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EXCUSES, EXCUSES: THE APPLICATION OF STATUTES OF REPOSE TO ENVIRONMENTALLY-RELATED INJURIES

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Abstract: Injuries resulting from environmental conditions created by improvements to real property have always been commonplace. Across jurisdictions, however, there is some evidence to suggest that defendants may be able to escape liability for certain environmentally-related injuries by invoking statutes of repose. Although statutes of repose may protect defendants from prejudice in court and relieve them of past obligations, they may also prevent injured plaintiffs from obtaining redress in court where their injuries were latent or undiscoverable. This Note explores the nature and purpose of statutes of repose, discusses whether they might be used by defendants during environmental litigation by addressing case law and public policy considerations, and offers suggestions for balancing the interests of plaintiffs and defendants to the extent that statutes of repose are applicable to environmental injuries.

Introduction

Landowners frequently hire contractors, architects, or related professionals to perform services on their property to make improvements, such as adding new construction or renovations. Often, the work is performed properly and to the satisfaction of the landowner. However, negligent or improper performance of such work may result in environmental damage and personal injuries to the landowner or other individuals. These plaintiffs would likely expect compensation from those who are responsible for their injuries, but that may not always be possible. State legislatures have enacted laws that regulate the time during which defendants may be held liable for the injuries of others. Such laws are known as statutes of repose. Like statutes of limitations, statutes of repose bar a cause of action from

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being filed in court after a specific period of time has elapsed.[1] Statutes of repose grant defendants a substantive right to be free from liability for the purpose of protecting them from obligations long past,[2] guarding against prejudice in court by ensuring good evidence is present,[3] and enabling them to plan their future activities with greater certainty and confidence.[4]

Although many courts have held statutes of repose to be constitutional,[5] a plaintiff's claim may be barred before the cause of action has accrued or before the injury has been discovered because statutes of repose begin to run earlier than statutes of limitations.[6] As a result, many plaintiffs might find themselves with no redress in court; especially plaintiffs whose injuries were latent for long periods of time.[7]

Many of these statutes of repose pertain to liability arising from making improvements to real property.[8] Accordingly, an important question is whether a statute of repose could be used by defendants facing liability for environmental harms or injuries that have occurred in connection with such services. This question is particularly important in light of the latency of environmental harms and the legal and sociopolitical concerns of fairness to plaintiffs and defendants alike. Should defendants, who have caused plaintiffs to suffer injuries and environmental harms, be immune to liability by virtue of the passage of time? Should the recovery interests of injured plaintiffs be balanced against—or even superseded by—defendants' interests in leaving the past behind? What environmental considerations would play into the effect of statutes of repose in such litigation? This Note will address some of the legal and social policy issues that statutes of repose may present in an environmental context by evaluating the stat-

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[1] *See* Klein v. Catalano, 437 N.E.2d 514, 516–18 (Mass. 1982); Sch. Bd. v. U.S. Gypsum Co., 360 S.E.2d 325, 327–28 (Va. 1987).

[2] *See* Mark W. Peacock, Comment, *An Equitable Approach to Products Liability Statutes of Repose*, 14 N. Ill. U. L. Rev. 223, 229–32 (1994).

[3] *See* 5 The Law of Hazardous Waste § 17.05[4], at 17-248 (Susan M. Cooke ed., 2004) (discussing rationales and principles underlying limitations periods).

[4] Peacock, *supra* note 2, at 231–33.

[5] 5 The Law of Hazardous Waste, *supra* note 3, § 17.05[4][d], at 17-259.

[6] *See* Town of Weymouth v. James J. Welch & Co., 6 Mass. L. Rep. 197, 198 (Super. Ct. 1996).

[7] *Developments in the Law—Toxic Waste Litigation*, 99 Harv. L. Rev. 1462, 1609–10 (1986) [hereinafter *Toxic Waste Litigation*]; *see* Lisa K. Mehs, Comment, *Asbestos Litigation and Statutes of Repose: The Application of the Discovery Rule in the Eighth Circuit Allows Plaintiffs to Breathe Easier*, 24 Creighton L. Rev. 965, 965–66 (1991).

[8] *See, e.g.*, Mass. Gen. Laws ch. 260, § 2B (2004); *see also* Josephine H. Hicks, Note, *The Constitutionality of Statutes of Repose: Federalism Reigns*, 38 Vand. L. Rev. 627, 629–31 (1985) (explaining different types of statutes of repose).

utes purpose, effect, and construction. In addition, this Note outlines arguments that plaintiffs and defendants may make regarding the application of statutes of repose in environmental litigation.

Part I of this Note examines the nature of statutes of repose and describes their acceptance as constitutional. Part II offers insight into how statutes of repose have been justified and discusses their relevance to environmental claims. Finally, Part III takes an analytical look at statutes of repose in an environmental context, evaluates the degree to which they may or may not be used in environmental litigation in light of case law and public policy considerations, and offers suggestions as to how to balance interests when applying statutes of repose.

I. The Nature of Statutes of Repose and Constitutionality

A. *The Difference Between Statutes of Repose and Statutes of Limitations*

Generally, a cause of action must be filed in court before it is barred by an applicable statute of limitations or statute of repose.[9] However, to plaintiffs and defendants, a statute of repose seems like a statute of limitations; both are legal instruments that limit a cause of action by imposing a time constraint.[10] Part of the confusion is exacerbated by the fact that courts have often been "inconsistent with their use of these terms."[11] Nevertheless, because each statute relates to different aspects of the cause of action, the statutes differ in their significance in litigation.[12]

A statute of limitations restricts the amount of time in which plaintiffs may file actions in court to enforce rights after their injuries have been, or should have been, discovered.[13] If the plaintiff does not file within the limitations period, his right to a remedy is waived.[14] Accordingly, a limitations statute can be seen as primarily an administrative tool used to facilitate court filings, since it is a rule that relates to procedure rather than substance.[15]

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[9] *Toxic Waste Litigation*, *supra* note 7, at 1604.

[10] *See* Sch. Bd. v. U.S. Gypsum Co., 360 S.E.2d 325, 327–28 (Va. 1987).

[11] Peacock, *supra* note 2, at 225–26.

[12] *See id.* at 225–27.

[13] *Id.* at 225–27; *see Sch. Bd.*, 360 S.E.2d at 327–28.

[14] Peacock, *supra* note 2, at 226.

[15] *See* Bolick v. Am. Barmag Corp., 293 S.E.2d 415, 418 (N.C. 1982); *Sch. Bd.*, 360 S.E.2d at 327–28; Robert I. Stevenson, *Products Liability and the Virginia Statute of Limitations—A Call for the Legislative Rescue Squad*, 16 U. Rich. L. Rev. 323, 334 n.38 (1982) ("[A] 'statute of repose' is intended as a substantive definition of rights as distinguished from a procedural limitation on the remedy used to enforce rights.").

Because environmental lawsuits are often centered around "allegations of improper activities that can be years, even decades, old, the statute of limitations is an important and frequently relied upon defense in such cases."[16] However, a time-barring statute that begins to run before potential plaintiffs show signs of injuries may preclude opportunities to obtain compensation.[17] Today, a majority of jurisdictions have adopted a "discovery exception" that requires the limitations period not to begin until the plaintiff knows of—or has reason to know of—the injury.[18] Discovery rules limit the effectiveness of statutes of limitations as a defense in environmental litigation.[19] However, even if discovery rules are generally accepted across states, they will not wholly eliminate the possibility that some claims would be time-barred.[20] Some states have limited discovery rules to statutes of repose.[21]

Statutes of repose limit the time during which a defendant may bear potential liability for injuries against plaintiffs.[22] Unlike a statute of limitations, "[a] statute of repose begins to run from the occurrence of the incident raising liability," rather than from the moment a cause of action accrues or an injury is discovered.[23] Statutes of repose typically apply to negligence and strict liability claims as well.[24] Where a statute contains language that restricts a party from filing an action after a specific date or time period, or provides that "no action may be filed for a claim that accrued before a particular date," this is usually a "tell-tale sign that the statute is one of repose, not of limitation."[25]

What does a statute of repose mean for litigants? Simply stated, claimants must file their suits within the applicable statute of limitations period, "but in no event may suit be brought after expiration of

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[16] Dean F. Pacific, *Recent Court of Appeals Decision Highlights: The Importance of Timely Assertion of Claims in Environmental Litigation*, Warner Norcross & Judd LLP Business Update. Feb. 2000, http://www.wnj.com/bup0200.html.

[17] 5 The Law of Hazardous Waste, *supra* note 3, § 17.05[4], at 17-247 to 17-249.

[18] *Id.*

[19] Pacific, *supra* note 16.

[20] *Toxic Waste Litigation*, *supra* note 7, at 1606.

[21] 5 The Law of Hazardous Waste, *supra* note 3, § 17.05[4], at 17-248; Carey C. Jordan, Comment, *Medical Monitoring in Toxic Tort Cases: Another Windfall for Texas Plaintiffs?*, 33 Hous. L. Rev. 473, 480 n.45 (1996).

[22] Klein v. Catalano, 437 N.E.2d 514, 516 (Mass. 1982); Sch. Bd. v. U.S. Gypsum Co., 360 S.E.2d 325, 327–28 (Va. 1987).

[23] Town of Weymouth v. James J. Welch & Co., 6 Mass. L. Rep. 197, 198 (Super. Ct. 1996).

[24] James L. Connaughton, Comment, *Recovery for Risk Comes of Age: Asbestos in Schools and the Duty to Abate a Latent Environmental Hazard*, 83 Nw. U. L. Rev. 512, 517 (1989).

[25] Shields v. Shell Oil Co., 604 N.W.2d 719, 726 (Mich. Ct. App. 1999) *rev'd on other grounds*, 621 N.W.2d 215 (Mich. 2000).

the repose period."[26] Therefore, if a plaintiff's cause of action does not arise or is not discovered before the statute of repose has run, it will be "extinguished" even if the plaintiff satisfies the statute of limitations; the defendant will thus escape liability.[27] Unlike statutes of limitations, statutes of repose create "a substantive right in those protected to be free from liability after a legislatively-determined period of time."[28] Statutes of repose gain their substantive quality by acting as an absolute bar to a cause of action.[29]

However, since statutes of repose may relieve defendants of liability even before a cause of action has accrued or been discovered,[30] their application to environmental claims is controversial.[31] In a variety of environmental cases—most notably, toxic exposure and contamination cases—a plaintiff may be unaware of an injury until long after it has occurred.[32] Many environmental cases "tend to involve injuries or damages that evolve over time."[33] For example, "[h]azardous substances may be released and migrate continuously for decades" before the toxins, or symptoms of illness, are detected by individuals or communities.[34] Property damage from environmental contamination may similarly be latent; thus, many years will often pass before the discovery of harm to property and the commencement of an action.[35] Therefore, it is these kinds of situations in which the running of a statute of repose before an injured party has discovered his cause of action has the potential to leave him without any relief.[36] In essence, a statute of repose exemplifies the doctrine of "'*damnum absque injuria*' ('a wrong for which the law affords no redress')."[37]

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[26] Peacock, *supra* note 2, at 227.

[27] *See id.* at 227; *see also Sch. Bd.*, 360 S.E.2d at 327–28 (holding that a statute of repose makes the defendant immune from liability when the repose period has run).

[28] First United Methodist Church v. U.S. Gypsum Co., 882 F.2d 862, 866 (4th Cir. 1989).

[29] Bolick v. Am. Barmag Corp., 293 S.E.2d 415, 418 (N.C. 1982).

[30] Town of Weymouth v. James J. Welch & Co., 6 Mass. L. Rep. 197, 198 (Super. Ct. 1996); *Sch. Bd.*, 360 S.E.2d at 327–28.

[31] *See Toxic Waste Litigation*, *supra* note 7, at 1604–10.

[32] 5 The Law of Hazardous Waste, *supra* note 3, § 17.05[4], at 17-249.

[33] *Id.*

[34] *Id.*

[35] *Id.*

[36] *Id.* at 17-248 to 17-249.

[37] Cyktor v. Aspen Manor Condo. Ass'n, 820 A.2d 129, 139 (N.J. Super. Ct. App. Div. 2003) (quoting Rosenberg v. Town of N. Bergen, 293 A.2d 662, 667 (N.J. 1972)).

B. *The Constitutionality of Statutes of Repose*

Despite the possibility that plaintiffs may be left without recompense for injuries, federal courts have held statutes of repose to be consistent with the U.S. Constitution;[38] statutes of repose have survived scrutiny with respect to due process and equal protection challenges, since courts have held that the statutes do not involve fundamental rights or suspect classifications.[39] Challenges to statutes of repose are more effective when based on state constitutions.[40] However, state courts usually follow the standards of review set forth by the Supreme Court of the United States when evaluating statutes of repose,[41] applying the lenient rational basis review in the absence of any fundamental right or suspect classification.[42] Under a rational basis test, courts will uphold a statute as long as it is merely rationally related to a permissible legislative objective.[43] Courts have not had much difficulty in concluding that statutes of repose serve their intended legislative purposes.[44] Courts have consistently held that the prevention of stale claims and the protection of defendants from protracted liability are "well-established" objectives for legislatures to pursue with statutes of repose.[45] Accordingly, legislatures may reasonably conclude that claims should no longer be viable after a certain number of years following substantial completion of improvements to real property.[46]

Viewed differently, the success of equal protection challenges under state constitutions may largely depend upon "how closely a state's equal protection analysis mirrors that of the United States Supreme Court's consideration of equal protection violations of the United States Constitution."[47] The rational basis analysis is likely favorable to those protected by a statute of repose, since it is an approach to constitutional law that is "designed to provide substantial deference to the legislative body . . . which generally yields a conclu-

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[38] *See* Britt v. Schindler Elevator Corp., 637 F. Supp. 734, 737 (D.C. Cir. 1986).

[39] *See id.* at 736–37 (holding that statute of repose did not involve a fundamental right or suspect classification, and was rationally related to a legitimate state purpose).

[40] Jan Allen Baughman, Comment, *The Statute of Repose: Ohio Legislators Propose to Lock the Courthouse Doors to Product-Injured Persons*, 25 Cap. U. L. Rev. 671, 681 (1996).

[41] Hicks, *supra* note 8, at 636–37.

[42] *Id.* at 636.

[43] *Id.* at 643.

[44] *Id.* at 636–37.

[45] *Id.*

[46] *Id.* at 638.

[47] Baughman, *supra* note 40, at 682–83.

sion validating the legislation under consideration."[48] In contrast, jurisdictions that employ a stricter standard or require a "tight match" between a law and its intended legislative purpose are less likely to find a repose statute constitutional.[49] A similar trend has been noted with respect to due process analysis among the states.[50]

Jurisdictions which have held statutes of repose to be unconstitutional have generally predicated this result upon "open court" provisions—requiring courts to remain open for any injury—of their respective state constitutions.[51] Recently, at least thirty-nine states have retained "some form of open courts provision."[52] In many of these states, "the courts view such open court provisions as a requirement that the state provide some remedy for every legally recognized wrong,"[53] although the specific language and construction of a state's open courts provision will control the scope of its applicability.[54] In some states, the mere possibility that a statute of repose could bar a cause of action before it arises is often sufficient to violate an open courts provision.[55]

Some courts have held that an "absolute denial of access to courts before the claim even arises is antithetical to the purpose of open courts provisions."[56] In such states, the underlying theory is that "'[d]eath cannot occur without there first being conception . . . . Neither can a cause of action expire before it accrues.'"[57] One state that follows this line of argument and is particularly averse to statutes of re-

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[48] Stephen J. Werber, *A National Product Liability Statute of Repose—Let's Not*, 64 TENN. L. REV. 763, 768 (1997).

[49] Baughman, *supra* note 40, at 682–83.

[50] *See* Hicks, *supra* note 8, at 644–45.

[51] Kenyon v. Hammer, 688 P.2d 961, 965–66 (Ariz. 1984); Hicks, *supra* note 8, at 644–45.

[52] Werber, *supra* note 48, at 774 n.57.

[53] *Kenyon*, 688 P.2d at 966 (citations omitted).

[54] Hicks, *supra* note 8, at 644–45. For a good example of a state open courts provision, see ALA. CONST. art. I, § 13 ("all courts shall be open; and that every person, for any injury done him, in his lands, goods, person, or reputation, shall have a remedy by due process of law; and right and justice shall be administered without sale, denial, or delay").

[55] Baughman, *supra* note 40, at 681.

[56] Hicks, *supra* note 8, at 647.

[57] *Id.* at 647 (alteration in original) (quoting Daugaard v. Baltic Coop. Bldg. Supply Ass'n, 349 N.W.2d 419, 425 (S.D. 1984)). *But see* Cleveland v. BDL Enters., 663 N.W.2d 212, 220–25 (S.D. 2003) (holding that the state open court provision did not prevent the legislature from enforcing statutes of limitation or statutes of repose).

pose is Ohio.[58] Ohio courts have held that statutes of repose which "closed the door" on remedies before causes of action could accrue are unconstitutional.[59] Similarly, the Arizona state courts have held statutes of repose to be inconsistent with the state constitution.[60] Arizona's Supreme Court has held that its state constitution guarantees the right to file and litigate actions in court as a "fundamental right."[61] Accordingly, the court has held that statutes of repose would violate equal protection under the state constitution, since they would discriminate against plaintiffs whose injuries had not arisen or had not been discovered before the repose period had run.[62] In effect, the "abolition of a cause of action before injury has occurred," or before the plaintiff is aware of his injury, has been declared an "abrogation" of a fundamental right afforded under the Arizona Constitution.[63]

Nevertheless, statutes of repose have been held to be constitutional by many jurisdictions,[64] because "open courts" principles have not been interpreted the same way in all jurisdictions.[65] For example, some state courts refrain from interfering with the legislature's annulment of a cause of action "if the theory on which the cause of action is based did not exist when the state adopted the constitutional mandate for open courts."[66] Other jurisdictions view their open courts provisions as protecting only vested rights so that "a citizen's constitutional right to a day in court is not violated by a repose time bar because a right to a cause of action cannot vest after the time period runs."[67] Accordingly, the legislature retains the power to "abrogate a nonvested right."[68]

In addition, some statutes of repose apply to only one particular theory of liability, such as strict liability, "so that open courts provisions are not violated because [other] remedies such as workers compensation still exist."[69] Moreover, some state courts "give more defer-

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[58] *See* Stephen J. Werber, *Ohio Tort Reform in 1998: The War Continues*, 45 CLEV. ST. L. REV. 539, 547 (1997). Some legal scholars have even hypothesized that "[a]ny statute of repose is too perverse to pass constitutional muster under Ohio law." *Id.* at 570.

[59] *Id.* at 547.

[60] Kenyon v. Hammer, 688 P.2d 961, 979 (Ariz. 1984).

[61] *Id.* at 975.

[62] *Id.* at 967–79.

[63] *Kenyon*, 688 P.2d at 966; *see* ARIZ. CONST. art. 18, § 6 (1911) ("[t]he right of action to recover damages for injuries shall never be abrogated . . . .").

[64] 5 THE LAW OF HAZARDOUS WASTE, *supra* note 3, § 17.05[4][d], at 17-259.

[65] Baughman, *supra* note 40, at 682.

[66] *Id.*

[67] *Id.*

[68] Hicks, *supra* note 8, at 645.

[69] Baughman, *supra* note 40, at 682.

ence to the state legislature and uphold repose statutes as legitimate measures that address reasonable goals."[70] There are also states that do not guarantee a fundamental right to bring actions for damages, thus enabling legislatures to "define, abolish and abrogate such rights with impunity so long as it acts reasonably."[71] Challenges to statutes of repose under the U.S. Constitution using "open courts" theories may also be unsuccessful, since the federal Constitution does not explicitly have such a provision.[72] Moreover, there is little evidence to suggest that the current membership on the U.S. Supreme Court would "take the 'activist' role needed to create such a right."[73]

Illinois and Missouri have open courts provisions but have upheld statutes of repose, finding that they do not conflict because statutes of repose eliminate the cause of action itself rather than close off the courts to anyone.[74] Even Alabama's open courts provision may be overcome by a statute of repose, although defendants must show that the law is substantially related to the eradication of a particular social evil.[75]

In contrast, the Supreme Court of New Hampshire has examined whether statutes of repose are "substantially related to [a] legitimate legislative object" when determining if they violate important substantive rights.[76] New Hampshire has been a leader in applying a more stringent standard of review than other courts when evaluating the constitutionality of statutes of repose.[77] It has been with "rare exception" that federal and state courts have applied standards of review that are more stringent than the rational basis test when determining the validity of statutes of repose.[78] However, despite the widespread acceptance of statutes of repose by state and federal courts, the "[c]ourts continue to grapple with constitutional issues when determining whether to uphold and apply a repose statute so as to preclude a cause of action before injury occurs . . . ."[79] Courts also struggle in cases where knowledge or discovery of the relationship between

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[70] *Id.*

[71] Kenyon v. Hammer, 688 P.2d 961, 965 (Ariz. 1984) (citing Johnson v. Star Mach. Co., 530 P.2d 53, 57 (Or. 1974)).

[72] Baughman, *supra* note 40, at 681.

[73] Werber, *supra* note 48, at 774.

[74] Adcock v. Montgomery Elevator Co., 654 N.E.2d 631, 635–36 (Ill. App. Ct. 1995); Blaske v. Smith & Entzeroth, Inc., 821 S.W.2d 822, 833 (Mo. 1991).

[75] Baugher v. Beaver Constr. Co., 791 So. 2d 932, 935–37 (Ala. 2000).

[76] Heath v. Sears, Roebuck & Co., 464 A.2d 288, 294–97 (N.H. 1983).

[77] *See* Hicks, *supra* note 8, at 640.

[78] Werber, *supra* note 48, at 768.

[79] *Id.* at 765.

the injury and the defendant's conduct did not exist or occur before the end of the repose period.[80]

II. Common Justifications for the Enactment of Statutes of Repose and Their Relevance to Environmental Claims

A. *Justifications for Statutes of Repose*

Numerous rationales exist to justify statutes of repose,[81] separately from statutes of limitations.[82] While applying a statute of limitations to bar a plaintiff's claim might be justifiable on grounds that he had no excuse for failing to file his suit on time, there is no comparable rationale for applying statutes of repose to time-bar suits.[83] On a broad level, statutes of repose have derived justification from considerations relating to the best economic interests of the public as a whole, and represent "substantive grants of immunity based on a legislative balance of the respective rights of potential plaintiffs and defendants struck by determining a time limit beyond which liability no longer exists."[84] A few main arguments stand out in support of statutes of repose.[85]

The first argument in favor of statutes of repose is built around the evidentiary difficulties in meeting the burden of proof when evaluating a defendant's liability in court.[86] With the passage of many years, the difficulty in locating or preserving reliable evidence to prove or disprove liability—especially for defects, negligence, damages, and potential defenses—increases, since evidence is often lost, memories fade, and witnesses can no longer be found.[87]

The second argument justifying statutes of repose is premised upon a theme of fairness to defendants, suggesting that defendants should not suffer protracted liability or else their ability to "plan their affairs with a degree of certainty" would be impaired.[88] In other words, legislatures have recognized a public interest in granting defendants immunity after a certain period of time has elapsed so that they may

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[80] *Id.*

[81] *See* Peacock, *supra* note 2, at 231–33.

[82] Eli J. Richardson, *Eliminating the Limitations of Limitations Law*, 29 Ariz. St. L.J. 1015, 1018 n.25 (1997).

[83] *Id.*

[84] First United Methodist Church v. U.S. Gypsum Co., 882 F.2d 862, 866 (4th Cir. 1989).

[85] *See* Peacock, *supra* note 2, at 231–33.

[86] *See id.*

[87] Baughman, *supra* note 40, at 678–79; Peacock, *supra* note 2, at 231–33.

[88] *Id.*

conduct their activities with the "reasonable expectation" that they will not be liable for "ancient obligations."[89]

Proponents of statutes of repose also believe that with the passage of time, jurors will unjustly and improperly evaluate defendant liability by holding defendants to safety standards and expectations that are based upon current technology and practices rather than those which existed at the time the defendants' actions occurred.[90] Similarly, defendants worry that misuse or modification of their products by plaintiffs that was unforeseeable at the time of manufacture "may be inappropriately judged foreseeable by a modern jury."[91]

Statutes of repose have also been intended to serve as a mechanism for combating insurance premiums in the construction industry, the manufacturing industry, and in the medical profession.[92] Not surprisingly, insurance companies and "big business" have "typically comprise[d] the main motivating force behind adoption . . . of statutes of repose."[93] Insurance companies have insisted that time limits on liability are necessary to provide defendants with affordable liability policies.[94] The underlying theory is that "[p]redictable liability endpoints for businesses enable actuaries to more accurately calculate the risks that determine premium prices," thereby increasing insurance policy options and stabilizing costs for defendants.[95] Historically, bearing responsibility for "older products, latent medical problems, and 'permanent' or durable improvements" exposed defendants to "abnormally long periods of potential liability and unusually large numbers of potential plaintiffs."[96]

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[89] Klein v. Catalano, 437 N.E.2d 514, 520 (Mass. 1982); *see* Town of Weymouth v. James J. Welch & Co., 6 Mass. L. Rep. 197, 198 (Super. Ct. 1996); Note, *Developments in the Law—Statutes of Limitations*, 63 Harv. L. Rev. 1177, 1185 (1950) [hereinafter *Statutes of Limitations*]. One court noted, a statute of repose "relieves defendants from worrying about litigation in the far distant future." Shields v. Shell Oil Co., 604 N.W.2d 719, 726 (Mich. Ct. App. 1999) (citing Frankenmuth Mut. Ins. Co. v. Marlette Homes, Inc., 573 N.W.2d 611, 613 (Mich. 1998)), *rev'd on other grounds*, 621 N.W.2d 215 (Mich. 2000).

[90] Baughman, *supra* note 40, at 679.

[91] *Id.*

[92] *Id.* at 679–80; Hicks, *supra* note 8, at 632.

[93] Baughman, *supra* note 40, at 679–80.

[94] *Id.* at 679. For example, in the area of products liability, insurers have argued that "inflated prices and policy cancellations are most directly caused by the potential for infinite manufacturer liability." *Id.*

[95] *Id.* at 679–80.

[96] Hicks, *supra* note 8, at 632.

B. *The Relevance of Statutes of Repose to Environmental Claims*

An important question for defendants facing environmental litigation is whether they may take advantage of statutes of repose to avoid liability. Currently, few states have enacted general statutes of repose that defendants might invoke to broadly defend against claims for environmental damage.[97] Oregon has a general statute of repose, which eliminates a cause of action for negligent injuries ten years after the defendant acted or failed to act.[98] The broad language of the Oregon statute appears applicable to a variety of legal claims, creating the possibility for application to environmental litigation.[99] Oregon courts have supported this broad construction of the statute, finding it applicable in cases of negligence, strict liability, and products liability claims.[100]

Even though most states lack a generally applicable statute of repose, various forms of repose statutes apply to particular claims and "pockets of liability."[101] For example, statutes of repose are commonly crafted for products liability, medical malpractice suits, and contractor liability for improvements to real property.[102] In products liability litigation, an applicable statute of repose would typically "begin to run at the date of manufacture or first sale to a consumer."[103] For home construction or improvements to real property, the applicable statutes of repose usually begin to run at the moment of the improvements' opening for use or upon substantial completion.[104] Real property statutes of repose typically prescribe a repose period ranging from seven to twelve years.[105]

Massachusetts has a statute of repose that applies directly to improvements to real property.[106] The law provides that tort actions for damages that arise out of the design, planning, construction, or gen-

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[97] *Toxic Waste Litigation*, *supra* note 7, at 1609.

[98] Or. Rev. Stat. § 12.115 (2003).

[99] *Id.*

[100] Johnson v. Star Mach. Co., 530 P.2d 53, 57–60 (Or. 1974); *Toxic Waste Litigation*, *supra* note 7, at 1609 n.38.

[101] 5 The Law of Hazardous Waste, *supra* note 3, § 17.05[4][d], at 17-259; *accord Toxic Waste Litigation*, *supra* note 7, at 1609.

[102] 5 The Law of Hazardous Waste, *supra* note 3, § 17.05[4][d], at 17-259; *accord Toxic Waste Litigation*, *supra* note 7, at 1609.

[103] Peacock, *supra* note 2, at 226.

[104] Mass. Gen. Laws ch. 260, § 2B (2004); Hicks, *supra* note 8, at 631.

[105] Andrew D. Ness & Marcia G. Madsen, *Trends in Contractor Liability for Hazardous Waste Cleanups: The Current Legal Environment*, 22 Pub. Cont. L.J. 581, 591 (1993).

[106] *See* Mass. Gen. Laws ch. 260, § 2B.

eral administration of improvements to real property cannot be filed "six years after the earlier of the dates of: (1) the opening of the improvement to use; or (2) substantial completion of the improvement and the taking of possession for occupancy by the owner."[107] Illinois has a similar real property statute of repose.[108] However, the Illinois statute appears to extend beyond tortious conduct, reaching injuries arising out of acts or omissions in connection with improvements to real property.[109] Virginia also has a statute of repose that applies to actions "for any injury to property, real or personal, or for bodily injury or wrongful death, arising out of the defective and unsafe condition of an improvement to real property."[110]

Real property statutes of repose vary widely in their construction.[111] Some real property statutes of repose, such as those in Connecticut and Florida, are more exclusive than others in that they mainly protect professionals including architects, contractors, and land surveyors.[112] Real property statutes of repose in other states "have a broader reach, protecting materialmen, laborers, and other workers participating in the construction."[113] Reacting to court decisions holding that statutes of repose violate equal protection rights, some legislatures have broadened the group of defendants that come within the scope of real property statutes of repose.[114] The most broadly crafted statutes of repose—such as those in Minnesota and Hawaii—are designed to protect almost "everyone involved in the construction," including the "owners or persons in possession of the improvement."[115] It remains unclear, however, whether real property statutes of repose protect contractors who remediate environmental damage—entities that remedy hazardous or toxic contamination problems created by other individuals— who inadvertently worsen or cause further environmental injuries to plaintiffs.[116]

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[107] *Id.*

[108] *See* 735 ILL. COMP. STAT. 5/13-214 (West 2002).

[109] *Id.* ("No action based upon tort, contract or otherwise may be brought against any person . . . after 10 years have elapsed from the time of such act or omission.").

[110] VA. CODE ANN. § 8.01-250 (2004).

[111] Ness & Madsen, *supra* note 105, at 591.

[112] Hicks, *supra* note 8, at 631 (citing CONN. GEN. STAT. ANN. § 52-584a (West Supp. 1984): FLA. STAT. ANN. § 95.11(3)(c) (West 1982)).

[113] Hicks, *supra* note 8, at 631 (citing N.C. GEN. STAT. § 1-50(5)(b)(9) (1983); WIS. STAT. ANN. § 893.155 (West 1983)).

[114] Hicks, *supra* note 8, at 631.

[115] *Id.* (citing HAW. REV. STAT. § 657-8 (Supp. 1982); MINN. STAT. ANN. § 541.051 (West Supp. 1984)).

[116] Ness & Madsen, *supra* note 105, at 591.

C. *Common Applications of Real Property Statutes of Repose*

Across jurisdictions, real property statutes of repose have commonly been used in cases surrounding personal injuries, wrongful death actions, nuisance, and related property damage claims.[117] *Sullivan v. Iantosca* illustrates the application of a real property statute of repose in Massachusetts.[118] In *Sullivan*, the court considered whether a defendant building contractor was liable in negligence for building the plaintiff's home on an improper landfill material that adversely affected the foundation of the structure.[119] However, the defects in the foundation did not appear for eight years.[120] Because the six-year statute of repose had already run, the court upheld a lower court decision granting summary judgment in favor of the defendant on negligence claims.[121] In broad support of the defendant's position, the court noted that, despite the fact that the plaintiff did not discover the cause of action until after the repose period had run, the statute was to be applied as written.[122] As construed by the court, the statute of repose forbid inquiry into "the fact that a plaintiff did not discover or reasonably could not have discovered the harm before the six-year period of the statute of repose expired."[123] Moreover, the court held that circumstances which would toll a relevant statute of limitations, such as fraudulent concealment, mental illness, minority, and common law estoppel would not modify the statute of repose or prevent its application.[124]

Similarly, in *Stanske v. Wazee Electric Co.*, a Colorado court held that the plaintiff's personal injury claims against the defendant—who negligently installed an electrical system that injured the plaintiff—was barred by the state real property statute of repose, since the statute encompassed "all actions" related to improvements to real property and the defendant's installation of the electrical system qualified

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[117] *See generally* Gaggero v. County of San Diego, 21 Cal. Rptr. 3d 388 (Ct. App. 2004); Stanske v. Wazee Elec. Co., 722 P.2d 402 (Colo. 1986); Olson v. Owens-Corning Fiberglas Corp., 556 N.E.2d 716 (Ill. App. Ct. 1990).

[118] *See* 569 N.E.2d 822, 823–26 (Mass. 1991).

[119] *See id.* at 823.

[120] *See id.* (stating that defects were discovered in 1986, but construction had ended in 1978).

[121] *See id.* at 823–26.

[122] *See id.* at 823–24.

[123] *Id.* (citing Tindol v. Boston Hous. Auth., 487 N.E.2d 488, 490 (1986)).

[124] *Sullivan*, 569 N.E.2d at 823–24.

as such an improvement.[125] The application of the Colorado real property statute of repose to personal injury cases was later echoed in *Homestake Enterprises v. Oliver*, in which the court held that the plaintiff's personal injury action against the defendant construction company for its negligent testing and observation of a sprinkler system was barred by the statute of repose.[126] Like Colorado, personal injury and wrongful death actions are covered by the Georgia real property statute of repose,[127] and may even protect defendant manufacturers of defective materials from such suits if those materials were an integral or essential part of the improvement to real property so as to be considered "improvements" themselves.[128]

D. *State Environmental Statutes and Statutes of Repose*

In at least two jurisdictions, defendants facing claims under state environmental statutes have not successfully relied on statues of repose for relief from environmental liability.[129] For example, in *Town of Weymouth v. James J. Welch & Co.*, a Massachusetts court was unwilling to apply the real property statute of repose to property damage claims related to contamination from hazardous substances under the Massachusetts Oil and Hazardous Material Release Prevention Act.[130] The defendant contractor was sued over the improper installation of an oil tank—which resulted in leakage contamination—under the law which comprehensively covered property contamination from hazardous substances.[131] The plaintiff was unaware of the contamination for almost thirteen years following the installation of the tank.[132] The defendant argued that the contamination claims were tort actions subject to the six-year statute of repose for improvements to real property and that he was relieved from liability, since the six-year repose period had

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[125] *See* 722 P.2d 402, 405, 407 (Colo. 1986); *see also* COLO. REV. STAT. § 13-80-104(1)(a) (2004) (previously codified at COLO. REV. STAT. § 13-80-127 (1984) with a longer repose period).

[126] *See* 817 P.2d 979, 984 (Colo. 1991) (holding defendant liable for causing road icing that lead to plaintiff's injury).

[127] GA. CODE. ANN. § 9-3-51 (West 1982).

[128] *See* Beall v. Inclinator Co. of Am., 356 S.E.2d 899, 900 (Ga. Ct. App. 1987).

[129] *See* Town of Weymouth v. James J. Welch & Co., 6 Mass. L. Rep. 197, 198–200 (Super. Ct. 1996); Pitney Bowes, Inc. v. Baker Indus., 649 A.2d 1325, 1327–28 (N.J. Super. Ct. App. Div. 1994).

[130] 6 Mass. L. Rep. at 198–200.

[131] *Id.* at 197–98; *see* MASS. GEN. LAWS, ch. 21E, §§ 2, 5(a) (2004).

[132] *James J. Welch & Co.*, 6 Mass. L. Rep. at 197.

already run.[133] However, the court ruled in favor of the plaintiff and asserted that it would be inappropriate to characterize claims under the contamination statute as tort actions for purposes of applying the real property statute of repose.[134] The court explained that doing so "would be unjust to victims of environmental pollution and spoliation of property," and would conflict with the purpose behind the contamination statute's liberal discovery rule, to compensate the injured.[135]

Similarly, New Jersey courts have held that the state real property statute of repose do not shield defendants from liability under the Spill Compensation and Control Act (Spill Act),[136] which covers contamination claims related to the discharge of hazardous substances.[137] In *Pitney Bowes, Inc. v. Baker Industries*, the defendant sought protection under a real property statute of repose since it faced liability under the Spill Act for improperly designing and installing heating oil tanks that leaked into the plaintiff's groundwater and caused contamination.[138] The court held that under the Spill Act there was "no provision of any defense available . . . based on the passage of time."[139] In essence, the court stated that the environmental statute created a new cause of action that was "unrelated to any time bar at all" and beyond the scope and applicability of the statute of repose.[140] Finally, the court justified its holding—much like the *James J. Welch & Co.* court— by observing that the function and purpose of the Spill Act was to address the "grave public consequences of hazardous-substance discharges that threaten the health and safety of everyone," and that limiting liability through a repose statute would impair the statutory scheme and run afoul of legislative intent.[141]

In contrast, Michigan courts have held that a statute of repose may bar an untimely filing of claims brought under a state environmental statute.[142] In *Shields v. Shell Oil Co.*, the plaintiff landowners purchased land on which Shell Oil Company had maintained under-

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[133] *Id.* at 198.

[134] *Id.* at 198–200.

[135] *Id.*

[136] *See* Pitney Bowes, Inc. v. Baker Indus., 649 A.2d 1325, 1325–28 (N.J. Super. Ct. App. Div. 1994) (explaining that defendant contractor's negligent design and installation of heating oil tanks resulted in soil contamination and groundwater pollution).

[137] *Id.* at 1326 (citing N.J. STAT. ANN. § 58:10–23.11 (West 1988)).

[138] *Id.*

[139] *Id.* at 1327.

[140] *Id.*

[141] *Id.* at 1328.

[142] Shields v. Shell Oil Co., 604 N.W.2d 719, 722, 724–27 (Mich. Ct. App. 1999) *rev'd on other grounds*, 621 N.W.2d 215 (Mich. 2000).

ground gasoline storage tanks.[143] When Shell performed excavations to the land to remove the tanks, the surrounding soil became contaminated with gasoline, which was subsequently discovered by the plaintiff.[144] Seeking recovery of response activity costs for the environmental pollution, the plaintiff filed an action under the Michigan Natural Resources and Environmental Protection Act (NREPA).[145] However, the court held that the NREPA claims were subject to a statute of repose that was meant to remove the "threat of litigation [from] haunting" defendants.[146] This decision is controversial and may be subject to further litigation; the state supreme court later reviewed the case and vacated the decision because there were too many unanswered questions as to whether the statute of repose should begin to run under the particular facts.[147]

The next part of this Note will present an analysis of the arguments that defendants and plaintiffs may use to either justify or prevent the application of statutes of repose in an environmental context. These arguments may have important ramifications for both legal policy and public environmental policy, particularly with respect to identifying responsible parties with proper evidence, compensating the injured, and encouraging environmental responsibility and compliance with environmental laws.

III. Analysis of Statutes of Repose in Environmental Contexts

A. *Past Applications of Statutes of Repose to Environmental Claims*

Improving land and real property poses a risk of creating environmental harm, especially in light of the nature of the work involved and materials used.[148] However, a defendant may face challenges in invoking a statute of repose to escape liability, as some courts have not allowed the use of statutes of repose for claims brought under environmental statutes.[149] Defendants may be able to justify the applica-

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[143] *Id.* at 722.

[144] *Id.*

[145] *Id.* at 722–23.

[146] *Id.* at 727.

[147] Shields v. Shell Oil Co., 621 N.W.2d 215, 215–16 (Mich. 2000).

[148] *See generally* Town of Weymouth v. James J. Welch & Co., 6 Mass. L. Rep. 197, 197–200 (Super. Ct. 1996); Biniek v. Exxon Mobil Corp., 818 A.2d 330, 332–33 (N.J. Super. Ct. Law Div. 2002); Pitney Bowes, Inc. v. Baker Indus., 649 A.2d 1325, 1327–28 (N.J. Super. Ct. App. Div. 1994).

[149] *See James J. Welch & Co.*, 6 Mass. L. Rep. at 198–200; *Pitney Bowes, Inc.*, 649 A.2d at 1327–28.

tion of statutes of repose for environmental injuries by analogizing to other types of claims and injuries that may involve environmental components, such as wrongful death and personal injury actions.[150] In tort litigation, for example, a plaintiff may assert that the defendant was negligent in rendering improvements to real property, and that this negligence caused another person's death, or physical or mental injuries.[151]

Since courts have applied real property statutes of repose to free defendants of liability in these circumstances, defendants sued under environmental statutes may be able to successfully argue for the application of statutes of repose in similar cases where the defendant's environmental harm led to the plaintiff's injuries.[152] In convincing a court to apply statutes of repose where environmental injuries are involved, defendants may argue that the causal relationship between their own conduct and the plaintiff's injuries does not change when environmental effects play a role in the plaintiff's injuries.[153] In both scenarios, the defendant performs improvements to real property in such a way as to create a hazard that has a delayed harmful impact on the plaintiff. Therefore, regardless of whether the plaintiff was hurt by a defective structure,[154] or was injured by contamination or pollution,[155] the injuries arose in connection with the improvements to real property performed by the defendant. However, it has been noted that some environmental claims, such as those based upon toxic waste exposure, are "fundamentally different" from other causes of action because the latent manifestation of the injuries may cause "serious doctrinal and practical problems" for the victims to seek recovery.[156]

Despite these issues, defendants may be able to rely on some precedent that applies real property statutes of repose to cases involv-

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[150] *See, e.g.*, McDonough v. Marr Scaffolding Co., 591 N.E.2d 1079, 1083–84 (Mass. 1992) (holding that the Massachusetts real property statute of repose applies to wrongful death claims involving improvements to real property); Parent v. Stone & Webster Eng'g Corp., 556 N.E.2d 1009, 1011 (Mass. 1990) (holding that the state real property statute of repose applies to personal injuries caused by defendant's negligence).

[151] *See McDonough*, 591 N.E.2d at 1080–81; *Parent*, 556 N.E.2d at 1010–11.

[152] *See, e.g.*, Shields v. Shell Oil Co., 604 N.W.2d 719, 722, 724–27 (Mich. Ct. App. 1999) *rev'd on other grounds*, 621 N.W.2d 215 (Mich. 2000); *Biniek*, 818 A.2d at 332–33.

[153] *Contra Toxic Waste Litigation*, *supra* note 7, at 1603 (noting that toxic tort claims are "fundamentally different" from other causes of action).

[154] *See McDonough*, 591 N.E.2d at 1080–81.

[155] *See Biniek*, 818 A.2d at 332–33 (demonstrating how defendant's negligent performance of services exposed plaintiffs to toxic contamination).

[156] *Toxic Waste Litigation*, *supra* note 7, at 1603.

ing environmental harms.[157] Recent cases in Mississippi and Washington have allowed a statute of repose affirmative defenses in cases involving environmental harms resulting from improvements to real property.[158] The Massachusetts Supreme Judicial Court has also applied real property statutes of repose to tort claims for both property damage and personal injuries involving environmental contamination.[159] Similarly, a New Jersey court has held that the state real property statute of repose may relieve defendants of liability for having caused injuries related to contamination and pollution resulting from fuel leakage, since the statute of repose was intended to cover such scenarios.[160] Defendants in other jurisdictions may be able to apply similar logic to argue that the scope of real property statutes of repose includes environmental harms, hazards, and injuries resulting from making improvements to real property.[161]

A recent California case illustrates the application of a real property statute of repose involving environmental complications.[162] In *Gaggero v. County of San Diego*, the California Court of Appeals affirmed a lower court decision, which held that the plaintiff's actions against the defendants for nuisance, negligence, trespass, and recovery of toxic waste response costs were time-barred by a ten-year statute of repose.[163] The statute covers actions arising out of latent defects in the design, construction, or operation of improvements to real property that result in property damage.[164] The plaintiff purchased a former landfill from the defendant and operated a nursery there for sev-

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[157] *See Biniek*, 818 A.2d at 334–36 (discussing that New Jersey's real property statute of repose would have applied to defendant's negligent contamination of property had he qualified for protection under the statute); Pitney Bowes, Inc. v. Baker Indus., 649 A.2d 1325, 1325 (N.J. Super. Ct. App. Div. 1994) (explaining that parties would be "otherwise entitled to the benefit of the ten-year repose" statute in cases involving construction that resulted in pollution and contamination, except for contribution claims under the "Spill Act").

[158] *See* Scheinblum v. Lauderdale County Bd. of Supervisors, 350 F. Supp. 2d 743, 745–47 (S.D. Miss. 2004); New Grade Int'l, Inc. v. Scott Techs., No. C03-2628RSM, 2004 U.S. Dist. LEXIS 26580, at *2, *14 (W.D. Wash. Nov. 30, 2004).

[159] *See* Conley v. Scott Prods., Inc., 518 N.E.2d 849, 850–51 (Mass. 1988) (affirming a lower court decision which granted summary judgment under the state real property statute of repose, even though defendant negligently installed urea formaldehyde foam insulation into plaintiff's home, resulting in property damage and personal injuries).

[160] *Biniek*, 818 A.2d at 334.

[161] *See id.*

[162] *See* Gaggero v. County of San Diego, 21 Cal. Rptr. 3d 388 (Ct. App. 2004).

[163] *Id.* at 389–90.

[164] CAL. CIV. PROC. CODE § 337.15(a) (West 2004); *Gaggero*, 21 Cal. Rptr. 3d at 389–90.

eral years.[165] Over time, the plaintiff noticed environmental damage to his nursery structures caused by the former landfill, such as severe subsidence.[166] Specifically, the plaintiff explained that the decomposition of materials deposited at the former landfill were producing methane gas and creating "void pockets in areas beneath the landfill covering."[167] However, the court held that because the defendant had made "improvement[s]" to the land while he was the owner and operator of the property, the statute of repose applied to the property damage claims that arose out of the defendant's conduct.[168]

Statutes of repose are particularly important in asbestos litigation which has historically involved personal injury causes of action for property damage and for negative health effects associated with toxic exposure.[169] Although asbestos litigation has been termed "the mother of all mass torts,"[170] there is significant controversy regarding when these lawsuits may be time-barred.[171] Asbestos is a highly toxic material, the harmful environmental and health effects of which may not be discovered until years after exposure.[172] In particular, diseases associated with toxic asbestos exposure, such as asbestosis, mesothelioma, and other forms of cancer, have long latency periods that range from ten to forty years, and are not reasonably discoverable by examination while dormant.[173]

For many years, actions for latent asbestos injuries were time-barred before individuals "reasonably could have known they were injured."[174] To remedy this problem, state legislatures, state courts, and the U.S. Supreme Court began adopting the discovery rule to postpone the accrual of the cause of action until the plaintiff discovered, or reasonably could have discovered, his latent injury.[175] However, this remedy chiefly concerns determining the date that a cause of action has accrued to a plaintiff for purposes of applying statutes of

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[165] *Gaggero*, 21 Cal. Rptr. 3d at 389–90.

[166] *Id.* at 390.

[167] *Id.*

[168] *Id.* at 389–90.

[169] Alex J. Grant, Note, *When Does the Clock Start Ticking?: Apply the Statute of Limitations in Asbestos Property Damage Actions*, 80 Cornell L. Rev. 695, 696–707 (1995).

[170] *Id.* at 696–98.

[171] *See id.* at 704–08.

[172] *Id.* at 707.

[173] Mehs, *supra* note 7, at 965–66.

[174] Grant, *supra* note 169, at 697.

[175] *Id.* at 697, 708; *see* Urie v. Thompson, 337 U.S. 163, 169–70 (1949).

limitations and is silent as to statutes of repose.[176] Thus, despite the concerns regarding the latent health and environmental effects of asbestos, statutes of repose have been applied in suits for toxic contamination from asbestos exposure.[177] In *Olson v. Owens-Corning Fiberglas Corp.*, the Appellate Court of Illinois affirmed a lower court decision that held that the plaintiff's wrongful death action against defendants for having exposed her husband to asbestos for decades was barred by a state statute of repose.[178] The plaintiff argued that the statute of repose should not be applied, since injuries from toxic exposure to asbestos are latent and may not be discoverable until after the repose period.[179] Although the court recognized that relieving defendants of liability before the cause of action has accrued would unfairly burden some plaintiffs, it was unwilling to create an exception to the statute of repose for latent asbestos-related injuries.[180]

B. *Arguments Favoring the Application of Statutes of Repose to Environmental Claims*

Defendants should take advantage of many of the policy justifications behind statutes of repose. Because improving real property often involves numerous problems in "maintaining quality control over . . . designs before construction and safety standards after construction,"[181] defendants could argue that statutes of repose are necessary to shield them from environmental claims arising from variables beyond their control,[182] or for which the passage of time would make liability unfair due to the degradation of evidence "in long-delayed litigation."[183]

Establishing causation and "defining the date of injury" for purposes of determining culpability is also especially difficult with envi-

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[176] *See* Grant, *supra* note 169, at 696–97; *see also Thompson*, 337 U.S. at 169–71 (holding that "invasion of legal rights" occurs and statute of limitations begins to run when plaintiff is reasonably capable of discovering his injuries if they are latent); Mehs, *supra* note 7, at 976.

[177] *See* Olson v. Owens-Corning Fiberglas Corp., 556 N.E.2d 716 (Ill. App. Ct. 1990).

[178] *Id.* at 719–21.

[179] *Id.* at 718.

[180] *Id.* at 719–21; Mehs, *supra* note 7, at 981.

[181] Hicks, *supra* note 8, at 633.

[182] *See id.* at 638 n.83.

[183] 5 The Law of Hazardous Waste, *supra* note 3, § 17.05[4], at 17-248 (discussing rationales for time-barring claims). For example, degradation of evidence may occur due to long-term exposure to the elements.

ronmental claims.[184] Evidence that shows who is responsible for environmental injuries may be confounded if there have been multiple owners or users of a property.[185] This is particularly problematic for architects and similar professionals, since they have no control over the condition of the property or the construction work they have performed once their work is complete.[186] Over time, injuries may arise from "improper maintenance or failure to [make proper] repair[s]" by the property owners, "rather than inherent design defects in the original construction" as allegedly created by defendants.[187] These defendants may have difficulty disproving evidence that ostensibly implicates their culpability for environmental hazards, but which may have actually been created by the actions of third-parties or by changes in the surrounding environment.

Related to evidentiary problems at trial is the problem of changing technologies and standards with respect to environmental harms.[188] Practices that may have previously been considered safe in an industry may later be found to carry grave environmental consequences.[189] Legal standards also change over time.[190] Courts have recognized this reality, noting that "the standards for architectural performance as well as building codes in effect could have changed significantly in the intervening years, and it would be difficult to establish the standard of care of a reasonably prudent architect at the time the design services were rendered . . . ."[191] Therefore, at trial, defendant architects and contractors face the possibility that their land improvements—and the ensuing environmental consequences—will be evaluated according to current

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[184] Grant, *supra* note 169, at 705; *see Toxic Waste Litigation*, *supra* note 7, at 1617–18 (describing the difficulties in establishing causation in environmental claims, and particularly toxic waste injuries, since the land involved may have changed ownership or control many times before injuries occurred).

[185] *Toxic Waste Litigation*, *supra* note 7, at 1617–18.

[186] Hicks, *supra* note 8, at 638 n.83; *see* Yarbro v. Hilton Hotels Corp., 655 P.2d 822, 825–26 (Colo. 1983).

[187] *Yarbro*, 655 P.2d at 825–26.

[188] *See* Arthur A. Schulcz, Comment, *Recovering Asbestos Abatement Costs*, 10 Geo. Mason U. L. Rev. 451, 452–54 (1988) (discussing the wide use of asbestos in industry and the increased awareness of its risks as time passed and medical studies were conducted).

[189] *See* Connaughton, *supra* note 24, at 514–15 (1989) (discussing the standard practice of using asbestos in buildings such as schools); Mehs, *supra* note 7, at 965 ("Only recently has society become aware of the dangers to human health and life associated with using one of the most dangerous materials of nature.").

[190] Frank E. Kulbaski III, *Statutes of Repose and The Post-Sale Duty to Warn: Time for a New Interpretation*, 32 Conn. L. Rev. 1027, 1031 (2000) (discussing changing legal standards as to safety and design specifications of products).

[191] *Yarbro*, 655 P.2d at 826 n.5.

legal, technological, and environmental considerations rather than those which existed at the time of the conduct in question.[192]

In this regard, the "attitudes of juries towards appropriate levels of safety" in design, construction, and performance of services at the time of trial may reflect safety and environmental considerations that were once thought unnecessary or even unforeseeable.[193] This implies that defendants may not be able to trust that taking appropriate environmental safety measures by today's standards would adequately defend them against future liability. As a result, defendants might have "great difficulty in predicting and planning for future liabilities."[194] Moreover, even if one argues that the threat of unpredictably-imposed liability by future juries may encourage meticulous environmental safety practices among architects and contractors, they would still have no reasonable way to conform their present conduct to future, unknown environmental standards to which they will ultimately be held at trial.[195] Thus, statutes of repose help ensure the use of environmental standards that were foreseeable to defendants at the time they acted.[196]

Additionally, it may be "wise public policy to minimize unreliable fact-finding" in environmental litigation by applying statutes of repose.[197] By functioning to ensure good evidence is presented at trials, statutes of repose—like statutes of limitations—are consistent with society's interests in preserving a reliable fact-finding justice system.[198] As one commentator has noted, "[s]ociety and the judiciary are primarily concerned with the difficulty of proof in older cases as well as the identification of fraudulent claims in such cases."[199] Society has an interest in bringing the proper perpetrators of environmental harms

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[192] *See* Kulbaski, *supra* note 190, at 1032–33.

[193] *Id.* at 1031.

[194] *Id.*

[195] *See id.*

[196] *See id.* at 1031–33 (discussing how statutes of repose increase the likelihood that defendants will be held to safety standards which existed at the time they acted rather than those which they could not foresee).

[197] Richardson, *supra* note 82, at 1021.

[198] Order of R.R. Telegraphers v. Ry. Express Agency, Inc., 321 U.S. 342, 348–49 (1944) ("by preventing . . . claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared"); Richardson, *supra* note 82, at 1021.

[199] Mehs, *supra* note 7, at 983.

to justice,[200] which may make individuals environmentally conscious, responsible, and compliant with the law.[201]

C. *Statutory Language and Composition*

Statutory language is an important element in determining whether the defendant's conduct comes within a statute of repose,[202] and what types of claims are covered.[203] Most commonly, defendants will have to show that the alleged conduct giving rise to the environmental harm is within the scope of the statutes.[204] For example, where a statute uses such wording, defendants will have to prove that their conduct qualifies as an "improvement to real property" within the meaning of the relevant statute of repose.[205] A majority of courts have adopted the view that, in determining whether the defendant's conduct constitutes an "improvement," factors such as whether the construction "enhances the use of the property, involves the expenditure of labor or money, is more than mere repair or replacement, adds to the value of the property, and is permanent in nature" shall be considered.[206]

1. "Improvements" to Real Property

Using the definition of "improvements" above, defendants can likely present their work as constituting improvements under statutes of repose, especially where their services involved a "'complex system of components.'"[207] Courts have focused on each component of the defendant's work as part of a "system" of improvements.[208] If defendants can show that a particular "component" of a qualified improvement should be characterized as an "integral part" of that improvement, then

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[200] *See* Pitney Bowes, Inc. v. Baker Indus., 649 A.2d 1325, 1326–28 (N.J. Super. Ct. App. Div. 1994).

[201] *See Toxic Waste Litigation*, *supra* note 7, at 1603 (noting that where environmental injuries go uncompensated, dangerous environmental activities may be undeterred).

[202] *See* Rosenberg v. Town of N. Bergen, 293 A.2d 662, 666 (N.J. 1972).

[203] *See* Ness & Madsen, *supra* note 105, at 591.

[204] *Rosenberg*, 293 A.2d at 666.

[205] Travelers Ins. Co. v. Guardian Alarm Co., 586 N.W.2d 760, 762 (Mich. Ct. App. 1998): Biniek v. Exxon Mobil Corp., 818 A.2d 330, 334–35 (N.J. Super. Ct. Law Div. 2002).

[206] Van Den Hul v. Baltic Farmers Elevator Co., 716 F.2d 504, 508 (8th Cir. 1983); *see* Collins v. Trinity Indus., Inc., 861 F.2d 1364, 1365 (5th Cir. 1988); *Travelers Ins. Co.*, 586 N.W.2d at 762.

[207] Adair v. Koppers Co., 741 F.2d 111, 115 (6th Cir. 1984) (quoting Mullis v. S. Co. Servs., 296 S.E.2d 579, 584 (Ga. 1982)); Pendzsu v. Beazer E., Inc., 557 N.W.2d 127, 132 (Mich. Ct. App. 1996).

[208] *Adair*, 741 F.2d at 115.

the component itself will be considered an "improvement to real property" under the relevant statute of repose.[209] This suggests that a particular component or aspect of the defendant's work—which caused the plaintiff's environmental injuries—may qualify as an improvement even if it would not have otherwise been an improvement when viewed in isolation.

Because some courts have adopted this system-based view, plaintiffs in those jurisdictions may have to negate the view that their injuries arose from components of work that were part of a system in order to invalidate application of the statute of repose.[210] However, this system-based view is logical when considering the statute's application to environmental injuries, since improvements made upon real property frequently do consist of a set or system of improvements "to artificially extract each component from an improvement to real property and view it in isolation would be an unrealistic and impractical method of determining what is an improvement to real property."[211] Therefore, as long as defendants render each component of their work as part of a scheme or system of improvements to real property, they increase their chances that courts will view their liability for environmental injuries as within the purview of statutes of repose.[212]

In contrast, merely replacing building structures, such as underground gasoline tanks, may not qualify for protection as an improvement, where the items have a "finite useful period for use."[213] Merely removing structures from land is also unlikely to qualify as an improvement, since the term generally denotes a "product, object, or some other tangible item that remains on the real property" after the work has been finished.[214] To circumvent this, however, defendants may argue that, to the extent making replacements or removing structures is part of a set or system of improvements to real property, this conduct should be considered an improvement, since some courts have held that "the work must be considered in light of the system" and not just on an individual basis.[215]

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[209] *See* Pitsch v. ESE Mich., Inc., 593 N.W.2d 565, 577 (Mich. Ct. App. 1999); *Travelers Ins. Co.*, 586 N.W.2d at 762.

[210] *See Adair*, 741 F.2d at 115; *Mullis*, 296 S.E.2d at 584.

[211] *Mullis*, 296 S.E.2d at 584; *see Adair*, 741 F.2d at 115; *Pendzsu*, 557 N.W.2d at 132.

[212] *See Adair*, 741 F.2d at 115; *Mullis*, 296 S.E.2d at 584; *Pendzsu*, 557 N.W.2d at 132.

[213] Biniek v. Exxon Mobil Corp., 818 A.2d 330, 336 (N.J. Super. Ct. Law Div. 2002).

[214] Pitsch v. ESE Mich., Inc., 593 N.W.2d 565, 577 (Mich. Ct. App. 1999).

[215] *Pendzsu*, 557 N.W.2d at 132.

Once it is established that the defendant made improvements to real property within the meaning of the particular state statute of repose, a variety of jurisdictions require a showing that the defendant's injurious conduct relate to the design, planning, construction, supervision, or general administration of that improvement to real property.[216] It is therefore in a potential defendant's interests to carefully examine his activities, so as to take appropriate steps to ensure that the improvements he performs upon a property can be properly characterized as fitting one of the above criteria. For example, liability arising out of an improvement to real property is unlikely to be considered related to the improvement's design where the defendant did not exercise "'substantial control over [its] design.'"[217] Such a scenario may resemble a situation in which the defendant has installed a widely manufactured product or device onto the plaintiff's property but neither had substantial control of the product's design, nor the design of its arrangement, placement, or function on the property.[218]

2. Type of claim

In light of the variation in the statutory language among jurisdictions,[219] it is important to examine whether a particular environmental claim is covered by the real property statute of repose. Consider, for example, harmful toxic contamination resulting from the defendant's negligent performance of improvements to real property.[220] If defendants in Massachusetts were to invoke the state real property statute of repose during litigation, they may only be able to escape environmental liability that is grounded in tort law, since the statute of repose only addresses "[a]ction[s] of tort . . . arising out of any deficiency or neglect" in rendering improvements to real property.[221] In contrast, under the broader statutory language of the Illinois statute of repose, a wider range of environmental claims may be covered, since the statute encompasses actions "based upon tort, con-

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[216] *See, e.g.*, CONN. GEN. STAT. ANN. § 52-584a(a) (West 2005); MASS. GEN. LAWS ch. 260, § 2B (2004); N.J. STAT. ANN. § 2A:14-1.1 (West 2000 & Supp. 2005).

[217] *Biniek*, 818 A.2d at 335 (quoting Brown v. Cent. Jersey Power & Light Co., 394 A.2d 397, 402 (N.J. Super. Ct. App. Div. 1978)).

[218] *Id.* at 335–36 (finding that defendant did not have control over the design of a gas tank it was installing or the piping system in which it was being installed, since the system was already in existence).

[219] *See* Ness & Madsen, *supra* note 105, at 591.

[220] *See* Town of Weymouth v. James J. Welch & Co., 6 Mass. L. Rep. 197 (Super. Ct. 1996).

[221] MASS GEN. LAWS ch. 260, § 2B (2004).

tract or otherwise."[222] Defendants in jurisdictions similar to Illinois may be able to exploit the broader statutory language, which could be construed to encompass a variety of legal claims that extend beyond the claims listed in the statute.[223]

D. *Arguments Against Application and Public Policy Concerns*

As a matter of environmental policy, however, courts and legislatures should give more attention to the effects of statutes of repose in environmental contexts, and should consider amending state laws to limit their application in such circumstances.[224]

1. Latency and Environmental Injuries

Even if statutes of repose protect some important evidentiary, judicial, and economic interests on behalf of defendants,[225] broadly applying statutes of repose to environmental claims may undermine the concept of fairness in our justice system, since some plaintiffs with latent injuries—such as toxic waste victims—would have their claims "systematically barred . . . on the merits."[226] The plight of victims of latent diseases from environmental harms "highlight[] the shortcomings" of rules that extinguish claims before the plaintiffs had a reasonable opportunity to discover their injuries.[227] Thus, courts and legislatures should recognize that defendants who would "otherwise be liable for generating and tortiously" creating environmental hazards should not escape liability simply for being fortunate that the hazards and injuries were latent in nature.[228]

For example, statutes of repose would frequently bar environmental claims involving serious illnesses, since they "characteristically set time limitations that . . . are shorter than the average latency period for cancer and other diseases."[229] Thus, a person who has been exposed to hazardous contaminants because of the defendant's negligent performance of services "may learn that she has developed leu-

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[222] 735 ILL. COMP. STAT. 5/13-214(b) (West 2002).

[223] *See id.*

[224] *See Toxic Waste Litigation*, *supra* note 7, at 1605 (arguing that legislatures should avoid enacting statutes of repose for particular environmental claims such as toxic waste injuries).

[225] *See* Peacock, *supra* note 2, at 230–32.

[226] *Toxic Waste Litigation*, *supra* note 7, at 1607.

[227] Grant, *supra* note 169, at 697.

[228] *Toxic Waste Litigation*, *supra* note 7, at 1607.

[229] *Id.* at 1609.

kemia . . . but may not connect her disease with exposure" in time to file a sustainable claim.[230] Even more concerning, however, is the fact that the latency of the victims illness may result in the victim remaining unaware of the environmental harms; moreover, the scientific community might be ignorant of the connection between the environmental harms and health consequences until it is too late.[231]

2. Public Policy Concerns

The problems of applying statutes of repose to environmental claims extends beyond a determination of whether injuries are latent. Granting defendants a substantive right to escape liability for their mistreatment of the environment would be to give them a free pass for creating harms that retain a public character because of the interconnection between the environment and the people which inhabit it.[232] The protective functions of environmental law and regulation may be undermined when defendants are aware that their potential liability for producing foreseeable environmental hazards and consequential injuries would be absolutely extinguished on a particular date.[233]

In effect, the limits that statutes of repose provide may empower contractors to plan and execute their construction activities with less caution toward the safety of clients and greater disrespect for potential environmental consequences, in the "hope that few claims will arise . . . before the statutory period ends."[234] If environmental injuries remain uncompensated, dangerous environmental activities will remain undeterred.[235] Accordingly, despite arguments that highlight the benefits of statutes of repose, the "fairness and efficiency costs of systematically barring actions and insulating [defendants] from environmental liability" are too high for society to bear.[236]

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[230] Troyen A. Brennan, *Environmental Torts*, 46 VAND. L. REV. 1, 54–55 (1993) (discussing how time limitations may preclude actions in court).

[231] *Id.*

[232] *See* First United Methodist Church v. U.S. Gypsum Co., 882 F.2d 862, 866 (4th Cir. 1989); ZYGMUNT J.B. PLATER ET AL., ENVIRONMENTAL LAW AND POLICY: NATURE, LAW, AND SOCIETY, at xxiv (3d ed. 2004) ("'Everything is connected to everything else'").

[233] Peacock, *supra* note 2, at 249; *Toxic Waste Litigation*, *supra* note 7, at 1602–04 (discussing the subversive effect that statutes of repose can have in tort law and products liability settings).

[234] Peacock, *supra* note 2, at 249.

[235] *Toxic Waste Litigation*, *supra* note 7, at 1603.

[236] *Id.* at 1610.

E. *Applying Statutes of Repose to State Environmental Statutes: A Look at Arguments For and Against Application*

The fact that some courts have refused to apply statutes of repose to certain environmental claims indicates that they have recognized that statutes of repose in an environmental context may be "contrary to principles of fairness."[237] In particular, these courts believe that applying statutes of repose could "impair the statutory scheme" of state environmental remediation laws, which are designed to prevent "the grave public consequences" of environmental harms by ensuring that no responsible party is excused.[238] Moreover, these environmental remediation statutes are designed to illuminate environmental policy and improve the government's ability to respond to environmental hazards.[239] Thus, the public good may be served by avoiding the application of statutes of repose to particular environmental claims—such as those brought under state environmental remediation statutes similar to the Massachusetts Oil and Hazardous Material Release Prevention Act,[240] the New Jersey's Spill Compensation and Control Act,[241] or the Michigan environmental remediation statutes.[242] States could more effectively enforce environmental protection laws by threatening defendants with having to pay for environmental response costs for their misconduct.[243]

At least one court has refused to apply a statute of repose to a state environmental remediation statute by arguing that the limitations period prescribed in the remediation statute was intended by the legislature to exclusively govern whether claims shall be heard in court.[244] The court held that application of a statute of repose would

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[237] Town of Weymouth v. James J. Welch & Co., 6 Mass. L. Rep. 197, 198 (Super. Ct. 1996).

[238] Pitney Bowes, Inc. v. Baker Indus., 649 A.2d 1325, 1328 (N.J. Super. Ct. App. Div. 1994).

[239] Wellesley Hills Realty Trust v. Mobil Oil Corp., 747 F. Supp. 93, 95 (D. Mass 1990).

[240] *See* MASS. GEN. LAWS ch. 21E, §§ 2, 5(a) (2004).

[241] *See* N.J. STAT. ANN. § 58:10 to 23.11 (West 1992).

[242] *See* MICH. COMP. LAWS ANN. § 324.20126 (West 1999 & Supp. 2005).

[243] Nassr v. Commonwealth, 477 N.E.2d 987, 992 (Mass. 1985) (noting that under a Massachusetts environmental remediation statute, parties responsible for pollution shall pay the costs of cleanup); Pitsch v. ESE Mich., Inc., 593 N.W.2d 565, 573–74 (Mich. Ct. App. 1999) (discussing the purposes of the Michigan Environmental Response Act as paralleling those of the federal Comprehensive Environmental Response, Compensation & Liability Act).

[244] Town of Weymouth v. James J. Welch & Co., 6 Mass. L. Rep. 197, 198–200 (Super. Ct. 1996) (holding that the purpose of the § 11A limitations period in the state environmental statute would be undermined if the state statute of repose were applied).

undermine the state's liberal discovery rule, since the statute of repose would have "a substantially greater impact on barring litigation than would a statute of limitations."[245] Moreover, the court held that the absence of language supporting a repose period in the environmental statute suggested legislative intent that the limitations period—with its liberal discovery rule—was to be the exclusive time-barring mechanism.[246]

However, the logic behind this holding is vulnerable to attacks. First, defendants may argue that statutes of repose should apply to claims based upon state environmental statutes where the statute of repose's language is broad.[247] For example, if the statute of repose were to specify that it shall apply to actions "based upon tort, contract or otherwise,"[248] defendants may argue that claims brought under environmental statutes could be said to fall within the broad "or otherwise" category of claims listed in the statute, especially where neither the statute of repose nor the particular environmental statute in question state to the contrary. Conversely, in jurisdictions where the statute of repose is primarily applicable to actions based upon tort—such as Massachusetts—defendants may have to categorize the environmental statutory claims in question as claims grounded in tort in order for the statute of repose to be relevant.[249]

Defendants may also argue that, despite the desirability of maintaining and enforcing a liberal discovery rule in environmental statutes to protect plaintiffs, displacing a statute of repose with such a limitations period is inappropriate given the disparate natures of statutes of repose and statutes of limitations.[250] "Statutes of limitation . . . are primarily instruments of public policy and of court management" by both "managing the progress of cases" and "granting or denying access to [the state's] courts."[251]

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[245] *Id.* at 199.

[246] *Id.* at 198–200.

[247] *See* 735 Ill. Comp. Stat. 5/13-214(b) (West 2002) (containing the phrase "or otherwise" to broaden the statute beyond the enumerated causes of action).

[248] *Id.*

[249] Mass. Gen. Laws ch. 260, § 2B (2004) (referencing only "actions of tort" as subject to the statute of repose); *see James J. Welch & Co.*, 6 Mass. L. Rep. at 198 (holding that the state environmental statute in question did not "sound in tort," and thus the statute of repose was inapplicable).

[250] Sch. Bd. v. U.S. Gypsum Co., 360 S.E.2d 325, 327–28 (Va. 1987); *see James J. Welch & Co.*, 6 Mass. L. Rep. at 198–200 (rejecting the applicability of the statute of repose given that the relevant environmental statute contained a limitations period).

[251] Goad v. Celotex Corp., 831 F.2d 508, 511 (4th Cir. 1987).

In contrast, statutes of repose are intended to "relieve potential defendants from anxiety over liability for acts committed long ago."[252] They are substantive definitions of the defendant's rights to escape liability, and are substantive laws which "reflect a State's determination of the proper relationship between the people and property within its boundaries."[253] Therefore, if courts displace statutes of repose with statutes of limitations and discovery rules, they would be displacing defendants' substantive rights concerning liability with mere procedural rules for judicial efficiency. The inherent differences between statutes of limitations and statutes of repose suggest that the procedure by which plaintiffs file lawsuits under statutes of limitations exists separately from defendants' substantive right to avoid liability under statutes of repose.[254] Indeed, statutes of limitations and statutes of repose coexist and may even be created in the same legislation.[255]

In addition, the fact that an environmental statute contains its own limitations period with a liberal discovery rule, but does not reference a repose period, need not suggest a legislative intent to dispense with statutes of repose.[256] Statutes of repose, like discovery rules, also protect important legal and social policy interests, and represent "a conscious policy decision that . . . defendants deserve the peace of mind that comes with a close-ended limitations period."[257] These interests are consistent with the Supreme Court's holding that the right of defendants "to be free of stale claims in time comes to prevail over the right to prosecute them."[258] Moreover, no true legal conflict exists between statutes of repose and statutes of limitations—even those with liberal discovery rules—since statutes of repose merely function as a "cap" on statutes of limitations.[259] Thus, defendants could argue that, if a particular environmental statute is to be

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[252] *Id.* at 511.

[253] *Id.*; Stevenson, *supra* note 15, at 334 n.38.

[254] *See* First United Methodist Church v. U.S. Gypsum Co., 882 F.2d 862, 866 (4th Cir. 1989).

[255] *See* O'Brien v. Hazelet & Erdal, 299 N.W.2d 336, 341 (Mich. 1980) (describing a state statute as both a statute of limitation and a statute of repose).

[256] *Contra* Town of Weymouth v. James J. Welch & Co., 6 Mass. L. Rep. 197, 198–200 (Super. Ct. 1996) (rejecting the applicability of the statute of repose to an environmental statute since a limitations period was provided for and no repose period was mentioned in the statute).

[257] Grant, *supra* note 169, at 728.

[258] Order of R.R. Telegraphers v. Ry. Express Agency, Inc., 321 U.S. 342, 349 (1944).

[259] Leslie Calkins O'Toole, Note, Wilder v. Amatex Corp.*: A First Step Toward Ameliorating the Effect of Statutes of Repose on Plaintiffs with Delayed Manifestation Diseases*, 64 N.C. L. Rev. 416, 417 (1986) (internal quotations omitted).

exempt from statutes of repose, then this exclusion should be based on reasons other than the mere presence of its own specific statute of limitations and discovery rule or lack of specific repose language.[260]

In response to these arguments, plaintiffs may assert that "[t]he primary goal of statutory interpretation is to ascertain and give effect to the Legislature's intent when it enacted a provision."[261] Accordingly, it is appropriate for courts to "look to the object of the statute, the harm which it is designed to remedy, and apply a reasonable construction which best accomplishes the statute's purpose."[262] Using this analysis, refusing to apply statutes of repose to environmental statutes is justifiable, particularly in instances where the legislature specifically mandates a liberal discovery rule within the statute itself.[263] Thus, subjecting those statutory environmental claims to a statute of repose could be contrary to the apparent intent of the legislature to create a specific cause of action that accrues when the plaintiff "'knew or, in the exercise of reasonable diligence, should have known, of the injury.'"[264] Since statutes of repose eliminate a cause of action, they conflict with the goals of the discovery rule in ensuring that "a plaintiff's claim does not expire before the plaintiff is aware of its existence."[265]

Additionally, plaintiffs may argue that statutes of repose must not apply to environmental remediation statutes, because doing so would frustrate the purposes of promoting environmental wellness and relief for the injured.[266] Plaintiffs may also argue that, consistent with rules of statutory interpretation, environmental remediation statutes create private environmental causes of action so specific that they were likely intended to be exempt from, or should not be invalidated by, statutes of

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[260] *But see James J. Welch & Co.*, 6 Mass. L. Rep. at 198–200.

[261] Shields v. Shell Oil Co., 604 N.W.2d 719, 724 (Mich. Ct. App. 1999) *rev'd on other grounds*, 621 N.W.2d 215 (Mich. 2000).

[262] In re Forfeiture of $5,264, 439 N.W.2d 246, 249 (Mich. 1989) (citations omitted); *Shields*, 604 N.W.2d at 724.

[263] *See* Mass. Gen. Laws ch. 21E, § 11A(4) (2004) (enabling plaintiffs to file actions to recover reimbursement, contribution, or equitable shares of response costs within three years of when the plaintiff "discovers or reasonably should have discovered" that the defendant is responsible for the environmental hazards covered by the statute); *James J. Welch & Co.*. 6 Mass. L. Rep. at 197–200.

[264] Grant, *supra* note 169, at 708 (quoting Columbus Bd. of Educ. v. Armstrong World Indus., Inc., 627 N.E.2d 1033, 1037 (Ohio Ct. App. 1993)).

[265] *Id.* at 707–08 (citing Mehs, *supra* note 7, at 974).

[266] *See* Wellesley Hills Realty Trust v. Mobil Oil Corp., 747 F. Supp. 93, 95 (D. Mass 1990); Pitsch v. ESE Mich., Inc., 593 N.W.2d 565, 573–74 (Mich. Ct. App. 1999); Pitney Bowes, Inc. v. Baker Indus., 649 A.2d 1325, 1326–27 (N.J. Super. Ct. App. Div. 1994).

repose, which speak in more general terms.[267] Indeed, it is "well-settled" that where two statutes cover a given subject matter, the more specific statute will prevail over the more general statute, which otherwise might apply.[268] Therefore, plaintiffs might successfully assert that environmental statutes more specifically cover the injuries in question than do statutes of repose, and should therefore operate independently and without interference from statutes of repose.[269]

F. *Balancing the Burden and a Potential for Compromise*

In the American justice system, "[t]he law imposes on a plaintiff, armed with knowledge of an injury and its cause, a duty to diligently pursue the resulting legal claim."[270] Because statutes of repose may bar claims before injuries are even discovered, the application of statutes of repose to environmental injuries effectively requires that plaintiffs also perform their own due diligence and discover injuries before the repose period has ended. However, as some commentators have noted, "defendants, rather than innocent victims, should suffer the inconveniences" resulting from environmental harms they have caused.[271] Accordingly, the burden to evaluate the environmental safety of improvements to real property *ex ante* should not be shifted from defendants to plaintiffs. For example, had the plaintiff in *Shields v. Shell Oil Co.* tested his soil sooner—thereby discovering the contamination caused by the defendant—he may have been able to file a claim before the end of the repose period.[272] In that case, the statute of repose effectively penalized the plaintiff for merely having continued in the course of his own activities on the assumption that the defendant had not acted adversely to his interests.[273] However, expecting

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[267] *Pitney Bowes, Inc.*, 649 A.2d at 1327 (holding that it is "self-evident" that the purpose of the Spill Act as an environmental remediation statute "would be defeated" if a statute of repose, which is more general than the Spill Act, were applicable to Spill Act claims).

[268] State v. State Employees' Review Bd., 687 A.2d 134, 143 (Conn. 1997) (internal quotations omitted); Tolchin v. Shell Oil Co., No. X03CV970510328S, 2004 Conn. Super. LEXIS 2203, at *8 (July 30, 2004).

[269] *See Tolchin*, 2004 Conn. Super. LEXIS 2203, at *7–10 (stating that a state environmental statute was more directly applicable to the plaintiff's claims pertaining to hazardous pollution than was the statute of repose invoked by defendants).

[270] Moll v. Abbott Labs., 506 N.W.2d 816, 830 (Mich. 1993).

[271] *Toxic Waste Litigation*, *supra* note 7, at 1607–08.

[272] Shields v. Shell Oil Co., 604 N.W.2d 719, 722, 727 (Mich. Ct. App. 1999) *rev'd on other grounds*, 621 N.W.2d 215 (Mich. 2000).

[273] *See id.* at 722–23. For a period of years after the purchase of the property from the defendant, the plaintiff made use of his property by installing new tanks underground. *Id.*

plaintiffs will take affirmative steps to avoid environmental injuries may be unreasonable or unrealistic, because this presupposes that plaintiffs are capable of discovering these injuries through reasonable means and in time for filing.[274]

What, then, can be done? In balancing the interests of plaintiffs and defendants in terms of environmental injuries and liability, state legislatures should consider modifying their statutes of repose in a way that both enables defendants to be sheltered from obligations long passed and gives plaintiffs a more reasonable opportunity to obtain relief for their injuries, whether overt or latent. Some states already have provisions built into their statutes of repose which provide plaintiffs with some protection from the harsh effects of repose time-bars.[275] For example, the Connecticut real property statute of repose states that, although actions arising out of deficient performance of improvements to real property must be brought within seven years of substantial completion of the improvements, plaintiffs shall have one additional year to bring their claims if their injuries—personal, property, or wrongful death—are discovered in the final year before the claims would be time-barred.[276] Similarly, the Illinois real property statute of repose provides that if before the ten year repose period has run, the plaintiff discovers his or her injuries, he or she will have no less than four years to bring the suit.[277] Florida's real property statute of repose takes a more complex approach and explicitly accounts for latent defects or injuries.[278] In Florida, the four year repose period for actions arising out of the performance of improvements to real property begins to run when the owner takes possession of the property or the work is completed.[279] However, if the injuries are latent, the repose period will instead begin to run when the plaintiff discovers, or should have discovered, the injury.[280] Nevertheless, the statute says

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It was only when the plaintiff moved to sell the property did he discover that the defendant's prior conduct contaminated his land. *See id.*

[274] *See* Mehs, *supra* note 7, at 965. For example, certain latent injuries associated with toxic exposure in the local environment may not be detectable by a routine examination. *Id.*

[275] These states include Connecticut, Florida, and Illinois. *See infra* notes 276–78.

[276] Conn. Gen. Stat. Ann. § 52-584a(a) to (b) (West 2005).

[277] 735 Ill. Comp. Stat. 5/13-214(b) (West 2003).

[278] Fla. Stat. Ann. § 95.11(3)(c) (West 2002 & Supp. 2006).

[279] *Id.*

[280] *Id.*

that the suit will be time-barred fifteen years after the owner takes possession or the work is completed.[281]

Providing plaintiffs with additional time to file their suits beyond the repose period may abate the danger of suits being time-barred before injuries have accrued. However, in order for such modifications to statutes of repose to apply this benefit to plaintiffs, the additional time afforded would have to be significant, based upon a timetable during which environmental injuries are likely to become apparent. Thus, legislatures should not only adopt modifications to statutes of repose that provide extra time for plaintiffs to file suits once they have discovered their injuries, but should also consider lengthening or enacting larger repose periods from the start, so as to reflect the latent expression of many environmentally-caused injuries. This policy would be consistent with the current goals of statutes of repose, such as preventing the use of degraded evidence, and avoid the imposition of unforeseeable standards.[282] If the goals of statutes of repose are important concerns in environmental litigation, shielding defendants following a longer repose period might be given greater legitimacy.

Conclusion

Statutes of repose are capable of enabling defendants to escape some of the particular "perils" of environmental litigation.[283] There is precedent that supports the notion that where the defendant's injurious conduct arises out of making improvements to real property, a state's real property statute of repose is relevant and applicable to the litigation, depending on the type of environmental claims involved and the particulars of the statutory language. In protecting their respective interests, plaintiffs and defendants should be aware that case law supports the application of statutes of repose to tort claims with environmental components, such as those involving property damage and personal injuries.[284] In contrast, there is some precedent for precluding

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[281] *Id.*

[282] 5 The Law of Hazardous Waste, *supra* note 3, § 17.05[4], at 17-248; Kulbaski, *supra* note 190, at 1031.

[283] Peter J. Lynch et al., *On the Frontier of Toxic Tort Liability: Evolution or Abdication?*, 6 Temp. Envtl. L. & Tech. J. 1, 28 (1987).

[284] *See e.g.*, Gaggero v. County of San Diego, 21 Cal. Rptr. 3d 388 (Ct. App. 2004); Conley v. Scott Prods., Inc., 518 N.E.2d 849, 850–51 (Mass. 1988); Scheinblum, v. Lauderdale County Bd. of Supervisors, 350 F. Supp. 2d 743, 745–47 (S.D. Miss. 2004); New Grade Int'l, Inc., v. Scott Techs., No. C03-2628RSM, 2004 U.S. Dist. LEXIS 26580, at *2, *14 (W.D. Wa. Nov. 30, 2004); Biniek v. Exxon Mobil Corp., 818 A.2d 330, 334–36 (N.J. Super. Ct. Law

the application of statutes of repose to claims falling under state environmental remediation statutes.[285] However, although these courts have refused to apply statutes of repose to statutory environmental claims,[286] defendants are not without legal and policy justifications to convince courts otherwise. These arguments include the presentation of good evidence at trial,[287] the appropriateness of particular legal standards enforced upon defendants,[288] and the discrete functions of statutes of repose as compared to statutes of limitations.[289] Moreover, plaintiffs must also be mindful that in most jurisdictions, it will be difficult for them to bring a constitutional challenge to defeat statutes of repose, since they are widely held to be constitutional and not contrary to fundamental rights.[290] This will likely remain the subject of controversy in latent injury cases in which the plaintiff's recovery may be time-barred before their injuries have been discovered.[291]

The debate most fundamental to the applicability of statutes of repose in environmental litigation is that which embodies "the conflict that arises between the policy goals of statutes of repose and the policy goals of recovery."[292] While some argue that fairness requires imposition of liability upon defendants for the environmental harms that they have caused to innocent plaintiffs,[293] others will argue that defendants deserve the peace of mind that they will not have to answer to liability arising long ago when environmental, technological, or legal circumstances were different.[294] A viable option to simul-

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Div. 2002) (suggesting that New Jersey's real property statute of repose is applicable to claims of negligent contamination of property);

[285] *See generally* Town of Weymouth v. James J. Welch & Co., 6 Mass. L. Rep. 197, (Super. Ct. 1996); Pitney Bowes, Inc. v. Baker Indus., 649 A.2d 1325 (N.J. Super. Ct. App. Div. 1994).

[286] *See generally* Town of Weymouth v. James J. Welch & Co., 6 Mass. L. Rep. 197, (Super. Ct. 1996); Pitney Bowes, Inc. v. Baker Indus., Inc., 649 A.2d 1325 (N.J. Super. Ct. App. Div. 1994).

[287] *See* 5 The Law of Hazardous Waste, *supra* note 3, § 17.05[4], at 17-248.

[288] *See* Kulbaski, *supra* note 190, at 1031–33.

[289] *See* Sch. Bd. v. U.S. Gypsum Co., 360 S.E.2d 325, 327 (Va. 1987); Peacock, *supra* note 2, at 225–28.

[290] *See* 5 The Law of Hazardous Waste, *supra* note 3, § 17.05[4][d], at 17-259; Baughman, *supra* note 40, at 682–83.

[291] *See* Mehs. *subra* note 7, at 965–66; *Toxic Waste Litigation*, *supra* note 7, at 1609–10.

[292] Mehs, *supra* note 7, at 966.

[293] *Toxic Waste Litigation*, *supra* note 7, at 1607–08.

[294] *See* Klein v. Catalano, 437 N.E.2d 514, 520 (Mass. 1982); Town of Weymouth v. James J. Welch & Co., 6 Mass. L. Rep. 197, 198–200 (Super. Ct. 1996); Shields v. Shell Oil Co., 604 N.W.2d 719, 726 (Mich. Ct. App. 1999) *rev'd on other grounds*, 621 N.W.2d 215 (Mich. 2000); Kulbaski, *supra* note 190, at 1031–33; *Statutes of Limitations*, *supra* note 89, at 1185.

taneously serve both the interests of plaintiffs and defendants may be the drafting of legislation to modify statutes of repose in ways that strike a compromise between the ability of plaintiffs to accrue a cause of action and the right of defendants to claim immunity after a period of time. In this regard, state legislatures should take the examples of Connecticut, Illinois, and Florida[295] and consider amending statutes of repose to better account for latent characteristics common to many environmental injuries. Appropriate amendments include allowing for extensions to file lawsuits—where injuries were discovered at the last minute—or lengthening the repose periods. Ultimately, however, each jurisdiction must determine when, how, or whether to apply statutes of repose, thus excusing defendants for their environmental harms, or whether to set aside statutes of repose and adopt the old maxim that "no man may take advantage of his own wrong."[296]

[295] *See supra* notes 276–81 and accompanying text.

[296] Glus v. Brooklyn E. Dist. Terminal, 359 U.S. 231, 232 (1959).