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## Limitation of Actions - Constitutional Law - North Dakota's Product Liability Act Statute of Repose Held Unconstitutional

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LIMITATION OF ACTIONS — CONSTITUTIONAL  
LAW — NORTH DAKOTA'S PRODUCT LIABILITY  
ACT STATUTE OF REPOSE HELD  
UNCONSTITUTIONAL

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During the summer of 1983, Williams County loaned a multi ton earth packer, manufactured by Ingram Manufacturing Company (Ingram), to the city of Williston, North Dakota.<sup>1</sup> Todd Hefta, a city employee, was assigned with a fellow employee to operate the earth packer.<sup>2</sup> On August 24, 1983, as the fellow employee climbed into the operator's seat of the packer, Hefta walked behind the packer to get a drink of water from a cooler placed on the back of the machine.<sup>3</sup> The operator touched the starter button and the earth packer "jumped backwards."<sup>4</sup> The machine ran over Hefta and he died as a result of the accident.<sup>5</sup> Bonny Hanson, Todd Hefta's mother, filed a wrongful death action against Williams County and Ingram.<sup>6</sup> In the complaint Hanson alleged negligence, breach of warranty, and strict liability in tort.<sup>7</sup> Ingram moved for summary judgment on the basis of

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1. See *Hanson v. Williams County*, 389 N.W.2d 319, 320 (N.D. 1986). Ingram Manufacturing Company manufactured the earth packer on November 13, 1963. *Id.* In April 1964 it was sold to Krider Equipment Company of Fargo, which later sold it to the State of North Dakota. *Id.* Williams County bought the packer from the state on July 9, 1980. *Id.*

2. *Id.*

3. *Id.*

4. *Id.* The earth packer operator allegedly checked the clutch to make sure it was out of gear before he touched the starter button. *Id.*

5. *Id.*

6. *Id.* Hanson filed the wrongful death action pursuant to chapter 32-21 of the North Dakota Century Code. *Id.* Section 32-21-01 of the North Dakota Century Code provides:

Whenever the death of a person shall be caused by a wrongful act, neglect, or default, and the act, neglect, or default is such as would have entitled the party injured, if death had not ensued, to maintain an action and recover damages in respect thereof, then and in every such case the person who, or the corporation or company which, would have been liable if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured or of the tortfeasor, and although the death shall have been caused under such circumstances as amount in law to felony.

N.D. CENT. CODE § 32-21-01 (Supp. 1983).

7. 389 N.W.2d at 320. The North Dakota Supreme Court determined that Hanson's claims based upon fraud, misrepresentation, and violations of relevant OSHA regulations were no longer material to the case. *Id.* at 320 n.1.

subsection 28-01.1-02(1) of the North Dakota Century Code.<sup>8</sup> Subsection 28-01.1-02(1) provides the applicable statute of repose for cases brought pursuant to North Dakota's Product Liability Act, and if applied, would have terminated Hanson's claim.<sup>9</sup> The district court granted Ingram's motion for summary judgment and dismissed Hanson's claim against Ingram.<sup>10</sup> The North Dakota Supreme Court reversed the district court and *held* that North Dakota's Product Liability Act's statute of repose violated the equal protection provision of the North Dakota Constitution.<sup>11</sup> *Hanson v. Williams County*, 389 N.W.2d 319 (N.D. 1986).

In the late 1970's many states enacted product liability legislation in response to a perceived crisis in the product liability field.<sup>12</sup> A number of manufacturers, retailers, and distributors

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8. *Id.* at 320. The North Dakota Product Liability Act's statute of repose, codified in § 28-01.1-02(1) of the North Dakota Century Code, provides:

1. There shall be no recovery of damages for personal injury, death, or damage to property caused by a defective product, . . . unless the injury, death, or damage occurred within ten years of the date of initial purchase for use or consumption, or within eleven years of the date of manufacture of a product, where that action is based upon, or arises out of, any of the following:
  - a. Breach of any implied warranties.
  - b. Defects in design, inspection, testing, or manufacture.
  - c. Failure to warn.
  - d. Failure to properly instruct in the use of a product.

N.D. CENT. CODE § 28-01.1-02(1) (Supp. 1985). For an extensive discussion of the statute's intended purpose, see *infra* notes 28-34 and accompanying text. North Dakota's Product Liability Act's statute of repose is labeled a statute of limitations. See N.D. CENT. CODE § 28-01.1-02 (Supp. 1985). This label, however, has no legal effect. See *id.* § 1-02-12 (headnotes do not constitute part of a statute). The time period in the statute begins to run from the date of the initial purchase, or date of manufacture of the product. See *id.* § 28-01.1-02. Because the time period runs from the occurrence of an event other than the injury, § 28-01.1-02 may bar a right of action before it accrues. See *id.* Thus, the statute is, in effect, a statute of repose. See *id.*

9. See N.D. CENT. CODE § 28-01.1-02(1) (Supp. 1985). For the text of § 28-01.1-02(1) of the North Dakota Century Code, see *supra* note 8. The parties agreed that Hanson's chances for recovery against Ingram depended on the constitutionality of the statute of repose. *Hanson v. Williams County*, Civ. No. 16489, mem. decision, at A-4 (June 24, 1985). The district court noted that some courts have held similar statutes of repose unconstitutional, while other courts have determined that similar statutes of repose are constitutional. *Id.* at A-2. The district court, however, refused to substitute its judgment for that of the legislature and reasoned that the issue was whether the classification adopted seemed reasonable to the legislature. *Id.*

10. 389 N.W.2d at 320. The district court recognized that Williams County, the owner of the earth packer, was in a different position than the manufacturer or retailer. See Civil No. 16489, at A-4. The court noted that the owner's obligation likely arose under the law of bailments, and therefore presented an entirely distinct basis of liability for Williams County. *Id.* Thus the court denied summary judgment on behalf of Williams County. *Id.*

11. 389 N.W.2d at 328. Article I, § 21 of the North Dakota Constitution guarantees equal protection of the laws to every individual. See N.D. CONST. art. I, § 21. Section 21 of article I provides: "No special privileges or immunities shall ever be granted which may not be altered, revoked or repealed by the legislative assembly; nor shall any citizen or class of citizens be granted privileges or immunities which upon the same terms shall not be granted to all citizens." *Id.*

12. See Dowokin, *Federal Reform of Product Liability Law*, 57 TUL. L. REV. 602, 608 (1983) (discussing state reaction to the product liability crisis); see also Herrmann, *An Overview of State Statutory Product Liability Law*, 27 TRIAL LAWYER'S GUIDE 1 (1983) (synopsis of each state's product

urged the federal government to adopt legislation to relieve the effects of the rising cost of product liability insurance.<sup>13</sup> The business community argued that an extraordinary increase in product liability insurance rates, coupled with an unprecedented increase in the number and size of product liability claims, was causing product liability insurance to become unavailable and unaffordable.<sup>14</sup> In response to these concerns, the federal government established the Federal Interagency Task Force to study potential solutions to the problems associated with the increase in product liability insurance rates.<sup>15</sup>

The Interagency Task Force suggested the drafting of federal legislation to battle increased product liability insurance rates.<sup>16</sup> The Department of Commerce drafted the Uniform Product Liability Act based on the findings of the Task Force and input from various groups affected by the product liability problem.<sup>17</sup> Although the Task Force assumed that most states would adopt the Uniform Product Liability Act, no state has adopted the Act in its

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liability laws); Annotation, *Validity and Construction of Statute Terminating Right or Action For Product-Caused Injury at Fixed Period After Manufacture, Sale, or Delivery*, 25 A.L.R. 4th 641 (1983) (various state product liability statutes of repose and an analysis of their validity).

13. See U.S. DEP'T OF COMMERCE, FED. INTERAGENCY TASK FORCE ON PRODUCT LIABILITY, FINAL REPORT I-3 (1978) [hereinafter TASK FORCE FINAL REPORT].

14. See *id.* at I-1. The increase in manufacturer liability was largely the result of the pro consumer trend in product liability litigation. See Dowokin, *supra* note 12, at 602. This trend is manifested by more frequent and larger jury awards. *Id.* at 603; see also Page & Stephens, *Product Liability Insurance "Crisis": Causes, Nostrums and Cures*, 13 CAP. U. L. REV. 387, 388-89 (1984) (manifestations of the product liability "crisis" include quadrupling of product liability insurance premiums, and a substantial increase in the number of product liability claims).

15. See TASK FORCE FINAL REPORT, *supra* note 13, at I-4. The United States Department of Commerce performed an initial study of the problems associated with product liability litigation, and suggested that there might be a product liability insurance problem that could place a great financial burden on the insurance industry. *Id.* The report prompted the administration to form the Interagency Task Force to study the problem in greater depth. *Id.*

The Federal Interagency Task Force on Product Liability confirmed the existence of the "crisis" and identified three principle causes of the product liability problem: (1) the liability rate making procedures; (2) the manufacturing of unreasonably unsafe products; and (3) the uncertain tort litigation system. *Id.* at I-20. The Task Force identified numerous less significant causes of the "crisis." *Id.* at I-29. These additional causes include inflation, consumer and worker awareness, increasing product complexity, and product misuse. *Id.*

16. U.S. DEP'T OF COMMERCE, INTERAGENCY TASK FORCE ON PRODUCT LIABILITY, BRIEFING REPORT, 1977, iv (1977). The Task Force indicated that federal legislation to battle increased product liability insurance rates would avoid duplicate efforts by the states, facilitate interstate commerce, and reduce the cost of insurance. *Id.* at v. On the basis of the Task Force's final report, the Department of Commerce drafted a report entitled "Draft Uniform Product Liability Law." 44 Fed. Reg. 2996 (1979); Model Uniform Product Liability Act, 44 Fed. Reg. 62,714 (1979) [hereinafter Uniform Product Liability Act]. The "Draft Law" contributed substantially to the Department of Commerce's Model Uniform Product Liability Act. *Id.* at 62,716. See generally Coccia, *Uniform Product Liability Legislation: A Proposed Federal Solution*, 27 TRIAL LAWYER'S GUIDE 236 (1983) (a discussion of the federal legislative response to the product liability crisis).

17. See Uniform Product Liability Act, *supra* note 16, at 62,714. A Draft Uniform Product Liability Law was published for public comment prior to the final drafting of the Act. *Id.*; see 44 Fed. Reg. 2996 (1979) (Draft Uniform Product Liability Law).

entirety.<sup>18</sup> Many states, however, have enacted some type of legislation designed to reduce product liability insurance rates.<sup>19</sup> Most of this legislation is loosely based on the Uniform Product Liability Act.<sup>20</sup> The most frequent reform that states have adopted is a provision that designates a specific time period in which a person may bring an action against manufacturers.<sup>21</sup>

In many states, legislatures have enacted a statute of limitations coupled with a statute of repose.<sup>22</sup> A statute of limitations bars a right of action unless it is filed within a specific period of time after all the elements of a claim for relief accrue.<sup>23</sup> The statutory time period, however, does not commence until the injury is discovered, or through the exercise of reasonable diligence should have been discovered.<sup>24</sup> On the other hand, a statute of repose precludes a plaintiff's claim after the lapse of a specific period of time, regardless of whether or not an injury has occurred.<sup>25</sup> A statute of repose establishes an absolute time after the purchase or manufacture of a product beyond which an injured party cannot bring an action.<sup>26</sup> The effect of a statute of repose, therefore, may be to preclude a right of action before the injury occurs.<sup>27</sup>

North Dakota adopted its Product Liability Act in 1979.<sup>28</sup> The

18. Dowokin, *supra* note 12, at 608. The Department of Commerce urged nationwide adoption of the Uniform Product Liability Act to provide uniformity and thus, a reduction in insurance rates. Uniform Product Liability Act, *supra* note 16, at 62,714.

19. *See, e.g.*, N.D. CENT. CODE ch. 28-01.1 (Supp. 1985) (product liability act). *See generally* Dowokin, *supra* note 12, at 608.

20. *Compare*, FLA. STAT. ANN. § 95.031(2) (West 1982) and IND. CODE ANN. § 34-4-20A-5 (Burns 1986) with Uniform Product Liability Act, *supra* note 16, at 62,714. *See generally* Dowokin, *supra* note 12, at 608.

21. *See, e.g.*; IND. CODE ANN. § 34-4-20A-5 (Burns 1986); *see also* Uniform Product Liability Act, *supra* note 16, § 110, at 62,732 (the length of time in which product sellers are subject to liability).

22. 2A L. FRUMER & M. FRIEDMAN, PRODUCTS LIABILITY § 16 C[2] (1986). Products liability statutes may contain three types of limitation periods: (1) a statute of limitations; (2) a statute of repose; (3) or a statute of limitations combined with a statute of repose. *See id.* A statute of limitation may run from the date of injury, death, or property damage. *Id.* A statute of repose may run from the date of the product's manufacture or sale. *Id.* A combination of the statutes of limitation and repose is likely to have one time period of limitation running from the date of death, injury, or property damage, and a second time limitation running from the date of manufacture or sale. *Id.*

23. *See* McGovern, *The Variety, Policy, and Constitutionality of Product Liability Statutes of Repose*, 30 AM. U. L. REV. 579, 584-85 (1981).

24. *Id.* at 583.

25. *Id.* at 584-85.

26. *See id.* If a state had a six year statute of limitations for the filing of product liability actions and a ten year product liability statute of repose that commenced at the date of initial purchase of a product, a person injured by a defective product eleven years after the date of sale may have no legal redress even if the claim were brought within the period of the six year statute of limitations. *See id.* at 585; *see also* N.D. CENT. CODE § 28-01.1-02(1) (Supp. 1985) (North Dakota product liability statute of repose). For the text of § 28-01.1-02(1) of the North Dakota Century Code, *see supra* note 8.

27. McGovern, *supra* note 23, at 585.

28. Products Liability Act, ch. 368, § 3, 1979 N.D. Laws 892. The North Dakota Product Liability Act is a modified version of the Utah Products Liability Act of 1977. *Compare* N.D. CENT. CODE ch. 28-01.1 (Supp. 1985) with UTAH CODE ANN. ch. 78-15 (1953); *see also* Kraft, *The North*

purpose of the Act is to alleviate the adverse effects of the increasing number of lawsuits against manufacturers of defective products.<sup>29</sup> The Act contains a statute of repose, which is codified in section 28-01.1-02 of the North Dakota Century Code.<sup>30</sup> The North Dakota Legislature intended the statute of repose to provide a reasonable time within which actions may be brought against manufacturers.<sup>31</sup>

Proponents of the North Dakota Product Liability Act statute of repose noted that the cost of product liability insurance had become unaffordable to many North Dakota manufacturers and that the statute of repose was essential to reduce insurance costs.<sup>32</sup>

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*Dakota Equity for Tortfeasors Struggle — Judicial Action vs. Legislature Over-Reaction*, 56 N.D.L. REV. 67, 99-100 (1980) (noting that North Dakota's Product Liability Act is a slightly modified version of Utah's Product Liability Act).

The Utah Supreme Court has recently declared the Utah Product Liability Act's statute of repose unconstitutional. *See Berry v. Beech Aircraft Corp.*, 717 P.2d 670, 686 (Utah 1985). The statute of repose violated the Utah Constitution's open court and wrongful death provisions. *Id.* at 683-85. The court determined that Utah's open court provision required an injured person to have an effective and reasonable alternative remedy equal to the remedy abrogated by the statute of repose. *Id.* at 680. The legislature's elimination of a plaintiff's right of action must not be arbitrary or unreasonable. *See id.* The court also reasoned that the Utah Constitution created a wrongful death action that cannot be legislatively defeated based on how soon the death occurs after the date of manufacturing or sale of a product. *Id.* at 685; *see* UTAH CODE ANN. ch. 78-15 (1953) (Utah Product Liability Act).

The North Dakota Product Liability Act provides an exception that is unavailable in the Utah Product Liability Act. *Compare* N.D. CENT. CODE ch. 28-01.1 (Supp. 1985) (North Dakota Product Liability Act) *with* UTAH CODE ANN. ch. 78-15 (1953) (Utah Product Liability Act). Subsection 28-01.1-02(3) of the North Dakota Century Code, frequently termed the "safety valve" exception, provides for the suspension of the ten year statute of limitations if the manufacturer recalls, modifies, or is aware of a product defect and fails to notify a user who is subsequently injured. *See* N.D. CENT. CODE § 28-01.1-02(3) (Supp. 1985). This "safety valve" exception mitigates the harsh effects of the statute of repose. *See id.*

29. *See* N.D. CENT. CODE § 28-01.1-01 (Supp. 1985). Section 28-01.1-01 of the North Dakota Century Code declares the legislative findings and intent of North Dakota's Product Liability Act. *See id.* Section 28-01.1-01 of the North Dakota Century Code provides:

1. The legislative assembly finds that the number of lawsuits and claims for damages and the amount of judgments and settlements arising from defective products has substantially increased in recent years. Because of these increases, the insurance industry has drastically increased the cost of products liability insurance. The effect of increased insurance premiums and increased claims has increased product cost through manufacturers, wholesalers, and retailers passing the cost of premiums to the consumer. Certain product manufacturers are discouraged from continuing to provide and manufacture certain products because of the high cost and possible unavailability of products liability insurance.
2. Because of these recent trends, and for the purpose of alleviating the adverse effects which these trends are producing in the manufacturing industry, it is necessary to protect the public interest by enacting measures designed to encourage private insurance companies to continue to provide products liability insurance.
3. It is the purpose of sections 28-01.1-01 through 28-01.1-05 to provide a reasonable time within which actions may be commenced against manufacturers, while limiting the time to a specific period for which products liability insurance premiums can be reasonably and accurately calculated; and to provide other procedural changes to expedite early evaluation and settlement of claims.

*Id.*

30. *Id.* § 28-01.1-02. For the relevant text of § 28-01.1-02 of the North Dakota Century Code, see *supra* note 8.

31. *See id.*

32. *See* NORTH DAKOTA LEGISLATIVE COUNCIL, REPORT TO THE FORTY-SIXTH LEGISLATIVE ASSEMBLY, 137, 138, 140 (1979) [hereinafter LEGISLATIVE COUNCIL REPORT]; *see also* Dickson, *The*

The proponents claimed that the statute of repose provided the certainty needed to accurately rate insurance premiums because it limited manufacturers' open ended liability.<sup>33</sup> Critics of the Act's statute of repose questioned its constitutionality, however, arguing that it unfairly limited the compensation available to injured victims.<sup>34</sup>

Injured parties have challenged the constitutional validity of statutes of repose on a number of occasions.<sup>35</sup> These challenges have been based on the state and federal constitutional guarantees of due process, equal protection, and access to the courts.<sup>36</sup>

A person may challenge a statute of repose on the grounds that the denial of, or encroachment upon, an individual's right to sue violates due process guarantees.<sup>37</sup> The due process clause of the fourteenth amendment to the United States Constitution provides that "[n]o State shall . . . deprive any person of life, liberty or property, without due process of law. . . ."<sup>38</sup> Most courts apply a "rational basis standard" when evaluating whether a statute of repose comports with due process guarantees.<sup>39</sup> Courts will uphold

*Statute of Limitations in North Dakota's Products Liability Act: An Exercise in Futility?*, 59 N.D.L. REV. 551 (1983) (recitation of the legislative enactment and procedural and substantive effects of the Act).

33. See LEGISLATIVE COUNCIL REPORT, *supra* note 32, at 140. Proponents of statutes of repose contend that the long period of potential liability is the most significant factor in the product liability problem. McGovern, *supra* note 23, at 593. Manufacturers contend that other benefits of the statute of repose include the elimination of stale evidence from "old" claims, and judicial economy. See LEGISLATIVE COUNCIL REPORT *supra* note 32, at 140; McGovern, *supra* note 23, at 593-94. Manufacturers also urge that the benefits of the statute of repose outweigh the potential plaintiffs' losses, because estimates indicate that the limitation would eliminate only one to three percent of all product liability actions. See LEGISLATIVE COUNCIL REPORT, *supra* note 32, at 140.

34. LEGISLATIVE COUNCIL REPORT, *supra* note 32, at 139. A North Dakota Attorney General's opinion suggested that possible constitutional defects existed because the North Dakota Product Liability Act statute of repose extinguished an existing remedy. *Id.* at 140. The opinion, however, added that the comparable medical malpractice statute of repose had not yet been considered by the North Dakota Supreme Court. *Id.*

35. See, e.g., *Thornton v. Mono Mfg. Co.*, 99 Ill. App. 3d 722, 725-26, 425 N.E.2d 522, 524-25 (1981) (statute of repose did not violate due process under the rational basis standard); *Davis v. Whiting Corp.*, 66 Or. App. 541, \_\_\_\_, 674 P.2d 1194, 1196 (statute of repose did not violate due process, equal protection, or access to courts provisions), *cert. denied*, 297 Or. 83, 679 P.2d 1367 (1984). See generally McGovern, *supra* note 23 (an in depth study of various product liability statutes of repose before 1981); Hicks, *The Constitutionality of Statutes of Repose: Federalism Reigns*, 38 VAND. L. REV. 627 (1985) (a study of various statutes of repose).

36. See Hicks, *supra* note 35, at 635.

37. See, e.g., *Thornton v. Mono Mfg. Co.*, 99 Ill. App. 3d 722, 726, 425 N.E.2d 522, 525 (1981) (statute of repose did not violate due process under the rational basis standard). See generally McGovern, *supra* note 23, at 613 (discussing the due process argument against a product liability statute of repose).

38. U.S. CONST. art. XIV, § I. The North Dakota due process clause provides that: "No person shall be twice put in jeopardy for the same offense, nor be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property without due process of law." N.D. CONST. art. I, § 12. State courts usually follow the federal guidelines in due process cases, regardless of whether the state court is applying a state or federal constitutional provision. Hicks, *supra* note 35, at 642.

39. See, e.g., *Yarbro v. Hilton Hotels Corp.*, 655 P.2d 822, 827 (Colo. 1982) (court applied the rational basis standard and determined that the statute of repose did not violate due process or equal

a statute of repose if it is rationally related to a permissive legislative objective or if the statute does not arbitrarily terminate a plaintiff's claim.<sup>40</sup>

The Illinois Supreme Court, in *Thornton v. Mono Manufacturing Co.*,<sup>41</sup> applied a rational basis standard of review to a due process challenge against Illinois' product liability statute of repose.<sup>42</sup> The plaintiff in *Thornton* was a minor who was injured when he stepped on a rotary cutter.<sup>43</sup> The rotary cutter had been purchased more than ten years before the filing of the complaint.<sup>44</sup> The court ruled that the minor's claim was barred by the Illinois statute of repose, which allowed an injured person's strict liability claim only if the complaint was filed within ten years of the product's purchase.<sup>45</sup> The plaintiff contended that the statute of repose arbitrarily limited strict liability claims, but not negligence or breach of warranty claims.<sup>46</sup> The court reasoned that, because strict liability possesses different characteristics than the doctrines of negligence or breach of warranty, a rational legislative purpose may have been served by the limitation.<sup>47</sup> Thus, the court found that a reasonable relationship existed between the statute of repose and its intended purpose.<sup>48</sup>

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protection); *Thornton v. Mono Mfg. Co.*, 99 Ill. App. 3d 722, 726, 425 N.E.2d 522, 525 (1981) (statute of repose did not violate due process under the rational basis standard). See generally Hicks, *supra* note 35, at 635. The rational basis standard of review is the lowest level of scrutiny a court may apply and is considered so deferential that few statutes fail the test. See *id.* at 643.

40. See, e.g., *Thornton v. Mono Mfg. Co.*, 99 Ill. App. 3d 722, 725, 425 N.E.2d 522, 524 (1981) ("[w]hether a statute violates the due process clause depends upon whether it bears a reasonable relationship to a constitutionally permissible purpose"); *Davis v. Whiting Corp.*, 66 Or. App. 541, \_\_\_, 674 P.2d 1194, 1196 (statute of repose constitutional if it is rationally related to legislative purpose), *cert. denied*, 297 Or. 883, 679 P.2d 1367 (1984). Although some courts have found that statutes of repose violate due process, no court has invalidated a statute of repose solely on due process grounds when applying the rational basis standard. Hicks, *supra* note 35, at 643.

41. 99 Ill. App. 3d 722, 425 N.E.2d 522 (1981).

42. *Thornton v. Mono Mfg. Co.*, 99 Ill. App. 3d 722, 725, 425 N.E.2d 522, 524 (1981). In *Thornton* the court stated that the Illinois Legislature enacted the Illinois product liability statute of repose to alleviate the effect of escalating insurance rates. *Id.* Manufacturers' rising insurance costs resulted from the increased exposure to lawsuits since the advent of product liability claims based on strict liability in tort. *Id.*

43. *Id.* at 724, 425 N.E.2d at 523.

44. *Id.* at 724, 425 N.E.2d at 524.

45. *Id.* The Illinois statute of repose stated that no product liability action based on strict liability in tort could be brought after ten years from the date of sale to its initial user. See ILL. ANN. STAT. ch. 83, para 22.2(b) (Smith-Hurd 1979) (repealed 1982).

46. 99 Ill. App. 3d at 725, 425 N.E.2d at 524. The plaintiff contended that the Illinois statute of repose violated the guarantee of due process because it had the effect of barring a right of action before it accrued. *Id.* at 726, 425 N.E.2d at 525. The court noted that the Illinois Legislature was at liberty to create or abolish rights as long as no vested rights were disturbed. *Id.* at 727, 425 N.E.2d at 525. The court reasoned that the plaintiff merely had an expectation of recovery based on an anticipation of the continuance of existing law and not a vested right because the statute came into effect before the plaintiff's accident occurred. *Id.* Thus, because the statute of repose did not disturb a vested legal right of the plaintiff's, there was no due process violation. *Id.*

47. *Id.* at 725, 425 N.E.2d at 524-25.

48. *Id.* at 726, 425 N.E.2d at 525. The court noted that whether the statute of repose is the best means to achieve a legislative goal is not a proper judicial inquiry. *Id.* at 725-26, 425 N.E.2d at 525.



Plaintiffs have also challenged the constitutionality of statutes of repose on the grounds that the statutes violate the "open courts" provisions contained in most state constitutions.<sup>49</sup> Although "open courts" provisions vary in form from state to state, these clauses generally guarantee that the courts will be open, without denial or delay, to every person for the redress of an injury.<sup>50</sup> Many courts have concluded that the applicable statute of repose does not violate the open courts provision.<sup>51</sup> A few courts, however, have concluded that the applicable statute of repose does violate an individual's guaranteed access to the courts.<sup>52</sup>

The Alabama Supreme Court, in *Lankford v. Sullivan, Long & Hagerty*,<sup>53</sup> applied Alabama's open courts provision to the Alabama Product Liability Act's statute of repose.<sup>54</sup> The plaintiffs were

Thus, the court concluded that the statute did bear a reasonable relationship to its intended purpose and therefore did not violate the plaintiff's due process guarantee. *See id.*

49. *See, e.g.*, *Dague v. Piper Aircraft Corp.*, 275 Ind. 520, 418 N.E.2d 207, 213 (1981) (court stated that Indiana's statute of repose had a strong presumption of validity and upheld the statute despite Indiana's open courts clause). *See generally* *McGovern*, *supra* note 23, at 615 (discussing the argument that a statute of repose violates the "open courts" provision contained in state constitutions). The open court analysis often parallels due process analysis because under both inquiries courts often look for a reasonable relationship between the statute and a legitimate legislative purpose. *Hicks*, *supra* note 35, at 645.

50. *See, e.g.*, N.D. CONST. art. I, § 9; ILL. CONST. art. I, § 12. Some states have labeled the open courts provision as "access to courts and remedy" provisions. *Hicks*, *supra* note 35, at 644. The North Dakota open courts provision provides:

All courts shall be open, and every man for any injury done him in his lands, goods, person or reputation shall have remedy by due process of law, and right and justice administered without sale, denial or delay. Suits may be brought against the state in such manner, in such courts, and in such cases, as the legislative assembly may, by law, direct.

N.D. CONST. art. I, § 9. The North Dakota Supreme Court recently interpreted the open courts provision of the North Dakota Constitution. *See Andrews v. O'Hearn*, 387 N.W.2d 716 (N.D. 1986). In *Andrews* the plaintiff argued that the open courts provision provided a guarantee of justice. *Id.* at 723. The court stated, however, that the open courts provision is guarantee of access to justice but not an absolute guarantee of justice. *See id.* The court determined that the open courts provision may be employed to "prevent the destruction of the only opportunity for an appropriate remedy." *Id.*

51. *See, e.g.*, *Dague v. Piper Aircraft Corp.*, 275 Ind. 520, \_\_\_\_\_, 418 N.E.2d 207, 213 (1981) (Indiana's statute of repose did not violate the state's open courts clause); *Davis v. Whiting Corp.*, 66 Or. App. 541, \_\_\_\_\_, 674 P.2d 1194, 1196 (statute of repose did not violate access to the courts provision), *cert. denied*, 297 Or. 82, 679 P.2d 1367 (1984).

52. *See, e.g.*, *Daugaard v. Baltic Coop. Bldg. Supply Ass'ns.*, 349 N.W.2d 419, 425-27 (S.D. 1984) (court reasoned that greater protection could be provided under the state constitution than under the Federal Constitution, and concluded that the statute of repose relating to claims against architects violated the open courts provision); *Kennedy v. Cumberland Eng'g Co.*, 471 A.2d 195, 198 (R.I. 1984) (court determined that the open courts provision barred the legislature from denying the plaintiff's rights by enacting a statute of repose); *Lankford v. Sullivan, Long & Hagerty*, 416 So. 2d 996, 1004 (Ala. 1982) (statute of repose violated the open courts provision). Courts applying the open courts provision state that if a statute provides an absolute denial of access to courts before a claim even arises, the statute is invalid because the bar to redress is antithetical to the purpose of the access to courts provision. *Hicks*, *supra* note 35, at 647.

53. 416 So. 2d 996 (Ala. 1982).

54. *Lankford v. Sullivan, Long & Hagerty*, 416 So. 2d 996, 999 (Ala. 1982); *see* ALA. CONST. art. I, § 13 (1975) (Alabama's open courts provision).

injured when a manlift upon which they were riding collapsed.<sup>55</sup> They alleged that the collapse was due to the negligent design, manufacture, installation, and inspection of the manlift.<sup>56</sup> The manlift had been installed fifteen years earlier.<sup>57</sup> The Alabama statute of repose barred a product liability claim not filed within ten years of the first use of the product.<sup>58</sup> Thus, the statute of repose barred the plaintiffs' claim.<sup>59</sup> The plaintiffs, however, alleged that the statute violated their right to a remedy under Alabama's open courts provision.<sup>60</sup> The Alabama Legislature enacted the statute of repose to provide a limited time frame for the commencement of product liability actions.<sup>61</sup> The legislature reasoned that, by limiting product liability actions, the evils caused by litigation would be reduced.<sup>62</sup> Applying the rational basis standard of review to the statute of repose, the court concluded that there was not a substantial relationship between the statute of repose and its intended purpose.<sup>63</sup> The court concluded that the statute of repose was arbitrary on its face and violated the state's open court provision.<sup>64</sup>

Finally, a person may challenge the constitutionality of a statute of repose on the grounds that it violates an individual's right

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55. 416 So. 2d at 998.

56. *Id.*

57. *Id.* at 999.

58. *Id.*; see ALA. CODE § 6-5-502 (Supp. 1986).

59. See 416 So. 2d at 999. The Alabama Supreme Court recognized that legislation that abolishes a common-law right of action is suspect. *Id.* at 1000. The court determined that the strict scrutiny standard of review was applicable because the legislation affected a common-law right of action. *Id.* The court noted that a legislatively created right of action required judicial deference as long as the legislation is not arbitrary. *Id.* Thus, the court implied that a legislatively created right of action is inherently less important than one created by the courts. *See id.* at 1000-01.

60. *Id.* at 999; see ALA. CONST. art I, § 13 (1975) (Alabama's open courts provision). The court noted that Alabama's statute of repose absolutely barred an action by a purchaser who was injured by a defective product ten years and one month after the first use of the product, while it allowed a purchaser to sue for injuries sustained nine years and eleven months after the first use. 416 So. 2d at 1003. The court contrasted the harshness of Alabama's statute of repose with that of the Model Uniform Product Liability Act. *Id.* For a discussion of the Model Uniform Product Liability Act, see Uniform Model Product Liability Act, *supra* note 16. The Model Act creates a presumption that the harm was caused after the expiration of the useful safe life of the product in claims made after ten years from the time of delivery. *Id.* § 110(B)(1), at 62,734. Alabama's statute of repose has a harsher effect because it creates an absolute cut off date rather than a rebuttable presumption. Compare ALA. CODE § 6-5-502 (Supp. 1986) (Alabama Products Liability Act statute of repose) with Uniform Model Product Liability Act, *supra* note 16, § 110(B)(1), at 62,734.

61. See *Lankford*, 416 So. 2d at 1001.

62. *Id.* The court noted that the Alabama Legislature determined that product liability litigation increased consumer prices, product liability insurance costs, and reduced the availability of product liability insurance. *See id.*

63. *Id.* at 1003. The Alabama Supreme Court recognized that the Alabama Product Liability Act statute of repose was intended to alleviate the effects of the product liability insurance crisis. *Id.* at 1001-03. The court, however, determined that even though there was evidence of a national insurance crisis, this evidence did not justify the statute of repose. *Id.* at 1002. The court found no indication that the statute of repose was a solution to the product liability problem and thus found an insufficient relationship existed between the statute and its intended purpose. *Id.* at 1003.

64. *Id.* at 1004; see also *Kennedy v. Cumberland Eng'g Co.*, 471 A.2d 195, 198 (R.I. 1984) (court determined that the open courts provision barred the legislature from denying the plaintiff's rights).

to equal protection of laws by creating arbitrary and unreasonable distinctions between classes of plaintiffs.<sup>65</sup> For example, a statute of repose may arbitrarily allow a product liability claim if the claim is made within eleven years of the product's manufacture.<sup>66</sup> The same statute, however, could bar any claim made after eleven years.<sup>67</sup>

Courts have applied the equal protection clause of both state and federal constitutions to invalidate statutes of repose.<sup>68</sup> One of three separate levels of scrutiny may be applied by the courts.<sup>69</sup> Many courts apply the rational basis standard of review.<sup>70</sup> Under a rational basis standard, courts will uphold the legislation if the statutory classification is reasonably related to a legitimate legislative objective.<sup>71</sup> However, if a statute creates a classification that is "inherently suspect" or encroaches upon an individual's fundamental rights, the courts will apply a strict scrutiny standard of review.<sup>72</sup> To survive strict scrutiny analysis, the statute must promote a compelling governmental purpose and be necessary to

65. See, e.g., *Heath v. Sears, Roebuck & Co.*, 123 N.H. 512, \_\_\_\_, 464 A.2d 288, 294 (1983) (court held the statute of repose invalid as a denial of equal protection of the laws). Courts applying an equal protection analysis often focus on the validity and reasonableness of the classifications, the uniformity of treatment within the classifications, and the relationship between the classifications and the purpose of the legislation. McGovern, *supra* note 23, at 606 n.148.

66. See, e.g., N.D. CENT. CODE § 28-01.1-02 (Supp. 1985). For the text of § 28-01.1-02, see *supra* note 8.

67. See, e.g., *id.*

68. See, e.g., *Heath v. Sears Roebuck & Co.*, 123 N.H. 512, \_\_\_\_, 464 A.2d 288, 296 (1983) (statute of repose violates state constitution). For a discussion of *Heath*, see *infra* notes 76-87 and accompanying text. See generally McGovern, *supra* note 23, at 606 (discussing the application of state and federal equal protection provisions to statutes of repose).

69. McGovern, *supra* note 23 at 607. A court may apply the strict scrutiny standard of review, an intermediate level of review, or the rational basis test to a product liability statute of repose. *Id.* For a discussion of the rational basis of review, see *infra* notes 70-71 and accompanying text. For a discussion of the strict scrutiny standard of review, see *infra* notes 72-73 and accompanying text. For a discussion of the intermediate standard of review, see *infra* notes 74-87 and accompanying text.

70. See, e.g., *Yarbro v. Hilton Hotels Corp.*, 655 P.2d 822, 825, (Colo. 1983) (statute of repose did not violate due process or equal protection under the rational basis test); *Klien v. Catalano*, 386 Mass. 701, \_\_\_\_, 437 N.E.2d 514, 519-25 (1982) (statute of repose protecting architect's work was upheld under a rational basis test); *Lamb v. Wedgwood South Corp.*, 308 N.C. 419, \_\_\_\_, 302 S.E.2d 868, 879 (1983) (same); *Rosenberg v. Town of North Bergen*, 61 N.J. 190, \_\_\_\_, 293 A.2d 662, 668 (1972) (under the rational basis analysis, statute of repose did not violate equal protection clause of the Federal Constitution).

71. See, e.g., *Klien v. Catalano*, 386 Mass. 701, \_\_\_\_, 437 N.E.2d 514, 519-25 (1982) (statute of repose protecting architect's work was upheld under a rational basis test); *Lamb v. Wedgwood South Corp.*, 308 N.C. 419, \_\_\_\_, 302 S.E.2d 868, 879 (1983) (same); *Davis v. Whiting Corp.*, 66 Or. App. 541, \_\_\_\_, 674 P.2d 1194, 1196 (the court found the rational basis test applicable and determined that the statute of repose did not violate due process, equal protection, or access to the courts provision), *cert. denied*, 297 Or. 82, 679 P.2d 1367 (1984). McGovern asserts that the "reasonableness" aspect of the rational basis standard depends on the facts of any given case and that there is considerable flexibility in its application. McGovern, *supra* note 23, at 607. Mere inequity of treatment usually will not render a classification unconstitutional. *Id.*

72. *Dickson*, *supra* note 32, at 566. The courts have not applied the strict scrutiny analysis to a product liability statute of repose. McGovern, *supra* note 23, at 607.

achieve that legislative purpose.<sup>73</sup> Lastly, the court may employ an intermediate level of scrutiny.<sup>74</sup> Under the intermediate standard, a statutory classification is constitutional only if a close correspondence exists between the classification and the legislative goals.<sup>75</sup>

The New Hampshire Supreme Court applied an intermediate standard of review to an equal protection challenge of a product liability statute of repose in *Heath v. Sears, Roebuck & Co.*<sup>76</sup> The plaintiffs alleged that the statute arbitrarily denied a class of plaintiffs injured by a defective product the right to sue a manufacturer.<sup>77</sup> The New Hampshire statute prohibited product liability claims against a manufacturer twelve years after the manufacturer sold or parted with control of the injury causing product, regardless of when the injury occurred.<sup>78</sup> A plaintiff, however, could recover for personal injuries not caused by a defective product if the action was started within six years of the injury, provided the injury occurred within twelve years from the time the manufacturer sold or parted with the product.<sup>79</sup>

The court recognized that, although the right to recover for personal injuries is not a fundamental right, it is an important substantive right.<sup>80</sup> Thus, the court applied an intermediate standard of review.<sup>81</sup> Under the intermediate standard of review, the court required that the classifications be reasonably and substantially related to the legislative objective.<sup>82</sup>

The court stated that the New Hampshire Legislature enacted the product liability statute of repose to ameliorate the product

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73. Dickson, *supra* note 32, at 559. Strict scrutiny is the most exacting standard of review in equal protection analysis. *Id.* A court will rarely find a statute of repose constitutional under the strict scrutiny standard of review. *Id.*

74. See generally *id.* For an example of the intermediate level of scrutiny applied to a statute of repose, see *infra* notes 76-86 and accompanying text.

75. See generally *id.* For an example of the intermediate level of scrutiny applied to a statute of repose, see *infra* notes 76-86 and accompany text. The court will independently examine the legislative justification for the statute of repose under the intermediate level of scrutiny to determine if there is a close correspondence between the statutory classification and the legislative goals of the statute. *Id.* at 567.

76. 123 N.H. 512, \_\_\_\_, 464 A.2d 288, 295 (1983).

77. See *Heath v. Sears, Roebuck & Co.*, 123 N.H. 512, \_\_\_\_, 464 A.2d 288, 295 (1983); see N.H. REV. STAT. ANN. § 507-D:2, II (a) (1983) (statute of repose for product liability claim). The court noted that although the New Hampshire Legislature could constitutionally establish a statute of limitations for all personal injury actions if it so desired, it could not discriminate against one class of plaintiffs in order to limit manufacturers' liability. 123 N.H. at \_\_\_\_, 464 A.2d at 296.

78. See N.H. REV. STAT. ANN. § 507-D:2, II (a) (1983).

79. See *id.* § 507-D:2 II (a), (c).

80. 123 N.H. at \_\_\_\_, 464 A.2d at 294 (citing *Carson v. Maurer*, 120 N.H. 925, 931-32, 424 A.2d 825, 830 (1980)).

81. *Id.* at \_\_\_\_, 464 A.2d at 295.

82. *Id.* For a discussion of the intermediate standard of review, see *supra* notes 74-75 and accompanying text.

liability insurance crisis.<sup>83</sup> The court, however, noted that the New Hampshire statute had little or no effect on national insurance rates.<sup>84</sup> Thus, the court determined that the statute of repose was not substantially related to its purpose and arbitrarily discriminated against one class of plaintiffs.<sup>85</sup> The court, therefore, concluded that the New Hampshire product liability statute of repose denied the plaintiffs the equal protection of the laws.<sup>86</sup>

The North Dakota Supreme Court examined the constitutionality of North Dakota's Product Liability Act's statute of repose in *Hanson v. Williams County*.<sup>87</sup> Hanson based her constitutional challenge of the North Dakota Product Liability Act on the North Dakota Constitution, which guarantees access to the courts,<sup>88</sup> equal protection,<sup>89</sup> and due process.<sup>90</sup> The court, however, based its decision solely on the equal protection provision.<sup>91</sup> The court stated that an injury caused by a defective product involves the important substantive right of human life and safety.<sup>92</sup> The court, therefore, applied an intermediate standard of review in its equal protection analysis.<sup>93</sup> The court noted that the

83. See *id.* at \_\_\_\_, 464 A.2d at 293, 296.

84. *Id.* at \_\_\_\_, 464 A.2d at 294. The court noted that a New Hampshire Legislative Committee concluded that it was unlikely that the enactment of the New Hampshire Product Liability Act would alleviate the product liability problem. *Id.*

85. See *id.* at \_\_\_\_, 464 A.2d at 295. One commentator suggests that had the New Hampshire Supreme Court applied the rational basis test in *Heath*, the court could have upheld the statute because of the deference given to the legislature under the rational basis test. Hicks, *supra* note 35, at 641. For a discussion of the rational basis standard of review, see *supra* note 71 and accompanying text.

86. 123 N.H. at \_\_\_\_, 464 A.2d at 296-97.

87. 389 N.W.2d 319 (N.D. 1986).

88. *Hanson v. Williams County*, 389 N.W.2d 319, 322-23 (N.D. 1986); see N.D. CONST. art. I, § 9 (open courts provision). For the text of article I, § 9 of the North Dakota Constitution, see *supra* note 50.

89. 389 N.W.2d 322-23; see N.D. CONST. art. I, § 21 (equal protection provision). For the text of article I, § 21 of the North Dakota Constitution, see *supra* note 11.

90. 389 N.W.2d 322-23; see N.D. CONST. art. I, § 12 (due process provision). For the text of article I, § 12 of the North Dakota Constitution, see *supra* note 38. Hanson did not specifically identify the state constitutional provisions on equal protection and due process in her challenge. 389 N.W.2d 319, 323 n.8. However, the court noted that Hanson referred primarily to the North Dakota Constitution and North Dakota caselaw to support her arguments. *Id.* Therefore, the court analyzed Hanson's challenges in terms of the North Dakota Constitution and North Dakota caselaw. See *id.* at 323-28.

91. 389 N.W.2d at 328.

92. *Id.* at 325. Chief Justice Erikstad dissented from the majority opinion in *Hanson*. See *id.* at 330 (Erikstad, C. J., dissenting). The Chief Justice stated that, since Hanson's right of action was an economic right, the rational basis standard of review should be applied to the statute of repose. *Id.* at 336. For a discussion of the rational basis standard, see *supra* note 71 and accompanying text. Chief Justice Erikstad indicated, however, that he would uphold the legislation under either the rational basis or the intermediate test. See *id.* at 343. He explained that the legislature often must act with a sparsity of facts and should not be prevented from reasonable experimentation. *Id.* at 345-46. The Chief Justice stated that the approach adopted by the majority was erroneous, stating "[i]t is not the function of the Court to second-guess the accuracy of a legislative determination of fact." *Id.* at 343.

93. *Id.* at 352. Hanson argued that the court should apply the strict scrutiny standard of review. *Id.* at 323 n.9. The court, however, concluded that the right to recover for personal injuries is an important substantive right, but that it is not similar to fundamental rights that require

intermediate standard of review requires a close correspondence between the statutory classification and the legislative goals.<sup>94</sup>

The court recognized that the classification made by the North Dakota Product Liability Act's statute of repose barred the claim of a person who was injured by a product that was initially purchased more than ten years before, or manufactured eleven years before the injury.<sup>95</sup> A person injured by a product that was purchased less than ten years before, or manufactured less than eleven years before the injury, however, could bring an action against the manufacturer.<sup>96</sup> The court then applied the intermediate level of review to the issue of "whether or not there is a close correspondence between [the] statutory classification and the legislative goals [that] would justify this classification."<sup>97</sup>

The court recognized that the statute of repose served an important governmental interest in alleviating the insurance problem faced by manufacturers.<sup>98</sup> However, the court required more than economic interests to justify the arbitrary denial of important substantive rights.<sup>99</sup> The court suggested a less arbitrary means of achieving the legislative goals.<sup>100</sup> The court stated that in "claims that involved harm caused more than ten years after time of delivery, a presumption should arise that the harm was caused after the useful safe life [of the product] had expired."<sup>101</sup> The court

strict scrutiny. *See id.* Thus, the court applied the intermediate level of review rather than strict scrutiny. *See id.* For a discussion of the strict scrutiny standard of review, *see supra* notes 72-73 and accompanying text.

Ingram, the manufacturer of the earth packer, urged the court to apply the rational basis standard of review. *Id.* at 323 n.10. The rational basis test is applied to a statute that pertains to economic regulation. *Id.* at 325. The court rejected the rational basis standard reasoning that human life and safety should not be viewed as a matter of economics. *Id.* Traditionally, a strong presumption of constitutionality attaches to a statute pertaining to economic matters and thus, a court gives deference to the legislative action. McGovern, *supra* note 23, at 607. For a discussion of the rational basis standard of review, *see supra* note 71 and accompanying text.

94. 389 N.W.2d at 323.

95. *Id.* at 326-27; *see* N.D. CENT. CODE § 28-01.1-02 (Supp. 1985). For the text of § 28-01.1-02 of the North Dakota Century Code, *see supra* note 8.

96. 389 N.W.2d at 326-27; *see* N.D. CENT. CODE § 28-01.1-02 (Supp. 1985). For the text of § 28-01.1-02 of the North Dakota Century Code, *see supra* note 8.

97. 389 N.W.2d at 327.

98. *Id.*

99. *Id.* at 328. The court recognized the North Dakota Legislature's attempt to reduce the costs of insurance to manufacturers; however, it questioned whether the statute of repose was the proper solution. *Id.* The court was concerned about the important substantive rights of life and safety that the statute of repose allowed one class of persons, but arbitrarily denied to another class of persons. *Id.* The court was unwilling to consider human life and safety as merely a matter of economics and resolved to focus on the individuals affected by the statute of repose. *Id.* at 325.

100. *Id.* at 328. The court noted that the Uniform Model Product Liability Act provided a less arbitrary means of reaching the legislative goals. *Id.*; *see* UNIFORM PRODUCT LIABILITY ACT, *supra* note 16, § 110(B)(1), at 62,734.

101. 389 N.W.2d at 328. The court recognized that the Uniform Product Liability Act merely creates a presumption that the harm was caused after the safe useful life of the product had expired. *Id.*; *see* UNIFORM PRODUCT LIABILITY ACT, *supra* note 16, § 110(B)(1), at 62,734. The Uniform

reasoned that this presumption would not provide an absolute cut off date for products liability claims, and therefore would be a less arbitrary means of reaching the legislative goals.<sup>102</sup> The court determined that the correspondence between the classification created by the statute of repose and the legislative goals was not sufficient to justify the arbitrary denial of a right of action of one class of plaintiffs.<sup>103</sup> Thus, the court concluded that the statute of repose violated the equal protection provision of the North Dakota Constitution.<sup>104</sup>

Prior to the North Dakota Supreme Court's decision in *Hanson*, the North Dakota Product Liability Act statute of repose could bar a right of action before it accrued.<sup>105</sup> The statute of repose shifted the risk of loss from the product manufacturer to the consumer.<sup>106</sup> The decision in *Hanson* reallocates the risk of loss to the manufacturers, who again must take responsibility for older products.<sup>107</sup> The number of claims made against manufacturers may increase, but it is unlikely that there will be a substantial increase.<sup>108</sup> Furthermore, despite the elimination of the North Dakota statute of repose, it is unlikely that product liability insurance rates will increase because premiums are determined on a nationwide basis rather than on state policy.<sup>109</sup>

The North Dakota Product Liability Act's statute of repose placed the decision of who may recover for an injury into the hands of the legislature and thus, victim compensation decisions shifted from the judicial system to the legislature.<sup>110</sup> The elimination of the statute of repose will redirect compensation decisions into the

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Product Liability Act does not provide for an absolute cut off date and thus does not produce the harsh effect of most state statutes of repose. *See id.*

102. *See* 389 N.W.2d at 328.

103. *Id.*

104. *Id.* The court reversed the district court decision and remanded the case for trial. *Id.*

105. *See* N.D. CENT. CODE § 28-01.1-02 (Supp. 1985).

106. *See id.*; McGovern, *supra* note 23, at 592. The statute of repose forced the consumer to bear the risk of loss by eliminating recovery for injury after a specific period of time. *See* N.D. CENT. CODE § 28-01.1-02 (Supp. 1985).

107. *See* *Hanson*, 389 N.W.2d at 328; McGovern, *supra* note 23, at 598 (discussing industry's incentive to make safe products when not protected by a statute of repose).

108. *See* Uniform Product Liability Act, Analysis, *supra* note 16, § 110, at 62,733 (citing Insurance Services Office (ISO) "Closed Claim Survey" at 105-08). One survey estimates that ninety-seven percent of product caused accidents occur within six years from the time the product was purchased and approximately eighty-three percent of all bodily injury accidents occur within ten years of the product's manufacture. *Id.* *But see* Kraft, *supra* note 28, at 102 n.125 (noting that these statistics are at best an educated guess).

109. *See* Model Uniform Products Liability Act, *supra* note 16, § 101 (D), at 62,716. Nationwide statistics are used to determine product liability insurance rates because a product produced in one state can readily cause injury in another state. *Id.*

110. *See* McGovern, *supra* note 23, at 592-93 (noting that the effect of a statute of repose is to shift decision making regarding compensation from the courts to the legislature).

judicial system.<sup>111</sup> Without the arbitrary classification barring a claim, an injured party will have his or her day in court and will receive a fair opportunity for compensation.<sup>112</sup> Manufacturers will be forced to pay the price for defective products, regardless of the product's age.<sup>113</sup> Thus, the risk of increased claims creates an economic incentive for manufacturers to produce safe products and focus on the long term risks involved in the use of their product.<sup>114</sup>

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111. *See id.* at 594. Once the plaintiff's recovery decision is placed in the courts, the principles of liability may be applied in a flexible manner. *Id.* at 596.

112. *Id.* at 596-97.

113. *See id.* at 597-98.

114. *Id.* at 598. If manufacturers are not held responsible for the safety of their products after the expiration of an arbitrary period of time, the normal economic incentive for safety and financial responsibility for older products is reduced. *Id.*



