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A STATUTE OF REPOSE FOR PRODUCT LIABILITY CLAIMS

*MICHAEL M. MARTIN**

INTRODUCTION

THE "product liability revolution" of the past two decades has increased manufacturers' exposure to liability[1] in three related respects: the persons who may sue, the theories under which they may claim and the duration of the manufacturer's responsibility. The number of persons who can sue for product-caused injuries has increased because the requirement of privity has been relaxed for causes of action not sounding in negligence. This process began in New York, as in many states, with decisions that allowed members of the purchaser's household to recover for defective foodstuffs;[2] was extended to encompass remote purchasers relying on express warranties[3] and, subsequently, remote purchasers asserting breach of implied warranties;[4] and finally permitted bystanders, or persons entirely outside the chain of privity, to recover for personal injuries and property damage caused by defective products.[5] In terms of the available theories of liability, negligence has been expanded by elimination of the "patent danger" rule;[6] breach of implied warranties now encom-

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1. Others besides manufacturers have been adversely affected by recent developments in product liability law, but because the problem under discussion is most acute for manufacturers, reference will typically be to them. *See generally* Model Uniform Product Liability Act § 102(D), 44 Fed. Reg. 62,714, 62,717 (1979). " 'Product liability claim' includes any claim or action brought for harm caused by the manufacture, production, making, construction, fabrication, design, formula, preparation, assembly, installation, testing, warnings, instructions, marketing, packaging, storage, or labelling of the relevant product. It includes, but is not limited to, any action previously based on: strict liability in tort; negligence; breach of express or implied warranty; breach of, or failure to discharge, a duty to warn or instruct, whether negligent or innocent; misrepresentation, concealment, or nondisclosure, whether negligent or innocent; or under any other substantive legal theory." *Id.*

2. Greenberg v. Lorenz, 9 N.Y.2d 195, 173 N.E.2d 773, 213 N.Y.S.2d 39 (1961); Ryan v. Progressive Grocery Stores, Inc., 255 N.Y. 388, 175 N.E. 105 (1931).

3. *See* Randy Knitwear, Inc. v. American Cyanamid Co., 11 N.Y.2d 5, 181 N.E.2d 399, 226 N.Y.S.2d 363 (1962).

4. *See* Goldberg v. Kollsman Instrument Corp., 12 N.Y.2d 432, 191 N.E.2d 81, 240 N.Y.S.2d 592 (1963).

5. Codling v. Paglia, 32 N.Y.2d 330, 298 N.E.2d 622, 345 N.Y.S.2d 461 (1973).

6. This rule relieved a manufacturer from liability if the danger created by the machine was open and obvious, that is, if the defect was patent. Micallef v. Miehle Co., 39 N.Y.2d 376, 378, 348 N.E.2d 571, 574, 384 N.Y.S.2d 115, 119 (1976) (overruling Campo v. Scofield, 301 N.Y. 468, 95 N.E.2d 802 (1950)).

passes design and warning as well as manufacturing defects;[7] and a cause of action for "strict products liability" has been recognized.[8] The duration of the manufacturer's responsibility has increased not only because persons more remote in the privity chain—or even outside it—are permitted to sue, but also because the plaintiffs have a choice among statutes of limitation. The plaintiff who asserts a negligence claim has three years, measured from the date of the injury, in which to bring suit;[9] but until 1975 the New York plaintiff not claiming in negligence was limited by the warranty statute, which was measured from the date the defendant sold the product.[10] Thus, it was possible for a claim to be barred before any injury had occurred. With the decision in *Victorson v. Bock Laundry Machine Co.*,[11] however, the Court of Appeals held that the cause of action for strict products liability sounded in tort and was governed by the three-years-from-date-of-injury limitation statute.[12] The *Victorson* decision meant that the non-negligent manufacturer of a defective product could be held liable many years after the product had left its hands, a situation frequently described as a "long-tail" problem.[13]

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7. *See, e.g.*, Cawley v. General Motors Corp., 67 Misc. 2d 768, 769, 324 N.Y.S.2d 246, 248 (Sup. Ct. 1971); Tirino v. Kenner Prods. Co., 72 Misc. 2d 1094, 1096, 341 N.Y.S.2d 61, 62 (Civ. Ct. 1973).

8. Codling v. Paglia, 32 N.Y.2d 330, 342, 298 N.E.2d 622, 628, 345 N.Y.S.2d 461, 469-70 (1973).

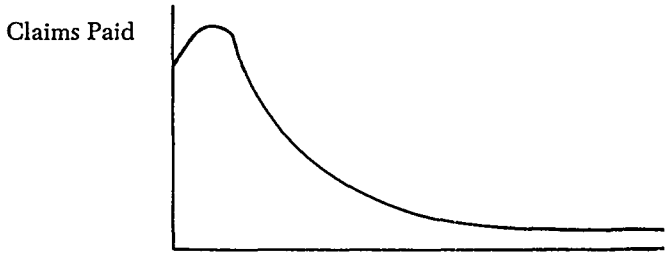
9. N.Y. Civ. Prac. Law § 214(4), (5) (McKinney Supp. 1981); *see, e.g.*, Beninati v. Oldsmobile Div., 94 Misc. 2d 835, 839, 405 N.Y.S.2d 917, 920 (Sup. Ct. 1978).

10. Mendel v. Pittsburgh Plate Glass Co., 25 N.Y.2d 340, 343-44, 253 N.E.2d 207, 209, 305 N.Y.S.2d 490, 493 (1969), *overruled*, Victorson v. Bock Laundry Mach. Co., 37 N.Y.2d 395, 400, 335 N.E.2d 275, 276, 373 N.Y.S.2d 39, 40 (1975). The limitation period for warranty actions applied in *Mendel* was six years, and that is still the period applicable to warranties outside the Uniform Commercial Code. N.Y. Civ. Prac. Law § 213(2) (McKinney 1972). Warranties arising under the Code are subject to a four-year statute. U.C.C. § 2-725 (1977).

11. 37 N.Y.2d 395, 335 N.E.2d 275, 373 N.Y.S.2d 39 (1975).

12. *Id.* at 399-400, 335 N.E.2d at 276, 373 N.Y.S.2d at 40.

13. The description comes from the shape of the graph drawn with claims paid on one axis and years from manufacture on the other:



There are several possibly detrimental consequences of extending the duration of the manufacturer's responsibility. First, it may be difficult to "cost in" tort liability over a period of ten, twenty, thirty or more years,[14] given the uncertainties of future economic developments with their effects on damages, to say nothing of the uncertainties of the legal standards that will be applied.[15] Second, the manufacturers most consistently exposed to these risks are those producing capital goods, such as industrial machinery.[16] These manufacturers sell relatively few products and, therefore, may be less able to "pass through" the costs in the price of new machines.[17] Third, if they do attempt to pass the costs through to customers, older producers, with liability exposure from units already in place, would be at a substantial competitive disadvantage compared to new entrants into the market.[18] Fourth, regardless of what the law may be, there are substantial risks in trying cases involving older products.[19] For example,

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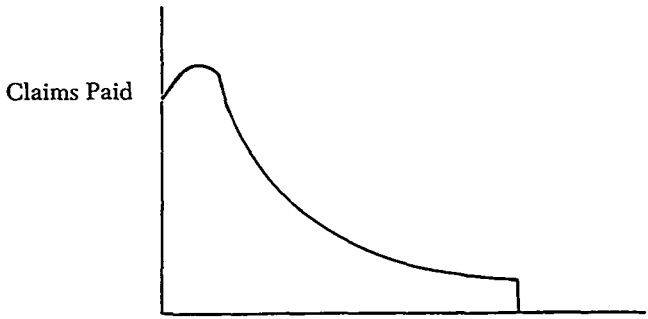
A statute of repose can cut off that "tail":



For a statistical analysis of the long-tail problem, see New York State Insurance Dep't, Product Liability Insurance—Supplemental Report 1, reports 5-6 (July 2, 1980); Insurance Services Office, Product Liability Closed Claim Survey: A Technical Analysis of Survey Results 78 (1977) [hereinafter cited as ISO Survey]. For a general discussion of the long-tail problem, see Phillips, *An Analysis of Proposed Reform of Products Liability Statutes of Limitations*, 56 N.C. L. Rev. 663, 668 (1978); Comment, *Statutes of Repose in Products Liability: The Assault Upon the Citadel of Strict Liability*, 23 S.D. L. Rev. 149, 153 (1978) [hereinafter cited as *Statutes of Repose*].

14. U.S. Dep't of Commerce, Interagency Task Force on Product Liability, Final Report VII-22 (1977) [hereinafter cited as Interagency Task Force Final Report].

15. *See id.* at I-28.

16. *See infra* note 48 and accompanying text.

17. Interagency Task Force Final Report, *supra* note 14, at VII-22.

18. *Id.* at VI-27. Product liability insurance typically covers claims made during the policy period. *Id.* at V-5, VII-20; Comment, *Alabama's Products Liability Statute of Repose*, 11 Cum. L. Rev. 163, 166 (1980) [hereinafter cited as *Product Liability in Alabama*].

19. *See* Interagency Task Force Final Report, *supra* note 14, at I-28.

there is a greater chance that the product has been subjected to a modification or misuse that the jury will say the manufacturer should have foreseen; there is also an increased risk that the jury, no matter how instructed, will use a hindsight perspective rather than evaluate the product by the state of the art at the time it was produced.[20] Finally, even if a manufacturer of an older product is able to prevail on the merits at trial, the investigation and processing of claims is an expensive procedure, and the expense is greater when witnesses and records are difficult to obtain or have long since disappeared.[21]

The manufacturers' increased exposure to liability for defective products was accompanied in the middle and late 1970's by greatly increased premium charges for product liability insurance.[22] The relationship between these phenomena, especially the question of the need for premium increases of the magnitude that were imposed, has been the subject of much controversy and some research.[23] It is clear,

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20. *See* Model Uniform Product Liability Act § 110 analysis, 44 Fed. Reg. 62,714, 62,734 (1979); Phillips, *supra* note 13, at 664; *Statutes of Repose*, *supra* note 13, at 171.

21. Missouri Senate Select Comm. on Product Liability, Report 8, at 11 (1977), *reprinted in* U.S. Dep't of Commerce, Interagency Task Force on Product Liability, Selected Papers 549, 563 (1978) [hereinafter cited as Interagency Task Force Selected Papers].

22. *See* Interagency Task Force Final Report, *supra* note 14, at VII-21; U.S. Dep't of Commerce, Interagency Task Force on Product Liability, Final Report of the Insurance Study by McKinsey & Co. 2-13 to -33 (1977) [hereinafter cited as Interagency Task Force Insurance Study].

23. The research having the broadest base was conducted by the Interagency Task Force on Product Liability, created by the President's Economic Policy Board in 1976. The Task Force commissioned independent contractors to do studies regarding the apparent product liability problem. Industry aspects of the problem were studied by Gordon Associates, Inc. and published in U.S. Dep't of Commerce, Interagency Task Force on Product Liability, Final Report of the Industry Study by Gordon Assocs. (1977) [hereinafter cited as Interagency Task Force Industry Study]; insurance aspects were studied by McKinsey & Company, Inc. and published in Interagency Task Force Insurance Study, *supra* note 22; and legal aspects were studied by The Research Group, Inc. and published in U.S. Dep't of Commerce, Interagency Task Force on Product Liability, Final Report of the Legal Study by The Research Group, Inc., (1977) [hereinafter cited as Interagency Task Force Legal Study]. The Task Force submitted its final report, based on those studies and other data it developed, in 1977. Interagency Task Force Final Report, *supra* note 14, ch. I. Other studies of the problem have taken the form of legislative hearings. *E.g.*, *Product Liability Insurance: Hearings Before the Subcomm. on Capital, Investment and Business Opportunities of the House of Rep. Comm. on Small Business*, 95th Cong., 1st Sess. (1977) [hereinafter cited as *House Small Business Hearings*]; *Product Liability Insurance: Hearings on S. 403 Before the Subcomm. for Consumers of the Senate Comm. on Commerce, Science, and Transportation*, 95th Cong., 1st Sess. (1977) [hereinafter cited as *S. 403 Hearings*]; *Impact on Product Liability: Hearings Before the Senate Select Comm. on Small Business*, 94th Cong., 2d Sess. (1976); Missouri Select Comm. on Product Liability, Report (1977), *reprinted in* Interagency Task Force Selected Papers, *supra* note 21, at 549; *Hearings on S. 5817, S. 5681, S. 6264,*

in any event, that the increasing cost of product liability insurance is a multifaceted problem;[24] one widely suggested "reform," at least in the sense of reducing claims and expenses, has been the adoption of statutes terminating a seller's responsibility after a specified time has passed.[25] These statutes are commonly known, and will be described in this Article, as "statutes of repose."

The simplest form of a statute of repose would typically provide that "no cause of action may be brought against the seller of a defective product for injuries occurring more than ten years after the seller sold the product." Such a statute is distinguishable from a "statute of limitation," which ordinarily begins to run when there has been a breach of the obligation.[26] The statute of limitation thus puts a time limit on the plaintiff's right to seek a remedy for a breach. The statute of repose, on the other hand, limits the obligation itself.[27] Injuries occurring after the running of the statute of repose do not constitute breaches of the obligation, since the obligation exists only during the statutory period. Similar policies lie behind the two types of statutes. Both serve to protect courts and defendants against the difficulties and uncertainties resulting from stale or unavailable evidence.[28] Moreover, both promote more efficient use of resources by permitting potential defendants to "close their books" regarding possible claims and to devote the released reserves to productive functions.[29] The principal difference between them is that the statute of limitation implicitly indicates disapproval of those plaintiffs who "sleep on their

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and S. 6883 Before the N.Y. Senate Subcomm. on Product Liability (1977) [hereinafter cited as *N.Y. Senate Product Liability Hearings*]; Defense Research Institute, Inc., Products Liability Position Paper No. 9 (1976); *Statutes of Repose*, *supra* note 13, at 167 n.113. *See generally* Note, *When the Product Ticks: Products Liability and Statutes of Limitations*, 11 Ind. L. Rev. 693, 694-99 (1978) [hereinafter cited as *Products Liability*].

24. Interagency Task Force Final Report, *supra* note 14, at I-20 to -31.

25. *E.g.*, *House Small Business Hearings*, *supra* note 23, *passim* (submission by William Logan); *N.Y. Senate Product Liability Hearings*, *supra* note 23 (submissions of Edward Reinfut, Jeffrey J. Zogg and Dennis B. Connally); Interagency Task Force Insurance Study, *supra* note 22, at 4-92; *see* ABA, Tort Reform and Related Proposals, *passim* (B. Levin & R. Coyne eds. 1979). Twenty-two states have adopted statutes of repose. *See* statutes cited *infra* note 36.

26. *See generally* Address by William McGovern, *The Status and Variety of Statutes of Limitation and Statutes of Repose in Product Liability Actions*, Joint General Session, ABA Convention, at 3-6 (Honolulu, Aug. 5, 1980) [hereinafter cited as McGovern Address].

27. *Id.* at 4.

28. *Developments in the Law—Statutes of Limitations*, 63 Harv. L. Rev. 1177, 1185 (1950); *Statutes of Repose*, *supra* note 13, at 168-69.

29. *See* Comment, *Limitation of Action Statutes for Architects and Builders—Blueprints for Non-action*, 18 Cath. U. L. Rev. 361, 377 (1969) [hereinafter cited as *Limitation of Action Statutes*].

rights," while the statute of repose operates to bar some plaintiffs no matter how diligent they may be in asserting their claims.[30]

Adoption of statutes of repose has been recommended not only by interested parties, such as manufacturers, their insurers and trade associations,[31] but also by the United States Department of Commerce, under whose direction the most comprehensive impartial study of product liability problems was conducted in 1976 and 1977.[32] The Model Uniform Product Liability Act, published by the Department in 1979,[33] includes a provision limiting the duration of a seller's responsibility to the product's "useful safe life,"[34] which is presumed not to exceed ten years.[35] As of January 1, 1982, twenty-two states had adopted statutes of repose applicable to product liability actions[36] or had statutes of limitation that had been interpreted as statutes of repose.[37] Most of those statutes, unlike the Model Uniform Product

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30. *See id.* at 378-79.

31. *See* sources cited *supra* note 25.

32. *See* Interagency Task Force Final Report, *supra* note 14. The Task Force recommended a ten-year statute of repose to protect manufacturers of workplace goods and a ten-year statute for consumer goods that would allow claims for "actual economic losses" after that period when the defect "was present in the product at the time it was sold (e.g., long-term risk from a pharmaceutical)." *Id.* at VII-28 to -29.

33. Model Uniform Product Liability Act, 44 Fed. Reg. 62,714 (1979). An earlier version, the Draft Uniform Product Liability Law, was published in 44 Fed. Reg. 2996 (1979).

34. Model Uniform Product Liability Act § 110(A)(1), 44 Fed. Reg. 62,714, 62,732 (1979).

35. *Id.* § 110(B)(1), 44 Fed. Reg. 62,714, 62,732 (1979).

36. Ala. Code § 6-5-502(c) (Supp. 1979); Ariz. Rev. Stat. Ann. § 12-551 (1982); Colo. Rev. Stat. § 13-21-403(3) (Supp. 1978); Conn. Rev. Gen. Stat. § 52-577a (1981); Fla. Stat. Ann. § 95.031(2) (West Supp. 1981); Ga. Code Ann. §§ 105-106(b)(2) (Supp. 1981); Idaho Code § 6-1403 (Supp. 1980); Ill. Ann. Stat. ch. 83, § 22.2 (Smith-Hurd Supp. 1981-1982); Ind. Code Ann. § 34-4-20A-5 (Burns Supp. 1981); Ky. Rev. Stat. Ann. § 411.310(1) (Bobbs-Merrill Supp. 1980); Mich. Comp. Laws Ann. § 600.5805(9) (Supp. 1980); Minn. Stat. Ann. § 604.03 (West Supp. 1981); Neb. Rev. Stat. § 25-224(2) (Supp. 1981); N.H. Rev. Stat. Ann. § 507-D:2(II) (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(2) (1979); R.I. Gen. Laws § 9-1-13(2) (Supp. 1981); S.D. Codified Laws Ann. § 15-2-12.1 (Supp. 1981); Tenn. Code Ann. § 29-28-103 (1980); Utah Code Ann. § 78-15-3 (1977). In addition, Connecticut, Kansas, North Carolina and Oregon have tort limitations provisions measured from the act or omission complained of, thus serving as statutes of repose. Conn. Rev. Gen. Stat. §§ 52-577, -584 (1981); Kan. Stat. Ann. § 60-513(b) (1976); N.C. Gen. Stat. § 1-52(16) (Supp. 1981); Or. Rev. Stat. § 12.115(2), (3) (1979). The Oregon statute is limited to negligent injuries. *Id.* The Kansas statute, however, has been construed as a customary statute of limitations running from the injury, with the ten-year repose limitation applicable only to injuries not reasonably discoverable at the time they accrue. Ruthrauff v. Kensinger, 214 Kan. 185, 195, 519 P.2d 661, 667 (1974). For statutes of repose applicable to architects and contractors and to medical malpractice actions, see *infra* note 158.

37. *E.g.*, Conn. Rev. Gen. Stat. §§ 52-577, -584 (1981), *construed in* Prokolkin v. General Motors Corp., 170 Conn. 289, 294-97, 365 A.2d 1180, 1183-84 (1976);

Liability Act, have absolute cutoffs, with the applicable periods ranging from five to twelve years.[38]

This Article considers whether it is necessary or desirable for New York to adopt a statute of repose applicable to product liability claims. Consideration is also given to the form such a statute should take, if a favorable decision as to its adoption is reached.

I. The Need for a Statute of Repose

The need for a statute of repose is a difficult matter to determine. Many persons and organizations have asserted that there is a significant "long-tail" problem and that some device must be adopted to relieve the burdens it imposes, especially those upon manufacturers.[39] Often these calls for "reform" are accompanied by reference to situations supposedly illustrating the need:

> Just a few miles north of here, a man made a screw machine years ago. . . . Last fall he was sued for over a quarter million dollars. That machine has changed hands four times. It has been modified at least three or four times in that period of time. A man was injured on that thing and now he is suing for a quarter of a million dollars. The suit was filed, I think, in Atlanta, Georgia. This man has to take himself and some of his staff down there to spend maybe three or four days, or maybe a week or ten days, testifying on this thing and the amount of money involved in this thing, no one knows. And he is right to the point now of whether to continue buying product liability insurance or not buying and taking a chance of another lawsuit. If he has another lawsuit and loses it, he will be out of business. He has already closed a foundry with 25 people employed because of this thing. He cannot afford the product liability [insurance] for the foundry. He has closed it down—there are 25 people out of work.[40]

Full documentation of these incidents is infrequently provided, and the subsequent history of the claim—for example, whether it was dismissed on summary judgment—is often lacking.[41]

Of course, there are situations in which enough information is available to ensure that the claims are not just figments of the imagination or distorted rumors. For example, the leading New York case of *Victorson v. Bock Laundry Machine Co.*[42] involved a twenty-one-year-old laundry centrifuge extractor that injured a customer's child

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Or. Rev. Stat. § 12.115(1) (1979), *construed in* Johnson v. Star Mach. Co., 270 Or. 694, 706-09, 530 P.2d 53, 59-60 (1974).

38. *See infra* pt. II(A)(3).

39. *See supra* note 25 and accompanying text.

40. Missouri Senate Select Comm. on Product Liability, Report 9 (1977), *reprinted in* Interagency Task Force Selected Papers, *supra* note 21, at 561.

41. *See* Interagency Task Force Selected Papers, *supra* note 21, at 325-27.

42. 37 N.Y.2d 395, 335 N.E.2d 275, 373 N.Y.S.2d 39 (1975).

who was able to stick his arm in it before it stopped spinning.[43] In this instance the case went to the Court of Appeals, which allowed the plaintiff to assert a strict liability claim, running from the date of injury, even though a breach of warranty claim would have been barred because the injury occurred more than four years after the manufacturer sold the machine.[44] The problem is that there is little data indicating whether cases like *Victorson* are common or relatively rare.

A. *Empirical Data*

The best empirical data available come from a study conducted by the Insurance Services Office (ISO), the statistical agency of the insurance industry.[45] The study was an analysis of 24,452 records of product liability claims closed by twenty-three major liability insurers from July 1, 1976 to March 15, 1977.[46] The principal findings of the ISO survey relevant to the present question are indicated in the following table:

TABLE 1

TIME FROM MANUFACTURE TO OCCURRENCE
BODILY INJURY CLAIMS[47]

Time Interval	Cumulative % of Injured Parties	Cumulative % of Payment
Up to 12 months	83.1%	49.4%
Up to 48 months	93.2	80.5
Up to 96 months	96.4	90.1
Up to 120 months	97.2	93.4
Up to 144 months	97.7	94.3
Number of Incidents	6,711	
Average Payment		$24,791

Thus, 83.1% of persons injured, accounting for 49.4% of bodily injury payments made, suffered their injuries within one year of the product's manufacture. Within four years of manufacture, 93.2% of personal injuries (80.5% of ultimate payments) had been incurred.

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43. *Id.* at 400, 335 N.E.2d at 276, 373 N.Y.S.2d at 41.
44. *Id.*
45. *See* ISO Survey, *supra* note 13, at 78.
46. *Id.* at 7. *See generally* Interagency Task Force Final Report, *supra* note 14, at V-29 to -33 (critique of and response to ISO methodology); Interagency Task Force Selected Papers, *supra* note 21, at 103-27 (same).
47. ISO Survey, *supra* note 13, at 81. For more complete data, see *id.* at 228, 412.

However, 3.6% of the injuries, accounting for 9.9% of payments, took place more than eight years after manufacture and 2.3% (5.7% of payments) occurred more than twelve years after manufacture.

The long-tail problem appears considerably more serious if the claims for capital goods are isolated, as shown in Table 2:

TABLE 2

TIME FROM MANUFACTURE TO OCCURRENCE—CAPITAL GOODS ONLY BODILY INJURY CLAIMS[48]

Time Interval	Cumulative % of Injured Parties	Cumulative % of Payment
Up to 12 months	38.3%	33.4%
Up to 48 months	66.9	68.4
Up to 96 months	78.5	82.6
Up to 120 months	83.5	87.1
Up to 144 months	86.0	87.6
Number of Incidents	480	
Average Payment	$68,261	

With capital goods, 21.5% of the persons injured suffer their injuries more than eight years after the product is manufactured and 14.0% are injured by products more than twelve years old.

The data from the ISO study are confirmed by data from more limited surveys regarding New York product liability claims.[49] For

48. *Id.* at 82. For more complete data, see *id.* at 230, 414.

49. A survey by the author of fully reported appellate decisions of the New York courts from 1973 to 1980 showed the following:

Years	Manufacture-Injury (cases)	Sale-Injury (cases)
0- 2	16	22
- 4	4	4
- 6	5	4
- 8	1	1
-10	0	2
-12	1	0
-15	1	1
-20	1	
20+	0	1
could not be determined	32	25
TOTAL	61	61

On file with the author, Fordham University School of Law. Two of the three cases over ten years involved pharmaceuticals whose effects were not discovered for more

example, a survey by the New York State Insurance Department of 4,548 product liability claims made against New York insurers during the last half of 1979[50] indicated that 7.9% of the 469 claims for which information was available involved injuries or property damage that occurred more than eight years after the product was manufactured and 2.8% of 1,241 claims involved injuries or property damage occurring more than eight years after the product had been sold by the insured.[51]

The ISO data suggest that even if a statute of repose as short as four years were adopted, fewer than seven percent of the persons injured by defective products would have their claims barred.[52] These claims, however, account for almost twenty percent of the product liability payments made and for a somewhat larger percentage of claim processing expenses.[53] If the statute of repose were eight years, fewer than four percent of injured parties, receiving about ten percent of the payments, would be unable to assert their claims against the manufacturer.

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than a decade; the third was a laundry centrifuge extractor. These data are very limited in their value. They are based on appellate opinions, which represent a small percentage of the cases filed and a relatively minute portion of the claims made. Usually the appellate decisions are rendered only in the more important product liability cases where complex issues must be resolved; there is, however, some indication that they tend to be more representative of the universe of cases in this area than in other tort areas. Interagency Task Force Final Report, *supra* note 14, at I-13. In any event, the small number of decisions surveyed precludes any statistically valid conclusions.

50. N.Y. State Insurance Dep't, Product Liability Insurance—Supplemental Report, report 1 (July 2, 1980). Pursuant to Act of July 13, 1979, ch. 692, § 4, 1979 N.Y. Laws 1346, 1347, insurers are required to file semi-annual reports regarding product liability insurance claims, cancellations and non-renewals with the Superintendent of Insurance, who, in turn, is to report to the Governor and the Legislature a summary of the data collected together with an assessment of the status of product liability insurance costs and any recommendations for statutory or administrative changes. The first report by the superintendent covered the six-month period ending December 31, 1979. N.Y. State Insurance Dep't, Product Liability Insurance—Report 3, 4 (May 30, 1980). Late-arriving data from that period required issuance of the Supplemental Report, *supra*, containing a claims analysis.

51. N.Y. State Insurance Dep't, Product Liability Insurance—Supplemental Report, reports 6-7 (July 2, 1980); *see also* ISO Survey, *supra* note 13, at 83 (97.4% of bodily injuries, accounting for 90.5% of payments, occurred within six years of the product's purchase).

52. If these data are valid, the decision in *Victorson*, *see supra* notes 10-12 and accompanying text, applying the three-years-from-injury statute of limitation, rather than the four-years-from-sale contractual statute, to strict products liability claims had the effect of allowing approximately an additional seven percent of injured parties to assert their claims.

53. For each dollar of payment, the insurance company defending the claim incurs an additional expense of 35 cents for bodily injury and 48 cents for property damage. ISO Survey, *supra* note 13, at 11. Claim processing expenses are presumably larger when older products are involved. *See supra* note 21 and accompanying text; N.Y. State Insurance Dep't, Product Liability Insurance—Supplemental Report, report 6 (July 2, 1980).

Manufacturers and potential plaintiffs necessarily will view the foregoing figures from different perspectives: From the manufacturer's point of view, a statute of repose would affect few people but would permit rather substantial savings. From the perspective of potential plaintiffs, however, a not insignificant number of persons with more serious injuries could get no compensation from the manufacturer. Choosing between these perspectives requires further analysis.

At the outset, it might be helpful to understand why the older cases tend to account for more than their proportionate share of final payments. The most likely reason for this phenomenon relates to the kinds of products involved at the different time intervals; small claims based on food products are disproportionately represented among the claims arising soon after manufacture,[54] while older products causing injury tend to be those with a greater capacity for serious consequences. The ISO data indicate that more than forty percent of the injuries occurring more than eight years after the product is manufactured involve capital goods.[55] The study does not indicate which other product categories most frequently generated long-tail claims. It is, however, possible to infer from the nature of products involved and data on the incidence of all claims[56] that, aside from capital goods, automotive and medical products and chemicals were most likely to cause personal injury more than eight years after manufacture.[57] Automotive products tend to be quite durable, and medical products tend either to be quite durable—for example, prosthetic devices—or tend, as in pharmaceuticals, to have consequences that may appear a substantial time after exposure. Aside from capital goods, it is not possible to express in quantitative terms the impact of the categories of products that give rise to long-tail claims. The ISO study did determine that more than twenty-one percent of the persons injured by capital goods, accounting for almost eighteen percent of the payment made, suffered injuries from products more than eight years old.[58] At least in that area, then, it appears that a statute of repose could have a significant effect.

B. *Likely Effects of a Statute of Repose in New York*

From the manufacturer's or seller's point of view, the effects of a statute of repose are likely to be related to the costs of claims, espe-

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54. ISO Survey, *supra* note 13, at 77.

55. *See id.* at 35; *Statutes of Repose*, *supra* note 13, at 170-71.

56. Of 239 persons injured, 103, or 43%, were injured by capital goods. ISO Survey, *supra* note 13, at 228, 230.

57. *Id.* at 35.

58. *Id.* at 82. For product lines specified as capital goods, see *id.* at 519-25.

cially to insurance premiums.[59] The adoption of the statute is not likely to affect the manufacturer's primary conduct: Unlike other possible adjustments in the law, such as admitting evidence of subsequent remedial measures,[60] the presence or absence of a statute of repose is unlikely to change the care a manufacturer will exercise in design or construction of its products.

Overall, a statute of repose of eight years would eliminate less than ten percent of the total payments for product injuries. It could, however, provide manufacturers a little relief in their product liability insurance rates.[61] In areas like capital goods, adoption of a statute of repose would eliminate twenty percent of the claims, thereby perhaps easing significantly the insurance rates manufacturers face.[62] Even for manufacturers of other types of products, for which the number of claims is not significant, the subjectivity of the ratemaking process may lead to lower premiums.[63] There is some evidence that older claims, or the fear of older claims, have a disproportionate effect when rates are established.[64] Limiting the uncertainty associated with those claims should permit rate reductions greater than their actual incidence would otherwise suggest.

Against these arguments in favor of a statute of repose there are at least two factors that would tend to reduce the net effects of a statute of repose in New York. First, New York law already provides protec-

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59. Costs incurred as a result of product liability include, in addition to insurance premiums, losses paid within the deductible amount of the policy, company claims handling, legal staff expenses and non-legal defense expenses. Interagency Task Force Final Report, *supra* note 14, at VI-28.

60. *See* Caprara v. Chrysler Corp., 52 N.Y.2d 114, 122, 417 N.E.2d 545, 549, 436 N.Y.S.2d 251, 255 (1981).

61. One underwriter told the Interagency Task Force, during the Insurance Study, that simply alleviating one problem (through a statute of repose) would not be sufficient justification for changing his company's underwriting posture; another indicated that even a federal statute might not lead to a reduction in rates. Interagency Task Force Insurance Study, *supra* note 22, at 4-92, 4-94. The Task Force's final report is ambivalent and unspecific as to a statute's likely effects on insurance rates. *See* Interagency Task Force Final Report, *supra* note 14, at VII-23; Johnson, *Products Liability "Reform": A Hazard to Consumers*, 56 N.C. L. Rev. 677, 690 n.66 (1978).

62. *See* Interagency Task Force Insurance Study, *supra* note 22, at 4-93.

63. The Interagency Task Force Insurance Study, *supra* note 22, concluded: "Rates for product liability insurance are based largely or, for some products, entirely on non-statistically derived, judgmental estimates of loss frequency and severity. Further, the rates can be modified, based on prior loss experience and nontangible factors. Thus, while actuarial considerations are a part of determining the appropriate rate levels, the impact of the actuarial analysis on the final rate used is minimal." *Id.* at I-40; *see* Interagency Task Force Final Report, *supra* note 14, at II-9 to -17; *see also* Interagency Task Force Selected Papers, *supra* note 21, at 101-08 (comments of Insurance Services Office on Final Report); *id.* at 109-27 (reply of Interagency Task Force staff).

64. Interagency Task Force Insurance Study, *supra* note 22, at 4-92.

tion not found in some other states against problems associated with long-tail claims. Almost all long-tail claims involving capital goods, and possibly many others, arise from workplace injuries.[65] These injuries often result from "defects" that are in fact, if not in law, attributable to the employer[66]—for example, encouraging or permitting unsafe uses of the products, maintaining improperly and making modifications that decrease safety.[67] In some states, the manufacturer tends to be held liable if the employer's conduct can be said in any sense to have been "foreseeable."[68] In New York, however, the Court of Appeals has been somewhat more responsive to the manufacturer's position. In the first place, the plaintiff may not recover unless the product was used in the manner that was intended[69] or, if the use was not intended, that was *reasonably* foreseeable.[70] The manufacturer's duty does not extend to designing or manufacturing a product that is impossible to abuse,[71] and improper use by the plaintiff or a third person bars the plaintiff's claim.[72] Furthermore, the manufacturer will not be held liable if modifications render a product defective that was not defective when it left the manufacturer's hands.

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65. See product categories termed "capital goods" in ISO Survey, *supra* note 13, at 519-25. Chemical products and some types of automotive products (e.g., trucks) are frequently involved in workplace injuries. *See* Interagency Task Force Legal Study, *supra* note 23, at III-78, -79. Such products also have consequences far removed from the date of manufacture. *Id.*

66. *See* Interagency Task Force Legal Study, *supra* note 23, at II-208.

67. The ISO Survey indicated that 11.9% of all payments for personal injury claims, and 14.0% of those for claims involving capital goods, were made in cases in which the product had been modified by someone other than the injured party. ISO Survey, *supra* note 13, at 107-08.

68. *See* Interagency Task Force Legal Study, *supra* note 23, at II-201 to -214. For a more complete discussion of this subject, see the dissenting opinion of Judge Fuchsberg in Robinson v. Reed-Prentice Div., 49 N.Y.2d 471, 483-86, 403 N.E.2d 440, 445-48, 426 N.Y.S.2d 717, 723-25 (1980) (Fuchsberg, J., dissenting).

69. Codling v. Paglia, 32 N.Y.2d 330, 342, 298 N.E.2d 622, 628, 345 N.Y.S.2d 461, 470 (1973).

70. Micallef v. Miehle Co., 39 N.Y.2d 376, 385-86, 348 N.E.2d 571, 577, 384 N.Y.S.2d 115, 121 (1976); *see* Bolm v. Triumph Corp., 33 N.Y.2d 151, 157-58, 305 N.E.2d 769, 772-73, 350 N.Y.S.2d 644, 648-49 (1973).

71. Robinson v. Reed-Prentice Div., 49 N.Y.2d 471, 480, 403 N.E.2d 440, 444, 426 N.Y.S.2d 717, 721 (1980).

72. Codling v. Paglia, 32 N.Y.2d 330, 342, 298 N.E.2d 622, 628-29, 345 N.Y.S.2d 461, 469-70 (1973); *see* Halloran v. Virginia Chems., Inc., 41 N.Y.2d 386, 392-93, 361 N.E.2d 991, 995-96, 393 N.Y.S.2d 341, 346-47 (1977). *But see* Micallef v. Miehle Co., 39 N.Y.2d 376, 386, 348 N.E.2d 571, 577, 384 N.Y.S.2d 115, 121 (1976) (manufacturer's obligation to design product to avoid user negligence). If the product is found defective under New York's narrower standards, the manufacturer may still assert misuse by the plaintiff or a third person, for example, the employer, as a ground for reduction, N.Y. Civ. Prac. Law art. 14-A (McKinney 1976), or apportionment, *id.* art. 14, of damages. *See* Guyot v. Al Charyn, Inc., 69 A.D.2d 79, 82, 417 N.Y.S.2d 941, 944 (1979).

Thus, in the recent case of *Robinson v. Reed-Prentice Division*,[73] the Court of Appeals held that the manufacturer could not be held liable for injuries resulting from modifications made by the employer that rendered safety guards installed by the manufacturer ineffective. The court's defendant-protective stance was evident from its decision against liability even though the manufacturer knew before the machine was sold that the employer intended to make the dangerous modifications and even though relatively inexpensive safer alternatives were available to the manufacturer.[74]

The foregoing suggests that to the extent workplace injuries involve employer fault, which seems more likely as the age of the product increases, a statute of repose might not add significantly to the legal protection already given a manufacturer by New York law. Nevertheless, a statute of repose could make a difference in transaction costs. Even under *Robinson*, a modification by the employer may present a difficult question as to whether the manufacturer exercised reasonable care in designing the product for unintended yet reasonably foreseeable uses.[75] The defense provided by a statute of repose is much more certain because it involves only a determination of significant dates.

Current New York law also provides protection to manufacturers of products other than capital goods. This is especially true with pharmaceuticals and chemicals, where the likelihood of successful long-tail claims is already minimized by the rule that begins the running of the statute of limitations with exposure to the deleterious substance, not with discovery of the consequent injury.[76] When long-tail claims for these products are allowed in other jurisdictions, it is probably because of a "discovery" rule,[77] rather than because the exposure did not

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73. 49 N.Y.2d 471, 403 N.E.2d 440, 426 N.Y.S.2d 717 (1980).

74. *Id.* at 477-78, 480-81, 403 N.E.2d at 442, 444, 426 N.Y.S.2d at 719, 721.

75. *See id.* at 480-81, 403 N.E.2d at 444, 426 N.Y.S.2d at 721-22.

76. Thornton v. Roosevelt Hosp., 47 N.Y.2d 780, 781, 391 N.E.2d 1002, 1003, 417 N.Y.S.2d 920, 922 (1979); Schwartz v. Heyden Newport Chem. Corp., 12 N.Y.2d 212, 218, 188 N.E.2d 142, 145, 237 N.Y.S.2d 714, 718, *cert. denied*, 374 U.S. 808 (1963). Of course, tolling provisions permit a long tail when the exposure occurs during a period of incapacity, such as when an infant takes a drug with delayed side effects.

77. *See, e.g.*, Karjala v. Johns-Manville Prods. Corp., 523 F.2d 155, 160 (8th Cir. 1975) (applying Minnesota law); Thrift v. Tenneco Chem. Inc., 381 F. Supp. 543, 545 (N.D. Tex. 1974); Williams v. Vick Chem. Co., 279 F. Supp. 833, 835-36 (S.D. Iowa 1967); Burd v. New Jersey Tel. Co., 76 N.J. 284, 292, 386 A.2d 1310, 1314-15 (1978); Schiele v. Hobart Corp., 284 Or. 483, 489-90, 587 P.2d 1010, 1014 (1978); McCroskey v. Bryant Air Cond. Co., 524 S.W.2d 487, 491 (Tenn. 1975); Kan. Stat. Ann. § 60-513(b) (1976); Mo. Ann. Stat. § 516.100 (Vernon 1952); S.C. Code Ann. § 15-3-535 (Law. Co-op. Supp. 1981); Vt. Stat. Ann. tit. 12, § 512(4) (Supp. 1981). *See generally* Birnbaum, *"First Breath's" Last Gasp: The Discovery Rule in Products Liability Cases*, 13 Forum 279 (1977) (discussing effect of discovery rule).

take place until many years after manufacture. A statute of repose, therefore, would be unlikely to bar many claims not already barred by the New York statute of limitations rule.

The second basis for arguing that a statute of repose would do little to provide insurance rate relief to manufacturers is that New York law applies to only eight percent of product liability claims nationwide for personal injuries[78] and only seven percent of claims for property damage.[79] Thus, for a statute of repose to have a significant effect on insurance premiums, adoption would have to be much more general.[80] Of course, adoption by New York might have greater effect if either premium rates were calculated taking into account the particular law governing the individual manufacturer or if certain industries, for example, the manufacture of capital goods, were disproportionately governed by New York law. There is, however, no indication that either is the case.[81]

From the point of view of injured persons, the arguments against a statute of repose logically focus on its effect of depriving them of compensation in some instances.[82] Certainly, the twenty percent of persons injured by capital goods, and perhaps even the much smaller percentages in other areas, seem significant numbers to those whose claims the statutes would bar. In practical effect, however, those numbers may be somewhat misleading. First, as previously noted, many long-tail claims involve workplace injuries. Almost all capital goods cases are of this nature and so, presumably, are many of the cases involving older automotive products[83] and chemicals. Most persons injured in the workplace are covered by workers' compensation, which means that even if claims against the manufacturer are barred by a statute of repose, an injured party is unlikely to go totally uncompensated for medical expenses and lost earnings.[84] Of course,

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78. *See* ISO Survey, *supra* note 13, at 27-28.

79. *See id.* at 28-29.

80. The 22 states that have enacted general or product liability statutes of repose, *see supra* note 36, provide the law for 34% of product liability personal injury claims and 38% of product liability property damage claims. *See id.* at 27-29; Phillips, *supra* note 13, at 672.

81. Product liability insurance rates are calculated on a nationwide basis. Interagency Task Force Final Report, *supra* note 14, at I-28. In the final analysis, however, the premiums actually charged amount to "informed best guesses" of the individual underwriter, affected by such factors as the competitive environment, the insurer's overall capacity or limitations on the capacity that the insurance company management is willing to devote to the line, potential defense costs, and myriad other factors. *Id.* at V-10, -12.

82. *E.g.*, *id.* at VII-24 to -25; Johnson, *supra* note 61, at 690-91.

83. Trucks, tractors and similar vehicles tend to have longer useful lives than consumer automobiles. *See supra* note 65.

84. Interagency Task Force Legal Study, *supra* note 23, at II-178 to -179; *Products Liability*, *supra* note 23, at 713, 723.

the inadequacy of compensation benefits has been, in the view of some, a major factor in the increasing number of suits against product manufacturers and, perhaps, in making the courts generally more amenable to product liability claims.[85] That view implies a general problem regarding compensation in the workplace, of which the "long tail" is only a minor part. Product manufacturers, as well as workers, would benefit more from a resolution of the problem through reform of the workers' compensation system than from attacking any of its inadequacies through a statute of repose. Second, as has already been noted, many of the long-tail claims identified in the ISO study are already barred under current New York law, so a statute of repose would have no effect on the persons injured in those cases. Many consumers who suffer product injuries outside the workplace are already unable to recover from the manufacturer because of the statute of limitations approach employed in New York for chemicals and drugs.[86] Others may find their opportunities to recover, or to recover fully, restricted by doctrines regarding standards of care in design,[87] or the comparative fault doctrine.[88] Finally, it is possible to draft a statute of repose that will not deprive injured consumers of rights to compensation against proximate parties such as retailers, yet will protect manufacturers against long-tail claims.[89]

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85. *See, e.g.*, *S. 403 Hearings*, *supra* note 23, at 268 (statement of Prof. Davis); Machinery and Allied Products Institute, Products Liability: A MAPI Survey 30 (1976), *reprinted in House Small Business Hearings*, *supra* note 23, at 241. *But see* Interagency Task Force Legal Study, *supra* note 23, at III-99 to -101.

86. *See supra* notes 76-77 and accompanying text.

87. Under New York law, a design is defective if it is "not reasonably contemplated by the ultimate consumer and is unreasonably dangerous for its intended use. . . . *[T]he ultimate question in determining whether an article is defectively designed involves a balancing of the likelihood of harm against the burden of taking precaution against that harm.*" Robinson v. Reed-Prentice Div., 49 N.Y.2d 471, 479, 403 N.E.2d 440, 443, 426 N.Y.S.2d 717, 720 (1980) (emphasis added). In contrast, under California law, for example, a product may be found defectively designed if it "fail[s] to perform as safely as an ordinary consumer would expect when used in an intended or reasonably foreseeable manner," without regard to any risk-benefit analysis. Barker v. Lull Eng'g Co., 20 Cal. 3d 413, 426-27, 432, 573 P.2d 443, 452, 455-56, 143 Cal. Rptr. 225, 234, 237-38 (1978) (emphasis and citations omitted). The practical difference between the two approaches lies in the greater difficulty faced by a Californian in obtaining a decision that the design is not defective as a matter of law. The California approach, therefore, requires most cases to be sent to the jury, thereby increasing transaction costs.

88. *See* N.Y. Civ. Prac. Law art. 14-A (McKinney 1976). If capital goods, automotive products and industrial chemicals are excluded because the claimants have access to other sources of compensation, such as workers' compensation, and pharmaceuticals and other non-industrial chemicals because claimants are likely to be barred from recovery for long-tail claims under current New York law, the remaining categories of products likely to produce significant numbers of long-tail claims, such as furniture and sporting goods, tend to result in smaller payments than the excluded categories. *See* ISO Survey, *supra* note 13, at 35.

89. Although it would be possible to measure each defendant's obligation from the date he last controlled the product, thereby giving consumers recovery against

In sum, the available data suggest the following effects of a statute of repose in New York. First, it might assist manufacturers of capital goods by leading to some reduction in their product liability insurance rates. At the same time, the workers' compensation system would cushion almost all victims against being completely denied recovery for their injuries. Second, so far as can be ascertained, the statute would be unlikely to have any effect on the product liability insurance rates of other manufacturers because the incidence of successful long-tail claims is already very low. If a statute of repose were adopted, some small percentage of consumers, probably not exceeding 1.5% of claimants with an eight-year statute and less with a longer one,[90] would be deprived of compensation from the parties protected by the statute, although those claimants might well have access to other sources such as immediate sellers and first-party insurance.

II. Drafting Considerations if a Statute of Repose Is To Be Recommended

The implication of the foregoing is that neither great benefit will be achieved nor great harm done if a statute of repose is adopted. Political factors may tip the balance, but it is difficult to discern clear policy elements strongly pointing one way or the other. Assuming that a decision is made in favor of proposing new legislation, the remainder of this Article considers the important features of a statute of repose.

A. *A Proposal For Discussion*

Because it will have little effect on the incidence or severity of product injuries[91] and will, if anything, only increase the social costs

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proximate sellers while protecting the remote manufacturers, the economic costs of precluding indemnification in such a situation are probably excessive. *See infra* note 105 and accompanying text.

90. This assumption is based on the fact that capital goods comprise more than 40%, and an inference that medical and industrial automotive products and chemicals comprise an additional 20%, of the 3.6% of claims that are made for products over eight years old. *See* ISO Survey, *supra* note 13, at 35; *supra* notes 55-58 and accompanying text.

91. The presence of a statute of repose certainly provides no greater incentive to take precautions than does its absence. At the same time, it is likely to have at most a negligible effect in the other direction. Manufacturers of capital goods are already subject to the deterrent forces of laws mandating safety devices, as well as market forces penalizing manufacturers of unsafe equipment. *Products Liability*, *supra* note 23, at 714. Furthermore, it is rarely practical to make a design decision that could take significant advantage of the statute's limit, given the small percentage of claims that constitute the long-tail problem in the first place; it is highly questionable whether many products, especially for consumers, are designed with much thought given to possible injuries after fifteen, as compared to after eight, years. At that level, the uncertainties are so great, and the incidence of injury so small, that risks are avoided by insurance rather than design changes. *But see id.* at 714 & n.125.

when losses are not spread, the principal objective of a statute of repose must be to reduce the costs of administering the system. The major "transaction costs" that the statute must remove are those related to uncertainty: uncertainty as to the duration of possible liability, as to the amounts of potential liability and as to the legal standards that will be applied.[92] Thus, a statute of repose serves its purpose only if it provides reasonable assurance to the manufacturer, insurer or other responsible party that at some point there will be no liability for injuries caused by the product. That reasonable assurance can only be given if, at that time, a relatively uncomplicated determination can be made that the responsible party's liability has terminated. Therefore, the principal criterion for the following suggestions for a statute of repose is that, in most cases, the statute's applicability should be determinable on a motion for summary judgment.[93]

Although one effect of a statute of repose is inevitably to eliminate claims that ultimately are or should be determined invalid, it is also recognized that the statute will bar some claims that are truly valid. The suggested statute is, therefore, intended to minimize the number of valid claims cut off while having the maximum effect in reducing the costs of other claims.

The principal features of a statute of repose are: (1) a definition of its scope, in terms of legal theory, subject matter, parties covered and so forth; (2) the event(s) that mark the beginning of its running; (3) the length of the period; (4) the consequences of the running of the period; and (5) any exceptions.[94] The following proposed statute includes each of these features:

> *No person shall have a cause of action for damages for personal injury, wrongful death or injury to property caused by a defective product, or for indemnification or contribution with respect to liability for personal injury, wrongful death or injury to property so caused, unless the personal injury, death or injury to property occurred within eight years after the product was manufactured. The foregoing limitation shall not apply if the personal injury, death or injury to property occurred within a longer period for which the party against whom the cause of action is asserted has expressly warranted the product. The foregoing limitation shall not apply to causes of action for negligence in repairing or maintaining a product.*

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92. *See supra* notes 14-21 and accompanying text. Even if strict application of the legal rules means that the plaintiff will not be successful, uncertainty as to the applicability of those rules or to whom they will be applied tends to encourage litigation with its attendant expenses. *See* Interagency Task Force Final Report, *supra* note 14, at I-28.

93. *See* N.Y. Civ. Prac. Law § 3212 (McKinney Supp. 1981).

94. *See* McGovern Address, *supra* note 26, at 13.

1. Scope

The suggested statute applies only to product liability claims, because it is meant to address the problems peculiar to such causes of actions. Those cases are broadly defined by the injury and its causal relation to a product, not by reference to legal theories such as negligence, strict liability and warranty. In this area particularly, legal theories can be ambiguous;[95] for example, in New York, "strict liability" for a defectively designed product seems to require a showing of lack of due care—that is, negligence.[96] To avoid situations in which the characterization is the sole determining factor of the repose period,[97] the definition of the scope of the statute mentions no theories, except express warranty and negligence in repairs.[98] Similarly, there is no mention of the various types of product defects that could be alleged,[99] because they also are ambiguous. Once again, a list could encourage counsel to make characterization arguments and force courts to make more difficult decisions than that implied in deciding whether the plaintiff seeks damages for injury "caused by a defective product." The proposal covers claims for personal injuries including illness,[100] property damage and wrongful death.[101] As the last section of this Article points out, there is no constitutional need to treat

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95. *See, e.g.*, Victorson v. Bock Laundry Mach. Co., 37 N.Y.2d 395, 400-02, 335 N.E.2d 275, 277-78, 373 N.Y.S.2d 39, 41-43 (1975).

96. Robinson v. Reed-Prentice Div., 49 N.Y.2d 471, 480, 403 N.E.2d 440, 444, 426 N.Y.S.2d 717, 721 (1980); Lancaster Silo & Block Co. v. Northern Propane Gas Co., 75 A.D.2d 55, 62, 427 N.Y.S.2d 1009, 1013-14 (1980).

97. This is already a problem with the causes of action for breach of warranty and strict products liability for personal injuries to non-contracting users or bystanders—in all respects save the statute of limitations the theories are identical. Martin, *1978 Survey of New York Law—Torts*, 30 Syracuse L. Rev. 555, 559 (1979); *see* Mendel v. Pittsburgh Plate Glass Co., 25 N.Y.2d 340, 345, 253 N.E.2d 207, 210, 305 N.Y.S.2d 490, 494-95 (1969), *overruled*, Victorson v. Bock Laundry Mach. Co., 37 N.Y.2d 395, 400, 335 N.E.2d 275, 277, 373 N.Y.S.2d 39, 41 (1975). *See generally* Martin v. Julius Dierck Equip. Co., 43 N.Y.2d 583, 591, 374 N.E.2d 97, 101, 403 N.Y.S.2d 185, 189 (1978) (cause of action accrues at time of injury); *id.* at 596, 374 N.E.2d at 104, 403 N.Y.S.2d at 192 (Gabrielli, J., dissenting) (same).

98. Other statutes, however, identify theories under which a cause of action may be brought. Ala. Code § 6-5-501(2) (Supp. 1979); Ill. Ann. Stat. ch. 83, § 22.2(a)(3) (Smith-Hurd Supp. 1981-1982); Ind. Code Ann. § 34-4-20A-1 (Burns Supp. 1981); N.D. Cent. Code § 28-01.1-02(1) (Supp. 1981); R.I. Gen. Laws § 9-1-13(b) (Supp. 1981); Utah Code Ann. § 78-15-3(1) (1977).

99. Several state statutes list the product defects that can be alleged. *E.g.*, Ala. Code § 6-5-501(2) (Supp. 1979); Ariz. Rev. Stat. Ann. § 12-681(3) (1982); Colo. Rev. Stat. § 13-21-401(2) (Supp. 1978); Ill. Ann. Stat. ch. 83, § 22.2(3) (Smith-Hurd Supp. 1981-1982).

100. Illness is explicitly covered in the Illinois statute. Ill. Ann. Stat. ch. 83, § 21.2 (Smith-Hurd Supp. 1981-1982).

101. All the statutes of repose, except Georgia's, specifically apply to wrongful death as well as personal injury and property damage claims. *E.g.*, Ky. Rev. Stat. Ann. § 411.300 (Bobbs-Merrill Supp. 1980); Mich. Comp. Laws Ann. § 600.5805(8) (Supp. 1981-1982); Minn. Stat. Ann. § 604.03 (West Supp. 1982).

wrongful death claims differently from other personal injury actions;[102] nor is there any apparent policy justification for reducing a defendant's protection in death cases. Economic loss is not mentioned because it is either an element of the listed injuries or an element of contractual damages that are not subject to the statute of repose.[103]

The proposed statute specifically applies to claims for indemnification or contribution arising out of injuries caused by defective products.[104] Because the repose period is measured for all defendants from the date of manufacture to the date of injury, not to the date the action is commenced, it will not place liability on those further along the merchandising chain, such as retailers and distributors. Forcing them to bear the responsibility for a significant number of claims would be economically inefficient: Insurance is more expensive for smaller units, and the deterrent effects of liability would only indirectly reach the manufacturers and designers ultimately responsible.[105] Although indemnification and contribution claims will extend the period for which manufacturers and others at the head of the chain must plan, as long as the period is measured from the same date for all defendants,[106] they will each enjoy the certainty that is the statute's desired goal. While it is theoretically possible under the proposal that a claim could be made against a manufacturer nineteen or more years[107] after the product was manufactured, in almost all

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102. *See infra* notes 186-98 and accompanying text.

103. *See* Martin v. Julius Dierck Equip. Co., 43 N.Y.2d 583, 590, 374 N.E.2d 97, 100, 403 N.Y.S.2d 185, 188-89 (1978). The statute makes no distinction between workplace and consumer injuries. This is consistent with the initial draft of the Model Uniform Product Liability Act, Draft Uniform Product Liability Law §§ 109(B)(1), (2), 44 Fed. Reg. 2996, 2999, 3000 (1979). *But see* Interagency Task Force Final Report, *supra* note 14, at VII-28 to -29 (suggesting that it would be useful to draw such a distinction).

104. The Connecticut and New Hampshire statutes include specific provisions applying the repose period to indemnification and contribution claims, commonly called "claims-over." Conn. Rev. Gen. Stat. § 52-577a (1981); N.H. Rev. Stat. Ann. § 507-D:2(II) (Supp. 1979). The New Hampshire statute extends the repose period by an additional ninety days. *Id.* The Alabama, Idaho, Illinois, Indiana and Nebraska statutes specifically do not apply to indemnification and contribution claims. Ala. Code § 6-5-502(c) (Supp. 1979); Idaho Code § 6-1303 (Supp. 1980); Ill. Ann. Stat. ch. 83, § 21.2 (Smith-Hurd Supp. 1981-1982); Ind. Code § 34-4-20A-6 (Burns Supp. 1981); Neb. Rev. Stat. § 25-224(3) (1979).

105. *See* Phillips, *supra* note 13, at 670.

106. Interagency Task Force Legal Study, *supra* note 23, at V-17 n.37; Siegel, *Procedure Catches Up—And Makes Trouble*, 45 St. John's L. Rev. 62, 70 (1970). If the statute were measured from the time each defendant sold or parted with possession and claims-over were not covered, the manufacturer's liability could be indefinitely extended, especially for products having long shelf lives.

107. Such an extended length of time could ensue as a result of the following: eight years repose period, plus three years personal injury limitation period as provided by N.Y. Civ. Prac. Law § 214(5) (McKinney Supp. 1981-1982), plus two years litigation or claim processing, plus six years indemnification or contribution limitation period

instances the claim-over will be asserted earlier by impleader or the manufacturer will receive other notice that the claim is pending.[108] In any event, a separate indemnification or contribution action is less likely to pose the same litigation problems for the manufacturer-defendant as would an action equally far removed, in terms of time, from the product's manufacture if brought by an injured plaintiff.

The proposed statute applies to all product liability actions, except those founded on express warranty.[109] The warranty exception recognizes that a party who has made an express commitment is not subject to the uncertainty that the statute is intended to avoid. This rationale does not depend on the existence of a direct bargaining relationship between the plaintiff and defendant: So long as the manufacturer has represented that it will stand behind a product for a period longer than the statute, it should not complain about a long-tail problem when the ultimate consumer, or even a bystander, is injured.[110]

A number of statutes of repose limit their application to certain causes of action. For example, some apply only to strict liability actions.[111] As previously noted, it is often difficult in practice to arrive at the distinction between strict liability and negligence actions. Such a limitation appears to have been adopted out of a concern that manufacturers might escape liability for products that are constructed or assembled in a negligent manner.[112] Although empirical evidence

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pursuant to N.Y. Civ. Prac. Law § 213(2) (McKinney 1972). *See* McDermott v. City of New York, 50 N.Y.2d 211, 218-19, 406 N.E.2d 460, 463, 428 N.Y.S.2d 643, 647 (1980).

108. The retailer would ordinarily want the manufacturer to assist in defending the product liability claim; and even if the retailer undertook the defense alone, it would have a strong incentive to assert the claim-over as soon as possible after an adverse judgment had been rendered.

109. Eight states exclude express warranties from their statutes of repose. Ariz. Rev. Stat. Ann. § 12-551 (1982); Idaho Code § 6-1303(1)(b) (Supp. 1981); Ill. Ann. Stat. ch. 83, § 21.2(4)(b) (Smith-Hurd Supp. 1981-1982); Ind. Code § 34-4-20A-1 (Burns Supp. 1981); N.D. Cent. Code § 28.01.1-02 (Supp. 1981-1982); R.I. Gen. Laws § 9-1-13 (Supp. 1981); Utah Code Ann. § 78-15-3 (1977). The statutes of Alabama, Connecticut and New Hampshire also exclude express warranties when the warranty is in writing. Ala. Code § 6-5-502(c) (Supp. 1979); Conn. Rev. Gen. Stat. § 52-577a (Supp. 1981); N.H. Rev. Stat. Ann. § 507-D:2 (IV) (Supp. 1979). Because the accrual of a cause of action is not relevant under the proposal, the problem presented by the ambiguity in U.C.C. § 2-725(2) (1977), which provides a separate accrual date when a warranty "explicitly extends to future performance," is avoided. *See generally* Phillips, *supra* note 13, at 669-70 (discussing interpretation problems created by UCC language).

110. *Cf.* Randy Knitwear, Inc. v. American Cyanamid Co., 11 N.Y.2d 5, 15, 181 N.E.2d 399, 407, 226 N.Y.S.2d 363, 370 (1962) (breach of express warranty).

111. *E.g.*, Ga. Code Ann. § 105-106(b)(2) (Supp. 1981); Ill. Ann. Stat. ch. 83, § 21.2 (Smith-Hurd Supp. 1981-1982); Mich. Comp. Laws Ann. § 600.5805(9) (Supp. 1981-1982).

112. *See* Interagency Task Force Final Report, *supra* note 14, at VII-24. By the same reasoning, the Task Force recommended that any statute of repose have an

is scanty, it would seem that such products rarely would survive the statutory period to cause injury. The limitation, therefore, is of questionable merit. Limitation to strict liability claims may also reflect the perception that these cases cause most of the problem and a belief that older negligence claims are self-policing in that the plaintiff's burdens of proof become more difficult to satisfy.[113] Permitting a negligence action, however, would leave the courts open to the design and warning defect cases that constitute most, if not all, of the long-tail problem.[114]

One state excludes all warranty actions from its statute of repose.[115] The proposed statute only excludes express warranties from its coverage. Implied warranties actually find their source in the law rather than in an agreement between the parties; consequently, unlike warranties that are express, they should be treated the same as tort actions for negligence and strict products liability.[116] Other states make the statute of repose inapplicable when the defendant has committed fraudulent misrepresentation, concealment or nondisclosure.[117] This exception creates an open invitation for plaintiffs to plead, for example, that the manufacturer committed "constructive fraud" in marketing the product with its alleged defect.[118] Once again, placing this sort of question before the court engenders the uncertainty the statute is intended to avoid.

The proposed statute operates in favor of all persons who may incur liability if the product is defectively designed, manufactured, assembled, packaged or labelled. The precise specification of "manufacturer, assembler or distributor"[119] is avoided because it might be read too narrowly and preclude some who should have the protection. The one class of possible defendants who should not be within the scope of

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exception for defects present in the product at the time it was sold. *Id.* at VII-28 to -29. As the report noted, "this compromises the apparent concreteness of the format of this remedy." *Id.* at VII-24.

113. *See* Defense Research Institute, Products Liability Position Paper No. 9, at 22 (1976); *Product Liability in Alabama, supra* note 18, at 171.

114. *See supra* note 98 and accompanying text; *see also Products Liability, supra* note 23, at 718 (forecasting expanded use of res ipsa loquitor in that event).

115. Ind. Code Ann. § 34-4-20A-1 (Burns Supp. 1981).

116. Martin v. Julius Dierck Equip. Co., 43 N.Y.2d 583, 589, 374 N.E.2d 97, 99-100, 403 N.Y.S.2d 185, 187 (1978).

117. *See, e.g.*, Conn. Rev. Gen. Stat. § 52-577a (1981); Idaho Code § 6-1303(2)(b)(2) (Supp. 1980); N.H. Rev. Stat. Ann. § 507-D:2(IV) (Supp. 1979).

118. *See* Baker v. Beech Aircraft Corp., 96 Cal. App. 3d 321, 325, 157 Cal. Rptr. 779, 782 (1979).

119. For example, the Illinois statute defines "seller" as "one who, in the course of a business conducted for the purpose, sells, distributes, leases, assembles, installs, produces, manufactures, fabricates, prepares, constructs, packages, labels, markets, repairs, maintains, or otherwise is involved in placing a product in the stream of commerce." Ill. Ann. Stat. ch. 83, § 21.2(a)(4) (Smith-Hurd Supp. 1981-1982).

the statute's protection are those who only repair or maintain the product;[120] they cannot be held responsible for design defects and thus are seldom, if ever, subject to long-tail liability. Furthermore, application of the statute would bar timely claims, even though those claims pose no long-tail difficulties for those who maintain or repair.

2. The Start of the Period of Repose

Under the proposal, the repose period is measured from the date of manufacture of the product.[121] This starting date was selected to allow the parties to be as certain as possible of their obligations and rights.[122] Similar certainty, and fewer barred claims, could be achieved by measuring each defendant's obligation from the date on which it last sold or controlled the product.[123] That formulation,

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120. See the New Hampshire statute, which limits claims against a person having a legal duty to maintain or repair to twelve years after that person ceases to have possession of the product or ceases to be under a duty to repair it. N.H. Rev. Stat. Ann. § 507-D:2 (II)(b) (Supp. 1979).

121. The date of manufacture is used as an alternate starting date in the Utah statute. Utah Code Ann. § 78-15-3(1) (1977). The Illinois statute provides that replacement of a component with a substitute part having the same design will not restart the statute for purposes of allowing a claim of defective design of the product *or* the component. Ill. Ann. Stat. ch. 83, § 21.2 (Smith-Hurd Supp. 1981-1982). By giving the benefit of the statute running from the time the assembled product was originally sold, this statute seems unduly protective of the manufacturer of the substitute part. If the design of the component has been determined to be defective in the intervening period, the manufacturer should not be able to continue supplying it with that design without the extension of its exposure to liability. With respect to manufacturing defects, the Illinois statute would presumably run from delivery of the substitute component. *See id.*; Nat'l Product Liability Council, Proposed Uniform State Product Liability Act, *reprinted in* Product Liability Prevention Conference, Proceedings 185 (1978).

122. The proposal does not restart the repose period when the defendant or the manufacturer regains possession of the product, for example, to recondition or repair it, or when a government agency issues a recall or other safety order. Other statutes, however, include a restart period. Ala. Code § 6-5-502(e)(1) (Supp. 1979) (manufacturer's repossession and government recall); Ill. Ann. Stat. ch. 83, § 21.2(c)(2) (Smith-Hurd Supp. 1981-1982) (manufacturer's repossession); N.H. Rev. Stat. Ann. § 507-D:2(II)(b) (Supp. 1981-1982) (same); N.D. Cent. Code § 28-01.1-02 (Supp. 1979) (same). Such a provision might seem fair because the parties would have notice that exposure to liability was extended. In some industries, however, such a provision would virtually eliminate the assurance that at some reasonably predictable time there would be no liability. Most models of automobiles, for example, are subject to one or more agency orders; since the timing of the orders varies widely, manufacturers subject to a statute of repose with a restart provision would have to plan as though no car would survive the extended repose period. Furthermore, a restart provision could tempt manufacturers not to submit defect reports required by statute. *See, e.g.*, 15 U.S.C. § 1411 (1976).

123. *See* Conn. Rev. Gen. Stat. § 52-577a(a) (1981); N.H. Rev. Stat. Ann. § 507-D:2(II)(a) (Supp. 1981-1982). See also the Kansas, North Carolina and Oregon general statutes of repose, which run from the date of the defendant's act that gives

however, would increase the risk that retailers and distributors would be held liable for selling products that are defective according to current standards, rather than according to the state of the art at the time they were designed.[124] Starting the running of the statute, as some states do, on the date when the product was first sold for use or consumption[125] preserves the injured party's right to compensation in a case when the product has a long shelf life in the hands of distributors and retailers;[126] however, it makes the manufacturer's period of responsibility uncertain, since it is dependent on how long distributors or retailers have kept the product on the shelf. Several of the statutes have two different periods, one running from the date of manufacture or sale by the defendant and the other from the first purchase of the product for use or consumption.[127] Unless the defendant's obligation ends when the first of the two periods has run,[128] the statute gives the manufacturer no predictable end to liability.

3. End of the Period

The proposed statute provides that the "personal injury, death or injury to property [for which damages are claimed must have] occurred within eight years after" the period began to run. There are three principal features to note about this part of the proposal: the ending date is (1) certain, (2) generally applicable and (3) measured to

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rise to a cause of action. Kan. Stat. Ann. § 60-513(b) (1976); N.C. Gen. Stat. § 1-52(16) (Supp. 1981); Or. Rev. Stat. § 12.115(1) (1979). The Connecticut general tort statutes of limitation also operate as statutes of repose because they are measured from the date of the act or omission complained of. Prokolkin v. General Motors Corp., 170 Conn. 289, 294-97, 365 A.2d 1180, 1183-84 (1976); Conn. Rev. Gen. Stat. § 52-577 (1981); *id.* § 52-584.

124. *See supra* note 20 and accompanying text.

125. Ariz. Rev. Stat. Ann. § 12-551 (1982); Colo. Rev. Stat. § 13-21-403(3) (Supp. 1978); Ga. Code Ann. § 105-106(b)(2) (Supp. 1981); Neb. Rev. Stat. § 25-224(2) (1979); N.C. Gen. Stat. § 1-50(6) (Supp. 1979); Or. Rev. Stat. § 30.905(1) (1979); R.I. Gen. Laws § 9-1-13(2)(b) (Supp. 1981); Tenn. Code Ann. § 29-28-103 (1980). Other statutes start the period with delivery to the original owner not in the business of selling the product to a user or consumer. *E.g.*, Idaho Code § 6-1303(1)(a) (Supp. 1981); S.D. Codified Laws Ann. § 15-2-12.1 (Supp. 1981).

126. *See* Massery, *Date-of-Sale Statutes of Limitation—A New Immunity for Product Suppliers*, 1977 Ins. L.J. 535, 547.

127. Ill. Ann. Stat. ch. 83, § 22.2 (Smith-Hurd Supp. 1981-1982); Ky. Rev. Stat. Ann. § 411.310(1) (Bobbs-Merrill Supp. 1980); N.D. Cent. Code § 28.01.1-02 (Supp. 1981); Utah Code Ann. § 78-15-3 (1977). These statutes are also intended to give the manufacturer some certainty while accommodating the needs of consumers of products with extended shelf lives. The Tennessee statute alternatively runs from the shorter of the first purchase for use or consumption or from the expiration of the "anticipated life of the product," which is the expiration date placed on the product by the manufacturer when required by law. Tenn. Code Ann. § 29-28-103 (1980).

128. *E.g.*, Ill. Ann. Stat. ch. 83, § 22.2(4)(b) (Smith-Hurd 1980); Tenn. Code Ann. § 29-28-103(a) (1980).

the injury, not commencement of the legal action. A certain end date is a feature included in most enacted statutes of repose.[129] A few, however, measure the repose period by the "useful safe life" of the product.[130] Such a provision avoids the apparent arbitrariness of subjecting products with widely varying expected life-spans to a single standard.[131] The transaction costs involved in avoiding arbitrariness are, unfortunately, substantial. Under the Minnesota statute, for example, a determination of whether the product's useful safe life has expired must consider such factors as the wear and tear to which it has been subjected, deterioration from natural causes, and the policies of the user and similar users as to repairs, renewals and replacements.[132] Furthermore, expiration of useful safe life almost always seems to be a jury question, since it is a defensive matter to be established by a preponderance of the evidence.[133] The product seller is given some relief by the inclusion of a statutory presumption, for example, that harm caused more than ten years "after time of delivery" occurs after the expiration of the product's useful safe life.[134] That presumption may be rebutted, however, by "clear and convincing

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129. *See, e.g.*, Ariz. Rev. Stat. Ann. § 12-551 (1982); Fla. Stat. Ann. § 95.031(2) (West 1982); Ga. Code Ann. § 105-106(b)(2) (Supp. 1981).

130. *E.g.*, Conn. Rev. Gen. Stat. § 52-577a(c) (1981); Idaho Code § 6-1303(1) (Supp. 1981). The Minnesota statute measures the period by the product's "useful life." Minn. Stat. Ann. § 604.03 (West Supp. 1981).

131. *See* Interagency Task Force Final Report, *supra* note 14, at VII-23 to -24; Phillips, *supra* note 13, at 673; *see also* Interagency Task Force Insurance Study, *supra* note 22, at 4-93 (discussing insurance problems created when single rate standard is adopted); Interagency Task Force Legal Study, *supra* note 23, at V-14 (dealing with legal problems a single standard would create). Allowance for differing lives among products is also the purpose of statutes creating a rebuttable presumption that the product is not defective after a specified number of years, *e.g.*, Ky. Rev. Stat. Ann. § 411.310(1) (Bobbs-Merrill Supp. 1980), and of statutes depriving the plaintiff of the benefits of any presumption after a specified period. *See, e.g.*, Mich. Comp. Laws Ann. § 600.5805(9) (Supp. 1980).

132. Minn. Stat. Ann. § 604.03 (West Supp. 1981); *accord* Conn. Rev. Gen. Stat. § 52-577a (1981). The Idaho statute defines "useful safe life" only as "the time during which the product would normally be likely to perform or be stored in a safe manner." Idaho Code § 6-1303 (Supp. 1981); *see also* Model Uniform Product Liability Act § 110(A)(1)(a)-(e), 44 Fed. Reg. 62,714, 62,732 (1979).

133. Idaho Code § 6-1303(1)(a) (Supp. 1981). The Minnesota statute does not specify which party has the burden of proof, but says only that expiration of the ordinary useful life of the product is "a defense to a claim." Minn. Stat. Ann. § 604.03 (West Supp. 1981). Under the Connecticut statute, "useful safe life" is a concept by which the claimant may obtain an extension of the ten-year repose period. Conn. Rev. Gen. Stat. § 52-577a(c),(d) (1981).

134. Idaho Code § 6-1303(2)(a) (Supp. 1981). The Minnesota statute does not provide any presumptive period of useful life. Minn. Stat. Ann. § 604.03 (West Supp. 1981). The Connecticut statute is phrased in terms of a statute of repose of ten years, with the claimant permitted to recover after that time if he can show that the product's useful safe life was longer. Conn. Rev. Gen. Stat. § 52-577a (1981).

evidence."[135] A statute measured by the product's useful life or useful safe life, even if limited by a fixed-term presumption, involves transaction costs that would seem largely to negate the possible benefits of the statute. An attempt to recognize the wide variation in useful lives by prescribing, through statute or regulation, different periods for different products would also be difficult.[136] Tables such as those established by the Internal Revenue Service[137] are not really appropriate for incorporation by reference into the statute, and creating a new statutory table for these purposes would be a mammoth undertaking.[138] Besides, it is questionable whether the "useful safe life" of a product is the correct criterion for the repose period. The long-tail problem arises not only when products are used past their useful safe lives; it is also related to changing technological standards, the difficulties of providing proof after the passage of years, and product modifications.[139] Because the proposed statute is intended to address these problems, the ending date is not only certain but also generally applicable to all products.

In order to make it clear that the statute of repose is not just a statute of limitation, the ending date of the repose period is the date of the injury, not the commencement of the action.[140] Statutes of limitation are generally treated as procedural for purposes of conflict of laws, so the forum applies its own limitation period regardless of

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135. Idaho Code § 6-1303(2)(a) (Supp. 1981).

136. Interagency Task Force Final Report, *supra* note 14, at VII-28.

137. *Id.* at VII-27; Interagency Task Force Industry Study, *supra* note 23, at VII-11 to -13.

138. *See Statutes of Repose*, *supra* note 13, at 177-78.

139. *See supra* notes 14-21 and accompanying text. *See generally* Massery, *supra* note 126, at 543-44, 547 (distinguishing between products with long useful lives and those with long shelf lives). To the extent that the long-tail problem is one of the products being used past their useful lives, manufacturers could be given some additional protection by being permitted to make effective disclaimers. *See* Interagency Task Force Legal Study, *supra* note 23, at 24-29; *cf.* Velez v. Craine & Clark Lumber Corp., 33 N.Y.2d 117, 124-25, 305 N.E.2d 750, 753-54, 350 N.Y.S.2d 617, 622-23 (1973) (analogy to UCC waiver and disclaimer provisions). The practicality of this remedy is limited by questions regarding the effectiveness of disclaimers when the parties do not have equal bargaining power, as well as when the injured person is outside the chain of privity. *See* U.C.C. § 2-318 (1977);Interagency Task Force Legal Study, *supra* note 23, at V-27 to -28; *cf.* Johnson, *supra* note 61, at 691 n.69 (suggesting that manufacturers may limit liability by specifying useful life on the product).

140. Eight statutes are measured to the date of injury. Ariz. Rev. Stat. Ann. § 12-551 (1982); Ga. Code Ann. § 105-106(b)(2) (Supp. 1981); Idaho Code § 6-1303 (Supp. 1981); Ky. Rev. Stat. Ann. § 411.310(1) (Bobbs-Merrill Supp. 1980); Mich. Comp. Laws Ann. § 600.5805(9) (Supp. 1980); Minn. Stat. Ann. § 604.03 (West Supp. 1981); N.D. Cent. Code § 28.01.1-02 (Supp. 1981); S.D. Codified Laws Ann. § 15-2-12.1 (Supp. 1981). The other statutes are measured to the commencement of an action. *E.g.*, N.H. Rev. Stat. Ann. § 507-D:2(II) (Supp. 1979); N.C. Gen. Stat. § 1-50(6) (Supp. 1979); Or. Rev. Stat. § 30.905(1) (1979).

which state's substantive law is applied.[141] If the repose period were so treated, New York manufacturers would be less likely to receive the statute's protection in out-of-state actions by non-resident plaintiffs.[142] The other reason to end the repose period with the date of injury is to avoid application of tolling provisions, such as absence from the jurisdiction and infancy, that may serve to extend the statute of limitations.[143] The rationale behind tolling provisions makes them inapplicable to statutes of repose. Tolling provisions are intended to excuse the plaintiff who might otherwise be thought to be sleeping on his rights; the policies underlying the statute of repose make such consideration of the plaintiff's conduct irrelevant.[144]

For purposes of determining the end of the repose period, the occurrence of the injury should be defined the same way as is the accrual of the cause of action for the statute of limitations. This approach will ensure no difference in result regardless of how continuous exposure and undetected injuries are treated.[145] Thus, if the plaintiff takes a drug at year five after sale by the manufacturer and discovers its adverse effects at year fifteen, the claim will be barred by the statute of limitations if the New York courts continue to measure that statute from the tortious ingestion,[146] and by the statute of repose if there should be a rule adopted saying the injury takes place at its discovery.[147]

The eight-year period selected for the proposal is obviously arbitrary; statutes adopted to date have repose periods of three to twelve

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141. Martin v. Julius Dierck Equip. Co., 43 N.Y.2d 583, 588-89, 374 N.E.2d 97, 99, 403 N.Y.S.2d 185, 187-88 (1978); *see* Sears, Roebuck & Co. v. Enco Assocs., 43 N.Y.2d 389, 397-98, 372 N.E.2d 555, 559, 401 N.Y.S.2d 767, 771-72 (1977).

142. Interagency Task Force Final Report, *supra* note 14, at VII-24. If New York had a substantive statute of repose, and a manufacturer from a state without such a statute were sued in New York by a New York plaintiff, the defendant manufacturer probably could not rely on the statute under a choice-of-law analysis focusing on the governmental interests involved because the manufacturer would not be within the statutory purpose of protecting New York defendants. *See* Babcock v. Jackson, 12 N.Y.2d 473, 482-83, 191 N.E.2d 279, 284, 240 N.Y.S.2d 743, 750-51 (1963). If, however, the choice-of-law analysis focuses on the place of the injury or the place where the product was purchased, *see* Neumeier v. Kuehner, 31 N.Y.2d 121, 128-29, 286 N.E.2d 454, 457-58, 335 N.Y.S.2d 64, 70-71 (1972), the out-of-state manufacturer might in some circumstances be able to avail itself of the New York statute's protections.

143. The Indiana, North Dakota, Tennessee and Utah statutes explicitly exclude tolling for minority or legal disability. Ind. Code Ann. § 34-4-20A-5 (Burns Supp. 1981) (measured to commencement of the action); N.D. Cent. Code § 28.01.1-02 (Supp. 1981) (measured to injury); Tenn. Code Ann. § 29-28-103 (1980) (measured to commencement); Utah Code Ann. § 78-15-3 (1977) (measured to injury).

144. *See supra* notes 28-30 and accompanying text.

145. *See* Phillips, *supra* note 13, at 667-69.

146. *See* cases cited *supra* note 76.

147. *See* sources cited *supra* note 77.

years, with the majority at ten.[148] Eight years was selected with the idea that it would preclude less than four percent of claims[149] and, in most cases, would enable sellers to close their books on products after eleven years due to the eight-year statute of repose and a further three-year limitation period in which the injured plaintiff must bring his claim.[150] The exceptions to the eleven-year period would occur when there are express warranties, when indemnification or contribution claims are asserted or when the statute of limitations is tolled; the defendant can plan for the former class and the latter two groups are not likely to be statistically significant.

4. Consequences of the Running of the Period

Under the proposal, expiration of the eight-year period is a complete bar to recovery for any subsequent injury. This consequence is more certain, and thus more desirable under the criteria here employed, than provisions in some of the statutes which only create a rebuttable presumption that the product is not defective[151] or that its useful safe life has passed[152] after the statutory period has expired.

5. Exceptions

The only exceptions in the proposal are for claims arising out of duties of maintenance and repair and for cases in which the defendant has knowledge that the period is extended, that is, when there is an express warranty. Other exceptions, such as for failures to warn of known defects,[153] for injuries caused by prolonged exposure,[154] or for defects or injuries not discoverable within the repose period,[155] would

148. *E.g.*, N.H. Rev. Stat. Ann. § 507-D:2(II) (Supp. 1979); R.I. Gen. Laws § 9-1-13(2) (Supp. 1980); *cf.* Conn. Rev. Gen. Stat. § 52-577 (1981) (general tort statute of limitation measured three years from the complained of act or omission).

149. *See supra* notes 47-48, 51 and accompanying text. A ten-year statute would allow recovery for an additional 0.8% of injured parties overall, but would reduce the capital goods claims barred from 21.5% to 16.5%. Assuming that the claimants in the latter category are less needy because of the workers' compensation remedy, reducing the protection accorded capital goods manufacturers by only a quarter does not seem to be worthwhile.

150. N.Y. Civ. Prac. Law § 214 (McKinney Supp. 1981-1982). Implied warranty claims are measured from the date of sale, so the four-year warranty statute would have run before the period of repose was up. The possibility of indemnification and contribution claims could, of course, extend this period. *See supra* notes 107-08 and accompanying text.

151. *E.g.*, Colo. Rev. Stat. § 13-21-403(3) (Supp. 1978); Ky. Rev. Stat. Ann. § 411.310(1) (Bobbs-Merrill Supp. 1980).

152. *E.g.*, Conn. Rev. Gen. Stat. § 52-577a(c) (1981); Idaho Code § 6-1403(2)(a) (Supp. 1981).

153. N.D. Cent. Code § 28-01.1-02(3) (Supp. 1981).

154. Idaho Code § 6-1403(2)(b)(4) (Supp. 1981).

155. *E.g.*, *id.*; Ill. Ann. Stat. ch. 83, § 22.2(d) (Smith-Hurd Supp. 1981-1982). The Tennessee statute has an explicit exception for injuries caused by asbestos. Tenn. Code Ann. § 29-28-103(b) (1980).

reduce the certainty provided by the statute and increase its transaction costs.[156]

B. *Constitutional Considerations*

A statute of repose of the sort suggested will undoubtedly be subjected to constitutional challenges, but it should be impervious to them. The only product liability statutes that have been struck down to date were invalidated on the basis of constitutional provisions not found in the New York constitution.[157] Statutes of repose for architects and builders[158] have been found unconstitutional in eleven states

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156. During the writing of this Article, the Consumer Subcommittee of the Senate Commerce Committee published a second draft of its proposed product liability legislation. Proposed Product Liability Act (Consumer Subcomm., Senate Commerce Comm., Working Draft No. 2, Mar. 1, 1982), *reprinted in* Legal Times, March 8, 1982, at 24. The legislation, which, if enacted, would preempt state law, creates a twenty-five year statute of repose for capital goods. The statute provides that a plaintiff alleging defective design may not bring a claim for injuries that occur more than twenty-five years from the date of delivery of the product to a non-seller. The statute is well drafted in that the injury must occur within the statutory period; it places no such limitation on initiation of the cause of action. *See supra* note 129 and accompanying text. Unfortunately, the statute also contains a number of poorly conceived provisions. A twenty-five year period of repose is likely to have little effect on the number of claims or payments. Data from the ISO Survey indicate that less than 14% of the claims and 12.5% of payments would be cut off by a statute with a twelve-year period. ISO Survey, *supra* note 13, at 82. After twenty-five years, few of those claims could be expected to remain. The percentage of claims will not be significantly affected by the fact that the proposed statute defines capital goods more broadly than did the ISO survey. *Compare* Proposed Product Liability Act § 25 (capital goods defined as product depreciable under the Internal Revenue Code of 1954) *with* ISO Survey, *supra* note 13, at 519-24 (listing fifty-two specific goods). While the number of goods included in the definition will increase, the percentage of non-capital goods claims remaining after twelve, and presumably twenty-five, years is even less than that of capital goods. *See* ISO Survey, *supra* note 13, at 81. In addition, because such an approach will reduce the impact upon transaction costs, a statute of repose should not limit its scope to injuries caused by unsafe design. *See supra* note 99 and accompanying text. The statute is also deficient in that it fails to exclude from coverage claims based on express warranties. Manufacturers who make such promises should not be provided with a statutory means to avoid them. Finally, the statute also provides that its provisions do not affect the right of any party subject to liability to seek indemnity and contribution from any other person responsible for the harm. This section is unnecessary. As long as the harm occurred during the statutory period, the right to make claims-over will be automatically preserved.

157. In Batilla v. Allis Chalmers Mfg. Co., 392 So. 2d 894 (Fla. 1980), the court, following Overland Constr. Co. v. Sirmons, 369 So. 2d 572 (Fla. 1979) (striking down the architects and engineers statute of repose), applied Florida's "open courts" constitutional provision. The South Carolina statute of repose was struck down in Bolick v. American Barmag Corp., 284 S.E.2d 188 (N.C. App. 1981), because it violated that state's constitution that preserves every person's right to remedy injuries inflicted upon him. S.C. Const. art. I, § 18.

158. *See* McGovern Address, *supra* note 26, at 16. Every state except Arizona, Iowa, Kansas, New York, Vermont, West Virginia and Wisconsin has an architects and contractors statute of repose. Ala. Code § 6-5-218 (1975); Alaska Stat. §

on three principal bases: due process, equal protection and provisions peculiar to particular state constitutions.[159] None of these bases

09.10.055 (1980); Ark. Stat. Ann. §§ 37-237, -239 (1979); Cal. Civ. Proc. Code §§ 337.1, .15 (West Supp. 1981); Colo Rev. Stat. § 13-80-127 (1978); Conn. Rev. Gen. Stat. § 52-584(a) (1981); Del. Code Ann. tit. 10, § 8127 (1974); D.C. Code Encycl. § 12-310 (West 1981); Fla. Stat. Ann. § 95.11(3) (West Supp. 1981); Ga. Code Ann. § 3-1006 (1975); Hawaii Rev. Stat. § 657-8 (1976); Idaho Code § 5-241 (1979); Ill. Ann. Stat. ch. 51, § 58 (Smith-Hurd Supp. 1981-1982); Ind. Code Ann. § 34-4-20-2 (Burns 1973); Ky. Rev. Stat. Ann. § 413.135 (Bobbs-Merrill 1972); La. Rev. Stat. Ann. § 9.2772 (West Supp. 1981); Me. Rev. Stat. Ann. tit. 14, § 752-A (1978); Md. Cts. & Jud. Proc. Code Ann. § 5-108 (1977); Mass. Ann. Laws ch. 260, § 2B (Michie/Law. Co-op. 1980); Mich. Comp. Laws Ann. § 600.5839 (1968); Minn. Stat. Ann. § 541.051 (West Supp. 1981); Miss. Code Ann. § 15-1-41 (1972); Mo. Ann. Stat. § 516.097 (Vernon 1982); Mont. Code Ann. § 27-2-208 (1981); Neb. Rev. Stat. § 25-223 (1979); Nev. Rev. Stat. § 311.205 (1976); N.H. Rev. Stat. Ann. § 508:4-b (1968); N.J. Stat. Ann. § 2A:14-1.1 (West 1978); N.M. Stat. Ann. § 37-1-27 (1978); N.C. Gen. Stat. § 1-50(5) (Supp. 1981); N.D. Cent. Code § 28-01-44 (1974); Ohio Rev. Code Ann. § 2305.131 (Page 1981); Okla. Stat. Ann. tit. 12, §§ 109, 110 (West 1981-1982); Or. Rev. Stat. § 12.135 (1979); Pa. Stat. Ann. tit. 42, § 5536 (Purdon Supp. 1981); R.I. Gen. Laws § 9-1-29 (Supp. 1981); S.C. Code Ann. §§ 15-3-640 to -670 (Law. Co-op. 1976); S.D. Codified Laws Ann. §§ 15-2-9, -11 (1967); Tenn. Code Ann. § 28-3-202 (1980); Tex. Rev. Civ. Stat. Ann. tit. 91, art. 5536a (Vernon 1980); Utah Code Ann. § 78-12-25.5 (1953); Va. Code § 8.01-250 (1977); Wash. Rev. Code Ann. § 34.16.310 (Supp. 1981); Wyo. Stat. § 1-3-111 (1977). In 1968 the New York Law Revision Commission, utilizing a study by Professor Martin Fogelman, recommended against enactment of a statute of repose. N.Y. Law Revision Comm'n, *Recommendation and Study Relating to a Statute of Limitations Applicable to Actions Against Architects, Engineers and Building Contractors*, in Reports, Recommendations and Studies 241 (1968) [hereinafter cited as N.Y. Law Revision Comm'n Study]. Kansas has a statute of repose applicable to tort actions in which the injury is not reasonably discoverable at the time it is incurred. *See supra* note 36. There are also statutes of repose for medical malpractice actions in twenty-five states: Ala. Code § 6-5-482 (1975); Cal. Civ. Proc. Code § 340.5 (West Supp. 1981); Conn. Rev. Gen. Stat. § 52-584 (1981); Del. Code Ann. tit. 18, § 6856 (1976); Fla. Stat. Ann. § 95.11(4) (West Supp. 1981); Hawaii Rev. Stat. § 657-7.3 (1976); Ill. Ann. Stat. ch. 83, § 22.1 (Smith-Hurd Supp. 1981-1982); Iowa Code Ann. § 614.1(9) (West Supp. 1979); Kan. Stat. Ann. § 60-513(c) (1976); Ky. Rev. Stat. Ann. § 413.140(1) (Bobbs-Merrill Supp. 1980); La. Rev. Stat. Ann. § 9:5628 (West Supp. 1981); Md. Cts. & Jud. Proc. Code Ann. § 5-109 (1979); Mont. Code Ann. § 27-2-205 (1981); Neb. Rev. Stat. § 25-222 (1979); Nev. Rev. Stat. § 41A.097 (1979); N.C. Gen. Stat. § 1-15(c) (Supp. 1981); N.D. Cent. Code § 28-01-18(3)(1978); Ohio Rev. Code Ann. § 2305.11 (Page 1981); Okla. Stat. Ann. tit. 76, § 18 (West 1981-1982); Or. Rev. Stat. § 12.110(4) (1979); S.C. Code Ann. § 15-3-545 (Law. Co-op. 1980); Tenn. Code Ann. § 29-26-116 (1980); Utah Code Ann. § 78-14-4 (1981); Vt. Stat. Ann. tit. 12, § 521 (Supp. 1981); Wash. Rev. Code Ann. § 4.16.350 (Supp. 1981). None of these medical malpractice statutes has been held unconstitutional by the highest court of any state. There has been, however, a lower court decision, which was subsequently reversed, against the constitutionality of the Illinois statute. Woodward v. Burnham City Hosp., 60 Ill. App. 3d 285, 377 N.E.2d 290 (1978), *rev'd*, 79 Ill. 2d 295, 402 N.E.2d 560 (1979). *But see* Anderson v. Wagner, 61 Ill. App. 3d 822, 378 N.E.2d 805 (1978), *aff'd*, 79 Ill. 2d 295, 402 N.E.2d 560 (1979). *See generally* McGovern, *The Variety, Policy and Constitutionality of Product Liability Statutes of Repose*, 30 Am. U. L. Rev. 579, 632-37 (1981).

159. Plant v. R.L. Reid, Inc., 294 Ala. 155, 313 So. 2d 518 (1975) (void for vagueness); Bagby Elevator & Elec. Co. v. McBride, 294 Ala. 191, 291 So. 2d 306

should be availing against a product liability statute of repose in New York.

The heart of the due process argument is that a statute of repose operates to deprive an injured person of a cause of action for his injuries.[160] This argument has been consistently rejected. The courts agree that while a remedy may not be abolished once a right vests—that is, after the injury has occurred—the right itself may be abolished.[161] The Supreme Court of the United States has recognized the authority of state legislatures, in the exercise of their police powers, to modify or abolish common-law rights of action.[162] The New York Court of Appeals took the same position when it upheld the state's automobile no-fault law against a due process attack in *Montgomery v. Daniels*.[163] When a statute is challenged on non-procedural grounds as violative of due process of law, the only question is whether there is " 'some fair, just and reasonable connection' between it and the promotion of the health, comfort, safety, and welfare of society."[164] So long as the legislation is in pursuance of permissible

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(1974) (violated clear title and single subject requirement); Overland Constr. Co. v. Sirmons, 369 So. 2d 572 (Fla. 1979) (violated open court provision); Fujioka v. Kam, 55 Hawaii 7, 514 P.2d 568 (1973) (violated equal protection guarantee and prohibition on special grant of exclusive privilege or immunity); Skinner v. Anderson, 38 Ill. 2d 455, 231 N.E.2d 588 (1967) (same); Saylor v. Hall, 497 S.W.2d 218 (Ky. 1973) (violated prohibition on abolishing negligence cause of action); Muzar v. Metro Town Houses, Inc., 82 Mich. App. 368, 266 N.W.2d 850 (1978) (violated equal protection); Pacific Indem. Co. v. Thompson-Yaeger, Inc., 260 N.W.2d 548 (Minn. 1977) (violated prohibition on grant of special or exclusive privilege or immunity); Loyal Order of Moose, Lodge 1785 v. Cavaness, 563 P.2d 143 (Okla. 1977) (violated equal protection); Broome v. Truluck, 270 S.C. 227, 241 S.E.2d 739 (1978) (same); Kallas Millwork Corp. v. Square D Co., 66 Wis. 2d 382, 225 N.W.2d 454 (1975) (same); Phillips v. ABC Builders, Inc., 611 P.2d 821 (Wyo. 1980) (violated open courts requirement and prohibition on grant of special or exclusive privilege or immunity). New York does not have the peculiar state constitutional provisions on which the Alabama, Florida, Hawaii, Illinois, Kentucky, Minnesota and Wyoming courts relied. *See generally* Interagency Task Force Legal Study, *supra* note 23, at V-12 to -13; *Product Liability in Alabama*, *supra* note 18, at 171-80.

160. *See, e.g.*, Hill v. Forrest & Cotton, Inc., 555 S.W.2d 145, 149 (Tex. Civ. App. 1977); McGovern, *supra* note 157, at 627 nn. 123-24. Concern about possibly violating due process was one reason the Law Revision Commission rejected a proposal for a statute of repose for architects, engineers and building contractors in 1968. N.Y. Law Revision Comm'n Study, *supra* note 158, at 246.

161. *E.g.*, Reeves v. Ille Elec. Co., 170 Mont. 104, 113, 551 P.2d 647, 652 (1976); Rosenberg v. Town of Northern Bergen, 61 N.J. 190, 199-200, 293 A.2d 662, 667 (1972); Freezer Storage, Inc. v. Armstrong Cork Co., 234 Pa. Super. 441, 449-51, 341 A.2d 184, 188-89 (1975), *aff'd*, 476 Pa. 270, 382 A.2d 715 (1978). The New York Constitution specifically grants to the Legislature the authority to change the common law. N.Y. Const. art. 1, § 14.

162. *See* Silver v. Silver, 280 U.S. 117, 122 (1929) (dictum).

163. 38 N.Y.2d 41, 340 N.E.2d 444, 378 N.Y.S.2d 1 (1975).

164. *Id.* at 54, 340 N.E.2d at 451, 378 N.Y.S.2d at 11 (quoting Nettleton Co. v. Diamond, 27 N.Y.2d 182, 193, 264 N.E.2d 118, 123, 31 N.Y.S.2d 625, 633 (1970), *appeal dismissed sub nom.* Reptile Products Ass'n. v. Diamond, 401 U.S. 969 (1971)).

state objectives and the means adopted are reasonably related to the accomplishment of those objectives,[165] the courts should not be concerned with whether the legislature's response to the problem is the wisest possible or whether it will surely accomplish the ends sought.[166] Thus, in the context of product liability, the legislature could reasonably conclude that current law contributes to vexatious litigation in the state's courts and a weakening of the state's economic development,[167] and that a statute of repose could help alleviate those problems.

The *Montgomery* court did not decide, but certainly did cast substantial doubt on, the argument that it is a deprivation of due process to abrogate a common-law right to sue in tort without providing an adequate substitute remedy.[168] As the court noted, early United States Supreme Court dictum supporting the argument[169] has been severely, if not totally, undercut by pronouncements in later cases.[170] Thus, it is extremely unlikely that a statute of repose would be struck down for failure to provide an adequate substitute remedy.

A statute of repose that was measured to the commencement of the action could be subject to due process objection if it did not provide an extension when the injury took place close to the end of the statutory period.[171] Otherwise, the right that accrued within the statutory period would, as a practical matter, be denied any remedy, and a due process violation would occur.[172] One solution would be to extend the statutory period when the injury occurs within, for example, the last two years of the stated period.[173] A better solution, for reasons noted above,[174] is to measure the statute of repose to the date of injury and independently to apply the statute of limitations from that date.

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165. *See* 38 N.Y.2d at 54, 340 N.E.2d at 452, 378 N.Y.S.2d at 12.

166. *Id.* at 56, 340 N.E.2d at 453, 378 N.Y.S.2d at 13.

167. *See supra* notes 14-21 and accompanying text; *cf.* Montgomery v. Daniels, 38 N.Y.2d 41, 55-56, 340 N.E.2d 444, 452-53, 378 N.Y.S.2d 1, 13 (1975) (discussing connection between money wasted in protracted automobile accident litigation and implementation of no-fault insurance).

168. 38 N.Y.2d at 56-57, 340 N.E.2d at 453-54, 378 N.Y.S.2d at 13-14; *see, e.g.*, Reeves v. Ille Elec. Co., 170 Mont. 104, 113, 551 P.2d 647, 652 (1976).

169. New York Cent. R.R. v. White, 243 U.S. 188, 201 (1917) (Court doubts whether the state could abolish all rights and defenses without producing adequate substitute).

170. 38 N.Y.2d at 56-57, 340 N.E.2d at 453, 378 N.Y.S.2d at 14 (citing Silver v. Silver, 280 U.S. 117, 122 (1929) (dictum); Arizona Employers' Liab. Cases, 250 U.S. 400, 421 (1919) (dictum)).

171. Interagency Task Force Legal Study, *supra* note 23, at V-13; *Limitation of Action Statutes*, *supra* note 29, at 373.

172. *See* Gibbe v. Zimmerman, 290 U.S. 263, 332 (1933).

173. The Indiana statute adopts this approach. Ind. Code Ann. § 34-4-20A-5 (Burns Supp. 1981).

174. *See supra* notes 129-44 and accompanying text.

Such a statute would also avoid the necessity of providing tolling provisions to protect the remedies of, for example, infant plaintiffs.[175]

The equal protection argument, the most successful of those employed against the architect's statutes of repose,[176] focuses on the distinction such statutes often make between architects and designers on the one hand, and builders and owners on the other.[177] Courts upholding constitutional challenges made on this basis have decided that there is no rational basis for the classification made by the statute; without the statute members of each group are subjected to the same sort of long-term liability, with equal difficulties in obtaining insurance or other means to protect themselves.[178]

A broadly written statute of repose for product liability, by contrast, would not be subject to this sort of equal protection attack because its protections would extend to all sellers, lessors, licensors and bailors now subject to liability for products defectively designed, manufactured, packaged or labelled. Furthermore, even a statute more narrowly defined should not be subject to an equal protection challenge as long as a rational basis can be shown for the distinctions it draws.[179] For example, a statute protecting only the manufacturers and sellers of capital goods could be justified by legislative findings that the problems of obtaining insurance are most serious for those persons and that the economic effect of long-tail claims varies more widely between older and newer manufacturers in this industry than in others.[180] Furthermore, the legislature could note that the class of

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175. *See* Turner v. Staggs, 89 Nev. 230, 234, 510 P.2d 879, 882 (1973), *cert. denied*, 414 U.S. 1079 (1974) (striking down notice-of-claim statute for lack of toll during minority). *But see* Brown v. Board of Trustees, 303 N.Y. 484, 104 N.E.2d 866 (1952) (upholding provision requiring a one-year notice of claim for a tort action brought by a minor against a public corporation).

176. McGovern, *supra* note 158, at 596 n.98. Equal protection analysis tends to be used in striking down statutes of repose under provisions prohibiting special class legislation. *Product Liability in Alabama*, *supra* note 18, at 176-80. New York has no "special class" provision in its constitution.

177. *E.g.*, Fujioka v. Kam, 55 Hawaii 7, 11-12, 514 P.2d 568, 571 (1973); Broome v. Truluck, 270 S.C. 227, 230-31, 241 S.E.2d 739, 740 (1978); *see* Skinner v. Anderson, 38 Ill. 2d 455, 460, 231 N.E.2d 588, 591 (1967) (violated prohibition against "special privilege" legislation).

178. *See supra* note 177. *But see, e.g.*, O'Connor v. Altus, 67 N.J. 106, 117-19, 335 A.2d 545, 550-51 (1975); Freezer Storage, Inc. v. Armstrong Cork Co., 476 Pa. 270, 276-78, 382 A.2d 715, 718-20 (1978).

179. The Court of Appeals applies the "rational basis" test to equal protection claims in the area of economics and social welfare legislation; "strict scrutiny" is applied only when a challenged law creates a classification drawn along suspect lines, such as race, or impairs a fundamental constitutional right, such as security of the person. An intermediate standard may be applied to some other "suspect" classifications. Montgomery v. Daniels, 38 N.Y.2d 41, 59-61, 340 N.E.2d 444, 455-57, 378 N.Y.S.2d 1, 16-18 (1975).

180. *See* Interagency Task Force Legal Study, *supra* note 23, at V-10, -11, -14; *supra* notes 16-18 and accompanying text; *cf.* Massery, *supra* note 126, at 547

persons most often injured by these products almost always has access to other compensation;[181] in *Montgomery v. Daniels*, the Court of Appeals employed similar reasoning to uphold the distinction between insured and uninsured plaintiffs under the automobile no-fault law.[182]

The unlikelihood of a successful due process or equal protection attack on a product liability statute of repose in New York is further suggested by the Court of Appeals' continuing adherence to the rule that the statute of limitations runs from the tortious invasion even for undiscoverable personal injuries. The effect of that rule is the same as that of a statute of repose: Even the injured person who has not slept on his rights because there was no way he could have asserted his claim within the statutory period is barred from recovery.[183] Chief Judge Desmond, dissenting in *Schwartz v. Heyden Newport Chemical Corp.*,[184] argued that this deprivation of a remedy before the plaintiff could assert his right might pose constitutional problems.[185] Nevertheless, the Court of Appeals has repeatedly reaffirmed the doctrine.[186]

The state constitutional provision most likely to cause difficulty in New York is article I, section 16. It states: "The right of action now existing to recover damages for injuries resulting in death, shall never be abrogated; and the amount recoverable shall not be subject to any statutory limitation."[187] This provision was the basis for striking down New York's first workers' compensation law in 1913.[188] Concern about the effect of section 16 also led to excluding death cases from the coverage of the automobile no-fault law.[189]

The argument against a statute of repose under section 16 would be that cutting off some claims before the person is killed abrogates the

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(shorter limitations imposed by notice-of-claim provisions for actions against governmental entities have been upheld because of special need to protect the public fisc).

181. *See supra* notes 84, 89 and accompanying text.

182. 38 N.Y.2d at 62, 340 N.E.2d at 457, 378 N.Y.S.2d at 19.

183. *E.g.*, Phillips, *supra* note 13, at 672; *Limitation of Action Statutes*, *supra* note 29, at 378-79.

184. 12 N.Y.2d 212, 188 N.E.2d 142, 237 N.Y.S.2d 714 (1963).

185. *Id.* at 219-20, 188 N.E.2d at 146, 237 N.Y.S.2d at 719-20 (Desmond, C.J., dissenting). The Chief Judge cited, *inter alia*, Urie v. Thompson, 337 U.S. 163 (1949), which dealt with the unreasonableness, but not the unconstitutionality, of barring a claim before the plaintiff could know and assert it. *Id.*

186. *See* sources cited *supra* note 76.

187. N.Y. Const. art. 1, § 16.

188. Ives v. South Buffalo Ry., 201 N.Y. 271, 304-05, 94 N.E. 431, 443-44 (1911). Section 18, originally § 19, was added to article 1 of the constitution in 1913 to authorize the workers' compensation law. Shanahan v. Monarch Eng'g Co., 219 N.Y. 469, 473-74, 114 N.E. 795, 796 (1916).

189. *See* N.Y. State Insurance Dep't, Automobile Insurance . . . For Whose Benefit? 86 n.139 (1970). The provision was also a source of concern when the Law Revision Commission was considering a statute of repose for architects. N.Y. Law Revision Comm'n Study, *supra* note 158, at 244-45.

right to recover for injuries resulting in death, which now exists regardless of when the injury occurs relative to the defendant's possession or control of the product. A proper reading of the constitutional provision and its legislative history, however, strongly indicates that it should be no impediment to a statute of repose even in death cases. First, section 16 speaks of "the right of action *now* existing" for wrongful death; it thus speaks as of the provision's effective date, January 1, 1895.[190] At that time, there was almost no product liability action in the modern sense: a negligence claim required privity in almost all instances;[191] recovery for personal injuries under a breach of warranty theory required privity[192] and was very severely limited by strict notions of foreseeable consequences;[193] and there was no "strict products liability" tort theory.[194] Thus, only the very rare wrongful death plaintiff nowadays would be asserting a claim for which recovery would have been granted in 1895. Furthermore, even in such a case the legislative history of section 16 makes clear that it was intended to preserve inviolate the *wrongful death* cause of action, not the underlying causes of action which the decedent might have asserted had he lived and on which a successful wrongful death cause of action depends.[195] The intent was to preserve to the beneficiaries the simple right to recover in circumstances in which the decedent could have recovered if he were alive[196] and especially to preserve that cause of action without the limitation on damages which the legislature had adopted.[197] The primary purpose of the constitutional provision was thus to ensure equality of treatment between living victims of tortfeasors and the statutory beneficiaries of deceased victims of tortfeasors—put simply, it should not be cheaper to kill a person than to injure him.[198] Since the "cause of action" preserved in section 16 is the wrongful death cause of action, not the cause of action that determines whether the death "was caused by the *wrongful* act, neglect, or default of another . . . who would have been liable in an action in favor of the deceased if death had not ensued,"[199] a statute of

190. *In re* Meng, 227 N.Y. 264, 273-74, 125 N.E. 508, 510 (1919). The present § 16 of article 1 was then § 18.

191. *See* MacPherson v. Buick Motor Co., 217 N.Y. 382, 390, 111 N.E. 1050, 1053 (1916).

192. *See supra* notes 2-5 and accompanying text.

193. Birdsinger v. McCormick Harvesting Mach. Co., 183 N.Y. 487, 493-94, 76 N.E. 611, 613-14 (1906).

194. *See supra* note 8 and accompanying text.

195. *See In re* Meng, 227 N.Y. 264, 274-78, 125 N.E. 508, 510-12 (1919).

196. *See* 2 W. Steele, Revised Record of the Constitutional Convention of 1894, at 625 (1900) [hereinafter cited as Record of Constitutional Convention].

197. Amerman v. Lizza & Sons, Inc., 45 A.D.2d 996, 998, 358 N.Y.S.2d 220, 224 (1974); 1 Record of Constitutional Convention, *supra* note 196, at 1106-27.

198. 1 Record of Constitutional Convention, *supra* note 196, at 1104-05; *see* 2 *id.* at 606-26.

199. N.Y. Est. Powers & Trusts Law § 5-4.1 (McKinney 1966) (emphasis added).

repose that applies equally in both death and personal injury cases should not be barred by section 16.

Conclusion

The available data suggest that a statute of repose would have little effect in New York, except possibly in permitting some reduction in the cost of product liability insurance for capital goods manufacturers. For other manufacturers, the incidence of successful claims that would be barred by the statute is already so low as to make any reduction of the insurance rates unlikely. Among those whose claims would be barred by the statute, few would be left totally without compensation. Almost all those injured by capital goods are covered by the workers' compensation system, and many among the relatively few not so protected have access to other sources of compensation, such as first-party insurance. Thus, whatever ills attend the current situation in product liability law—and there are many—adoption of a statute of repose would seem to be only tinkering, not a step toward their ultimate cure.