Cornell Law Review

Volume 80
Issue 3 *March 1995*

Article 6

When Does the Clock Start Ticking?: Applying the Statute of Limitations in Asbestos Property Damage Actions

Alex J. Grant

Follow this and additional works at: http://scholarship.law.cornell.edu/clr

Part of the Law Commons

Recommended Citation
Alex J. Grant, *When Does the Clock Start Ticking?: Applying the Statute of Limitations in Asbestos Property Damage Actions* ,
80 Cornell L. Rev. 695 (1995)
Available at: http://scholarship.law.cornell.edu/clr/vol80/iss3/6

This Note is brought to you for free and open access by the Journals at Scholarship@Cornell Law: A Digital Repository. It has been accepted for inclusion in Cornell Law Review by an authorized administrator of Scholarship@Cornell Law: A Digital Repository. For more information, please contact jmp8@cornell.edu.

WHEN DOES THE CLOCK START TICKING?: APPLYING THE STATUTE OF LIMITATIONS IN ASBESTOS PROPERTY DAMAGE ACTIONS

Introduction 696

I. Theories of Liability and the Accrual of the Cause of Action 699
   A. A Sketch of the Asbestos Property Damage Action .. 699
   B. Accrual of the Tort Cause of Action 704
      1. Date of Injury Rule 705
      2. Discovery Rule 708
         a. Knowledge of "Contamination" Starts the Clock Ticking 709
         b. Knowledge of the Presence of Friable Asbestos Plus General Awareness of the Dangers of Asbestos Starts the Clock Ticking 710
         c. Knowledge of the Presence of Asbestos and Awareness of Its Dangers Starts the Clock Ticking 712
         d. Cause of Action Accrues upon Awareness of Dangers of Asbestos in Buildings 713
      3. Missouri's Particularized Common Law Rule for Asbestos Property Damage Actions 715
   C. Accrual of the Breach of Warranty Cause of Action . 716
      1. Asbestos Property Damage and Warranty Claims: Difficulties on the Merits 717
      2. The Statute of Limitations Forecloses Most Warranty Causes of Action 717
   D. The Restitution Cause of Action: Solving the Time-Bar Problem, But Wrong on the Merits 719
      1. Restitution Cause of Action Avoids the Statute of Limitations 719
      2. Restitution Should Not be Available for Property Damage Caused by a Defective Product 720
   E. Nuisance: Solving the Time-Bar Problem, But Again, Wrong on the Merits 722
   F. Allegations of Fraud: Tolling the Statute of Limitations 723

II. The Role of State Legislation and Sovereign Immunity . 725
   A. Special Asbestos Legislation 725
      1. Statutes that Expand the Limitations Period 725

2. Revival Statutes 726
3. Statutes that Specify When a Cause of Action Accrues 727
B. Statutes of Repose 728
1. How Statutes of Repose Work 728
2. Defendants Protected by Statutes of Repose 729
C. Sovereign Immunity: Nullifying the Statute of Limitations Defense 731
1. Entities Protected by Sovereign Immunity....... 731
2. The Sovereign May Waive Its Immunity......... 733
3. The Limits of Sovereign Immunity: Government Entity Must Seek to Vindicate a "Public Right" 734
III. Difficulties with the Discovery Rule and a Proposal 736
A. The Difficulties in Filing a Timely Claim and How the Statute of Limitations Shapes Plaintiff's Case on the Merits 736
1. Plaintiff's Theory of Liability Helps to Define "Injury".. 737
2. Asbestos Property Damage: A Creeping Problem for Building Owners.................. 739
B. Vagneness of the Discovery Rule.................... 740
C. Proposal for a Particularized Discovery Rule 741
1. Attempts by Courts and Legislatures to Formulate a Particularized Discovery Rule 741
2. Proposed Rule... 742
3. Abrogation of Sovereign Immunity 744
Conclusion 746

INTRODUCTION

Asbestos personal injury litigation has been the mother of all mass torts. It has overwhelmed state and federal court dockets for well over a decade, while leaving many claims unsatisfied, and costing some $7 billion,[1] with billions more to follow.[2] For these reasons, it has also been the mother of invention. Among the many reforms

[1] Christopher F. Edley & Paul C. Weiler, *Asbestos: A Multi-Billion Dollar Crisis*, 30 HARV. J. ON LEGIS. 383, 390 n.12 (1993) (citing Suzanne L. Oliver & Leslie Spencer, *Who Will the Monster Devour Next?*, FORBES, Feb. 18, 1991, at 75, 79).

[2] Judge Jack B. Weinstein, who has played a large role in managing asbestos personal injury litigation, has estimated that pending and future personal injury claims will likely cost between $26 and $28 billion. *See In re* Joint E. & S. Dist. Asbestos Litig. (Findley v. Blinken), 129 B.R. 710, 907 (E. & S.D.N.Y. 1991), *vacated*, 982 F.2d 721 (2d Cir. 1992). *See generally Asbestos Litigation Crisis in Federal and State Courts: Hearings Before the Subcomm. on Intellectual Property and Judicial Administration of the House Comm. on the Judiciary*, 102d Cong., 1st & 2d Sess. (1991-92) [hereinafter *Litigation Crisis*].

prompted in part by the personal injury litigation was the widespread adoption of the discovery rule for applying the statute of limitations.[3] The plight of victims of latent diseases highlighted the shortcomings of a rule that extinguished their causes of action before they reasonably could have known they were injured.[4] Courts and legislatures responded with the discovery rule, which postpones the accrual of a cause of action until the plaintiff discovers the injury.[5]

In the last fifteen years, courts and legislatures have confronted a second wave of asbestos litigation: claims by building owners for property damage caused by asbestos. As with the first wave, the question of how to apply the statute of limitations—that is, when does the clock start ticking—has proven difficult in asbestos property damage cases. Courts have struggled in applying the discovery rule to these cases, producing inconsistent outcomes and confusing doctrine.[6]

The importance of the statute of limitations issue comes into sharp focus in the national class action, *In re Asbestos School Litigation*,[7] filed on behalf of some 35,000 private and public schools.[8] The court in this class action has yet to address the statute of limitations question comprehensively, the resolution of which may very well negate a large number of the schools' claims. To date, asbestos property damage cases not part of this class action have typically involved millions of

---

3 *See, e.g.*, IND. CODE ANN. § 33-1-1.5-5.5 (Burns 1992) (adopting discovery rule for causes of action involving asbestos-related injuries); Susan D. Glimcher, *Statutes of Limitations and the Discovery Rule in Latent Injury Claims: An Exception or the Law*, 43 U. PITT. L. REV. 501, 522 (1982) ("[A]doption of a discovery rule by judicial or legislative enactment thus becomes merely a nominal concession to the ever-increasing numbers of toxic substances victims.").

4 *See, e.g.*, Steinhardt v. Johns-Manville Corp., 430 N.E.2d 1297, 1299 (N.Y. 1981) (Fuchsberg, J., dissenting); *cf.* Michael D. Green, *The Paradox of Statutes of Limitations in Toxic Substances Litigation*, 76 CAL. L. REV. 965, 970 (1988) (asbestos personal injury plaintiffs "frequently rnn afoul of the statute of limitations").

5 *See, e.g.*, N.Y. CIV. PRAC. L. & R. 214-c (McKinney 1990) (adopting discovery rule after repeated invitations by the New York Court of Appeals); Glimcher, *supra* note 3, at 502 (growing number of jurisdictions adopting the discovery rule); Green, *supra* note 4, at 976 (describing widespread adoption of the discovery rule); Gideon Mark, Comment, *Issues in Asbestos Litigation*, 34 HASTINGS L.J. 871, 881 (1983) (majority of courts apply discovery rule; some jurisdictions have adopted discovery rule by legislative enactment); John K. Strader, Note, *Preserving Causes of Action in Latent Disease Cases: The Locke v. Johns-Manville Corp. Date-of-the-Injury Accrual Rule*, 68 VA. L. REV. 615, 624 (1982) (discovery rule probably the majority rule in latent disease cases).

6 *See* discussion *infra* part I.B.2.

7 *In re* Asbestos Sch. Litig., No. 83-0268 (E.D. Pa. filed Jan. 17, 1983). Approximately 500 colleges and universities are included in a separate class action against manufacturers of asbestos-containing products. *See* Central Wesleyan College v. W.R. Grace & Co., 143 F.R.D. 628 (D.S.C. 1992) (class action conditionally certified), *aff'd*, 6 F.3d 177 (4th Cir. 1993).

8 *See In re* Asbestos Sch. Litig., No. 83-0268, 1990 WL 73000, at *1 (E.D. Pa. May 25, 1990) (national class action includes over 35,000 not-for-profit elementary and secondary schools).

dollars in judgment or settlement costs.[9] The stakes are high for the defendant asbestos manufacturers and for the school boards which must, in the end, find a way to pay for expensive asbestos abatement.[10]

Part I of this Note considers the different rules that courts and legislatures have formulated for determining when statutes of limitations and statutes of repose apply and when they begin to run. It surveys the causes of action usually asserted by building owners and explains their impact on limitations periods. Part II describes the prominent role of state legislation that preempts normal statute of limitations rules by reviving stale claims or by immunizing building owners from the consequences of their failure to file timely claims. That Part concludes with a discussion of the role sovereign immunity plays in asbestos property damage litigation.[11]

Part III analyzes the discovery rule, the prevailing accrual rule for tort-based causes of action and concludes that the discovery rule suffers from irreducible vagueness when applied to asbestos property damage cases. This Part discusses why complying with statutes of limitations has been a persistent problem for plaintiff building owners and why this issue is so consistently litigated.[12] This Part argues that statutes of limitations have necessarily influenced substantive theories of legal liability and have forced plaintiffs to choose causes of action and theories of product defect that make recovery more difficult.

---

9 *See* Kansas City v. W.R. Grace & Co. (*Kansas City II*), Nos. WD45130, WD45144, WD45276, 1992 WL 202510, at *1 (Mo. Ct. App. Aug. 25, 1992) (jury verdict in favor of city in the sum of $14.25 million); Rowan County Bd. of Educ. v. United States Gypsum Co., 418 S.E.2d 648 (N.C. 1992) (plaintiff awarded $1.8 million verdict); Dennis Cassano, *State Settles Asbestos Claims Firms to Pay $11 million*, STAR TRIB., Feb. 10, 1989, at 1B (State of Minnesota settles lawsuit against several asbestos companies; settlements in the case totaled $14 million); Lydia Villalva Lijo, *School Wins Asbestos Lawsuit*, ST. PAUL PIONEER PRESS DISPATCH, Oct. 6, 1990, at 8A ($3.3 million verdict); *1992's Largest Verdicts Asbestos: Property Damage*, NAT'L L.J., Jan. 25, 1993, at S4 ($23.2 million verdict awarded in first phase of *City of Baltimore v. Keene Corp.*; plaintiff seeking $45 million in next phase of trial against manufacturers of thermal asbestos insulation); Wayne Wangsted, *Northstar Owners Win $19.7 Million Judgment W.R. Grace to Appeal*, ST. PAUL PIONEER PRESS, Dec. 22, 1993, at 1B (owners of 17-story building awarded $19.7 million verdict against W.R. Grace).

10 *Cf.* Richard C. Ausness, *Tort Liability for Asbestos Removal Costs*, 73 OR. L. REV. 505, 511 (1994) (cost of removing asbestos from schools and public buildings estimated at $55 billion); Suzanne L. Oliver & Leslie Spencer, *Who Will the Monster Devour Next?*, FORBES, Feb. 18, 1991, at 75, 79 (cost of removing asbestos in buildings estimated at $100 billion).

11 Many jurisdictions allow public entities to circumvent statutes of limitations via the sovereign immunity doctrine. *See* discussion *infra* part II.C.

12 Commentators and those close to the asbestos property damage litigation recognize that the statute of limitations is the most significant barrier to recovery. *See* KRISTIN OLSON, LEGAL ASPECTS OF ASBESTOS ABATEMENT 13 (1986) (noting the "special problem" of statutes of limitations in asbestos property damage actions); Arthur A. Schulcz, Comment, *Recovering Asbestos Abatement Costs*, 10 GEO. MASON U. L. REV. 451, 459 (1988) (analyzing difficulty of recovering for asbestos abatement costs in Virginia due to statute of limitations); Barbara M. Christensen & Kristine A. Larscheid, Note, *Asbestos Abatement: The Second Wave of the Asbestos Litigation Industry*, 27 WASHBURN L.J. 454, 491 (1988) ("The real threat to plaintiffs' ability to recover asbestos abatement costs are statutes of limitations.").

That is, the statute of limitations shapes the entire lawsuit, forcing plaintiffs to construct a theory of liability around the time-bar problem. Part III maintains that although important policies motivate the discovery rule, it yields disparate results in similar situations and fails to provide adequate guidance to building owners who seek to preserve their rights.

This Note proposes a more formal discovery rule, one that sets forth specific facts that must be ascertained before a cause of action accrues. Specifically, a tort cause of action for asbestos property damage should accrue when an expert notifies the plaintiff building owner of: (1) the presence of asbestos in the building, (2) the general dangers of asbestos, and (3) the need to maintain or remove the asbestos-containing material. This rule would produce predictable outcomes and would fairly balance the interests of plaintiffs and defendants. The impact of this litigation on the public and the litigants justifies a specialized procedural rule that addresses the difficulties in applying statutes of limitations to asbestos property damage cases.

I
THEORIES OF LIABILITY AND THE ACCRUAL OF THE CAUSE OF ACTION

A. A Sketch of the Asbestos Property Damage Action

To understand the legal issues underlying the statute of limitations problem in asbestos property damage suits, it is necessary to understand the facts leading up to a typical suit. Generalizations are appropriate in this context because many of the relevant facts are common to most of these lawsuits.[13] Asbestos has long been used in products where its fire-resistant and insulating properties are needed.[14] During World War II, great quantities of asbestos were

13 The similarities among the many asbestos property damage suits are especially salient when considering the statute of limitations issue. Of course, differences in the types of asbestos-containing products involved in these cases will undoubtedly influence other aspects of the lawsuit, such as the plaintiff's proof of product defect in a tort cause of action. *See, e.g.*, Appletree Square 1 Ltd. v. W.R. Grace & Co., 815 F. Supp. 1266 (D. Minn. 1993) (suit involving sprayed asbestos fireproofing applied to steel beams of office buildings), *aff'd*, 29 F.3d 1283 (8th Cir. 1994); Cinnaminson Bd. of Educ. v. United States Gypsum Co., 552 F. Supp. 855 (D.N.J. 1982) (action to recover costs of removing asbestos-containing acoustical plaster used in the ceilings of school buildings).

14 *See* MINES BRANCH, CANADIAN DEPT. OF INTERIOR, ASBESTOS: ITS OCCURRENCE, EXPLOITATION AND USES 125-48 (1905) (describing commercial applications of asbestos, including its use, after 1878, in asbestos cloth, theater curtains, rope, wall plaster, and pipecovering); Lee S. Siegel, Note, *As the Asbestos Crumbles: A Look at New Evidentiary Issues in Asbestos-Related Property Damage Litigations*, 20 HOFSTRA L. REV. 1139, 1140 (1992) (describing asbestos as "an important fire retardant since the time of Caesar").

used in the boiler rooms of warships,[15] and one of the most common uses of asbestos since 1946 has been as sprayed-on fireproofing and insulation.[16] Between 1946 and 1973, asbestos products gained great popularity in the construction of educational and commercial buildings.[17] These are the buildings that are at issue in the asbestos property damage litigation.[18] The products at issue include asbestos

---

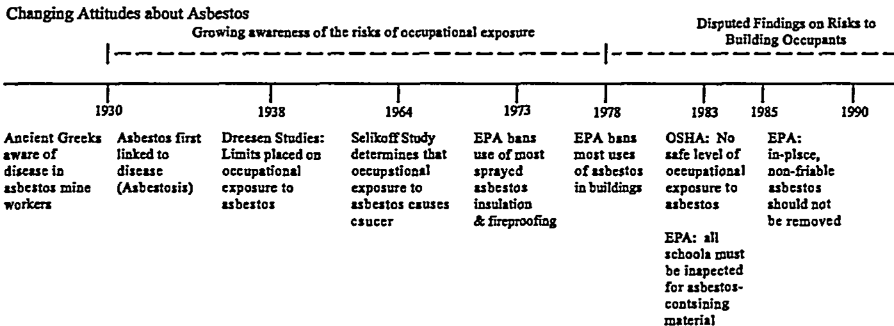
15 *See* Edley & Weiler, *supra* note 1, at 387.

16 Frank B. Cross, Legal Responses to Indoor Air Pollution 24 (1990).

17 *See* University Sys. of N.H. v. United States Gypsum Co., 756 F. Supp. 640, 649 (D.N.H. 1991). William J. Nicholson of the Mt. Sinai School of Medicine surveyed office buildings that contained asbestos-containing materials. He estimated that one-half of all new office buildings constructed between 1958 and 1970 used a sprayed-on asbestos fireproofing that was applied to the steel beams. *Id.* Note the important role played by this type of product: it adhered to the skeleton of the building and helped to protect it from fire. *See also Abatement of Asbestos in D.C. Public Schools: Oversight Hearing on Problems Related to Asbestos and its Abatement in D.C. Public Schools Before the Subcomm. on Judiciary and Education of the House Comm. on the District of Columbia*, 98th Cong., 2d Sess. 6 (1984) (statement of Edward A. Klein, Director, TSCA Assistance Office, Office of Toxic Substances, U.S. Environmental Protection Agency) ("asbestos-containing materials were applied to walls, ceilings, and structural components of certain buildings" between end of World War II and 1973); Olson, *supra* note 12, at 2 (asbestos first used in schools after World War II; tens of thousands of tons of asbestos used in schools and colleges between 1946 and 1973); Donald J. Pinchin, Asbestos in Buildings: A Study Prepared for The Royal Commission on Matters of Health and Safety Arising from the Use of Asbestos in Ontario 3.7 (1982) ("use of sprayed asbestos was most widespread" in Ontario from 1950 to 1973); Lindley J. Brenza, Comment, *Asbestos in Schools and the Economic Loss Doctrine*, 54 U. Chi. L. Rev. 277, 277 (1987) (noting the use of asbestos as a structural material during the middle of the 20th century); Siegel, *supra* note 14, at 1141 (discussing "broad use of asbestos in structures since the 1940s").

18 *See* Concordia College Corp. v. W.R. Grace & Co., 999 F.2d 326, 328 (8th Cir. 1993) (college buildings completed between 1957 and 1970), *cert. denied*, 114 S. Ct. 926 (1994); First United Methodist Church v. United States Gypsum Co., 882 F.2d 862, 864 (4th Cir. 1989) (church constructed in 1961 and 1962), *cert. denied*, 430 U.S. 1070 (1990); Wesley Theological Seminary of the United Methodist Church v. United States Gypsum Co., 876 F.2d 119, 120 (D.C. Cir. 1989) (seminary buildings constructed between 1957 and 1960), *cert. denied*, 494 U.S. 1003 (1990); City of Greenville v. W.R. Grace & Co., 827 F.2d 975, 976 (4th Cir. 1987) (city hall building completed in 1971 and 1972); Appletree Square 1 Ltd. v. W.R. Grace Co., 815 F. Supp. 1266, 1268 (D. Minn. 1993) (office building completed in 1974), *aff'd*, 29 F.3d 1283 (8th Cir. 1994); Roseville Plaza Ltd. v. United States Gypsum Co., 811 F. Supp. 1200, 1202 (E.D. Mich. 1992) (shopping center constructed in the early 1960s), *aff'd*, 31 F.3d 397 (6th Cir. 1994); Heider v. W.R. Grace & Co., No. 89 C 9067, 1992 U.S. Dist. LEXIS 10239 (N.D. Ill. July 15, 1992) (warehouse constructed in 1967); Cheshire Medical Ctr. v. W.R. Grace & Co., 764 F. Supp. 213, 214-15 (D.N.H. 1991) (medical center constructed between 1971 and 1972); Independent Sch. Dist. No. 197 v. W.R. Grace & Co., 752 F. Supp. 286, 289 (D. Minn. 1990) (school building completed in 1971); Security Homestead Ass'n v. W.R. Grace & Co., 743 F. Supp. 456 (E.D. La. 1990) (office tower built during 1970 to 1971); Cinnaminson Bd. of Educ. v. United States Gypsum Co., 552 F. Supp. 855 (D.N.J. 1982) (schools built between 1959 and 1964); Celotex Corp. v. Saint Joseph Hosp., 376 S.E.2d 880, 881 (Ga. 1989) (hospital renovation during 1969 to 1970); *Kansas City II*, Nos. WD45130, WD45144, WD45276, 1992 WL 202510, at *1 (Mo. Ct. App. Aug. 25, 1992) (airport terminals constructed between 1969 and 1972); Rowan County Bd. of Educ. v. United States Gypsum Co., 359 S.E.2d 814, 815 (N.C. Ct. App. 1987) (construction of schools during 1950 and 1961); Beavercreek Local Sch. v. Basic, Inc., 595 N.E.2d 360, 363 (Ohio Ct. App. 1991) (schools constructed during 1955 and 1962); Kershaw County Bd. of Educ. v. United States Gypsum Co., 396 S.E.2d 369, 370 (S.C. 1990) (schools

thermal insulation for boilers,[19] asbestos pipecovering,[20] asbestos floor tile,[21] asbestos ceiling tile,[22] and sprayed-on asbestos fireproofing.[23]



Another dimension of asbestos property damage cases is the growing awareness of the dangers of asbestos products just as they gained maximum popularity during the 1950s and 1960s. Plaintiff building owners' knowledge of these dangers is crucial in statute of limitations analysis.[24] The process of learning about the hazards of asbestos began early. Indeed, it is often noted that even the ancient

built 1956-58); University of Vt. v. W.R. Grace & Co., 565 A.2d 1354, 1355 (Vt. 1989) (athletic fieldhouse converted into a central heating facility in 1970 to 1971). Most asbestos property damage actions have been filed since 1984. *See Asbestos Information Clearinghouse: Hearing on H.R. 5078 Before the Subcomm. on Commerce, Transportation, and Tonrism of the House Comm. on Energy and Commerce*, 99th Cong., 2d Sess. 83 (1986) (statement of Richard P. Brown, Jr., on behalf of United States Gypsum Co.) (indicating that the first asbestos-in-buildings case was brought in 1980, and that large numbers of cases have since been brought, beginning in 1982 to 1983).

19 *See, e.g., University Sys. of N.H.*, 756 F. Supp. at 643 (One group of defendants supplied asbestos "thermal (pipe and boiler) insulation.").

20 *See, e.g., id.*

21 *See, e.g., id.* at 643 n.5 (plaintiff's suit originally included manufacturers and sellers of floor tile products; these defendants had settled with the plaintiff at the time of the court's opinion).

22 *See, e.g.,* Tioga Pub. Sch. Dist. No. 15 v. United States Gypsum Co., 984 F.2d 915, 916-17 (8th Cir. 1993); Adams-Arapahoe Sch. Dist. No. 28-J v. United States Gypsum Co., No. 91-1046, 1992 WL 58963 (10th Cir. Mar. 23, 1992); School Dist. of Independence v. United States Gypsum Co., 750 S.W.2d 442, 444 (Mo. Ct. App. 1988); *First United Methodist*, 882 F.2d at 864; *Wesley*, 876 F.2d at 120; *Cinnaminson*, 552 F. Supp. at 856; *Beavercreek*, 595 N.E.2d at 363; *Kershaw*, 396 S.E.2d at 370.

23 *See, e.g.,* Appletree Square 1 Ltd. v. W.R. Grace & Co., 815 F. Supp. 1266, 1268 (D. Minn. 1993), *aff'd*, 29 F.3d 1283 (8th Cir. 1994); Roseville Plaza Ltd. v. United States Gypsum Co., 811 F. Supp. 1200, 1202 (E.D. Mich. 1992), *aff'd*, 31 F.3d 397 (6th Cir. 1994); Independent Sch. Dist. No. 197 v. W.R. Grace & Co., 752 F. Supp. 286, 288 (D. Minn. 1990); Security Homestead Ass'n v. W.R. Grace & Co., 743 F. Supp. 456, 457 (E.D. La. 1990); Uricam Corp. v. W.R. Grace & Co., 739 F. Supp. 1493, 1494 (W.D. Okla. 1990); *Kansas City II*, Nos. WD45130, WD45144, WD45276, 1992 WL 202510 (Mo. Ct. App. Aug. 25, 1992); Mt. Lebanon Sch. Dist. v. W.R. Grace & Co., 607 A.2d 756, 757 (Pa. Super. Ct. 1992); University of Vt. v. W.R. Grace & Co., 565 A.2d 1354, 1355 (Vt. 1989).

24 *See* discussion *infra* part I.B.2.

Greeks understood the dangers associated with exposure to asbestos.[25] Between the 1930s and 1978, when the EPA banned the use of sprayed-on asbestos building materials,[26] the scientific community discovered many of the adverse health effects caused by exposure to asbestos.[27] This increasing knowledge, however, was of the risks to *occupationally* exposed workers.[28] For a long time, experts believed, and indeed some still contend today, that low-level exposure to building occupants posed no threat to human health.[29] Therefore, in 1964, when scientists indisputably established the link between occupational exposure to asbestos and cancer,[30] the risks to building occupants were simply not known. Finally, in the late 1970s, the EPA concluded that asbestos in buildings may pose a health hazard.[31] Yet,

---

25 *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 n.1 (1991).

26 *See* 43 Fed. Reg. 26,372 (1978) (EPA ban of virtually all spray application of asbestos); *see also* National Emission Standards for Hazardous Air Pollutants, 38 Fed. Reg. 8826 (1973) (sprayed materials containing more than 1% asbestos banned).

27 *See* PAUL BRODEUR, OUTRAGEOUS MISCONDUCT: THE ASBESTOS INDUSTRY ON TRIAL 14, 115-27 (1985); BARRY I. CASTLEMAN, ASBESTOS: MEDICAL AND LEGAL ASPECTS 10-31 (1984) (describing how the scientific community discovered the disease of asbestosis); *see also* BRODEUR, *supra*, at 199-204 (discussing development of five million particles per cubic foot standard and role of 1938 Dreesen study).

28 *See supra* note 27.

29 *See The Asbestos School Hazard Abatement Act of 1984—Oversight: Hearing Before the Senate Comm. on Environment and Public Works*, 99th Cong., 1st Sess. 104-05 (1985) [hereinafter *1985 Hearings*] (written statement of Donald Dewees, Professor of Economics, Professor of Law, University of Toronto) (citing four studies of asbestos fiber levels in buildings, the earliest of which was conducted in 1975); *see also* BRODEUR, *supra* note 27, at 35, 136 (occupational exposure to asbestos of five million particles per cubic foot considered acceptable from 1938-1968).

30 *See* BRODEUR, *supra* note 27, at 30-31 (describing the results of studies conducted by Dr. Irving Selikoff on the effects of asbestos exposure in industrial settings); Irving J. Selikoff & Herbert Seidman, *Asbestos-Associated Deaths among Insulation Workers in the United States and Canada, 1967-1987*, *in* THE THIRD WAVE OF ASBESTOS DISEASE: EXPOSURE TO ASBESTOS IN PLACE 1-3 (Philip J. Landrigan & Homayoun Kazemi eds., 1991) (explaining studies of occupationally exposed workers, including a 1964 Selikoff study linking lung cancer to asbestos exposure) (citing Irving J. Selikoff et al., *Asbestos Exposure and Neoplastia*, 188 JAMA 22 (1964)).

31 *See* ENVIRONMENTAL PROTECTION AGENCY, ASBESTOS-CONTAINING MATERIALS IN SCHOOLS BUILDINGS: A GUIDANCE DOCUMENT i (1979) [hereinafter EPA GUIDANCE DOCUMENT] ("Until recently exposure to asbestos was generally considered an occupational health hazard . . . now we have learned of an equally serious exposure problem that can occur in all types of buildings. . . ."); CROSS, *supra* note 16, at 28 ("[I]n the late 1970s, governments and individuals began to notice the potential problem of indoor asbestos exposure."); *see also* Detroit Bd. of Educ. v. Celotex Corp., 493 N.W.2d 513, 516, 519-20 (Mich. Ct. App. 1992) (noting that the EPA barred the use of asbestos in buildings in 1978 and had instituted a program to warn school districts of the dangers of asbestos in buildings); Kansas City v. W.R. Grace & Co. (*Kansas City I*), 778 S.W.2d 264, 270 (Mo. Ct. App. 1989) (observing that it was not until 1983 that OSHA determined that "there was no level of exposure to asbestos below which clinical effects did not occur").

even after these hesitant first findings, the dangers of asbestos are still unclear and disputed.[32]

Use of Asbestos and Resulting Litigation

1880	1927	World War II	1946	1973	1983	1984
First Uses of Asbestos in Buildings: Theater Curtains, Wall Plaster	Buster Keaton wears suit of asbestos cloth in THE GENERAL	Use of Asbestos Increases Dramatically: Insulation and Fireproofing in Ships	Widespread Use of Asbestos in Buildings: 1946-1973 Insulation for Boilers & Pipes; Use of Asbestos Cement, Floor Tile, Accoustical Ceiling Tile, Sprayed-on Fireproofing and Insulation		National School Class Action Filed	Most Asbestos Property Damage Actions Filed After 1984

The typical asbestos property damage suit involves a plaintiff who owns a large commercial building or a large number of educational buildings constructed between 1946 and 1973.[33] These buildings contain asbestos products, originally installed to carry out essential functions.[34] A progression of the plaintiff building owner's awareness of an "asbestos problem" can be charted. Since the plaintiff is usually a bureaucratic entity, such as a corporation or a school district, information does not pass easily to the decisionmakers who would be responsible for commencing a lawsuit.[35] The presence of asbestos is typically the first fact known,[36] followed by a general awareness of the dangers

---

32 *Compare* 47 Fed. Reg. 23,360 (1982) (EPA requires elementary and secondary schools to inspect for friable asbestos; schools must achieve compliance by May 27, 1983); L. Christine Oliver et al., *Asbestos-Related Abnormalities in School Maintenance Personnel in* THE THIRD WAVE OF ASBESTOS DISEASE: EXPOSURE TO ASBESTOS IN PLACE, *supra* note 30, at 521, 521-28 (studies indicating risks of asbestos exposure to building occupants) *with Asbestos School Hazard Abatement: Hearing on H.R. 3677 Before the Subcomm. on Transportation and Hazardous Materials of the House Comm. on Energy and Commerce*, 101st Cong., 2d Sess. 28-29 (1990) (statement of Linda J. Fisher, Assistant Administrator for Pesticides and Toxic Substances, Environmental Protection Agency) (stating that "building occupants face only a very slight risk" and taking issue with the "one fiber can kill" notion); CROSS, *supra* note 16, at 29 ("[R]isk from indoor asbestos is several times lower than that presented by lightning, tornadoes, hurricanes, and any number of other natural dangers; risk from exposure to low levels of asbestos is speculative and uncertain."); *id.* at 27 ("For buildings with wet-applied asbestos, nearly all measured concentrations were less than 0.0006 f/cc, which approximated outdoor levels."); Siegel, *supra* note 14, at 1146 n.45 (EPA rejects removal in favor of management of in place asbestos) (citing National Emission Standards for Hazardous Air Pollutants: Asbestos NESHAP Revision, 55 Fed. Reg. 48,406 (1990)).

33 *See supra* note 17 and accompanying text.

34 *See supra* notes 14-23 and accompanying text.

35 *See, e.g.*, City of Wichita v. United States Gypsum Co., 828 F. Supp. 851, 866-67 (D. Kan. 1993) (plaintiff argues that limitations period does not begin to run until city manager and city counsel have notice of substantial injury; court holds that knowledge of lower level employees may be imputed to the city); University Sys. of N.H. v. United States Gypsum Co., 756 F. Supp. 640, 648-49 (D.N.H. 1991) (defendant argues that knowledge of three "key players" should be imputed to the entire university system, an entity that owned and operated some 150 buildings throughout the state).

36 The building owner may learn of the presence of asbestos very early, perhaps at the time the building was constructed. *See, e.g.*, *Kansas City II*, Nos. WD45130, WD45144, WD45276, 1992 WL 202510, at *2 (Mo. Ct. App. Aug. 25, 1992) (complaints about the presence of asbestos raised during the construction of airport terminal buildings).

of asbestos during the late 1970s or early 1980s.[37] Thereafter, the plaintiff may learn of flaws in the asbestos-containing material—chipping, flaking, or erosions.[38] The building owner may then learn of "contamination" of the building, that is, the presence of *airborne* asbestos particles in the environment.[39] Finally, an expert hired by the plaintiff or employed by a government agency may notify the plaintiff building owner of the need to abate (remove or maintain) the asbestos.[40] This litany of facts usually comes to the plaintiff gradually, or may be discovered all at once in an expert's report.[41]

In this factual context, an asbestos property damage action must be understood as an after-the-fact attempt to construct a theory of liability that avoids the statute of limitations. In light of these facts, courts and legislatures must formulate rules governing statutes of limitations and statutes of repose. This section examines the causes of action commonly asserted and how each substantive basis of liability affects the time-bar issue.

B. Accrual of the Tort Cause of Action

Tort causes of action (strict liability, negligence) are the primary bases of liability in asbestos property damage actions. To determine whether the statute of limitations bars the suit, the court must ascertain "from when" the limitations period begins. According to the general rule, the limitations period runs from the point at which the cause of action "accrues."[42] This section examines the common law doctrines which have supplied the mechanism for fixing that point.

---

37 *See supra* note 31 and accompanying text.

38 *See, e.g., Kansas City II*, WD45130, WD45144, WD45276, 1992 WL 202510, at *5-*6 (city learned in 1975 of the flaking of asbestos fireproofing material applied to steel beams, three years after construction of terminal building was completed).

39 *See, e.g.*, Clayton Ctr. Assocs. v. W.R. Grace & Co., 861 S.W.2d 686 (Mo. Ct. App. 1993) (laboratory testing established the presence of airborne asbestos; court concludes that plaintiff's cause of action accrued when airborne asbestos fibers were discovered).

40 *See, e.g.*, Beavercreek Local Sch. v. Basic, Inc., 595 N.E.2d 360, 371-72 (Ohio Ct. App. 1991) (recommendations made to plaintiff by local agency informing plaintiff that its asbestos should be encapsulated was sufficient notice to start the statute of limitations period rnnning).

41 In Detroit Bd. of Educ. v. Celotex Corp., 493 N.W.2d 513 (Mich. Ct. App. 1992), the plaintiff building owner learned almost all of these elements simultaneously. *Id.* at 519-20. In this case, the plaintiff commissioned a survey that established the presence of asbestos as well as the need to remove it; the plaintiff acquired knowledge of the general dangers of asbestos from other sources. *Id.* Plaintiff argued that it was unaware of its injury until it received reports of the presence of airborne asbestos. *Id.* at 520. The court rejected this contention, persuaded by the fact that the plaintiff had submitted a funding proposal for the "estimated costs of abatement" to the EPA before it received air sample results indicating asbestos contamination. *Id.*

42 E.E. Woods, Annotation, *Statute of Limitations: When Cause of Action Arises on Action against Manufacturer or Seller of Product Causing Injury of Death*, 4 A.L.R.3d 821 (1965) (citing 24 AM. JUR. *Limitations of Actions* § 113 (1941)).

1. *Date of Injury Rule*

The traditional common-law rule started the statute of limitations clock running from the "date of injury."[43] Actual or constructive notice to the plaintiff was irrelevant. This approach often barred the claims of those plaintiffs who concededly could not have complied with the statute.[44] The case law contains slim justification for this rule; apparently the policy of repose outweighed even rudimentary fairness to plaintiffs.[45]

Applying this rule turned on defining when the "injury" occurred. Early asbestos personal injury cases exposed the difficulty of determining the point of injury as well as the harshness of this rule. In *Schmidt v. Merchants Despatch Transportation Co.*,[46] for instance, the plaintiff contracted pneumoconiosis[47] after having been exposed to asbestos dust while working for the defendant employer. The New York Court of Appeals held that the three-year limitations period ran from the point at which the plaintiff inhaled asbestos dust.[48] Manifestations of disease would not appear until years later, so actions seeking damages for latent injuries of this sort were almost always time-barred. The rule thus became: a "cause of action for negligence accrues when there has been an invasion of personal or property rights."[49] The image of an "invasion" of a vested right became the key to pinpointing the injury and deciding the statute of limitations question.

Latent injury cases, such as *Schmidt*, presented major problems in defining the date of injury. For example, the ingestion of toxins may result in disease, but only many years later.[50] Likewise, the manifesta-

---

43 *See* Thornton v. Roosevelt Hosp., 391 N.E.2d 1002, 1003 (N.Y. 1979) (citing Victorson v. Bock Laundry Mach. Co., 335 N.E.2d 275 (N.Y. 1975)).

44 *See id.*

45 In Steinhardt v. Johns-Manville Corp., 430 N.E.2d 1297 (N.Y. 1981), the New York Court of Appeals affirmed the dismissal of claims brought by workers stricken with asbestos-related diseases on statute of limitations grounds. The court held that the causes of action accrued at the time of last exposure to the asbestos, not when the plaintiffs could have known that they were sick. *Id.* at 1299. The court did not attempt to justify the result, but instead noted its unfairness and explicitly left it to the legislature to change the rule. *Id.* Indeed, the dissent remarked that at first blush, "to state [the date of injury rule] would appear to refute it." *Id.* Instead of taking the majority's deferential approach, the dissent argued that the right result could be reached by ignoring the date of injury rule even though it had been reaffirmed in many previous cases. *Id.* at 1300.

46 200 N.E. 824 (N.Y. 1936).

47 Pneumoconiosis is a disease of the lungs caused by the inhalation of dusts. *Id.* at 825. Today, the plaintiff's injury would be called asbestosis.

48 *Id.* at 828.

49 Durant v. Grange Silo Co., 207 N.Y.S.2d 691, 692 (App. Div. 1960) (citing *Schmidt* and Great Am. Indem. Co. v. Lapp Insulator Co., 125 N.Y.S.2d 147 (App. Div. 1953)).

50 "The diseases associated with asbestos exposure are all characterized by long latency periods." Mehs, *supra* note 25, at 965; *see also* CASTLEMAN, *supra* note 27, at 31 (describing the "inexorable progress" of asbestos disease).

tion of symptoms may occur long after exposure.[51] Instead of fixing the injury at the time of a disease's onset, which would attach a natural meaning to the word "injury" and avoid unfairness to plaintiffs, the invasion of rights concept led courts to concentrate on when the harmful substance entered the body.[52] Under this theory, once a toxin has entered the body, the plaintiff's rights have been invaded and injury has occurred.[53] This line of reasoning resulted in a debate over whether the limitations period ran from the first or last exposure.[54] This controversy is divorced from the principal policies behind statutes of limitation: fairness to plaintiffs and repose for defendants. The problems involved in applying this rule resulted from the elusive "invasion" concept, not from any explicit consideration of competing principles or values.

In property damage cases in which the damage resulted from a single event, the date of injury rule did not pose much difficulty. In *Durant v. Grange Silo Co.*[55] and *Great American Indemnity Co. v. Lapp Insulator Co.*,[56] a silo and radio tower, respectively, collapsed. The invasion concept fixed the date of injury at the time of collapse, rather than when the structures were first built. The *Lapp* court reasoned that the collapse marked the invasion of property rights.[57] Thus, in these cases, the cause of action coincidentally accrued when the plaintiff learned of his cause of action, obtaining the same result that a discovery rule would have reached.[58]

In property damage cases in which the harm to the property is not immediately manifest, however, the date of injury is harder to determine. In a case analogous to the asbestos property damage litigation, the New York Supreme Court in *City of New York v. Lead Industry Association, Inc.*[59] confronted the problem of setting the date of injury in a suit alleging property damage due to the presence of toxic lead paint in the city's buildings. The city sued for the abatement costs of the lead paint. On a motion for dismissal on statute of limitation grounds, the court held that the "injury occurred the first time the paint was applied,"[60] rather than when the city expended monies to correct the health hazard. Again, the invasion concept proved criti-

---

51 *See* CASTLEMAN, *supra* note 27, at 31; Mehs, *supra* note 25, at 965.

52 *See* Thornton v. Roosevelt Hosp., 391 N.E.2d 1002, 1003 (N.Y. 1979).

53 *Id.*

54 *See* Mehs, *supra* note 25, at 970-73.

55 207 N.Y.S.2d 691 (App. Div. 1960).

56 125 N.Y.S.2d 147 (App. Div. 1953).

57 *Id.* at 149.

58 *See infra* notes 256-76 and accompanying text.

59 No. 143651/89, 1991 WL 284454 (N.Y. Sup. Ct. Dec. 23, 1991).

60 *Id.* at *3.

cal. The court characterized the introduction of a toxic substance into a building as an invasion of the plaintiff's property rights.[61]

Applied to an asbestos property damage case, the date of injury rule would lead to an outcome similar to that reached in *City of New York*. The introduction of asbestos into a building parallels the facts of a lead paint property damage case. Like lead paint, asbestos is a toxic substance that does not manifest its potential as a health hazard until many years after construction.[62] Indeed, in *University of Vermont v. W.R. Grace & Co.*,[63] the trial court applied the date of injury rule and concluded that the injury occurred at the time the asbestos-containing materials were installed.[64] In asbestos property damage cases, the invasion concept effectively prevents a plaintiff from maintaining a cause of action.[65]

The date of injury rule is antiquated doctrine. Courts[66] and legislatures[67] have long lost their enthusiasm for a rule that eliminates a

---

61 Plaintiffs argued for the application of a discovery rule, enacted by the New York legislature in 1986, but this rule expressly did not apply to acts or omissions prior to July 1, 1986. *See* N.Y. Civ. Prac. L. & R. 214-(6) (McKinney 1990). Several judicial opinions before 1986 had hinted at a departure from the date of injury rule; *see, e.g.*, Steinhardt v. Johns-Manville Corp., 430 N.E.2d 1297 (N.Y. 1981) (Fuchsberg, J., dissenting) (in an asbestos wrongful death case, arguing that prior New York date of injury cases do not support the conclusion that the cause of action accrues at the point of exposure); New York Seven-Up Bottling Co. v. Dow Chem. Co., 466 N.Y.S.2d 478 (App. Div. 1983) (in an action involving a defective roof, the injury occurred at the time of product failure, not its installation).

The New York Court of Appeals, in what will be one of the last New York cases applying the date of injury rule, put to rest any notions that prior decisions had suggested anything but a "first exposure" date of injury rule. *See* Snyder v. Town Insulation, Inc., 615 N.E.2d 999 (N.Y. 1993). The court in *City of New York* reached a similar conclusion in the property damage context. The injury to the buildings occurred at the time that the buildings were first "exposed" to the toxic lead paint. *City of New York*, No. 14365/89, 1991 WL 284454, at *3.

62 *See supra* notes 50-51 and accompanying text.

63 565 A.2d 1354 (Vt. 1989).

64 *Id.* at 1355.

65 Corporation of Mercer Univ. v. National Gypsum Co., 877 F.2d 35 (11th Cir. 1989) (applying Georgia law) illustrates the operation of the date of injury rule. In *Mercer*, plaintiff's buildings were constructed between 1906 and 1972. This meant that under the date of injury rule the cause of action accrued no later than 1972, and that the limitations period expired no later than 1976 under Georgia's four year statute of limitations. The trial court first held that the discovery rule applied to plaintiff's claims and the case proceeded to trial. Corporation of Mercer Univ. v. National Gypsum Co., 24 Env't Rep. Cas. (BNA) 1953 (M.D. Ga. 1986). On appeal, the Eleventh Circuit certified the question to the Supreme Court of Georgia of whether the discovery rule applied to property damage cases. Corporation of Mercer Univ. v. National Gypsum Co., 832 F.2d 1233 (11th Cir. 1987). It held that the discovery rule was inapplicable to cases not involving bodily injury. Corporation of Mercer Univ. v. National Gypsum Co., 368 S.E.2d 732, 733 (Ga. 1988). In light of the Georgia Supreme Court's decision, the Eleventh Circuit concluded that the plaintiff's claims were time-barred, since it did not file suit until 1985. *Mercer*, 877 F.2d at 36.

66 *See* Steinhardt v. Johns-Manville Corp., 430 N.E.2d 1297 (N.Y. 1981).

67 In 1986, New York overturned the common-law date of injury rule and statutorily imposed a discovery rule in its place. *See* N.Y. Civ. Prac. L. & R. 214-c (McKinney 1990).

cause of action as untimely even though the plaintiff may be entirely faultless. The date of injury rule should be recognized as a mechanism that generally precludes plaintiffs from recovering in latent injury cases. It is a relic of formalistic legal reasoning, relying on the elusive notion of an "invasion" of "personal or property rights,"[68] rather than focusing on the competing policies behind statutes of limitations. Application of the date of injury rule to asbestos property damage suits would virtually immunize manufacturers from liability.[69] While it advances the policy of repose—a legitimate concern in statutes of limitations—the date of injury rule admittedly "causes hardship,"[70] failing to adequately consider fairness to plaintiff building owners.

2. *Discovery Rule*

The discovery rule states that a "cause of action [in tort] accrues when the plaintiff knew or, in the exercise of reasonable diligence, should have known, of the injury."[71] This rule is now the most prevalent.[72] Either by statute or by judicial rulemaking, "the present trend in most jurisdictions in products liability cases involving chemicals, drugs and asbestos is to apply a variation of the discovery rule."[73] This rule moves away from the rigidity of the date of injury rule and seeks to assure that a plaintiff's claim does not expire before the plaintiff is aware of its existence.[74]

Under this scheme, the plaintiff's knowledge of injury is critical. Defining the injury is probably the most hotly contested issue under the discovery rule, because knowledge of that injury is precisely what triggers the start of the limitations period. Courts, including courts

---

68 *See* Schmidt v. Merchants Despatch Transp. Co., 200 N.E. 824, 827 (N.Y. 1936).

69 Since 1973, the EPA has drastically limited the use of asbestos for fireproofing and insulation purposes. *See* Brenza, *supra* note 17, at 280 n.9 (citing 40 C.F.R. § 61.22(e) (1973)). The result is that no reported case has involved asbestos products installed after that date. For a case involving one of the last buildings to contain sprayed-on asbestos, see Appletree Square 1 Ltd. Partnership v. W.R. Grace & Co., 815 F. Supp. 1266 (D. Minn. 1993), *aff'd*, 29 F.3d 1283 (8th Cir. 1994). The building at issue in that case was completed in 1974. *Id.* at 1269. The date of injury rule would place the "invasion of rights" at the point of installation of the asbestos products. *See supra* notes 60-63 and accompanying text. The date of injury rule would therefore act like the statute of limitations applicable to warranty claims, that is, time-barring most, if not all asbestos property damage claims.

70 *Schmidt*, 200 N.E. at 828.

71 Columbus Bd. of Educ. v. Armstrong World Indus., Inc., 627 N.E.2d 1033, 1037 (Ohio Ct. App. 1993).

72 *See* Mehs, *supra* note 25, at 974 (citing Sbeila Birnbaum, *"First Breath's" Last Gasp: The Discovery Rule in Products Liability Cases*, 13 FORUM 279, 281 (1977)).

73 *Id.*

74 *See* Mehs, *supra* note 25, at 974 (noting that "'the injured party should be allowed to bave his day in court when his injury was of an inherently unknowable nature'") (citing Sheila Birnbaum, *"First Breath's" Last Gasp: The Discovery Rule in Products Liability Cases*, 13 FORUM 279, 285 (1977)).

within a single jurisdiction, that have applied the discovery rule in asbestos property damage actions have defined the injury several different ways. Consequently, tort causes of action have accrued upon (1) knowledge of "contamination" of the building by airborne asbestos, (2) knowledge of the presence of friable asbestos, (3) knowledge of the presence of asbestos, and (4) knowledge of the dangers of asbestos in buildings.

a. *Knowledge of "Contamination" Starts the Clock Ticking*

Many courts have held that a tort cause of action in an asbestos property damage case accrues upon the plaintiff's knowledge of "contamination," which means that elevated levels of airborne asbestos fibers have been detected in the building. In *Heider v. W.R. Grace & Co.*,[75] the plaintiff was a private building owner who sued asbestos manufacturers for abatement costs. The defendant argued that the Illinois five-year statute of limitations barred the claim because the plaintiff discovered the presence of asbestos in his building nine years before filing his complaint.[76] The court nevertheless allowed the plaintiff[77] to maintain the cause of action because the mere presence of asbestos in buildings was not a sufficient basis for suing for property damage.[78] Since contamination to other parts of the building was required, the court concluded that the plaintiff did not possess actual or constructive knowledge of his injury until he discovered contamination.[79]

In *Heider*, the court assumed that the plaintiff needed to discover all of the elements of actionable property damage in order to discover its injury. Thus, discovering the injury was equivalent to discovering the existence of a legal cause of action against the asbestos defendants. The requirement of contamination as an element of a tort cause of action for asbestos property damage draws on the *Heider* court's interpretation of the economic loss doctrine.[80] The economic loss doctrine states that a plaintiff may not sue in tort for pure economic loss, and that the plaintiff must recover, if at all, under a contract theory.[81] A plaintiff may, however, recover for property damage.[82] *Heider* relied on decisions by a number of courts that have distinguished be-

75 No. 89 C 9067, 1992 U.S. Dist. LEXIS 10239 (N.D. Ill. July 15, 1992).

76 *Id.* at *9-*12.

77 In *Heider*, a prior owner of the building actually discovered the presence of asbestos; however, since the plaintiff was successor in interest, the viability of the plaintiff's cause of action depended on whether the prior owner would have been time-barred. *Id.* at *16.

78 *Id.* at *12.

79 *Id.* at *12-*13.

80 *See id.* at *8-*16 (discussing cases construing the economic loss doctrine in deciding when cause of action accrued).

81 *See* Brenza, *supra* note 17, at 277-78.

82 *See id.*

tween economic loss and property damage in actions for the recovery of asbestos abatement costs.[83] These decisions have held that while the presence of asbestos may cause the building owner to incur expense for removing it, it does not cause physical injury to other property.[84] Property damage occurs only when fibers release from the asbestos-containing material, and asbestos dust "contaminates" *other* areas of the building.[85]

Other courts that have used this knowledge-of-contamination rule have employed similar reasoning.[86] In *MDU Resources Group v. W.R. Grace & Co.*, the Eighth Circuit, in construing North Dakota law, held that the statute of limitations began to run when the plaintiff discovered asbestos contamination.[87] It began its analysis by stating that "[b]efore we can determine when the statute of limitations began to run on MDU's claims, we must first determine when an asbestos plaintiff is injured and can bring suit."[88] As in *Heider*, the court linked the definition of "injury" for purposes of the discovery rule to the requirements of a valid tort cause of action. The court found that under the economic loss doctrine, a building owner must allege that the asbestos contaminated the building.[89] Thus, the cause of action accrued only when the plaintiff discovered contamination.

b. *Knowledge of the Presence of Friable Asbestos Plus General Awareness of the Dangers of Asbestos Starts the Clock Ticking*

Some courts have found that a plaintiff need not discover all the elements of its cause of action before the limitations period begins to run.[90] In *Detroit Board of Education v. Celotex Corp.*,[91] the Michigan Court of Appeals held that the plaintiff school board discovered its

---

83 *See* Adams-Arapahoe Sch. Dist. No. 28-J v. United States Gypsum Co., 958 F.2d 381 (10th Cir. 1992); City of Greenville v. W.R. Grace & Co., 827 F.2d 975 (4th Cir. 1987); 3250 Wilshire Blvd. Bldg. v. W.R. Grace & Co., No. CV 87-6048-WMB, 1989 U.S. Dist. Lexis 17287 (C.D. Cal. July 24, 1989); Catasqua Area Sch. Dist. v. Eagle-Picher Indus., Inc., No. 85-3743, 1988 WL 102689 (E.D. Pa. Sept. 28, 1988); City of Manchester v. National Gypsum Co., 637 F. Supp. 646 (D.R.I. 1986); Hooksett Sch. Dist. v. W.R. Grace & Co., 617 F. Supp. 126 (D.N.H. 1984); Board of Educ. of Chicago v. A, C & S, Inc., 546 N.E.2d 580 (Ill. 1989).

84 *See id.*

85 *See City of Greenville*, 827 F.2d at 977-78.

86 Farm Credit Bank v. United States Mineral Prods. Co., 864 F. Supp. 643 (W.D. Ky. 1994); City of Wichita v. United States Gypsum Co., 828 F. Supp. 851 (D. Kan. 1993); Landry v. Keene Corp., 811 F. Supp. 367 (N.D. Ill. 1993); City of San Diego v. United States Gypsum, 35 Cal. Rptr. 2d 876 (Ct. App. 1994).

87 14 F.3d 1274 (8th Cir. 1994).

88 *Id.* at 1278.

89 *Id.* at 1278-79.

90 *See, e.g.*, Appletree Square 1 Ltd. v. W.R. Grace & Co., 29 F.3d 1283, 1285 (8th Cir. 1994) (applying Minnesota law).

91 493 N.W.2d 513 (Mich. Ct. App. 1992).

injury once it "was in possession of a general knowledge of the hazards of friable asbestos [and] also had actual knowledge that such materials were in its buildings," and knew that the asbestos "would require abatement." The court in *Detroit Board of Education* focused on the plaintiff's knowledge of the presence of friable asbestos,[92] rather than on whether the plaintiff knew it had a legal claim.[93] The court failed, however, to provide an underlying rationale for its definition of "injury," which made uncertain how it would resolve cases arising under slightly different facts.

The court in *California Sansome Co. v. United States Gypsum Co.*[94] came to a similar resolution of the statute of limitations issue, holding on its facts that the cause of action accrued essentially when the plaintiffs learned of friable asbestos, but did not state a general rule for when a cause of action accrues in asbestos property damage actions. In *California Sansome*, the plaintiffs filed their action on April 24, 1989, and under California's three-year statute of limitations, the plaintiffs' action would have been time-barred had it discovered its injury prior to April 24, 1986.[95] The court analyzed the issue by recounting the facts that the plaintiffs had learned by 1986. It noted that prior to April, 1986, the plaintiffs knew that: (1) its buildings had fireproofing material that contained asbestos; (2) the fireproofing was friable; (3) "asbestos fireproofing was alleged to be a health hazard when it was disturbed"; (4) institutional investors were "staying away from" buildings with asbestos; (5) the federal government would not lease space in buildings containing asbestos; and (6) removal was expensive.[96] The court held that under California's "on inquiry" discovery rule, the "plaintiffs suspected, and should have suspected, their injury and its wrongful cause" prior to April, 1986.[97] The court's construction of the California discovery rule clearly required less knowledge of the plaintiffs' asbestos problem for a cause of action to accrue than the courts required in *Heider* or *MDU Resources Group*.[98] Unfortunately,

---

92 Friable asbestos is asbestos that is capable of being crumbled in one's hands. It is susceptible to deterioration and the release of asbestos fibers into the air, and according to the EPA, "can cause contamination and exposure problems." EPA GUIDANCE DOCUMENT, *supra* note 31, at 2-3.

93 *Detroit Bd. of Educ.*, 493 N.W.2d at 520.

94 819 F. Supp. 878 (N.D. Cal. 1993).

95 *Id.* at 879-80.

96 *Id.* at 883-84.

97 *Id.* at 884. By its terms, the California discovery rule imposes a greater burden on plaintiffs than many other jurisdictions' discovery rules. In California, "[a] plaintiff's claims are deemed to have accrued for purposes of the running of the applicable statute of limitations when the plaintiff suspected or should have suspected that it had been injured and that the injury was the result of wrongdoing—or, in other words, when the plaintiff had notice of information sufficient to put a reasonable person on inquiry." *Id.* at 881.

98 The California Court of Appeal in City of San Diego v. United States Gypsum, 35 Cal. Rptr. 2d 876 (Ct. App. 1994), held that under California law the cause of action ac-

the *California Sansome* court did not intimate which facts were essential to the outcome or state a rule that would help to resolve future cases.

c. *Knowledge of the Presence of Asbestos and Awareness of Its Dangers Starts the Clock Ticking*

The Sixth Circuit in *Roseville Plaza Limited Partnership v. United States Gypsum Co.*[99] held as a matter of Michigan law that a cause of action for asbestos property damage accrued upon discovery of the simple presence of asbestos.[100] It relied principally upon the Michigan Court of Appeals' decision in *Detroit Board of Education* and found that "knowledge of the presence of asbestos is enough to inform an individual, through the exercise of reasonable diligence, of a 'possible cause of action' for asbestos abatement or removal."[101] This reasoning clearly diverges from the analysis behind the contamination rule. In *Roseville*, the plaintiff needed only to learn of a "possible" cause of action, but under the contamination rule, a plaintiff must learn of all elements of an actual cause of action. The Sixth Circuit's reasoning, however, did not address the apparent inconsistency between its holding and the outcome in *Detroit Board of Education*, since the two decisions required different levels of knowledge for the cause of action to accrue.[102]

A number of other courts deciding asbestos property damage cases have also held that discovery of the presence of asbestos starts the statute of limitations clock ticking.[103] In *Trizec Properties, Inc. v. United States Mineral Products Co.*,[104] for example, the Fifth Circuit held that the limitations period began to run from the point at which the plaintiff had knowledge of the presence of asbestos,[105] but its reasoning was less than lucid. It stated that under Louisiana's discovery rule,

---

crued when asbestos-containing materials began to deteriorate, that is, when the materials began to release asbestos fibers. *Id.* at 881.

99 31 F.3d 397 (6th Cir. 1994) (applying Michigan law).

100 *Id.* at 400.

101 *Id.*

102 *Id.* (citing *Detroit Bd. of Educ.*, 493 N.W.2d at 520, and then announcing holding "[a]fter careful review of the record and the law of Michigan").

103 *See* Hebron Pub. Sch. Dist. No. 13 v. United States Gypsum, 953 F.2d 398, 401-02 (8th Cir. 1992) (applying North Dakota law); NCR Corp. v. United States Mineral Prods. Co., No. 91-3339, slip op. at 6 (Ohio Ct. App. Oct. 1, 1993); *see also* Cameron Parish Sch. Dist. Bd. v. Acands, Inc. No. 94-545, 1994 WL 597618 (La. Ct. App. Nov. 2, 1994); Columbus Bd. of Educ. v. Armstrong World Indus., Inc., 627 N.E.2d 1033 (Ohio Ct. App. 1993); Beavercreek Local Sch. v. Basic, Inc., 595 N.E.2d 360 (Ohio Ct. App. 1991). In these last three cases, the courts held that knowledge of the presence of asbestos, knowledge of the dangers of asbestos, and the fact that the plaintiff took steps to abate asbestos caused the limitations period to begin to run. In Part III, this Note proposes a rule that would comport with these decisions.

104 974 F.2d 602 (5th Cir. 1992).

105 *Id.* at 607.

"the prescriptive period on a cause of action begins to run when the person in whose favor a cause of action exists knows or should have known of the existence of his cause of action."[106] The court concluded that the plaintiff's claim was time-barred based upon the point at which the plaintiff had acquired knowledge of the presence of asbestos.[107] It did not, however, explain how knowledge of the presence of asbestos related to knowledge of the "existence of [a] cause of action."[108]

d. *Cause of Action Accrues upon Awareness of Dangers of Asbestos in Buildings*

The Michigan Court of Appeals in *Warren Consolidated Schools v. W.R. Grace & Co.*[109] allowed a tort cause of action to accrue before the plaintiff had any specific knowledge about an asbestos problem in its buildings. In *Warren*, the school district filed its complaint against asbestos manufacturers on April 4, 1986.[110] Under the discovery rule and Michigan's three-year statute of limitations, the school district's claim would have been time-barred if it should have discovered its injury before April 4, 1983. The court, however, held that the cause of action accrued before that date and dismissed the plaintiff's claim. Although the plaintiff claimed that it was not aware of even the presence of asbestos on April 4, 1983, the court stated that the plaintiff knew of the risks of airborne asbestos by 1977.[111] The court found it significant that the Michigan Department of Public Health had "warned" the school district to inspect its buildings for friable asbestos, and that federal statutes and regulations in the late 1970s had informed building owners of the risks of asbestos.[112]

The *Warren* case is notable because the court based its decision on plaintiff's awareness of the dangers of asbestos in general, and not on its awareness of any facts concerning specific buildings and the asbestos products in them. *Warren*, therefore, is an unprecedented interpretation of the discovery rule. This case also illustrates the difficulty in applying the discovery rule in asbestos property damage actions. The Michigan Court of Appeals, which decided both *Warren* and *Detroit Board of Education v. Celotex Corp.*,[113] found in the latter case that the cause of action accrued when the plaintiff became aware of

106 *Id.*
107 *Id.*
108 *Id.*
109 518 N.W.2d 508 (Mich. Ct. App. 1994).
110 *Id.* at 509.
111 *Id.* at 510.
112 *Id.*
113 493 N.W.2d 513 (Mich. Ct. App. 1992).

the presence of friable asbestos in its buildings.[114] *Warren* cites *Detroit Board of Education* as authority for its holding, but does not address this apparent inconsistency.[115]

The previous discussion demonstrates that courts have failed to achieve a consistent application of the discovery rule. This has proven true even for cases within the same jurisdiction. Moreover, few if any decisions have provided reasoned elaboration for their holdings. In some cases, courts simply give conclusory statements of the outcome without ever clearly indicating what level of knowledge is necessary, as a general matter, for a cause of action to accrue. This state of affairs provides little guidance to either building owners seeking to preserve their rights or to courts charged with deciding future cases. What is missing is a principled basis for thinking about when a cause of action should accrue.

The "contamination" rule, which a number of courts have adopted, is the clearest conceptual approach. The reasoning behind this rule is that the clock does not start ticking until the plaintiff knew or should have known that he or she had a cognizable tort claim for property damage. It is also intuitively appealing to equate the "injury" for statute of limitations purposes with the "injury" for which the plaintiff will claim a right to compensation in the case on the merits. Moreover, courts are likely to feel most comfortable with the contamination rule because it draws on a well-developed body of case law that defines the required elements of an asbestos property damage action.

The discovery rule surely requires, as any accrual rule must, the existence of facts that would allow the plaintiff to state a claim. Otherwise, as noted in *Schmidt v. Merchants Despatch Transportation Co.*, the limitations period could begin to run before the necessary facts existed, and the plaintiff's claim "might be barred before liability arose."[116] However, fairness to the plaintiff would not necessarily require *knowledge* of each element of a cause of action. Indeed, most courts specifically state that the plaintiff need not know the extent of its damages for the clock to start ticking. Instead, fairness only requires knowledge (actual or constructive) of a "problem" with the product, which, if investigated, would reveal the facts necessary to plead a valid claim. The discovery rule, by its own terms, demands only actual or constructive knowledge of an "injury."[117] This elastic

---

114 *Id.* at 520.

115 518 N.W.2d at 510-11.

116 200 N.E. 824, 827 (N.Y. 1936).

117 Columbus Bd. of Educ. v. Armstrong World Indus., Inc., 627 N.E.2d 1033, 1037 (Ohio Ct. App. 1993).

term, coupled with the policies behind statutes of limitations,[118] would suggest that the ability to plead a valid claim is not an indispensable part of a discovery rule.

Unfortunately, once courts have eschewed the contamination rule, they have found themselves at sea in deciding what exactly the building owner should know before a cause of action accrues. A number of decisions have set knowledge of the presence of asbestos or knowledge of the presence of friable asbestos as the requirement for accrual of the cause of action. These cases, however, have failed to really explain why a certain level of knowledge, and no other, should start the clock ticking. Embedded in these decisions, however, is the concept of reasonable notice. In *Detroit Board of Education*, for example, the court stated that "[p]erfect knowledge of the extent of an injury" is not required for the limitations period to begin to run.[119] The devil has been in determining how much knowledge *is* required.[120]

3. *Missouri's Particularized Common Law Rule for Asbestos Property Damage Actions*

Missouri courts, after repeatedly confronting the statute of limitations issue, have refined their general discovery rule to formulate a rule that determines when a tort cause of action accrues in an asbestos property damage case. The Missouri rule states that a cause of action in tort accrues when there is a "release of toxic asbestos fibers into the environment . . . together with the ability to ascertain a substantial and unreasonable risk of harm from the release of the toxic asbestos fibers."[121] In both *Kansas City v. W.R. Grace & Co.* (*Kansas City I*)[122] and *Clayton Center Associates v. W.R. Grace & Co.*,[123] the plaintiffs, suing for property damage caused by asbestos in buildings survived the statute of limitations challenge under this generous (for plaintiffs) rule.

In Missouri, defendants must show both actual contamination of the building by asbestos fibers and knowledge of a health hazard.[124] Far beyond mere presence of asbestos or even presence of friable asbestos, "contamination" under the Missouri rule means that signifi-

118 The main concern behind the discovery rule is assuring fairness to plaintiffs. However, meaningful notice does not require perfect knowledge or even knowledge sufficient to successfully litigate a claim.

119 493 N.W.2d at 520; *cf.* Warren Consol. Sch. v. Basic, Inc., 518 N.W.2d 508, 510 (Mich. Ct. App. 1994) (plaintiff must discover only a "possible cause of action").

120 In Part III this Note attempts to pinpoint what reasonable notice should mean in an asbestos property damage action.

121 *Kansas City I*, 778 S.W.2d 264, 268 (Mo. Ct. App. 1989) (citing School Dist. of Independence v. United States Gypsum Co., 750 S.W.2d 442, 457 (Mo. Ct. App. 1988)).

122 778 S.W.2d 264 (Mo. Ct. App. 1989).

123 861 S.W.2d 686 (Mo. Ct. App. 1993).

124 *See Clayton*, 861 S.W.2d at 690 (citing *Kansas City I*, 778 S.W.2d at 268).

cant levels of asbestos fibers have been released into the building's airspace.[125] In *Clayton*, the court found no contamination even though a report showed measurable, though low, levels of asbestos fibers in the environment.[126] The high threshold for establishing "contamination" makes it difficult to prevail on a statute of limitations defense in this jurisdiction.

The other element of a successful statute of limitations defense in Missouri is establishing the plaintiff's knowledge of an unreasonable health risk.[127] This is a heavy burden for defendants. In *Kansas City I*, the plaintiff city learned, well before the critical statute of limitations date, of problems with the asbestos-containing building materials in the municipal airport.[128] Asbestos-laden materials had been breaking apart and falling down into work areas of the airport.[129] In addition, the city knew of the general dangers of asbestos exposure.[130] Despite these facts, the *Kansas City I* court held that the city did not possess the requisite knowledge of a substantial health risk and denied the defendants' motion for summary judgment.[131] *Kansas City I* demonstrates that defendants in asbestos property damage cases will have difficulty asserting a statute of limitations defense under the Missouri discovery rule because courts will require a substantial showing of plaintiff's knowledge of an asbestos problem in order for the cause of action to accrue.

C. Accrual of the Breach of Warranty Cause of Action

Plaintiff building owners often allege that defendants have breached an express or implied warranty by supplying a potentially hazardous product that can only be removed at great cost.[132]

---

125 *See id.*

126 *Id.* The court in *Clayton* noted that the fiber levels were well below the then EPA standard of 2.0 fibers/cc. *Id.* While this is true, it is extraordinary that the court established the maximum level of *occupational* exposure as the standard for "contamination." Certainly, the reasonable risk to building occupants is lower than that for occupationally exposed workers. "Contamination," for statute of limitations purposes, should probably be defined as *any* known release of asbestos fibers into the environment.

127 *Kansas City I*, 778 S.W.2d at 268.

128 *Id.* at 269.

129 *Id.*

130 *Id.* at 270.

131 *Id.* at 271.

132 *See, e.g.*, Appletree Square 1 Ltd. v. W.R. Grace & Co., 815 F. Supp. 1266, 1280 (D. Minn. 1993) (plaintiff alleged that defendant breached express warranties, as well as implied warranties of merchantability and fitness for a particular purpose), *aff'd*, 29 F.3d 1283 (8th Cir. 1994).

1. *Asbestos Property Damage and Warranty Claims: Difficulties on the Merits*

An express warranty claim may fail on the merits if plaintiffs are unable to make a prima facie showing of the defendants' affirmative representations of the product's qualities.[133] Indeed, some plaintiffs have not succeeded on an express warranty theory because they were unable to allege any explicit affirmations that defendants made about their products.[134] On the other hand, a cause of action for a breach of the implied warranty of merchantability requires no such explicit promise.[135] Implied warranty causes of action, however, have sometimes proven to be unsuccessful because the plaintiff is not in privity with the defendant.[136] The Uniform Commercial Code (U.C.C.) generally requires that a plaintiff be in privity with the defendant to state a claim for branch of an implied warranty.[137] Although privity is not always required when a plaintiff alleges personal injury, it is required when property damage is at issue.[138] Thus, a plaintiff who retains no contract rights against the asbestos manufacturer or seller will likely be barred from recovery under any warranty theory.

2. *The Statute of Limitations Forecloses Most Warranty Causes of Action*

Apart from the substantive problems with warranty causes of action, one must also recognize the presumptive effect of the statute of limitations. Warranty claims in asbestos property damage suits are—almost without exception—time-barred, mooting the substantive issues just discussed.[139] As a practical matter, a plaintiff without knowl-

---

133 *See, e.g.*, Board of Educ. of Chicago v. A, C & S, Inc., 546 N.E.2d 580, 598 (Ill. 1989) (concluding that allegations were too vague to support an express warranty claim).

134 *See id.*

135 U.C.C. § 2-314 (1977) (implied warranty of merchantability is an obligation implied by law, and does not depend on the terms of the parties' contract for its enforcement in court).

136 *See, e.g., Board of Educ. of Chicago*, 546 N.E.2d at 596 ("plaintiffs only state a cause of action against the defendants with whom they can establish privity of contract").

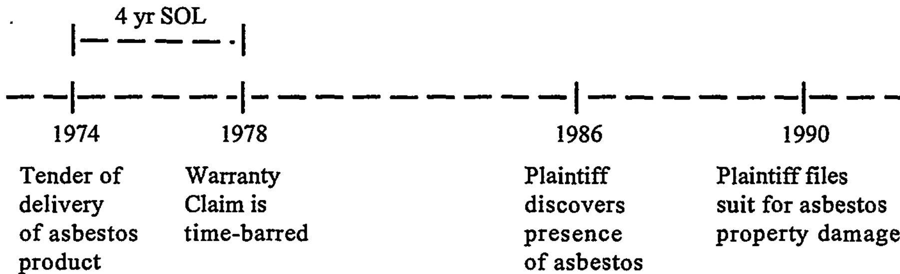
137 *See id.* at 595 (citing 3 R. ANDERSON, UNIFORM COMMERCIAL CODE §§ 2-314:92 through 2-314:98 (1983)).

138 *See id.* at 596 (citing JAMES J. WHITE & ROBERT S. SUMMERS, UNIFORM COMMERCIAL CODE § 11-4, at 535 (3d ed. 1988)).

139 *See, e.g.*, Farm Credit Bank v. United States Mineral Prods. Co., 864 F. Supp. 643, 646-47 (W.D. Ky. 1994); Appletree Square 1 Ltd. v. W.R. Grace & Co., 815 F. Supp. 1266, 1281 (D. Minn. 1993), *aff'd*, 29 F.3d 1283 (8th Cir. 1994); May v. A C & S, Inc., 812 F. Supp. 934, 944 (E.D. Mo. 1993); *In re* Asbestos Sch. Litig., No. 83-0268, 1990 WL 199065, at *3 (E.D. Pa. Dec. 3, 1990); Altoona Area Vocational Tech. Sch. v. United States Mineral Prods. Co., No. 86-2498, 1988 WL 236355, at *3 (W.D. Pa. Apr. 13, 1988); Crotched Mountain Rehabilitation Ctr., Inc. v. National Gypsum Co., No. C85-488-L, slip op. (D.N.H. Dec. 25, 1985).

edge of the alleged breach of warranty will be hard-pressed to file her lawsuit on time.[140]

Statute of Limitations for Warranty Claim
(*Appletree Square Ltd. 1 Partnership v. W.R. Grace & Co.*[141])



When attempting to recover under U.C.C. warranty theory, plaintiffs must contend with a four-year statute of limitations.[142] More importantly, breach of warranty claims accrue at the time of "tender of delivery" of the goods.[143] Knowledge of the breach is specifically omitted as a requirement for the limitations period to begin running.[144] Consequently, a plaintiff cannot recover under U.C.C. warranty causes of action unless the defect in the goods can be discovered within four years of delivery. The apparent unfairness of this rule[145] can only be explained by the underlying policies of the U.C.C., namely, to encourage the efficient sale of goods.[146] Essentially, the

140 *See, e.g.*, *Appletree*, 815 F. Supp. at 1280-81. The buildings at issue were completed in 1973-74, and the plaintiff claimed that it did not learn of even the presence of asbestos until 1986. *Id.* at 1276-77. The court held that the warranty claim was time-barred because the cause of action accrued at the time of the tender of delivery, meaning that the four-year limitations period began to run in 1973 or 1974. *Id.* at 1280-81.

141 815 F. Supp. 1266 (D. Minn. 1993), *aff'd*, 29 F.3d 1283 (8th Cir. 1994).

142 U.C.C. § 2-725(1) (1977).

143 *Id.* § 2-725(2) (excepting warranties explicitly extending to future performance).

144 *See* James J. White & Robert S. Summers, Uniform Commercial Code § 11-9 (3d ed. 1988) ("The statute normally commences to run upon tender of delivery, and the clock *ticks even though the buyer does not know the goods are defective.*").

145 A plaintiff's claims under warranty theory can be time-barred even though most of the buildings at issue in asbestos property damage litigation were constructed 20 to 40 years ago. Until the early 1970s asbestos products were perceived as very useful or even essential in the construction of buildings. During this time period, the health risks of exposure to airborne asbestos were not widely appreciated. *See supra* notes 24-32 and accompanying text. The practical effect of the statute of limitations under the U.C.C. is to time-bar claims well before a building owner could discover the alleged breach, and hence, well before she could ever file a complaint.

146 As the court in Crotched Mountain Rehabilitation Ctr., Inc. v. National Gypsum Co., No. C85-488-L, slip op. (D.N.H. Dec. 27, 1985) observed: "A final and less important policy behind the notice requirement is to give the defendant that same kind of mind balm he gets from the statute of limitations. There is some value in allowing a seller, at some point, to close his books on goods sold in the past and to pass on to other things." *Id.* at 3

U.C.C. statute of limitations operates to provide maximum certainty for the parties by fixing the time of the transaction as the beginning of the limitations period.[147]

D. The Restitution Cause of Action: Solving the Time-Bar Problem, But Wrong on the Merits

Plaintiffs have consistently pleaded restitution claims in asbestos property damage actions. Essentially, restitution is an equitable principle that requires the "making good or giving equivalent for any loss, damage or injury" when it would be unjust not to do so.[148]

1. *Restitution Cause of Action Avoids the Statute of Limitations*

Plaintiff building owners have relied on section 115 of the Restatement of Restitution for the proposition that one who has performed "the duty of another by supplying things or services is entitled to restitution" if the supplying of the goods or services was done unofficiously and "[was] immediately necessary to satisfy the requirements of public decency, health or safety."[149] Liability under restitution requires the payment of money to correct a wrong, and it is this payment that a plaintiff seeks to recover.[150] Plaintiffs have therefore argued that a restitution claim does not accrue until the building owner spends money to abate the asbestos, since the owner sustains no injury until he or she has incurred expense.[151] Restitution theory thus enables plaintiffs to circumvent normal accrual rules or to avoid the consequences of their own delay.

(quoting JAMES J. WHITE & ROBERT S. SUMMERS, UNIFORM COMMERCIAL CODE § 11-9, at 344 (2d ed. 1972); *see also* Cinnaminson Bd. of Educ. v. United States Gypsum Co., 552 F. Supp. 855, 860-61 (D.N.J. 1982) (citing the "concern of finality underlying the statute of limitations of the U.C.C.").

147 Note how the accrual of a warranty cause of action resembles the operation of a statute of repose. *See* discussion *infra* part II.B. In both situations, a clearly-defined point triggers the start of the limitations period, and the plaintiff's lack of knowledge of the existence of his or her claim is irrelevant.

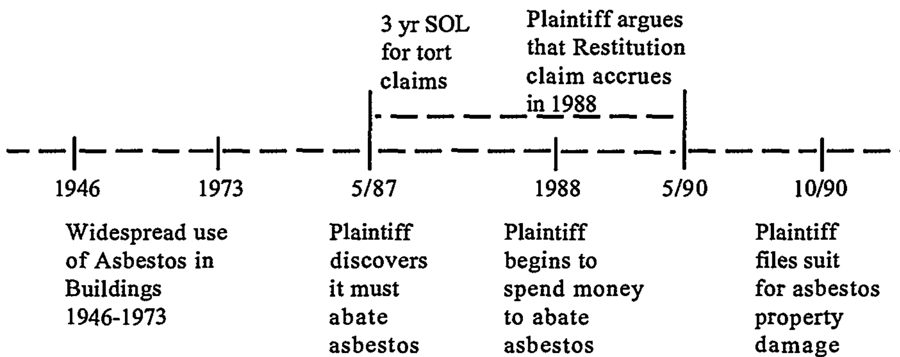
148 BLACK'S LAW DICTIONARY 1313 (6th ed. 1990).

149 RESTATEMENT (FIRST) OF RESTITUTION § 115 (1937).

150 *See, e.g.*, Board of Educ. of Chicago v. A, C & S, Inc., 546 N.E.2d 580, 596-97 (Ill. 1989). Almost every asbestos property damage action is one to recover money already spent for clean-up costs.

151 *See* 888 7th Ave. Assoc. Ltd. Partnership v. AAER Sprayed Insulations, Inc., No. 11579/91, slip. op. at 15 (N.Y. Sup. Ct. Feb. 24, 1992) (rejecting argument that the "statute of limitations would not begin to run on the indemnity and restitution claims until the owner of [the] property decided to spend money to remedy that hazard"), *aff'd*, 605 N.Y.S.2d 25 (App. Div. 1993); *cf.* Security Homestead Ass'n v. W.R. Grace & Co., 743 F. Supp. 456, 461 (E.D. La. 1990) (rejecting restitution theory, noting that "[p]laintiff had numerous possible remedies when it first discovered that its fireproofing material contained asbestos, but failed to act upon them within the one-year prescriptive period provided by law").

Restitution Claim: Creative Pleading to Avoid the Statute of Limitations (*888 7th Avenue Associates Limited Partnership v. AAER Sprayed Insulations, Inc.*[152])



2. *Restitution Should Not be Available for Property Damage Caused by a Defective Product*

Although courts have accepted section 115 of the Restatement of Restitution as controlling authority,[153] each element of this cause of action is suspect in the property damage context. Some courts have ruled that a building owner's efforts to abate asbestos from his or her own building are "officious."[154] Furthermore, defendants have argued that asbestos abatement is not "immediately necessary" to protect the public health.[155]

The most significant obstacle for plaintiffs has been establishing the underlying duty owed by the asbestos manufacturer or sellers. Plaintiffs argue that the defendants have a duty to abate, and that their failure to do so creates a claim for restitution.[156] Under traditional restitution theory, the defendant owes an underlying duty to a

---

152 No. 11579/91, slip op. (N.Y. Sup. Ct. Feb. 24, 1992), *aff'd*, 605 N.Y.S.2d 25 (App. Div. 1993).

153 *See, e.g.*, Hebron Pub. Sch. Dist. No. 13 v. United States Gypsum, 690 F. Supp. 866, 869 (D.N.D. 1988); Board of Educ. of Chicago v. A, C & S, Inc., 546 N.E.2d 580, 597 (Ill. 1989).

154 *See, e.g.*, Roseville Plaza Ltd. Partnership v. United States Gypsum Co., 811 F. Supp. 1200, 1212-13 (E.D. Mich. 1992), *aff'd*, 31 F.3d 397 (6th Cir. 1994); Hooksett Sch. Dist. v. W.R. Grace & Co., 617 F. Supp. 126, 134 (D.N.H. 1984) (plaintiff acting as "volunteer" when it removed asbestos).

155 *See Hebron Pub. Sch. Dist.*, 690 F. Supp. at 869. The court rejected the defendant's argument that abatement was not "immediately necessary." Although it did concede that asbestos is "slow-acting," the fact that few, if any building occupants have become sick when most asbestos in buildings has been in place for decades, lends credence to the defendant's argument. Another court may well accept this line of reasoning.

156 *See, e.g.*, *Roseville Plaza*, 811 F. Supp. at 1210.

third person rather than to the plaintiff himself.[157] The language of section 115 seems broad enough, however, to encompass duties owed by an asbestos manufacturer to a plaintiff building owner.[158] Nonetheless, courts have had difficulty finding an independent legal duty owed by defendants to abate asbestos.[159] A few courts have decided that *other* causes of action may establish that duty and have upheld the validity of restitution on motions to dismiss.[160]

This approach has the perverse effect of allowing a restitution claim only if the plaintiff can prevail under other causes of action (i.e., negligence, strict liability, or breach of warranty).[161] One problem with this approach is that a restitution claim would be created with every products liability case.[162] More importantly, it would allow plaintiffs to extend, indefinitely, the time in which they may bring suit—a result inimical to the purpose of a statute of limitations.[163] In sum, courts have generally rejected restitution claims in asbestos property damage actions,[164] but if accepted, this theory may allow plaintiffs to subvert the statute of limitations altogether.

---

157 *See Board of Educ. of Chicago*, 546 N.E.2d at 597 (citing cases in which restitution was a valid cause of action, all involved performance of a duty that benefitted the public at large).

158 *Cf. Hebron Pub. Sch. Dist.*, 690 F. Supp. at 869 (noting that § 115's duty element is a "flexible concept"); City of N.Y. v. Keene Corp., 505 N.Y.S.2d 782, 787 (Sup. Ct. 1986) (upholding restitution cause of action), *aff'd* 513 N.Y.S.2d 1004 (App. Div. 1987); *see also* City of Phila. v. Lead Indus. Ass'n., No. 90-7064, 1992 U.S. Dist. LEXIS 5849 at *25 (E.D. Pa. 1992) ("Section 115 of the Restatement certainly does not require by its terms or under the case law interpreting it, that a duty must be absolute to fall within it parameters.") (lead paint case).

159 *See, e.g.*, Heider v. W.R. Grace & Co.-CONN., No. 89 C 9067, 1990 WL 129347 (N.D. Ill. Aug. 24, 1990); Altoona Area Vocational Tech. Sch. v. United States Mineral Prods. Co., No. 86-2498, 1988 WL 236355 (W.D. Pa. Apr. 13, 1988); Board of Educ. of Chicago v. A, C & S, Inc., 546 N.E.2d 580, 598 (Ill. 1989).

160 *See Hebron Pub. Sch. Dist.*, 690 F. Supp. at 869.; *City of N.Y.*, 505 N.Y.S.2d at 787.

161 Besides, if the plaintiff can establish another viable cause of action, a restitution claim would seem redundant.

162 *See Board of Educ. of Chicago*, 546 N.E.2d at 598.

163 888 7th Ave. Assoc. Ltd. Partnership v. AAER Sprayed Insulations, Inc., No. 11579/91, slip op. at 15-16 (N.Y. Sup. Ct. Feb. 24, 1992) ("To permit these indemnity and restitution claims, when the underlying claims upon which the breaches of duty are premised were time-barred, would undermine the purposes of the statute of limitations."), *aff'd*, 605 N.Y.S.2d 25 (App. Div. 1993).

164 *See, e.g.*, Farm Credit Bank v. United States Mineral Prods. Co., 864 F. Supp. 643, 647-48 (W.D. Ky. 1994); Roseville Plaza Ltd. Partnership v. United States Gypsum Co., 811 F. Supp. 1200, 1212-13 (E.D. Mich. 1992), *aff'd*, 31 F.3d 397 (6th Cir. 1994); Heider v. W.R. Grace & Co.-CONN., No. 89 C 9067, 1990 WL 129347 (N.D. Ill. Aug. 24, 1990); Security Homestead Ass'n v. W.R. Grace & Co., 743 F. Supp. 456, 462 (E.D. La. 1990); Altoona Area Vocational Tech. Sch. v. United States Mineral Prods. Co., No. 86-2498, 1988 WL 236355 (W.D. Pa. Apr. 13, 1988); Hooksett Sch. Dist. v. W.R. Grace & Co., 617 F. Supp. 126, 134 (D.N.H. 1984); *Board of Educ. of Chicago*, 546 N.E.2d at 598. *Contra* Drayton Pub. Sch. Dist. No. 19 v. W.R. Grace & Co., 728 F. Supp. 1410, 1414-15 (D.N.D. 1989); *Hebron Pub. Sch. Dist.*, 690 F. Supp. at 869; Adams-Arapahoe Sch. Dist. No. 28-J v. Celotex Corp., 637 F.

E. Nuisance: Solving the Time-Bar Problem, But Again, Wrong on the Merits

Plaintiffs have also attempted to use nuisance theory to avoid the statute of limitations. In asbestos property damage actions plaintiffs have argued that the presence of asbestos products in buildings is a nuisance for which the manufacturers, sellers, and installers are liable.[165] For example, in *Tioga Public School District No. 15 v. United States Gypsum Co.*,[166] the school district argued that asbestos in buildings is a nuisance because it (1) "[a]nnoys, injures, or endangers the comfort, repose, health, or safety of others" and (2) "renders other persons insecure in . . . the use of property."[167] Under this theory, the presence of asbestos products is a *continuing* nuisance until they are removed. Therefore, a cause of action for nuisance would not be barred by the statute of limitations since the defendants' breach of duty is ongoing.[168]

The defects of this theory are manifest. First, a nuisance is, in broad terms, "a wrongful use of property."[169] The selling of a product is incongruous with that concept. Second, the defendant must generally be in control of the alleged nuisance.[170] Asbestos manufacturers and sellers have no control over products once they have been sold and have no "legal right to abate whatever hazard its product may have posed."[171] Finally, plaintiffs could cast every products liability ac-

---

Supp. 1207, 1209 (D. Colo. 1986); City of N.Y. v. Keene Corp., 505 N.Y.S.2d 782 (Sup. Ct. 1986), *aff'd*, 513 N.Y.S.2d 1004 (App. Div. 1987).

165 *See, e.g.*, Detroit Bd. of Educ. v. Celotex Corp., 493 N.W.2d 513 (Mich. Ct. App. 1992).

166 984 F.2d 915 (8th Cir. 1993) (applying North Dakota law).

167 *Id.* at 920 (citing N.D. CENT. CODE § 42-01-01 (Michie Supp. 1993)).

168 *See Detroit Bd. of Educ.*, 493 N.W.2d at 521 (noting that plaintiff's "nuisance claim survived in the trial court . . . on the basis that the asbestos products were a continuing nuisance" and therefore not barred by the statute of limitations); *see also* Lawrence Teplin et al., *A Practical Legal Approach to Asbestos in Buildings, in* ASBESTOS ABATEMENT UPDATE 50 (George A. Peters & Barbara J. Peters eds., 1990) (advising that building owner may argue that the presence of asbestos constitutes a "continuing tort" that tolls the statute of limitations) (citing Huntsville City Bd. of Educ. v. National Gypsum Co., No. CV 83-325L (Ala. Cir. Ct. Aug. 28, 1984)).

169 *Detroit Bd. of Educ.*, 493 N.W.2d at 521 (distinguishing between wrongful use of property and "improper condition of property"). The court in *Tioga Pub. Sch. Dist.*, in dismissing plaintiff's nuisance claim, stated that "North Dakota cases applying the state's nuisance statute all appear to arise in the classic context of a landowner or other person in control of property conducting an activity on his land in such a manner as to interfere with the property rights of a neighbor." 984 F.2d at 920.

170 *See Tioga Pub. Sch. Dist.*, 984 F.2d at 920 (noting that liability for nuisance usually turns on whether defendant "is in control of the instrumentality"); City of Manchester v. National Gypsum Co., 637 F. Supp. 646, 656 (D.R.I. 1986) ("If the defendants exercised no control over the instrumentality, then a remedy directed against them is of little use.") (applying New Hampshire law).

171 Roseville Plaza Ltd. v. United States Gypsum Co., 811 F. Supp. 1200, 1210 (E.D. Mich. 1992), *aff'd*, 31 F.3d 397 (6th Cir. 1994).

tion as a nuisance claim,[172] thereby postponing the filing of their complaints and subverting the public policies underlying statutes of limitations. For these reasons, courts have almost unanimously rejected nuisance claims in asbestos property damage cases.[173]

F. Allegations of Fraud: Tolling the Statute of Limitations

Plaintiff building owners, in drafting their complaints, commonly allege some form of fraud.[174] These claims are difficult to prove and are generally unsupported by the facts.[175] However, fraudulent behav-

---

172 *See id.* ("[T]he public would not be served by neutralizing the limitation period by labeling a products liability claim one for nuisance."); County of Johnson v. United States Gypsum Co., 580 F. Supp. 284, 290 (E.D. Tenn. 1984).

173 *See Tioga Pub. Sch. Dist.*, 984 F.2d at 920 (noting that all courts that "have considered the issue have rejected nuisance . . . theory" in asbestos property damage cases); Roseville Plaza Ltd. v. United States Gypsum Co., 811 F. Supp. 1200 (E.D. Mich. 1992), *aff'd*, 31 F.3d 397 (6th Cir. 1994); City of Manchester v. National Gypsum Co., 637 F. Supp. 646 (D.R.I. 1986); Corporation of Mercer Univ. v. National Gypsum Co., 24 Env't Rep. Cas. (BNA) 1953 (M.D. Ga. 1986); County of Johnson v. United States Gypsum Co., 584 F. Supp. 284 (E.D. Tenn. 1984); Hooksett Sch. Dist. v. W.R. Grace & Co., 617 F. Supp. 126 (D.N.H. 1984); City of San Diego v. United States Gypsum, 35 Cal. Rptr. 2d 876 (Ct. App. 1994); Warren Consol. Sch. v. W.R. Grace & Co., 518 N.W.2d 508 (Mich. Ct. App. 1994); Detroit Bd. of Educ. v. Celotex Corp., 493 N.W.2d 513 (Mich. Ct. App. 1992). *But see* Hebron Pub. Sch. Dist. No. 13 v. United States Gypsum, 690 F. Supp. 866, 872 (D.N.D. 1988) (denying motion to dismiss nuisance count; finding that North Dakota law does not require "that the nuisance be under the control of the defendant").

174 *See, e.g.*, Metropolitan Fed. Bank v. W.R. Grace & Co., 999 F.2d 1257, 1261 (8th Cir. 1993) (applying Minnesota law); *In re* Asbestos Sch. Litig., No. 83-0268, 1990 WL 73000, at *1 (E.D. Pa. May 25, 1990); Crotched Mountain Rehabilitation Ctr., Inc. v. National Gypsum Co., No. C85-488-L (D.N.H. Dec. 27, 1985); Board of Educ. of Chicago v. A, C & S, Inc., 546 N.E.2d 580, 594 (Ill. 1989); *Kansas City I*, 778 S.W.2d 264, 273 (Mo. Ct. App. 1989).

175 *See, e.g.*, Board of Educ. of Chicago v. A, C & S, Inc., 546 N.E.2d 580, 594 (Ill. 1989). The court dismissed plaintiff's fraudulent misrepresentation claim on the ground that it was not pled with sufficient "specificity, certainty and particularity." *Id.* The court expressed incredulity at plaintiff's assertion that "78 named defendants and 26 unnamed ones" participated in a joint effort to suppress the dissemination of information about asbestos products from the early 1900s. *Id.* This vague conspiracy comprising a "nebulous group of defendants" in different industries, doing business at different times, simply could not support a fraud claim. *Id.*

The difficulty in even pleading fraud underscores the problems encountered in actually proving it. Many courts have dismissed fraud claims either because they were inadequately pled, or because the claims were unsupported by the evidence in the record. *See, e.g.*, *Metropolitan Fed. Bank*, 999 F.2d at 1261 (no fraud because defendants made no affirmative representations to plaintiff); Appletree Square 1 Ltd. v. W.R. Grace & Co., 815 F. Supp. 1266, 1275 (D. Minn. 1993) (no issue of material fact as to fraudulent concealment; defendants' motion for summary judgment granted), *aff'd*, 29 F.3d 1283 (8th Cir. 1994); Landry v. Keene Corp., 811 F. Supp. 367, 372-73 (N.D. Ill. 1993) (plaintiffs did not plead any affirmative acts or representations to establish fraudulent concealment to toll statute of repose); *In re* Asbestos Sch. Litig., No. 83-0268, 1991 WL 3890, at *2 (E.D. Pa. Jan. 9, 1991) (defendant's motion for summary judgment granted because no evidence "suggests an affirmative act of fraud by the defendants"); *In re* Asbestos Sch. Litig., No. 83-0268, 1990 WL 73000 (E.D. Pa. May 25, 1990) (no facts to support plaintiffs' claims of fraudulent

ior that prevents a plaintiff from discovering his or her injury will toll the statute of limitations or, if applicable, the statute of repose.[176]

With respect to statutes of limitations, fraud by the defendant will toll the statute until the time when the plaintiff should have discovered the fraud.[177] For a warranty claim, U.C.C. section 2-725(4) expressly permits equitable tolling doctrines to postpone the accrual of the cause of action even though U.C.C. section 2-725(2) states that the cause of action accrues at the time of tender of delivery.[178] This provision may allow a plaintiff to benefit from a quasi-discovery rule.[179] For tort claims, the allegation of fraud means that the cause of action accrues upon discovery of the fraud rather than the underlying injury.[180]

Fraud also tolls statutes of repose until discovery of the defective condition of the structure.[181] Again, the plaintiff benefits from a discovery rule rather than facing the usual statute of repose, which extinguishes the right to sue a specified number of years following construction of the building.[182] Allegations of fraud, by their nature, tend to raise factual issues, making a claim of fraudulent concealment or civil conspiracy a potentially effective means of avoiding dismissal on statute of limitations grounds.[183]

---

concealment). *But see* Rowan County Bd. of Educ. v. United States Gypsum Co., 418 S.E.2d 648 (N.C. 1992) (upholding finding of fraud in action against asbestos manufacturer).

176 *See, e.g.*, *Metropolitan Fed. Bank*, 793 F. Supp. at 208 (fraud tolls statute of repose); *In re* Asbestos Sch. Litig., No. 83-0268, 1991 WL 175848, at *3 (E.D. Pa. Sept. 4, 1991) (allegations of fraud "delay the commencement of the applicable limitations period" for statute of limitations).

177 *See In re* Asbestos Sch. Litig., No. 83-0268, 1991 WL 175848, at *3 (E.D. Pa. Sept. 4, 1991) (limitations period does not begin to run "until the plaintiff knew, or exercising reasonable diligence should have known of the alleged fraud").

178 *See* WHITE & SUMMERS, *supra* note 144, at § 11-9 (citing U.C.C. § 2-725).

179 *See* City of Manchester v. National Gypsum Co., 637 F. Supp. 646, 653 (D.R.I. 1986) (fraudulent concealment tolls statute of limitations for breach of warranty claim); Crotched Mountain Rehabilitation Ctr., Inc. v. National Gypsum Co., No. C85-488-L, slip op. (D.N.H. Dec. 27, 1985) (same).

180 *See Kansas City I*, 778 S.W.2d 264, 273 (Mo. Ct. App. 1989) (affirmative acts to conceal fraud will toll the statute until the fraud is discovered); *In re* Asbestos Sch. Litig., No. 83-0268, 1991 WL 175848, at *3 (E.D. Pa. Sept. 4, 1991) (statute tolled "until the plaintiff knew, or in exercising reasonable diligence should have known of the alleged fraud").

181 *See, e.g.*, Appletree Square 1 Ltd. v. W.R. Grace & Co., 815 F. Supp. 1266, 1274 (D. Minn. 1993) (fraudulent actions preventing plaintiff from discovering defective condition toll statute of repose), *aff'd*, 29 F.3d 1283 (8th Cir. 1994).

182 *See id.*

183 *See, e.g.*, *In re* Asbestos Sch. Litig., No. 83-0268, 1991 WL 175848, at *7 (E.D. Pa. Sept. 4, 1991) (genuine issue of fact as to plaintiffs' knowledge of defendants' alleged conspiratorial or concerted behavior); Independent Sch. Dist. No. 197 v. W.R. Grace & Co., 752 F. Supp. 286, 290 (D. Minn. 1990) (allegation of fraudulent concealment avoids the statute of repose because the defendant was unable to show that plaintiff had, in fact, discovered its injury within 10 years of the completion of the building); Corporation of Mercer Univ. v. National Gypsum Co., 24 Env't Rep. Cas. (BNA) 1953 (M.D. Ga. 1986) (defendant's motion for summary judgment denied on fraud cause of action); *City of*

II
The Role of State Legislation and Sovereign Immunity

A. Special Asbestos Legislation

In response to the magnitude of the asbestos personal injury litigation and the particular statute of limitations problems inherent in latent injury cases, many state legislatures have enacted statutes that govern the limitations period for asbestos personal injury suits.[184] Some legislatures have also created special statutes of limitations for asbestos property damage actions.[185] These statutes take three forms: (1) legislation that creates a special limitations period for asbestos property damage actions,[186] (2) legislation that "revives" claims otherwise time-barred,[187] and (3) legislation that specifies what facts are necessary for a cause of action to accrue.[188]

1. *Statutes that Expand the Limitations Period*

The Massachusetts statute exemplifies the first type of statute; it doubles the normal statute of limitations of three years to six years for asbestos property damage actions.[189] By lengthening the limitations period for this class of actions, the Massachusetts legislature clearly expressed leniency for public bodies seeking to recover asbestos abatement costs, and the statute has posed few interpretative problems.[190] Connecticut likewise gives asbestos cases special treatment, but takes a somewhat different approach.[191] Its statute subjects all products liability claims, including asbestos property damage suits, to the normal three-year limitations period.[192] However, the plaintiffs may not generally bring products liability claims more than ten years after the defendant parted with "possession or control of the product."[193] The

---

Manchester, 637 F. Supp. at 653-55 (fraud claims upheld on motion to dismiss); Hooksett Sch. Dist. v. W.R. Grace & Co., 617 F. Supp. 126 (D.N.H. 1984) (plaintiff stated claim for fraudulent concealment); *Kansas City I*, 778 S.W.2d at 273 (allegations of defendant's fraudulent misrepresentation of the safety of their products raised a factual issue).

184 *See, e.g.*, Ala. Code § 6-2-30(b) (1993) (discovery rule for asbestos personal injury suits). *See generally* Mehs, *supra* note 25.

185 Most of the special legislation described in this section applies only to suits where the plaintiff is a governmental, educational, or charitable entity. Legislatures have not generally extended leniency to private, for-profit entities.

186 *See, e.g.*, Conn. Gen. Stat. Ann. § 52-577a(e) (West 1991); Mass. Ann. Laws ch. 260, § 2D (Law. Co-op. 1991).

187 *See* Minn. Stat. Ann. § 541.22 (West 1994).

188 *See* Ohio Rev. Code Ann. § 2305.091(B) (Anderson Supp. 1993).

189 Mass. Ann. Laws ch. 260, § 2D (Law. Co-op. 1991).

190 *See also* D.C. Code Ann. § 12-301 (1989) (mandating five-year limitations period for injury to real property caused by toxic substances "including products containing asbestos" and three year limitations period for all other injuries to real property).

191 Conn. Gen. Stat. Ann. § 52-577a(e) (West 1991).

192 *Id.* § 52-577a(a).

193 *Id.*

Connecticut statute extends this ten-year period to thirty years in asbestos property damage cases.[194]

2. *Revival Statutes*

Seven states have passed "revival" statutes which resuscitate admittedly stale claims and allow plaintiffs to bring suit within a specified period after the effective date of the statute. In effect, these statutes toll the statute of limitations for a limited time and create a window during which plaintiffs may bring suit.[195] Revival statutes are the most controversial form of special asbestos legislation and have encountered several constitutional challenges.[196] All but three of these statutes limit their protection to public entities, leaving private building owners to face the normal accrual rules.[197]

The North Dakota revival statute is an example of legislation that applies only to public bodies.[198] It also illustrates the extent to which legislatures have carefully preserved claims against asbestos defendants when the plaintiff is a governmental entity. Enacted in 1993, the statute sets August 1, 1997 as a deadline for parties to file lawsuits to recover costs for abating asbestos in "public buildings."[199] Given that the dangers of asbestos in buildings were generally known by the early 1980s,[200] the statute allows public entities in North Dakota a great deal of time to investigate any claims they might have against asbestos manufacturers and sellers. Moreover, the North Dakota statute broadly

---

194 *Id.* § 52-577a(e).

195 *See* GA. CODE ANN. § 9-3-30.1 (Supp. 1993) (revival until July 1, 1990 for "any person or entity, public or private," school districts, the state or its political subdivisions); IND. CODE ANN. § 33-1-1.5-5.5 (Burns 1992) (1989 Ind. Acts 217-1989 § 9 applied the discovery rule retroactively and revived claims otherwise barred as of June 30, 1989); LA. REV. STAT. ANN. § 9:5644 (West 1991) (revives stale claims until one year after the effective date of the statute); MASS. ANN. LAWS ch. 260, § 2D(2) (Law. Co-op. 1992) (revival until July 1, 1990 for the state or its political subdivisions); MINN. STAT. ANN. § 541.22(2) (West Supp. 1994) (revival until July 1, 1990 for all building owners); N.D. CENT. CODE § 28-01-47(2) (Supp. 1993) (revival until August 1, 1997 for suits involving public buildings); VA. CODE ANN. § 8.01-250.1 (Michie 1992) (revival until July 1, 1990 for governmental entities and charitable organizations).

196 *See, e.g.*, Celotex Corp. v. St. Joseph Hosp., 376 S.E.2d 880, 882 (Ga. 1989) (Georgia revival statute constitutes a "special law" not permitted by state constitution); Security Homestead Ass'n v. W.R. Grace & Co., 743 F. Supp. 456, 459 (E.D. La. 1990) (Louisiana revival statute is not a "special law" prohibited by state constitution); City of Boston v. Keene Corp., 547 N.E.2d 328, 334 (Mass. 1989) (Massachusetts revival statute does not violate state constitution); Independent Sch. Dist. No. 197 v. W.R. Grace & Co., 752 F. Supp. 286, 292-98 (D. Minn. 1990) (Minnesota revival statute does not violate state constitution).

197 The three statutes applicable to non-public entities are: GA. CODE ANN. § 9-3-30.1 (Supp. 1993); LA. REV. STAT. ANN. § 9:5644 (West 1991); MINN. STAT. ANN. § 541.22(2) (West Supp. 1994).

198 N.D. CENT. CODE § 28-01-47 (Supp. 1993).

199 *Id.*

200 *See supra* notes 24-32 and accompanying text.

defines "public building,"[201] allowing this generous provision to reach many parties. The motivation behind a special exemption statute like North Dakota's is not difficult to comprehend. Indeed, another North Dakota statute, passed in 1987, authorized the levying of special property taxes to cover the costs of asbestos removal.[202] The legislature, therefore, is keenly aware of the fiscal consequences of asbestos abatement and has an interest in allowing asbestos property damage suits brought by the state or its political subdivisions to proceed. In other words, the motivation behind statutes like the North Dakota statute is to revive lawsuits that seek to recapture costs otherwise borne by the public.

3. *Statutes that Specify When a Cause of Action Accrues*

The third type of statute attempts to remove the legal wrangling over when the cause of action accrues. Ohio is the only state with a statute of this type, and it places the accrual date at the point of notification by a governmental official or expert that the asbestos should be abated.[203] This legislation finds its roots in the common-law discovery rule.[204] However, the statute does not rely on the elusive term "injury," but specifically defines the injury, so that a plaintiff knows exactly what he or she must discover.[205] Applicable only to governmental bodies,[206] the Ohio statute is not especially solicitous toward plaintiffs. Instead, it creates a formal rule that clearly states when the lawsuit must be filed. Part III of this Note proposes an accrual rule similar to the Ohio statute.[207]

---

201 "Public Building" is defined as "any building owned by any county, city, township, school district, park district, or any other unit of local government, the state or any agency, industry, institution, board, or department thereof." N.D. CENT. CODE § 28-01-47(3) (Supp. 1993).

202 *See* N.D. CENT. CODE § 57-15-17.1 (1993).

203 OHIO REV. CODE ANN. § 2305.091(B) (Anderson Supp. 1993) (effective October 8, 1992). It reads:

> A cause of action for any removal, measures, or reimbursement described in divisions (A)(1) to (4) [asbestos property damage actions brought by school districts] of this section accrues upon the date that the board of education is informed by an official of a state, county, or local health department or of the United States environmental protection agency, the Ohio environmental protection agency, or the industrial commission who has conducted an inspection for asbestos or who has received test data concerning asbestos located in a building or other structure that is owned by the board of education, that asbestos or materials that contain asbestos in any building or other structure that is owned by the board of education should be removed from the building or other structure or be encapsulated or otherwise maintained because the asbestos poses a health hazard or risk to persons who use the building or other structure.

204 *See* discussion *supra* part I.B.2.

205 *See* OHIO REV. CODE ANN. § 2305.091(B) (Anderson Supp. 1993).

206 *See id.*

207 *See* discussion *infra* part III.C.

B. Statutes of Repose

Statutes of Repose offer another mechanism for time-barring the plaintiff building owner's tort claim. State legislatures have passed many types of statutes of repose, but relevant to asbestos property damage litigation are statutes that apply to the construction or improvement of real property. Under the laws of most states, tort claims arising out of the construction or improvement of real property are time-barred after ten years.[208]

1. *How Statutes of Repose Work*

Statutes of repose often operate similarly to statutes of limitations in breach of warranty actions. Like the U.C.C.'s four-year statute of limitations for warranty claims, statutes of repose specify a time period within which a plaintiff can maintain a cause of action, and there is no requirement of injury or of notice of that injury for the clock to begin ticking.[209] Instead, most statutes of repose mark "substantial completion" of the construction project as the starting point for the statute of repose limitations period.[210] Thus, the limitations period for both U.C.C. statute of limitations and statutes of repose begins to run from about the same date—the construction of the building—since a breach of warranty cause of action accrues upon delivery of the asbestos product.[211] Remembering the trajectory of the typical asbestos property damage case, construction of the building usually occurs during the 1960s, whereas awareness of any risks from asbestos in buildings likely comes only after 1978.[212] Thus, plaintiffs may be barred from seeking a remedy even if the alleged injury is one that could not have been discovered in time. This reflects more than a policy of discouraging stale claims, a policy that statutes of limitations vindicate. Rather, statutes of repose reflect a conscious policy decision that certain defendants deserve the peace of mind that comes with a close-ended limitations period.[213]

---

208 *See* Andrew Alpern, Note, *Statutes of Repose and the Construction Industry: A Proposal for New York*, 12 CARDOZO L. REV. 1975 (1991) (showing that 23 of 46 states with construction statutes of repose set a 10-year claims period).

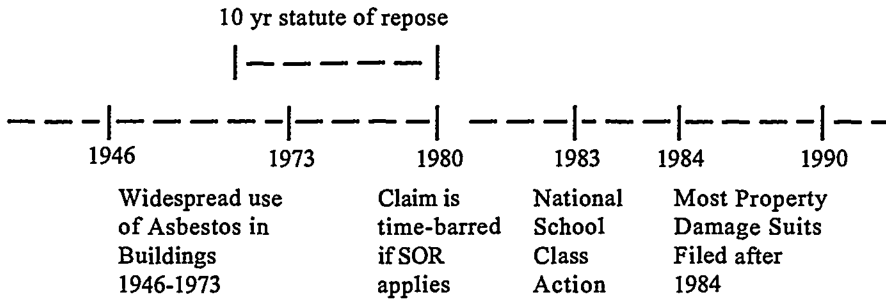
209 *See* Concordia College Corp. v. W.R. Grace & Co., 999 F.2d 326, 328 (8th Cir. 1993) ("regardless of when the injury is discovered . . . the cause will he deemed accrued no later than ten years after substantial completion of the construction") (interpreting Minnesota statute of repose), *cert. denied*, 114 S. Ct. 926 (1994).

210 *See* Alpern, *supra* note 208 (showing that 28 of 46 state statutes of repose set the starting point at substantial completion).

211 *See* discussion *supra* part I.C.2.

212 *See supra* notes 24-32 and accompanying text.

213 *Cf.* Mehs, *supra* note 25, at 966-68.



2. *Defendants Protected by Statutes of Repose*

The actual impact of construction statutes of repose on asbestos property damage litigation has been small. Building owners seeking to recover abatement costs have generally chosen to sue asbestos manufacturers for selling a defective product and have refrained from targeting contractors, architects, or designers for negligently choosing to install asbestos-containing materials.[214] This choice may be in part explained by plaintiffs' interest in pursuing deep pockets, but statutes of repose best explain why actions against asbestos manufacturers are plaintiffs' primary avenue of recovery.

Illinois has a typical construction statute of repose; it states that:

> No action based upon tort, contract or otherwise may be brought against any person for an act or omission of such person in the design, planning, supervision, observation or management of construction, or construction of an improvement to real property after 10 years have elapsed from the time of such act or omission. . . .[215]

Illinois courts have uniformly held that its statute of repose protects parties like architects, engineers, and contractors, who essentially sell their services, but not manufacturers of "standard products generally available to the public and not custom designed for the project."[216] Decisions from most other jurisdictions follow the interpretation

214 *See* Christensen & Larscheid, *supra* note 12, at 476-77 (defendants in asbestos property damage cases almost exclusively memhers of the asbestos industry; architects and contractors rarely sued); *see also In re* Asbestos Sch. Litig., No. 83-0268, 1990 WL 73000, at *1 (E.D. Pa. May, 25, 1990) (defendants in nationwide class action are "members of the asbestos industry as miners, manufacturers or suppliers").

215 ILL. ANN. STAT. ch. 735, para. 5/13-214(b) (Smith-Hurd 1992).

216 *See* Illinois Masonic Medical Ctr. v. A C & S, 640 N.E.2d 31, 35 (Ill. App. Ct. 1994); *accord* State Farm Auto. Ins. Co. v. W.R. Grace & Co., 24 F.3d 955 (7th Cir. 1994) (Illinois construction statute of repose not applicable to manufacturer of asbestos fireproofing material), *cert. denied*, 115 S. Ct. 298 (1994); Heider v. W.R. Grace & Co.-CONN., 815 F. Supp. 1137 (N.D. Ill. 1993) (same); Landry v. Keene Corp., 811 F. Supp. 367 (N.D. Ill. 1993) (same); Illinois v. Asbestospray Corp., 616 N.E.2d 652 (Ill. App. Ct. 1993) (Illinois statute of repose not applicable to manufacturers of standard products).

given to the Illinois statute by refusing to apply their statutes of repose to manufacturers of mass-produced asbestos products.[217] Construction statutes of repose are best understood as covering conduct that involves the application of skill to a particular project. Indeed, the plain language of the Illinois statute practically requires this interpretation by the use of words like "design," "plan," and "management." This langnage quite clearly excludes defendants that utilize a mechanical process to fabricate standardized goods.

Most statutes of repose draw a distinction between defendants who are sued for negligently providing services and those who are sued for selling, in a commercial chain of distribution, defective products. However, a few statutes of repose include somewhat different language from that of the Illinois statute and have been interpreted to apply to remote manufacturers of asbestos products.[218] The Minnesota statute of repose, for example, includes a provision for persons "furnishing" materials for the improvement of real property.[219] Hawaii's statute of repose similarly encompasses the "manufacturing and supplying of material."[220] Courts have held that both statutes apply to asbestos manufacturers.[221] The result has been that some plaintiffs,

---

217 *See, e.g.*, Corbally v. W.R. Grace & Co., 993 F.2d 492 (5th Cir. 1993) (Texas statute of repose does not apply to manufacturer of asbestos fireproofing material); Hebron Pub. Sch. Dist. No. 13 v. United States Gypsum Co., 953 F.2d 398 (8th Cir. 1992) (North Dakota statute of repose does not protect manufacturer of building materials); Wesley Theological Seminary of the United Methodist Church v. United States Gypsum Co., 876 F.2d 119 (D.C. Cir. 1989) (District of Columbia statute of repose does not apply to manufacturers of asbestos products); Dayton Ind. Sch. Dist. v. United States Mineral Prods. Co., 800 F. Supp. 1430 (E.D. Tex. 1992) (Texas statute of repose does not apply to suppliers and manufacturers because they, unlike architects and builders, can maintain high levels of quality control of their products); Uricam Corp., N.V. v. W.R. Grace & Co., 739 F. Supp. 1493 (W.D. Okla. 1990) (Oklahoma statute of repose does not apply to manufacturers of products); Cinnaminson Twp. Bd. of Educ. v. United States Gypsum Co., 552 F. Supp. 855 (D.N.J. 1982) (New Jersey statute of repose does not protect asbestos manufacturers); City of San Diego v. United States Gypsum, 25 Cal. Rptr. 2d 876, 882 (Ct. App. 1994) (California statute of repose does not apply to manufacturers of allegedly defective products).

218 The Maryland statute of repose, MD. CODE ANN., CTS. & JUD. PROC. § 5-108(a) (1989), limits causes of actions for damages "resulting from the defective and unsafe condition of an improvement to real property." In First United Methodist Church v. United States Gypsum Co., 882 F.2d 862 (4th Cir. 1989), *cert. denied*, 493 U.S. 1070 (1990), the court interpreted the statute to preclude actions against manufacturers as well as "builders, contractors, landlords and realtors." *Id.* at 864-65. It reasoned that nothing in the language of the statute indicated an intent to limit the class of persons protected. The Maryland statute can be easily distinguished from statutes like the Illinois statute of repose, which speak to "designing" and "management" activities. *See supra* notes 215-17 and accompanying text; *see also* School Bd. of Norfolk v. United States Gypsum Co., 360 S.E.2d 325, 327 n.3 (Va. 1987) (Virginia statute of repose applies to manufacturers of building materials) (citing Cape Henry Towers, Inc. v. National Gypsum Co., 331 S.E.2d 476 (Va. 1985)).

219 MINN. STAT. § 541.051(1)(a) (1992).

220 HAW. REV. STAT. § 657-8 (1983).

221 *See In re* Asbestos Sch. Litig., No. 83-0268, 1991 WL 3890 (E.D. Pa. Jan. 9, 1991) (Hawaii's statute of repose bars claims of certain Hawaiian school districts against asbestos

absent a showing of fraudulent concealment,[222] lose their rights to recovery before they could ever have known to sue.[223]

C. Sovereign Immunity: Nullifying the Statute of Limitations Defense

The Introduction of this Note highlighted the fact that many of the plaintiffs in the asbestos property damage litigation are government entities. Defendants raising a statute of limitations defense will therefore often find that sovereign immunity negates this defense.[224] Common-law sovereign immunity from statutes of limitations is classically stated as "*nullum tempus occurrit regi* ('no time runs against the sovereign')."[225] At its root an absolute rule,[226] sovereign immunity is a powerful weapon against statute of limitations problems.

1. *Entities Protected by Sovereign Immunity*

State law varies greatly as to who or what is protected by sovereign immunity. While the state itself clearly enjoys sovereign immunity, political subdivisions such as counties, cities, or school districts occupy a more uncertain position. The courts' willingness to in effect confer

---

product manufacturers); *see also* Metropolitan Fed. Bank v. W.R. Grace & Co., 999 F.2d 1257 (8th Cir. 1993) (Minnesota statute of repose bars suit against manufacturers of asbestos products); Concordia College Corp. v. W.R. Grace & Co., 999 F.2d 326 (8th Cir. 1993) (same); Independent Sch. Dist. No. 197 v. W.R. Grace & Co., 752 F. Supp. 286 (D. Minn. 1990) (Minnesota statute of repose applicable in actions against asbestos manufacturers).

Similar to the Minnesota statute, the North Carolina statute of repose applies to the "furnishing of materials," but the North Carolina Supreme Court in Forsyth Memorial Hosp., Inc. v. Armstrong World Industries, Inc., 444 S.E.2d 423 (N.C. 1994) interpreted the North Carolina statute of repose to exclude "remote manufacturers" of asbestos products. *Id.* at 427. The court reasoned that the statute would reach a "materialman" who furnishes materials directly to the job site, but not a "remote manufacturer" who provides the materials indirectly through the commerce stream. *Id.* *Forsyth* reinforces the trend of limiting statutes of repose to defendants that sell services rather than products.

222 Plaintiffs confronted with statutes of repose like these are forced to allege fraudulent concealment to toll the statute. *See, e.g.*, *Independent Sch. Dist. No. 197*, 752 F. Supp. at 289-91. Plaintiffs can avoid dismissal only by successfully raising factual issues of defendants' fraudulent conduct. A plaintiff's success is contingent upon how closely the court chooses to scrutinize these allegations. *See* discussion *supra* part I.F.

223 The buildings at issue in *Concordia College* were "substantially" completed between 1957 and 1970. 999 F.2d at 328. Under Minnesota's 10-year statute of repose, the outermost limit for any claim for property damage would have been 1980, before the first asbestos property damage action was filed.

224 *See, e.g.*, District of Columbia v. Owens-Corning Fiberglas Corp., 572 A.2d 394 (D.C. 1990), *cert. denied*, 498 U.S. 880 (1990).

225 *Id.* at 400; *see also* Commonwealth of Va. v. Owens-Corning Fiberglas Corp., 385 S.E.2d 865, 867 (Va. 1989).

226 *See District of Columbia*, 572 A.2d at 401. The court noted that sovereign immunity is derived from "royal privilege." *Id.* It stated that the immunity apparently "survived the Revolution more by force of habit or precedent than by reason." *Id.* The court cited United States v. Lee, 106 U.S. 196 (1882) as affirming the continued vitality of sovereign immunity, despite its lack of principled support.

sovereign status on political subdivisions has been a key issue in asbestos property damage litigation since most suits are filed by political subdivisions, not the states.

Courts have unanimously held that sovereign immunity applies when the state sues in its own name. In *Commonwealth of Virginia v. Owens-Corning Fiberglas Corp.*,[227] the Virginia Supreme Court decided that sovereign immunity applied to the Commonwealth of Virginia "as it did to the Crown."[228] Courts applying other states' laws have also found that states unquestionably have sovereign status.[229]

On the other hand, political subdivisions must sometimes litigate their claims as private building owners because they are not considered arms of the state for sovereign immunity purposes.[230] For example, the case law is split on the status of school districts, with most courts holding that school districts may claim sovereign immunity. In *Tucson Unified School District v. Owens-Corning Fiberglas Corp.*,[231] for instance, the Arizona Supreme Court held that school districts, as political subdivisions of the state, could benefit from sovereign immunity to the same extent as the state itself. The court in *Livingston Board of Education v. United States Gypsum Co.*[232] reached a similar conclusion in applying New Jersey law. It reasoned that school districts were "state agencies fulfilling a state purpose" because "public education is a constitutional obligation of the legislature."[233] In contrast, the Court of

---

227 385 S.E.2d 865 (Va. 1989).

228 *Id.* at 867.

229 *See, e.g.*, Tucson Unified Sch. Dist. v. Owens-Corning Fiberglas Corp., 849 P.2d 790, 791 (Ariz. 1993) (sovereign immunity applies to state) (citing ARIZ. REV. STAT. ANN. § 12-510 (1994) (certified question); Illinois v. Asbestospray Corp., 616 N.E.2d 652 (Ill. App. Ct. 1993) (state entitled to exemption from statutory time bar); Altoona Area Vocational Tech. Sch. v. United States Mineral Co., 1988 WL 236355, at *2 (W.D. Pa. Apr. 13, 1988) (state has absolute right to invoke sovereign immunity) (dictum).

230 *Compare* Northampton County Area Community College v. Dow Chem., 566 A.2d 591 (Pa. Super. Ct. 1989) (community college not a state entity and therefore subject to statute of limitations), *aff'd*, 598 A.2d 1288 (Pa. 1991) *with* City of Phila. v. Lead Indus. Ass'n, 994 F.2d 112 (3d Cir. 1993) (Philadelphia Housing Authority as agency of state is absolutely immune from statute of limitations).

231 849 P.2d 790 (Ariz. 1993).

232 592 A.2d 653 (N.J. App. Div. 1991).

233 *Id.* at 656. Most courts have refused to deny sovereign immunity solely because the plaintiff is a political subdivision of the state. *See, e.g.*, City of Wichita v. United States Gypsum Co., 828 F. Supp. 851 (D. Kan. 1993) (sovereign immunity applicable if municipality's claim arises out of governmental, rather than proprietary function); Dayton Indep. Sch. Dist. v. United States Mineral Prods. Co., 789 F. Supp. 819 (E.D. Tex. 1992) (statute of limitations does not apply to subdivisions of the state) (dictum); West Haven Sch. Dist. v. Owens-Corning Fiberglas Corp., 721 F. Supp. 1547 (D. Conn. 1988) (sovereign immunity protects municipality if acting within governmental function); District of Columbia v. Owen-Corning Fiberglas Corp., 572 A.2d 394 (D.C. 1989) (municipality protested by sovereign immunity), *cert. denied*, 498 U.S. 880 (1990); Board of Educ. of Chicago v. A, C & S, Inc., 546 N.E.2d 580 (Ill. 1989) (sovereign immunity protects board of education); Rowan County Bd. of Educ. v. United States Gypsum Co., 418 S.E.2d 648 (N.C. 1992) (same).

Appeals of Ohio held in *Beavercreek Local Schools v. Basic, Inc.*[234] that school districts and boards of education could not claim sovereign immunity. It insisted that only the state, as the sovereign, could claim an exemption from the statute of limitations.[235]

2. *The Sovereign May Waive Its Immunity*

The sovereign, of course, may affirmatively subject itself to its own statute of limitations.[236] Defendants have argued that statutes of repose manifest an intent on the part of legislatures to override sovereign immunity by creating vested rights protected by state constitutions. In *Commonwealth of Virginia v. Owens-Corning Fiberglas Corp.*,[237] the Supreme Court of Virginia accepted this argument and declared that sovereign immunity could not nullify rights protected by the Constitution of Virginia.[238] The court reasoned that a statute of repose creates a right to be free from lawsuits after the end of the repose period. It therefore held that the Virginia statute of repose[239] abrogated the common-law immunity.[240] Every other reported asbestos property damage case, however, has rejected this notion of vested rights[241] and has held that statutes of repose do not indicate that the sovereign has waived its immunity.[242] These decisions have simply refused to find a legislative intent in statutes of repose to create substan-

---

234 595 N.E.2d 360 (Ohio Ct. App. 1991).

235 *Id.* at 370.

236 Sovereign immunity is derived from the immunity initially enjoyed by the Crown. It is therefore a common-law immunity that requires the legislature to positively subject itself to its own statutes of limitations. *See District of Columbia*, 572 A.2d at 404 (sovereign must specifically waive common-law immunity); *Board of Educ. of Chicago*, 546 N.E.2d at 603 (same); *Rowan County Bd. of Educ.*, 418 S.E.2d at 652 (nullum tempus exempts state and political subdivisions "unless the pertinent statute expressly includes the State").

237 385 S.E.2d 865 (Va. 1989).

238 *Id.* at 867-68.

239 VA. CODE ANN. § 8.01-250 (Michie 1992).

240 *See id.*

241 *See* Wesley Theological Seminary of the United Methodist Church v. United States Gypsum, 876 F.2d 119 (D.C. Cir. 1989) (applying District of Columbia law) (statute of repose does not create substantive rights); Independent Sch. Dist. No. 197 v. W.R. Grace & Co., 752 F. Supp. 286 (D. Minn. 1990) (same); *cf.* City of Boston v. Keene Corp., 548 N.E.2d 328 (Mass. 1989) (running of statute of limitations does not create a vested right).

242 *See* District of Columbia v. Owens-Corning Fiberglas Corp., 572 A.2d 394, 401 (D.C. 1989) ("sovereign enjoy[s] a common-law immunity from the operation of statutes of limitations and *repose*") (emphasis added), *cert. denied*, 498 U.S. 880 (1990); Illinois v. Asbestospray Corp., 616 N.E.2d 652 (Ill. App. Ct. 1993) (products liability statute of repose does not override state's sovereign immunity); Rowan County Bd. of Educ. v. United States Gypsum Co., 418 S.E.2d 648 (N.C. 1992) (state immune from statutes of limitations and statutes of repose when pursuing a governmental purpose); *cf.* Thomas A. Bowden, Comment, *Sovereign Immunity from Statutes of Limitations in Maryland*, 46 MD. L. REV. 408, 416-17 (1987) (noting that waivers of sovereign immunity are strictly construed).

tive rights. Instead, the courts have interpreted statutes of repose as leaving sovereign immunity intact.[243]

3. *The Limits of Sovereign Immunity: Government Entity Must Seek to Vindicate a "Public Right"*

Most states impose a final limitation on a governmental entity's ability to claim sovereign immunity: it must seek to vindicate a public right.[244] Traditionally, sovereign immunity was an absolute privilege which rested upon the near absolute power of the Crown. Today, the public policy of protecting "public rights" supports a more limited form of sovereign immunity. Specifically, sovereign immunity protects the public from bearing the costs of negligent conduct by agents of the sovereign when they fail to bring an action within the period prescribed by the statute of limitations.[245] Arguably, the innocent public should not be forced to pay for the mistakes of absent-minded officials.

Under this rule, the inquiry is whether the plaintiff's suit in fact seeks to protect rights sufficiently "public" in nature.[246] The key is determining whether the right asserted is that of the "general public, or whether it belongs only to the government or some small distinct subsection of the public at large."[247] The magnitude of the public interest at stake can be measured both in terms of the number of people affected and the degree to which individual interests are threatened. In *Board of Education of Chicago v. A, C & S, Inc.*, the Illinois Supreme Court decided that not every member of the public needed to be affected by the asserted right for it to qualify as a "public right."[248] *Board of Education of Chicago* involved claims brought by various school districts to recover the costs of removing asbestos products in school buildings.[249] The court found significant the health risk to students and workers posed by the presence of asbestos-containing materials.[250] This concern, coupled with the broad-based interest of

243 The appropriateness and wisdom of sovereign immunity in the context of the asbestos property damage litigation are discussed in Part II.C of this Note.

244 *See, e.g., District of Columbia*, 572 A.2d at 401; Board of Educ. of Chicago v. A, C & S, Inc., 546 N.E.2d 580 (Ill. 1989); *Rowan County Bd. of Educ.*, 418 S.E.2d at 654-55.

245 *See District of Columbia*, 572 A.2d at 401 (noting "legitimate public policy of preserving 'public rights, revenues, and property from injury or loss, by the negligence of public officers'") (quoting Guaranty Trust Co. v. United States, 304 U.S. 126, 132 (1938)); Anderson County Bd. of Educ. v. National Gypsum Co., 821 F.2d 1230, 1232 (6th Cir. 1987) (applying Tennessee law) ("the public should not suffer because of the negligence of its officers and agents") (quoting State *ex rel.* Bd. of Univ. Sch. Lands v. Andrus, 671 F.2d 271, 274 (8th Cir. 1982)).

246 Board of Educ. of Chicago v. A, C & S, Inc., 546 N.E.2d 580, 600 (Ill. 1989).

247 *Id.* at 601.

248 546 N.E.2d 580 (Ill. 1989).

249 *Id.* at 583-84.

250 *Id.* at 602.

recovering money that would otherwise come from the general funds of the state, led the court to conclude that the plaintiffs were asserting a "public" right and were entitled to sovereign immunity.[251]

The District of Columbia Court of Appeals reached a similar result in *District of Columbia v. Owens-Corning Fiberglas Corp.*[252] There the District of Columbia sought to recover asbestos abatement costs for various public buildings from asbestos manufacturers and sellers. After considering the issue of the District's status as a sovereign, the court considered whether the sovereign was suing to "vindicate" public rights or rights "proprietary to the government alone."[253] The court argued that more than a "naked financial interest" was required, but conceded that the public/proprietary line was difficult to draw since the public must make good on any financial loss to the government.[254] However, as in *Board of Education of Chicago*, the alleged health risks to building occupants enabled the court to conclude that something more than a "financial interest" was at stake.[255] Although the District *was* ultimately seeking to "replenish its own funds," the source of the expense (public health) proved important in the court's finding that the District of Columbia could successfully assert sovereign immunity.[256]

---

251 *Id.* The Asbestos Abatement Act, ILL. ANN. STAT. ch. 105, para. 1-16 (Smith-Hurd 1993 & Supp. 1994), enacted by the Illinois state legislature, supported the court's decision. This is a comprehensive statute that directs school districts to determine whether asbestos is present in their school buildings, and whether the asbestos-containing materials pose an unreasonable health risk, and then to take steps to mitigate the situation. The statute resulted from legislative findings that asbestos in buildings could pose a serious health risk to occupants.

Paragraph 105/9 of the Asbestos Abatement Act designates funding sources for asbestos abatement costs. School districts may apply to the state to receive funds from general revenues. However, "proceeds from litigation against manufacturers, distributors and contractors of asbestos products," must be sougbt, and any recovery will offset the state's contribution to abatement costs. *Board of Educ. of Chicago*, therefore, can be seen as an easy case for allowing sovereign immunity since the legislature had already expressed its opinion, through the Asbestos Abatement Act, that asbestos in schools impacted the public interest. Moreover, this statute makes it clear that any money recovered from the defendants in *Board of Educ. of Chicago* would directly affect the costs borne by Illinois taxpayers.

252 572 A.2d 394 (D.C. 1989), *cert. denied*, 498 U.S. 880 (1990).

253 *Id.* at 406-07.

254 *Id.* at 407.

255 *Id.*

256 *Id.* at 410. Most other courts have determined that governmental entities suing for asbestos abatement costs are asserting a public right. *See, e.g.*, City of Wichita v. United States Gypsum Co., 828 F. Supp. 851 (D. Kan. 1993) (public library is governmental function; auditorium where users pay fee is proprietary); Altoona Area Vocational Tech. Sch. v. United States Mineral Prods. Co., No. 86-2498, 1988 WL 236355, at *2 (W.D. Pa. Apr. 13, 1988) (municipality or public corporation must seek to enforce right in exercise of a "strictly governmental function;" plaintiff entitled to sovereign immunity because of duty to minimize safety hazards in schools); Livingston Bd. of Educ. v. United States Gypsum Co., 592 A.2d 653, 656-57 (N.J. Super. Ct. App. Div. 1991) (school district acting in governmental, not proprietary capacity); Rowan County Bd. of Educ. v. United States Gypsum

In sum, sovereign immunity may be something of a jungle, but courts in jurisdictions that recognize sovereign immunity will probably apply the doctrine in asbestos property damage cases when the plaintiff is a state or one of its political subdivisions.[257]

III
Difficulties with the Discovery Rule and a Proposal

Part I of this Note demonstrates that plaintiffs must rely on tort theories of liability—i.e., negligence and strict liability—to recover in asbestos property damage actions. However, the statute of limitations is both a persistently litigated and a consistently losing issue for plaintiffs. This Part explores why the statute of limitations is a prominent issue in the asbestos property damage litigation, and how it affects a plaintiff's case on the merits. It also analyzes the accrual rules for tort actions and argues for the widespread implementation of a formalized discovery rule that one jurisdiction has already adopted.

A. The Difficulties in Filing a Timely Claim and How the Statute of Limitations Shapes Plaintiff's Case on the Merits

The now prevalent discovery rule for tort claims allows plaintiffs to bring suit after receiving notice of their injury.[258] Most jurisdictions have adopted essentially the same formulation of the discovery rule; the cause of action accrues upon the plaintiff's actual or constructive knowledge of injury.[259] Courts, in applying the discovery rule in asbestos property damage cases, face remarkably similar facts. Presumably, applying essentially the same rule to essentially the same facts

---

Co., 418 S.E.2d 648 (N.C. 1992) (board of education acting in pursuit of governmental purpose); Mount Lebanon Sch. Dist. v. W.R. Grace & Co., 607 A.2d 756, 762 (Pa. Super. Ct. 1992) (school district enforcing "strictly public rights").

257 A few courts have concluded that an action brought to recover asbestos abatement costs does not assert a "public" right. *See, e.g.*, Anderson County Bd. of Educ. v. National Gypsum Co., 821 F.2d 1230 (6th Cir. 1987) (applying Tennessee law); *In re* Asbestos Sch. Litig., 768 F. Supp. 146 (E.D. Pa. 1991) (applying Pennsylvania law); West Haven Sch. Dist. v. Owens-Corning Fiberglas Corp., 721 F. Supp. 1547 (D. Conn. 1988) (applying Connecticut law); County of Johnson v. United States Gypsum Co., 580 F. Supp. 284 (E.D. Tenn. 1984) (applying Tennessee law); *see also* City of Phila. v. Lead Indus. Ass'n, Inc., 994 F.2d 112, 119-20 (3d Cir. 1993) (applying Pennsylvania law) (city as political subdivision of the state must seek to enforce "strictly public right;" sovereign immunity inapplicable to "claims arising out [of] a contract voluntarily entered into by both a government entity and the defendant") (lead paint case).

The Supreme Court of Arizona eschewed the public/proprietary distinction altogether in *Tucson Unified Sch. Dist. v. Owens-Corning Fiberglas Corp.*, 849 P.2d 790 (Ariz. 1993), and concluded that the "nature of the plaintiff, not of the litigation" determines whether sovereign immunity applies. *Id.* at 793. In other words, the court need only look to the sovereign status of the governmental entity bringing the lawsuit.

258 *See supra* notes 3-5 and accompanying text.

259 *See* discussion *supra* part I.B.2.

would produce easily reconcilable outcomes. However, this simply has not been the case.

1. *Plaintiff's Theory of Liability Helps to Define "Injury"*

Litigation strategy explains some of the inconsistent outcomes in applying the discovery rule. As explained in Part I, the discovery rule hinges on the open-ended term "injury." In asbestos property damage cases, the "injury" for purposes of the statute of limitations has been influenced by the definition of the "injury" for which the plaintiff is seeking damages. In other words, the plaintiff's theory of liability—the plaintiff's rationale for why the product is defective—influences the time-bar issue.

In *Kansas City I*,[260] the Missouri Court of Appeals, on appeal from the granting of defendant's motion for summary judgment, held that tort causes of action did not accrue until asbestos fibers "contaminated" the building and the city acquired knowledge of that fact.[261] No one disputed that the city learned of the presence of and potential dangers of asbestos well before the critical date—five years prior to the filing of the complaint.[262] However, plaintiff's theory of the case was that it sustained property damage when the asbestos fibers were released into the environment.[263] Accordingly, the court found that the "injury" the plaintiff needed to discover was *contamination*. Thus, the city needed acquire a great deal of knowledge about its asbestos problem before a cause of action would accrue. The plaintiff's theory in effect elevated the level of knowledge required for its cause of action to accrue, thereby avoiding summary judgment.[264]

At trial, the city changed its theory; it defined the alleged injury as the *presence* of asbestos, not contamination.[265] It is not difficult to understand why the city changed its position. If the mere presence of asbestos in the building constituted the property damage, then the plaintiff's proof would have become much easier on its strict liability claim. To show that it had been harmed, the city merely would have to prove that the defendant's asbestos-containing products were installed in the building—a relatively easy task. On the other hand, proving "contamination" would be more difficult. The plaintiff would have to show that toxic asbestos fibers had entered the environment and had created "an unreasonable risk of harm."[266] After making its

260 778 S.W.2d 264 (Mo. Ct. App. 1989).
261 *Id.* at 268.
262 *Id.* at 269-70.
263 *Id.* at 264-70.
264 *Id.* at 270.
265 *Kansas City II*, Nos. WD45130, WD45144, WD45276, 1992 WL 202510, at *5 (Mo. Ct. App. Aug. 25, 1992).
266 *See Kansas City I*, 778 S.W.2d 264, 268 (Mo. Ct. App. 1989).

path to victory easier by changing its theory of liability, the city obtained a jury verdict and judgment in its favor.[267]

On appeal, the Missouri Court of Appeals reversed the judgment for the city on statute of limitations grounds (*Kansas City II*).[268] The *Kansas City II* court noted the change in position and looked at the facts relevant to the statute of limitations issue.[269] With the change in theory, the statute of limitations analysis changed. The focus shifted away from the city's awareness of "contamination" to its knowledge of the *presence* of asbestos in its buildings.[270] The court held that the city had clearly discovered the presence of asbestos, and hence its injury, well before the critical date and entered judgment for the defendant.[271]

After the Court of Appeals of Missouri decided *Kansas City II*, the Missouri Supreme Court ordered the case transferred to its docket (*Kansas City III*).[272] The Missouri Supreme Court held that *Kansas City I*, which decided the statute of limitations issue in favor of the plaintiff in the summary judgment context, constituted the "law of the case" and could not be relitigated unless there was "a change in the issues or the evidence."[273] The court found that the evidence before the court of appeals in *Kansas City I* was essentially the same as the evidence presented at trial. Consequently, the court held that the "law of the case" precluded reconsideration of the statute of limitations issue and affirmed the judgment in favor of the plaintiff.

The court in *Kansas City III* also asserted, without explanation, that "[o]bviously, the issues here and the issues in [*Kansas City I*] regarding the running of the statute of limitations are precisely the same."[274] In this, the Missouri Supreme Court was simply wrong. As *Kansas City II* explains, the plaintiff maintained at trial that its injury was the presence of asbestos and recovered on that basis.[275] *Kansas City III* failed to appreciate the difference between claiming "contamination" and "presence" as the injury, and dismissed defendant's argument without really considering it. The court failed to understand the advantage that the plaintiff gained by circumventing the statute of limitations on one theory and recovering on the basis of another theory.

267 *Kansas City II*, Nos. WD45130, WD45144, WD45276, 1992 WL 202510, at *1 (Mo. Ct. App. Aug. 25, 1992).

268 *Id.*

269 *Id.* at *1-*5.

270 *Id.* at *5.

271 *Id.* at *6-*7.

272 Kansas City v. Keene Corp. (*Kansas City III*), 855 S.W.2d 360 (Mo. 1993) (en banc).

273 *Id.* at 366.

274 *Id.*

275 *Kansas City II*, Nos. WD45130, WD45144, WD45276, 1992 WL 202510, at *5 (Mo. Ct. App. Aug. 25, 1992).

Plaintiffs, in the end, cannot avoid the statute of limitations simply by pleading one position and arguing another at trial. When plaintiffs make themselves into moving targets, defendants should be able to re-assert the statute of limitations defense and gain either a directed verdict or JNOV, depending on the particular facts of the case. A court, such as the Missouri Court of Appeals in *Kansas City II*, with a full awareness of the issues in the case, should find that the law of the case does not prohibit reconsideration of the statute of limitations question under these circumstances.[276]

The plaintiff's substantive theories of liability, therefore, affect how the plaintiff fares on the statute of limitations question. If the plaintiff asserts that the mere presence of asbestos is its injury, then the defendants will be ready to use the plaintiff's strategy against it, arguing that the plaintiff discovered its injury much earlier on.[277] Since the plaintiff will almost always discover the presence of asbestos before a specific defect in the asbestos product,[278] the defendant will be able to push back the date of plaintiff's knowledge of injury—the key to a successful statute of limitations defense.

2. *Asbestos Property Damage: A Creeping Problem for Building Owners*

The nature of the injury caused by asbestos in buildings contributes to the difficulty of complying with statutes of limitations. Asbestos is a slow-acting agent, causing disease only after a long latency period.[279] Moreover, levels of asbestos fibers in buildings are usually extremely low—a tiny fraction of OSHA's permissible exposure limit—and often no higher than asbestos fiber levels outdoors.[280] Exposure to asbestos in buildings, arguably, poses little or no actual threat to health at any given time.[281] Since building occupants rarely

---

276 The law of the case rule prevents relitigation of an issue already decided "within the context of a single case." *See* Joan Steinman, *Law of the Case: Judicial Puzzle in Consolidated and Transferred Cases and in Mulitdistrict Litigation*, 135 U. PA. L. REV. 595, 597-98 (1987); *see also* JACK H. FRIEDENTHAL ET AL., CIVIL PROCEDURE § 14.1 (1985) (explaining law of the case rule). The court in *Kansas City III* confirmed that this rule contemplates the *same* issue having been previously decided.

277 *See In re* Asbestos Sch. Litig., No. 83-0268, 1991 WL 175848, at *1 (E.D. Pa. Sept 4, 1991) (considering defendants' motion for summary judgment on statute of limitations grounds in response to plaintiffs' position that mere presence of asbestos is injurious).

278 *See supra* notes 33-41 and accompanying text.

279 *See supra* notes 50-51 and accompanying text.

280 *See* CROSS, *supra* note 16, at 27 ("For buildings with wet-applied asbestos, nearly all measured concentrations were less than 0.0006 f/cc, which approximated outdoor levels."); Siegel, *supra* note 14, at 1164 n.170-74.

281 CROSS, *supra* note 16, at 29 ("risk from indoor asbestos is several times lower than that presented by lightning, tornadoes, hurricanes, and any number of other natural dangers[;] . . . risk from exposure to low levels of asbestos is speculative and uncertain");

become sick due to asbestos in buildings,[282] the building owner receives no clear warning signs that he or she has an asbestos problem.[283] The plaintiff, therefore, perceives no clear point at which to file a lawsuit, even though the plaintiff has arguably discovered his or her injury.

The discovery rule as applied in asbestos property damage cases has not proven to be a savior for plaintiffs as it has been in personal injury litigation, where the manifestation of disease provides a clear point at which to file a lawsuit.[284] Asbestos in buildings is not only a latent injury, but also a low-level injury. This combination causes plaintiffs to postpone the filing of their complaints, even though they are aware of their "injury" as it is defined by the law.

B. Vagueness of the Discovery Rule

Almost every jurisdiction has adopted the discovery rule for tort-based causes of action for latent injuries.[285] Yet in asbestos property damage cases, the discovery rule has not proved to be an adequate legal standard, despite its accommodation of plaintiffs with latent injuries.[286] Indeed, the discovery rule has yielded disparate results under similar facts.[287] The rule is nominally the same everywhere: actual or constructive knowledge of injury triggers the limitations period.[288] However, the level and kind of knowledge required for the cause of action to accrue varies among jurisdictions, with some courts focusing on knowledge of the dangers of asbestos generally, and others looking to the precise danger posed by the asbestos in the buildings at issue.[289] Furthermore, the plaintiff's position regarding the source of the product's defect helps to define the "injury," which leads to difficulties in determining what facts the plaintiff was supposed to discover, i.e., the mere presence of asbestos or contamination.[290]

These puzzles leave asbestos property damage plaintiffs in a position of uncertainty. The discovery rule has led to such different out-

---

Siegel, *supra* note 14, at 1170-71 (low risk to health compared to many other ordinary life activities such as riding a bicycle).

282 *See* CROSS, *supra* note 16, at 29.

283 Contrast the injury sustained when a fire caused by a defective product damages a building. In this situation, even the most inattentive plaintiff would realize that he or she has a cause of action.

284 *Cf.* Glimcher, *supra* note 3, at 501 (noting that the statute of limitations usually does not pose problems in a traditional tort case where the injury is a broken bone).

285 *See supra* note 5 and accompanying text.

286 *See* discussion *supra* part I.B.2.

287 *See* discussion *supra* part I.B.2.

288 *See* Columbus Bd. of Educ. v. Armstrong World Indus., Inc., 627 N.E.2d 1033, 1037 (Ohio Ct. App. 1993).

289 *See* discussion *supra* part I.B.2.

290 *See* discussion *supra* part III.A.1.

comes that a building owner cannot know when he or she must sue or lose his or her rights. Yet, the discovery rule was designed to avoid difficulties in complying with the statute of limitations. When there is no single event that clearly puts the plaintiff on notice that he or she has been injured, such as diagnosis of an asbestos-related disease in a personal injury suit, the discovery rule fails because of vagneness.

C. Proposal for a Particularized Discovery Rule

To say to an injured building owner that a tort cause of action accrues when the injury is discovered is to say very little, given the difficulty of grasping what is meant by the term "injury." A better rule would remove the elusive term "injury" from the formula and detail the specific facts that a plaintiff must know in order for the statute of limitations period to begin to run. This is, indeed, an unabashed call for a bright-line rule to govern asbestos property damage actions, and a clear rejection of the flexible discovery rule that would govern all other products liability litigation. Certainly, it would be onerous and pointless to formulate a particularized rule for every product that engenders litigation. However, the number of these cases, coupled with the persistence of the statute of limitations issue, justifies special treatment.[291]

1. *Attempts by Courts and Legislatures to Formulate a Particularized Discovery Rule*

Missouri courts, after deciding several statute of limitations questions in asbestos property damage suits, have developed a particularized common-law rule that attempts to narrow Missouri's normal discovery rule.[292] Under the Missouri rule, the plaintiff must have "knowledge of a substantial and unreasonable risk of harm" to build-

291 Particularized rules in mass tort litigation are far from unprecedented. Indeed, when a product engenders tremendous litigation, courts, with good reason, adopt new rules that address the unique problems raised by the litigation. The DES litigation saw a dramatic departure from normal tort principles on causation, a change the courts imposed to avoid injustice to the many victims of a defective product. *See* Sindell v. Abbott Lab., 607 P.2d 924 (Cal. 1980) (adopting market share liability), *cert. denied*, 449 U.S. 912 (1980). The Agent Orange Litigation required a similar change in plaintiff's burden of proof. *See In re* "Agent Orange" Prod. Liab. Litig., 597 F. Supp. 740 (E.D.N.Y. 1984), *aff'd*, 818 F.2d 145 (2d Cir. 1987), *cert. denied*, 484 U.S. 1004 (1988). In a similar vein, courts have used special procedures to govern asbestos personal injury cases, such as the Judicial Panel for Multidistrict Litigation's decision to consolidate all such cases pending in federal courts for pretrial management. *See* Stephen Labaton, *Judges' Panel, Seeing Court Crisis, Combines 26,000 Asbestos Cases*, N.Y. TIMES, July 30, 1991, A1. In sum, fairuess, judicial economy and the need for comprehensible legal standards are among the bases that motivate courts to develop particularized rules.

292 *See* discussion *supra* part I.B.3.

ing occupants before a cause of action accrues.[293] Yet, even this rule fails to alleviate much of the uncertainty over when a building owner should sue. The risk from asbestos in almost any building is relatively small.[294] Therefore, even the most dangerous buildings would be on the margins of what an ordinary person would call an "unreasonable risk." Indeed, a growing number of experts feels that most asbestos in buildings poses little risk and should be left undisturbed.[295]

Keeping in mind that, at bottom, the reason for the lawsuit is the recovery of clean-up costs,[296] this Note proposes that discovery of the need to remove or maintain asbestos should start the statute of limitations clock ticking. Requiring the discovery of an "injury" or an "unreasonable risk of harm" simply confuses the issue. The Ohio statute regarding school district actions concerning asbestos follows this approach. In addition, it adds an important requirement—that the school board learn of the need to abate asbestos from a governmental official.[297] This official may be a member of the state or federal environmental protection agency or an industrial commission and must base his or her decision on an inspection of the building and/or a review of test results.[298] A cause of action accrues when the school board learns that (1) the asbestos must be removed or maintained because it (2) poses a "health hazard or risk" to building occupants.[299] Importantly, the Ohio statute does not ask the school board to assess whether a "health hazard or risk" exists, but instead requires an expert in the field to draw this conclusion.[300]

2. *Proposed Rule*

This Note proposes a rule that tracks the provisions of the Ohio statute, although with some significant deviations.[301] Under this pro-

---

293 *See* Clayton Ctr. Assocs. v. W.R. Grace & Co., 861 S.W.2d 686, 690 (Mo. Ct. App. 1993).

294 The risk of death before reaching age 65 from exposure to asbestos in buildings has been estimated as three times less than the risk of being struck by lightening, and seven times less than the risk of drinking New York City tap water. *See* Siegel, *supra* note 14, at 1171 n.207.

295 *See id.* at 1144 (discussing the clean-up debate).

296 *See* discussion *supra* part I.A.

297 OHIO REV. CODE ANN. § 2305.091 (Anderson Supp. 1993).

298 *Id.* § 2305.091(B).

299 *Id.*

300 *Id.*

301 One other jurisdiction, Louisiana, has modified the free-form discovery rule, but this rule fails to address the process concerns analyzed in this Note. The Louisiana statute suspends the statute of limitations until the completion of abatement work or until the building owner discovers the "identity of the manufacturer of the materials which require abatement." LA. REV. STAT. ANN. § 9:5644 (West 1991). This statute avoids a discovery rule predicated on knowing the existence of an "injury." However, the first prong is far too indulgent, and the second prong may postpone the running of the statute of limitations indefinitely, an outcome that greatly undermines the policy of repose. First, suspending

posed rule, tort claims would accrue when an expert informs the plaintiff of (1) the presence of asbestos in the building, (2) the general dangers of asbestos, and (3) the need to maintain or remove the asbestos-containing material. Like the Ohio statute, the key to this proposal is the requirement that the plaintiff discover his or her injury through an expert's assessment of the asbestos in the building. The virtue of this requirement is that a building owner is not put in the position of deciding, on the basis of observations made by lay people, whether "injury" has been sustained. Inspecting, evaluating, and managing asbestos is a difficult technical matter. Because asbestos in an inert state does not always differ in appearance from asbestos that is friable and should be abated, discovering the injury demands expert assistance.[302]

The requirement of notification by an expert serves an evidentiary function. Information communicated to a building owner on this matter will almost assuredly be in writing, and it will be stated in a way that draws conclusions from data and advises a course of action. Expert reports will therefore be tangible proof of what the plaintiff understood about its asbestos problem, thereby facilitating the statute of limitations determination both at trial and at the summary judgment stage.[303]

The rule proposed in this Note diverges from the Ohio approach by allowing a cause of action to accrue upon notification by experts from private firms as well as from government agencies. This divergence is natural and necessary, lest plaintiffs benefit from an overly solicitous rule. Whereas this Note proposes a rule applicable to actions brought by both private and public building owners, the Ohio statute only applies to school districts.[304] The Ohio requirement that the expert be part of a government agency may be appropriate when that agency is charged with inspecting the very buildings at issue in litigation. However, since commercial building owners and some public entities routinely rely on private firms to inspect and monitor as-

---

the statute of limitations until the completion of abatement work is unnecessary. Fairness only dictates that the building owner be *clearly* put on notice that she should sue. Certainly, the start of abatement work would qualify as clear notice. Second, suspending the statute of limitations until the building owner becomes aware of the identity of the manufacturer could result in lawsuits long after learning of an asbestos problem in the building or even years after abatement work has been completed. The Louisiana statute thus clearly fails to eliminate stale claims, the *raison d'etre* for statutes of limitations.

302 *See 1985 Hearings, supra* note 29, at 230-35 (written statement of Wayne Tansil, Director of Special Projects, the Pickering Firm) ("asbestos identification and exposure assessment isn't simple").

303 *See Kansas City I*, 778 S.W.2d 264, 269-70 (Mo. Ct. App. 1989) (discussing expert reports and plaintiff's knowledge of injury).

304 OHIO REV. CODE ANN. § 2305.091 (Anderson Supp. 1993).

bestos,[305] notice from these experts should trigger the statute of limitations. Finally, fairness requires that the Ohio rule be expanded to include private experts so that plaintiffs cannot prolong the filing of the lawsuit. Triggering the statute of limitations only upon notification by government experts would relieve plaintiffs of their duty to bring a timely action, disappointing the legitimate expectations of asbestos defendants.

On the other hand, one could critique the proposed rule as unfair to defendants by allowing plaintiffs to ignore notice given by non-experts in order to prolong the filing of the lawsuit. Nevertheless, expanding the rule proposed by this Note to incorporate knowledge gained from non-experts would make it similar to the free-form discovery rule, which this Note has previously criticized.[306] In addition, non-experts would rarely be able to accurately determine (1) the presence of asbestos, (2) the dangers of asbestos generally, and (3) the need to abate the asbestos.[307] A credible recommendation to maintain or remove asbestos-containing material would have to be made by someone with the training and experience to test the composition of building materials and to evaluate the health risk posed by asbestos-containing material. Building managers, custodians, or building occupants without this expertise would be unable to advise a building owner whether to undergo asbestos abatement.

The rule proposed in this Note would allow a cause of action to accrue only after the plaintiff building owner has received reasonable notice of its claims. Rather than looking to the plaintiff's knowledge of "contamination," this rule focuses on the plaintiff's awareness of the need to take affirmative steps to correct a potential problem with the building. Only at this point, does the plaintiff know that asbestos in the building has caused, or will cause, loss. Knowing that the asbestos-containing materials are "friable," or that small numbers of invisible fibers are in the air, may mean very little to a building owner. On the other hand, knowing that it must take steps, however small, to remove or maintain asbestos-containing material, should alert the plaintiff to investigate its legal rights.

3. *Abrogation of Sovereign Immunity*

This Note supports subjecting school boards and other government entities to the same statute of limitations faced by private plaintiffs. Although the Ohio statute subjects school boards to the statute

305 *See 1985 Hearings*, *supra* note 29, at 230 (written statement of Wayne Tansil) (discussing firm's asbestos abatement consultation work for over 800 facilities).

306 *See* discussion *supra* I.B.2.

307 *See supra* text accompanying note 299.

of limitations,[308] other jurisdictions have given school boards immunity from statutes of limitations under sovereign immunity doctrine.[309] When school boards or other governmental entities can escape the statute of limitations altogether, sovereign immunity works injustice on defendants and prolongs the asbestos crisis in our courts.[310] These concerns should override the traditional "public policy of preserving the public rights, revenues, and property from injury and loss."[311] This Note would extend its proposed rule to all building owners, governmental and private. A uniform, comprehensible and judicially manageable legal standard should govern all asbestos property damage actions. A formal discovery rule best balances fairness to the plaintiff and defendant and makes litigation over the statute of limitations issue less likely.

Of course, abrogating sovereign immunity in asbestos property damage cases would require a decision by the legislatures, not by the courts.[312] For state legislatures to subject themselves to the same statute of limitations that private parties must face would be a significant public policy choice. Although they have generally declined to waive their built-in advantage, legislatures have many reasons to make an exception to sovereign immunity in the asbestos property damage litigation. First, the uncertainty surrounding potential liability from asbestos litigation affects the future of non-bankrupt defendants.[313] Without some limitations period, school boards and government entities could litigate these cases into the twenty-first century. Second, allowing already old cases to grow significantly older would unfairly prejudice defendants. Government entities could strategically wait for memories to fade and evidence to be lost to impede defendants' ability to present their case. Finally, courts need to achieve closure of all asbestos litigation. Cases languishing in court for ten years and more is an embarrassment to the judiciary, as well as a monument to inefficiency.[314] Applying a fair and uniform accrual rule would create an endpoint to the asbestos property damage litigation.

---

308 OHIO REV. CODE ANN. § 2305.091 (Anderson Supp. 1993).

309 *See supra* notes 230-34 and accompanying text.

310 *See supra* notes 1-2 and accompanying text.

311 United States v. Hoar, 26 F. Cas. 329, 330 (C.C.D. Mass. 1821) (No. 15,373) (Story, J.).

312 *See supra* notes 236-43 and accompanying text.

313 *Cf.* BRODEUR, *supra* note 27, at 283-320 (describing the Manville bankruptcy proceedings).

314 *See In re* Asbestos Sch. Litig., No. 83-0268 (E.D. Pa. filed Jan. 17, 1983). This case has not yet been tried.

CONCLUSION

The statute of limitations has been a central issue in the asbestos property damage litigation. It has shaped plaintiffs' litigation strategies and has been a repeated source of confusion in our courts. The importance of these second-wave asbestos suits in terms of the money at stake and the impact on government bodies, such as school boards, argues for a comprehensible and fair rule to govern the running of the statute of limitations. In general, this Note supports the discovery rule because of its fairness to plaintiffs in latent injury cases; indeed, almost all courts have accepted this rule for tort-based causes of action. This Note also proposes a particularized discovery rule applicable to asbestos property damage actions, where actual or constructive knowledge of the need to abate asbestos starts the statute of limitations clock ticking. This rule removes the confusion inherent in a court's determination of when the plaintiff learned of its "injury." Finally, this Note argues for an abrogation of sovereign immunity in asbestos property damage cases on the grounds that a particularized discovery rule makes compliance with the statute of limitations easy and that the asbestos crisis must not be prolonged any further.

Alex J. Grant†

† Candidate for J.D., 1995. I would like to thank Amy Ralph, Silvia Serpe, John Chun, and Edward T. Dangel for their helpful comments and suggestions.