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Abstract

Latent toxic illness typically does not become manifest until months, years, or decades after a person's exposure to a toxic substance. The timing, extent, and characteristics of its physical manifestation are unpredictable and vary among individuals. Similarly, property damages associated with environmental contamination may not be detected for years, and the diseases caused by the contamination could take even longer to manifest. Accordingly, toxic harms present unique challenges for plaintiffs confronted with time limitations on their actions. Statutes of repose operate in conjunction with statutes of limitations to provide defendants with maximum protection from stale claims. Unlike statutes of limitations, however, they run from an event external to the plaintiff's injury, such as the sale of a product or the completion of an improvement to real property. Even if the statute of limitations has not yet expired, the plaintiff's claim may nevertheless be barred if it is brought after the repose period. Plaintiffs whose latent illnesses take longer to become detectable are likely to be time-barred; conversely, those who get sick sooner, i.e. before the repose period expires, may bring their claims. This Article examines the ways in which statutes of repose—and their narrow judicial interpretations—negatively impact latent-illness claimants. The Article demonstrates that to date any attempts by state legislatures to remedy this situation have fallen short. This Article concludes that the best solution is the simplest one—an absolute statutory exclusion for claims based on latent injuries.

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Introduction

Plaintiffs with latent toxic injury claims often encounter substantive and procedural doctrines that bar recovery even when the merits of their claims seem to demand a remedy. Latent toxic illness is insidious, and the timing, extent, and characteristics of its physical manifestation are unpredictable. Thus, toxic injuries provide the states with unique challenges in formulating time limitations for bringing tort actions—through statutes of limitations and statutes of repose—while at the same time accomplishing the policy goals underlying the time limits. Toxic injury typically does not become manifest until a date significantly later than the time of the plaintiff's exposure to the toxic substance. For example, asbestos-related illness may not manifest until years or decades after the plaintiff's last exposure.[1] Similarly, property damages associated with environmental contamination may not be detected for years, and the diseases caused by the contamination could take even longer to manifest.[2]

1. *See* Borel v. Fibreboard Paper Prods. Corp., 493 F.2d 1076, 1085 n.15 (5th Cir. 1973) (discussing studies conducted during the 1950s and 1960s examining the occurrence of asbestosis in asbestos insulation workers); *see also* Dan Fagin, Toms River: A Story of Science and Salvation 260–67 (2013) (discussing the triggers of carcinogenesis).

2. One of the earliest and most dramatic examples was the so-called "Love Canal" environmental disaster site, which generated evacuations, remediation, and decades of litigation. *See generally*, *Lessons from Love Canal: A Public Health Resource*, B.U. (2003), http://www.bu.edu/lovecanal/main2.html [https://perma.cc/5MGV-J6V8] (providing a history of the contamination, community action, and remediation at the site, extending over many years). This Article employs the terms "latent illness" and "latent toxic injury" throughout, but in certain contexts the terms are intended to encompass property contamination by toxic substances that could cause illness.

Statutes of limitations are ubiquitous, and their impact is well understood. Although nearly all the states and the District of Columbia have some form of tort statute of repose, these statutes, which may impose an absolute bar on some actions, are less conspicuous. Their impact on certain claims is either poorly understood or simply ignored by state legislatures. Statutes of repose operate in conjunction with, but in a manner different from, statutes of limitations. While personal injury statutes of limitations begin to run at the time the action accrues—typically when the injury to the plaintiff occurs—statutes of repose run from a designated point in time external to the plaintiff, such as the manufacture and sale of a product.[3] The state legislature defines in the first instance the act that triggers the running of the repose period. This act may have occurred years, or even decades, before the action accrues. The most common statutes of repose run for a fixed period of time from the sale of a product[4] or from the completion of an improvement to real property.[5] Both types apply directly to latent toxic injury claims, the former to toxic product claims and the latter to environmental contamination claims and their associated personal injuries. When a statute of repose applies to the case in addition to a statute of limitations, the plaintiff's action must be timely under both statutes. Thus, a plaintiff may be time-barred by the statute of repose even if the claim has not yet accrued under the statute of limitations.[6]

In the 1970s and 1980s, the states began to recognize the unfairness of applying a strict statute of limitations, which typically ran from the last exposure to the toxic substance, in latent illness cases, leading to revision of their arbitrary rules to accommodate plaintiffs

3. The United States Supreme Court has defined a statute of repose as placing "an outer limit on the right to bring a civil action [that] is measured not from the date on which the claim accrues but instead from the date of the last culpable act or omission of the defendant." CTS Corp. v. Waldburger, 134 S. Ct. 2175, 2182 (2014). The Court called it "an 'absolute . . . bar' on a defendant's temporal liability." *Id.* at 2183 (citation omitted); *cf.* California Pub. Emps.' Ret. Sys. v. Anz Sec., Inc., 137 S. Ct. 2042, 2050 (2017) (reasserting the concept of absolute bar in deciding that the petitioner, which had opted out of a class action settlement, was barred by a federal statute of repose from maintaining a subsequent individual action).

4. *See, e.g.*, Ind. Code § 34-20-3-1(b)(2) (2017) (running for ten years from the date of "delivery" of the product).

5. *See, e.g.*, Md. Code Ann., Cts. & Jud. Proc. § 5-108(a) (West 2011) (running for twenty years from when the improvement is first available for its intended use).

6. Conversely, unless the legislature provides otherwise by extending the accrual date, the claim could be barred by the statute of limitations before the period in the statute of repose expires. "Discovery" statutes of limitations are pervasive now, however, thus minimizing the likelihood of this scenario.

whose injuries manifested much later. The impetus for many of these statutory changes was the mass litigation arising from exposures to diethylstilbestrol ("DES"), the prescription drug given to pregnant women from the 1940s to the 1970s to prevent miscarriages.[7] Latent injuries to the offspring of women who ingested DES during pregnancy included signature cancers and other reproductive injuries that typically manifested years after birth and into adulthood, well after both the initial exposure to DES in utero and the birth of the offspring.[8] When these illnesses manifested they were long past the time allowed by the relevant statute of limitations for commencing a personal injury action. For reasons of fairness, the states eventually embraced "discovery" limitations periods[9] for DES claims and other claims based upon latent toxic injuries, pursuant to which the action is deemed to have accrued when the plaintiff discovered or reasonably should have discovered the injury.[10]

Although the states have uniformly embraced discovery statutes of limitations for latent disease claims, many states have remained intransigent in enforcing their repose statutes. Courts have routinely applied statutes of repose strictly and arbitrarily, with harsh results for plaintiffs. For example, in *In re Depakote: Alexander v. Abbott Laboratories, Inc.*,[11] the court conducted a choice of law analysis and

7. *See* Hymowitz v. Eli Lilly & Co., 539 N.E.2d 1069, 1073 (N.Y. 1989) (discussing the statute of limitations problems associated with DES-related illness).

8. *See* Bichler v. Eli Lilly & Co., 436 N.E.2d 182, 184 (N.Y. 1982) (discussing the connection between pre-natal DES exposure and cancer).

9. *See, e.g.*, N.Y. C.P.L.R. 214-c (McKinney 2003) (running the three-year statute of limitations "from the date of discovery of the injury by the plaintiff or from the date when through the exercise of reasonable diligence such injury should have been discovered by the plaintiff, whichever is earlier," in cases involving latent injury); Moll v. Abbott Labs., 506 N.W.2d 816, 823–24 (Mich. 1993) (interpreting the Michigan discovery statute of limitations to apply to pharmaceutical product liability claims).

10. *See, e.g.*, Cal. Civ. Proc. Code § 340.8(a) (West 2006). In California, for actions based upon exposures to "a hazardous material or toxic substance," the statute of limitations:

> shall be no later than either two years from the date of injury, or two years after the plaintiff becomes aware of, or reasonably should have become aware of, (1) an injury, (2) the physical cause of the injury, and (3) sufficient facts to put a reasonable person on inquiry notice that the injury was caused or contributed to by the wrongful act of another, whichever occurs later.

Id.

11. No. 12–CV–52–NJR–SCW, 2017 WL 1326964 (S.D. Ill. Apr. 11, 2017), *on recons.*, No. 12–CV–52–NJR–SCW, 2017 WL 3116238 (S.D. Ill. July 21, 2017).

concluded that the Indiana product liability statute of repose barred the minor plaintiffs' claims for birth defects arising from in utero exposures to the defendant's prescription drug, Depakote, ingested by their mothers during pregnancy.[12] Although Illinois—the other state with interests in the litigation—also had a statute of repose, it contained a tolling provision for minors, which would have benefited the plaintiffs.[13] The court was not persuaded, however, by the plaintiffs' argument that Illinois law should apply because of its policy interest in protecting minors from harsh results and ruled instead that the Indiana bar should apply.[14]

Even in cases in which the relevant discovery statute of limitations is sufficiently broad to accommodate the plaintiff's claims—and where the equities of the case demand a remedy—the statute of repose has often barred the claim. Consider, hypothetically, a state that has a discovery statute of limitations for personal injuries that runs for three years from the time that the plaintiff knows of the injury and also knows of its likely cause. The same jurisdiction has a statute of repose for product liability claims that runs for ten years from the date on which the defendant sold the product to the initial consumer. Assume the plaintiff brings a product liability personal injury claim against the defendant product seller less than three years after her undisputed diagnosis and knowledge of causal connection to the defendant's product. But the claim happens to be commenced twenty years from the time the product was first sold because the plaintiff's illness took many years to manifest. Clearly the plaintiff would not be barred by the statute of limitations, but, absent an exception, the claim is absolutely barred by the ten-year statute of repose.

The states are not unaware of this problem, and some have struggled with the inherent unfairness of applying statutes of repose to latent injury claims. Although the states have uniformly embraced the concept of discovery statutes of limitations to address this problem, those states with statutes of repose have largely done little to fully alleviate the disability that repose places on latent injury plaintiffs who are unfortunate enough to have their injuries manifest after the expiration of the repose period. Several state courts have flatly rejected the harsh and arbitrary bar of statutes of repose on

12. *Id.* at *4.

13. *Id.* at *5; *see* 735 Ill. Comp. Stat. Ann. 5/13-213(d) (West 2011) *invalidated by* Best v. Taylor Mach. Works, 689 N.E.2d 1057, 1105–06 (Ill. 1997) (tolling the period of limitations until the person turns eighteen or is no longer under a legal disability).

14. *In re Depakote*, 2017 WL 1326964, at *6–7.

state constitutional grounds.[15] On the other end of the spectrum are the states that continue to tolerate the inequities of their repose statutes in the service of absolute protection of certain business interests and activities. In between these extremes are the states that have undertaken ad hoc efforts, resulting in a hodge-podge of insufficient state rules enacted incrementally and favoring certain toxic tort plaintiffs over others. Where a statute of repose applies to some or all latent toxic injury cases, the difference between a viable claim and one that is time-barred may simply be the fortuity of one plaintiff's illness manifesting a day before the illness of another plaintiff.

With these considerations in mind, this Article argues that latent toxic injury cases have unique characteristics that make it fundamentally unfair to apply statutes of repose in most cases. These considerations substantially outweigh any need for shielding defendants from stale claims and unexpected liabilities. Accordingly, states determined to retain their statutes of repose for at least some claims should enact an absolute exclusion for latent illness claims. Part I of this Article provides a brief overview of the types of statutes of repose that appear in latent toxic injury litigation, demonstrating the harsh results of a strict interpretation of the statutes and examining the typical justifications for these callous rules. Part II surveys some of the ways that states have chipped away at their repose statutes for latent illness claims, including judicial rulings on their constitutionality, and demonstrates the inadequacy of those attempts. Part III seeks an effective solution to the problem and shows that even those few states that have enacted broad exceptions for latent injuries simply do not go far enough. Ultimately, this Article concludes that only an absolute exclusion for latent injury claims will suffice to avoid the disability that statutes of repose impose upon toxic tort plaintiffs.

I. An Overview of the Problem

Statutes of repose operate in conjunction with statutes of limitations to provide maximum protection for defendants. Traditionally, personal injury actions were deemed to accrue for statute of limitations purposes at the time the tort occurs, which was when the plaintiff suffered injury.[16] Two events—the defendant's act and the plaintiff's injury—typically occurred at or around the same time, as with most motor vehicle accidents, for example. The full extent of the plaintiff's injury might not be known at the time of the defendant's

15. *See infra* notes 62–77 and accompanying text.

16. *See* Dan B. Dobbs et al., Hornbook on Torts § 18.2, at 429 (2d ed. 2016).

act, but the fact that the plaintiff suffered an injury was known. Statutes of limitations did not originally contemplate latent illness cases, in which the time between the defendant's action, the plaintiff's exposure to a toxic substance, and the first manifestation of an illness caused by that exposure could stretch for years or decades. Courts and legislatures eventually relented on the arbitrary bar of statutes of limitations by introducing the "discovery" concept for latent illness. The New Hampshire statute of limitations for "personal actions," excludeing defamation, contains typical language:

> [The action] may be brought only within 3 years of the act or omission complained of, except that when the injury and its causal relationship to the act or omission were not discovered and could not reasonably have been discovered at the time of the act or omission, the action shall be commenced within 3 years of the time the plaintiff discovers, or in the exercise of reasonable diligence should have discovered, the injury and its causal relationship to the act or omission complained of.[17]

A few jurisdictions have crafted specific discovery statutes for latent harms associated with specific toxic exposures, such as hazardous chemicals.[18] All discovery statutes of limitations recognize the fundamental unfairness of barring a plaintiff's claim before the plaintiff knew or could have known of the illness.

In contrast, statutes of repose run from the time of a particular act by the defendant, such as the sale of a product,[19] the designation

17. N.H. REV. STAT. ANN. § 508:4(I) (2010).

18. *See, e.g.*, CONN. GEN. STAT. ANN. § 52-577c (West 2013), *amended by* 2015 Conn. Legis. Serv. P.A. 15-67 (West). The Connecticut statute of limitations provides a discovery rule for claims due to "exposure to a hazardous chemical substance or mixture or hazardous pollutant." *Id.* (running two years from the date when the injury was discovered or reasonably could have been discovered). The New York discovery statute of limitations for "latent effects of exposure to any substance or combination of substances, in any form, upon or within the body or upon or within property" is broader, including products and biological substances. N.Y. C.P.L.R. 214-c(2) (McKinney 2003). Although the New York statute allows the plaintiff time to ascertain the cause of the illness and thereby identify the defendant, the plaintiff's task becomes more onerous as time goes on, and eventually a final repose is imposed. *Id.* 214-c(4).

19. *See* ALA. CODE § 6-5-502(c) (2014), *invalidated by* Lankford v. Sullivan, Long & Hagerty, 416 So. 2d 996, 1004 (Ala. 1982); ARIZ. REV. STAT. ANN. § 12-551 (2016), *invalidated by* Hazine v. Montgomery Elevator Co., 861 P.2d 625, 630 (Ariz. 1993); CONN. GEN. STAT. ANN. § 52-577a(a) (West 2013); FLA. STAT. § 95.031(2)(b) (2017); GA. CODE ANN. § 51-1-11(b)(2) (2007); 735 ILL. COMP. STAT. ANN. 5/13-213(b) (West 2011), *invalidated by* Best v. Taylor Mach. Works, 689 N.E.2d 1057, 1105–06 (Ill. 1997); IND. CODE § 34-20-3-1 (2017); IOWA CODE § 614.1(2A) (2017); KY. REV. STAT. ANN. § 411.310(1) (West 2017); NEB. REV. STAT. § 25-224(2) (2016); N.H. REV.

of the product's useful safe life,[20] the completion of an improvement to real property,[21] or the time of a particular medical treatment,[22]

Stat. Ann. § 507-D:2(II)(a) (2010), *invalidated by* Heath v. Sears, Roebuck & Co., 464 A.2d 288 (N.H. 1983); N.C. Gen. Stat. § 1-46.1 (2015); N.D. Cent. Code § 28-01.3-08(1) (2016), *invalidated by* Dickie v. Farmers Union Oil Co. of LaMoure, 611 N.W.2d 168 (N.D. 2000); Ohio Rev. Code Ann. § 2305.10(C) (West 2004); Or. Rev. Stat. § 30.905 (2015); 9 R.I. Gen. Laws Ann. § 9-1-13(b) (West 2006), *invalidated by* Kennedy v. Cumberland Eng'g Co., Inc., 471 A.2d 195 (R.I. 1984); Tenn. Code Ann. § 29-28-103(a) (2012); Tex. Civ. Prac. & Rem. Code Ann. § 16.012(b) (West 2002); Wis. Stat. § 895.047(5) (2015–16).

20. *See e.g.*, Conn. Gen. Stat. Ann. § 52-577a(c) (West 2013), *amended by* 2017 Conn. Legis. Serv. P.A. 17-97 (H.B. 7194) (West) (allowing an exception to the statute of repose for plaintiffs who can prove that the harm occurred during the useful safe life of the product); Fla. Stat. § 95.031(2)(b) (2017); Idaho Code § 6-1403(1) (2010); Kan. Stat. Ann. § 60-3303(b)(1) (2005); Mich. Comp. Laws Ann. § 600.5805(13) (West 2013) (stating if the product has been in use for ten years or more, the plaintiff loses any presumptions that otherwise would apply); Minn. Stat. § 604.03 (2017); Tenn. Code Ann. § 29-28-103(a) (2012); Wash. Rev. Code § 7.72.060(1)(a), (2) (2017).

21. *See e.g.*, Ala. Code § 6-5-218(a) (2014), *invalidated by* Jackson v. Mannesmann Demag Corp., 435 So. 2d 725 (Ala. 1983); Alaska Stat. Ann. § 09.10.055(a) (2007); Ariz. Rev. Stat. Ann. § 12-552(A) (2016); Ark. Code Ann. § 16-56-112 (West 2013); Cal. Civ. Proc. Code §§ 337.1, 337.15 (West 2006); Colo. Rev. Stat. § 13-80-104 (2017); Conn. Gen. Stat. Ann. § 52-584a (West 2013); Del. Code Ann. tit. 10, § 8127 (2016); D.C. Code § 12-310 (2001); Fla. Stat. § 95.11(3)(c) (2017); Ga. Code Ann. § 9-3-51 (2017); Haw. Rev. Stat. Ann. § 657-8 (West 2008); Idaho Code § 5-241 (2010); 735 Ill. Comp. Stat. Ann. 5/13-214 (West 2011), *amended* by 2014 Ill. Legis. Serv. P.A. 98-1131 (S.B. 2221) (West); Ind. Code § 32-30-1-5(d) (2017); Iowa Code § 614.1(11)(a) (2017); Ky. Rev. Stat. Ann. § 413.135 (West 2017), *invalidated by* Perkins v. Ne. Log Homes, 808 S.W.2d 809 (Ky. 1991); La. Stat. Ann. § 9:2772(A)(1) (2005); Me. Rev. Stat. Ann. tit. 14, § 752-A (2003); Md. Code Ann., Cts. & Jud. Proc. § 5-108(a) (West 2011); Mass. Gen. Laws ch. 260, § 2B (2016); Mich. Comp. Laws Ann. § 600.5839 (West 2013); Minn. Stat. § 541.051 (2017); Miss. Code Ann. § 15-1-41 (West 2013); Mo. Rev. Stat. § 516.097 (2016); Mont. Code Ann. § 27-2-208 (2017); Nev. Rev. Stat. §§ 11.202, 11.2055 (2016); N.H. Rev. Stat. Ann. § 508:4-b (2010); N.J. Stat. Ann. § 2A:14-1.1 (West 2015); N.M. Stat. Ann. § 37-1-27 (West 2010); N.C. Gen. Stat. § 1-50(a)(5)(f) (2015); N.D. Cent. Code § 28-01-44 (2016); Ohio Rev. Code Ann. § 2305.131 (West 2004); Okla. Stat. tit. 12, § 109 (2011); Or. Rev. Stat. § 12.135(1) (2015); 42 Pa. Stat. and Cons. Ann. § 5536 (West 2004); 9 R.I. Gen. Laws Ann. § 9-1-29 (West 2006); S.C. Code Ann. § 15-3-640 (2017); S.D. Codified Laws §§ 15-2A-3 to -9 (2014); Tenn. Code Ann. §§ 28-3-202 to -205 (West 2012); Tex. Civ. Prac. & Rem. Code Ann. §§ 16.008 to .009(a) (West 2002); Utah Code Ann. § 78B-2-225(4) (LexisNexis 2012); Va. Code Ann. § 8.01-250 (West 2017); Wash. Rev. Code § 4.16.310 (2017); W. Va. Code Ann. § 55-2-6a (West 2002), *amended by* 2015 W. Va. Legis. Serv. Ch. 2; Wis. Stat. § 893.89 (2015–16); Wyo. Stat. Ann. §§ 1-3-111

regardless of when the plaintiff suffered injury. The Georgia product liability statute, for example, provides that "[n]o action shall be commenced pursuant to this subsection with respect to an injury after ten years from the date of the first sale for use or consumption of the personal property causing or otherwise bringing about the injury."[23] Pennsylvania's real property improvements statute of repose provides that actions for property damage or personal injury against developers, contractors, or architects of a real property improvement may not be brought more than twelve years after "construction of such improvement."[24] Thus, a repose provision sets an arbitrary outside limit on all claims, even if the person has not yet discovered the basis for the claim.[25]

Statutes of repose such as these were the darlings of the tort reform movement in the late twentieth century, touted by reformists bent on protecting business and industry from tort lawsuits.[26] With plaintiff-friendly developments such as the abrogation of the privity requirement and the expansion of strict product liability, legislatures and courts solidified these arbitrary time limits to even the playing field.[27] Architects, engineers, and building contractors felt the same pressure as product sellers from the abandonment of privity[28] in ac-

to -113 (West 2007); *see also* NEB. REV. STAT. § 25-223 (2016) (running from "the time of the act giving rise to the cause of action"); N.C. GEN. STAT. § 1-52(16) (2015) (stating the general tort claim statute of repose), *amended by* H.B. No. 436, 2017 Gen. Assembly (N.C.).

22. *See, e.g.*, N.D. CENT. CODE § 28-01-18(3) (2016); UTAH CODE ANN. § 78B-3-404(1) (LexisNexis 2012); W. VA. CODE ANN. § 55-7B-4 (West 2002), *amended by* 2017 W. Va. Legis. Serv. Ch. 3. The North Dakota statute expressly states that the repose period will not be extended for non-discovery of the injury, unless the non-discovery was caused by the defendant's fraud. N.D. CENT. CODE § 28-01-18(3) (2016). Some medical malpractice statutes of repose contain an exception for discovery of a foreign object left inside the plaintiff. *See, e.g.*, MASS. GEN. LAWS ch. 260, § 4 (2016). Medical malpractice repose statutes are outside the scope of this Article, however, as the injuries typically are not latent illnesses caused by exposure to a toxic substance.

23. GA. CODE ANN. § 51-1-11(b)(2) (2007).

24. 42 PA. STAT. AND CONS. ANN. § 5536(a) (West 2004).

25. *See* CTS Corp. v. Waldburger, 134 S. Ct. 2175, 2187 (2014).

26. DOBBS ET AL., *supra* note 16, § 18.4, at 433.

27. *See id.*; *cf.* Chrysler Corp. v. Batten, 450 S.E.2d 208, 212 (Ga. 1994). The Georgia Supreme Court noted that the stabilization of the product liability insurance underwriting market was a goal of the statute of repose, which applied to both strict liability and negligence actions. *Id.*

28. *See, e.g.*, Hanna v. Fletcher, 231 F.2d 469, 476 (D.C. Cir. 1956) (holding that privity of contract no longer applied to negligence claims against a building contractor).

tions against them for improvements to real property.[29] Furthermore, those engaged in building design and construction resented what they viewed as the unfairness of the discovery statutes of limitations and lobbied for the kind of finite limit on litigation that a statute of repose would impose.[30]

Some state legislatures have included in their statutes of repose the policies they hoped repose would advance. To this end, for example, the Utah legislature provided a list of general "findings" in the state's statute of repose for claims related to improvements to real property.[31] This list reflects the universal policy justifications for statutes of repose in all contexts. The Utah legislature first expressed the view that after a certain length of time, "the possibility of injury or damage . . . become[s] highly remote," which results in "unexpected[] . . . costs and hardships" for the defendant.[32] Ultimately, the legislature stated, the possibility of injury becomes too "remote and unexpected" more than seven years from the completion of the improvement,[33] presumably diminishing any perceived unfairness to plaintiffs. The statute identifies certain "undue and unlimited liability risks" that include, but are not limited to, the cost of liability insurance, the cost of document storage, and the hardship of defending against claims brought many years after a project is finished.[34] Not to put too fine a point on it, the legislature stated that "these costs and hardships constitute clear social and economic evils."[35] Essentially, these justifications amount to unpredictability and inability to accurately estimate and plan for future costs.

The Alabama legislature articulated a common variation on these policies, this time referencing product liability litigation:

> The Legislature finds that product liability actions and litigation have increased substantially, and the cost of such litigation has risen in recent years. The Legislature further finds that these increases are having an impact upon consumer prices, and upon the availability, cost, and use of product liability

29. Michael J. Vardaro & Jennifer E. Waggoner, Note, *Statutes of Repose—The Design Professional's Defense to Perpetual Liability*, 10 St. John's J. Legal Comment. 697, 715–16 (1995).

30. Jackson v. Mannesmann Demag Corp., 435 So. 2d 725, 728–29 (Ala. 1983) (holding the Alabama statute of repose for improvements to real property unconstitutional).

31. Utah Code Ann. § 78B-2-225(2) (LexisNexis 2012).

32. *Id.* § 78B-2-225(2)(a).

33. *Id.* § 78B-2-225(2)(d).

34. *Id.* § 78B-2-225(2)(b).

35. *Id.* § 78B-2-225(2)(c).

> insurance, thus, affecting the availability of compensation for injured consumers.[36]

Thus, Alabama went further than Utah on the tort reform bandwagon, suggesting that even spreading losses through consumer prices and liability insurance would nevertheless result in such high costs to defendants that little would be left to compensate injured consumers. To ameliorate these perceived "social evils,"[37] the legislature adopted a consistent set of limitations and repose rules for all product liability actions.[38]

With respect to improvements to real property, the South Dakota legislature articulated a set of policy justifications for mandating a repose period which were specifically directed at real property construction projects. The legislature stated that following completion of a project:

> [P]ersons involved in the planning, design, and construction of improvements to real estate lack control over the determination of the need for, the undertaking of and the responsibility for maintenance, and lack control over other forces, uses and intervening causes which cause stress, strain, wear, and tear to the improvements and, in most cases, have no right or opportunity to be made aware of or to evaluate the effect of these forces on a particular improvement or to take action to overcome the effect of these forces.[39]

Accordingly, the statute established an outside limit for actions of ten years following the substantial completion of a project.[40] In the opinion of the legislature, the repose period was "in the public interest and in the interest of equating the rights of due process between the prospective litigants."[41]

These policies are less explicit in other real property improvement statutes of repose. A common exception to real property improvement statutes are claims against the party in possession of the improvement

36. Ala. Code § 6-5-500 (2014).

37. Lankford v. Sullivan, Long & Hagerty, 416 So. 2d 996, 1001 (Ala. 1982).

38. Ala. Code § 6-5-500 ("It is the intent of the Legislature that a comprehensive system consisting of the time for commencement of actions, for discoverability of actions based upon insidious disease and the repose of actions shall be instituted in this state.").

39. S.D. Codified Laws § 15-2A-1 (2014).

40. *Id.*

41. *Id.*

after completion, typically a landowner or tenant.[42] This exception allows claims against parties with continuing control of the improvement and with the ability to maintain and repair it. While the control justification may be theoretically valid, it completely ignores the practical situation in which a person is exposed to a toxic condition prior to the expiration of the repose period, but manifests an illness after the repose period has expired.

Another argument in favor of statutes of repose for claims arising from improvements to real property is that architectural and engineering creativity is unfairly restricted by the prospect of unending litigation.[43] Of course, the same could be said for the designers of products, including medical devices, prescription drugs, and thousands of other products that could result in serious—and potentially latent—injuries to consumers. This Article posits that the policy justifications for both product liability and real property improvement statutes of repose are manifestly unfair when the injury claimed is latent illness.[44]

The states' reluctance to reform their statutes of repose is explained by the policies the legislatures have advanced, policies that go beyond merely assuring an end to anticipated litigation. As the Utah statute demonstrated, statutes of repose are intended to protect broader business interests.[45] Forcing a business entity to defend a tort claim beyond a certain fixed time constitutes a "clear social and economic evil[]" in the legislature's express view.[46] Such hyperbolic language evinces a strong preference for the interests of business over the rights of injured parties to compensation. The states may also have felt the need to even the playing field because of a perceived advantage that some modern tort doctrines, such as strict product liability, may have provided to plaintiffs.[47] Because statutes of repose may bar a claim that would otherwise be timely under the statute of

42. *See, e.g.*, CAL. CIV. PROC. CODE § 337.1(d) (West 2006) (patent defects); *id.* § 337.15(e) (latent defects); COLO. REV. STAT. § 13-80-104(3) (2017); N.C. GEN. STAT. § 1-50(a)(5)(d) (2015).

43. Vardaro & Waggoner, *supra* note 29, at 715–16.

44. *See infra* notes 114–120, 169–179 and accompanying text.

45. UTAH CODE ANN. § 78B-2-225(2)(a) (LexisNexis 2012).

46. *Id.* § 78B-2-225(2)(c).

47. *See* DOBBS ET AL., *supra* note 16, § 18.4, at 433 (noting that statutes of repose evolved to provide a procedural replacement for some obsolete substantive tort doctrines that had shielded some defendants from liability, such as the privity rule in product liability cases).

limitations, statutes of repose are the ultimate trump card for defendants.[48]

A close examination of the interaction of a statute of repose and a statute of limitations in a toxic latent illness case is particularly instructive. This interaction and its arbitrary result is exemplified by *Montgomery v. Wyeth*,[49] a case under Tennessee law. Tennessee courts had long interpreted the personal injury statute of limitations to be a discovery statute.[50] But the state's product liability statute of repose added an additional restriction, providing that:

> [An action] must be brought within six (6) years of the date of injury, in any event, the action must be brought within ten (10) years from the date on which the product was first purchased for use or consumption, or within one (1) year after the expiration of the anticipated life of the product, whichever is the shorter.[51]

In *Montgomery*, the plaintiff took the defendant's drug in 1997, during the short period of time that it was on the market.[52] She was diagnosed with pulmonary hypertension in 2005 and brought a personal injury action within six months of the diagnosis, well within the discovery statute of limitations.[53] But her personal injury claim was barred by the accompanying statute of repose.[54] Although the plaintiff brought suit within ten years of her first use or consumption of the drug, the court held that the "anticipated life" of the product had expired.[55] The Tennessee legislature defined "anticipated life" as determined by "the 'expiration date placed on the product by the manufacturer when required by law.'"[56] The Sixth Circuit, affirming the district court, held that because the expiration date set by Wyeth

48. The bar can work the other way as well, i.e., a claim timely under the statute of repose could still be barred if it is beyond the statute of limitations. This scenario is far less likely to occur in cases involving latent toxic injury subject to a discovery statute of limitations.

49. 580 F.3d 455 (6th Cir. 2009).

50. *See* McCroskey v. Bryant Air Conditioning Co., 524 S.W.2d 487, 491 (Tenn. 1975).

51. TENN. CODE ANN. § 29-28-103(a) (West 2012). The statute contains an exception for asbestos and silicone gel breast implants. *Id.* § 29-28-103(b).

52. *Montgomery*, 580 F.3d at 458.

53. *Id.*

54. *Id.* at 458–59.

55. *Id.* at 467 (quoting TENN. CODE ANN. § 29-28-102(1) (West 2012)).

56. *Id.* (quoting § 29-28-102(1)).

for its drug was three years from the date of manufacture, here 1997, the statute of repose barred any action brought after September 2000, regardless of the fact that it was brought within ten years of first purchase.[57] Moreover, the plaintiff did not need to know the expiration date for the action to be barred.[58] The court stated: "'Statutes of limitation find their justification in necessity and convenience rather than logic . . . . They represent a *public policy* about the privilege to litigate.'"[59]

Montgomery illustrates the inherent unfairness of a statute of repose and its particular unfairness to latent illness plaintiffs. The plaintiff's action was timely under the statute of limitations, but ran afoul of an especially arbitrary and restrictive clause in the statute of repose. The determination of the "anticipated life" of the product was exclusively within the manufacturer's domain, and the setting of the expiration date did not require any logical or reasonable basis. The plaintiff had no control over when she would become ill, placing her at a decided disadvantage for any legal recovery. Moreover, the statute treated her differently from any plaintiffs who had the fortuity to develop the same illness earlier in time and within the statute's parameters. The message the statute communicates to manufacturers is to set early expiration dates so as to reduce the number of claims for latent injuries and receive maximum protection from product litigation.

II. The Erratic Road to Reform

For decades courts and scholars have been aware of the problems associated with applying statutes of repose to latent illness,[60] but reform has been sluggish and stunningly inconsistent. Statutes of repose are creatures of state law, making state courts the ultimate arbiters of the validity of those statutes. Accordingly, early challengers to statutes of repose brought actions in state court that raised a variety of constitutional arguments under both state and federal constitutional provisions, and some were successful.[61] Although it is beyond the scope of this Article to examine the substance of these

57. *Id.*

58. *Id.*

59. *Id.* (quoting Mathis v. Eli Lilly & Co., 719 F.2d 134, 140 (6th Cir. 1983)).

60. *See, e.g.*, Pierce v. Johns-Manville Sales Corp., 464 A.2d 1020, 1027–28 (Md. 1983).

61. *See generally* Francis E. McGovern, *The Status of Statutes of Limitations and Statutes of Repose in Product Liability Actions: Present and Future*, 16 Forum 416, 425–29 (1980).

constitutional challenges in any detail, this Part begins with a brief overview of some of these cases. The cases demonstrate the tenacity of the policies underlying statutes of repose and reinforce the inequity of their application. This Part then examines legislative enactments that have limited the operation of statutes of repose under some circumstances, but which have been patently inadequate to address the problem of latent toxic illness.

A. Early Constitutional Challenges

Objectors have advanced a variety of constitutional arguments, with mixed and limited results. In Alabama, both the product liability statute[62] and the real property improvements statute[63] ran afoul of the state constitutional provision guaranteeing open courts.[64] In holding that the product liability statute of repose violated this provision, the Alabama Supreme Court observed that the legislature's list of "social evils" that necessitated a repose period bore no substantial relationship to the ten-year statute of repose.[65] The court ultimately concluded that "[t]o say that barring claims involving products that have been used for more than 10 years will eradicate and ease the cost increases in consumer prices and product liability insurance is unreasonable in our opinion."[66] The court applied the same rationale in holding the real property improvements statute of repose in violation of the open courts provision, having rejected an effort to distinguish real property construction from manufactured products.[67]

In New Hampshire, the state's highest court held that the product liability statute of repose denied plaintiffs equal protection of the laws, concluding that the repose statute had no reasonable relationship to the state's objective of reducing product liability insurance

62. Lankford v. Sullivan, Long & Hagerty, 416 So. 2d 996, 1004 (Ala. 1982) (holding Ala. Code § 6-5-502(c) (1975) unconstitutional).

63. Jackson v. Mannesmann Demag Corp., 435 So. 2d 725, 728–29 (Ala. 1983) (holding Ala. Code § 6-5-218(a) (1975) unconstitutional).

64. Ala. Const. art. I, § 13.

65. *Lankford*, 416 So. 2d at 1001 (citing Ala. Code § 6-5-500 (1975) (amended 1979)).

66. *Id.* The court also stated that the product liability statute was a violation of due process because "it does not provide for an extension of the limitation period for someone injured shortly before the expiration period." *Id.* at 1003. The court suggested that the addition of a savings clause to allow claims for injuries occurring immediately prior to the expiration of the repose period would rectify the statute. *Id.* As this Article demonstrates, a savings provision does not solve the fundamental problem of latent illness claims.

67. *Jackson*, 435 So. 2d at 728 (citing *Lankford*, 416 So. 2d at 1002–03).

costs.[68] In *Heath v. Sears, Roebuck & Co.*, the court reasoned that "[t]he effect of this absolute limitation on suits against manufacturers is to nullify some causes of actions before they even arise,"[69] meaning that the injuries suffered by some product plaintiffs will not manifest until after the expiration of the statute of repose. The court was especially concerned with the statute's disparate and arbitrary impact on product plaintiffs when compared to non-product plaintiffs whose claims were not subject to the statute of repose.[70]

Similarly, the North Dakota Supreme Court held that the general product liability statute of repose violated the equal protection clause of the state constitution because "[t]here is simply no demonstration by the testimony or evidence submitted to the legislature which shows harm or prejudice to sellers and manufacturers resulting from damage awards against them for injuries incurred more than 10 years from initial purchase or 11 years from manufacture of defective products."[71] In contrast, a few years earlier the same court had upheld the ten-year statute of repose applicable to improvements to real property against an equal protection challenge.[72] When the product liability defendants tried to argue that the reasoning of the earlier case should apply equally to the product statute of repose, the court disagreed, stating that "'[a]rchitects, contractors, engineers, and inspectors . . . in most cases do not have continuing control over or involvement with the maintenance of the improvement after its initial construction,'" but a "'materialman provides manufactured goods and should be held accountable under the general tort rules governing liability for defects in those products.'"[73]

A few litigants have been successful with other constitutional arguments. For example, the Kentucky Supreme Court held that the statute of repose for improvements to real property violated both the state constitution's prohibition against special legislation and its open courts provision.[74] In so ruling, the Kentucky court stated that while "a majority of the states have upheld the construction industry's statute of repose against attack on constitutional grounds," the

68. Heath v. Sears, Roebuck & Co., 464 A.2d 288, 295 (N.H. 1983).

69. *Id.* at 295.

70. *Id.*

71. Dickie v. Farmers Union Oil Co., 611 N.W.2d 168, 172 (N.D. 2000).

72. Bellemare v. Gateway Builders, Inc., 420 N.W.2d 733, 738 (N.D. 1988) (citing N.D. Cent. Code § 28-01-44(1)(c) (2016)).

73. *Dickie*, 611 N.W.2d at 172 (quoting *Bellemare*, 420 N.W.2d at 738).

74. Perkins v. Ne. Log Homes, 808 S.W.2d 809, 817 (Ky. 1991) (discussing Ky. Const. §§ 14, 54, 59 & 241).

Kentucky state constitution mandated its finding of a violation.[75] The court then punctuated its decision with an editorial comment: "If that places us in a statistical minority, we can only commiserate with the citizens of other states who do not enjoy similar protection."[76]

Those courts finding constitutional violations have emphasized the lack of evidence that statutes of repose achieve their legislative policy goals. But for the most part, as the Kentucky Supreme Court noted, statutes of repose have withstood constitutional challenges.[77] Some state legislatures have recognized the problems that statutes of repose create for plaintiffs with latent illness claims and have taken action—usually on an ad hoc basis—to minimize or eliminate those problems, but these efforts have lacked a comprehensive and effective approach.

B. Legislative Revisions

Attempts to solve the problems of repose statutes for latent illness plaintiffs are evident in both product liability legislation and statutes addressing improvements to real property, but to date these attempts have fallen short. In some states, the problems are compounded by the multiple identities of some substances as both products and releases into the environment during and after property improvements.[78] For example, lead may be harmful as a product component,[79]

75. *Id.* at 818.

76. *Id.*

77. *See, e.g.*, Mathis v. Eli Lilly & Co., 719 F.2d 134, 141, 145 (6th Cir. 1983) (holding that the Tennessee product liability statute of repose does not violate the due process clauses of the U.S. Constitution and the state constitution or the state constitutional prohibition of impairment of contracts); Mercado v. Baker, 792 P.2d 342, 343–44 (Idaho 1990) (holding that the Idaho product liability statute of repose does not deny equal protection of the law or violate the open courts provision of the state constitution, nor is it unconstitutionally vague); Craftsman Builder's Supply, Inc. v. Butler Mfg. Co., 974 P.2d 1194, 1200–01 (Utah 1999) (holding that the Utah construction statute of repose did not violate the open courts provision of the state constitution because the legislature clearly identified the "social evils" the statute was intended to address).

78. This multiple identity issue has led some states to explicitly exclude defective products from the scope of their real property improvement statutes of repose. *See, e.g.*, ALASKA STAT. § 09.10.055(b)(1)(E) (2007) (excluding defective products); D.C. CODE § 12-310(b)(3) (2001) (excluding "any manufacturer or supplier of any equipment or machinery or other articles installed in a structure upon real property"); NEV. REV. STAT. § 11.202(2)(b)(2) (2016) (excluding defective products); *see also* Buttz v. Owens-Corning Fiberglas Corp., 557 N.W.2d 90, 92 (Iowa 1996) (holding that asbestos used for a real property improvement was a product, and not subject to the statute of repose, because the plaintiff's exposure occurred before the asbestos-containing product was attached to the real property). *But see* S.C. CODE ANN. § 15-3-

and also when released into the environment at certain levels, resulting in non-product tort claims such as nuisance.[80] Furthermore, strict construction of statutes of repose has achieved inconsistent and illogical results. Examples abound, and, at their most complex, a state's statutory clusters create a legal Gordian knot.

Some states have excluded from repose a single substance or several substances known to cause latent illness and to which a plaintiff must have been exposed to avoid repose.[81] These statutes are often construed very narrowly and to the detriment of plaintiffs, as a Tennessee case illustrates.[82] The same Tennessee statute of repose that thwarted the plaintiff in *Montgomery*[83] contains an exception for asbestos exposure and silicone gel breast implants.[84] This provision has been applied strictly—some might say mercilessly. In *Adams v. Air Liquide America*,[85] the court affirmed the dismissal of a case brought by a sandblaster who suffered from silicosis and silica-related lung cancer.[86] The Tennessee court determined that silica was

640(9) (2017) (including within the repose period actions against "owners or manufacturers of components, or against any person furnishing materials" for the improvement).

79. *See, e.g.*, Banks *ex rel.* Banks v. Sherwin-Williams Co., 134 So. 3d 706, 712 (Miss. 2014) (denying summary judgment to the defendant in a product liability action because a material question of fact existed as to whether the plaintiff was exposed to the defendant's lead paint product).

80. *See, e.g.*, Concerned Pastors for Soc. Action v. Khouri, 194 F. Supp. 3d 589, 605–06 (E.D. Mich. 2016) (denying the local and state officials' motions to dismiss in an action arising from lead contamination of the public water supply in Flint, Michigan).

81. *See, e.g.,* ALASKA STAT. § 09.10.055(b)(1)(A) (2007) (excluding injury from "prolonged exposure to hazardous waste" from the construction repose statute); CONN. GEN. STAT. ANN. § 52-577a(e) (West 2013), *amended by* 2017 Conn. Legis. Serv. P.A. 17-97 (West) (excluding injury from asbestos); 735 ILL. COMP. STAT. ANN. 5/13-214(f) (West 2011), *amended by* 2014 Ill. Legis. Serv. P.A. 98-1131 (West) (excluding discharge of asbestos into the environment from the real property improvements repose statute); TENN. CODE ANN. § 29-28-103(b) (West 2012) (excluding asbestos and silicone gel breast implants from the product liability repose statute). Other states have special, longer statutes of repose for specific exposures. *See, e.g.*, IDAHO CODE § 5-243 (2010) (providing a thirty-year repose period for ionizing radiation injuries).

82. *See* Montgomery v. Wyeth, 580 F.3d 455, 465 (6th Cir. 2009).

83. *See supra* notes 49–60 and accompanying text.

84. TENN. CODE ANN. § 29-28-103(b) (West 2012).

85. No. M2013–02607–COA–R3–CV, 2014 WL 6680693 (Tenn. Ct. App. Nov. 25, 2014).

86. *Id.* at *6.

sufficiently distinguishable from asbestos to receive different treatment under the statute of repose.[87] The plaintiff challenged the constitutionality of the statute of repose on the grounds that it violated the Equal Protection Clause of the United States Constitution[88] and the privileges and immunities clause of the state constitution.[89] The court held that the state legislature had a rational basis for distinguishing asbestos and silicone breast implants from other substances covered by the statute of repose.[90] Among other things, the court noted that while asbestos had been designated a toxic substance, silica had not, and that while silicosis is uniquely occupational in nature, asbestosis may affect nonworkers exposed in homes, schools, and other locations.[91] Accordingly, the court rejected the constitutional claims.[92] Had the court ruled the other way, however, its decision easily would have been supported by substantial medical and scientific evidence of similarities between asbestos disease and silica disease. Both are typically workplace dust exposures, and either may cause both non-malignant obstructive lung disease and forms of lung cancer.[93] The court's decision was purely policy-based

87. *Id.*

88. U.S. CONST. amend. XIV, § 1.

89. TENN. CONST. art. XI, § 8.

90. *Adams*, 2014 WL 6680693, at *6; *see also* Wyatt v. A-Best Prods. Co., 924 S.W.2d 98, 106–07 (Tenn. Ct. App. 1996) (holding that the asbestos exception withstood an equal protection challenge). In *Wyatt*, the court reasoned that even if extending the exception in the statute of repose to all latent injuries would have been a better means of addressing the issues raised, there is no requirement that the legislature select the best or most perfect option, only a rational option. The court concluded that "we cannot say that the General Assembly's decision to classify asbestos-related claims differently from other latent-injury claims is so patently arbitrary as lacking any rational basis." *Id.* at 106.

91. *Adams*, 2014 WL 6680693, at *2. While asbestos is listed on the federal Agency for Toxic Substances and Disease Registry, silica is not. *Toxicological Profile for Asbestos*, AGENCY FOR TOXIC SUBSTANCES & DISEASE REGISTRY (Sep. 2001), http://www.atsdr.cdc.gov/ToxProfiles/tp.asp?id=30&tid=4 [https://perma.cc/5X52-BF9Q].

92. *Adams*, 2014 WL 6680693, at *6.

93. Raed A. Dweik & Peter J. Mazzone, *Occupational Lung Disease*, CLEVE. CLINIC CTR. FOR CONTINUING EDUC. (Aug. 2010), http://www.clevelandclinicmeded.com/medicalpubs/diseasemanagement/pulmonary/occupational-lung-disease/ [https://perma.cc/UGB8-G9UN]. Although the court was correct that silica exposure occurs most commonly in the workplace, it may be a threat beyond the workplace as a component of hazardous particulate matter emanating from construction sites and other locations. *See Particulate Matter (PM) Basics*, U.S. ENVTL. PROTECTION AGENCY, https://www.epa.gov/pm-pollution/particulate-matter-pm-basics [https://perma.cc/5SWP-YE5J]

and reflects the tenacity of the original justifications for repose statutes.

Such inconsistencies and incremental steps are apparent elsewhere, where designating one or a couple of substances for exclusion has created a jumble of separate rules and disparate treatment. Alaska's construction statute of repose expressly excludes from its scope "prolonged exposure to hazardous waste,"[94] but not exposure to other substances capable of causing latent illness. New Hampshire excludes from its eight-year repose period for real property improvements claims related to "nuclear power generation, nuclear waste storage, or the long-term storage of hazardous materials."[95] Some states exclude only asbestos product liability claims and claims arising from silicone gel breast implants from the statutory period.[96] In Connecticut, the legislature has extended the repose period for asbestos-based product actions from the state's ten-years-from-delivery period to eighty years from last exposure for personal injury claims and thirty years from last contact for property damage claims.[97] Idaho has enacted a special repose period for injuries due to ionizing radiation. The ordinary product liability repose period in Idaho is ten years from the time of delivery and sets up a presumption that the useful safe life of the product begins at delivery and ends ten years later.[98] The special statute of repose for injuries due to ionizing radiation extends the repose period from ten to thirty years from "the last occurrence to which the injury is attributed."[99]

The courts are tasked with interpreting statutes of repose, and the recent history of Indiana's asbestos-product repose statute reveals just how tangled the interactions between the legislature and the courts may become. Indiana has been involved in an ongoing debate over whether its product statute of repose applies only to the sale of raw asbestos or includes within its scope the sale of products containing asbestos. The Indiana general product statute includes a repose provision of ten years from "delivery of the product to the initial user or

(last updated Sept. 12, 2016); Nat'l Inst. for Occupational Safety & Health, *Silica*, CTR. FOR DISEASE CONTROL AND PREVENTION http://www.cdc.gov/niosh/topics/silica/ [https://perma.cc/DD35-DFCY].

94. ALASKA STAT. § 09.10.055(b)(1)(A) (2007).

95. N.H. REV. STAT. ANN. § 508:4-b(V)(b) (2010).

96. *See, e.g.*, OR. REV. STAT. § 30.907(2) (2015) (asbestos); *id.* § 30.908(2) (silicone breast implants); TENN. CODE ANN. § 29-28-103(b) (2012) (both).

97. CONN. GEN. STAT. ANN. § 52-577a(e) (West 2013), *amended by* 2017 Conn. Legis. Serv. P.A. 17-97 (West).

98. IDAHO CODE § 6-1403(1)–(2) (2010).

99. *Id.* § 5-243.

consumer."[100] The legislature excluded certain asbestos claims,[101] but only those brought against "persons who mined and sold commercial asbestos" and certain asbestos bankruptcy funds.[102] In the 2003 case of *AlliedSignal, Inc. v. Ott*,[103] the Indiana Supreme Court upheld the classification in the asbestos exception, which meant that actions against defendants who sold asbestos-containing products rather than raw asbestos, were subject to the ten-years-from-delivery general statute of repose.[104] The court further concluded that the statute was not constitutionally infirm, as it treated plaintiffs with asbestos product liability claims in the same manner as plaintiffs with other product liability claims.[105]

In a vigorous dissent in *Ott*, Justice Dickson lent a powerful voice to the policy arguments for excluding latent toxic illness claims from statutes of repose:

> There are no inherent characteristics that distinguish workers with asbestos-related diseases caused by exposure to raw asbestos from those with the same diseases brought about by exposure to manufactured products containing asbestos. Thus the unequal treatment accorded to each class cannot be reasonably related to any inherent differences. With the majority's refusal to construe [the asbestos exception] to equally treat all persons with asbestos-related diseases, the product liability statute of repose clearly grants to persons whose diseases derive from raw asbestos substantial privileges and immunities that do not equally belong to identically situated

100. Ind. Code § 34-20-3-1(b)(2) (2017).

101. *Id.* § 34-20-3-2, *invalidated by* Myers v. Crouse-Hinds Div. of Cooper Indus., Inc., 53 N.E.3d 1160, 1168 (Ind. 2016). The statute of limitations provides that a personal injury or property damage action based on exposure to asbestos "must be commenced within two (2) years after the cause of action accrues." *Id.* § 34-20-3-2(a)(2). Accrual is based on the plaintiff's knowledge of either an asbestos-related injury or property damage from asbestos. *Id.* § 34-20-3-2(b)–(c).

102. *Id.* § 34-20-3-2(d)(2).

103. 785 N.E.2d 1068 (Ind. 2003).

104. *Id.* at 1073 ("We think that the language used by the Legislature represents its conscious intent to subject to [the asbestos exception] only those persons who produce raw asbestos—'persons who mine[] and s[ell] commercial asbestos'—and leave those who sell asbestos-containing products within the ambit of [the repose statute].").

105. *Id.* at 1077. The court held that the exception did not violate the equal privileges and immunities clause of Indiana's constitution because no "cognizable harm" resulted from subjecting plaintiffs suing asbestos product manufacturers to the ten-year repose statute. *Id.*

> persons whose diseases result from asbestos-containing products. The constitutional violation is apparent.[106]

Justice Dickson's words must have resonated with the other members of the Indiana Supreme Court, as evidenced by its 2016 decision in *Myers v. Crouse-Hinds Division of Cooper Industries, Inc.*[107] The court reflected anew on the disparate treatment of plaintiffs exposed to raw asbestos and those exposed to asbestos-containing products, holding that the classification violated the privileges and immunities clause of the Indiana Constitution.[108] Justice Dickson wrote the opinion for the evenly split court.[109] Not surprisingly, the key factor in the court's decision was that asbestos plaintiffs' personal injuries are identical regardless of the type of asbestos defendant—the same latent illnesses that develop over decades, often with a protracted period in which the plaintiff is symptom-free.[110] The court concluded with an especially broad statement recognizing the special problems of all plaintiffs with latent illness claims: "As a result, the Product Liability Act statute of repose does not apply to cases involving protracted exposure to an inherently dangerous foreign substance . . . ."[111]

The *Myers* decision potentially extends beyond asbestos to all other latent illness product liability claims, although the parameters of the terms "protracted exposure[s]" and "inherently dangerous foreign substance[s]" are unclear. What is indisputably clear is that, absent an exception, statutes of repose create two classes of latent illness plaintiffs—those who became sick before the repose period expired and those whose illnesses manifested after expiration—but reward only the former group with the ability to seek redress. Their illnesses may be identical, caused by exposure to the same substance

106. *Id.* at 1083 (Dickson, J., dissenting).

107. 53 N.E.3d 1160 (Ind. 2016).

108. *Id.* at 1166.

109. *Id.* at 1162.

110. The court concluded that the disparate treatment of these two classes of asbestos plaintiffs violated the equal privileges and immunities clause because (1) the classification bore no reasonable relationship to "inherent characteristics which distinguish the unequally treated class," and (2) although the classes were "similarly situated," the statute impermissibly gave one class preferential treatment over the other. *Id.* at 1165–66 (quoting Collins v. Day, 644 N.E.2d 72, 80 (Ind. 1994)). Because the asbestos statute contained a non-severability clause, the court invalidated the entire statute, although it stopped short of overruling *Ott*. *See id.* at 1168 ("While we decline to reconsider our decision in *AlliedSignal v. Ott*, we find that Section 2 of the Product Liability Act violates the Indiana Constitution."). But the result was effectively to overrule that case.

111. *Id.* at 1167.

and exhibiting the same etiology, distinguishable only by the length of the latency period. Taken to its logical conclusion—and illogical result—someone who had a short exposure to the substance but developed the illness within the repose period would be able to pursue a claim, while someone with a substantially greater exposure whose illness manifested after the expiration of the repose period would be barred. The open question in Indiana is whether *Myers* solves this problem, in whole or in part, for injuries other than asbestos.

Myers may not be the end of the Indiana saga, however. The ink had barely dried on the *Myers* decision when a bill was introduced in January 2017 in the Indiana House that would repeal the asbestos exception and apply the repose statute to all asbestos claims, regardless of the defendant.[112] If the legislature enacts a version of the proposed House bill, that would constitute a rejection of the *Myers* court's recognition of the unique problems of latent illness plaintiffs. The cycle of challenges would likely begin again. At the present time, the Indiana Supreme Court's broad statement on latent illnesses strongly suggests that the court would reach the same result in future cases involving exposure to toxic products other than asbestos.

The Indiana example shows the state courts parsing a statute that has outlived both its rationality and its practicality. The dance between the legislature and the courts culminated in the only logical and humane result—though that result may be temporary, depending on the actions of the legislature. The process leading to that result was incremental and painfully slow. The tenacity of the legislative interests underlying the statute of repose accounts for such a politicized and protracted process of reform.

In a broader context, the Indiana example demonstrates that many state legislatures lack an understanding of the universal characteristics of latent toxic illness and the unique challenges experienced by latent illness plaintiffs—or they are simply willing to ignore those hardships and cater to certain economic interests instead. The various substances excluded from some states' repose periods[113] tend to be those that have either generated the most litigation or received the most publicity in the particular jurisdiction, which is just a variation of the squeaky wheel adage. The reality is that all latent illnesses, regardless of the exposures causing them, present the identical legal challenges for plaintiffs confronted with statutes of repose.

Statutes of repose for claims related to improvements to real property also have been subjected to similar desultory treatment, as illustrated by a handful of cases under Wisconsin law. The Wisconsin

112. H.B. 1276, 121st Gen. Assemb., Reg. Sess. (Ind. 2017).

113. For examples, see *supra* notes 96–102 and accompanying text.

statute of repose provides that an action must be commenced no later than ten years after the "substantial completion of the improvement to real property" on which the action is based.[114] Asbestos defendants seized upon this statute to defend personal injury actions brought by plaintiffs who were exposed to asbestos while working in a variety of construction and remediation settings. In *Peter v. Sprinkmann Sons Corporation*,[115] a Wisconsin appellate court allowed an asbestos personal injury action to go forward because the plaintiff's decedent had been exposed to asbestos while working on repairs to real property, not on improvements. The statute explicitly excludes repairs from its scope.[116] The court concluded that the decedent's work making routine repairs to insulation on machine pipe did not constitute "improvements to real property" within the meaning of the statute of repose.[117] In *Ahnert v. Employers Insurance Company*,[118] a federal court, applying the same Wisconsin provisions, stated that the exclusion of repairs from the repose provision "is reasonable because improvements to real property have a completion date whereas regular repairs and maintenance can continue ad infinitum."[119] In the context of latent illness cases, however, the distinction between repairs and improvements is virtually meaningless. Developing mesothelioma in the course of work on real property has the same effects

114. Wis. Stat. § 893.89(1) (2015–16).

115. 860 N.W.2d 308 (Wis. Ct. App. 2015).

116. Wis. Stat. § 893.89(4)(c) (2015–16) (stating that the statute of repose "does not apply to . . . damages resulting from negligence in the maintenance, operation or inspection of an improvement to real property.").

117. *Peter*, 860 N.W.2d at 315. The court relied upon a distinction between "improvements" and "maintenance and repairs" that the Wisconsin Supreme Court had adopted in several earlier cases. *See, e.g.*, Kohn v. Darlington Cmty. Schs., 698 N.W.2d 794, 815 (Wis. 2005) ("Owners and occupiers are protected to the extent they are involved in the actual improvement of the property. They are not protected for post-improvement conduct, such as negligent inspection or maintenance of the improvement."); *see also* Brezonick v. A.W. Chesterton Co., No. 2014AP2775, 2015 WL 9283609, at *7 (Wis. App. Ct. Dec. 22, 2015) (reversing summary judgment for the defendant on the ground that the plaintiff's decedent was exposed to asbestos while engaged in repair and maintenance work within the meaning of the statute of repose).

118. No. 13-C-1456, 2016 WL 97612 (E.D. Wis. Jan. 6, 2016).

119. *Id.* at *6. The court rejected the plaintiff's argument that the statute of repose was unconstitutional as applied to asbestos-related disease claims. *Id.* at *6 n.4 (citing *Kohn*, 698 N.W.2d at 818 (Wis. 2005)).

on the worker's health whether the work could be categorized as an improvement to property or repairs and maintenance.[120]

North Carolina's pastiche of repose statutes tells another tale of the inadequacy of an incremental approach to latent illness claims. The state's general statute of repose for personal injuries or property damage provides that "no cause of action shall accrue more than 10 years from the last act or omission of the defendant giving rise to the cause of action."[121] A separate repose statute, which apparently overrides the general repose statute, applies to claims arising from "any alleged defect or any failure in relation to a product;" repose in these cases occurs twelve years from "initial purchase for use or consumption."[122]

A third statute, which by its terms modifies the ten-year general tort statute of repose, carves out an exception for claims arising from groundwater contamination:

> The 10-year period . . . shall not be construed to bar an action for personal injury, or property damages caused or contributed to by groundwater contaminated by a hazardous substance, pollutant, or contaminant, including personal injury or property damages resulting from the consumption, exposure, or use of water supplied from groundwater contaminated by a hazardous substance, pollutant, or contaminant.[123]

This exception was enacted in the wake of the 2014 United States Supreme Court decision in *CTS Corporation v. Waldburger*,[124] where the Court considered whether a discovery statute of limitations in the federal Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA")[125] preempted application of the North

120. Interestingly, Wisconsin recognizes these inequities in its product liability statute of repose. The statute imposes a repose period of 15 years from the time of manufacture, but expressly excludes claims based upon latent illness. Wis. Stat. § 895.047(5) (2015–16) ("This subsection does not apply to an action based on a claim for damages caused by a latent disease."); *see infra* notes 171–176 and accompanying text. The statute also contains an exception for negligence and breach of warranty claims. Wis. Stat. § 895.047(6) (2015–16). But the legislature has not taken the same approach for real property improvement actions.

121. N.C. Gen. Stat. § 1-52(16) (2015).

122. *Id.* § 1-46.1.

123. *Id.* § 130A-26.3. The statute defines "hazardous substance, pollutant, or contaminant" as "the concentration of the hazardous substance, pollutant, or contaminant exceed[ing] a groundwater quality standard set forth in 15A NCAC 2L.0202." *Id.*

124. 134 S. Ct. 2175 (2014).

125. 42 U.S.C § 9658 (2012). CERCLA is also known as the Superfund statute.

Carolina statute of repose in a state-law nuisance claim arising from toxic chemical contamination.[126] In its far-reaching decision, the Supreme Court held that while the CERCLA discovery provision preempts relevant state statutes of *limitations*, it does not preempt state statutes of repose,[127] leaving to state legislatures and courts the task of determining whether any extensions or exclusions apply to the repose statute.

The groundwater exception, however, left a gaping hole. Excluding only those illnesses caused by contaminated groundwater was severely restrictive, regardless of any environmental policy the statute embodied. The exception ignored identical or similar latent illnesses caused by other types of environmental pollution—outdoor or indoor—and excluded persons who were exposed to contaminated groundwater prior to enactment of the exception in 2014 but whose illnesses did not manifest until later.

One decision applying North Carolina law awkwardly attempted to correct this omission. In *Stahle v. CTS Corporation*,[128] the Fourth Circuit Court of Appeals concluded that the term "personal injury" in North Carolina's general statute of repose did not encompass latent disease claims.[129] The court worked hard to make this distinction, saying that while the general repose period applied to "latent injury," it did not apply to disease.[130] As a result, plaintiffs with latent disease claims would not be subject to the general statute of repose.[131] The Fourth Circuit offered little support for its interpretation in North Carolina state decisions, relying mostly on a 1985 North Carolina Supreme Court case that involved occupational disease and the statute of limitations.[132] The court did not address the interaction of the

126. *Waldburger*, 134 S. Ct. at 2180. The North Carolina groundwater exception applied only prospectively from the time of its enactment in 2014. *See* Bryant v. United States, 768 F.3d 1378, 1385 (11th Cir. 2014) (citing McCrater v. Stone & Webster Eng'g Corp., 104 S.E.2d 858, 860 (N.C. 1958)).

127. *Waldburger*, 134 S. Ct. at 2187–88.

128. 817 F.3d 96 (4th Cir. 2016).

129. *Id.* at 100.

130. *Id.* at 104 ("North Carolina law clearly establishes that a disease is not a latent injury.").

131. It remains to be seen whether the Fourth Circuit's statutory interpretation gains traction, especially in North Carolina state courts. And, as the concurring judge lamented, the court could not certify the question to the North Carolina Supreme Court and was therefore without its guidance. *Id.* at 113–15 (Thacker, J., concurring).

132. *See id.* at 104 (citing Wilder v. Amatex Corp., 336 S.E.2d 66, 70–71 (N.C. 1985)). *Wilder v. Amatex Corp.* contained language supportive of the Fourth Circuit's ruling in *Stahle*: "Both the [North Carolina Supreme] Court and the legislature have long been cognizant of the difference between diseases on the

groundwater exception with the general repose statute, as the plaintiff's claim arose prior to the exception's 2014 enactment. This ongoing uncertainty highlights the frustratingly sluggish and sporadic process of ameliorating the negative and disparate impact of these statutes of repose in individual cases, even when that impact is acknowledged.

As these various examples demonstrate, states seem to be awakening to the need for substantial statute of repose reform for latent illness claims, but most reforms have continued to lead to contradictory or anomalous results. Sporadic and incremental efforts are insufficient; a more comprehensive approach is necessary. Although a few states have taken more assertive steps to eliminate the problems, as discussed in the next Part, these reforms remain insufficient.

III. A Simple Solution Within Reach

A. The Need for a Broad Latent Illness Exclusion

Latent illnesses are unlike other tort injuries, a distinction that has been uniformly recognized by state legislatures and courts in statute of limitations jurisprudence. Thus, those statutes provide that an action accrues at the time of the plaintiff's discovery of the illness and—in most jurisdictions—its likely cause. Why, then, do so many states continue to apply their statutes of repose to latent illness cases? The answer is relatively indefensible. States are concerned with protecting defendants from unpredictable future costs that may be "undue and unlimited."[133] But, as the Utah legislature acknowledged, the passage of time renders future injury "highly remote."[134] These justifications are contradictory. The more remote the possibility of litigation after a certain period of time, the less likely that "undue and unlimited" costs will surprise defendants.[135] If the likelihood of litigation far into the future is so "remote" and "unexpected," presumably it would be rare. What would be the harm—or the great "social evil"—in allowing the litigation? The Alabama legislature expressed concern that the costs of insuring remote product liability claims would be prohibitive.[136] But plaintiffs are at a distinct

one hand and other kinds of injury on the other from the standpoint of identifying legally relevant time periods."

133. Utah Code Ann. § 78B-2-225(2)(b) (LexisNexis 2012); *see supra* notes 32–36 and accompanying text.

134. Utah Code Ann. § 78B-2-225(2)(d) (LexisNexis 2012).

135. *Id.* § 78B-2-225(2)(b).

136. Ala. Code § 6-5-500 (2014).

disadvantage in proving their cases after a long passage of time. Evidence of exposure may be lost or destroyed in the course of business; witnesses may have disappeared. The longer the latency period between exposure to a toxic substance and manifestation of illness, the more difficult the task of proving causation, largely because of the possibility of intervening and superseding causes.

As previously mentioned, one reason legislatures enacted product liability statutes of repose was the expansion of liability for product sellers under the strict product liability regime, including abandonment of the rules of privity of contract.[137] But these justifications for statutes of repose have become largely obsolete. Recent decades have seen a contraction of strict liability, as reflected in the *Restatement of Torts (Third): Products Liability*, which espouses a risk-utility test and safer alternative design requirement for design defect claims[138] and a straightforward negligence test for failure-to-warn claims.[139] Moreover, federal preemption has become an important defense in many toxic tort cases, which benefits product sellers by precluding many product liability actions.[140] In holding the New Hampshire product liability statute of repose unconstitutional, the New Hampshire Supreme Court stated that "persons injured by defective products are deprived arbitrarily of a right to sue the manufacturers responsible for those defective products by virtue of a statute that has become entirely divorced from its underlying purpose."[141] To the extent that outmoded policy rationales are embedded in many state statutes of repose, the statutes have outlived their original purpose.

Another rationale for product liability statutes of repose was that they provide added protection for sellers of products as those products

137. *See supra* notes 27–29 and accompanying text. Similarly, abandonment of privity of contract has been cited as one reason underlying statutes of repose for claims based upon improvements to real property. *See* Leichling v. Honeywell Int'l, Inc., 842 F.3d 848, 851 (4th Cir. 2016) (citing Rose v. Fox Pool Corp., 643 A.2d 906, 911–13 (Md. 1994)).

138. RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2(b) (AM. LAW INST. 1998).

139. *Id.* § 2(c).

140. *See* Jean Macchiaroli Eggen, *The Mature Product Preemption Doctrine: The Unitary Standard and the Paradox of Consumer Protection*, 60 CASE W. RES. L. REV. 95, 115–32 (2009) (discussing U.S. Supreme Court jurisprudence on preemption of state product liability claims); Jean Macchiaroli Eggen, *The Normalization of Product Preemption Doctrine*, 57 ALA. L. REV. 725, 752–69 (2006) (analyzing the normative subtext of the U.S. Supreme Court's product liability preemption cases).

141. Heath v. Sears, Roebuck & Co., 464 A.2d 288, 296 (N.H. 1983).

age and deteriorate from normal use.[142] Again, that rationale fails to hold up in cases of latent injury. A latent illness plaintiff typically was exposed to the substance causing the illness months, years, or decades before the illness manifested in symptoms causally associated with the exposure—in other words, at a time when the product likely had not deteriorated. Indeed, the old-product rationale fails even when the plaintiff's exposure was after the repose period had expired. Product sellers are the most knowledgeable entities about the aging of their own products under normal use and have marketing data to determine the potential for future liability. As a result, they can procure sufficient liability insurance coverage and take advantage of traditional defenses such as assumption of the risk and comparative fault.[143]

Statutes of repose for real property improvements are also based on a set of erroneous presumptions. The concept of "latent injury" in the construction and property improvement context is traditionally associated with latent undiscoverable conditions that may cause accidents years later when the plaintiff encounters the condition.[144] Generally, legislatures did not contemplate that illnesses would fall within the meaning of latent injury in this context. Nor did they contemplate the situation in which a plaintiff has an earlier exposure or multiple exposures that triggers a disease process with physical manifestations that appear and are diagnosable much later, after the expiration of the repose period. The result mirrors that in toxic product liability cases, in which those whose illnesses manifested after the repose period would be barred while persons whose identical illnesses manifested within the repose period could maintain their claims. Furthermore, persons whose latent illnesses arose from exposures to substances associated with real property improvements would be barred from suit in a way that persons exposed to the same substances by other means may not.

142. *See* Gary T. Schwartz, *New Products, Old Products, Evolving Law, Retroactive Law*, 58 N.Y.U. L. REV. 796, 845–46 (1983).

143. *See generally* RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY §§ 17–18 (AM. LAW INST. 1998) (defining apportionment of responsibility, disclaimers, and other contractual exculpations); DAVID G. OWEN, PRODUCTS LIABILITY LAW § 13.1–.4, at 792–876 (2005) (explaining the use of contributory negligence, comparative fault, and assumption of the risk as defenses to product liability claims).

144. *See* CAL. CIV. PROC. CODE § 337.15 (West 2006) (running ten years from "substantial completion" for injuries arising from a "latent deficiency"). The legislature defined "latent deficiency" as "not apparent by reasonable inspection," clearly referencing the condition of the property. *See id.* § 337.15(b).

B. Seeking a Solution

As discussed in Part II of this Article, some state legislatures have recognized the unfairness of applying statutes of repose to latent illness claims, but have failed to take sufficient steps to remedy the problem. Only by enacting a broad exclusion for latent illnesses—applicable across the board for all tort claims and consistent with the discovery statutes of limitations—will the problems be adequately addressed. A few states have shown a willingness to consider such a solution, but have stopped short of a complete and comprehensive exclusion for latent illness claims. These statutes represent a substantial improvement over the ad hoc statutes discussed earlier by broadly focusing on latent illness claims. It is instructive to examine their approaches as they provide insight into the state legislatures' reticence and reveal the shortcomings of any approach short of an absolute exclusion.

These broader approaches fall into two general categories. The first category may best be viewed as an extension of the single-substance exceptions previously discussed.[145] While evincing a good-faith effort to address the pitfalls of repose for latent illness plaintiffs, these statutes offer little more than a narrow hit-or-miss approach. These statutes, exemplified by Iowa and Kansas, contain exceptions for latent illness caused by exposure to "harmful materials," which the statutes then list.[146] Using almost identical language, the "harmful materials" are defined by both states as:

> [S]ilicone gel breast implants . . . ; . . . asbestos, dioxins, . . . or polychlorinated biphenyls, whether alone or as part of any product; or any substance which is determined to present an unreasonable risk of injury to health or the environment by the United States environmental protection agency pursuant to the federal Toxic Substance Control Act . . . or by [the] state . . . .[147]

Iowa includes tobacco in the list of harmful materials, but Kansas does not.[148] Although the Toxic Substances Control Act ("TSCA")

145. *See supra* notes 78–116 and accompanying text.

146. *See* IOWA CODE § 614.1(2A)(b)(1) (2017) (excepting exposure to "harmful materials" from the general repose period of fifteen years from first purchase); KAN. STAT. ANN. § 60-3303(d)(1) (2005), *preempted on other grounds by* Troutman v. Curtis, 143 P.3d 74 (2006) (excepting exposure to harmful material from the general repose period of ten years from time of delivery).

147. IOWA CODE § 614.1(2A)(b)(2) (2017).

148. *Id.*; *see* KAN. STAT. ANN. § 60-3303(d)(2) (2005), *preempted on other grounds by* Troutman v. Curtis, 143 P.3d 74 (2006).

could be a convenient benchmark, not all substances capable of causing latent illness, such as prescription drugs, are regulated under TSCA, which was rewritten and re-authorized in 2016 by the Frank R. Lautenberg Chemical Safety for the 21st Century Act.[149] Moreover, the parameters of the new TSCA have yet to be tested. Thus, as a practical matter, using TSCA to identify excluded substances has its own set of problems. Both Iowa and Kansas limit the exception for latent illness to product liability claims.[150] Indeed, the Iowa statute explicitly states that the exception does not apply to latent illness claims related to improvements to real property.[151]

The second category is typified by the few states that have enacted an exception for claims alleging exposures within the repose period followed by a disease manifestation after that time. These statutes represent a better approach than the laundry-list exceptions, but do not adequately solve the problem. The Texas statute of repose for product liability claims provides that "a claimant must commence a products liability action against a manufacturer or seller of a product before the end of fifteen years after the date of the sale of the product by the defendant."[152] The exception to this rule for latent injuries states:

> (d) This section does not apply to a products liability action seeking damages for personal injury or wrongful death in which the claimant alleges:
>
> (1) the claimant was exposed to the product that is the subject of the action before the end of 15 years after the date the product was first sold;
>
> (2) the claimant's exposure to the product caused the claimant's disease that is the basis of the action; and
>
> (3) the symptoms of the claimant's disease did not, before the end of 15 years after the date of the first sale of the product by the defendant, manifest themselves to a degree and for a

149. *See* Frank R. Lautenberg Chemical Safety for the 21st Century Act, Pub. L. No. 114-182, 130 Stat. 448 (2016) (amending 15 U.S.C.A. §§ 2601 et seq. (2012)).

150. IOWA CODE ANN. § 614.1(11)(a)(3) (2017) (running eight years from the defendant's injury-causing action for actions arising from improvements to real property); KAN. STAT. ANN. § 60-3303(d)(1) (20005), *preempted on other grounds by* Troutman v. Curtis 143 P.3d 74 (2006).

151. IOWA CODE § 614.1(2A)(b)(1) (2017).

152. TEX. CIV. PRAC. & REM. CODE ANN. § 16.012(b) (West 2002).

> duration that would put a reasonable person on notice that the person suffered some injury.[153]

This exception is deficient for several reasons.

First, ambiguous terms in the exception leave open the possibility of a narrow interpretation. Substantial questions of fact could exist in determining whether the plaintiff's symptoms were of the "degree" and "duration" to place "a reasonable person on notice."[154] Place the person on notice of what? Subsection (3) states that it is notice "that the person suffered some injury," but says nothing about knowledge of the likely cause of that injury, which is only referenced in subsection (2).[155] While this last point is relevant to the discovery statute of limitations, rather than the statute of repose, the imprecise language shows how easily the concepts and problems become entangled; they are actually two distinct issues. Second, the Texas exception does not encompass all injuries, but is limited to personal injuries and wrongful death. Third, the exception applies only to the product liability statute of repose; the Texas statutes of repose for improvements to real property noticeably omit any language that could be construed to apply to latent illness.[156] In fact, somewhat perversely, legislation introduced in January 2017 would amend the real property improvements repose statute to reduce the repose period from ten years to five years.[157] The best that can be said about the Texas approach is that it allows a limited number of claims that would otherwise be barred by repose. While Texas recognizes the timing problem of latent illness, it does not offer a solution for the inequitable results.

153. *Id.* § 16.012(d); *see also id.* § 16.012(d-1) ("This section does not reduce a limitations period for a cause of action described by Subsection (d) that accrues before the end of the limitations period under this section."). It is noteworthy that the exception only covers claims for personal injuries and wrongful death, not claims for property damages. The basic statute defines "products liability action," including a list of types of relief that may be sought. *Id.* § 16.012(a)(2). Claims for property damages, personal injuries, and wrongful death all appear on this list, so the absence of property damages in the exception leaves no doubt that the legislature intended to omit them from that subsection. *Id.* § 16.012(a)(2)(A).

154. *Id.* § 16.012(d)(3).

155. *Id.* § 16.012(d)(2)–(3).

156. *See id.* § 16.008 (applying the statute of repose to architects, engineers, and others engaged in designing, planning, or inspecting the improvement); *id.* § 16.009(a) (applying the statute of repose to those engaged in the construction of the improvement).

157. H.B. 1053, 85th Leg. (Tex. 2017).

Nor does Florida, which has enacted a similar exception, avoid these pitfalls. Florida's basic product statute of repose is keyed into both the "expected useful life" and date of delivery:

> Under no circumstances may a claimant commence an action for products liability . . . to recover for harm allegedly caused by a product with an expected useful life of 10 years or less, if the harm was caused by exposure to or use of the product more than 12 years after delivery of the product to its first purchaser or lessee . . . .[158]

The statute declares that "[a]ll products . . . are conclusively presumed to have an expected useful life of 10 years or less."[159] The exception for latent injury claims provides that the repose period "does not apply if the claimant was exposed to or used the product within the repose period, but an injury caused by such exposure or use did not manifest itself until after expiration of the repose period."[160] The statute is broader than the Texas statute, as it includes property damages, but does not extend to all latent illness plaintiffs, only those whose exposures occurred within the repose period. Like Texas, the Florida statute of repose for improvements to real property applies its ten-year repose period to all actions, regardless of whether they involve latent injuries.[161]

Idaho's product liability repose statute contains a provision that appears on its face to be a broader latent illness exception:

> The ten (10) year period of repose . . . 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

158. FLA. STAT. § 95.031(2)(b) (2017).

159. *Id.*

160. *Id.* § 95.031(2)(c). *See generally* R.J. Reynolds Tobacco Co. v. Ciccone, 190 So. 3d 1028, 1038 (Fla. 2016) (discussing the "unique problem" of latent illness in the context of a toxic tort case). The court employed the term "creeping disease," which had been used in earlier Florida decisions, and concluded that at least for the purposes of the Florida statute of limitations "a plaintiff should not, and cannot, be required to file a cause of action before even realizing that the cause of action exists." *Id.* This view will likely guide the court in any future decisions interpreting the exception.

161. FLA. STAT. ANN. § 95.11(3)(c) (2017). The Kansas product liability statute also contains an exception for "prolonged exposure." KAN. STAT. ANN. § 60-3303(b)(2)(D) (2005), *preempted on other grounds by* Troutman v. Curtis, 143 P.3d 74 (2006).

> delivery, or if the harm, caused within ten (10) years after the time of delivery, did not manifest itself until after that time.[162]

This provision suffers from the same linguistic infirmities as the Texas statute, however. For example, to be "prolonged," must the exposure have been continuous during and after the repose period? To satisfy the "injury-causing aspect" requirement, is it sufficient to offer expert evidence of a causal connection between the product and the illness, or must the plaintiff also offer evidence of the specific defect connected to the hazard? As in Texas and Florida, the Idaho statute of repose for improvements to real property is untouched by this exception.[163]

In Georgia, the product liability statute of repose—ten years from the first sale of the product for use or consumption for actions against manufacturers—applies to strict liability and negligence claims, but not to failure to warn claims.[164] The statute contains an exception for negligence actions against a product manufacturer for "a disease or birth defect."[165] One difficulty with the statute is its fragmented nature: It applies to some product claims but not all, and to some injuries but not others.[166] Furthermore, in product liability law, the distinction between negligence and failure to warn is in nomenclature only,[167] yet Georgia law insists on the awkward separation of these claims for the apparent purpose of barring some of them.[168] In applying the exception only to negligence actions, the legislature subjects persons with diseases or birth defects to the statute of repose for strict liability claims. This incongruity has the effect of enhancing the burden of these plaintiffs, as they must prove that the manufacturer

162. Idaho Code Ann. § 6-1403(2)(b)(4) (2010).

163. *Id.* § 5-241.

164. Ga. Code Ann. § 51-1-11(b)(2), (c) (2007).

165. *Id.* § 51-1-11(c).

166. *See, e.g.*, Watkins v. Ford Motor Co., 190 F.3d 1213, 1219 (11th Cir. 1999) (stating that "it is possible to have a situation where the plaintiff is barred from bringing a design defect claim and yet is allowed to proceed with a failure to warn claim based upon the dangers arising from the same alleged design defect").

167. *See, e.g.*, Restatement (Third) of Torts: Products Liability § 2(c) (Am. Law Inst. 1998) (stating that a product is defective for failure to warn "when the foreseeable risks of harm posed by the product could have been reduced or avoided by the provision of reasonable instructions or warnings by the seller . . . and the omission of the instructions or warnings renders the product not reasonably safe"). This Section states a negligence standard.

168. *See* Chrysler Corp. v. Batten, 450 S.E.2d 208, 213 (Ga. 1994) (holding that negligent failure to warn claims arising from a defectively designed product are not covered by the statute of repose).

acted negligently if they expect to be able to bring a claim after the repose period has expired, a task which is not ordinarily required for strict liability claims.[169]

C. A Simpler, Fairer, and More Predictable Model

What the foregoing states have in common is a good-faith effort to minimize the problems of latent illness plaintiffs by enacting broader exceptions that reach beyond single substances, at least in the context of product liability actions. They employ more inclusive language, such as "harmful materials" or the generic term "disease," to describe the exception. But despite the progress that these statutes represent, they remain deficient. There is, however, a simple solution. In states determined to retain their statutes of repose,[170] legislatures should impose an absolute latent illness exclusion, for both product liability actions and real property improvement claims. Short of a ruling that the statute is unconstitutional, an absolute exclusion is the only means to avoid the inequities and disparate treatment experienced by latent illness claimants.

What would such an exclusion look like? Wisconsin's product liability statute of repose contains a suitably broad exclusion. The statute states that the repose period of fifteen years from the date of manufacture "does not apply to an action based on a claim for damages caused by a latent disease."[171] The statute makes clear that the exclusion applies to all product liability claims and product defendants allowable in the state.[172] More generally, it also contains an absolute exclusion for negligence and breach of warranty product claims.[173] While the exclusion leaves to the courts a determination

169. The Third Restatement has brought strict liability claims much closer to negligence claims, however, by focusing on the behavior of the manufacturer in developing the product. Restatement (Third) of Torts: Products Liability § 2(b) (Am. Law Inst. 1998) (stating that a product is defective in design "when the foreseeable risks of harm posed by the product could have been reduced or avoided by the adoption of a reasonable alternative design by the seller . . . and the omission of the alternative design renders the product not reasonably safe").

170. Many of the arguments in this Article in favor of an absolute exclusion for latent illness would apply equally to an argument to abrogate statutes of repose more generally. That argument is beyond the scope of this Article, but to the extent that statutes of repose embody archaic concerns, full reconsideration is warranted.

171. Wis. Stat. § 895.047(5) (2015–16).

172. Wis. Stat. § 895.047(1)–(2) (2015–16) (providing, with some provisos, for a variety of strict liability claims against product manufacturers, sellers, and distributors).

173. *Id.* § 895.047(6).

whether the plaintiff's illness was within the legislature's contemplation of "latent disease," it avoids the line drawing, linguistic acrobatics, and counter-intuitive results associated with so many other statutes.

Not even Wisconsin, however, has extended the exclusion to its statute of repose for improvements to real property.[174] Yet the same problems and inconsistencies exist for latent illness plaintiffs who may bring their actions past the time of repose set by those statutes. Potential plaintiffs are at risk for identical illnesses, regardless of when they may manifest. To discriminate against those plaintiffs who develop their illnesses past the repose period is manifestly unfair. Plaintiffs with latent illnesses caused by contamination from an improvement to real property have as much reason as product liability plaintiffs to be allowed to maintain their claims regardless of the time of diagnosis or manifestation. These plaintiffs most likely have had no control over the circumstances that gave rise to their exposure and injury. While the design and building defendants may have relinquished control years earlier, these defendants are in possession of the information to assist courts and juries in identifying the defect and determining whether causation is met.[175] An underlying premise of these repose statutes is that as time passes, it is more likely that some intervening action or lack of proper maintenance by the property owner was the cause of the injury. This premise is evidenced by the fact that claims against property owners are commonly excepted from the statute of repose.[176] But latent injuries may also be the fault of those who created the improvement and along with it the original defect; and the defect may not be detectable to the property owner in the ordinary course of using the land and structures. Allowing injured persons to bring actions against both the owners and the parties responsible for creating the improvement would ensure that all the circumstances of the injury are fully addressed and would make available more pockets for settlement or verdicts, assuming the plaintiffs are able to prove their cases after a long passage of time. Logic and tort principles dictate that if fault is shared among two or more responsible parties, then liability should also be allocated among those parties, unless their contractual agreements provide otherwise.

Compelling public policies also support an absolute exclusion. Product sellers who are required to answer to future plaintiffs will be encouraged to keep better track of their products through post-market

174. *See id.* § 893.89; *see supra* notes 113–119 and accompanying text.

175. The design and building defendants are certainly in a superior position to the injured plaintiff to provide information on the defect. In most cases they will be in an equal or superior position to the landowner as well.

176. *See supra* note 42 and accompanying text.

surveillance, assure strict compliance with safety regulations, and buy adequate insurance. Their costs would be incorporated into the costs of doing business using the traditional mechanisms of liability insurance and appropriately pricing their products. But in the digital era of the twenty-first century, those mechanisms and the available information to assess them are more sophisticated than ever imagined when statutes of repose were first deemed necessary. If the potential for liability many years or decades into the future is unlikely—due to the probability of missing evidence and the difficulty of proving causation—nothing should prevent insurance companies from appropriately pricing their liability insurance products, especially considering the wide availability of big data in the insurance industry. Although there is little to prevent surprise mass litigation, the same may be said at any point in time, including soon after the pro–duct has been sold.[177] Moreover, at least some costly mass litigation could have been prevented or minimized if defendants had only acknowledged available studies and acted upon that knowledge at an early date. The extent of asbestos and tobacco litigation may appear to have been unanticipated, but sellers of both products had reason to know decades earlier that their products were harmful.[178] The goal of deterrence is more properly served by the possibility of litigation than by immunity from suit.

If latent illness plaintiffs are excluded from statutes of repose for real property improvements, potential design and building defendants' dealings with subcontractors and suppliers of materials will become more important, presumably resulting in safer design and construction in the first instance. Transparently negotiated indemnification clauses in their contracts with their subcontractors and with the landowners financing the project—including an explicit understanding that liability may stretch into the future for certain injuries that are not easily

177. *See generally, In re* Takata Airbags Prods. Liab. Litig., 193 F. Supp. 3d 1324 (S.D. Fla. 2016) (addressing a federal multi-district motor vehicle airbag litigation).

178. *See* Borel v. Fibreboard Paper Prods. Corp., 493 F.2d 1076, 1089–90 (5th Cir. 1973) (holding that the manufacturers' status as experts required them to be aware of the existing studies on the danger of asbestos, conduct their own studies, and warn users of the foreseeable dangers); *see also,* Jean Macchiaroli Eggen, *The Synergy of Toxic Tort Law and Public Health: Lessons From a Century of Cigarettes*, 41 Conn. L. Rev. 561, 586–94 (2008) (discussing the epidemiological studies on smoking in the context of their impact on toxic tort litigation). *See generally* Allan M. Brandt, The Cigarette Century: The Rise, Fall, and Deadly Persistence of the Product That Defined America (2007) (discussing the hold that the tobacco industry has had on the American public despite the many studies demonstrating the hazards of smoking).

discoverable—should clarify the understandings of the parties regarding the extent of liability the clauses cover.

Plaintiffs are at the mercy of state legislatures in any event. The legislators are more beholden to special interests and politics than the members of the judicial branch.[179] Even though state judges are likely to be elected, the rules of procedure, evidence, and professional responsibility are designed to even the playing field among adversaries to the greatest possible extent. But state legislators have fewer constraints and may be swayed by business, insurance, and other corporate interests and monetary contributions in formulating legislation. Statutes of repose clearly reflect this distinction.

Conclusion

Statutes of repose were enacted to protect defendants from stale claims, with little or no consideration of fairness to plaintiffs who developed latent illnesses that were undetectable until after the repose period expired. The fact that some states have carved out an exception to their repose statutes for asbestos-related disease or other latent illnesses demonstrates that states are well aware of the special disability their statutes of repose impose upon latent illness plaintiffs. Constitutional challenges to statutes of repose have had some success, but many states remain tenaciously committed to protecting certain business interests regardless of the consequences to injured parties.

Decades ago, states revised their tort statutes of limitations by enacting discovery rules whereby a claim accrued only when the plaintiff knew of the injury and the likely cause. These revised statutes of limitations acknowledged the unique predicament of plaintiffs who suffer from latent illnesses. In contrast, however, many states have retained their statutes of repose, in whole or in part, notwithstanding the obsolescence of the premises and policies on which the statutes are based. Ad hoc efforts to accommodate toxic tort plaintiffs have not resolved the problem and instead have created various classifications with disparate treatment of similarly situated plaintiffs. It is time to fully recognize the fundamental unfairness of these statutes of repose in this context. States should enact an absolute exclusion to their tort statutes of repose for latent toxic claims.

179. *See* McGovern, *supra* note 61, at 431.