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PRODUCT LIABILITY OF THE 1980s: "REPOSE IS NOT THE DESTINY" OF MANUFACTURERS

TERRY MOREHEAD DWORKIN†

In response to the growing number of product liability suits and dramatic rises in insurance premiums, many state legislatures were persuaded to enact statutes of repose. Adopted under the pressure exerted by the lobbies of special interest groups, the statutes of repose stand as a form of special legislation that in effect denies the existence of a duty between a defendant and potential plaintiff after a specified number of years. In the context of the delayed manifestation injury, Professor Dworkin argues that the time bar set by the statutes of repose may be successfully avoided by several means: distinguishing between old-product injury and delayed manifestation cases, tolling the statute of limitations period, and challenging the constitutional validity of the repose statutes on equal protection and due process grounds. Although comprehensive legislative action addressing the special problems of delayed manifestation injury would be preferred, the courts are likely to counteract the harsh effects of the statutes of repose by emphasizing the rights of plaintiffs injured by technologically defective products.

"Certainty generally is an illusion, and repose is not the destiny of man."¹ Neither does repose appear to be the destiny of manufacturers. Despite recent legislation designed to give manufacturers repose from product liability, many factors indicate that these statutes will not afford the certainty sought.

Repose statutes were a response to the upheaval in product liability law of the 1970s.² As consumerism swelled, injured parties gained greater awareness of their rights, and courts facilitated suits by wider adoption of theories such as strict liability³ and expansion of traditional tort theories.⁴ This development in turn led to an escalation in the number of suits brought against manufactur-

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1. J. BARTLETT, FAMILIAR QUOTATIONS 787 (14th ed. 1968) (quoting O.W. HOLMES, THE PATH OF THE LAW (1897)).

2. See, e.g., INTERAGENCY TASK FORCE ON PROD. LIAB., U.S. DEP'T OF COMMERCE, PRODUCT LIABILITY: FINAL REPORT OF THE LEGAL STUDY (1977); Epstein, *Products Liability: The Search for the Middle Ground*, 56 N.C.L. REV. 643 (1978); Phillips, *A Synopsis of the Developing Law of Products Liability*, 28 DRAKE L. REV. 317 (1978-79); Schwartz, *Foreword: Understanding Products Liability*, 67 CALIF. L. REV. 435 (1979).

3. Strict product liability was first adopted in 1963 in *Greenman v. Yuba Power Prods., Inc.*, 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1963). Its wide adoption was fostered by RESTATEMENT (SECOND) OF TORTS § 402A (1965), and it is now recognized in some form in virtually every jurisdiction.

4. The abrogation of the patent danger rule in some jurisdictions is one example. See, e.g.,

ers, and in the number and amounts of awards.⁵ Insurers, reacting in part to this situation and to open-ended liability, raised premiums for product liability insurance by hundreds and sometimes thousands of percent.⁶ A feeling of crisis permeated the business and insurance world, and in the latter half of the decade these groups exerted their considerable influence to effect legislative changes to counteract these trends.⁷ As a result, product liability reform statutes have been passed by a majority of states,⁸ and passage of a federal bill may be forthcoming.⁹ These acts feature statutes of repose as the primary

Mitchell v. Fruehauf Corp., 568 F.2d 1139 (5th Cir. 1978); Micallef v. Miehle Co., 39 N.Y.2d 376, 348 N.E.2d 571, 384 N.Y.S.2d 115 (1976).

Another example is the adoption of the Wade-Keeton test, which measures the reasonableness of a manufacturer's actions by standards at the time of trial and not at the time design and marketing decisions were made. See, e.g., Bailey v. Boatland of Houston, Inc., 585 S.W.2d 805 (Tex. Civ. App. 1979); Stanfield v. Medalist Indus., Inc., 34 Ill. App. 3d 635, 340 N.E.2d 276 (1975); Keeton, *Product Liability and the Meaning of Defect*, 5 ST. MARY'S L.J. 30 (1973); Wade, *Strict Tort Liability of Manufacturers*, 19 SW.L.J. 5 (1965).

5. There were 50,000 product liability suits in 1960, and over 1,000,000 by 1976. NATIONAL LEGAL CENTER FOR THE PUB. INTEREST, PRE-CONFERENCE "WORKING PAPERS" OF RICHARD BIEDER 4 (Apr. 1982).

6. Note, *When the Product Ticks: Products Liability and Statutes of Limitations*, 11 IND. L. REV. 693, 698-99 (1978).

7. The American Insurance Association was one of the groups that sought change through its PRODUCT LIABILITY LEGISLATIVE PACKAGE: STATUTES DESIGNED TO IMPROVE THE FAIRNESS AND ADMINISTRATION OF PRODUCT LIABILITY LAW (American Ins. Ass'n, 1977). See Note, *The Proposed Product Liability Statute in Ohio—Its Purpose and Probable Results*, 29 CLEV. ST. L. REV. 141, 144 n.14 (1980). Suggested changes included a statute of repose and a state-of-the-art defense. Massery, *Date-of-Sale Statutes of Limitation—A New Immunity for Product Suppliers*, 656 INS. L.J. 535 (1977).

8. See, e.g., ALA. CODE § 6-5-502 (Supp. 1982); ARIZ. REV. STAT. ANN. § 12-551 (1982); COLO. REV. STAT. § 13-21-403(3) (Supp. 1981); CONN. GEN. STAT. ANN. § 52-577a (West Supp. 1982); FLA. STAT. ANN. § 95.031(2) (West 1982); GA. CODE ANN. § 51-1-11 (1982); IDAHO CODE § [6-1403] 6-1303 (Supp. 1982); ILL. ANN. STAT. ch. 110, § 13-213(b) (Smith-Hurd Supp. 1982); IND. CODE ANN. § [34-4-20A-5] 33-1-1.5-1 (Burns Supp. 1982); KAN. STAT. ANN. § 60-513(b) (1976); KY. REV. STAT. ANN. § 411.310(1) (Baldwin 1981); NEB. REV. STAT. § 25-224 (1979); N.H. REV. STAT. ANN. § 507-D:2 (Supp. 1979); N.C. GEN. STAT. § 1-52(16) (Supp. 1981); N.D. CENT. CODE § 28-01.1-02 (Supp. 1981); OR. REV. STAT. § 30.905 (1981); R.I. GEN. LAWS § 9-1-13 (Supp. 1981); S.D. CODIFIED LAWS ANN. § 15-2-12.1 (Supp. 1982); TENN. CODE ANN. § 29-28-103 (1980); UTAH CODE ANN. § 78-15-3(1) (1977); WASH. REV. CODE ANN. § 7.72.060 (Supp. 1982). See also McGovern, *The Status of Statutes of Limitations and Statutes of Repose in Product Liability Actions: Present and Future*, 16 FORUM 416, 425 (1981).

9. The Product Liability Risk Retention Act of 1981 was enacted in Congress on September 25, 1981. Pub. L. No. 97-45, 95 Stat. 949 (1981). The Act allows manufacturers to operate self-insurance groups on a nationwide basis. In addition, federal tort reform of the product liability laws is being considered. Nationwide reform is urged by some commentators because of the inconsistencies in the laws and statutory changes from state to state. *Products Liability*, 67 A.B.A. J. 1253 (1981). On October 15, 1981, the Senate Commerce Consumer Subcommittee unveiled a draft bill designed to promote uniformity roughly along the lines of the MODEL UNIF. PROD. LIAB. ACT, reprinted in 44 Fed. Reg. 62,714 (1979), and asked for public comments. Amended after public comment, the proposed Act is soon to be introduced in the Senate. *Products Liability*, 68 A.B.A. J. 399 (1982). It is supported by the Product Liability Alliance, a group of approximately 150 organizations including the Business Roundtable, the American Insurance Association, and the National Association of Manufacturers. The Alliance is represented by Victor Schwartz, former chairman of the Task Force that drafted the Model Uniform Product Liability Act. The proposal would establish probusiness policies, such as requiring plaintiff to prove defendant manufactured the injury-causing product (thus overruling *Sindell v. Abbott Laboratories*, 26 Cal. 3d 588, 607 P.2d 924, 163 Cal. Rptr. 132 (market share liability theory), cert. denied, 449 U.S. 912 (1980)), a presumption in favor of the safety of the product if it meets federal standards, and shifting the burden of proof from product manufacturers and distributors to consumers. A similar bill has also been introduced in the House. H.R. 5214, 97th Cong., 2d Sess. (1982).

vehicle for alleviating the problem of extended liability.¹⁰

Concurrent with this legislative trend has been the continuing, countervailing common-law trend to increase manufacturers' liability. A key factor in this increase has been the expansion of liability for widespread, time-delayed product injuries.¹¹ Time-delayed injury suits may well come to dominate tort litigation of the 1980s,¹² and for some manufacturers such liability will far exceed that which was threatened in the Seventies. Since the injury in this type of suit usually manifests itself after the repose period statutorily established by the new statutes,¹³ an increasingly important question is whether these statutes will be interpreted to time-bar such suits.

This article will examine the proconsumer trends such as market share liability and corporate successor liability, recent developments regarding stat-

10. These statutes are seen as a solution for several reasons: they would solve the "long tail" or open-ended liability problem and thereby help stabilize insurance rates; they would prevent the use of time-of-trial standards to judge products several years after their development and manufacture, see *supra* note 4 and accompanying text; Henderson, *Coping with the Time Dimension in Products Liability*, 69 CALIF. L. REV. 919 (1981); Phillips, *An Analysis of Proposed Reform of Products Liability Statutes of Limitations*, 56 N.C.L. REV. 663, 665 (1978), and they would preclude a small number of suits involving some of the most seriously injured plaintiffs. Twerski & Weinstein, *A Critique of the Uniform Product Liability Law—A Rush to Judgment*, 28 DRAKE L. REV. 221, 244 (1978-1979).

11. See, e.g., *White v. Johns-Manville Corp.*, 662 F.2d 234 (4th Cir. 1981), *cert. denied*, 102 S. Ct. 1037 (1982) (asbestos); *In re "Agent Orange" Prod. Liability Litigation*, 635 F.2d 987 (2d Cir. 1980), *cert. denied*, 102 S. Ct. 980 (1982) ("agent orange"); *Borel v. Fibreboard Paper Prods. Corp.*, 493 F.2d 1076 (5th Cir. 1973), *cert. denied*, 419 U.S. 869 (1974) (asbestos); *Sindell v. Abbott Laboratories*, 26 Cal. 3d 588, 607 P.2d 924, 163 Cal. Rptr. 132, *cert. denied*, 449 U.S. 912 (1980); *Bichler v. Eli Lilly & Co.*, 79 A.D.2d 317, 436 N.Y.S.2d 625 (1981) (DES); *Heck v. Beryllium Corp.*, 424 Pa. 140, 226 A.2d 87 (1966) (beryllium); *Abel v. Eli Lilly & Co.*, 94 Mich. App. 53, 289 N.W.2d 20 (1980) (DES); *Ferrigno v. Eli Lilly & Co.*, 175 N.J. Super. 551, 420 A.2d 1305 (Law Div. 1980) (DES).

12. There are estimated to be over 1,000 pending DES suits, and the number is growing as more of the estimated three million DES daughters bring suit. *Lawscope—Toxic Time Bombs*, 67 A.B.A. J. 139, 140 (1981); Note, *Market Share Liability: An Answer to the DES Causation Problem*, 94 HARV. L. REV. 668, 668 n.7 (1981). In addition, DES has been linked to decreased fertility in sons of mothers who took the drug. Comment, *DES and a Proposed Theory of Enterprise Liability*, 46 FORDHAM L. REV. 963, 964 n.5 (1978). The number of asbestos-related suits is even greater. There are estimated to be 25,000 suits pending, and that number is estimated to be growing by six hundred per month per manufacturer, of which there are more than two dozen. Masters, *Asbestos Liability Suits Strain Manufacturers, Court System*, Legal Times, Mar. 30, 1981, at 1, col. 2. The growth will be even greater as a result of the decision in *White v. Johns-Manville Corp.*, 662 F.2d 234 (4th Cir. 1981), *cert. denied*, 102 S. Ct. 1037 (1982), which allowed seamen and shipyard workers to sue under admiralty law and thereby avoid time bars in many states. In addition, it was recently discovered that a significant number of spouses and children contracted asbestiosis from contact with the clothing, skin, and hair of shipyard workers. Chicago Tribune, Oct. 4, 1981, § 2, at 9, col. 1 (citing a study released by the American Lung Association). Agent Orange plaintiffs are estimated to number 50,000 or more. *Lawscope—Toxic Time Bombs*, 67 A.B.A. J. 139 (1981).

Suits based on toxic waste, radiation injuries (such as those from the Bikini and Eniwetok atolls tests), microwaves (see *infra* note 73), and various drugs and chemicals whose harmful effects are just becoming known will greatly increase the numbers.

13. The repose periods range from five years to twelve years, but the majority of states have adopted a ten-year period. Dworkin, *Product Liability Reform and the Model Uniform Product Liability Act*, 60 NEB. L. REV. 50, 68 & n.127 (1981). In DES cases, for example, the injury generally does not manifest itself until at least ten to twenty years after the mother's ingestion of the drug. *Sindell v. Abbott Laboratories*, 26 Cal. 3d 588, 589, 607 P.2d 924, 925, 163 Cal. Rptr. 132, 133, *cert. denied*, 449 U.S. 912 (1980), and in asbestiosis a similar time lag can occur. Granelli, *The Asbestos Case Explosion*, Nat'l L.J., Oct. 19, 1981, at 1, col. 1.

utes of limitations and statutes of repose, and the likely results when these conflicting common-law and legislative trends meet in the context of time-delayed product injuries. Public policy issues, as reflected in decisions based on constitutionality, duty, estoppel, and tolling or suspension of the running of the limitations period, indicate that many courts will not find the statutes to be a bar.

I. STATUTES OF LIMITATIONS TRENDS

The recognition and protection of a repose interest is not new.¹⁴ It has long been conceded that some time limitation on the ability to bring suit is necessary if practicality as well as justice are to be served.¹⁵ Defendants at some point should be able to institute financial plans with certainty, free from the threat of stale claims; plaintiffs, if truly aggrieved, should pursue remedies within a reasonable period of time; and defendants and courts should not have to deal with cases in which the passage of time seriously hampers the search for truth.¹⁶ For the traditional statute of limitations, the legislature balances the interests of the parties in light of these considerations, and determines that at some point the right to be free from stale claims must prevail over the right to prosecute them.¹⁷ This determination is usually made to cover a wide class of actions, such as torts, or to encompass similarly situated parties.

The conflict between a plaintiff's interest in bringing suit and a defendant's repose interest has been most sharply highlighted by cases in which the plaintiff has been injured but does not discover the injury, or does not discover the connection between the injury and the action causing it, until after the period set by the legislature has run. Interpretation of the statutes of limitations to bar such suits has not been consistent, but in the first half of the twentieth century courts generally put greater emphasis on the repose interest and strictly construed the statutes by starting the limitations period at the time of the incident causing the injury.¹⁸ Thus, the plaintiff's suit was denied if discovery of the injury took place after the statutorily defined period.¹⁹ This strict interpretation has gradually given way to a rule that focuses upon the actual time of discovery of injury. Such a rule now exists in some form in

14. The first tort statute of limitations in 1623 provided for a six-year limitations period "after the cause of such actions or suit." 21 Jac. I.C. 16 (1623).

15. "Statutes of limitation find their justification in necessity and convenience rather than in logic . . . They represent a public policy about the privilege to litigate." Chase Sec. Corp. v. Donaldson, 325 U.S. 304, 314 (1945). See also Order of R.R. Telegraphers v. Railway Express Agency, Inc., 321 U.S. 342 (1944); Riddlesbarger v. Hartford Ins. Co., 74 U.S. (7 Wall.) 386 (1869); I.H. WOOD, A TREATISE ON THE LIMITATIONS OF ACTIONS AT LAW AND IN EQUITY 9 (2d ed. 1893).

16. See, e.g., United States v. Kubrick, 444 U.S. 111 (1979); Gates Rubber Co. v. USM Corp., 508 F.2d 603 (7th Cir. 1975).

17. Order of R.R. Telegraphers v. Railway Express Agency, Inc., 321 U.S. at 349.

18. Note, *Developments in the Law—Statutes of Limitations*, 63 HARV. L. REV. 1177 (1950).

19. See, e.g., Riley v. United States, 212 F.2d 692 (4th Cir. 1954); Silvertooth v. Shallenberger, 49 Ga. App. 133, 174 S.E. 365 (1934); Lindquist v. Mullen, 45 Wash. 2d 675, 277 P.2d 724 (1954).

most jurisdictions when personal injuries are involved.²⁰ Under this interpretation, the statutory period begins to run when the injury is or should reasonably have been discovered, not when the alleged tort is committed.

This "discovery rule" was first widely adopted in medical malpractice cases in which a foreign object was left in the patient's body. In these cases the limitations period is short (generally one or two years), the nature of the injury often prevents the plaintiff from quickly discovering what is wrong, and he or she often is forced to rely on the defendant's statements.²¹ The courts determined that under these circumstances plaintiffs should not be denied their right to sue. The discovery rule has now been adopted in many other tort areas, the courts having concluded that the equities involved in nonmedical cases are essentially the same as those present in the medical malpractice situation.²²

Increasingly, the trend toward favoring a plaintiff's right to bring suit for personal injury has been furthered by adoption of a causal-connection-accrual rule. Under this rule, counting for the limitations period does not begin until the plaintiff discovers both the injury and that defendant has caused it, and in some instances, not until the plaintiff also discovers he or she has a cause of action.²³

In a strictly commercial setting, in which damages are economic, courts have been more reluctant to adopt a discovery rule, and repose interests are emphasized.²⁴ Stability and predictability are considered crucial in the busi-

20. See, e.g., *Urie v. Thompson*, 337 U.S. 163 (1949); *Warrington v. Charles Pfizer & Co.*, 274 Cal. App. 2d 564, 80 Cal. Rptr. 130 (1969). See also W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* § 30, at 144 (4th ed. 1971).

21. RESTATEMENT (SECOND) OF TORTS § 899 comment e (1965).

22. See, e.g., *Williams v. Borden, Inc.*, 637 F.2d 731 (10th Cir. 1980); *Louisville Trust Co. v. Johns-Manville Prods. Corp.*, 580 S.W.2d 497, 500-01 (Ky. 1979); *Frederick v. Calbio Pharmaceuticals*, 89 Cal. App. 3d 49, 152 Cal. Rptr. 292 (1979).

23. See, e.g., *Goodman v. Meade Johnson & Co.*, 534 F.2d 566 (3d Cir.), cert. denied, 429 U.S. 828 (1976); *Raymond v. Eli Lilly & Co.*, 117 N.H. 164, 371 A.2d 170 (1977); *Frederick v. Calbio Pharmaceuticals*, 89 Cal. App. 3d 49, 152 Cal. Rptr. 292 (1979). *Contra United States v. Kubrick*, 444 U.S. 111 (1979). In *Kubrick* the Court, in deciding whether the two-year limitation period of the Federal Tort Claims Act began to run at the time plaintiff became aware of injury or when plaintiff discovered a negligence connection, differentiated between those cases in which plaintiff is ignorant of his injury and those in which he is ignorant of his legal rights. When the plaintiff is ignorant of his injury, the facts about causation may be in the defendant's control or very difficult to obtain and therefore accrual should not begin until this knowledge is obtained. Mere ignorance of legal rights does not stop the period from running from discovery of injury caused by the defendant since the plaintiff, upon discovery, is no longer at defendant's mercy. Cf. *O'Brien v. Eli Lilly & Co.*, 668 F.2d 704 (3d Cir. 1981) (limitations period began to run when plaintiff learned she had cancer five years earlier and not three years later when she discovered her mother had taken DES; mother had previously denied taking the drug and her doctor had said the relationship between her cancer and the drug was unclear).

24. See, e.g., *Durant v. Grange Silo Co.*, 12 A.D.2d 694, 207 N.Y.S.2d 691 (1960); *Smith v. Fairbanks, Morse & Co.*, 101 Tex. 24, 102 S.W. 908 (1907). Emphasis on repose also has occurred in legal malpractice suits in which the damages are only economic. In a recent decision, *Shideler v. Dwyer*, — Ind. —, 417 N.E.2d 281 (1981), the Indiana Supreme Court ruled that plaintiff's suit for malpractice in drafting a will constituted a claim of injury to personal property and arose when the death of the testator occurred, not when the probate court decreed that the gift to the plaintiff was void. Since plaintiff brought suit after discovering the injury when the gift was denied more than two years after the death of the testator, the two-year limitations period barred suit. *But see Anderson v. Neal*, 428 A.2d 1189 (Me. 1981) (unreasonable and unfair to bar redress

ness context if commerce is to thrive. This repose preference is reflected in the limitations period generally adopted by the states from the Uniform Commercial Code, which bars suits brought more than four years after the sale of the product in question.²⁵ Here too, however, when personal injury results from a commercial transaction, courts have tended to deemphasize repose and opt for a plaintiff's right to bring suit. When personal injury is caused by a product, most courts have construed the suit to be a tort action rather than a warranty action under the U.C.C., and have allowed the tort accrual-from-discovery rule to prevail.²⁶

This preference for a plaintiff's right to sue was carried over into the construction of limitations statutes for strict liability. Since strict liability theory draws from both tort and warranty law, the use of either the four-year statute of repose of the U.C.C. or the tort discovery limitations period would have been supportable. Most jurisdictions, however, have favored the plaintiff's interests over repose interests and have applied the tort time-of-discovery limitation.²⁷ Thus, discovery accrual has often been used in delayed manifestation suits, which are increasingly based on strict liability.²⁸

A recent case that demonstrates the degree to which courts are willing to stretch the discovery rule to accommodate a plaintiff's delayed manifestation product liability suit is *Ferrer v. Richardson-Merrell*,²⁹ decided in 1980 by the California Court of Appeal. Plaintiff, a doctor, self-prescribed MER/29 in March 1960. A few months later he was unable to read, suffered severe dermatitis, was unable to work for four to six weeks, and suffered some permanent eye damage.³⁰ Plaintiff knew that these reactions were "likely" related to the MER/29 and discontinued its use. In 1976 he developed cataracts, and at that time filed suit against the drug manufacturer.³¹ The California limitations period is one year.³² Citing "straws in the wind," such as special limitations rules in nuisance and progressive occupational disease cases³³ and

of potentially catastrophic economic loss before client reasonably should have discovered it); *Ameraccount Club, Inc. v. Hill*, 617 S.W.2d 876 (Tenn. 1981) (no bar of recovery for economic loss before client discovered it).

25. U.C.C. § 2-725 (1972).

26. *See, e.g.*, *Brown v. Merrow Mach. Co.*, 411 F. Supp. 1162 (D. Conn. 1976); *Kinney v. Goodyear Tire & Rubber Co.*, 134 Vt. 571, 367 A.2d 677 (1976). In *Parish v. B.F. Goodrich Co.*, 395 Mich. 271, 235 N.W.2d 570 (1975), the court chose the tort statute of limitations over the warranty statute even though plaintiff was thereby barred from suit. The majority stressed that it was the type of harm incurred, not the type of liability that was involved, which controlled. *See also Garcia v. Texas Instruments, Inc.*, 598 S.W.2d 24 (Tex. Civ. App. 1980).

27. *See, e.g.*, *Raymond v. Eli Lilly & Co.*, 117 N.H. 164, 371 A.2d 170 (1977); *Victorsen v. Bock Laundry Mach. Co.*, 37 N.Y.2d 395, 335 N.E.2d 275, 373 N.Y.S.2d 39 (1975).

28. *See, e.g.*, *Louisville Trust Co. v. Johns-Manville Prods. Corp.*, 580 S.W.2d 497 (Ky. 1979); *Wigginton v. Reichold Chems., Inc.*, 133 Ill. App. 2d 776, 274 N.E.2d 118 (1971). *See also Birnbaum, "First Breath's" Last Gasp: The Discovery Rule in Products Liability Cases*, 13 FORUM 279, 285 (1977).

29. 105 Cal. App. 3d 316, 164 Cal. Rptr. 591 (1980).

30. *Id.* at 319, 164 Cal. Rptr. at 592.

31. *Id.*

32. CAL. CIV. PROC. CODE § 340 (West Supp. 1982).

33. In nuisance cases, when it is not clear whether the nuisance is permanent or temporary, plaintiff can elect to prosecute either claim and will not be met by a plea of merger if he or she

currently developing merger exceptions of *res judicata*,³⁴ the court found that plaintiff should be able to split his cause of action and sue for the cataract damage, especially since he did not claim that the 1960 troubles were MER/29 related.³⁵ Accrual would begin not when plaintiff first suffered serious damage and knew the cause, but sixteen years later when he suffered further damage. "The simple fact is that rules developed against the relatively unsophisticated backdrops of barroom brawls, intersection collisions and slips and falls lose some of their relevance in these days of miracle drugs with their wondrous, unintended, unanticipated and frequently long-delayed side effects."³⁶

The equitable reasoning behind these changes clearly expresses this and other courts' greater concern for a plaintiff's right to bring suit than for a defendant's repose interests. If a plaintiff has been blameless in failing to discover the injury, then justice requires that the suit be allowed. The statute of limitations is construed to require only that the plaintiff act within a reasonable time after discovering that his or her rights have been invaded.³⁷ In opting for a tort discovery approach, courts have emphasized the rights of innocent plaintiffs and safety considerations,³⁸ as compared to the interests of

incorrectly treated a permanent nuisance as temporary. Plaintiff can therefore bring successive actions if the nuisance is permanent. *Spaulding v. Cameron*, 38 Cal. 2d 265, 239 P.2d 625 (1952).

34. Section 26(1)(f) of the RESTATEMENT (SECOND) OF JUDGMENTS (1982) lists "extraordinary reason" and a prior judgment that is "plainly inconsistent with the fair and equitable implementation of a statutory or constitutional scheme" as exceptions to the general rule against splitting causes of action.

35. 105 Cal. App. 3d at 321, 164 Cal. Rptr. at 593.

36. *Id.* at 324, 164 Cal. Rptr. at 595. See also *Goodman v. Mead Johnson & Co.*, 534 F.2d 566 (3d Cir. 1976). Cf. *Fearson v. Johns-Manville Sales Corp.*, 525 F. Supp. 671 (D.D.C. 1981) (worker diagnosed as having mild asbestiosis in 1973 allowed to bring wrongful death suit in 1980 despite three-year statute of limitations because the court construed the bronchogenic carcinoma to be an independent disease, and not a maturation of the harm from exposure to asbestos diagnosed in 1973).

A recent lower court attempt to extend wrongful death and survival action statutes of limitations, however, was overturned on appeal. In *Anthony v. Koppers Co.*, 284 Pa. Super. 81, 425 A.2d 428 (1980), the Pennsylvania Superior Court found that decedents suffered injury *after* their death by construing the statute to begin running when decedents' representatives could reasonably discover the causal connection between the deaths and defendant's coke oven emissions. The Pennsylvania Supreme Court, — Pa. —, 436 A.2d 181 (1981), refused to apply the discovery rule in wrongful death limitations, and literally construed the statute, which allowed suit "within one year after the death, and not thereafter." PA. STAT. ANN. tit. 12, § 1603 (Purdon 1953) *repealed by* tit. 42, § 5524(2) (Purdon 1981). *Accord* *Stiles v. Union Carbide Corp.*, 520 F. Supp. 865 (S.D. Tex. 1981). In *Hammond v. North Am. Asbestos Corp.*, No. 80-L-52 (McLean County Ct., Ill., Feb. 26, 1981), the state's two-year statute of limitations (which barred husband's asbestiosis suit) was in effect avoided when a wife was allowed to recover \$125,000 in compensatory damages and \$375,000 in punitive damages for loss of consortium caused by her husband's illness. The consortium statute of limitations is six years.

37. In interpreting the accrual time of the Federal Employer's Liability Act, the Supreme Court in *Urie v. Thompson*, 337 U.S. 163 (1949), stated:

We do not think the humane legislative plan intended such consequences [barring the suit] to attach to blameless ignorance. Nor do we think those consequences can be reconciled with the traditional purposes of statutes of limitations, which conventionally require the assertion of claims within a specified period of time after notice of the invasion of legal rights.

Id. at 170. See also *Raymond v. Eli Lilly & Co.*, 117 N.H. 164, 371 A.2d 170 (1977).

38. See, e.g., *Raymond v. Eli Lilly & Co.*, 117 N.H. 164, 371 A.2d 170 (1977); *Fernandi v. Strully*, 35 N.J. 434, 173 A.2d 277 (1961).

defendants who were responsible for their products,³⁹ limited expectations of defendants concerning repose,⁴⁰ and stale evidence.⁴¹ Many of the same considerations have prompted the courts to expand or adapt traditional tort theories to facilitate delayed manifestation suits when the delay has caused non-statute of limitations problems in bringing suit.

II. PRODUCT LIABILITY TRENDS

An example of this facilitation to overcome time-related problems can be seen in recent DES decisions.⁴² DES, or diethylstilbestrol, is a drug that was generically prescribed between 1941 and 1971 for the prevention of miscarriages.⁴³ The medication causes cancer and precancerous growths in daughters of the ingesters a minimum of ten to twelve years after ingestion.⁴⁴ Because of the delayed manifestation of injury and the generic nature of the drug, which permitted pharmacists to fill doctors' prescriptions and refills with whatever was on hand,⁴⁵ plaintiffs were unable to identify which of the over 200 DES manufacturers produced the drug that injured them.⁴⁶ Recently,

39. See, e.g., *Martinez-Ferrer v. Richardson-Merrell, Inc.*, 105 Cal. App. 3d 324, 164 Cal. Rptr. 591 (1980); *Anthony v. Koppers Co.*, 284 Pa. Super. 81, 425 A.2d 428 (1980).

40. The implication is that if one markets a product, especially drugs and chemicals, the long-range effects of which are unknown because they result from rapid advances in science or technology, one cannot expect repose interests to intercede and cut off liability after a brief time. Marketing of the drug or chemical implies long-range responsibility:

The harmful propensities of drugs are often not fully known at the time the drugs are marketed. These companies know or at least should expect that some time may pass before the harmful effects of their products manifest themselves in drug users and that there may be another lapse of time before the injured person is able to discover the causal connection

Raymond v. Eli Lilly & Co., 117 N.H. 164, 171, 371 A.2d 170, 176 (1977). See also *Martinez-Ferrer v. Richardson-Merrell, Inc.*, 105 Cal. App. 3d 318, 324, 164 Cal. Rptr. 591, 595 (1980).

41. Since businesses are expected to keep records, and are in the best position to collect information regarding the safety and performance of their products, the problem of stale evidence is assumed to have less of an impact on the commercial defendant. *Martinez-Ferrer v. Richardson-Merrell, Inc.*, 105 Cal. App. 3d at 325, 164 Cal. Rptr. at 596; *Raymond v. Eli Lilly & Co.*, 117 N.H. 164, 371 A.2d 170 (1977); *Birnbaum, supra* note 28, at 290.

42. See *supra* note 11.

43. Diethylstilbestrol is a synthetic female hormone developed in England in 1937 as a chemical substitute for estrogen. See generally *PHYSICIANS' DESK REFERENCE* 1099 (36th ed. 1982); *Kroll, Intra-Industry Joint Liability: The Era of Absolute Products Liability*, 687 *INS. L.J.* 185 (1980). There is also evidence that the drug might have been given to pregnant women to promote a healthier baby in a normal pregnancy. Note, *Diethylstilbestrol: Extension of Federal Class Action Procedures to Generic Drug Litigation*, 14 *U.S.F.L. REV.* 461, 464 (1980).

44. See *PHYSICIANS' DESK REFERENCE* 1099 (36th ed. 1982). DES causes adenocarcinoma, a fast-spreading cancer, in approximately one to four per 1,000 DES daughters. Usual treatment includes a hysterectomy and removal of the vagina. Between 30 to 90% of DES daughters suffer from adenosis, or precancerous vaginal and cervical growths which can spread to other body areas. The condition requires close monitoring by biopsy or colposcopic examination, and treatment includes cauterization, surgery, or cryosurgery. DES has been linked to reduced fertility in males. Comment, *DES and a Proposed Theory of Enterprise Liability*, 46 *FORDHAM L. REV.* 963, 964 n.5 (1978).

45. Note, *supra* note 43. An additional source of confusion arises because some drug companies that manufactured DES sold it to other companies that in turn sold it under their own labels. Note, *California Expands Tort Liability Under the Novel "Market Share" Theory: Sindell v. Abbott Laboratories*, 8 *PEPPERDINE L. REV.* 1011, 1011 n.1 (1981).

46. *Sindell v. Abbott Laboratories*, 26 Cal. 3d at 610, 607 P.2d at 935, 163 Cal. Rptr. at 143.

courts have started allowing these suits despite the inability to identify the specific manufacturer, rather than nonsuiting on the causation question as they previously had done.⁴⁷

The California Supreme Court made the most important and controversial change in *Sindell v. Abbott Laboratories, Inc.*⁴⁸ In *Sindell* the court expanded the earlier ground-breaking precedent of *Summers v. Tice*⁴⁹ by adopting the theory of market share liability. Under this theory, if a plaintiff joins enough defendants so that together defendants had a "substantial share" of the relevant market, the burden of proof is shifted to the defendants to show that they, individually, did not produce the drug that injured the plaintiff.⁵⁰ Since defendants have no better information than plaintiffs, they generally are unable to meet this burden. The court held that this shift was fair, however, because defendants who were responsible for marketing the drug have to pay only a percentage of the judgement proportionate to their share of the market.⁵¹ Other courts recently have reached similar results, although not necessarily by the same theory.⁵²

Another time-related change in products liability law designed to facilitate plaintiffs' suits is the recent liberalization of corporate successor liability in some jurisdictions. Traditionally a successor corporation did not assume the debts or liabilities, including tort-related liabilities, of the corporation it purchased if all assets were transferred free of fraud and no provision was made for the successor corporation to do so.⁵³ In 1977 California broke with tradition by adopting the "product line" approach, allowing the successor cor-

47. See, e.g., *Gray v. United States*, 445 F. Supp. 337 (S.D. Tex. 1978); *McCreery v. Eli Lilly & Co.*, 87 Cal. App. 3d 77, 150 Cal. Rptr. 730 (1978).

48. 26 Cal. 3d 588, 607 P.2d 924, 163 Cal. Rptr. 132, cert. denied, 449 U.S. 912 (1980).

49. 33 Cal. 2d 80, 199 P.2d 1 (1948) (since defendant hunters negligently shot in plaintiff's direction, and plaintiff was without fault, burden of proof shifted to defendants to show which of them had not hit plaintiff). California has long been a leader in shifting burdens of proof to accommodate plaintiff's suit. See, e.g., *Ybarra v. Spangard*, 25 Cal. 2d 486, 154 P.2d 687 (1944). In *Barker v. Lull Eng'g Co.*, 20 Cal. 3d 413, 432, 573 P.2d 443, 456, 143 Cal. Rptr. 225, 238 (1978), the court continued its proplaintiff product liability trend by creating a two-pronged test by which a plaintiff can prove a product defective in design. If a plaintiff fails to meet the threshold "ordinary consumer expectations" test, plaintiff may still prevail if defendant manufacturer is unable to show that the benefits of the design outweigh the risks inherent in the design.

50. "Substantial" market share is not defined. The court specifically refused to adopt the 75 to 80% figure used in the law review that proposed the theory. 26 Cal. 3d at 612, 607 P.2d at 937, 113 Cal. Rptr. at 145. See Comment, *DES and a Proposed Theory of Enterprise Liability*, 46 *FORDHAM L. REV.* 963, 996 (1978). Also undefined are the market area, the time period in which the market share is to be determined, and the uses for which the production in the market definition was sold.

51. 26 Cal. 3d at 611-13, 607 P.2d at 936-38, 163 Cal. Rptr. at 144-46.

52. See, e.g., *Bichler v. Eli Lilly & Co.*, 79 A.D. 2d 317, 436 N.Y.S.2d 625 (1981) (concert of action theory); *Abel v. Eli Lilly & Co.*, 94 Mich. App. 53, 289 N.W.2d 20 (1979) (alternative liability and concert of action); *Ferrigno v. Eli Lilly & Co.*, 175 N.J. Super. 551, 420 A.2d 1305 (Law. Div. 1980) (alternative liability with market share theory overtones). *Contra* *Payton v. Abbott Laboratories*, 512 F. Supp. 1031 (D. Mass. 1981) (no concert of action or joint venture); *Ryan v. Eli Lilly & Co.*, 514 F. Supp. 1004 (D.S.C. 1981) (no concert of action, alternative liability, enterprise liability, or market share liability).

53. See, e.g., *Kloberdanz v. Joy Mfg. Co.*, 288 F. Supp. 817 (D. Colo. 1968); *Ortiz v. South Bend Lathe*, 46 Cal. App. 3d 842, 120 Cal. Rptr. 556 (1975). See also 15 W. FLETCHER, *CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS* § 7122, at 188 (1973).

poration to be sued in strict liability for a product it did not produce if that product was in the same product line as the one the successor corporation was now manufacturing.⁵⁴ A primary reason cited by the court for changing the law was that plaintiffs otherwise would be remediless because their recourse against the predecessor was virtually extinguished by the acquisition.⁵⁵ In addition, the successor had the ability to assume the risk-spreading role and purchased the risk along with the good will of the predecessor.⁵⁶

New Jersey recently followed California's lead and adopted this theory in *Ramirez v. Amsted Industries*.⁵⁷ The New Jersey Supreme Court used the product line concept to allow suit by a plaintiff injured by a power press manufactured in 1948 or 1949. In another case decided the same day the court expanded the concept by allowing suit against an intermediate successor corporation who was no longer producing the line, but was still in business.⁵⁸ Pennsylvania adopted the *Ramirez* product line formulation because it implemented "the social policies underlying strict product liability."⁵⁹

In explaining the reasons for facilitating plaintiffs' suits in these circumstances courts again have emphasized the innocence of plaintiffs, who would otherwise be left remediless, as compared to the responsibility of defendants for marketing the product, spreading costs,⁶⁰ and promoting safety,⁶¹ as well as the relative unimportance of stale evidence.⁶² These are essentially the same considerations that initially prompted many courts to adopt strict product liability,⁶³ and the facilitation of claims represents a continuation of that pro-plaintiff/consumer trend. The new statutes of repose fly in the face of this trend.

III. STATUTES OF REPOSE

Modern statutes of repose differ from the conventional statutes of limita-

54. *Ray v. Alad Corp.*, 19 Cal. 3d 22, 560 P.2d 3, 136 Cal. Rptr. 574 (1977).

55. *Id.* at 31-33, 560 P.2d at 8-10, 136 Cal. Rptr. at 579-81.

56. *Id.* at 33-34, 560 P.2d at 10-11, 136 Cal. Rptr. at 581-82.

57. 86 N.J. 332, 431 A.2d 811 (1981).

58. *Nieves v. Bruno Sherman Corp.*, 86 N.J. 361, 431 A.2d 826 (1981).

59. *Dawejko v. Jorgensen Steel Co.*, 290 Pa. Super. 15, —, 434 A.2d 106, 111 (1981). The United States District Court for the Eastern District of Pennsylvania refused to extend the *Dawejko* decision to cover a manufacturer who had acquired the right to the predecessor's name, patents, trademarks, company records, and engineering drawings, but had not acquired the predecessor's physical plant and machinery, which were purchased by a different company. The predecessor corporation was dissolved. *Savini v. Kent Mach. Works, Inc.*, 525 F. Supp. 711 (E.D. Pa. 1981). See also *Bernard v. Kee Mfg. Co.*, 409 So. 2d 1047 (Fla. 1982) (court refused to adopt the product-line theory primarily because it could financially destroy small companies).

60. See, e.g., *Ray v. Alad Corp.*, 19 Cal. 3d 22, 560 P.2d 3, 136 Cal. Rptr. 574 (1977); *Ferrigno v. Eli Lilly & Co.*, 175 N.J. Super. 551, 420 A.2d 1305 (Law. Div. 1980).

61. See, e.g., *Sindell v. Abbott Laboratories*, 26 Cal. 3d at 610, 607 P.2d at 936, 163 Cal. Rptr. at 144. *Ramirez v. Amsted Indus., Inc.*, 86 N.J. 332, 431 A.2d 811 (1981).

62. See, e.g., *Sindell v. Abbott Laboratories*, 26 Cal. 3d 588, 607 P.2d 924, 163 Cal. Rptr. 132, cert. denied, 449 U.S. 912 (1980); *Abel v. Eli Lilly & Co.*, 94 Mich. App. 59, 289 N.W.2d 20 (1979).

63. See, e.g., *Bachner v. Pearson*, 479 P.2d 319, 328 (Alaska 1970); *Escola v. Coca Cola Bottling Co.*, 24 Cal. 2d 453, 462, 150 P.2d 436, 441 (1944) (Traynor, J., concurring); RESTATEMENT (SECOND) OF TORTS § 402A (1965).

tions because they heavily emphasize the repose interest in order to protect a special class of potential litigants. They set a definite accrual time unrelated to discovery of injury, and in essence deny that the defendant owes a duty to the plaintiff after a specific number of years.⁶⁴ In product liability repose statutes, for example, it is the age of the product, not the timeliness of the plaintiff's actions, that is the focus of the statute, and suit often is barred before injury occurs.⁶⁵ Rather than following the balance struck by the courts between a plaintiff's right to sue and a defendant's repose interests, the legislatures, at the request of and under pressure from special interest groups, have chosen to protect defendants in order to solve a perceived crisis in various segments of the economy.⁶⁶ Such statutes have been passed to protect architects and builders,⁶⁷ and health care providers,⁶⁸ as well as sellers of products.

Architects' and builders' repose statutes were the first passed and were generally upheld.⁶⁹ This success offered support for the passage of similar

64. See, e.g., Massery, *supra* note 7, at 541; McGovern, *supra* note 8, at 419.

65. The repose period is generally measured from the time the product is sold or delivered to the initial user. See, e.g., ARIZ. REV. STAT. ANN. § 12-551 (1982); IND. CODE ANN. § [34-4-20A-5] 33-1-1.5-5 (Burns Supp. 1982); R.I. GEN. LAWS § 9-1-13 (Supp. 1981). Other accrual periods are used, however. See, e.g., KY. REV. STAT. ANN. § 411.310 (Baldwin 1981) (five years from date of manufacture); UTAH CODE ANN. § 78-15-3(1) (1977) (six years from sale to consumer or ten years from date of manufacture). Since products, especially capital goods, can and sometimes do cause injury more than ten years after the product is sold, delivered, or manufactured, suit based on such injury is barred.

In delayed manifestation cases discovery does not usually occur until after the running of the period. Therefore, these types of suits also are potentially barred. See *supra* note 13.

66. Note, *supra* note 6, at 694; Note, *Various Risk Allocation Schemes Under the Model Uniform Product Liability Act: An Analysis of the Statute of Repose, Comparative Fault Principles, and the Conflicting Social Policies Arising from Workplace Product Injuries*, 48 GEO. WASH. L. REV. 588, 589 (1980).

67. See, e.g., ALASKA STAT. § 09.10.055 (1973); ARK. STAT. ANN. § 37-237 (Supp. 1981); CAL. CIV. PROC. CODE § 337.1 (West Supp. 1982); FLA. STAT. ANN. § 95.11(3)(c) (West 1982); GA. CODE ANN. § 9-3-51 (1982); HAWAII REV. STAT. § 657-8 (Supp. 1981); IDAHO CODE § 5-241 (1979); ILL. ANN. STAT. ch. 83, § 24f (Smith-Hurd 1976); KAN. STAT. ANN. § 60-513 (1976); KY. REV. STAT. ANN. § 413.135 (Baldwin 1981); LA. REV. STAT. ANN. § 9:2772 (West Supp. 1982); MICH. COMP. LAWS ANN. § 600.5839 (West 1968); MINN. STAT. ANN. § 541.051 (West Supp. 1982); MISS. CODE ANN. § 15-1-41 (1972); NEV. REV. STAT. § 11.205 (1979); N.H. REV. STAT. ANN. § 508:4-b (1968); N.J. STAT. ANN. § 2A:14-1.1 (West Cum. 1982); 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. § [2305.13.1] 2305.131 (Page 1981); OKLA. STAT. ANN. tit. 12, § 109 (West Supp. 1981); S.D. CODIFIED LAWS ANN. § 15-2-9 (Supp. 1982); TENN. CODE ANN. § 28-3-202 (1980); UTAH CODE ANN. § 78-12-25.5 (1977); WIS. STAT. ANN. § 893.155 (West 1973) *repealed by* § 893.89 (West Supp. 1982); WYO. STAT. § 1-3-111 (Supp. 1982).

68. See, e.g., COLO. REV. STAT. § 13-80-105 (Supp. 1981); CONN. GEN. STAT. ANN. § 52-584 (West Supp. 1982); FLA. STAT. ANN. § 95.11(4) (West 1982); HAWAII REV. STAT. § 657-7.3 (1976); ILL. ANN. STAT. ch. 110, § 13-212 (Smith-Hurd Supp. 1982); IND. CODE ANN. § 16-9.5-3-1 (Burns Supp. 1982); IOWA CODE ANN. § 614.1(9) (West 1950); KAN. STAT. ANN. § 60-513(a)(7) (1976); MO. REV. STAT. § 538.020 (Supp. 1981); N.D. CENT. CODE § 28-01-18 (Supp. 1981); OHIO REV. CODE ANN. § 2305.11 (Page 1981); S.C. CODE ANN. § 15-3-545 (Law. Co-op. Supp. 1981); TENN. CODE ANN. § 28-3-104 (1980); WASH. REV. CODE ANN. § 4.16.350 (Supp. 1982).

69. See, e.g., Smith v. Allen-Bradley Co., 371 F. Supp. 698 (W.D. Va. 1974); Agus v. Future Chattanooga Dev. Corp., 358 F. Supp. 246 (E.D. Tenn. 1973); Carter v. Hartenstein, 248 Ark. 1172, 455 S.W.2d 918 (1970), *appeal dismissed*, 401 U.S. 901 (1971); Reeves v. Ille Elec. Co., 170 Mont. 104, 551 P.2d 647 (1976); Rosenberg v. Town of North Bergen, 61 N.J. 190, 293 A.2d 662 (1972); Howell v. Burk, 90 N.M. 688, 568 P.2d 214 (Ct. App.), *cert. denied*, 91 N.M. 3, 569 P.2d 413 (1977); Josephs v. Burns, 260 Or. 493, 491 P.2d 203 (1971); Freezer Storage, Inc. v. Armstrong Cork Co., 476 Pa. 270, 382 A.2d 715 (1978); Good v. Christensen, 527 P.2d 223 (Utah 1974);

medical malpractice legislation, but increasingly the statutes protecting health care providers, as well as those protecting architects and builders, have failed to withstand challenge.⁷⁰ The product liability statutes of repose, the latest legislative time control effort, are even more likely to meet with failure in the courts, especially when challenged in the context of delayed manifestation suits, despite the assumptions of most commentators.⁷¹

Several indications support this assumption. The strong pro-plaintiff/consumer bias, which has led to the wide adoption of strict liability, the expansion of theories to facilitate delayed manifestation suits, and the application of discovery-of-harm accrual for statutes of limitations, has already been discussed. These trends and biases will not easily be set aside by the courts, especially when it is not clear that the legislators had delayed manifestation cases in mind when the repose statutes were enacted, when there is less of a crisis than originally feared, and when the statutes, which are special legislation,⁷² change substantive rights but may not alleviate the problem. In addition, although statutes of repose affect a relatively static number of people injured by architects, builders, and health care providers, many new types of product-caused delayed manifestation injuries are discovered yearly.⁷³ The

Yakima Fruit & Cold Storage Co. v. Central Heating & Plumbing Co., 81 Wash. 2d 528, 503 P.2d 108 (1972). *But see* Skinner v. Anderson, 38 Ill. 2d 455, 231 N.E.2d 588 (1967).

70. Architects' and builders' statutes were held unconstitutional in: Bagby Elevator & Elec. Co. v. McBride, 292 Ala. 191, 291 So. 2d 306 (1974); Overland Constr. Co. v. Sirmons, 369 So. 2d 572 (Fla. 1979); Fujioka v. Kam, 55 Hawaii 7, 514 P.2d 568 (1973); Saylor v. Hall, 497 S.W.2d 218 (Ky. Ct. App. 1973); Pacific Indem. Co. v. Thompson-Yeager, Inc. 260 N.W.2d 548 (Minn. 1977); Loyal Order of Moose, Lodge 1785 v. Cavaness, 563 P.2d 143 (Okla. 1977); Broome v. Truluck, 270 S.C. 227, 241 S.E.2d 739 (1978); Kallas Millwork Corp. v. Square D Co., 66 Wis. 2d 382, 225 N.W.2d 454 (1975); Phillips v. ABC Builders, Inc., 611 P.2d 821 (Wyo. 1980). California created judicial exceptions to its statute and thereby sustained it. Regents v. Hartford Accident & Indem. Co., 21 Cal. 3d 624, 581 P.2d 197, 147 Cal. Rptr. 486 (1978).

Parts or all of several states' medical malpractice legislation have been overturned on a variety of grounds. *See, e.g.*, Eastin v. Broomfield, 116 Ariz. 576, 570 P.2d 744 (1977) (posting bond); Aldana v. Holub, 381 So. 2d 231 (Fla. 1980) (review panel); Wright v. Central DuPage Hosp. Ass'n, 63 Ill. 2d 313, 347 N.E.2d 736 (1976) (review panel); State *ex rel.* Cardinal Glennon Memorial Hosp. for Children v. Gaertner, 583 S.W.2d 107 (Mo. 1979) (en banc); Linder v. Smith, 629 P.2d 1187 (Mont. 1981) (limitation on evidence); Carson v. Maurer, 120 N.H. 925, 424 A.2d 825 (1980) (statute of repose among eight of Act's ten provisions invalidated); Arneson v. Olson, 270 N.W.2d 125 (N.D. 1978) (limitation on damages); Mattos v. Thompson, 491 Pa. 385, 421 A.2d 190 (1980) (arbitration panels); American Bank & Trust Co. v. Community Hosp., 104 Cal. App. 3d 219, 163 Cal. Rptr. 513 (1980) (damages award provision); Simon v. St. Elizabeth Medical Center, 3 Ohio Op. 3d 164, 355 N.E.2d 903 (1976) (compulsory arbitration: limitation on damages); Graley v. Satayatham, 74 Ohio Op. 2d 316, 343 N.E.2d 832 (1976) (limitations on damages). *Cf.* Jones v. State Bd. of Medicine, 97 Idaho 859, 555 P.2d 399 (1976), *cert. denied*, 431 U.S. 914 (1977).

71. *See, e.g.*, MODEL UNIF. PROD. LIAB. ACT § 110 analysis, reprinted in 44 Fed. Reg. 62,714, 62,734 (1979); Berns & Lykos, *Sindell v. Abbott Labs—"The Heir of the Citadel,"* 15 FORUM 1031, 1039 (1980); Johnson, *Products Liability "Reform": A Hazard to Consumers*, 56 N.C.L. REV. 677, 690 (1978); Note, *supra* note 66, at 598.

72. *See infra* notes 170-72 and accompanying text.

73. In one of the latest delayed manifestation injury areas, an increasing number of suits are being filed for injury from exposure to microwaves that occurred at least a decade prior to the filing of suit. *See, e.g.*, Karras v. General Elec. Corp., No. CV-79-L-20237 (Cook County Cir. Ct., 1979) (settlement for 13-year exposure to microwaves); Yannon v. New York Tel., N.Y. State Workers' Compensation Bd., Case 3602 (1980); Nat'l L.J., Sept. 14, 1981, at 1, col. 2. Another delayed manifestation injury on which a class action suit has recently been based is cancer resulting from exposure to newspaper ink. In *Hanna v. Sun Chem. Corp.*, C-81-1697 (N.D. Ohio), the

non-suiting of hundreds of thousands of injured plaintiffs cannot fail to influence judicial decisions.⁷⁴

IV. AVOIDANCE OF THE TIME BAR

Courts faced with plaintiffs whose injuries do not manifest themselves until after the repose period has elapsed can pursue several options to allow plaintiffs' suits. A few courts have already used some of these options, which include distinguishing between delayed manifestation and delayed injury (old-product) suits, tolling, and declaring the repose statute unconstitutional. The advantage of the first two options is that delayed manifestation suits may be prosecuted without directly upsetting legislative judgment in an area in which wide discretion has traditionally been allowed.⁷⁵ While no court has yet distinguished delayed manifestation from delayed injury in avoiding the time bar, good reasons exist for doing so.

A. *Delayed Manifestation and Delayed Injury*

As the liability of manufacturers increased and insurance rates soared, both manufacturers and insurers tended to focus on the "long-tail" problem as the primary cause of their ills.⁷⁶ Manufacturers viewed the extended potential liability for old products as making them insurers of their products, and insurers cited that phenomenon as one of the main factors in their inability to predict liability and hold down premiums. "Horror stories" were cited to prove the point⁷⁷—liability for a 17-year-old bus,⁷⁸ a 24-year-old tractor,⁷⁹ a 30-year-old pickling machine.⁸⁰ When insurers and business groups went to the legislators to lobby for change, similar examples of old products causing injury were used.⁸¹ Little attention was paid to injuries that were old by the time they manifested themselves. Thus, there is little indication that legislators meant to include delayed manifestation cases within the repose statute's bar.

While the equities involved in old-product injuries and delayed manifes-

named plaintiff, who had worked on newspaper presses for 28 years, sued all companies that supply Ohio newspapers with ink for his development of cancer of the larynx. At the same time a suit was filed for the estate of a pressman who died from cancer that affected several organs, *Grady v. Sun Chem. Corp.*, No. C-81-1696 (N.D. Ohio 1981).

74. See *supra* note 12.

75. "Statutes of limitation find their justification in necessity and convenience rather than in logic. . . . They are by definition arbitrary, and their operation does not discriminate between the just and the unjust claim, or the avoidable and unavoidable delay. . . . They represent a public policy about the privilege to litigate. . . ." *Chase Sec. Corp. v. Donaldson*, 325 U.S. 304, 314 (1945).

76. "Long-tail" is a term used to describe the liability of a manufacturer who is potentially liable for injuries caused by the product as long as the product continues to exist. Of course, the longer a product is in existence without injuring anyone, the harder it is for a plaintiff to show it was defective. MODEL UNIF. PROD. LIAB. ACT § 110 analysis, *reprinted in* 44 Fed. Reg. 62,714, 62,734 (1979); Johnson, *supra* note 71, at 691.

77. Johnson, *supra* note 71, at 679.

78. *Mondshour v. General Motors Corp.*, 298 F. Supp. 111 (D. Md. 1969).

79. *Gates v. Ford Motor Co.*, 494 F.2d 458 (10th Cir. 1974).

80. *Kaczmarek v. Mesta Mach. Co.*, 463 F.2d 675 (3d Cir. 1972).

81. MODEL UNIF. PROD. LIAB. ACT § 110 analysis, *reprinted in* 44 Fed. Reg. at 62,733.

tation injuries are similar—"innocent plaintiffs" are barred from suit before they discover their injury—there are aspects that might have led legislatures to differentiate. Most old-product injuries involve capital goods in a workplace situation. Thus, while plaintiffs may be barred from suit against the manufacturer, they will still receive payment under workers' compensation plans.⁸² The same is not true for a large proportion of persons injured by products causing delayed manifestations,⁸³ such as drugs, radiation,⁸⁴ and hazardous waste.⁸⁵ Barring suit against the manufacturer in these cases will bar recovery altogether.

A similar distinction may also be made based on the type of product involved. Capital and other long-lived goods very often are sold with an express warranty that extends beyond the repose period.⁸⁶ Since almost all the statutes of repose except express warranties from the repose period, these kinds of suits would not be barred, and plaintiffs injured by warranted capital goods still will have an alternative recourse in the courts.⁸⁷ Delayed manifestation claimants will not.

A final distinction concerns the number of plaintiffs barred from remedy. The number of plaintiffs injured by old products who are barred from suit is relatively quite small. A study by the Insurance Services Office indicates that cases based on products over six years old which caused injury are less than

82. The Interagency Task Force on Product Liability and the U.S. Department of Commerce concluded that workers' compensation should be the sole recovery vehicle for product-related workplace injuries if additional benefits were included in the compensation plans. The drafters of the U.P.L.A. concluded, however, that changing the workers' compensation system was beyond their scope, and they therefore adopted a plan proposed by the American Insurance Association in their PRODUCT LIABILITY LEGISLATIVE PACKAGE 75-76 (1977), which reduced the liability of the manufacturer by the amount of workers' compensation benefits received by the claimant. See MODEL UNIF. PROD. LIAB. ACT § 114(A) analysis, *reprinted in* 44 Fed. Reg. at 62,740.

83. The highest proportion of work-related delayed manifestation injuries currently is from exposure to asbestos. The recent decision in *White v. Johns-Manville Corp.*, 662 F.2d 234 (1981), *cert. denied*, 102 S. Ct. 1037 (1982), will allow many plaintiffs to avoid state time bars by bringing suit under admiralty law and thereby utilizing the time-of-discovery rule.

84. Very few of the personal injury claims resulting from the Three Mile Island accident were work-related. *Jonsrud v. Carter*, 620 F.2d 29 (3d Cir. 1980). These claimants were denied class certification and were excluded from a settlement fund of \$25 million covering economic losses and medical checkups. They now must proceed on an individual basis. *In re Three Mile Island Litigation*, 87 F.R.D. 433 (M.D. Pa. 1981). Likewise, the Bikini and Eniwetok Atoll cases do not involve work-related injuries. See *supra* note 12.

85. Congress, in the wake of the chemical devastation at Love Canal, has passed "superfund" legislation designed to prevent improper disposal, to clean up sites, and to compensate state and federal governments for injuries to natural resources. The legislation did not establish a federal cause of action for personal injury resulting from hazardous waste, however, and litigants will have to recover by suing in state courts. 42 U.S.C. § 6921 (1976 & Supp. IV 1980).

86. Cf. *Miller v. Bock Laundry Mach. Co.*, 568 S.W.2d 648 (Tex. 1977) (liability for failure of an 18-year-old laundry machine seal when the normal life expectancy was 30 to 40 years); INTER-AGENCY TASK FORCE ON PRODUCT LIABILITY, U.S. DEP'T OF COMMERCE, FINAL REPORT OF THE LEGAL STUDY 4-5 (1977).

87. See, e.g., ALA. CODE § 6-5-502 (Supp. 1982) (non-oral express warranty); ARIZ. REV. STAT. ANN. § 12-551 (1982); ILL. ANN. STAT. ch. 110, § 13-213 (Smith-Hurd Supp. 1982). The U.P.L.A. also exempts express warranties from the application of the Act's repose statute. MODEL UNIF. PROD. LIAB. ACT § 110(B)(2)(a), *reprinted in* 44 Fed. Reg. at 62,740.

three percent of litigated claims.⁸⁸ The number of delayed manifestation cases is approaching 100,000 annually and growing yearly as new hazards of "advances in science and technology" are discovered.⁸⁹

Whether these differences would have prompted different legislation is problematic. There are indications that when delayed manifestation problems were brought to the drafters' attention, some allowance was made. Some legislatures exempted specific delayed manifestation injuries such as asbestiosis and ionizing radiation injuries from their statute's coverage,⁹⁰ and the drafters of the Model Uniform Product Liability Act, who made the most comprehensive study of the situation, exempted delayed manifestation cases altogether.⁹¹

The drafters of the Model Uniform Product Liability Act, after balancing plaintiffs' and defendants' interests, favored plaintiffs by refusing to adopt a statute of repose because it "may deprive a person . . . of the right to bring a claim based on a defective product before the injury has actually occurred."⁹² Instead, they substituted a rebuttable presumption that after ten years a product is beyond its useful safe life, and increased the burden of proof necessary to overcome this presumption.⁹³ Nevertheless, even after rejecting a statute of repose the drafters felt delayed manifestation plaintiffs needed further protection, and exempted them from the coverage of the ten-year presumption.⁹⁴ Thus, under the Model Act delayed manifestation cases would be governed by the usual time-of-discovery statute of limitations.⁹⁵ A few states have also

88. Ins. Servs. Office, N.Y. City, 1976 Products Liability Closed Claim Survey (Dec. 1976) reported that products over six years old made up only 2.7% of the litigated claims.

89. See *supra* notes 11-12 & 73. It has been estimated that suits based on the newly discovered delayed injuries from microwaves could be the broadest-based products liability litigation ever. Nat'l L.J., Sept. 14, 1981, at 1, col. 2. Suits based on exposure to formaldehyde will further swell the delayed manifestation suit numbers. Hundreds of suits have been filed, and hundreds more are expected now that the Consumer Product Safety Commission has banned urea-formaldehyde foam insulation. Nat'l L.J., May 10, 1982, at 30, col. 1.

90. See, e.g., ALA. CODE § 6-2-30 (Supp. 1982) (asbestos); IDAHO CODE § 5-243 (1979) (ionizing radiation); TENN. CODE ANN. § 29-28-103(b) (1980) (asbestos); VT. STAT. ANN. tit. 12, § 518 (1973) (ionizing radiation). The proposed Ohio product liability reform bill exempted injuries from exposure to toxic substances because of the delayed manifestation problems. S. 67, 113th Gen. Assembly, Reg. Sess. § 2305.101(A) (Ohio 1979-80). McGovern, *supra* note 8, at 424.

91. MODEL UNIF. PROD. LIAB. ACT § 110(B)(2)(d), reprinted in 44 Fed. Reg. at 62,732. Idaho's Statute, IDAHO CODE § [6-1403(2)(b) 4] 6-1303(2)(b) 4 (Supp. 1982), makes the same exceptions.

92. MODEL UNIF. PROD. LIAB. ACT § 110 analysis, reprinted in 44 Fed. Reg. at 62,733 (emphasis in original).

93. *Id.* § 110(B)(1), reprinted in 44 Fed. Reg. at 62,732.

94. *Id.* § 110(B)(2)(d), reprinted in 44 Fed. Reg. at 62,732, provides:

The ten-(10) year period of repose established in Subsection (B)(1) shall not apply if the harm was caused by prolonged exposure to a defective product, or if the injury-causing aspect of the product that existed at the time of delivery was not discoverable by an ordinary reasonably prudent person until more than ten(10) years after the time of delivery, or if the harm, caused within ten(10) years after the time of delivery, did not manifest itself until after that time.

95. *Id.* § 110(C), reprinted in Fed. Reg. at 62,732, specifically provides, "No claim under this Act may be brought more than two (2) years from the time the claimant discovered, or in the exercise of due diligence should have discovered, the harm and the cause thereof."

The subsequent analysis states that a discovery approach was adopted so claimants who "would have no reason to know about the harm or the causal connection to a defective product

adopted the rebuttable presumption approach.⁹⁶

Legislative history is seldom an infallible indication of intent, and speculation about reactions to different kinds and strengths of information is risky at best. Courts, however, may take cognizance of these differences and, following the lead of the Model Act, find that the statutes should not apply to delayed manifestation cases. Statutes in derogation of the common law are to be construed narrowly,⁹⁷ and such a construction would be consistent with this tradition. In addition, courts deluged with thousands of plaintiffs who are denied compensation through no fault of their own are more likely to be influenced by the volume and to make allowances. Once some courts do so, others will likely follow, especially those that see deference to the legislature as "out of vogue" and believe that the idea "that changes should come from the legislature is not in good repute."⁹⁸

B. Tolling

Another approach the courts could take that would both generally uphold the repose legislation and allow delayed manifestation suits is the application of tolling. Tolling of a statutory limitations period has traditionally occurred to give an injured party a reasonable chance to pursue his or her claim. Limitations periods traditionally have been tolled in cases involving fraudulent concealment,⁹⁹ absence of the defendant from the jurisdiction,¹⁰⁰ minor or incompetent plaintiffs,¹⁰¹ wrongful death,¹⁰² and contribution and indemnity claims.¹⁰³ In addition, courts have used time extensions in product liability cases to avoid nondiscovery statutory time bars by finding continuing duties to correct or warn,¹⁰⁴ by starting accrual for cumulative injuries from multiple uses at time of last exposure,¹⁰⁵ and by recognizing express warranties.¹⁰⁶

(*e.g.*, the case of long-term pharmaceutical harms)" would not be barred. *Id.* § 110(C) analysis, reprinted in 44 Fed. Reg. at 62,734.

96. *See, e.g.*, COLO. REV. STAT. § 13-21-403(3) (Supp. 1981); IDAHO CODE § [6-1403] 6-1303 (Supp. 1982); KY. REV. STAT. ANN. § 411.310 (Baldwin Supp. 1981); WASH. REV. CODE ANN. § 7.72.060 (Supp. 1982). *See also* MICH. COMP. LAWS ANN. § 600.5805(9) (Cum. Supp. 1982).

97. *Bagby Elevator & Elec. Co. v. McBride*, 292 Ala. 191, 291 So. 2d 306 (1974); *Green v. State*, 257 Ind. 244, 274 N.E.2d 267 (1971).

98. *Turpin v. Sortini*, 119 Cal. App. 3d 690, —, 174 Cal. Rptr. 128, 135 (1981) (Andreen, J., dissenting).

99. *See, e.g.*, *Baker v. Beech Aircraft Corp.*, 39 Cal. App. 3d 315, 114 Cal. Rptr. 171 (1974); *Warington v. Charles Pfizer & Co.*, 274 Cal. App. 2d 564, 80 Cal. Rptr. 130 (1969).

100. *See, e.g.*, *G.D. Searle & Co. v. Cohn*, 102 S. Ct. 1137 (1982); *Couts v. Rose*, 152 Ohio St. 458, 90 N.E. 139 (1950); *Vaughn v. Dietz*, 430 S.W.2d 487 (Tex. 1968).

101. *See, e.g.*, *Wilbon v. D.F. Bast Co.*, 73 Ill. 2d 58, 382 N.E.2d 784 (1978); *Barnette v. Butler Aviation Int'l, Inc.*, 89 Misc. 2d 350, 391 N.Y.S.2d 348 (1977).

102. *See, e.g.*, *Deschamps v. Campdresser & McKee, Inc.*, 113 N.H. 344, 306 A.2d 771 (1973); *Redick v. Rohm & Haas Co.*, 97 N.J. Super. 58, 234 A.2d 252 (Law. Div. 1967).

103. *See, e.g.*, *United States Lines v. United States*, 470 F.2d 487 (5th Cir. 1972); *Keleket X-Ray Corp. v. United States*, 275 F.2d 167 (D.C. Cir. 1960); Phillips, *An Analysis of Proposed Reform of Products Liability Statutes of Limitations*, 56 N.C.L. REV. 663, 671-72 (1978).

104. *See, e.g.*, *Boains v. Lasar Mfg. Co.*, 330 F. Supp. 1134 (D. Conn. 1971); *Handler v. Remington Arms Co.*, 144 Conn. 316, 130 A.2d 793 (1957).

105. *See, e.g.*, *Wright v. Carter Prods., Inc.*, 244 F.2d 53 (2d Cir. 1957). The "last exposure" rule has generally been adopted in an effort to skirt the statute of limitations bar without adopting

While a few states have specifically included an individual tolling provision in their product liability reform statutes,¹⁰⁷ most statutes are silent as to the applicability of these traditional tolling exceptions to their repose periods. Tolling is clearly inconsistent with a firm repose period and would not allow the actuarial certainty for which the statutes were passed. Yet the notion of equitable tolling is long established.¹⁰⁸ The application of tolling exceptions for infants and other incompetents, as well as for absence from the jurisdiction seems likely in the delayed manifestation context. These traditional exceptions will affect few cases and will not unduly upset repose interests.

The United States Supreme Court recently upheld the application of tolling in a product liability suit involving a birth control drug but no delayed manifestation injury. In *G.D. Searle & Co. v. Cohn*,¹⁰⁹ plaintiff brought suit eleven years after suffering a stroke allegedly caused by defendant's contraceptive. Defendant, an out-of-state corporation, was served without problem

a discovery rule. Although the rule in fact provides for a different accrual time, rather than actual tolling, it does allow for a time extension and has limited application, as does tolling.

The Virginia Supreme Court recently abandoned the last exposure rule and adopted a semi-discovery rule. In *Locke v. Johns-Manville Corp.*, 221 Va. 951, 275 S.E.2d 900 (1981), the court said that injury was not the broad notion that a person's legally protected interests have been invaded (last exposure), but a positive physical or mental harm which must be found in the medical evidence. The court noted that this rule was not a discovery rule because that had to be adopted by the state legislature.

Nebraska recently adopted the last exposure rule to solve the related problem of determining which of 40 employers should be liable for decedent's peritoneal mesothelioma caused by exposure to asbestos. Since decedent was employed by the "union hall" method, he worked for many employers over a period of years. The "last injurious exposure" rule adopted by the court puts liability for a delayed manifestation occupational disease contracted in the course of successive employments on the employer who most recently exposed the worker to the harmful substance. *Osteen v. A.C. & S., Inc.*, 209 Neb. 282, 307 N.W.2d 514 (1981).

A similar issue is involved in the dispute between insurance companies regarding the time at which liability for instance coverage should attach. The Fifth and Sixth Circuits have ruled that liability for coverage of claims by asbestos workers under standard occurrence policies is determined at the time the worker is exposed to asbestos. *Porter v. American Optical Corp.*, 641 F.2d 1128 (5th Cir. 1981); *Insurance Co. of N. Am. v. Forty-Eight Insulations*, 633 F.2d 1212 (6th Cir. 1980). The D.C. Circuit, however, expanded the coverage period by ruling coverage is triggered by exposure to asbestos, exposure in residence as well as by manifestation. Once triggered, the insurer is liable for the entire loss. *Keene Corp. v. Insurance Co. of N. Am.*, 667 F.2d 1034 (D.C. Cir. 1981).

106. Extension of the time period to the duration of an express warranty is used to prevent defendant from profiting from its own wrongdoing and is similar to tolling for fraud. See *infra* notes 129-31 and accompanying text. The U.P.L.A. exempts application of the 10-year useful safe life presumption in cases in which a product seller has expressly warranted that the product can be safely used for more than 10 years. Some states have made similar exceptions. See, e.g., CONN. GEN. STAT. ANN. § 52-577a(d) (West Supp. 1982). In addition, in cases in which a warranty explicitly extends to future performance of the goods, U.C.C. § 2-725(2) (1972) begins accrual of its 4-year statute of limitations at the time the breach is or should have been discovered.

107. See, e.g., ALA. CODE § 6-5-501(2) (West Supp. 1982) (contribution or indemnity); CONN. GEN. STAT. ANN. § 52-577a(d) (West Supp. 1982) (express warranty longer than 10 years or intentional or fraudulent misrepresentation); FLA. STAT. ANN. § 95.051(1) (West 1982) (absence from the jurisdiction); IDAHO CODE § [6-1403] 6-1303 (Supp. 1982) (fraud); ILL. ANN. STAT. ch. 110, § 13-213(d) (Smith-Hurd Supp. 1982) (incapacity); NEB. REV. STAT. § 25-224(3) (1979) (contribution or indemnity); N.H. REV. STAT. ANN. § 507-D: 2 IV (Supp. 1979) (fraud or written warranty); TENN. CODE ANN. § 29-28-103 (1980) (minority).

108. See *supra* notes 99-103 and accompanying text.

109. 102 S. Ct. 1137 (1982).

under New Jersey's long-arm rule.¹¹⁰ When defendant moved for summary judgment based on New Jersey's two-year statute of limitations,¹¹¹ plaintiff alleged the statute should be tolled because defendant was "not represented" in New Jersey "by any person or officer upon whom summons or other original process may be served."¹¹² The Court upheld a New Jersey Supreme Court finding¹¹³ that being amenable to service through a long-arm statute is not the equivalent of *in personam* service¹¹⁴ and rejected the district court's reasoning that since the long-arm statute, which made foreign corporations amenable to service in New Jersey, was passed after the tolling provision, the tolling provision no longer served a logical purpose and therefore discriminated against unrepresented foreign corporations.¹¹⁵ The Court remanded the case for a determination whether requiring a foreign corporation to register to do business in New Jersey to avoid tolling, and thereby subjecting the corporation to all duties and liabilities imposed on domestic corporations, is a violation of the commerce clause.

It is not clear that this statute as interpreted by the New Jersey Supreme Court can survive a commerce clause challenge.¹¹⁶ But if it does, and if other states adopt similar interpretations, courts can avoid statute of limitations bars in most cases. Thus, the remanded case will play a very important role in resolving the balance between plaintiffs' right to bring suit and defendants' repose interests. In any event, the minimal requirements for tolling adopted by the Court¹¹⁷ are likely to encourage other courts to recognize more readily tolling exceptions in the delayed manifestation context with greater flexibility.

Tennessee's ten-year product liability statute of repose was tolled before the *Cohn* decision in a case involving a minor with a delayed manifestation

110. N.J. Civ. P. 4:4-4(c)(1) (1969).

111. N.J. STAT. ANN. § 2A:14-2 (West 1952).

112. *Id.* § 2A:14-22.

113. *Velmohos v. Maren Eng'g Corp.*, 83 N.J. 232, 416 A.2d 372 (1980).

114. Using a rational standard, the Court found the statute did not violate the equal protection clause because unrepresented foreign corporations are potentially difficult to locate, and additional conditions must be met for long-arm service. — U.S. —, 102 S. Ct. at 1142-43. Justice Stevens, in his dissent, would not have found the statute rational because less restrictive alternatives, such as a longer period of limitations for suits against foreign corporations, or tolling only for corporations that had not filed their address with the Secretary of State, were possible. *Id.* at 1147 (Stevens, J., dissenting).

115. 447 F. Supp. 903 (D.N.J. 1978).

116. *See Allenberg Cotton Co. v. Pittman*, 419 U.S. 20 (1974); *Sioux Remedy Co. v. Cope*, 235 U.S. 197 (1914). In *G.D. Searle & Co.* Justice Powell and Chief Justice Burger, dissenting in part, found that defendants' commerce clause challenge had "considerable force," and would have decided that issue of the case as well. 102 S. Ct. at 1147 (Powell, J., dissenting).

117. Besides ignoring the ease with which defendant, and indeed virtually all corporations, can be served under long-arm statutes, the Court also cited the New Jersey Supreme Court's laches justification in defense of its finding. The New Jersey Supreme Court said its decision was not unfair to defendant because if plaintiff inexcusably delayed in bringing suit and thereby prejudiced defendant, defendant could plead laches. *Id.* at 1144 (citing *Velmohos v. Maren Eng'g Corp.*, 83 N.J. 282, 293 n.10, 416 A.2d 372, 378 n.10 (1980)). As Justice Stevens pointed out, there are "material differences" between laches and the statute of limitations bar. In the former, plaintiff must prove inexcusable delay and prejudice, while the latter requires no such proof. 102 S. Ct. at 1147-48 (Stevens, J., dissenting).

injury. In *Tate v. Eli Lilly & Co.*¹¹⁸ the District Court for the Middle District of Tennessee found that the statute, which runs from six years from date of injury or ten years from the date on which the product was first purchased for use, except for minors who must bring suit within one year of reaching majority if that occurs sooner, did not bar plaintiff's DES claim.¹¹⁹ The court found that Tennessee had a long-standing policy of protecting the accrued rights of minors until they reach majority and, therefore, the phrase "whichever occurs sooner" for minors should have no effect. The majority believed that simple inadvertence was responsible for the legislature's failure to delete the phrase during the deliberative process.¹²⁰ A different Tennessee district court, however, refused to allow an adult's DES suit only a month later, finding the ten-year statutory bar "harsh" but constitutional.¹²¹

An Illinois appellate court, in deciding a constitutional challenge to the ten-year statute of repose brought by an eight-year-old boy injured by a product purchased ten years and eleven days before his injury, did not apply tolling.¹²² Using an approach similar to a rational basis test, the court found the statute denied neither due process nor the state's guarantee of a remedy for every wrong.¹²³ Denial of tolling in such a situation has been interpreted as a denial of due process by some courts and commentators, and will be discussed in the next section.¹²⁴ This suit involved a typical delayed injury which was clearly within the contemplation of the legislature when the statute was passed.¹²⁵ It is not clear whether the court would decide the same way if a delayed manifestation injury were involved.¹²⁶

Tolling exceptions involving fraudulent concealment and continuing duties would have a much greater impact on plaintiffs' ability to bring suit, especially in delayed manifestation cases. Delayed manifestation situations are particularly amenable to charges of defendant's fraudulent concealment or failure to warn. Because of the nature of the injury, delayed manifestation product-related injuries generally involve a time lag between the discovery of the cause and effect relationship and the general public knowledge of that relationship.¹²⁷ Product manufacturers are in the best position to collect data on

118. 522 F. Supp. 1048 (M.D. Tenn. 1981).

119. TENN. CODE ANN. § 29-28-103 (1980).

120. 522 F. Supp. at 1050.

121. *Mathis v. Eli Lilly & Co.*, [1981] 9 PROD. SAFETY & LIAB. REP. (BNA) 875 (E.D. Tenn. Oct. 15, 1981).

122. *Thornton v. Mono Mfg. Co.*, 99 Ill. App. 3d 722, 425 N.E.2d 522 (1981).

123. *Id.*

124. See *infra* notes 201-38 and accompanying text.

125. *Thornton v. Mono Mfg. Co.*, 99 Ill. App. 3d 722, 425 N.E.2d 522 (1981).

126. Cf. *Nolan v. Johns-Manville Asbestos*, 85 Ill. 2d 146, 421 N.E.2d 869 (1981) (discovery rule applied in delayed manifestation asbestiosis case).

127. See *Raymond v. Eli Lilly & Co.*, 117 N.H. 164, 371 A.2d 170 (1977). In DES cases, for example, it generally is alleged that defendants knew or should have known that DES was both ineffective and unsafe. Plaintiffs support this allegation by pointing to the fact that by 1947 there was a substantial body of scientific literature linking the use of hormones to carcinogenic effects, and there were studies showing that oral administration of DES to laboratory animals produced cancer. Despite increasing evidence, it was not discontinued as an antiabortion drug until 1971 when the FDA contraindicated its use by pregnant women. Note, *supra* note 12, at 971 n.25.

their products' effects and usually have information regarding injuries or the possibility of injuries before others gain such knowledge.¹²⁸ Many of the delayed manifestation suits, such as those involving DES and asbestos, are based in part on allegations that defendants knew or should have known that the product was dangerous, but kept that information from the public and continued to advertise and market the product or expose people to it.¹²⁹ Thus, the seeds of an estoppel argument are planted in most delayed manifestation cases.

Courts have consistently applied tolling in fraudulent concealment cases as an equitable bar to estop a defendant from benefitting from his own wrongdoing.¹³⁰ The Supreme Court, recognizing the equitable necessity for such a bar in a recent discovery-rule case said:

That plaintiff has been injured in fact may be unknown or unknowable until the injury manifests itself; and the facts about causation may be in the control of the putative defendant, unavailable to the plaintiff or at least very difficult to obtain. The prospect is not so bleak for a plaintiff in possession of the critical facts that he has been hurt and who has inflicted the injury. He is no longer at the mercy of the latter.¹³¹

In the former case, the Court would begin accrual at the time of discovery, but not in the latter, when plaintiff is aware of his injury but not of his legal rights. Other courts have recently expressed similar concerns, and have ruled accordingly.¹³²

The same equities are involved in cases alleging continuing duties to warn, which are increasingly providing a basis for recovery.¹³³ The Indiana Supreme Court refused to toll the state's ten-year statute of repose in a chal-

128. See MODEL UNIF. PROD. LIAB. ACT § 104(C)(6) analysis, *reprinted in* 44 Fed. Reg. at 62,725.

129. See, e.g., *Bell v. Goddard*, 366 F.2d 177, 179 (7th Cir. 1966); *Sindell v. Abbott Laboratories*, 26 Cal. 3d 588, 607 P.2d 924, 163 Cal. Rptr. 132, *cert. denied*, 449 U.S. 912 (1980); *Johns-Manville Prods. Corp. v. Contra Costa Superior Court*, 27 Cal. 3d 465, 612 P.2d 948, 165 Cal. Rptr. 858 (1980).

130. See, e.g., *Warrington v. Charles Pfizer & Co.*, 274 Cal. App. 2d 564, 80 Cal. Rptr. 130 (1969); *Lakeman v. LaFrance*, 102 N.H. 300, 156 A.2d 123 (1959).

131. *United States v. Kubrick*, 444 U.S. 111 (1979).

132. *Canton Lutheran Church v. Sovik, Mathre, Sathrum & Quanbeck*, 507 F. Supp. 873 (1981); *Johns-Manville Prods. Corp. v. Contra Costa Superior Court*, 27 Cal. 3d 465, 612 P.2d 948, 165 Cal. Rptr. 858 (1980) (allegation of fraudulent concealment sufficient to allow worker to avoid workers' compensation bar and sue employer for aggravation of asbestiosis). Cf. MODEL UNIF. PROD. LIAB. ACT § 110(B)(2)(b), *reprinted in* 44 Fed. Reg. at 62,732.

133. Increasingly, courts are holding manufacturers liable for failure to warn even when the likelihood of harm is extremely small. See, e.g., *Harrison v. Flota Mercante Grancolombiana, S.A.*, 577 F.2d 968 (5th Cir. 1978); *Graham v. Joseph T. Ryerson & Sons*, 8 PROD. SAFETY & LIAB. REP. (BNA) 415 (Del. Super. Ct. 1980); *Moran v. Faberge, Inc.*, 273 Md. 538, 332 A.2d 11 (1975); *Kozlowski v. John E. Smith's Sons*, 87 Wis. 2d 882, 275 N.W.2d 915 (1979). These courts consider warnings to be relatively easy and inexpensive to give, and almost presumptively effective. Therefore, plaintiffs are increasingly using failure to warn, including failure based on postproduction knowledge, as a backup theory of liability. Cf. MODEL UNIF. PROD. LIAB. ACT § 104(C) analysis, *reprinted in* 44 Fed. Reg. at 62,725.

Failure to carry out a duty to warn based on postproduction knowledge, like postproduction duties to correct or repair, has served as a basis for extension of the limitations period. Phillips, *supra* note 103, at 666-67.

lence based in part on such an argument.¹³⁴ The case, however, did not involve a delayed manifestation injury. Other Indiana courts have indicated that a delayed manifestation case might lead to different results.¹³⁵

In light of today's proconsumer atmosphere and the willingness of courts to construe limitations statutes to facilitate suits, it is most unlikely that courts will not apply tolling to estop a defendant from benefitting from its alleged wrongdoing in delayed manifestation cases. Use of tolling exceptions will enable courts to allow delayed manifestation suits while maintaining the statute's constitutionality and bar to old-product suits. Nonetheless, the greater the number of exceptions to the bar that are allowed, the more arbitrary the statute will appear, and its use as a predictor of potential liability will be minimal. Thus, use of estoppel may prove to be only a temporary measure on the way to invalidation of product liability statutes of repose.

C. Constitutionality

Constitutional challenges are the most common and comprehensive way of eliminating strict repose periods. Statutes of repose are increasingly being overturned on constitutional grounds as courts more closely examine the actual equities involved. At least eleven states have found architects' and builders' repose statutes unconstitutional.¹³⁶ A similar number of courts have found part or all of the medical malpractice reform statutes constitutionally infirm, and many of these contain repose periods.¹³⁷ While a few courts have based their decisions on equal protection or due process grounds, most have based them on state constitutional provisions granting access to the courts for redress of injury or on provisions barring special legislation.¹³⁸ These provisions protect interests similar to those protected by due process and equal protection clauses, and courts usually discuss them as if they were interchangeable.¹³⁹

134. The plaintiff in *Dague v. Piper Aircraft Corp.*, — Ind. —, 418 N.E.2d 207, 212 (1981) (citing IND. CODE § 33-1-1.5-1 (Supp. 1980)), argued that defendant had a continuing duty to warn users of dangerous features, and that the duty was general and therefore not barred by the Indiana limitation which was to "govern all product liability actions." (emphasis in original). The court found that the legislature intended to include negligent failure to warn in the limitation and that "no cause of action would exist on any such product liability theory after ten years." *Id.* at —, 418 N.E.2d at 212 (emphasis in original). In addition, it found that irrespective of a continuing duty, the cause of action did not accrue until plaintiff was harmed and that harm occurred after the statutory period.

135. *Cf. City of Ft. Wayne v. Cameron*, 267 Ind. 329, 370 N.E.2d 338 (1977); *Alwood v. Davis*, — Ind. App. —, 411 N.E.2d 759, 761 (1980).

136. *See supra* note 70.

137. *Id.*

138. *See, e.g., Skinner v. Anderson*, 38 Ill. 2d 455, 231 N.E.2d 588 (1967) (citing ILL. CONST. art. IV, § 22: "The general assembly shall not pass local or special laws in any of the following enumerated cases, that is to say: . . . granting to any corporation, association or individual any special or exclusive privilege, immunity or franchise whatever."); *Overland Constr. Co. v. Sirmons*, 369 So. 2d 572 (Fla. 1979) (citing FLA. CONST. art. I, § 21: "The courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial or delay.").

139. *See, e.g., Fujioka v. Kam*, 55 Hawaii 7, 514 P.2d 568 (1973); *Bruomo v. Truluck*, 270 S.C. 227, 241 S.E.2d 739 (1978); *Kallas Millwork Corp. v. Square D Co.*, 66 Wis. 2d 382, 225 N.W.2d 454 (1975).

Product liability statutes of repose are subject to challenge on the same grounds.

1. Equal Protection and Special Legislation

In an equal protection challenge, the classifications made by the legislature must be shown to be reasonably related to the state's objective in order to be upheld.¹⁴⁰ The reasonableness of the relationship is subject to different levels of scrutiny—rational basis, intermediate, and strict scrutiny.¹⁴¹ The closer the scrutiny, the less likely the legislation is to be upheld. It is clear that a strict scrutiny test is not appropriate for statutes of repose because they involve neither suspect classifications nor fundamental rights.¹⁴² Thus, courts must choose between rationality and the intermediate (close and substantial relationship) standards when reviewing repose statutes on equal protection grounds. Courts have invalidated repose statutes under each of these standards in non-product liability cases.

Most courts have used the less demanding rationality standard to test the architects' and builders' repose statutes, and although most have found the classifications rationally related to the goal of controlling liability in the construction industry and thereby alleviating the "crisis," an increasing number are not so finding.¹⁴³ Like statutes of repose for manufacturers and sellers of products, architects' and builders' statutes of repose were passed to solve a perceived crisis in the industry caused by changing laws and expanded liability.¹⁴⁴ Although coverage of the architects' and builders' statutes is not uniform, most apply only to contractors, builders, architects, and similar groups involved in the construction process, but not to groups such as owners and material suppliers who also face significant liability.¹⁴⁵ It is this limited coverage that has proved fatal under special legislation and equal protection challenges.¹⁴⁶ Following the lead of the "seminal" decision of *Skinner v.*

140. See, e.g., *United States v. Kras*, 409 U.S. 434 (1973); *Phillips v. ABC Builders, Inc.*, 611 P.2d 821 (Wyo. 1980); Nowack, *Realigning the Standards of Review Under the Equal Protection Guarantee—Prohibited, Neutral, and Permissive Classifications*, 62 GEO. L.J. 1071, 1073 (1974).

141. See Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 25-37 (1972).

142. See, e.g., *Shapiro v. Thompson*, 394 U.S. 618 (1969) (right to travel); *Bolling v. Sharpe*, 347 U.S. 497 (1954) (race); *McClanahan v. American Gilsonite Co.*, 494 F. Supp. 1334, 1344 (1980) (no suspect classification present; strict scrutiny test not applied).

143. See *supra* note 70.

144. In the 1960s the protection for architects and builders under the privity doctrine was withdrawn, subjecting them to liability to third-party suits. The increased liability was not only in numbers of potential suits, but also for greater spans of time. *Carter v. Hartenstein*, 248 Ark. 1172, 455 S.W.2d 918 (1970), *appeal dismissed*, 401 U.S. 901 (1971); *Overland Constr. Co. v. Sirmans*, 369 So. 2d 572, 574 (Fla. 1979); Comment, *Limitation of Action Statutes for Architects and Builders—Blueprints for Non-action*, 18 CATH. U.L. REV. 361, 363 (1969).

145. Comment, *Limitation of Action Statutes for Architects and Builders—Blueprints for Non-action*, 18 CATH. U.L. REV. 361, 365 (1969).

146. See, e.g., *Fujioka v. Kam*, 55 Hawaii 7, 514 P.2d 568 (1973); *Pacific Indem. Co. v. Thompson-Yaeger, Inc.*, 194 Minn. 97, 260 N.W.2d 548 (1977); *Kallas Millwork Corp. v. Square D Co.*, 66 Wis. 2d 382, 225 N.W.2d 454 (1975); *Phillips v. ABC Builders, Inc.*, 611 P.2d 821, 824 (Wyo. 1980). See also *Graley v. Satayatham*, 74 Ohio Op. 2d 316, 343 N.E.2d 832 (C.P. Cuyahoga

Andersen,¹⁴⁷ courts, in overturning the statutes, have found no rational reason why only certain groups should be singled out for protection from all those who are potentially liable.¹⁴⁸

A similar challenge may be made to the product liability statutes of repose: they protect only some of the persons or groups potentially liable in a product liability suit. Owners of products or premises where injuries occur are not specifically granted the immunity given to manufacturers and sellers.¹⁴⁹ Nevertheless, this denial of equal protection argument is less persuasive for the product liability statutes because these statutes protect a greater number and wider class of potential defendants, or simply bar most actions based on product injury no matter who the defendant may be.¹⁵⁰ Because of this wider coverage and inclusion of groups most likely to be defendants and most involved in the crisis, courts are more likely to find the legislation rationally related to the goal of reducing insurance rates by limiting liability. At least one court has so held in an old-product injury suit.¹⁵¹ An argument based on denial of equal protection to manufacturers of short-lived as opposed to long-lived products is also unlikely to be successful when examined on a rational relationship basis.¹⁵²

An equal protection argument potentially more appealing to today's courts in the product liability setting is based on the denial of equal protection to plaintiffs. Persons whose injuries do not manifest themselves until after the running of the statutory period are denied the protection accorded to plaintiffs whose injuries are readily apparent soon after the product is used. Similarly, persons injured by older products do not receive the same protection as those injured by newer ones. Even though these classifications may not be seen as irrational, they are likely to be overturned if an intermediate standard is used.¹⁵³

County 1976) (court drew distinctions between medical malpractice defendants and other tort defendants in finding the statute violative of equal protection).

147. 38 Ill. 2d 455, 231 N.E.2d 588 (1967), *cited in* Phillips v. ABC Builders, Inc., 611 P.2d 821, 825 (Wyo. 1980).

148. *See supra* cases at note 146.

149. Vargo & Liebman, *Products Liability, Survey of Recent Developments in Indiana Law*, 12 IND. L. REV. 227, 252 (1979).

150. *See, e.g.*, ALA. CODE § 6-5-502 (Supp. 1982); IDAHO CODE § [6-1403] 6-1303 (Supp. 1982); IND. CODE ANN. § [34-4-20A-1] 33-1-1.5-1 (Burns Supp. 1982); NEB. REV. STAT. § 25-224 (1979); N.H. REV. STAT. ANN. § 507-D: 1 (Supp. 1979); OR. REV. STAT. § 30.900 (1981); R.I. GEN. LAWS § 9-1-13 (Supp. 1981); S.D. CODIFIED LAWS ANN. § 15-2-12.1 (Supp. 1982); TENN. CODE ANN. § 29-28-103 (1980). *But see* ILL. ANN. STAT. ch. 110, § 13-213 (Smith-Hurd Supp. 1982) (limited to strict liability in tort).

151. In *Dague v. Piper Aircraft Corp.*, 513 F. Supp. 19 (N.D. Ind. 1980), the court rejected plaintiff's equal protection argument based on denial of protection to third-party owners of products, finding plaintiff's argument tenuous at best. The majority found the legislation was reasonably related to the goal of making insurance available, which also served the broad public purpose of providing a source of funds for recovery that might not otherwise be available. It also ultimately reduced the product cost to the public by holding down the seller's business costs. *Id.* at 25.

152. *See infra* notes 154-58 and accompanying text.

153. *Cf.* Overland Constr. Co. v. Sirmons, 369 So. 2d 572, 574 (Fla. 1979) (architects and builders statute overturned); Carson v. Maurer, 120 N.H. 925, 424 A.2d 825 (1980) (middle standard used to invalidate medical malpractice statute).

While no one disputes the legislature's right to make distinctions, the classifications must not be arbitrary. Under a mere rationality standard there is evidence that a repose period which cuts off a plaintiff's right to sue for old-product injuries after ten years is not arbitrary.¹⁵⁴ The legislature has chosen a time period during which almost all evident product injuries occur.¹⁵⁵ The assumption behind choosing a fairly long period is that if a product functions safely for a number of years, it may be assumed to be nondefective, and if it causes injury after that time, the injury probably occurred for some reason unrelated to defect, such as product misuse, alteration, or use beyond the product's reasonable safe life.¹⁵⁶ Thus, while a more rational distinction could have been made—for example, setting different periods for short-lived and long-lived capital goods—no reasonable period would have been perfect, and some repose was considered necessary to stabilize insurance rates and therefore to help ease the crisis.¹⁵⁷ If some cutoff period is acceptable, one that allows a fairly long time for a product to manifest defects and allows for inclusion of almost all old-product suits is likely to meet the minimum rationality test.¹⁵⁸

Delayed manifestation equal protection challenges might be more successful because a much larger number of these cases are excluded by the statutes, and the courts and legislatures traditionally have seen greater inequities in not allowing suit for someone who is injured and does not know it.¹⁵⁹ In addition, precedent exists under the medical malpractice statutes of repose for disallowing such distinctions. Delayed manifestation injury cases are similar to delayed discovery of foreign object cases in medical malpractice.¹⁶⁰ The latter were generally exempted from inclusion in the statutes of repose passed

154. A majority of states with repose statutes have selected 10 years as the appropriate period. *See, e.g.*, ALA. CODE § 6-5-502(c) (Supp. 1982); CONN. GEN. STAT. ANN. § 52-577a (West Supp. 1982); GA. CODE ANN. § 51-1-11(b)(2) (1982); IDAHO CODE § [6-1403] 6-1303 (Supp. 1982); NEB. REV. STAT. § 25-224(2) (1979); R.I. GEN. LAWS § 9-1-13 (Supp. 1981); TENN. CODE ANN. § 29-28-103 (1980); UTAH CODE ANN. § 78-15-3 (1977). The periods range from a low of six years, N.C. GEN. STAT. § 1-50(6) (Supp. 1981); S.D. CODIFIED LAWS ANN. § 15-2-12.1 (Supp. 1982), to a high of twelve years. ARIZ. REV. STAT. ANN. § 12-551 (1982); FLA. STAT. ANN. § 95.031 (West 1982); ILL. ANN. STAT. ch. 110, § 13-213 (Smith-Hurd Supp. 1982); MICH. COMP. LAWS ANN. § 600.5805(9) (Supp. 1982); N.H. REV. STAT. ANN. § 507-D (Supp. 1979).

Most states commence the period from date of sale to the consumer; some states, however, measure it from the time of manufacture. *See, e.g.*, R.I. GEN. LAWS § 9-1-13 (Cum. Supp. 1981) (date of sale to consumer); UTAH CODE ANN. § 78-15-3(1) (1977) (six years from sale to consumer or ten years from date of manufacture).

155. *See supra* note 88.

156. MODEL UNIF. PROD. LIAB. ACT § 110 analysis, *reprinted in* 44 Fed. Reg. at 62,734. Some states, following the U.P.L.A., have used this assumption to set a rebuttable presumption of nondefectiveness rather than setting a repose period. *See, e.g.*, COLO. REV. STAT. § 13-21-403(3) (Supp. 1981); KY. REV. STAT. ANN. § 411.310(1) (Baldwin 1981); WASH. REV. CODE ANN. § 7.72.060 (Supp. 1982).

157. *Cf.* ALA. CODE § 6-5-500 (Supp. 1981) (intent of legislature; legislative findings); *Dague v. Piper Aircraft Corp.*, 513 F. Supp. 19, 25 (N.D. Ind. 1980).

158. *Dague v. Piper Aircraft Corp.*, 513 F. Supp. at 25.

159. *See supra* notes 18-41 and accompanying text. Legislative accommodation to this problem can be seen in some of the product liability reform statutes. *See, e.g.*, ALA. CODE § 6-5-502(b) (Supp. 1982) (discovery rule for latent or delayed manifestation instead of one year statute of limitations).

160. Birnbaum, *supra* note 28, at 289.

to protect health care providers, and a discovery statute of limitations was maintained for them.¹⁶¹ There is little rational reason to deny suit to delayed manifestation plaintiffs, whose injuries are often deadly or life-threatening and debilitating, while allowing suit to plaintiffs injured by doctors and other health care providers who have left foreign objects in their bodies. Both the medical malpractice and product liability statutes were passed to solve an economic crisis,¹⁶² and that solution will not be helped by allowing suit in one case but not the other.

The New Hampshire Supreme Court, which recently overturned a medical malpractice statute of repose in *Carson v. Maurer*,¹⁶³ used a middle standard of review to find that distinctions made on the basis of delayed discovery due to hidden injuries were unconstitutional. One provision of New Hampshire's medical malpractice act reduced the statute of limitations from six to two years, and started it running from the commission of the act, not discovery, unless suit was based on the discovery of a foreign object in the body.¹⁶⁴ In the latter instance, suit had to be commenced within two years of the time of discovery. The act also abolished the tolling of the statute for infants and incompetents.¹⁶⁵ The court found the legislature could not abolish the discovery rule for just one class of medical malpractice plaintiffs, nor could it penalize infants and incompetents in relation to their kind under nonmalpractice circumstances.¹⁶⁶ Other courts have indicated a willingness to adopt similar holdings.¹⁶⁷

The court in *Carson* used an intermediate standard of review in examining the constitutionality of the statute.¹⁶⁸ In so doing it followed several other courts that have used this stricter standard to find the medical malpractice acts unconstitutional.¹⁶⁹ The use of this middle tier approach would be equally appropriate in examining product liability statutes of repose.

It is fitting to use a heightened review for this type of legislation for several reasons. Unlike traditional statutes of limitations which set procedural

161. See, e.g., COLO. REV. STAT. § 13-80-105(1)(a) (Supp. 1981); IOWA CODE ANN. § 614.1(9) (Cum. Supp. 1981).

162. Abraham, *Medical Malpractice Reform: A Preliminary Analysis*, 36 MD. L. REV. 489 (1977); Massery, *supra* note 7; Redish, *Legislative Response to the Medical Malpractice Insurance Crisis: Constitutional Implications*, 55 TEX. L. REV. 759 (1977); Note, *supra* note 7.

163. 120 N.H. 925, 424 A.2d 825 (1980).

164. N.H. REV. STAT. ANN. § 507-C:5 (Supp. 1979).

165. "A minor under the age of 8 years at the time of the act, omission or failure complained of shall in any event have until his tenth birthday in which to commence an action." *Id.*

166. 120 N.H. at 936-37, 424 A.2d at 833-34.

167. See, e.g., *Bunker v. National Gypsum Co.*, — Ind. App. —, 426 N.E.2d 422 (1981); *Alwood v. Davis*, — Ind. App. —, — 411 N.E.2d 759, 761 (1980); *State v. Wilson*, No. 74-329 (Mont. Aug. 4, 1981).

168. "[T]he classifications . . . must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation" 120 N.H. at 932, 424 A.2d at 830-31.

169. See, e.g., *Jones v. State Bd. of Medicine*, 97 Idaho 859, 555 P.2d 399 (1976); *Arneson v. Olson*, 270 N.W.2d 125 (N.D. 1978); *Mattos v. Thompson*, 491 Pa. 385, 421 A.2d 190 (1980). Cf. *Muzar v. Metro Town Houses, Inc.*, 82 Mich. App. 368, 266 N.W.2d 850 (1978) (architects' and builders' statute of repose case).

duties, statutes of repose extinguish substantive rights by denying a duty of care from manufacturers to consumers.¹⁷⁰ This removal of substantive rights, which affects thousands of plaintiffs injured by widely used products, requires more careful scrutiny than that accorded procedural changes. Moreover, in these instances the heightened review becomes even more compelling because of the aura of special legislation. The repose statutes were brought to the legislators and supported by a lobby of the very groups they were intended to protect.¹⁷¹ These are groups that wield considerable power, money, and influence and can therefore exert considerable pressure on the lawmakers. Those injured by the special legislation had no such power or influence to act as a counterbalance, and no unified voice to represent them. The legislation was presented in a "crisis" atmosphere in which quick solutions rather than careful examination of actual facts and figures were the order of the day.¹⁷² It is precisely in this type of situation, in which it is clear that both sides were not adequately represented and that the substantive rights of the under-represented group were harmed, that the middle review is appropriate.

Use of such a standard comports with the views of modern constitutional writers who predicted and called for greater use of a stricter standard in a wider variety of cases over a decade ago. Professor Gunther foresaw the increased use of closer scrutiny in a wider range of cases in which interests were not adequately represented.¹⁷³ More recently, Professors Nowak and Ely have urged more careful review of issues involving equal protection.¹⁷⁴ Ely, whose book *Democracy and Distrust*¹⁷⁵ has sparked considerable discussion and debate,¹⁷⁶ divides provisions of the Constitution into two groups: (1) mandates from the Framers requiring certain actions, and (2) provisions that are open-ended statements of ideals whose substance is to be filled in subsequently by courts. The equal protection clause belongs to the latter group.¹⁷⁷ In setting the parameters of equal protection and in reviewing legislation in light of them, courts are to be guided by the notion that broad participation in the processes and distributions of a representative democracy, rather than individual notions of fairness and due process, is the crucial goal.¹⁷⁸ The issues involved in these statutes of repose do not rise to the blockage of participation in democracy as does the denial of voting privileges, nor do they involve a dis-

170. Massery, *supra* note 7; Witherspoon, *Constitutionality of the Texas Statute Limiting Liability for Medical Malpractice*, 10 TEX. TECH. L. REV. 419, 454-55 (1979).

171. PRODUCT LIABILITY LEGISLATIVE PACKAGE: STATUTES DESIGNED TO IMPROVE THE FAIRNESS AND ADMINISTRATION OF PRODUCT LIABILITY LAW (American Ins. Ass'n 1977). See *supra* note 7.

172. Johnson, *supra* note 71, at 678; Twerski & Weinstein, *supra* note 10, at 222-23.

173. Gunther, *supra* note 141. Cf. *Dike v. School Bd. of Orange County*, 650 F.2d 783 (5th Cir. 1981) (right to breastfeed).

174. Nowak, *supra* note 140; Ely, *Constitutional Interpretivism: Its Allure and Impossibility*, 53 IND. L.J. 399 (1978).

175. J. ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980).

176. See, e.g., Alexander, *Modern Equal Protection Theories: A Metatheoretical Taxonomy and Critique*, 42 OHIO ST. L.J. 3 (1981); Berger, *Ely's "Theory of Judicial Review,"* 42 OHIO ST. L.J. 87 (1981).

177. J. ELY, *supra* note 175, at 119-24.

178. *Id.*

crete and insular minority requiring substantial constitutional protection. They do, however, call for greater scrutiny than mere rationality because of the lack of participation and power of the harmed group and the importance of the right denied.¹⁷⁹

Courts have used this middle standard when reviewing statutes denying compensation for bodily injury in non-product liability contexts. In *Hunter v. North Mason School District*¹⁸⁰ for example, the Washington Supreme Court found that a statute which limited plaintiff's right to bring suit against the government by requiring formal notice of the claim within 120 days¹⁸¹ placed a "substantial burden" on a "substantial property right . . . in many cases fundamental to the injured person's physical well-being and ability to live a decent life."¹⁸² Since most tort victims did not know of the notice requirement, suit against the government in most instances was barred, while tort victims of nongovernmental defendants were allowed three years within which to bring suit. Such a distinction, when tested by a middle standard of review because of the "substantial" importance of the right,¹⁸³ denied equal protection. The same reasoning has been applied in the medical malpractice context. The court in *Carson v. Maurer*, in fact, cited *Hunter* as primary support for its holding that barriers put in the way of a medical malpractice victim's ability to bring suit affected an important substantive right and therefore should be judged by the use of the middle standard.¹⁸⁴ Courts in other contexts have similarly used a more than mere rationality test when barriers to the right to bring suit were involved.¹⁸⁵ The same reasoning is applicable to denial of compensation for bodily injury caused by products.

Once a stricter, middle standard is used, it is appropriate for courts to examine whether a crisis actually exists and, if so, whether the legislation will alleviate that crisis.¹⁸⁶ It is appropriate to question both the existence of the crisis and the extent to which increases in awards contributed to that crisis, because without a crisis the classification would neither serve an important governmental end nor could its alleviation be substantially achieved. In the delayed manifestation situation, the answer to both these questions appears to be no. As in the medical malpractice area, writers and courts are beginning to discover that the crisis may have been more perceived than real.¹⁸⁷

Over five years ago, after extensive study of the problem, the Interagency

179. Cf. *id.* at 73-104; Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920, 934 (1973).

180. 85 Wash. 2d 810, 539 P.2d 845 (1975).

181. WASH. REV. CODE ANN. § 4.96.020 (Supp. 1982).

182. 85 Wash. 2d at 814, 539 P.2d at 847-48.

183. See *supra* note 169.

184. 120 N.H. at 931-32, 424 A.2d at 830.

185. See, e.g., *Muzar v. Metro Town Houses, Inc.*, 82 Mich. App. 368, 266 N.W.2d 850 (1978) (architects' and builders' statute of repose). Cf. *Brown v. Merlo*, 8 Cal. 3d 855, 506 P.2d 212, 106 Cal. Rptr. 388 (1973) (guest statute).

186. *Carson v. Maurer*, 120 N.H. 925, 424 A.2d 825 (1980); *Mattos v. Thompson*, 491 Pa. 385, 421 A.2d 190 (1980); *Redish*, *supra* note 162, at 772.

187. *Jones v. State Bd. of Medicine*, 97 Idaho 859, 872, 555 P.2d 399, 412 (1976); T. LOMBARDI, *MEDICAL MALPRACTICE INSURANCE: A LEGISLATOR'S VIEW* (1978); Note, *Which Equal*

Task Force on Product Liability concluded that the crisis may be more imagined than real, that the open-ended problem was not very significant, and that insurance rates were not necessarily responsive to actual liabilities.¹⁸⁸ As stated in the Analysis to the proposed Model Uniform Product Liability Act, "The limited available data show that insurers' apprehensions about older products may be exaggerated."¹⁸⁹ Over ninety-seven percent of product-related accidents occurred within six years of product purchase,¹⁹⁰ and the problem caused by the few old-product cases that were successfully prosecuted was never adequately documented.¹⁹¹ There was little evidence to support the claim that businesses were being forced to close because of the jump in rates. Recent evidence indicates that plaintiffs are not particularly more successful in prosecuting claims than they were several years ago.¹⁹² Old-product claims are especially difficult for plaintiffs because the older the product, the heavier the burden on the plaintiff to overcome the natural assumption that a product in use without incident for a long period of time was not defective.¹⁹³ As one commentator put it, a "few horror stories" drove rates up because rates are based on subjective factors.¹⁹⁴

In the great majority of cases insurance companies did not rely on actual product liability data when increasing premiums.¹⁹⁵ Because product liability coverage was part of a comprehensive general liability package, the claim payout ratio for product liability injuries could not be determined, and the subjective loss estimates that form the basis of premium settings were even more subjective in the product liability area.¹⁹⁶ States recently have taken this subjective factor into account when considering product liability reform.¹⁹⁷ The

Protection Standard for Medical Malpractice Legislation?, 8 HASTINGS CONST. L.Q. 125, 127-30 (1980).

Insurance industry representatives, testifying in 1975, stated that unavailability of insurance because of price increases was a problem in only nine states. *Federal Medical Malpractice Insurance Act, 1975: Hearings Before the Subcomm. on Health of the Senate Comm. on Labor and Public Welfare*, 94th Cong., 1st Sess. (Apr. 7-15, 1975). By 1977 rates were being reduced in some of those states. Witherspoon, *supra* note 170, at 447 n.126.1.

188. INTERAGENCY TASK FORCE ON PROD. LIAB., U.S. DEP'T OF COMMERCE, BRIEFING REPORT ii, 40 (1977).

189. MODEL UNIF. PROD. LIAB. ACT § 110 analysis, *reprinted in* 44 Fed. Reg. at 62,733.

190. *Id.*

191. Massery, *supra* note 7, at 542; Phillips, *supra* note 103, at 664; Begam, *One More Insurance 'Crisis'*, TRIAL MAG., Nov. 1976, at 46, 49.

192. NATIONAL LEGAL CENTER FOR THE PUB. INTERESTS, *supra* note 5, at 4. A REPORT OF THE PRODUCTS LIABILITY CLOSED CLAIM SURVEY INSURANCE SERVICES OFFICE (Report 25, 1976), *cited in* Massery, *supra* note 7, at 544 n.52, showed that of the cases which went to trial, only 28% resulted in verdicts in favor of plaintiffs. A recent report of the Rand Corporation's Institute for Civil Justice indicates the median amount of jury awards is declining. *Median Civil Jury Award Declines*, Nat'l L.J., Feb. 23, 1981, at 3, col. 1.

193. See *Kiusis v. Baldwin-Lima-Hamilton Corp.*, 457 Pa. 321, 332, 319 A.2d 914, 921 (1974); MODEL UNIF. PROD. LIAB. ACT § 110 analysis, *reprinted in* 44 Fed. Reg. at 62,734; Prosser, *The Fall of the Citadel*, 50 MINN. L. REV. 791, 844-45 (1966).

194. Johnson, *supra* note 71, at 679.

195. INTERAGENCY TASK FORCE ON PROD. LIAB., *supra* note 2, at I-22.

196. *Id.* at I-23 to -24.

197. Ohio, for example, in its 1980 proposed liability act, devoted a substantial portion of the bill to sections requiring insurance companies to report the data upon which premiums are based and requiring that rates be based upon actual stated expenditures. S. 67, 113th Gen. Assembly,

pattern of the subjective nature of rate setting and the artificial creation of a crisis atmosphere, which has been well documented in the medical malpractice field,¹⁹⁸ is emerging in the products liability area as a key cause of the highly increased premiums.

In addition, even if there were a crisis, it is far from clear that the repose statutes would alleviate it. Since most product manufacturers and product liability insurers operate on a multistate basis, anything short of a nationwide repose period would do little to alleviate the problem of open-ended liability because premiums are calculated on the experience in all relevant states.¹⁹⁹ If, as has been suggested, the rates are more the result of economic fluctuations and unsuccessful investment practices than realistic liability predictions, requirements that premiums be well documented and based on actual state insurance claims would be far more useful and equitable.²⁰⁰

As in the medical malpractice challenges, use of a middle standard of review is likely to result in overturning the product liability statutes of repose on equal protection and special legislation grounds.

2. Due Process and Guaranteed Access to the Courts

Courts have also begun to take a closer look at repose statutes when evaluating their validity on grounds of due process and guaranteed access to the courts. Product liability statutes of repose that have been declared unconstitutional were overturned primarily on this latter ground. The Florida Supreme Court, in a 4-3 decision in *Battilla v. Allis Chalmers Manufacturing Co.*,²⁰¹ declared the Florida product liability statute of repose to be in violation of the state constitution. The basis for this finding was an earlier decision, *Overland Construction Company v. Simmons*,²⁰² which invalidated the Florida repose statute for architects and builders because it was in violation of the Florida constitutional provision granting access to the courts for redress of injury.²⁰³ The *Overland* court interpreted this provision to mean that a common-law right cannot be taken away unless the legislature "has shown an overpowering public necessity for this prohibitory provision, and an absence of less onerous alternatives."²⁰⁴ The court found that the legislature had not expressed such a necessity, and the court could not find one in the changed circumstances which led to increased liability.²⁰⁵ In addition, the problems of reliable evidence and changes in technology were no different than those faced by all litigants, and

Reg. Sess. §§ 3929.301, 3937.021 (Ohio 1979-80). In addition § 3937.021 would have created a commission designed to study the impact of the reform legislation on product liability law in Ohio and to make recommendations to the legislature regarding revisions.

198. See *supra* note 187.

199. Phillips, *supra* note 103, at 672.

200. INTERAGENCY TASK FORCE ON PROD. LIAB., U.S. DEP'T OF COMMERCE, III FINAL REPORT OF THE LEGAL STUDY 131-32 (1977).

201. 392 So. 2d 874 (Fla. 1980).

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

203. FLA. CONST. art. I, § 21.

204. 369 So. 2d at 574.

205. *Id.*

there was not sufficient reason to protect the construction industry at the expense of the injured plaintiff.²⁰⁶ The court did not discuss less onerous alternatives, but in a product liability setting, measures such as different repose periods for different kinds of goods,²⁰⁷ rebuttable presumptions of nondefectiveness,²⁰⁸ and closer monitoring of the setting of premiums are well recognized.

In a subsequent decision the Florida court, with only one dissent, affirmed its finding of unconstitutionality of the product liability statute of repose in a delayed manifestation case. Plaintiff in *Diamond v. E.R. Squibb & Sons, Inc.*²⁰⁹ suffered injury from DES, but the injury did not manifest itself until twenty years after her mother's ingestion of the drug. The differences between delayed manifestation and old-product injury cases persuaded two of the judges who dissented in *Battilla* to change their opinions.²¹⁰

States that have held architect and builder repose statutes unconstitutional may also overturn their product liability statute of repose.²¹¹ In *Bolick v. American Barmag Corp.*,²¹² the North Carolina Court of Appeals recently used its state constitutional provision guaranteeing legal remedy for injury done²¹³ to declare that state's six-year product liability statute of repose²¹⁴ unconstitutional.²¹⁵ While recognizing that legislatures have the power to set limitation periods, the court found that this statute was not one of limitation because it cut off claims before they could accrue. This bar to the seeking of redress before the right arose violated the constitutional guarantee of remedy.²¹⁶ The court cited the Florida and Kentucky decisions as well as other states' decisions overturning architects' and builders' statutes.²¹⁷ Unlike Florida and Kentucky, however, North Carolina had not previously overturned a repose statute.²¹⁸

206. The U.S. District Court for the Southern District of Florida recently reached the same conclusion in *Ellison v. Northwest Eng'g Co.*, 521 F. Supp. 199 (S.D. Fla. 1981).

207. Note, *supra* note 6, at 713-14.

208. See *supra* note 156.

209. 397 So. 2d 671 (Fla. 1981).

210. *Id.* at 672.

211. See, e.g., *Saylor v. Hall*, 497 S.W.2d 218 (Ky. 1973); *Phillips v. ABC Builders, Inc.*, 611 P.2d 821 (Wyo. 1980). Wisconsin interpreted a similar constitutional provision on equal protection grounds. *Kallas Millwork Corp. v. Square D Co.*, 66 Wis. 2d 382, 225 N.W.2d 454 (1975).

212. 54 N.C. App. 589, 284 S.E.2d 188 (1981). See also *Survey of Recent Developments—Constitutional Law*, 60 N.C.L. REV. 1272, 1285 (1981).

213. N.C. CONST. art. I, § 18.

214. N.C. GEN. STAT. § 1-50(6) (Supp. 1981).

215. 54 N.C. App. at 595, 284 S.E.2d at 192.

216. N.C. CONST. art. I, § 18.

217. 54 N.C. App. at 593, 284 S.E.2d at 191.

218. North Carolina courts had interpreted the state's earlier statute of repose (N.C. GEN. STAT. § 1-15(b) (Supp. 1977) (repealed 1979)) to apply only to cases in which injury was not readily apparent. They were thus able to avoid most of the hardships caused by the lack of a discovery rule. *Raftery v. William C. Vick Constr. Co.*, 291 N.C. 180, 230 S.E.2d 405 (1976). The passage of the 1979 statute was designed to reverse this interpretation. Special Project, *The Counterattack to Retake the Citadel Continues: An Analysis of the Constitutionality of Statutes of Repose in Products Liability*, 46 J. AIR L. & COM. 449, 465 (1981).

In *Thorton v. Mono Manufacturing Co.*²¹⁹ Illinois also recognized that the state's ten-year limitation statute was not a true statute of limitations but a law extinguishing a right of action.²²⁰ Nevertheless, the Illinois Appellate Court did not find the statute to be in violation either of due process or the state constitution's guarantee of a judicial remedy for every wrong.²²¹ The court distinguished its constitutional provision from Florida's by stating that in Illinois the access principle was merely a philosophy, whereas the Florida court had interpreted the provision as granting vested rights in certain remedies which could be abrogated only by showing overpowering public necessity and absence of less onerous alternatives.²²² The Illinois statute, however, applies only to strict liability actions.²²³ Thus, plaintiff is not foreclosed from suit but merely from one theory. Indiana has also upheld its statute against attack based in part on the state constitutional provision granting legal remedy for injury.²²⁴

It is not clear at this point whether many other courts are likely to adopt this due process/access-to-courts reasoning. Most of the challenges to the architects' and builders' repose statutes, both successful and unsuccessful, were based on equal protection clauses. More recently, however, in the medical malpractice area, several courts have overturned reform statutes on the ground that they limit access to the courts.²²⁵ Although these decisions have focused on the statutes' requirement of use of medical malpractice panels,²²⁶ they indicate a greater willingness to review closely legislation on court access/due process grounds. Again, it is the judicial willingness to engage in close review that will be the key.

It is well recognized that constitutional provisions requiring remedy by due course of law are not blanket guarantees.²²⁷ Not every injury is remedied. And even for those that have been remedied in the past, legislatures may modify the law to reflect changing realities.²²⁸ Most states have found that rights which are not fundamental and have not vested can be rationally created or

219. 99 Ill. App. 3d 722, 425 N.E.2d 522 (1981).

220. *Id.* at 726-27, 425 N.E.2d at 525.

221. ILL. CONST. art. I, § 12.

222. 54 Ill. App. 3d at 727-28, 425 N.E.2d at 525-26.

223. ILL. ANN. STAT. ch. 110, § 13.213(3) (Smith-Hurd Supp. 1982).

224. *Dague v. Piper Aircraft Corp.*, 513 F. Supp. 19 (N.D. Ind. 1980).

225. *See, e.g.*, *Wright v. Central Du Page Hosp. Ass'n*, 63 Ill. 2d 313, 347 N.E.2d 736 (1976); *State ex rel. Cardinal Glennon Memorial Hosp. for Children v. Gaertner*, 583 S.W.2d 107 (Mo. 1979) (en banc); *Parker v. Children's Hosp. of Philadelphia*, 483 Pa. 106, 394 A.2d 932 (1978).

226. *See, e.g.*, *Caldana v. Holub*, 381 So. 2d 231 (Fla. 1980); *State ex rel. Cardinal Glennon Memorial Hosp. for Children v. Gaertner*, 583 S.W.2d 107 (Mo. 1979) (en banc); *Mattos v. Thompson*, 491 Pa. 385, 421 A.2d 190 (1980).

227. *Dague v. Piper Aircraft Corp.*, 513 F. Supp. 19, 25-26 (N.D. Ind. 1980).

228. [N]o one has a vested interest in any rule of the common law. Rights of property which have been created by the common law cannot be taken away without due process; but the law itself, as a rule of conduct, within constitutional limits, may be changed at the will of the legislature. The great office of statutes is to remedy defects in the common law as they develop, and to adopt it to the change of time and circumstance.

Galleger v. Davis, 183 A. 620, 624 (Del. Super. Ct. 1936). *See also Silver v. Silver*, 280 U.S. 117 (1929).

abrogated at the legislatures' will.²²⁹ Changing the time period in which suit can be brought (a time period that comports with earlier statutes of limitations interpretations) to solve a perceived economic crisis while allowing the majority of suits has been found to comport with this legislative right.²³⁰ But the denial of rights to thousands of plaintiffs in delayed manifestation suits may cause the courts to require either an "overpowering public necessity" or a showing of less onerous alternatives.²³¹

A further distinction based on delayed manifestation injuries is possible. Due process challenges to statutes of repose primarily have been based on the argument that the legislature cannot take away a right without providing a reasonable alternative.²³² In tort, however, there is no cause of action and therefore no vested property right upon which to base a due process challenge, until injury occurs. Therefore, an injury occurring after the running of the statutory period, such as an injury from old products, is not entitled to due process protection.²³³ Delayed manifestation suits, however, present a slightly different problem. In these cases injury often occurs within the statutory period; plaintiff is just unaware of its existence. Thus, in these cases a challenge to the statutes may rest upon a theoretical basis entirely distinct from the more traditional challenges.²³⁴ These cases are similar to those that involve denial of tolling of the statute for children and incompetents.²³⁵ Traditionally, statutes of limitations were tolled for these groups until they reached majority or regained competency in order to allow them full cognizance of their injuries and adequate time to pursue legal remedies. Denying tolling of the period until awareness of injury occurs is arguably a denial of due process because it denies reasonable access to the courts without providing adequate alternatives.²³⁶ The same may be said of repose statutes in delayed manifestation cases.

Two other potential due process problems exist for some statutes that do not provide for a grace period at the end of the statutory period or between the former law and the new repose period. Since the legislature may modify a vested right only if it provides a reasonable alternative, the new statutes must allow a grace period during which suits that would not be barred under the former law can be brought before being barred by the new period.²³⁷ Likewise, if no provision is made for persons who are injured near the end of the

229. *Duke Power Co. v. Carolina Envtl. Study Group, Inc.*, 438 U.S. 59, 87-88 (1978); *Sidele v. Majors*, 264 Ind. 206, 341 N.E.2d 763 (1976).

230. *Dague v. Piper Aircraft Corp.*, 513 F. Supp. 19, 25 (N.D. Ind. 1980).

231. *Overland Constr. Co. v. Sirmons*, 369 So. 2d 572, 573 (Fla. 1979) (citing *Kluger v. White*, 281 So. 2d 1, 4 (Fla. 1973)).

232. *See, e.g., Reeves v. Ille Elec. Co.*, 170 Mont. 104, 551 P.2d 647 (1976); *Rosenberg v. Town of North Bergen*, 61 N.J. 190, 293 A.2d 662 (1972).

233. *Dague v. Piper Aircraft Corp.*, 513 F. Supp. at 23; *Rosenberg v. Town of North Bergen*, 61 N.J. at 199, 293 A.2d at 666-67.

234. *See Bunker v. National Gypsum Co.*, ___ Ind. ___, 406 N.E.2d 1239 (1980).

235. *See, e.g., IND. CODE ANN. § [34-4-20A-5] 33-1-1.5-5* (Burns Supp. 1982); *N.D. CENT. CODE § 28-01.1-02(2)* (Supp. 1981); *UTAH CODE ANN. § 78-15-3(2)* (1977).

236. *Massery, supra* note 7, at 548.

237. *See, e.g., NEB. REV. STAT. § 25-224* (1979); *S.D. CODIFIED LAWS ANN. § 15-2-12.1* (Supp.

repose period, such as incorporating the usual two-year statute of limitations so a reasonable time is provided during which to bring suit, the statute may be violative of due process.²³⁸ These due process problems, while individually important, are easily remedied without changing the definite cutoff date for the vast majority of plaintiffs, and will therefore probably have little impact.

V. SUMMARY

Product liability statutes of repose were passed in a "crisis" atmosphere to help swing the pendulum away from what manufacturers and insurers saw as an extremely proplaintiff position. Generally, the language of the statutes is unequivocal and would seem to indicate a legislative intent to cut off liability after a specific number of years. The legislative preference for repose in order to maintain a healthy business atmosphere is clear. If strictly interpreted, the statutes will bar thousands of suits in which injured plaintiffs, through no fault of their own, do not discover their injuries until after the statutory period has run. To be sure, barring such suits would be consistent with repose interests and a legislative desire to limit liability and thereby promote a probusiness climate. Nonetheless, such an interpretation would be inconsistent with the loss-spreading and safety-promoting policies currently fostered by courts in a wide variety of decisions. An absolute time bar provides little incentive to produce safe, long-lasting products, and may lead to practices such as dumping potentially dangerous products in states that have repose statutes and establishing long shelf lives before sale.

Courts are being asked to review these statutes, and except for those courts that give extreme deference to legislative judgment, they are not likely to find the statutes as unequivocal as had been assumed, especially when statutes are challenged in delayed manifestation cases. The climate of crisis has passed. Courts reviewing the legislation in this calmer atmosphere will probably see less reason to protect insurance companies and businesses at the expense of plaintiffs' substantive rights, particularly in light of the evidence indicating these groups were at least in part responsible for the "crisis" and possessed the influence to have legislation passed to protect themselves. Precedents set in cases construing repose statutes that protect health practitioners and architects and builders will likely be used by many courts to invalidate the product liability statutes on constitutional grounds. Two state courts have already done so. Other jurisdictions may take a less sweeping approach by applying time extensions such as tolling or by upholding the repose statutes but finding that they apply only to old-product injury cases.

In our litigious society, courts are increasingly asked to provide antidotes to modern social problems.²³⁹ Delayed manifestation injuries caused by tech-

1982). *Bauld v. J.A. Jones Constr. Co.*, 357 So. 2d 401 (Fla. 1978); *Balzer v. Inland Steel Co.*, 100 Ill. App. 3d 1071, 427 N.E.2d 999 (1981).

238. *See, e.g.*, ILL. ANN. STAT. ch. 110, § 13-213 (Smith-Hurd Supp. 1982); IND. CODE ANN. § [34-4-20A-5] 33-1-1.5-5 (Burns Supp. 1982).

239. J. LIEBERMAN, *THE LITIGIOUS SOCIETY* (1981).

nological innovation are prime examples of such problems. Little has been done so far by legislatures to deal comprehensively with these technological effects.²⁴⁰ Until such responsible action is taken, courts are likely to review legislation closely.

Many preferable legislative responses could have been made: closer regulation of rate setting, rebuttable presumptions of nondefectiveness, different periods of repose for different types of goods, and so on. Since legislatures did not choose one of these less restrictive alternatives, many courts are likely to ameliorate the statutes' harsh effects by opting to protect the rights of the delayed manifestation plaintiffs.

240. One example of a more comprehensive legislative approach is the Superfund Section 301(c) Study, which is empowered to study the rights of individuals injured by chemicals, whether the tort system is adequate to cover them, and possible changes that should be made. Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. §§ 9601-9657 (Supp. IV 1980).