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AN ANALYSIS OF PROPOSED REFORM OF PRODUCTS LIABILITY STATUTES OF LIMITATIONS

JERRY J. PHILLIPS†

Manufacturers contend there is currently a products liability “crisis,” as evidenced by the soaring rates of products insurance premiums during the past few years. That these rates have gone up dramatically is beyond dispute. The reasons for the increase, however, are not clear. Manufacturers say the higher rates are principally due to the rapidly increasing size and frequency of products claims and recoveries in recent years. This development, they assert, is attributable to a greater willingness of courts and juries to permit recoveries in what manufacturers consider to be doubtful cases. Moreover, they contend that the controlling rules of law have been interpreted heavily against their interests. What is needed, they conclude, is remedial legislation, either at the state or federal level, to right the presently existing imbalance and unfairness in the law.¹

Of the various proposals that have been put forward, one receiving some of the strongest support from manufacturers is for reform of the products liability statutes of limitations.² As the law presently stands, there are usually several statutes of limitations potentially applicable to a products cause of action, with the plaintiff often determining the choice of statute by how he elects to plead his claim.³ Manufacturers believe there should be only one statute of limitations applicable to a products liability cause of action.⁴ There is some merit to this proposition, since it makes little sense to give the plaintiff a different limitations period depending, for example, on whether he pleads strict liability in tort or strict liability in implied warranty. It is hard to reduce the problem to a single solution, however, because certain aspects of products litigation may dictate different limitations

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1. See BUSINESS WEEK, Jan. 17, 1977, at 62; *id.*, May 31, 1976, at 60; FORBES, June 15, 1976, at 52; NATION'S BUSINESS, June 1977, at 24.

2. NATION'S BUSINESS, *supra* note 1, at 30. “Modification of the statute of limitations at the federal level has been designated as one of the three most desirable remedies by manufacturing groups.” 5 RESEARCH GROUP, INC., FINAL REPORT OF THE LEGAL STUDY 5 (Interagency Task Force on Product Liability Jan. 1977).

3. D. NOEL & J. PHILLIPS, PRODUCTS LIABILITY IN A NUTSHELL 320-25 (1974).

4. See NATION'S BUSINESS, *supra* note 1.

periods. For example, warranties of future performance⁵ and wrongful death actions⁶ may require different periods and there are many situations, considered hereafter, in which the running of the statutory period should be tolled.

Not only do the manufacturers want a single limitations period for all products claims, but they also want a definite cutoff of liability after the passage of a certain number of years from the date of sale of a product. The cutoff will occur no matter when an injury proximately resulting from a defect in the product is actually suffered or reasonably should have been discovered.⁷ This is the heart of their proposal. In products law today, the limitations period typically does not begin to run until the plaintiff either suffers injury or reasonably should discover he has suffered injury from a defective product.⁸ For machinery and other durable products and for cumulative injuries resulting from multiple sales, the accrual date may be many years after the date of a product sale, thus creating a "long-tail" claims problem. The tendency, moreover, is to judge defectiveness by the standards of production and design in existence at the date of trial, rather than by those standards current at the date of manufacture.⁹ An outer cutoff point would avoid the application of continually evolving standards once that point is reached.

The extent or severity of the long-tail claims problem has never been adequately documented, and there is some indication that the problem is not a major one.¹⁰ Whatever might be shown by a broad, in-depth empirical

5. See U.C.C. § 2-725(2).

6. See 2 S. SPEISER, RECOVERY FOR WRONGFUL DEATH §§ 11.5-.8 (2d ed. 1975).

7. See authorities cited notes 1 & 2 *supra*.

8. RESEARCH GROUP, INC., *supra* note 2, at 2, 3. Some jurisdictions allow the plaintiff to rely on both the warranty (date of sale accrual) and the tort (date of injury or date of discovery accrual) statutes of limitations if he pleads separate counts on each theory. Others look to the "gist of the action," usually finding that the action, however pleaded, "sounds in tort" and that only the tort statute of limitations applies. D. NOEL & J. PHILLIPS, *supra* note 3, at 320-23. For a review of the differing results under the date of injury and date of discovery rules in cases involving cumulative injuries and gradually occurring injuries, see Birnbaum, "First Breath's" *Last Gasp: The Discovery Rule in Products Liability Cases*, 13 FORUM 279 (1977).

9. Phillips, *The Standard for Determining Defectiveness in Products Liability*, 46 U. CIN. L. REV. 101, 115-19 (1977).

10. "[T]he only comprehensive study so far done on this problem indicates that only 2.7 per cent of the products involved in products liability actions were purchased more than six years prior to the injury-causing event." Massery, *Date-of-Sale Statutes of Limitation—A New Immunity for Product Suppliers*, 1977 INS. L.J. 535, 542 (citing 5 INSURANCE SERVICES OFFICE, 1976 PRODUCTS LIABILITY CLOSED CLAIM SURVEY). "The results of this study cannot be overemphasized. Initiated by the insurance industry and conducted by the Insurance Services Office, the ratemaking arm of the industry, the study encompassed 7,800 claims closed between July 1 and November 1, 1976 by 23 of the largest property and casualty insurance companies in the country." *Id.* at 542 n.40.

In our legal contractor's study of 655 appellate cases, the date of manufacture could be determined in 198 situations. While the sampling was a rough one at best, the

study of the age of products on which claims are made, it is nevertheless clear that manufacturers consider the long-tail problem a major one and are devoting substantial lobbying efforts to obtaining enactment of outer cutoff statutes for products liability claims.¹¹ The proposals are examined on their merits herein on the assumption that the problem may be substantial.

The proposals for the length of the outer period vary from four to twelve years.¹² Thus the typical statute might provide that the plaintiff must bring his action within two years after he is injured, or, alternatively, after he reasonably should have discovered his injury (the inner limitations period), but in no event later than ten years after the date of manufacture or sale of the product (the outer limitations period).¹³ Failure of the plaintiff to file his claim within the limitations of either of these two periods would bar his action. The outer limitations period achieves repose without regard to when the injury occurs or when it reasonably should have been discovered.

A statute of limitations is designed to accommodate conflicting policy considerations. On one hand, it seeks to achieve ultimate repose at some point in time. On the other hand, it is designed to give the injured party a reasonable length of time within which to assert his or her claim. In the achievement of this second goal the outer limitations period is patently deficient. The deficiency is so substantial that it probably cannot be justified

contractor found that product liability litigation relating to significantly aged equipment occurs, but not often. Thirteen percent of the cases in which the date of manufacture was known involved equipment over 20 years old. Only four percent of the date of manufacture sample involved equipment over 25 years old.

INTERAGENCY TASK FORCE ON PRODUCT LIABILITY, FINAL REPORT VII-20 (Nov. 1977).

11. "Regardless of what the data show, our insurance study suggests it is the underwriter's concern about the potential loss regarding older products that may be an important factor of the increase in liability premiums for manufacturers of durable goods." INTERAGENCY TASK FORCE ON PRODUCT LIABILITY, *supra* note 10, at VII-21.

"[S]ome underwriters have said that even if old products represent a relative 'handful of losses,' they have had an impact on underwriting judgments far out of proportion to their statistical significance." *Id.* VII-23.

Trade associations have developed a number of tort reform proposals, including an outer cutoff period statute of limitations. Bills are now awaiting action in the legislatures of Connecticut, Georgia, Indiana, Kansas, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Nebraska, New Mexico, North Dakota, Oregon and Washington. NATION'S BUSINESS, *supra* note 1, at 30. "Both federal and state legislation needs to be enacted which includes a statute of limitation and repose—which cuts off a manufacturer's liability, in the absence of an express warranty, no longer than 10 years after a product is sold, leased or delivered by any seller . . ." Illinois State Chamber of Commerce, News Release (Oct. 19, 1977) (quoting spokesman for the National Product Liability Council, a diverse group of corporations concerned with the product liability problem) (copy on file in office of *North Carolina Law Review*).

12. RESEARCH GROUP, INC., *supra* note 2, at 4.

13. For states with special statutes of limitations for products liability actions see CONN. GEN. STAT. ANN. § 52-577a (West Supp. 1978); FLA. STAT. ANN. § 95.031(2) (Harrison Cum. Supp. 1977); OR. REV. STAT. § 30.905 (1977); UTAH CODE ANN. § 78-15-3 (1977). North Carolina has a similar statute, N.C. GEN. STAT. § 1-15(b) (Cum. Supp. 1977), for claims for bodily injury or property damage, however arising. See Massery, *supra* note 10, at 536-37.

on the ground of achieving repose.¹⁴ Moreover, many situations will arise in which exceptions to the outer limitations period should, as a matter of policy, be made. Once such a process is begun, these exceptions may swallow the rule, or else cause it to be so irregularly applied as to be arbitrary. On balance, the fairest solution is to have only an inner limitations period of some reasonable length, and to have that period run from the date the plaintiff actually discovers or reasonably should discover that his injury was caused by the defendant's defective product.

I. LIKELY EXCEPTIONS TO THE ACCRUAL OF AN OUTER PERIOD OF LIMITATIONS

A period of limitations begins to run when the plaintiff's cause of action accrues. The point of accrual obviously can be placed at many different times. Even once a given point in time is fixed, situations may arise in which it is advisable to delay the accrual, or to suspend the running of the limitations period after accrual has occurred. Such a delay or suspension is often referred to as a tolling of the statute of limitations. Whether exceptional situations are described as tolling the date of accrual or as providing a new accrual date, the result is the same: the plaintiff is given additional time within which to bring his suit. Accordingly, both concepts will be treated together in this section and their impact on the principle of an outer cutoff period will be examined.

A. *Continuing Duties and Subsequently Arising Duties*

Some courts have held that once a manufacturer supplies a defective product, he is under a continuing duty either to correct the defective condition or to warn the purchaser of that condition.¹⁵ The evidence of this continuing duty may toll the statute of limitations.¹⁶

14. The tension between these policies caused the Rhode Island Supreme Court to reject the repose rationale outright. The policy behind a statute of limitations is to prevent a plaintiff from gaining an unfair advantage by carelessly or willfully sleeping on his rights, not to provide a strictly finite period of potential liability on which the tort-feasor may rely. As such, an indefinite time of accrual is not in conflict with the essential rationale of the statute of limitations. Any unfairness to defendants in requiring them to defend against unavoidably delayed actions is more than balanced by the intrinsic injustice of barring plaintiffs' action before it can reasonably be brought.

Romano v. Westinghouse Elec. Co., 114 R.I. 451, 461, 336 A.2d 555, 560 (1975).

15. See D. NOEL & J. PHILLIPS, CASES AND MATERIALS ON PRODUCTS LIABILITY 448, 508-10, 559-64 (1976) and cases cited therein.

16. Compare *Boains v. Lasar Mfg. Co.*, 330 F. Supp. 1134 (D. Conn. 1971) (strict liability), and *Handler v. Remington Arms Co.*, 144 Conn. 316, 130 A.2d 793 (1957) (negligence), with *Prokolkin v. General Motors Corp.*, 170 Conn. 289, 365 A.2d 1180 (1976) (suit based on continuing duty to warn may not be brought in strict liability under statute of limitations). For a novel application of the continuous treatment doctrine applied in professional malpractice actions, see *Holdridge v. Heyer-Schulte Corp.*, 440 F. Supp. 1088 (N.D.N.Y. 1977).

If such a duty is imposed even though the manufacturer is not reasonably aware of the defect, or even though he cannot reasonably locate the user, then the continuing duty concept is a transparent ruse for avoiding the manufacture or sale accrual date. A subsequent duty to warn or correct may also be based on negligence principles and should have the effect of tolling the statute or of creating a later accrual date. If, for example, the manufacturer is under a statutory or common law duty to recall and repair products already on the market,¹⁷ failure reasonably to perform that duty should cause the statutory period to begin anew each day the duty is not performed.

It has been held that promises of repair will delay the running of the statute.¹⁸ Moreover, it seems clear that repairs that are negligently performed or that cause other defects in the product start the period running anew from the date of such repairs,¹⁹ or, under a more liberal view, from the date injuries proximately resulting from such inadequate repair are or reasonably should have been discovered.²⁰ Continued servicing and repair by the manufacturer or seller is a common feature of present-day products transactions. Any statute of limitations that absolves the product supplier from liability for inadequacy of repairs would raise serious questions regarding the wisdom of the statute.

A statute that runs only from the date of sale could discourage performance of a manufacturer's subsequently arising duty of care. A manufacturer could delay in giving warning or in making a repair, relying on the fact that the statutory period could run before any injury from a defective product occurs. On the other hand, a statute that begins running anew each day the duty is unperformed would tend to discourage delay. Once the duty to repair is undertaken, a statute that runs from the date of improper repair, or from the discovery thereof, encourages proper repair. Even if absolving the seller from liability by not tolling the statute for improper repair could arguably encourage a seller to undertake the making of repairs, it would do so at the risk of sacrificing the encouragement of careful performance.

B. *Cumulative Injuries*

Many modern-day products injuries are cumulative in nature. The

17. See *Balido v. Improved Mach., Inc.*, 29 Cal. App. 3d 633, 105 Cal. Rptr. 890 (1973) (common law duty to recall and repair); *H. P. Hood & Sons, Inc. v. Ford Motor Co.*, — Mass. —, 345 N.E.2d 683 (1976) (recall notice in compliance with statute does not satisfy the common law duty to warn); *Fields v. Volkswagen of Am., Inc.*, 555 P.2d 48 (Okla. 1976) (statutory duty of recall).

18. See 3A L. FRUMER & M. FRIEDMAN, *PRODUCTS LIABILITY* § 40.01[2], at 12-32 & n.8 (1977) and cases cited therein.

19. See W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* § 30, at 144 (4th ed. 1971).

20. See *id.*

plaintiff is injured not by a single use or exposure to defendant's product, but by multiple uses or exposures that involve numerous product sales over an extended period of time. Suppose, for example, that the outer limitations period has run on some, but not all, of the sales when suit is brought. The plaintiff might be able to apportion his damages between the sales on which the statute has run and those on which it has not, but more commonly he will be unable to make this apportionment. In the latter event the court can: (1) deny recovery entirely;²¹ (2) allow the factfinder to make a rough apportionment based in whole or in part on guesswork;²² or (3) permit full recovery.²³ A fourth approach is to shift the burden of apportionment to the defendant,²⁴ but if that burden cannot be carried this approach has the same ultimate effect as the third.

The third approach, permitting full recovery, seems to be the best one. It is in line with the better-reasoned decisions involving multiple tortfeasors: when the plaintiff is unable to apportion his damages among tortfeasors, he is permitted to take a joint and several judgment for the entire amount against each.²⁵ Moreover, the sales on which the statute has not run may frequently be the critical ones in terms of causing the plaintiff's injury. They are the *sine qua non* of the injury.²⁶ By analogy, persons may negligently stack lumber on a platform, overloading it, but it is the last plank stacked that breaks the platform. The person who stacks the last plank may be liable for the entire damages arising from destruction of the platform,²⁷ regardless of whether the persons who stacked the other planks would also be liable.²⁸

It is difficult to distinguish on principle the situation of the single sale on which the outer cutoff period has run, and the situation of multiple sales when the statutory period has run on some, but not all, of the sales. In the latter situation, the plaintiff may be permitted to recover because of the fortuity that some sales occurred more recently than others, even though all of them contributed to the injury. However, the relative positions of the parties in the two situations are essentially the same. The plaintiff who suffers a delayed injury as the result of a single sale on which the outer

21. *Schmidt v. Merchants Dispatch Transp. Co.*, 270 N.Y. 287, 200 N.E. 824 (1936).

22. *Tyler v. Railroad St. & Co.*, 322 F. Supp. 541 (E.D. Va. 1971).

23. *Wright v. Carter Prods., Inc.*, 244 F.2d 53 (2d Cir. 1957).

24. *Sterling Drug, Inc. v. Cornish*, 370 F.2d 82 (8th Cir. 1966).

25. *See, e.g., Michie v. Great Lakes Steel Div., Nat'l Steel Corp.*, 495 F.2d 213 (6th Cir. 1974); *Velsicol Chem. Corp. v. Chattanooga Coke & Chem. Co.*, — Tenn. —, 543 S.W.2d 337 (1976).

26. *Wright v. Carter Prods., Inc.*, 244 F.2d 53, 63 (2d Cir. 1957).

27. *See W. PROSSER, J. WADE & V. SCHWARTZ, CASES AND MATERIALS ON TORTS* 300-01 (6th ed. 1976).

28. *See text accompanying notes 36-40 infra.*

cutoff period has run may be in no better position to discover the danger than one who is injured by multiple sales. Nor may the manufacturer be in any better position to prevent the injury in one situation than in the other. The multiple sale exception therefore goes a long way toward undoing the logic of adopting an outer cutoff period.

C. Warranties Extending to Future Performance

The Uniform Commercial Code provides that a cause of action for breach of warranty in the sale of goods accrues when tender of delivery is made, "except that where a warranty explicitly extends to future performance of the goods and discovery of the breach must await the time of such performance the cause of action accrues when the breach is or should have been discovered."²⁹ Courts are not in agreement as to what is meant by a warranty that "explicitly extends to future performance." Apparently, the term is not intended to be synonymous with express warranties³⁰ and the concept of explicit extension has been applied to implied warranties.³¹ The key factor is whether the buyer must await the happening of future events before he can determine if a warranty, express or implied, has been breached. If he must, then the exception applies.

It is evident that this exception potentially could swallow both the rule of the Uniform Commercial Code statute of limitations³² and of the manufacturers' proposal regarding an outer cutoff period. All warranties can be construed as extending to future performance if the breach is not reasonably discoverable at the time of delivery.

Any enactment of an outer cutoff period for products liability claims would have to deal with this Code exception in some way. Should the exception be limited to commercial transactions or to transactions involving solely economic loss?³³ The logic or practicality of doing either is unclear. What distinguishes a commercial transaction from any other, or economic loss from physical injury, for purposes of determining when a cause of action should accrue? The Code statute of limitations is intended to apply to

29. U.C.C. § 2-725(2).

30. See D. NOEL & J. PHILLIPS, *supra* note 3, at 333.

31. *Aced v. Hobbs-Sesack Plumbing Co.*, 55 Cal. 2d 573, 583-84, 360 P.2d 897, 903, 12 Cal. Rptr. 257, 263 (1961).

32. The general rule of the Code is that an action for breach of warranty accrues "when tender of delivery is made," U.C.C. § 2-725(2), and the explicit extension provision is an exception to this rule.

33. The American Insurance Association has proposed an outer cutoff period of eight years that will be applicable to breach of warranty actions only when recovery for injury to personal property is sought under U.C.C. § 2-715(2)(b). AMERICAN INSURANCE ASSOCIATION, PRODUCT LIABILITY LEGISLATIVE PACKAGE: STATUTES DESIGNED TO IMPROVE THE FAIRNESS AND ADMINISTRATION OF PRODUCT LIABILITY LAW 14 (Mar. 1977) (copy on file with author).

all sales of goods,³⁴ and any restriction of its scope would be contrary to the intent of the drafters. Another possibility is the repeal of the Code exception. Only this approach would be defensible if an outer cutoff statute were enacted for products claims generally, but repeal would not necessarily close the loophole. Persons may vary the statutory period by agreement, and there should be no public policy prohibiting them from doing so when the agreement is freely negotiated.³⁵ If such agreements are permitted, it is a short step to finding that the defendant has impliedly agreed to extend the statutory period by warranties and advertisements looking to future performance. Repeal of the Code exception would still leave the courts with the contract construction problem of determining when the parties intended to vary the outer cutoff period by agreement. Outright prohibitions of such agreements would be an unwarranted intrusion into the area of freedom of contract. Moreover, the Code exception represents the considered judgment of its drafters, and should not lightly be abolished, especially since the need for this exception is as real now as when the Code was drafted.

D. Contribution and Indemnity

Claims for contribution and indemnity are generally held to accrue when a joint tortfeasor or indemnitee has had a judgment recovered against him or has settled the claim of a third person.³⁶ If the outer cutoff period for the manufacturer runs from the date of his sale of the product to the retailer or other distributor, and the retailer's period runs from the date of his own sale, the retailer may end up with his rights of recovery-over cut off before they ever arise.

Utah has attempted to remedy this situation as between retailer and manufacturer by enacting a longer period for the manufacturer than for the

34. The Code applies to transactions in goods, U.C.C. §§ 2-102, -105, and provides for recovery of consequential damages, including damages for injury to the person or property arising from breach of warranty. *Id.* § 2-715(2).

35. The American Insurance Association proposal provides that the parties may vary the statutory period by "a written contractual obligation which provides for a different period of limitation in which any action may be commenced." AMERICAN INSURANCE ASSOCIATION, *supra* note 33, at 14. While U.C.C. § 2-725(1) provides that the parties may by agreement "reduce the period of limitation to not less than one year but may not extend it," this prohibition on extension is substantially undercut by the explicit extension exception to § 2-725(2). "It is only when there is some overriding reason for public concern, some real and valid problem, that a party should be allowed to evade the terms of a contract he has agreed to." *Hudson Waterways Corp. v. Coastal Marine Serv., Inc.*, 436 F. Supp. 597, 605 (E.D. Tex. 1977). There should be no such concern about private agreements extending a date-of-sale accrual time, since the usual tort rule delaying accrual to time of injury or of discovery thereof, *W. PROSSER, supra* note 19, § 30, at 144-45, achieves a result similar to extension by private agreement. Private agreements effecting a widely accepted legal goal should not be against public policy.

36. *L. FRUMER & M. FRIEDMAN, supra* note 18, § 44.09; *D. NOEL & J. PHILLIPS, supra* note 3, at 329-30.

retailer.³⁷ There is no assurance that this approach will solve the problem in all cases, since the longer period may still run before the shorter one if there is a significant delay in the ultimate sale.³⁸ The Utah approach also cuts off claims based on resale of the goods after the initial consumer purchase.³⁹ Further, no provision is made for indemnity or contribution claims by nonsellers.

It is no solution to have the statute of limitations run for all potential defendants from the date of original sale by the manufacturer. For one thing, such an approach could result in the statute running against some defendants even before they commit any tortious act. For another, a defendant might be sued at the end of the statutory period and find himself without reasonable time to claim over before the period has run.⁴⁰

It seems unduly harsh to cut off large numbers of indemnity and contribution claims before they reasonably can be asserted. Yet these claims present no special equities meriting exceptional treatment not presented by products liability claims in general. The effect that an outer cutoff rule would have on claims over simply illustrates the general shortcoming of such a rule.

E. Miscellaneous Exceptions

There are a number of other tolling exceptions commonly built into local law. Fraudulent concealment normally tolls the statute of limitations, as does infancy or other incompetency, and the absence of a defendant from the jurisdiction.⁴¹ Many jurisdictions allow a wrongful death claim although the deceased's claim for personal injuries has been barred by the lapse of time before his death.⁴²

Questions arise as to how these exceptions should be dealt with in the

37. "No action shall be brought for the recovery of damages for personal injury, death or damage to property more than six years after the date of initial purchase for use or consumption, or ten years after the date of manufacture, of a product" UTAH CODE ANN. § 78-15-3 (1977) (effective May 10, 1977).

38. Some products such as ammunition, nails and the like have unlimited shelf lives and may remain unsold in the retailer's hands for several years. See Massery, *supra* note 10, at 543-44.

39. UTAH CODE ANN. § 78-15-3 (1977).

40. See *Harryman v. Hayles*, — Iowa —, 257 N.W.2d 631 (1977) (notice-of-claim provision for suits against municipalities struck down as unconstitutional because it did not provide reasonable tolling period for incapacitated claimants).

The Interagency Task Force study recognizes that, with a date-of-manufacture accrual, a "due process problem may occur in those jurisdictions which do not allow a grace period to bring action for an injury which occurs near the end of a statutory period." RESEARCH GROUP, INC., *supra* note 2, at 12 (footnote omitted).

41. See D. NOEL & J. PHILLIPS, *supra* note 3, at 336-37; *Developments in the Law—Statutes of Limitations*, 63 HARV. L. REV. 1177, 1220-29 (1950).

42. S. SPEISER, *supra* note 6, § 11.17.

context of a statute establishing an outer cutoff period: (1) shall these exceptions be abolished in the case of products liability claims if an outer cutoff period has run; (2) what is the justification for such a Draconian approach; (3) should some of the exceptions be retained; and (4) if so, how can the choice be justified? It would cut against the grain of justice to hold that a person can bar a claim against himself by fraudulently concealing that claim. The rights of incompetents equally demand vindication when there is no one available to assert the claims during incompetency. A claim should not be barred if the defendant is evading service of process. Nor should the separate claims of a deceased's dependents be barred before they can be asserted.

The plight of such barred claimants, however, is little different from that of the competent person who is unable to assert a claim during the statutory period because an injury proximately resulting from the defect has not yet occurred or because he reasonably does not know it has occurred. In all these situations the claimant is unable as a practical matter to assert his claim; there is no reason to favor one situation over the other. The comparison points up the lack of wisdom of an outer cutoff approach.

II. GENERAL POLICY CONSIDERATIONS

The foregoing discussion highlights an essential weakness of an outer cutoff statute of limitations. There are numerous exceptions that the courts would probably, by judicial interpretation, read into the statute unless expressly forbidden from doing so by the legislature. If these exceptions are allowed to develop, they will make the random application of the general rule arbitrary. Express prohibition of all exceptions, however, undesirably freezes common law development. The enactment of some exceptions and prohibition of others presents undesirable and probably indefensible choices.

Enactment of outer cutoff period statutes of limitations on a state-by-state basis presents other problems of inequity if all jurisdictions do not adopt such statutes. The residents of State *A*, which has a date-of-discovery rule, will have an advantage over State *B* residents who have an outer cutoff statute. The manufacturers of State *B* will not benefit from that State's rule if they sell their products in State *A*. It is unlikely that insurance premiums calculated by companies doing business on a nationwide basis will be significantly reduced by piecemeal enactments.⁴³

43. INTERAGENCY TASK FORCE ON PRODUCT LIABILITY, EXECUTIVE SUMMARY FOR THE FINAL REPORT I-9 (Nov. 1977); INTERAGENCY TASK FORCE ON PRODUCT LIABILITY, *supra* note 10, at VII-21, VII-23.

Congress probably has authority under the commerce clause⁴⁴ to enact a national products liability statute of limitations, and the foregoing discussion indicates there is much to be said in favor of national uniformity in this area. The enactment of a federal outer cutoff rule would not, however, avoid the problem of determining which exceptions should be made to the rule. The same policy considerations that argue for a date-of-discovery rule on a statewide basis would apply equally to federal legislation.

It is also possible that an outer cutoff period statute of limitations would be subject to constitutional attack in some jurisdictions. Such attacks have been successfully made on similar statutes for architects and builders.⁴⁵ Probably the better view, however, is that the lack of wisdom of such legislation does not rise to constitutional dimensions.⁴⁶ Reasonable persons can differ as to the need for an outer cutoff period, although persuasive arguments weigh substantially against such an enactment. Carving out a special rule for products transactions is as justifiable as enacting a special statute of limitations for doctors, architects, builders, sellers of goods and the like. If there is indeed a products liability insurance crisis, and if enactment of such a statute would have a significant impact on solving that crisis, there may be more justification than is usually the case for enacting a special rule. There will be difficulty, however, in defining the scope of products transactions, since the developing law of products liability has been extended to transactions involving neither a product nor a sale.⁴⁷

Manufacturers are right in asserting that they should not be held liable for injuries that occur simply because a product wears out. But no uniform wearing-out time should be enacted for all products alike by means of a statute of limitations. The lives of different products vary widely, as do the lives of similar products depending on the extent of their use and maintenance. The defense that a product has broken because its expectable life has expired is a valid one, but it should not be placed in the straitjacket of a uniform period based on a statute of limitations.

An outer cutoff period serves the purpose of preventing stale claims only fitfully. An inner cutoff period more properly accommodates the

44. U.S. CONST. art. 1, § 8, cl. 3.

45. See *Pacific Indem. Co. v. Thompson-Yaeger, Inc.*, — Minn. —, 260 N.W.2d 548 (1977); Massery, *supra* note 10, at 545-48; Comment, *Limitation of Action Statutes for Architects and Builders—Blueprints for Non-Action*, 18 CATH. L. REV. 361 (1968).

46. "Contrary to the position of those courts which hold that the repose statutes for architects and builders are based on irrational classifications, a legislature would seem entitled to make such a judgment." RESEARCH GROUP, INC., *supra* note 2, at 10-11.

47. See *Delaney v. Towmotor Corp.*, 339 F.2d 4 (2d Cir. 1964) (bailment); *Schipper v. Levitt & Sons, Inc.*, 44 N.J. 70, 207 A.2d 314 (1965) (sale of house); Greenfield, *Consumer Protection in Service Transactions—Implied Warranties and Strict Liability in Tort*, 1974 UTAH L. REV. 661.

competing interests of supplier and plaintiff. The manufacturer may dispose of production and design records after a certain period of time, but proof of inadequate design or warnings will normally turn on expert testimony and common sense rather than on manufacturing records.⁴⁸ The manufacturer cannot complain if his records of unsatisfactory performance of the product and of customer complaints regarding that performance are unavailable. In the case of defects in production and handling, the lapse of time will pose substantial difficulties for the plaintiff in tracing the defect to the date of manufacture.⁴⁹ If he can do this by a preponderance of the evidence, why should he be denied the right to do so?

As mentioned earlier, manufacturers are concerned about the use of post-sale safety improvements to show defectiveness at the date of manufacture.⁵⁰ Enactment of an outer cutoff period will not meet this problem. It will only arbitrarily prevent such proof in certain cases. Establishing defectiveness by showing subsequent remedial measures presents different policy considerations that should not be confused with the policies underlying statutes of limitations. Proof of subsequent remedial measures is frequently used to show feasibility of improvement or to impeach a witness' credibility.⁵¹ These uses have nothing to do with whether it is desirable to have repose of claims after a certain period of time.

Finally, it may be contended that to allow claims for product injuries occurring long after the date of manufacture unfairly handicaps the manufacturer in insuring against products hazards. Insurance companies generally sell products liability insurance on an occurrence basis.⁵² The result is that

48. Records of safety design testing, when available, may be useful in establishing a defense, *see Coccia, Your Product is Defendable*, 40 INS. COUNSEL J. 130, 137-38 (1973), but most of this evidence is documentary and is maintained over a long period of time, *see Raymond v. Eli Lilly & Co.*, — N.H. —, —, 371 A.2d 170, 176 (1977). Moreover, the passage of time is likely to increase available scientific knowledge regarding causation and defect, *id.*, and courts often admit such post-sale developments into evidence, Phillips, *supra* note 9, at 115-19. Proof of whatever defect is alleged in the case of alleged inadequate warnings "can easily be found, since the defect would be the same in many other samples of the product . . . [I]nexpensive common sense is often the most important element in presenting a warning case to a jury." D. NOEL & J. PHILLIPS, *supra* note 15, at 446.

49. Where production defects are involved, the plaintiff must sustain the "heavy burden of showing that the defect existed when it left the manufacturer's hands." *Ford Motor Co. v. Lonon*, 217 Tenn. 400, 422, 398 S.W.2d 240, 250 (1966).

50. *See* text accompanying note 9 *supra*.

51. *See Ault v. International Harvester Co.*, 13 Cal. 3d 113, 528 P.2d 1148, 117 Cal. Rptr. 812 (1974); FED. R. EVID. 407.

52. "Product insurance usually provides coverage on what is called 'occurrence' basis, whereby coverage is provided for all product-related damages that occur during the policy period. Neither the time of manufacture of the product nor the time at which the claim is made determines whether the policy provides coverage." INTERAGENCY TASK FORCE ON PRODUCT LIABILITY, *supra* note 10, at V-5. *But cf. Veal, Product Insurance Coverage—When Is an Occurrence?*, 1 J. PRODUCT LIABILITY 149, 155 (1977): "[I]n product liability cases there is

the manufacturer must charge insurance costs to products that are not to any appreciable extent responsible for the risk that is being insured against. Products manufactured in 1970 will bear the risk of those manufactured in 1950. Thus prior faults and defects may make a perfectly good product in today's market noncompetitive. It can be contended that a product should bear its own costs and that those costs should not be shifted unfairly to another product and time.⁵³

This insurance problem is probably not as serious as it may seem on first impression. If one line of punch presses in 1970 is suffering claims losses arising from sales in 1950, it is possible that competitive punch presses will be experiencing similar losses. In any event, manufacturers of like products in 1970 will be paying similar insurance premiums owing to nationally established rates. It is unlikely that the widespread adoption of an outer cutoff limitations period would by itself have any significant impact on these rates.⁵⁴ The very reasons that cause insurance companies to be unable to predict future losses on a date-of-manufacture basis of coverage also operate to prevent manufacturers, who are often self-insurers, from making such predictions. A currently made product is not in any real sense bearing its own costs if it must absorb inflation and legal and social changes for a distant future of which it realistically is not a part. The price of today's products, on the other hand, may reasonably reflect the rate of claims losses as determined by the experience of immediately preceding years.

III. CONCLUSION

While arguments can be made in favor of an outer cutoff period for products liability claims, and while this approach has been adopted in some instances, on balance the approach seems ill advised. A major drawback is the need for exceptions to the rule. If all the needed exceptions are allowed, application of the rule will be so irregular as to be arbitrary. Refusal to allow any exceptions, on the other hand, would be much too rigid an approach.

Moreover, the reasons against using a date of discovery rule are not

ample authority for the proposition that 'occurrence' must be related to the causative act rather than the result thereof." Such a construction of the insurance policy eliminates the alleged problem discussed in the text.

53. "When the machine was sold, the manufacturer could not 'cost in' tort liability on the basis of a standard that would evolve 20 years in the future." INTERAGENCY TASK FORCE ON PRODUCT LIABILITY, *supra* note 10, at VII-22.

54. One underwriter interviewed by the federal Interagency Task Force on Products Liability indicated that "reform" in regard to manufacturers' liability for old products "would not be sufficient justification for changing his company's underwriting posture." *Id.* at VII-21; *see* text accompanying note 43 *supra*. An outer cutoff statute of limitations for medical malpractice claims in Indiana "did not curtail the rise of medical malpractice premiums in that state." INTERAGENCY TASK FORCE ON PRODUCT LIABILITY, *supra* note 10, at VII-23.

persuasive. Staleness of evidence is not a major problem in products litigation. Subsequently evolving standards present different policy considerations, and the policies underlying statutes of limitations should not be subverted in an attempt to deal with those considerations. The expectable lives of products are too varied to tie to a fixed period of limitations. Insuring present claims arising from products made in the distant past poses no undue burden or inequity on manufacturers. Most importantly, just claims that are capable of being proved should not be barred merely because of the fortuity that a product-related injurious defect did not manifest itself earlier.