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STATUS AND TRENDS IN STATE PRODUCT LIABILITY LAW: STATUTES OF LIMITATION AND OF REPOSE

INTRODUCTION

Should manufacturers escape liability for personal injury after their products have been on the market for a certain length of time? In light of the recent product liability explosion, this is a pressing question for critics of existing product liability statutes. Statutes of limitation and of repose are statutory creations. Little needs to be said about statutes of limitation because they are universally accepted as necessary and fair. On the other hand, statutes of repose, which have become increasingly popular in recent years, often are criticized and questioned. It remains to be seen whether statutes of repose will weather the storm they have created.

This section will examine the policy bases for the existence of statutes of limitation and statutes of repose. After a brief discussion of why statutes of limitation are so widely accepted, the section will focus on how some states have enacted statutes of repose to supplement statutes of limitation. The section will detail the successes and failures of state statutes of repose and examine the merits of a national statute of repose.

STATUTES OF LIMITATION: THE STARTING POINT

Statutes of limitation have been in existence since the enactment of the Roman Code.¹ Because they focus upon the conduct of the plaintiff rather than the essence of the claim, statutes of limitation are considered procedural, rather than substantive.² Statutes of limitation encourage plaintiffs to speedily bring actions before the court, and they deny plaintiffs the power to enforce stale claims.

Statutes of limitation find their justification in necessity and convenience rather than in logic. They represent a public policy about the privilege to litigate.³ Their length, however, always has been assigned arbitrarily, without regard to the merit of potential claims.⁴

Three general categories of statutes of limitation exist in product liability legislation.⁵ First, there are statutes that combine a long outside period of limitation that runs from the time of manufacture or sale, with

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1. See *Developments in the Law—Statutes of Limitations*, 63 HARV. L. REV. 1177, 1177 (1950).
 2. See *United States v. Curtiss Aeroplane Co.*, 147 F.2d 639, 642 (2nd Cir. 1945).
 3. “[Statutes of limitation] are by definition arbitrary, and their operation does not discriminate between the just and the unjust claim, or the voidable or unavoidable delay. They have come into the law not through the judicial process but through legislation.” *Chase Securities Corp. v. Donaldson*, 325 U.S. 304, 314 (1945).
 4. See Massery, *Date-of-Sale Statutes of Limitations—A New Immunity for Product Suppliers*, 177 INS. L.J. 535, 537 (1977).
 5. See P. SHERMAN, *PRODUCTS LIABILITY FOR THE GENERAL PRACTITIONER* 160 (1981 & Supp. 1986).

a shorter period that runs from the date of injury.⁶ A second category establishes a single period of limitations, which runs from the date of sale.⁷ The final category begins to run at the time of injury⁸ but also creates a maximum period of liability by establishing a rebuttable presumption against defectiveness after the ordinary useful life of the product.⁹

THE PARALLEL POLICY OF STATUTES OF REPOSE

Statutes of repose are also rooted in public policy. In response to complaints by manufacturers and their insurers about the growing number of product liability suits, many state legislatures have enacted statutes of repose. The statutes operate to procedurally cut off a plaintiff's product liability action at a specified time after the product has left the possession of the seller or manufacturer.

There are at least five definitions of "statute of repose."¹⁰ The first definition does not distinguish between a statute of repose and a statute of limitation.¹¹ The second definition treats the statute of repose as a general category that encompasses various statutes, including a statute of limitation.¹² The third definition states that a statute of repose is a type of statute of limitation.¹³ The fourth definition indicates that a statute of repose is separate and distinct from a statute of limitation because it begins to run at a time unrelated to the accrual of the cause of action.¹⁴

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6. Arizona, Colorado, Connecticut, Illinois, Indiana, Nebraska, New Hampshire and Tennessee have enacted this type of statute of limitation. *See infra* note 16.
 7. North Carolina, North Dakota and Rhode Island have enacted this type of statute of limitation. *See infra* note 16.
 8. Arkansas and Colorado have enacted this type of statute of limitation. *See infra* note 16.
 9. Idaho, Kansas, Kentucky, Michigan and Minnesota have enacted this type of statute of limitation. *See infra* note 16.
 10. *See generally* McGovern, *The Variety, Policy and Constitutionality of Product Liability Statutes of Repose*, 30 AM. U.L. REV. 579, 582-87 (1981).
 11. Professor McGovern indicated that older treatise writers and judges often used "repose" and "limitation" interchangeably. *See, e.g.,* Gorman v. Judge of Newaygo Circuit Court, 27 Mich. 138, 141 (1873). In fact, most modern courts do not use the term "statute of repose" consistently.
 12. "A statute of repose is an act that promotes a policy of finality in legal relationships, and it can include any number of statutory devices that accomplish this purpose." McGovern, *supra* note 10, at 583, *citing* Rosenberg v. Town of New Bergen, 61 N.J. 190, 201, 293 A.2d 662, 667 (1972).
 13. "This definition suggests that a statute of repose is the portion of a statute of limitation that places a cap or outer limit on a statute that begins to run when a party discovers the existence of an injury or cause of action." McGovern, *supra* note 10, at 583.
 14. *See id.* at 584. As Professor Martin has stated:

The simplest form of a statute of repose would typically provide that "no cause of action may be brought against the seller of a defective product for injuries occurring more than ten years after the seller sold the product." Such a statute is distinguishable from a "statute of limitation" which ordinarily begins to run when there has been a breach of the obligation. The statute of limitation thus puts a time limit on the plaintiff's right to seek a remedy for a breach. The statute of repose, on the other hand, limits the obligation itself.

Martin, *A Statute of Repose for Product Liability Claims*, 50 FORDHAM L. REV. 745, 749 (1982).

The final definition views a statute of repose as establishing an affirmative defense for the manufacturer or seller.¹⁵

To date, at least twenty-three states¹⁶ have enacted product liability statutes of repose in one form or another¹⁷ in response to the chaos in the area of product liability during recent years. In turn, many state

15. See McGovern, *supra* note 10, at 584. This definition is most often found in the "useful life" provision of product liability statutes, which indicates that a defendant may be relieved of any liability by proving that the product was used beyond its useful life.
16. See ALA. CODE § 6-5-502 (Supp. 1986) (within 10 years after the product is first used); ARIZ. REV. STAT. ANN. § 12-551 (Supp. 1986) (within 12 years after the product was first sold for use or consumption, unless the cause of action is based upon the negligence of the manufacturer or seller or a breach of an express warranty provided by the manufacturer or seller); ARK. STAT. ANN. § 34-2804 (Supp. 1985) (use of a product beyond its anticipated life by a consumer where the consumer knew or should have known the anticipated life of the product may be considered as evidence of fault on the part of the consumer); COLO. REV. STAT. § 13-21-403(3) (Supp. 1986) (10 years after a product is first sold for use or consumption, it shall be rebuttably presumed that the product was not defective); CONN. GEN. STAT. ANN. § 52-577(a) (West Supp. 1986) (within 10 years from the date that the party last parted with possession or control of the product); FLA. STAT. ANN. § 95.031(2) (West 1982) (within 12 years after the date of delivery of the completed product to its original purchaser); GA. CODE ANN. § 105-106(b)(2) (1984) (within 10 years from the date of the first sale for use or consumption of the personal property causing or otherwise bringing about the injury); IDAHO CODE § 6-1403 (Supp. 1986) (after 10 years, presumption arises that the harm was caused after the useful life has expired); ILL. ANN. STAT. ch. 110, para. 13-213 (Smith-Hurd 1984) (within 12 years from the date of the first sale, lease or delivery of possession by a seller or 10 years from the date of first sale, lease or delivery of possession to its initial user or consumer); IND. CODE ANN. § 33-1-1.5-5 (West Supp. 1986) (within 10 years after the delivery of the product to the initial user or consumer); KAN. STAT. ANN. § 60-33-3 (1983) (seller shall not be liable if harm was caused after the product's useful life; after 10 years a rebuttable presumption arises that it occurred beyond the useful life); KY. REV. STAT. ANN. § 411.310 (Supp. 1981) (rebuttable presumption that product was not defective if more than five years after date of sale to first consumer or more than eight years after date of manufacture); MICH. COMP. LAWS ANN. § 600.5805(a) (West Supp. 1986) (if product has been in use less than 10 years, the plaintiff, in proving *prima facie* case, shall be required to do so without benefit of any presumption); MINN. STAT. ANN. § 604.03 (West Supp. 1986) (it is a defense that injury was sustained after the expiration of the ordinary useful life of the product); NEB. REV. STAT. § 25-224 (1985) (within 10 years after the date the product was first sold or leased for use or consumption); N.H. REV. STAT. ANN. § 507-D:2 (Supp. 1986) (within 12 years after the manufacturer of the product parted with its possession and control or sold it, whichever occurred last); N.C. GEN. STAT. § 1-5-0(6) (Supp. 1983) (within six years after the date of initial purchase for use or consumption); N.D. CENT. CODE § 28-01.1-02 (Supp. 1985) (within 10 years of the date of initial purchase for use or consumption or within 11 years of the date of manufacture); OR. REV. STAT. § 30-905(1) (Supp. 1986) (within eight years after the date on which the product was first purchased for use or consumption); R.I. GEN. LAWS § 9-1-13 (1985) (within 10 years after the date the product was first purchased for use or consumption); TENN. CODE ANN. § 29-28-103 (1986) (within 10 years from the date on which the product was first purchased for use or consumption, or within one year after the expiration of the anticipated life of the product); UTAH CODE ANN. § 78-15-3 (1977) (within six years after date of initial purchase for use or consumption or 10 years after the date of manufacture); and WASH. REV. CODE ANN. § 7.72.060 (Supp. 1987) (a seller is not subject to liability if seller proves that harm was caused after product's useful life has expired; if harm was caused within 12 years after the time of delivery, rebuttable presumption that the harm was caused after the useful life had expired).
17. Statutes of repose exist in other areas of the law besides product liability, such as medical malpractice and architect and contractor liability. See Dworkin, *Product Liability of the 1980s: Repose is Not the Destiny of Man*, 61 N.C.L. REV. 33, 43 (1982).

judiciaries responded to the clamor of consumerists and declared these statutes void.¹⁸

Arguments in Favor of Statutes of Repose

Statutes of repose have strong appeal to industry because they eliminate the long-tail¹⁹ or open-ended²⁰ liability problems associated with older products. Allowing a plaintiff to initiate a product liability action indefinitely after the product is introduced into the market subjects the manufacturer and the seller to potential liability for the entire life of the product. This long-tail liability makes it difficult for sellers and manufacturers to adjust risk and set realistic product prices.²¹ The resulting lack of statistical foreseeability is reflected in insurance premiums.²² The imposition of a statute of repose limits a manufacturer's liability, provides certainty to manufacturers and insurance companies, and ultimately reduces insurance premiums.²³

This leads to a second argument in favor of statutes of repose. The risk of liability for a defective product without a statute of repose is much greater for some groups of manufacturers than others. For example, manufacturers who produce capital goods, such as large machines, are at a distinct competitive disadvantage compared with those who do not. Because they sell few items in comparison with other manufacturers, capital goods manufacturers are less able to absorb the risk of liability within the price of their products.²⁴ Similarly, older manufacturers are at a disadvantage compared with manufacturers just entering the market

18. See *infra* notes 36-38 and accompanying text.

19. Long-tail liability describes the situation in which a manufacturer of a defective product is liable many years after the product left its hands. The concept derives its name from the shape of the graph drawn with claims paid on one axis and years from manufacture on the other. A statute of repose is enacted to cut off the tail. See Martin, *supra* note 14, at 746.

20. Another term for long-tail liability is open-ended liability. See *Tetterton v. Long Mfg. Co., Inc.*, 314 N.C. 44, 332 S.E.2d 67 (1985) (statute of repose did not violate open courts provision of state constitution because the effect was merely to bar claims within a certain period after product's manufacture in order to shield the manufacturer from open-ended liability, which runs anew with each subsequent purchase, creating unending liability).

21. "[Without statutes of repose] it may be difficult to 'cost in' tort liability over a period of ten, twenty, thirty or more years, given the uncertainties of future economic developments with their effects on damages, to say nothing of the uncertainties of the legal standards that will be applied." Martin, *supra* note 14, at 747, citing U.S. DEP'T OF COMMERCE, INTERAGENCY TASK FORCE ON PRODUCT LIABILITY, FINAL REPORT VII-22, I-28 (1977) [hereinafter cited as INTERAGENCY TASK FORCE FINAL REPORT].

22. "Insofar as resource allocation is concerned, [losses generated from product liability lawsuits] are just as truly costs of producing particular goods as are more favorable risks. Lack of foreseeability makes it somewhat more difficult to include these costs in the price of the item produced." McGovern, *supra* note 10, at 593. Because most businesses choose to insure themselves against these losses, this lack of foreseeability reflects itself in higher insurance premiums. See *id.*; Calabresi, *Some Thoughts on Risk Distribution and the Law of Torts*, 70 YALE L.J. 499, 529 (1961).

23. See *Thornton v. Mono Mfg. Co.*, 99 Ill. App. 3d 722, 425 N.E.2d 522, 523 (1981).

24. See INTERAGENCY TASK FORCE FINAL REPORT, *supra* note 21, at VII-22, cited in Martin, *supra* note 14, at 748.

because they face liability exposure from products already sold.²⁵

Another argument in favor of statutes of repose involves the procedural aspect of defending product liability lawsuits. There are substantial and unique problems associated with defending a suit based on a thirty-year-old product. Investigation,²⁶ admissibility of evidence,²⁷ availability of witnesses and defenses,²⁸ and high transaction costs²⁹ are among the many difficulties.

Statutes of repose also promote judicial economy by eliminating a particular group of cases from an already crowded judicial docket.³⁰ In essence, proponents of statutes of repose are asking legislatures to define the scope of compensable harm and to balance the inherent unfairness to defendant manufacturers and sellers.

Arguments Against Statutes of Repose

Most of the arguments against statutes of repose center on inflexibility and lack of uniformity. One of the more popular allegations is the inequity created when statutes of repose are enacted on a state-by-state basis.³¹ Residents of a state with a "date of discovery" statute of limitations³² are at a distinct advantage compared with residents of a state with a statute of repose that bars suit after a certain number of years. In addition, opponents argue that state-by-state enactment of statutes of repose would not reduce insurance rates because rates are set on a national scale and scarcely take the reduced risk of liability in any given jurisdiction into account.³³

Inequality exists not only between states but also between products. Because the useful life of different products varies, opponents argue that a uniform wearing-out time set without regard to useful life would be unfair.³⁴

The most powerful argument against statutes of repose involves the question of constitutionality. Some courts have found statutes of repose

25. See generally Hicks, *The Constitutionality of Statutes of Repose: Federalism Reigns*, 38 VAND. L. REV. 627 (1985).

26. See Martin, *supra* note 14, at 748.

27. See *Johnson v. Star Machinery Co.*, 270 Or. 694, 530 P.2d 53, 56 (1974) (two reasons generally advanced for imposition of a statute of repose are (1) the reliability and availability of evidence and (2) the prevention of the burden of protracted or unknown potential liability).

28. See Martin, *supra* note 14, at 748.

29. See McGovern, *supra* note 10, at 594 ("the litigation expenses that the manufacturer would otherwise incur in defending action involving older products would be calculated in the societal savings generated by [a statute of repose]").

30. See *id.*

31. See McGovern, *supra* note 10, at 595; Phillips, *An Analysis of Proposed Reform of Products Liability Statutes of Limitation*, 56 N.C.L. REV. 663, 672 (1978).

32. Jurisdictions with "date of discovery" statutes of limitation, in this instance, do not have statutes of repose. Instead of cutting off liability after eight years from the date of manufacture of the product, these states cut off liability within a specified time from discovery. Therefore, the time within which a plaintiff must bring a suit varies from situation to situation.

33. See McGovern, *supra* note 10, at 595.

34. See Phillips, *supra* note 31, at 673.

deny product liability claimants their day in court, notwithstanding the merits of their claims and the direct liability of potential defendants.³⁵ At least thirteen states³⁶ have ruled on the constitutionality of state statutes of repose. Of these, six states have upheld the statutes,³⁷ and seven states have declared them unconstitutional.³⁸ The majority of the constitutional challenges have been made on the basis of equal protection under the fourteenth amendment,³⁹ due process of law under state and federal constitutions,⁴⁰ and violations of state "open-court" provisions, which guarantee equal access to courts.⁴¹

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35. See *Heath v. Sears, Roebuck & Co.*, 123 N.H. 512, 464 A.2d 288 (1983) (the effect of this absolute limitation on suits against the manufacturer is to nullify some causes of action before they arise); *Kennedy v. Cumberland Engineering Co.*, 471 A.2d 195 (R.I. 1984) (statute of repose found unconstitutional because it denied court access to a class of plaintiffs merely because they were injured by a product more than 10 years old).
 36. Alabama, Connecticut, Florida, Illinois, Indiana, New Hampshire, North Carolina, North Dakota, Oregon, Rhode Island, South Dakota, Tennessee and Utah. See *infra* notes 37-38.
 37. See, e.g., *Daily v. New Britain Mach. Co.*, 200 Conn. 562, 512 A.2d 893 (1986) (statute of repose does not violate the state or federal constitutions); *Costello v. Unarco Industries, Inc.*, 129 Ill. App. 3d 736, 473 N.E.2d 96 (1984) (product liability statute of repose does not violate special legislation and certain remedy provisions of the Illinois Constitution, nor does it violate due process or equal protection requirements of the Illinois and federal constitutions); *Dague v. Piper Aircraft Corp.*, 418 N.E.2d 607 (Ind. 1984) (the Indiana product liability act, which encompasses a 10-year statute of repose, does not contravene the provision of the state constitution guaranteeing access to open court); *Tetterton v. Long Mfg. Co.*, 314 N.C. 44, 332 S.E.2d 67 (1985) (product liability six-year statute of repose did not violate equal protection or the open courts provision of the state constitution); *Davis v. Whiting Corp.*, 66 Or. App. 541, 674 P.2d 1194 (1984) (eight-year product liability statute of repose did not violate the state constitutional guarantee of access to the courts or equal protection); *Buckner v. GAF Corp.*, 495 F. Supp. 351 (E.D. Tenn. 1979) (product liability statute of repose did not violate due process).
 38. See, e.g., *Lankford v. Sullivan, Long, & Hagerty*, 416 So. 2d 996 (Ala. 1982) (10-year product liability statute of repose was unconstitutional as violative of the Alabama constitutional provision requiring that all courts be open); *Diamond v. E.R. Squibb and Sons, Inc.*, 397 So. 2d 671 (Fla. 1981) (where product liability action against manufacturer of drug was barred before it ever existed in that it was not discovered until 20 years after the drug was administered, and the 12-year statute of repose, as applied, violated state constitution's guarantee of access to courts); *Heath v. Sears, Roebuck & Co.*, 464 A.2d 288 (N.H. 1983) (12-year statute of repose was unconstitutional); *Hanson v. Williams County*, 389 N.W.2d 319 (N.D. 1986) (10-year product liability statute of repose violates the equal protection clause of the state constitution); *Kennedy v. Cumberland Engineering Co.*, 471 A.2d 195 (R.I. 1984) (10-year statute of repose was unconstitutional because it denied court access to product liability claimants injured by products more than 10 years old); *Daugaard v. Baltic Co-op Bldg. Supply Ass'n.*, 349 N.W.2d 419 (S.D. 1984) (six-year product liability statute of repose was unconstitutional as violative of, and repugnant to, constitutional provisions insuring the citizenry of open courts); *Berry v. Beech Aircraft*, 717 P.2d 670 (Utah 1985) (product liability statute of repose operating to bar actions without regard to when an injury occurs found unconstitutional as violative of open courts provision).
 39. See *Hicks*, *supra* note 25, at 635-42. The appropriate standard to apply with an equal protection claim in this context is the rational basis test. Under that test, the statute will be upheld if it is a rational means of achieving a proper legislative purpose. Statutes of limitation generally have withstood the rational basis test, because the purpose of the statute is to limit the number of claims and set a finite period during which a defendant may be liable. See *Burnett v. New York Cent. R.R.*, 380 U.S. 424 (1965); *Purk v. Federal Press Co.*, 387 So. 2d 354 (Fla. 1980) (court rejected a contention that the statute of repose denied equal protection by establishing a classification that had no rational relation to a proper state objective).
 40. See *Dague v. Piper Aircraft Corp.*, 275 Ind. 520, 418 N.E.2d 207 (1981). The court held that

APPROACHES TO STATUTES OF REPOSE

When drafting a statute of repose, state legislators list the scope, start of the period of repose, end of the period of repose and consequences of the running of the period as the most important considerations.⁴² With regard to the scope of the statute, state approaches vary sharply. Some states exclude express warranties⁴³ or all warranties⁴⁴ from their statutes of repose, some states apply statutes of repose only to strict liability actions,⁴⁵ and still other states make the statutes of repose inapplicable in cases where fraudulent misrepresentation, concealment or nondisclosure is alleged.⁴⁶ Also included in the concept of scope are the potential defendants. Each statute defines the class of defendants differently,⁴⁷ some more broadly than others.

Two types of statutes of repose dominate the state arena with regard to the start of the period of repose: "date of sale" and "useful life."⁴⁸ In states that use the "date of sale" approach,⁴⁹ consumers are protected against products that remain with the manufacturer or seller for extended periods of time. Variations of this starting period run from the date of manufacture,⁵⁰ the first purchase of the product for use or consumption,⁵¹ the date the party last parted with possession or control of the product,⁵² or the date of delivery.⁵³

statute of repose was not sufficiently arbitrary or unreasonable as to be constitutionally impermissible under the due process clause. *Id.* at 214. See also Annot., *Validity and Construction of Statutes Terminating Right of Action for Product Caused Injury at Fixed Period After Manufacture, Sale or Delivery*, 25 A.L.R.4th 641, 651 (1983).

41. See Hicks, *supra* note 25, at 644-48. Many states have open-court provisions that state, for example, that "all courts shall be open; and that every person, for any injury done him . . . shall have a remedy by due process of law; and right and justice shall be administered without sale, denial, or delay." See, e.g., ALA. CONST. art. 1, § 13; CONN. CONST. art. 1, § 10; FLA. CONST. art. 1, § 21.
- Jurisdictions have held that the open-court provision is analogous to the due process clause of the United States Constitution, and it prevents state legislatures from abolishing a common law cause of action. See, e.g., *Tetterton v. Long Mfg. Co.*, 314 N.C. 44, 332 S.E.2d 67 (1985); *Dague v. Piper Aircraft Corp.*, 418 N.E.2d 207 (Ind. 1981); *Overland Constr. v. Sirmons*, 369 So. 2d 572 (Fla. 1979); and *Gentile v. Altermatt*, 169 Conn. 267, 363 A.2d 1 (1976).
42. See Martin, *supra* note 14, at 762, citing Address by William McGovern, ABA Convention (Honolulu, Aug. 5, 1980).
43. E.g., CONN. GEN. STAT. ANN. § 52-577(a) (West Supp. 1986); IND. CODE ANN. § 33-1-1.5-5 (West Supp. 1986).
44. E.g., IND. CODE ANN. § 33-1-1.5-5 (West Supp. 1986).
45. E.g., GA. CODE ANN. § 105-106(b)(2) (1984).
46. E.g., CONN. GEN. STAT. ANN. § 52-577(a) (West Supp. 1986).
47. New Hampshire addresses claims against a person having a legal duty to maintain or repair the product. N.H. REV. STAT. ANN. § 507-D:2(II)(b) (Supp. 1986). Illinois, by contrast, defines "seller" very broadly. ILL. REV. STAT. ch. 110, para. 13-213(a)(4) (Smith-Hurd Supp. 1984).
48. See Martin, *supra* note 14, at 767-68.
49. E.g., Alabama, Arizona, Colorado, Connecticut, Idaho, Illinois, Indiana, Nebraska, New Hampshire, North Dakota, Rhode Island, Utah and Washington.
50. E.g., Kentucky, North Dakota, Tennessee and Utah.
51. E.g., Alabama, Arizona, Colorado, Georgia, Kentucky, Michigan, Nebraska, North Carolina, North Dakota, Oregon, Rhode Island, Tennessee and Utah.
52. E.g., Connecticut and New Hampshire.
53. E.g., Florida and Indiana.

The "useful life" approach deals primarily with the end of the limitation period and avoids some of the inflexibility of the "date of sale" approach.⁵⁴ Under the "useful life" approach, the statute relieves a defendant of liability when the defendant proves an allegedly defective product was used beyond its useful life.⁵⁵

The consequences of the running of the period differ depending on whether the "useful life" or "date of sale" approach is used. In jurisdictions using the "useful life" approach, the expiration of the useful or anticipated product life or the statutory period creates a rebuttable presumption that the product was not defective. Most "date of sale" statutes bar any recovery for a defective product after the period ends.

The effects of statutes of repose are permanent. They shift the risk of loss from the manufacturer or seller to the consumer. They also shift the responsibility of deciding whether to allow compensation from the judiciary to the legislature.

The Future

Professor Dworkin has suggested several alternatives to courts faced with justifiable claims for relief after the expiration of the statute of repose.⁵⁶ These options include distinguishing between delayed-manifestation and delayed-injury suits,⁵⁷ tolling the period and declaring the repose statute unconstitutional.⁵⁸ Dworkin maintains that the advantage of the first two options is that delayed-manifestation suits may be prosecuted without directly upsetting legislative judgment in an area where wide discretion traditionally has been allowed.⁵⁹ In addition, some commentators have proposed that Congress pass a uniform statute of repose.⁶⁰ Proponents of such legislation contend that it would provide an accurate basis for insurance rates, would facilitate the flow of interstate commerce

54. *E.g.*, Connecticut, Idaho, Kansas, Michigan, Minnesota, Tennessee and Washington.

55. Under the common standard, useful life is a concept by which the claimant may obtain an extension of the repose period. For instance, the plaintiff could prove that the product seller gave instructions about the useful life that indicate it is longer than the typical state statute of repose. *See* CONN. GEN. STAT. ANN. § 52-577 (West Supp. 1986).

56. In Connecticut and Minnesota, the determination of whether the product's useful life has expired includes consideration of such factors as the effect on the product of wear and tear or deterioration from natural causes; the policy of the user and similar users on repairs, renewals and replacements; the effect of climatic and other local conditions in which the product was used; representations, instructions and warnings the product seller gave about the useful life of the product; and any modification or alteration of the product by a user or third party. CONN. GEN. STAT. ANN. § 52-577(a) (West Supp. 1986); MINN. STAT. ANN. § 604.03 (West Supp. 1986).

57. This solution focuses on the long-tail problem discussed in *supra* note 19 and accompanying text. There are inequities involved in bringing an old-product injury suit where the product at issue is 10, 20 or even 30 years old. But inequities also exist when there is a delayed manifestation of an injury and the plaintiff is not allowed to bring suit. Legislatures should distinguish between the two types of suits.

58. *See* Dworkin, *supra* note 17, at 45.

59. *See id.*

60. *See, e.g.*, Hicks, *supra* note 25, at 653.

and would allow manufacturers to successfully base marketing decisions on economic principles.⁶¹

CONCLUSION

Product liability statutes of repose continue to be severely criticized for their harshness and inflexibility, and some plaintiffs have successfully challenged their constitutionality. It appears that the trend is against state statutes of repose. Courts are increasingly realizing that harsh results are caused by these statutes, and they are remedying the situation by declaring them unconstitutional. When deciding whether to institute a state statute of repose, legislators should keep in mind the statute's inflexibility, lack of uniformity and potential unfairness. Legislators may also wish to consider the high probability that a federal statute of repose for product liability claims will be implemented in the near future. A federal limitation period would alleviate the lack of uniformity that exists between plaintiffs and products. Legislators should work toward this national standard because a federal statute of repose would stand the best chance of weathering the storm created by inconsistency among the states.

*Lori A. Merlo**

61. *See id.* at 633.

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