkswagen of Am., Inc., 315 F. Supp. 1120 (D.N.H. 1970) (action against auto manufacturer for injuries sustained when auto overturned). The *Nelson* court stated that the " 'repose' of the manufacturer must give way to the welfare of the consuming public [even if it meant] liability *in perpetuity* . . . ." 315 F. Supp. at 1122 (emphasis in original).

86. *See supra* notes 70-77 and accompanying text.

87. *See, e.g.*, Green v. Volkswagen of Am., 485 F.2d 430, 431 (6th Cir. 1973) (16-year-old van); Wittkamp v. United States, 343 F. Supp. 1075, 1076-77 (E.D. Mich. 1972) (55-year-old rifle); Kuisis v. Baldwin-Lima-Hamilton Corp., 457 Pa. 321, 319 A.2d 914, 921 (1974) (20-year-old crane).

88. *See supra* notes 57-58 and accompanying text.

89. *See infra* notes 169-70 for examples of these tolling provisions.

90. Nebraska's statute of repose, for example, does not affect the right of indemnity from other persons. NEB. REV. STAT. § 25-224(3) (Supp. 1982). Utah has tried to remedy the potential indemnity problem by enacting a longer liability period for manufacturers than retailers. UTAH CODE ANN. § 78-15-3 (1977). The UPLA also makes an indemnity exception. UPLA § 110(B)(2)(c), 44 Fed. Reg. 62,714, 62,732 (1979).

91. *See also* Sherman, *Legislative Responses to Judicial Activism in Strict Liability: Reform or Reaction?*, 44 BROOKLYN L. REV. 359, 384 (1978).

92. Phillips, *supra* note 51, at 664; Twerski & Weinstein, *A Critique of the Uniform Product Liability Law—A Rush to Judgment*, 28 DRAKE L. REV. 221, 244 (1978-1979).

93. *See* Johnson, *Products Liability "Reform": A Hazard to Consumers*, 56 N.C.L. REV. 677, 678 (1978) (manufacturer perception of crisis in products liability and concomitant danger this crisis poses to consumer); NEWSWEEK, June 13, 1977, at 11; Wall St. J., Mar. 3, 1977, at 36, col. 3; Wall St. J., Oct. 27, 1976, at 4, cols. 1-2; Wall St. J., Apr. 8, 1976, at 20, col. 4; Wash. Post, Nov. 2, 1977, at D-1, cols. 1-2.

94. Comment, *supra* note 8, at 166.

sumers. Additionally, manufacturers point to the trend toward disproportionately large jury awards, a perceived relaxation of the plaintiff's burden of proof, and liberalized rules of evidence.[95]

Manufacturers contend that this trend may have devastating consequences for both the manufacturer and the judicial process.[96] For example, the increasing number and average dollar amount of products liability claims and awards has led to a dramatic escalation in products liability insurance premiums.[97] This increase is due, in large part, to highly subjective methods of insurance rate-making.[98] The judgments involved in setting premiums have been distorted in recent years by the uncertainty associated with products that have been in use for many years,[99] and have caused many insurers to engage in "panic-pricing."[100] Unknown liability for an equally unknown number of years has led to a worst-case type of analysis. As a result, many insurers have either refused to issue products liability policies altogether or have set premiums so high as to make them effectively unavailable.[101]

In addition to the increased costs and uncertainty posed by open-ended products liability, forcing the manufacturer to defend an action many years after the product has left its hands creates additional burdens. Manufacturers argue that the defense of products actions becomes exceptionally difficult after a number of years has elapsed.[102] Evidence necessary to rebut proof of a product's defectiveness at the time it left the manufacturer's hands may have long since disappeared. Additionally, a product may have been misused, altered, or modified during its life, causing an initially safe product to become defective. Proving such defenses after a substantial period of time may be nearly impossible.[103]

---

95. *Id.*; *see also* Hoenig, *Products Liability Problems and Proposed Reforms*, 1977 INS. L.J. 213, 215.

96. See *supra* note 93 and accompanying text.

97. Phillips, *supra* note 51, at 663; Comment, *Limiting Liability: Products Liability and a Statute of Repose*, 32 BAYLOR L. REV. 137, 139-40 (1980) [hereinafter cited as Comment, *Limiting Liability*]; Comment, *Alabama's Products Liability Statute of Repose*, 11 CUM. L. REV. 163, 165 (1980) [hereinafter cited as Comment, *Alabama's Products*].

98. For a discussion of the current insurance mechanism in products liability, see Comment, *Limiting Liability*, *supra* note 97, at 141-42.

99. *Id.* at 141.

100. *See Hearings Before the Subcomm. on Capital, Investment, and Business Opportunities of the Comm. on Small Business Product Liability Insurance*, 95th Cong., 1st Sess. 70-75 (1978) (analysis of insurance problem in products liability).

101. Comment, *Limiting Liability*, *supra* note 97, at 142. This uncertainty has had a negative impact on the ability of businesses to plan and price effectively. *Id.* at 139; McGovern, *supra* note 5, at 593. An argument that weakens this contention, however, is the fact that a manufacturer need only pass on the cost of liability insurance to the consumer. Thus, instead of actually paying the increase in premiums, the manufacturer can marginally increase the price of each product. The manufacturer is insured, and the consumer, the ultimate beneficiary of the policy, foots the bill.

102. Herrington, *Products Liability: Model Proposals for Legislative Reform*, 43 J. AIR L. & COM. 221, 224 (1977).

103. Herrington, *supra* note 102, at 224; McGovern, *supra* note 5, at 589.

B. *The Uniform Product Liability Act*

In response to the conflicting views surrounding products liability,[104] the Economic Policy Board of the Executive Office of the President established an Interagency Task Force to examine the present state of products liability law.[105] The Task Force found that the cost of products liability insurance premiums had increased dramatically and that while the number of claims involving older products did not justify this increase, the insurer's apprehension about potential liability for older products, although exaggerated, was real.[106] This apprehension had caused both insurers and manufacturers to engage in intensive lobbying efforts to remedy the current situation.[107] The reform most sought after by manufacturers was the establishment of a statute of repose for products actions. The Task Force's Model Uniform Product Liability Act (UPLA) incorporated a statute of repose[108] that would run from the date of manufacture or sale, creating a limited time period within which any action arising out of the use of a product, defective or otherwise, must be brought or be forever barred.[109]

Supporters of the UPLA contend that statutes of repose establish an actuarially certain date from which potential liability can be calculated, enabling more accurate risk assessment and stabilizing insurance premiums.[110] Businesses can then set more realistic prices and plan more effectively. In addition, proponents argue that a specific cut-off date for filing suit would counterbalance the recent consumer bias of products liability, thus insuring fairness to manufacturers by eliminating those claims for which evidence is difficult to produce.[111] Finally, other proponents of such statutes argue that if a product has been used without incident for a number of years, this injury-free use should create the presumption that the product was not defective at the time it was purchased or delivered.[112]

---

104. For one commentator's view that the crisis has been fostered by manufacturers and insurers in an attempt to avoid responsibility for their unsafe products, see Jamail, *The Manufactured Assault*, TRIAL, Nov. 1979, at 24. *See also* Nader, *The Corporate Assault on Products Liability: A Call to Action*, TRIAL, Oct. 1977, at 38 (consumer-advocate's view of crisis).

105. U.S. DEP'T OF COM., INTERAGENCY TASK FORCE REPORT ON PRODUCT LIABILITY 1-5 (1977) [hereinafter cited as INTERAGENCY TASK FORCE REPORT].

106. *Id.* at VII-21. According to a survey published by the Insurance Services Office, more than 97% of product injuries occur within six years of purchase. INS. SERV. OFFICE, PRODUCT LIABILITY CLOSED CLAIM SURVEY (1976).

107. INTERAGENCY TASK FORCE REPORT, *supra* note 105, at VII-21 to -34.

108. UPLA § 110(B), 44 Fed. Reg. 62,714, 62,732 (1979). The Task Force's model act, the Model Uniform Product Liability Act, is discussed *infra* notes 138-39 and accompanying text.

109. *See infra* notes 140-72 and accompanying text for a discussion of the variations of these statutes in different states.

110. 44 Fed. Reg. 62,714, 62,733 (1979) (analysis of Model Act and advantages of statutes of repose).

111. The drafters of the UPLA reasoned that one of the advantages of incorporating a statute of repose into the Model Act was to "eliminate tenuous claims involving older products for which evidence of defective conditions may be difficult to produce." *Id.*; *see also supra* notes 102-03 and accompanying text for a discussion of some of the defense problems manufacturers may encounter.

112. *See* V. WALKOWIAK, MATERIALS ON PRODUCTS LIABILITY E-21 (3d ed. 1981); Comment, *Limiting Liability*, *supra* note 97, at 143; Note, *Various Risk Allocation Schemes*

Others counter such arguments by pointing to the fact that products litigation after the passage of many years is just as difficult for the plaintiff as for the manufacturer.[113] The injured party still must prove that the product was defective when it left the manufacturer's hands, according to the standards existent at the time of delivery, and that the injury was not the result of misuse or normal wear and tear in the intervening years of use.[114] Further, opponents of a statute of repose point out that in most states evidence of wear and tear, along with the age of a product, is admissible in products actions to show nondefectiveness.[115] The age of a product is usually examined in light of its expected useful life.[116]

In addition to a statute of repose, then, the concept of useful life has also been codified in the UPLA.[117] This section provides that a manufacturer is not liable for injury caused by his product if he proves by a preponderance of the evidence that the harm was caused after the product's useful safe life had ended.[118] In determining whether this useful safe life has expired, the fact-finder is to consider such factors as foreseeable wear and tear, deterioration, manufacturer representations, and consumer modification of the product.[119] The UPLA provides that useful safe life is an affirmative defense, accruing at the date of delivery.[120] If the alleged harm occurred within the useful life of the product, a plaintiff is allowed two years to bring suit from the date of injury or date of discovery of injury.[121] In focusing on common-law-like factors to determine safe life, the UPLA provision recognizes as impractical any attempt to apply one safe life period to all products.[122]

C. *Shifting the Burden: Who Decides?*

The enactment of a statute of repose, whether in the form of a rigid limitation period or a flexible useful life concept, has the effect of shifting the burden of loss to the consumer after the repose period has elapsed. Such a result conflicts with the basic policy underlying products liabil-

---

Under the Model Uniform Product Liability Act: An Analysis of the Statute of Repose; Comparative Fault Principles, and the Conflicting Social Policies Arising from Workplace Product Inquiries, 48 GEO. WASH. L. REV. 588, 598 (1980).

113. Johnson, *supra* note 93, at 691.

114. *Id.*

115. *See, e.g.*, Gates v. Ford Motor Co., 494 F.2d 458, 459 (10th Cir. 1974) (manufacturers not liable for negligent design of 24-year-old tractor); Kaczmarek v. Mesta Mach. Co., 463 F.2d 675, 678 (3d Cir. 1972) (no duty to furnish chain that would not wear out); Tucker v. Unit Crane & Shovel Corp., 256 Or. 318, 473 P.2d 862, 862 (1970) ("prolonged use of a manufactured article is but one factor, albeit an important one, in the determination of whether a defect in the product made it unsafe . . . .").

116. V. WALKOWIAK, *supra* note 112, at E-21.

117. UPLA § 110(A), 44 Fed. Reg. 62,714, 62,732 (1979). The UPLA is only a model code, and as yet no state has adopted it in whole. For an analysis of the model act, see Twerski & Weinstein, *supra* note 92.

118. UPLA § 110(A), 44 Fed. Reg. at 62,732.

119. *Id.*

120. *Id.*

121. *See id.* § 110(C), 44 Fed. Reg. at 62,732 (statute of limitation).

122. 44 Fed. Reg. at 62,733.

ity,[123] raising a critical issue: who is to determine when the shift should occur?[124] Some contend that such a decision is most fit for the judiciary, since strict tort liability is in large part a judicial creation.[125] In addition, the flexibility of courts to adapt to individual cases and the equal footing of the parties in the litigation process are reasons for leaving most aspects of products actions, including risk of loss, to the judiciary.[126] Indeed, legislatures have traditionally been deferential to the courts in matters of tort reform.[127] Yet most courts bow to legislative pronouncements providing for society's general welfare, assuming they are found reasonable and not arbitrary.[128]

Others argue that because legislatures have always had the power to prescribe statutes of limitation, they, and not courts, are best suited to codify statutes of repose. The Wisconsin Supreme Court took this view in *Kozlowski v. John E. Smith's Sons Co.*,[129] holding that the general statute of limitation, running from date of injury, applied to the product case before it.[130] The court recognized the problem of open-ended manufacturer liability, however, and recommended legislative review.[131] The court stated that at the time the personal injury statute of limitation was enacted, the legislature could not have contemplated its application to products thirty-five years after manufacture.[132] The court thus proposed a statute of repose running from date of manufacture.[133] The court refused to impose such a standard, however, emphasizing that the complexity involved in products liability law required extensive hearings and debates proper to the legislative process.[134]

A further problem is whether federal or state government would be most effective in implementing these proposed reforms.[135] Those urging federal

123. *See* Owen, *supra* note 48 (shift away from traditional answers and policies attending products liability).

124. McGovern, *supra* note 5, at 592.

125. *See* Greenman v. Yuba Power Prods., 59 Cal. 2d 57, 377 P.2d 897, 899, 27 Cal. Rptr. 697, 699 (1962); Garthwait v. Burgio, 153 Conn. 284, 216 A.2d 189, 192 (1965); Suvada v. White Motor Co., 32 Ill. 2d 612, 210 N.E.2d 182, 186 (1965).

126. *See* McGovern, *supra* note 5, at 597.

127. *Id.*

128. For an example of the judiciary's traditional deference to the legislature in matters pertaining to the general welfare, see City of New Orleans v. Dukes, 427 U.S. 297, 303 (1976), where the Supreme Court stated that the judiciary would not "judge the wisdom . . . of legislative policy determinations made in areas that neither affect fundamental rights nor [suspect classes]."

129. 87 Wis. 2d 882, 275 N.W.2d 915 (1979).

130. 275 N.W.2d at 924.

131. *Id.*

132. *Id.*

133. *Id.*

134. *Id.* at 925; *see also* Thornton v. Mono Mfg. Co., 99 Ill. App. 3d 722, 425 N.E.2d 522, 525 (1981). The *Thornton* court, in construing the state's statute of repose as a valid exercise of the legislature's police power, stated: "Whether this particular statute is the best means of achieving the desired goal of the legislature is not, of course, a proper subject of judicial inquiry." 425 N.E.2d at 525. For a discussion of the relative advantages of allowing the legislature, rather than the courts, to impose periods of ultimate repose, see McGovern, *supra* note 51, at 431-33; McGovern, *supra* note 5, at 592-98.

135. The Interagency Task Force recognized the effect of products liability law on inter-

implementation argue that since products liability actions usually involve interstate transactions, state-by-state enactment would raise difficult conflicts of law questions that could be avoided by a uniform act.[136] Additionally, individual state enactment would do little to ease the manufacturer's insurance crisis since product liability premiums are often calculated on a nationwide basis.[137] The Interagency Task Force proposed the UPLA in light of these concerns,[138] but products problems vary to such a degree from state to state that legislative reform has traditionally been thought best left to each state.[139]

D. State Legislative Responses

Because the difficulties associated with products liability law vary from state to state, the statutes of repose enacted in response to those problems also vary from state to state.[140] The principal variations among the statutes concern what theories of recovery are covered, whether the statute operates as a complete bar to recovery, when the period of limitation commences to run, and what exceptions, if any, are allowed to mitigate the sometimes harsh effect of the statutes. There are currently twenty-one products liability statutes of repose, ranging in length from five to twelve years.[141] Several states have drafted general statutes of repose applicable

---

state commerce and recommended that any widespread products liability reform be implemented at the federal level. INTERAGENCY TASK FORCE REPORT, *supra* note 105, at VII-19 to -20. This would increase uniformity, avoid conflicts between the states, and reduce insurance premiums. *Id.* at VII-20.

136. *See supra* note 9.

137. INTERAGENCY TASK FORCE REPORT, *supra* note 105, at VII-21 to -23. For a discussion of the impact the state character of products actions has on the insurance mechanism, see McGovern, *supra* note 5, at 595; Phillips, *supra* note 51, at 672; Comment, *Limiting Liability*, *supra* note 97, at 181.

138. Congress derives the authority to enact a federal products statute from U.S. CONST. art. 1, § 8, cl. 3, which authorizes Congress to "regulate commerce . . . among the several States." Section 103 of the UPLA provides that adoption of the model act will preempt "all existing law governing matters within its coverage, including the 'Uniform Commercial Code' and similar laws." UPLA § 103, 44 Fed. Reg. at 62,720. Several federal products liability statutes now exist: 30 U.S.C. §§ 901-945 (1976) (black lung disease); *id.* § 2210 (nuclear incidents); *id.* § 2476 (swine flu). In 1977 a bill was unsuccessfully introduced in the Senate providing for a 10-year federal products liability statute of limitation. S. 403, 95th Cong., 1st Sess. (1977).

139. Critics of the UPLA argue that codifying all products liability law into one act is a "mammoth if not impossible task." 2A L. FRUMER & M. FRIEDMAN, PRODUCTS LIABILITY, § 16D.01 (1982).

140. Products liability statutes are fairly recent creations; most have been enacted within the last five years. The first products liability statute of repose was enacted by Utah in 1977. UTAH CODE ANN. § 78-15-3 (1977). The most recently enacted is that of Washington. WASH. REV. CODE ANN. § 7.72.060 (Supp. 1983-1984).

141. *See* ALA. CODE § 6-5-502 (Supp. 1982); ARIZ. REV. STAT. ANN. § 12-551 (1982); COLO. REV. STAT. § 13-21-403(3) (Supp. 1982); CONN. GEN. STAT. § 52-277a (1981); FLA. STAT. ANN. § 95.031(2) (West 1982); GA. CODE ANN. § 105-106(b)(2) (Supp. 1982); IDAHO CODE § 6-1403(2) (Supp. 1982); ILL. ANN. STAT. ch. 110, ¶ 13-213 (Smith-Hurd Pam. Supp. 1983-1984); IND. CODE ANN. § 34-4-20A-5 (Burns Supp. 1982); KAN. STAT. ANN. § 60-3303 (Supp. 1982); KY. REV. STAT. ANN. § 411.310 (Baldwin Supp. 1982); NEB. REV. STAT. § 25-224 (Supp. 1982); N.H. REV. STAT. ANN. § 507-D:2 (Supp. 1979); N.C. GEN. STAT. § 1-50(6) (Supp. 1981); N.D. CENT. CODE § 28-01.1-02 (Supp. 1981); OR. REV. STAT. § 30.905(1) (1981); R.I. GEN. LAWS § 9-1-13 (Supp. 1982); S.D. CODIFIED LAWS ANN. § 15-2-12.1 (Supp.

to all products actions.[142] Others have adopted specific statutes applicable to particular products.[143] Most statutes of repose apply to all causes of action based on personal or property injury, regardless of the legal theory being pled,[144] while other statutes specifically exclude actions based on breach of express warranty or intentional misrepresentation from their coverage.[145]

One suggested method of curbing the inequities associated with statutes of repose is to exclude actions based on negligence from their coverage.[146] In this way a plaintiff retains a cause of action in negligence, even if a warranty or strict liability action is barred, subject, however, to the difficult burden of proving lack of due care at the time of manufacture. This method avoids the inherent inequity of completely barring a plaintiff from a remedy before he is injured. Yet the majority of statutes of repose do just that by prescribing an absolute bar to recovery,[147] or by creating an irrebuttable presumption that a product is nondefective if a certain period of time has passed since its manufacture.[148] This presumption is based on a legislative conclusion that the useful safe life of all products is, or should be, identical.[149]

1982); TENN. CODE ANN. § 29-28-103 (1980); UTAH CODE ANN. § 78-15-3 (1977); WASH. REV. CODE ANN. § 7.72.060 (Supp. 1983-1984). The UPLA sets out a 10-year statute of repose in § 110(B). UPLA § 110(B), 44 Fed. Reg. at 62,732. Its drafters contend that such time is an adequate safeguard for consumers as it is in excess of the time allowed in most states. V. WALKOWIAK, *supra* note 112, at E-22.

142. States with general statutes of repose are Connecticut, Kansas, North Carolina, North Dakota, and Oregon.

143. *See, e.g.*, IDAHO CODE § 5-243 (1979) (ionizing radiation injury); TENN. CODE ANN. § 29-28-103(b) (1980) (asbestos).

144. *See, e.g.*, COLO. REV. STAT. § 13-80-127.5(1) (Supp. 1982) (statute will apply "regardless of the substantive legal theory or theories upon which action is brought"); N.D. CENT. CODE § 28-01.1-02(1) (Supp. 1981) (statute will apply to any action based on "[b]reach of any implied warranties," "[d]efects in design, inspection, testing, or manufacture," "[f]ailure to warn," and "[f]ailure to properly instruct in the use of a product"); OR. REV. STAT. § 30.905(1) (1981) (includes actions based on design, inspection, testing, and like).

145. *See, e.g.*, ARIZ. REV. STAT. ANN. § 12-551 (1982) (specifically excluding actions based on breach of express warranty); CONN. GEN. STAT. § 52-577a(d) (1981) (exempting "any action against a product seller who intentionally misrepresents a product or fraudulently conceals information about it").

146. *See, e.g.*, ARIZ. REV. STAT. ANN. § 12-551 (1982); *see also* Herrington, *supra* note 102, at 224 (view that this reform would remedy much of injustice associated with repose statutes).

147. *See supra* note 141 (statutes of Alabama, Arizona, Connecticut, Florida, Georgia, Illinois, Indiana, Nebraska, New Hampshire, North Carolina, North Dakota, Oregon, Rhode Island, and Utah).

148. Statutes that create this presumption may encounter some constitutional problems in light of the United States Supreme Court's irrebuttable presumption doctrine. *See* Cleveland Bd. of Educ. v. Lafleur, 414 U.S. 632 (1974) (invalidating school board's irrebuttable presumption that teachers over five months pregnant were physically unable to perform their duties). In evaluating such irrebuttable presumptions a court must inquire whether the state has any compelling interest in fixing a definite period of time for all products and in not allowing an aggrieved person to present evidence overcoming the presumption.

149. *See* Note, *supra* note 9, at 149-51 (irrebuttable presumption doctrine in context of statutes of repose). Statutes of repose containing such irrebuttable presumptions are likely to fail constitutional analysis if, like *Lafleur*, "the right to present evidence rebutting the conclusive presumption prevails over notions of administrative convenience." *Id.* at 151.

In recognition of the vast number of products on the market with varying useful lives, some states have enacted repose statutes that raise only a rebuttable presumption. These statutes provide that a product's useful life is presumed to expire after a certain number of years,[150] or that after a certain number of years without incident, a product is presumed to be non-effective.[151] The plaintiff, however, is allowed to rebut the presumption by introducing evidence of defectiveness despite expiration of the limitation period.[152] Rebuttability does not, however, remedy all the inequities associated with statutes of repose.[153] Presumptions are meant to bring to light evidence in the control of one of the parties, or further a social policy by favoring one party over another.[154] In products actions the manufacturer is the one with control of much of the evidence needed to prove defectiveness. Allowing the presumption to favor the manufacturer is contrary to the basic risk-shifting policy of products liability since the presumption may increase an injured plaintiff's burden of proof and thus bar the plaintiff's claim as effectively as would an irrebuttable presumption.[155]

In their various forms state statutes of repose provide for several possible accrual dates.[156] A statute may commence at date of sale for use or consumption,[157] or run from the date the defendant parted with possession and control.[158] Two different limitation periods, running from date of sale and date of manufacture, may be incorporated into a single repose statute.[159] Finally, a statute of repose may commence at the date of delivery

150. For example, WASH. REV. CODE ANN. § 7.72.060 (Supp. 1983-1984) establishes that a product is rebuttably presumed useful for 12 years, and IDAHO CODE § 6-1403(2) (Supp. 1982) provides for a 10-year useful safe life rebutted only by clear and convincing evidence. The UPLA creates a similar rebuttable presumption by providing that if harm from a product occurs more than 10 years after delivery, "a presumption arises that the harm was caused after the useful safe life had expired." UPLA § 110(B), 44 Fed. Reg. at 62,732. Plaintiffs can rebut this presumption only by clear and convincing evidence. *Id.*

151. *See, e.g.*, KY. REV. STAT. ANN. § 411.310 (Baldwin Supp. 1982) (useful safe life presumed to be five years after sale and eight years after manufacture).

152. *See, e.g.*, IDAHO CODE § 6-1403(2) (Supp. 1982) (clear and convincing evidence required to rebut presumption); KY. REV. STAT. ANN. § 411.310 (Baldwin Supp. 1982) (presumption rebutted by preponderance of the evidence).

153. *See* W. PROSSER, *supra* note 12, § 38 (discussion of use and purpose of presumptions).

154. *Id.*

155. *Cf.* Bivins, *The Product Liability Crisis: Modest Proposals for Legislative Reform*, 11 AKRON L. REV. 595, 614 (1978) (rebuttable presumption avoids inequity of absolute bar, but doubtful aid to defendant).

156. *See supra* notes 54-85 and accompanying text for a discussion of accrual dates of traditional statutes of limitation in products liability actions.

157. *See, e.g.*, ARIZ. REV. STAT. ANN. § 12-551 (1982) ("twelve years after the product was first sold for use or consumption"); NEB. REV. STAT. § 25-224(2) (Supp. 1982) (10 years after date product was "first sold or leased for use or consumption"). Other states having statutes of repose running from this date include Colorado, Georgia, Illinois, New Hampshire, North Carolina, North Dakota, Oregon, Rhode Island, and Tennessee. *See supra* note 141.

158. *See* CONN. GEN. STAT. ANN. § 52-277a(a) ("ten years from the date that such party last parted with possession or control of the product").

159. *See* KY. REV. STAT. ANN. 411.310(1) (Baldwin Supp. 1981) ("five (5) years after the date of sale to the first consumer or more than eight (8) years after the date of manufac-

to the original purchaser.[160] A grace period may also be provided so that if the harm occurs near the end of the repose period, the injured claimant has a number of years, usually two, beyond the repose period in which to bring suit.[161]

The trigger date for these statutes, however, is not as important as their effect in combination with tort statutes of limitation. The most common type of repose statute is one that works in conjunction with the traditional tort statute of limitation applicable to strict liability actions. The statute usually provides that a products liability action will be barred if not brought within a certain number of years from the date of injury, or discovery of injury, but in no event shall the action be brought later than the specified repose period, regardless of when the defect manifests itself or the injury is discovered.[162] Such a statute has the potential of barring a plaintiff from suit before his injury occurs. The injustice of such a law is magnified when applied to products with unlimited shelf lives[163] or to durable goods whose defects do not manifest themselves until after many years of continuous use.[164] Other statutes of repose run from date of injury and contain no outer limit on liability.[165] This type of statute is nearly identical to traditional tort statutes of limitation, complete with discovery provisions, except that it is tailored to products actions. While such date-of-injury statutes give maximum protection to the consumer, they do not speak to the manufacturers' concerns.

---

ture"); UTAH CODE ANN. § 78-15-3(1) (1977) (no more than six years after date of initial purchase or 10 years after date of manufacture).

160. *See, e.g.*, IDAHO CODE § 6-1403 (Supp. 1982) (presumption arises when harm caused "more than ten (10) years after the time of delivery"); S.D. CODIFIED LAWS ANN. § 15-2-12.1 (Supp. 1982) (more than six years after "date of the delivery of the completed product to its first purchaser or lessee"). The UPLA's statute of repose runs from the time of delivery to the first purchaser or lessee not engaged in the business of selling such products or using them as component parts of another product to be sold. UPLA § 110(A)(1), 44 Fed. Reg. at 62,732. Florida, Indiana, Kansas, and Washington also start their statutory period at date of delivery. *See supra* note 141.

161. IND. CODE ANN. § 34-4-20A-5 (Burns Supp. 1982) ("if the cause of action accrues more than eight [8] years but not more than ten [10] years after that initial delivery, the action may be commenced at any time within two [2] years after the cause of action accrues."). Thus, the longest period in which an action could be brought in Indiana is 12 years. *Id.*

162. *See, e.g.*, ARIZ. REV. STAT. ANN. § 12-551 (1982) (no later than two years after injury, but no later than 12 years after first purchase for use or consumption); N.H. REV. STAT. ANN. § 507-D:2 (Supp. 1979) (within three years of injury or discovery of injury, but no later than 12 years after manufacturer parted with possession or control).

163. *See, e.g.*, Filler v. Raytex Corp., 435 F.2d 336 (7th Cir. 1970) (eyeglasses); Sweeney v. Max A.R. Mathews & Co., 46 Ill. 2d 64, 264 N.E.2d 170 (1970) (concrete nails); Hogenson v. Service Armament Co., 77 Wash. 2d 209, 461 P.2d 311 (1969) (ammunition).

164. One commentator has remarked that since statutes of repose make no distinction between durable and consumer goods, their effect is particularly harsh in the workplace context, where a worker who has little opportunity to select the machinery may be injured many years after its purchase. Comment, *Alabama's Products*, *supra* note 97, at 181.

165. *See, e.g.*, MINN. STAT. ANN. § 541.05, subd. 2 (West Supp. 1983) (requiring that any strict products liability action be brought within four years of date of injury); ARK. STAT. ANN. § 34-2803 (Supp. 1981) (providing that all products liability actions be brought within three years of date of "death, injury or damage"); *see also* 1 L. FRUMER & M. FRIEDMAN, *supra* note 41, § 3D-12 (discussion of these statutes).

Many states have attempted to reach a middle ground between these two extremes by incorporating various exceptions into their statutes of repose. These exceptions are designed to mitigate the harshness of an absolute cap on liability by giving an injured plaintiff additional time within which to bring suit.[166] Some statutes provide that a manufacturer may expressly waive or extend the statutory period,[167] while another prohibits manufacturers from limiting the statute's operation by agreement.[168] While many products liability statutes of repose fail to make any exception for age minority or disability,[169] others provide for the tolling of the statute until majority is reached or the disability removed.[170] Most statutes of repose also exempt from their operation actions based on a manufacturer's fraudulent concealment, deceit, or intentional misrepresentation.[171] Finally, many states have enacted special statutes of repose that exclude those injuries caused by prolonged exposure to a defective product, or those injuries that are not reasonably discoverable until after the repose period has elapsed.[172]

E. Constitutionality

Products liability statutes of repose are frequently challenged on constitutional grounds, the most common of which are equal protection, due process, and right of access to the courts.[173] Equal protection challenges

166. *See generally* Phillips, *supra* note 51, for a discussion of these various exceptions to statutes of repose.

167. *See, e.g.*, ALA. CODE § 6-5-502(d) (Supp. 1982) (seller may waive or extend period of time); ILL. ANN. STAT. ch. 110, ¶ 13-213(b) (Smith-Hurd Pam. Supp. 1983-1984) (unless defendant expressly warranted product for longer period of time); UPLA § 110B(2)(a), 44 Fed. Reg. at 62,732.

168. *See* GA. CODE ANN. § 105-106(b)(3) (Supp. 1982) ("A manufacturer may not exclude or limit the operation . . . .").

169. *See, e.g.*, IND. CODE ANN. § 34-4-20A-5 (Burns Supp. 1982) ("to all persons regardless of minority or legal disability"); N.D. CENT. CODE § 28-01.1-02(2) (Supp. 1981) ("regardless of minority or other legal disability"); UTAH CODE ANN. § 78-15-3(2) (1977) ("regardless of minority or other legal disability"); *see also* Delay v. Marathon LeTourreau Sales & Serv. Co., 48 Or. App. 811, 618 P.2d 11, 13 (1980) (Oregon's statutes not tolled by plaintiff's insanity).

170. *See, e.g.*, COLO. REV. STAT. § 12-80-127.5(2) (Supp. 1982) (if under 18 years, mentally incompetent, imprisoned, or absent from United States at time cause of action accrues); ILL. ANN. STAT. ch. 110, ¶ 13-213(d) (Smith-Hurd Pam. Supp. 1983-1984) (under 18, insane, or imprisoned on criminal charges); TENN. CODE ANN. § 29-28-103(a) (1980) (minor must bring suit within one year after majority).

171. *See, e.g.*, N.H. REV. STAT. ANN. § 507-D:2(IV) (Supp. 1979) (does not apply to actions based on defendant's fraudulent misrepresentations, concealment, or nondisclosure); UPLA § 110(B)(2)(b), 44 Fed. Reg. at 62,732.

172. *See, e.g.*, ALA. CODE § 6-5-502(b) (Supp. 1982) (latent injury, toxic or harmful injury producing substance over a period of time); IDAHO CODE § 6-1403(2)(b)(4) (Supp. 1982) (prolonged exposure to defective or injury-causing aspect of product not discovered); TENN. CODE ANN. § 29-28-103(b) (1980) (exposure to asbestos). The UPLA has a similar provision designed for those situations when a product contains a hidden defect at the time of delivery, that is not discoverable by a reasonably prudent person, and that does not manifest itself until after the expiration of the statute. UPLA § 110(B)(2)(d), 44 Fed. Reg. at 62,732.

173. McGovern, *supra* note 5, at 604. A state court may subject statutes of repose to more stringent scrutiny in examining the acts of its own legislature than a federal court would. *Id.*

under either state or federal constitutions usually focus on the statute's dissimilar treatment of a class of plaintiffs, a class of defendants, or a class of regulated subject matter.[174] When reviewing a statute of repose for equal protection purposes, a court will generally look to see if the statute rests on a rational basis.[175] The court must determine whether the classification is a reasonable means of achieving a proper legislative objective, and whether all class members within the classification are treated uniformly.[176]

Two cases involving equal protection challenges to products liability statutes of repose are *Thornton v. Mono Manufacturing Co.* [177] and *Dague v. Piper Aircraft Corp.* [178] In *Thornton* Illinois's ten-year-after-sale statute of repose was claimed violative of equal protection because it applied only to strict liability actions and not to actions based on implied warranty or negligence. The Illinois Supreme Court affirmed the statute's constitutionality, holding that the classification created by the statute was rational in view of the independence of a strict liability cause of action from the traditional constraints applicable to the other two actions.[179] In *Dague* Indiana's ten-year-after-delivery statute similarly withstood the plaintiff's claim that it singled out manufacturers of older products for special protection over manufacturers of new ones. The federal district court found that the repose statute served a public purpose by holding down insurance costs and thus created a source of funds for plaintiff recovery.[180] The court suggested that the statute actually benefitted plaintiffs by assisting in stabilizing damage potential.[181] Statutes of repose are thus given a strong presumption of validity if some proper legislative purpose is found.

Due process[182] protects rights and remedies that have already vested by requiring that a plaintiff be given a sufficient amount of time within which to bring his claim once a cause of action accrues.[183] The United States Supreme Court has held, however, that legislatures may create new rights for potential plaintiffs and may also abolish rights previously recognized at

174. *See* Massery, *supra* note 3, at 545 (happenstance of date of sale creates classification between two similarly situated manufacturers); Comment, *Alabama's Products*, *supra* note 97, at 180 (arbitrary distinction between those injured immediately prior and subsequent to termination of period); Note, *supra* note 9, at 149 (improbable that statutes will fall to equal protection analysis if wording of statute includes "all product liability type actions").

175. *See* Cleland v. National College of Business, 435 U.S. 213, 216 (1978) (upholding restrictions of G.I. Bill's veteran's educational assistance program); County Bd. v. Richards, 434 U.S. 5, 7 (1977) (upholding Virginia zoning ordinance).

176. Harrison v. Schrader, 569 S.W.2d 822, 826 (Tenn. 1978) (medical malpractice statute of repose upheld under equal protection scrutiny); *see also* McGovern, *supra* note 5, at 606-10 (discussion of subtleties of equal protection analysis for statutes of repose).

177. 99 Ill. App. 3d 722, 425 N.E.2d 522 (1981).

178. 513 F. Supp. 19 (N.D. Ind. 1980).

179. 425 N.E.2d at 524.

180. 513 F. Supp. at 25.

181. *Id.*

182. The right to equal protection and due process is guaranteed by the federal Constitution. U.S. CONST. amend. XIV, § 1.

183. For due process cases dealing with an individual's right to sue, see Wilson v. Iseminger, 185 U.S. 55 (1902); Howell v. Burk, 90 N.M. 688, 568 P.2d 214 (Ct. App.), *cert. denied*, 91 N.M. 3, 569 P.2d 615 (1977).

common law without violating the due process guarantee.[184] Legislatures may also prospectively limit the time within which actions may be brought and modify existing periods as to claims that have not yet vested.[185] These existing periods may be shortened or lengthened so long as a reasonable time to file suit is provided.[186]

A statute of repose is usually attacked as violative of due process on the ground that it takes away a plaintiff's vested right to bring an action before the right to assert the claim arises.[187] In addressing a due process challenge to Illinois's repose statute, the *Thorton* court concluded that instead of depriving a plaintiff of a vested right, the statute prevented a potential cause of action from ever arising.[188] The statute in *Thornton* was held to preclude a minor's action for injuries received from a rotary cutter machine.[189] The court rejected plaintiff's argument that the statute, which did not provide for tolling for minors, violated the minor's right to due process.[190] The court found that the policy behind tolling a statute of limitation for minors was to ensure that their rights would not be extinguished because of their age disability.[191] The court concluded that the statute of repose extinguished the cause of action before it arose, regardless of whether the holder of that cause was a child or an adult.[192] The statute was therefore held constitutional.[193]

The plaintiff's constitutional argument in *Dague v. Piper Aircraft Corp.*[194] similarly failed when the Indiana Supreme Court upheld Indiana's statute of repose. The court initially recognized the strong presumption of constitutionality given to legislative acts.[195] Since the plaintiff's cause of action did not accrue until the date of injury, which injury occurred after the limitation period had run, the court concluded that no cause of action existed at the time the plaintiff allegedly suffered damages.[196] Indiana's statute of repose therefore did not run afoul of due process.[197]

An injured consumer appears more likely to succeed in challenging the

184. Silver v. Silver, 280 U.S. 117, 121-22 (1929).

185. Comment, *supra* note 1, at 1190. Of course, such legislation must still withstand constitutional scrutiny if challenged. *Id.* at 1186-90.

186. *See id.* at 1190.

187. For cases upholding state statutes of repose on due process grounds, see Thornton v. Mono Mfg. Co., 99 Ill. App. 3d 772, 425 N.E.2d 522 (1981); Dague v. Piper Aircraft Corp., 418 N.E.2d 207 (Ind. 1981); Johnson v. Star Mach. Co., 270 Or. 694, 530 P.2d 53 (1974).

188. 425 N.E.2d at 525.

189. *Id.* at 527.

190. *Id.*

191. *Id.*

192. *Id.* The court stated that the purpose of "dampen[ing] the rapid escalation of insurance rates which has accompanied widened exposure to lawsuits" was reasonably related to the 10-year period. *Id.* at 524.

193. *Id.* at 527.

194. 418 N.E.2d 207 (Ind. 1981).

195. *Id.* at 213.

196. *Id.*

197. *Id.*; *see also* Johnson v. Star Mach. Co., 270 Or. 694, 530 P.2d 53, 57 (1974) (Oregon statute of repose found constitutional under due process attack).

constitutionality of a statute of repose by invoking a provision found in many state constitutions, the open court clause.[198] This provision generally provides that a plaintiff cannot be denied access to the courts of his state.[199] Construed broadly, such a provision may be read as prohibiting or severely limiting legislative abolition of common law rights. In *Battilla v. Allis Chalmers Manufacturing Co.*[200] the Florida Supreme Court struck down Florida's products liability statute of repose as denying a plaintiff's access to the courts.[201] The court relied on the reasoning in *Overland Construction Co. v. Sirmons*,[202] in which Florida's statute of repose for architects had been struck down.[203] The *Overland* court held that the architectural statute abolished a common law right to sue without providing an alternative remedy.[204] Because the state had failed to show an "overpowering public necessity" or an "absence of less onerous alternatives," the statute was ruled unconstitutional.[205] The *Overland* court implied that if the legislature had demonstrated the availability of alternative forms of redress, the statute might have been upheld.[206] Construed narrowly, however, open court provisions may be interpreted as merely enunciating a general philosophical guideline for the state, rather than granting a substantive right of access.[207]

IV. THE CASE FOR A PRODUCTS LIABILITY STATUTE OF REPOSE IN TEXAS

A. Products Liability in Texas

The Texas Supreme Court stated the basic rule of products liability in

198. *See, e.g.*, FLA. CONST. art. 1, § 21. Florida's open court provision reads: "The courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial or delay." *Id.*; *see also* ALA. CONST. art. 1, § 13; CONN. CONST. art. 1, § 10; WIS. CONST. art. 1, § 9. The federal Constitution contains no counterpart to this clause.

199. For a discussion of such remedy clauses and their impact on the constitutionality of statutes of repose, see McGovern, *supra* note 5, at 617; Comment, *Alabama's Products*, *supra* note 97, at 172-80.

200. 392 So. 2d 874 (Fla. 1981).

201. *Id.* at 874.

202. 369 So. 2d 572 (Fla. 1979).

203. *Id.* at 575. The statute provided that no action based on the design, planning, or construction of an improvement to realty could be brought against a professional engineer, registered architect, or licensed contractor after 12 years after completion. *Id.* at 572. Many other states have similar architectural statutes of repose, the constitutionality of which has been tested many times. *See* McGovern, *supra* note 51, at 427-28, for a discussion of these statutes. Courts are not, however, uniform as to their rulings of constitutionality.

204. 369 So. 2d at 574-75.

205. *Id.* at 574. The court stated that the passage of time imposed heavy proof burdens on all litigants, and thus the statute benefitted "one class of defendants, at the expense of an injured party's right to sue . . . ." *Id.* at 575.

206. *Id.* at 574.

207. *See* Thornton v. Mono Mfg. Co., 99 Ill. App. 3d 722, 425 N.E.2d 522, 526 (1981) (remedy provision in Illinois constitution is philosophy rather than mandate; court refused to follow *Overland*). These remedy clauses may also be construed as binding only on the judiciary, rather than on the legislature, or as prohibiting the abolition of vested rights only, not those not yet accrued. *See* McGovern, *supra* note 5, at 616; Comment, *Alabama's Products*, *supra* note 97, at 173.

Texas in *Signal Oil & Gas Co. v. Universal Oil Products*,[208] holding that "[o]ne who sells any product in a defective condition unreasonably dangerous to the user or consumer or *to his property* is subject to liability for physical harm thereby caused to the ultimate user or consumer, or *to his property* . . . ."[209] Products liability law in Texas, as stated in *Signal Oil*, is largely a matter of judicial creation and has developed from the initial imposition of implied warranty as a matter of public policy[210] to a judicial adoption of section 402A of the *Restatement (Second) of Torts*[211] and the abolition of the privity requirement in warranty actions.[212] Today, Texas consumers find remedies for products injuries in section 402A and the Texas version of the Uniform Commercial Code.[213] As in other jurisdictions, products liability actions in Texas can be predicated upon any of the three basic products liability theories.

B. Statutes of Limitation in Texas

The application of Texas statutes of limitation varies depending on the theory under which a products claim is brought.[214] In general a Texas statute of limitation begins to run when a cause of action accrues. If the cause of action sounds in negligence, accrual usually occurs at the time the tort is committed even though damages are not immediately apparent.[215] In *Metal Structures Corp. v. Plains Textiles, Inc.*[216] the court of civil appeals refused to depart from the rule that statutes of limitation run from the time of commission of the negligent act, and not from the time the injuries are ascertained.[217] Thus, the plaintiff was barred from recovery though most of his damages occurred after the expiration of the statute.[218]

---

208. 572 S.W.2d 320 (Tex. 1978).

209. *Id.* at 325 (quoting RESTATEMENT (SECOND) OF TORTS § 402A (1965)) (emphasis added by court).

210. Jacob E. Decker & Sons, Inc. v. Capps, 139 Tex. 609, 164 S.W.2d 828 (1942) (implied warranty in food case).

211. McKisson v. Sales Affiliates, Inc., 416 S.W.2d 787, 789-90 (Tex. 1967) (specifically adopting § 402A).

212. Nobility Homes of Tex., Inc. v. Shivers, 557 S.W.2d 77, 81 (Tex. 1977).

213. *Signal Oil*, 572 S.W.2d at 326-27; *see* TEX. BUS. & COM. CODE ANN. §§ 2.312-318 (Tex. UCC) (Vernon 1968).

214. Texas courts have generally held that the primary purpose of a statute of limitation is to compel the assertion of claims within a reasonable time and thereby afford the opposing party a fair opportunity to defend while the evidence is fresh and witnesses are available. Robinson v. Weaver, 550 S.W.2d 18, 20 (Tex. 1977) (citing Price v. Estate of Anderson, 522 S.W.2d 690, 692 (Tex. 1975); Hallaway v. Thompson, 148 Tex. 471, 478, 226 S.W.2d 816, 820 (Tex. 1950)).

215. Atkins v. Crosland, 417 S.W.2d 150, 153 (Tex. 1967); Lyles v. Johnson, 585 S.W.2d 778, 782 (Tex. Civ. App.—Houston [1st Dist.] 1979, writ ref'd n.r.e.).

216. 470 S.W.2d 93 (Tex. Civ. App.—Amarillo 1971, writ ref'd n.r.e.).

217. *Id.* at 98-99.

218. *Id.* at 99; *see also* Fusco v. Johns-Manville Prods. Corp., 643 F.2d 1181, 1183 (5th Cir. 1981) ("In actions for negligence, the period of limitations begins to run from the commission of the negligent act, not the date of the ascertainment of damages."); Robinson v. Weaver, 550 S.W.2d 18, 19 (Tex. 1977) (cause of action accrues when wrongful act effects an injury, regardless of when plaintiff learned of this injury). The statute of limitation applicable to negligence actions is the two-year statute set out in TEX. REV. CIV. STAT. ANN. art. 5526 (Vernon Supp. 1982-1983).

The same two-year statute of limitation applicable to negligence actions applies to strict products liability in tort.[219] In strict liability actions, however, this limitation period begins to run when injury is discovered, or should have been discovered in the exercise of reasonable diligence.[220]

The four-year limitation period of the Uniform Commercial Code is applicable to products actions based solely on implied warranty.[221] In the 1980 case of *Garcia v. Texas Instruments, Inc.* [222] the Texas Supreme Court held that the adoption of section 402A did not repeal the remedies and limitations available under the Texas UCC, and thus the UCC's four-year statute of limitation applied to a personal injury suit brought in warranty.[223] This was so despite the difficulty of bringing personal injury actions under the Texas UCC.[224] Unlike negligence actions, however, the statute of limitation for breach of warranty actions begins to run when the plaintiff discovers or, in the exercise of reasonable diligence should have discovered, his injury.[225] Hence the discovery rule, while generally not applicable in negligence, is applicable in strict products liability in tort and in warranty.

---

219. Roman v. A.H. Robins Co., 518 F.2d 970, 971 (5th Cir. 1975) (products liability action brought against drug manufacturer five years after consumer first learned of injury); Cleveland v. Square-D Co., 613 S.W.2d 790, 792 (Tex. Civ. App.—Houston [14th Dist.] 1981, no writ) (§ 402A action governed by two-year statute of limitation).

220. *See* Fusco v. Johns-Manville Prods. Corp., 643 F.2d 1181, 1183 (5th Cir. 1981) (limitation period in products liability actions commences when "buyer discovers, or in exercise of ordinary care should have discovered injury"); Borel v. Fireboard Paper Prods. Corp., 493 F.2d 1076, 1102 (5th Cir. 1973) (cause of action in asbestos case does not accrue until injury manifests itself), *cert. denied*, 419 U.S. 869 (1974); Thrift v. Tenneco Chems., Inc., 381 F. Supp. 543, 545 (N.D. Tex. 1974) (where disease caused by drug manufactured by defendant did not appear until 23 years after it was administered, statute of limitation ran upon discovery of nature and cause of injuries); *cf.* Roman v. A.H. Robins Co., 518 F.2d 970, 972 (5th Cir. 1975) (action not filed until five years after plaintiff was advised by physician that her problems probably resulted from adverse drug reaction barred).

221. TEX. BUS. & COM. CODE ANN. § 2.725(a) (Tex. UCC) (Vernon 1968).

222. 610 S.W.2d 456 (Tex. 1980) (suit for sulphur burns against manufacturer of container).

223. *Id.* at 462; *see also* Morton v. Texas Welding & Mfg. Co., 408 F. Supp. 7, 10-11 (S.D. Tex. 1976) (claims based on warranty for explosion of propane truck governed by four-year Texas UCC statute of limitation); Cleveland v. Square-D Co., 613 S.W.2d 790, 791 (Tex. Civ. App.—Houston [14th Dist.] 1981, no writ) (four-year statute of limitation set out in TEX. BUS. & COM. CODE ANN. § 2.725(a) (Tex. UCC) (Vernon 1968) applied in implied warranty action).

224. The *Garcia* court cited Code provisions regarding elements of proof, causation, disclaimer, and notice as possible difficulties involved in applying the UCC. 610 S.W.2d at 461; *see also* Heavner v. Uniroyal, Inc., 63 N.J. 130, 305 A.2d 412, 425-26 (1972) (Code provisions regarding consequential damages, notice, and disclaimer classified as "too much luggage"); Pearson v. Franklin Labs., Inc., 254 N.W.2d 133, 138-39 (S.D. 1977) (notice, disclaimer, and privity requirements of UCC distinguish warranty from strict liability).

225. *See* Morton v. Texas Welding & Mfg. Co., 408 F. Supp. 7, 11 (S.D. Tex. 1976) (discovery rule in warranty actions unchanged by enactment of UCC); Metal Structures Corp. v. Plains Textiles, Inc., 470 S.W.2d 93, 99 (Tex. Civ. App.—Amarillo 1971, writ ref'd n.r.e.) (period of limitation commences not at sale, but when buyer discovers, or should have discovered, injury); *see also* Puretex Lemon Juice, Inc. v. S. Riekes & Sons, Inc., 351 S.W.2d 119, 122-23 (Tex. Civ. App.—San Antonio 1961, writ ref'd n.r.e.).

C. *Statutes of Repose in Texas*

Texas currently has no products liability statute of repose. Texas does, however, have both an architects' statute of repose[226] and a medical malpractice statute of repose,[227] both of which have been subject to constitutional scrutiny by the Texas courts. Although the Texas Constitution prohibits the divesting of rights that have completely vested,[228] statutes of repose have withstood this ban on retroactive effect by being interpreted as affecting remedies or procedures rather than substantive rights.[229] Practically, however, such statutes do have a substantive effect because they abolish a plaintiff's cause of action without affording him an alternate means of relief.

The Texas architects' statute of repose bars any claim not brought within ten years of substantial completion against any registered, licensed architect furnishing the design, inspection, or construction of any improvement or structure.[230] Like the malpractice statute, it has the potential effect of completely cutting off an injured plaintiff's cause of action before it arises. The statute does allow for a two-year grace period,[231] however, and does not apply when a written warranty guarantees an improvement for more than ten years, when the action is against the person in actual possession, or when it is based on willful misconduct or fraudulent concealment.[232] Thus, even if a manufacturer is insulated from liability ten years after substantial completion, the owner or lessor of the building is not protected from negligence suits under this statute. The constitutionality of the statute was upheld in the face of equal protection and due process challenges in *Hill v. Forrest & Cotton, Inc.*[233] In *Hill* the widows of men asphyxiated by inhalation of sewage gases brought suit against the engineers who designed the sewage treatment plant, but were barred by the statute.[234] In upholding the statute's constitutionality the court of appeals relied on the strong presumption that the legislature understood and correctly appreciated the needs of its own people.[235] The *Hill* court found that curative or remedial legislation, such as the statute at issue, should be given the most liberal constitutional construction possible.[236]

In construing the architectural statute the *Hill* court also held that the statute was not tolled because of the plaintiff's minority, and that it was not

226. TEX. REV. CIV. STAT. ANN. art. 5536a (Vernon Supp. 1982-1983).
227. *Id.* art. 4590i, § 10.01.
228. TEX. CONST. art. 1, § 6.
229. Doran v. Compton, 645 F.2d 440, 446 (5th Cir. 1981).
230. TEX. REV. CIV. STAT. ANN. art. 5536a(2) (Vernon Supp. 1982-1983).
231. *Id.*
232. *Id.*
233. 555 S.W.2d 145 (Tex. Civ. App.—Eastland 1977, writ ref'd n.r.e.).
234. *Id.* at 150.
235. *Id.* at 149 (citing Smith v. Davis, 426 S.W.2d 827 (Tex. 1968)).
236. 555 S.W.2d at 149; *see also* Ellerbe v. Otis Elevator Co., 618 S.W.2d 870, 873 (Tex. Civ. App.—Houston [1st Dist.] 1981, writ ref'd n.r.e.) (reaffirming constitutionality of architects' statute of repose).

improper to give the statute retroactive effect.[237] While statutes of limitation will normally not run against minors until they reach majority,[238] this rule was held inapplicable in *Hill*, since at the time the minor brought suit the statute had extinguished her claim and she had no cause of action to which the tolling statute could be applied.[239] Although the statute did not become effective until after the wrong was committed, the *Hill* court found that the statute could properly be given retroactive effect because "mere retroactivity" was not sufficient to void a statute.[240] As long as the plaintiffs were afforded a reasonable time to protect their interest, the statute would stand.[241]

The statute of limitation contained in the Medical Liability and Insurance Improvement Act provides that no health care liability claim may be brought unless filed within two years of the occurrence of the breach or tort or from the date on which the medical or health care treatment was completed.[242] The single exception to this bar states that minors under the age of twelve have until age fourteen to file suit or have the claim filed on their behalf.[243] Otherwise, the bar applies to "all persons regardless of minority or other legal disability."[244] This statute abolishes the prior common law rule that in medical malpractice cases the statute of limitation runs from the date the malpractice was or should have been discovered.[245] In the findings and purposes section of the statute the legislature evidenced its concern with what it deemed to be a medical malpractice crisis existing in Texas.[246] The validity of this legislative concern was affirmed in *Littlefield v. Hays*,[247] in which the court of civil appeals found that it was well within the legislature's power to "set an absolute time beyond which the insurer has no exposure."[248] The court upheld the Act's constitutionality on both equal protection and open court grounds, finding that the statute had a fair and substantial relation to the objective of meeting the insurance crisis and that it was proper for the legislature to focus on this group of

237. 555 S.W.2d at 150.

238. *See* TEX. REV. CIV. STAT. ANN. art. 5535 (Vernon Supp. 1982-1983). This provision also tolls statutes of limitation for persons imprisoned or of unsound mind. *Id.*; *see also* McCrary v. City of Odessa, 482 S.W.2d 151, 154 (Tex. 1972) (common law tolling of statute in absence of statute so providing).

239. 555 S.W.2d at 150; *see also* Mahathy v. George L. Ingram & Assocs., 584 S.W.2d 521, 522 (Tex. Civ. App.—Beaumont 1979, no writ) (minor's action against architect for injuries sustained when she cut her arm on glass door barred).

240. 555 S.W.2d at 150 (quoting Texas Water Rights Comm'n v. Wright, 464 S.W.2d 642 (Tex. 1979)).

241. 555 S.W.2d at 150.

242. TEX. REV. CIV. STAT. ANN. art. 4590i, § 10.01 (Vernon Supp. 1982-1983).

243. *Id.*

244. *Id.*

245. *See* Hays v. Hall, 488 S.W.2d 412, 414 (Tex. 1973). The *Hays* court, in applying the discovery rule, recognized that if the statute ran from the date of operation, the patient's legal remedy might be barred before the injury was discovered. "A result so absurd and so unjust ought not to be possible." *Id.*; *see also* Robinson v. Weaver, 550 S.W.2d 18, 19 (Tex. 1977) (discovery rule applicable in medical malpractice suit prior to Liability Act's passage).

246. TEX. REV. CIV. STAT. ANN. art. 4590i, § 1.02 (Vernon Supp. 1982-1983).

247. 609 S.W.2d 627 (Tex. Civ. App.—Amarillo 1980, no writ).

248. *Id.* at 630.

health care providers because their problems differed from those of other insureds.[249] While recognizing that the statute effectively abolished the discovery rule, the court found that such abolition was not of sufficient constitutional dimensions to invalidate the law.[250]

In the recent case of *Sax v. Votteler*,[251] however, the Texas Supreme Court examined the constitutionality of section 4 of article 5.82 of the Texas Insurance Code, the forerunner of the medical malpractice statute.[252] This section provided for a two-year statute of limitation running from the date of breach, tort, or completion of medical treatment. Its provision for minors, however, was less liberal than that contained in the Medical Liability Act, providing that minors under the age of six had until their eighth birthday to file their claim.[253] The supreme court in *Sax* held article 5.82 unconstitutional as it applied to a minor's cause of action.[254] While recognizing that the article's purpose of establishing standards for setting health care liability insurance rates was reasonable, and that a connection existed between the length of an insured's potential liability and such rates, the court found the legislature's means of achieving this purpose unreasonable.[255] Relying exclusively on the open court provision of the Texas Constitution,[256] the court held the statute of limitation in this section of the Insurance Code unconstitutional when "weighed against the effective abrogation of a child's right to redress," and in light of the fact that the legislature had failed to provide "any adequate substitute to obtain redress for . . . injuries."[257] The court was careful, however, to limit its holding to the statute as it applied to minors.[258] In finding the minor's

249. *Id.*
250. *Id.*
251. 648 S.W.2d 661 (Tex. 1983).
252. Act of June 3, 1975, ch. 330, § 4, 1975 Tex. Gen. Laws 864, 865-66, *repealed by* Medical Liability and Insurance Improvement Act, 1977, ch. 817, Part 1, 1977 Tex. Gen. Laws 2039. The Professional Liability Insurance for Physicians, Podiatrists, and Hospitals Act amended chapter 5 of the Insurance Code by adding article 5.82, § 4 of which provided:

> Notwithstanding any other law, no claim against a person or hospital covered by a policy of professional liability insurance covering a person licensed to practice medicine or podiatry or certified to administer anesthesia in this state or a hospital licensed under the Texas Hospital Licensing Law, as amended (Art. 4437f, Vernon's Texas Civil Statutes), whether for breach of express or implied contract or tort, for compensation for a medical treatment or hospitalization may be commenced unless the action is filed within two years of the breach or the tort complained of or from the date the medical treatment that is the subject of the claim or the hospitalization for which the claim is made is completed, except that minors under the age of six years shall have until their eighth birthday in which to file, or have filed on their behalf, such claim. Except as herein provided, this section applies to all persons regardless of minority or other legal disability.

Act of June 3, 1975, ch. 330, § 4, 1975 Tex. Gen. Laws 864, 865-66.
253. *Id.*
254. 648 S.W.2d at 667.
255. *Id.*
256. *Id.* TEX. CONST. art. I, § 13 provides: "All courts shall be open, and every person for an injury done him, in his lands, goods, person or reputation, shall have remedy by due course of law."
257. 648 S.W.2d at 667.
258. *Id.*

parents barred by the statute, the court impliedly upheld the act as applied to adults.[259]

D. Proposal For Texas Legislative Change

Texas has no specific products liability statutes of limitation or repose.[260] In recent years, however, the Texas Legislature has considered proposals seeking to impose a time limit on suits for injuries arising out of the use of defective products.[261] Because these proposals have also included other controversial product reforms, they have failed to pass.[262] Given the favorable judicial treatment accorded the medical malpractice and architects' statutes of repose, however, Texas law appears receptive to legislative enactments capping a defendant's potentially unlimited liability, if such acts are based on rational policy grounds and make exception for minors. Any products liability legislation passed by the Texas Legislature, therefore, will probably contain a repose provision if the products liability "crisis," like the medical malpractice "crisis," is perceived as real.

The Texas Legislature, however, should not enact a products liability statute of repose without careful consideration. Care should be taken to strike a balance between protection of the manufacturer from infinite liability and protection of the often innocent plaintiff from injury caused by defective products. The statute should afford the plaintiff a reasonable amount of time to discover his injury.[263] Perhaps the statute could be limited to actions brought in strict liability and implied warranty. In this way the consumer would still be able to proceed on a negligence theory, subject to the difficult requirement of proving unreasonable conduct. Strict products liability, however, was developed to overcome the difficulty of proving a manufacturer negligent,[264] and thus a statute with such an exception would still seem to be contrary to the spirit of strict products liability. Another way to avoid cutting off completely a plaintiff's action would be to make the presumption created by the repose statute a rebuttable one that could be overcome by a preponderance of the evidence. Imposing on the plaintiff the additional burden of overcoming a presumption may be unreasonable, however, in light of the difficulties associated with proving a product defective after a long period of time.

In striking this balance between manufacturer and consumer the Texas Legislature must also consider when a products liability statute of repose

259. *See id.*

260. Comment, *Limiting Liability*, *supra* note 97, at 142-44.

261. *See* Tex H.B. 2310, 67th Leg. (1981); Tex. H.B. 1161, 66th Leg. (1979); Tex. S.B. 263, 66th Leg. (1979); *see also* Hunter v. Fort Worth Capital Corp., 620 S.W.2d 547, 555 n.2 (Tex. 1981) (Spears, J., dissenting) (various proposals considered by legislature); Keeton, *Torts, Annual Survey of Texas Law*, 34 Sw. L.J. 1, 5 (1980) (discussion of legislative activity in this area).

262. One such reform is the establishment of comparative fault mechanisms in strict products liability. *See* Duncan v. Cessna Aircraft Co., 26 Tex. Sup. Ct. J. 507 (1983); Keeton, *supra* note 261, at 5.

263. *See supra* note 148 for the constitutional ramifications of this requirement.

264. *See supra* notes 37-50 and accompanying text.

should begin to run. The most equitable trigger date appears to be the date of delivery to the first user or purchaser not engaged in the business of selling such products. A statute that runs from the date of manufacture could cause harsh results because many products spend long periods of time on a retailer's shelf. The statute should also include a grace period that allows a plaintiff additional time to bring suit if his injury is discovered within two years of the expiration of the statute.[265] Other exceptions giving consumers additional time to sue should also be included in order to mitigate the severity of the statute in certain circumstances. The Texas medical liability statute, for instance, provides that it will be tolled for two years if the plaintiff is under twelve years of age.[266] Since there is no justifiable distinction between minors under twelve and those laboring under other disabilities, a products liability statute of repose should also make exception for other disabled plaintiffs. Exception should also be made for actions based on indemnity, fraud, or express warranty. In this way third-party claims against the manufacturer would be preserved, the defendant would not be unjustly enriched by his own misrepresentations, and express promises would be upheld. Finally, a products liability repose statute could have the effect of abolishing the discovery rule, which Texas has traditionally applied in products actions.[267] Exception should therefore be made for those cases in which the injury is not discoverable until many years after sale, or is the result of prolonged exposure to a defective product. Utilization of some or all of these exceptions will result in an equitable distribution of the burdens associated with injuries caused by older defective products and will avoid placing the entire burden on the injured consumer.

A products liability statute of repose also raises serious constitutional issues, because such a statute must meet the demands of equal protection and due process. If the statute is drafted to include all those in the chain of manufacture, however, and is rationally related to a permissible goal, it will probably survive equal protection analysis.[268] Similarly, a statute of repose should withstand a constitutional due process challenge if a reasonable period of time is allotted for a party to assert his claim and a reasonable legislative purpose for the limitation can be found. The fact that Texas courts have taken the view that repose statutes extinguish a person's claim before it ever arises and do not deprive a plaintiff of a vested right of action[269] also supports the validity of the statute. A more difficult constitutional objection to overcome, however, may be the Texas Constitution's open court provision.[270] If a statute of repose is held to abolish a common law right of action, Texas courts generally must inquire whether the statute

265. *See supra* note 161 and accompanying text.

266. TEX. REV. CIV. STAT. ANN. art. 4590i, § 10.01 (Vernon Supp. 1982-1983). The constitutionality of even this provision is, however, questionable in light of *Sax v. Votteler*.

267. *See supra* note 220 and accompanying text.

268. *See supra* notes 174-80 and accompanying text.

269. *See supra* note 239 and accompanying text.

270. *See supra* note 256 for the text of this provision.

represents a reasonable exercise of police power for the general welfare and whether it substitutes a reasonable alternative remedy.[271] Since a products liability statute of repose would not provide any alternative remedy to a plaintiff who is barred from suit before the injury occurs, the statute may not pass constitutional muster under the open court provision. This result is particularly likely if the statute makes no exception for minors.

In addressing such constitutional challenges to statutes of repose, Texas courts have thus far found a permissible state objective in the reduction of liability insurance costs.[272] The courts should question, however, whether the goal of reducing insurance premiums is proper in light of the effect statutes of repose have on a plaintiff's right to recover. Perhaps reform should be aimed instead at what seems to be the crux of the manufacturers' crisis, the insurance mechanism itself. Other product liability reforms, less arbitrary and more responsive to the plaintiff's conduct, could be instituted, or more stringent evidentiary rules could be implemented. A useful safe life concept would deal with most of the manufacturers' fears concerning older products, while avoiding the deprivation of an injured consumer's right of action. These reforms, in other words, could accomplish what statutes of repose attempt to do and still provide a better balancing of consumer and manufacturer interests.

Even assuming the constitutionality of a products liability statute of repose, the Texas Legislature should question the wisdom of enacting such a statute. Products liability in Texas has been for the most part a judicial creation. The inherent flexibility of the judiciary permits a case-by-case response to the many variables in products actions. A statute of repose precludes a flexible response to these variables and may often lead to harsh consequences. If Texas does decide to alter the statutes of limitation in products actions, however, the legislature should be cognizant of these conflicting interests and draft a statute of repose that strikes an equitable balance between them.

V. CONCLUSION

The products liability crisis will probably not soon disappear, nor will manufacturers and their insurers stop lobbying state legislatures for reform of products liability statutes of limitation in an effort to cap long-term liability. Statutes of repose may well be among the most frequently suggested and most often successful of proposed reforms, both in Texas and elsewhere. These statutes, however, can cause harsh results by depriving a consumer injured by an older product of his cause of action before it arises. Much of this severity can be lessened by carefully drafted statutes that balance the competing interests of the manufacturer and consumer and by equitable judicial construction. These statutes do, however, effec-

271. Lebohm v. City of Galveston, 154 Tex. 192, 198, 275 S.W.2d 951, 954 (1955) (distinction between valid alteration of common law right and the abolition of that right).

272. *See supra* notes 233-59 and accompanying text.

tively shift the burden in products liability cases involving older products onto the consumer, a result that conflicts with the consumer protection policy that underlies products liability law. A product, if defective at the time it left the manufacturer, is no less defective because of the passage of time. A statute of repose, rather than cutting off a plaintiff's opportunity to sue because of his delinquency, divests him of an important right. It appears, in other words, to abort "the [plaintiff's] right of action, not in the first trimester, but before conception."[273]

273. Saylor v. Hall, 497 S.W.2d 218, 224 (Ky. 1973) (review of Kentucky statute of repose).