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## Due Process Challenges to Statutes of Repose

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## COMMENT

# DUE PROCESS CHALLENGES TO STATUTES OF REPOSE

by Susan C. Randall

TORT law has undergone a number of plaintiff oriented substantive and procedural changes in recent years. Substantive changes are numerous. Courts have expanded the concept of legal duty.<sup>1</sup> Plaintiffs have succeeded in gaining recognition of new torts and have thereby recovered damages for previously noncompensable injuries.<sup>2</sup> Comparative fault schemes have liberalized the contributory negligence and assumption of the risk bars to recovery.<sup>3</sup> Judges have relaxed evidentiary requirements, thus making plaintiffs' recoveries easier to obtain.<sup>4</sup>

Liberalization of statutes of limitation represents a corresponding pro-plaintiff trend in procedural tort law. Legislatures and courts have significantly redefined the point at which a cause of action accrues for statute of limitation purposes. A statute of limitation begins to run when a cause of

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1. See, e.g., *Trentacost v. Brussel*, 82 N.J. 214, 412 A.2d 436, 441 (1980) (landlord in high crime area owes duty to tenants to protect them from third-party trespassers); *Nixon v. Mr. Property Management Co.*, 690 S.W.2d 546, 549-50 (Tex. 1985) (apartment building owner owes duty to public to secure vacant apartments and is liable to crime victims for failure to do so); *Otis Eng'g Corp. v. Clark*, 668 S.W.2d 307, 309-10 (Tex. 1983) (employer owes duty to public to protect it from acts of intoxicated employee dismissed from work).

2. See, e.g., *Dillon v. Legg*, 68 Cal. 2d 728, 441 P.2d 912, 69 Cal. Rptr. 72 (1968) (en banc) (recognizing new tort of negligent infliction of mental distress); *accord* *Corso v. Merrill*, 119 N.H. 647, 406 A.2d 300, 307 (1979). The Texas Supreme Court appears on the verge of creating a new tort based on *Dillon v. Legg* principles. See *Cavnar v. Quality Control Parking, Inc.*, 696 S.W.2d 549, 550-51 (Tex. 1985); *Sanchez v. Schindler*, 651 S.W.2d 249, 251 (Tex. 1983); *Id.* at 255 (Ray, J., concurring); *Bedgood v. Madalin*, 600 S.W.2d 773, 777 n.1 (Tex. 1980) (Spears, J., concurring).

3. E.g., *Li v. Yellow Cab Co.*, 13 Cal. 3d 804, 828-29, 532 P.2d 1226, 1242-43, 119 Cal. Rptr. 858, 875-76 (1975) (en banc) (adopting a pure comparative fault scheme with no contributory negligence bar to recovery); *Farley v. M M Cattle Co.*, 529 S.W.2d 751, 753 (Tex. 1975) (abolishing assumption of the risk bar to recovery). *Farley* abolished assumption of the risk in light of TEX. REV. CIV. STAT. ANN. art. 2212a (Vernon 1973) (recodified as TEX. CIV. PRAC. & REM. CODE ch. 33 (Vernon 1986)), which is a modified comparative fault scheme with a 51% contributory negligence bar to recovery. *Id.*

4. See, e.g., *Canterbury v. Spence*, 464 F.2d 772, 792 (D.C. Cir.), *cert. denied*, 409 U.S. 1064 (1972) (lay rather than expert medical testimony held sufficient to establish patient's need to know in order to give informed consent); *Loui v. Oakley*, 50 Hawaii 260, 438 P.2d 393, 396-97 (1968) (plaintiff who received similar injuries from four unrelated auto accidents over several-year period need not establish by preponderance of evidence percent of injury attributable to each defendant to recover).

action accrues. Traditionally, a cause of action accrued when the negligence or injury occurred.<sup>5</sup> Many states now apply the discovery rule, which provides that a cause of action accrues when the injured party first discovers the damage or when the damage would have been discovered had the party used due diligence.<sup>6</sup>

Certain categories of prospective defendants have reacted to the pro-plaintiff trend in procedural law by lobbying for the enactment of statutes of repose.<sup>7</sup> Repose statutes shelter legislatively designated groups from property and personal injury actions after a period of time has elapsed. That time period is determined by statute and is unrelated to when an accident or discovery of damage occurs. Statutes of repose thus resemble statutes of limitation in that they establish time deadlines within which a plaintiff must bring an action. The two types of statutes, however, differ significantly in operation and effect.

Plaintiffs have launched a series of constitutional attacks, most notably on due process grounds, against statutes of repose.<sup>8</sup> The core of the due process

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5. See *Wylar v. Tripi*, 25 Ohio St. 2d 164, 166-67, 267 N.E.2d 419, 421 (1971) (review of traditional accrual rule and its inequities); *Developments in the Law—Statutes of Limitation*, 63 HARV. L. REV. 1177, 1200 (1950).

6. E.g., *Frederick v. Calbio Pharmaceuticals*, 89 Cal. App. 3d 49, 53-54, 152 Cal. Rptr. 292, 294-95 (1979); *Rosenberg v. Town of North Bergen*, 61 N.J. 190, 197, 293 A.2d 662, 665 (1972); *Nelson v. Krusen*, 678 S.W.2d 918, 922 (Tex. 1984); see also *Wylar v. Tripi*, 25 Ohio St. 2d 164, 166-72, 267 N.E.2d 419, 421-23 (1971) (court reviewed reasons for rejecting traditional rule but declined to adopt discovery rule because of lack of legislative support for the change). Courts have most frequently adopted the discovery rule in relation to medical malpractice suits. See, e.g., *McKenna v. Ortho Pharmaceutical Corp.*, 622 F.2d 657, 666-67 (3d Cir.), cert. denied, 449 U.S. 976 (1980) (interpreting Ohio as having adopted discovery rule for malpractice); *Fernandi v. Strully*, 35 N.J. 434, 450-51, 173 A.2d 277, 285-86 (1961) (discovery rule adopted for medical malpractice suits because it is more equitable than time-of-injury rule); *Nelson v. Krusen*, 678 S.W.2d 918, 922-23 (Tex. 1984) (health care liability statute of limitation unconstitutional if it bars cause of action before plaintiff reasonably should have known of the injury). Courts have, however, applied the rule in other contexts as well. See, e.g., *Regents of Univ. of Cal. v. Hartford Accident & Indem. Co.*, 21 Cal. 3d 624, 581 P.2d 197, 200, 147 Cal. Rptr. 486, 488 (1978) (latent property defects); *New Market Poultry Farms v. Fellows*, 51 N.J. 419, 424, 241 A.2d 633, 636-37 (1968) (cause of action for mistake in land case survey accrued at time discovered, not at time of negligence); ALA. CODE § 6-5-502(b) (Supp. 1985) (discovery rule applied to latent product defects; statute overruled on other grounds in *Lankford v. Sullivan*, 416 So. 2d 996, 1004 (Ala. 1982)); *infra* text accompanying notes 119-121.

7. See *infra* text accompanying note 10; *Jackson v. Mannesmann Demag Corp.*, 435 So. 2d 725, 726 (Ala. 1983); Kornblut, *Statutes of Limitation: An Overview*, ARCHITECTURAL RECORD, Aug. 1975, at 49, 49-50. See also *infra* text accompanying notes 14-20 for discussion of factors influencing this prodefendant backlash. See generally Dworkin, *Product Liability of the 1980's: "Repose Is Not the Destiny" of Manufacturers*, 61 N.C.L. REV. 33 (1982) (analysis of rise and possible downfall of product liability statutes of repose).

8. Plaintiffs have challenged statutes of repose on a variety of state constitutional grounds. See McGovern, *The Variety, Policy and Constitutionality of Product Liability Statutes of Repose*, 30 AM. U.L. REV. 579, 600-06 (1981). Although framed in terms of state constitutional provisions, the majority of these challenges involve federal constitutional questions of equal protection and due process. U.S. CONST. amend. XIV, art. 1, §§ 2, 17. Equal protection challenges generally concern only specific provisions of construction industry statutes of repose since the statutes typically protect the construction industry without protecting owners and materialmen. See *infra* note 11. Courts have invalidated construction industry statutes of repose on equal protection grounds in: *Fujioka v. Kam*, 55 Hawaii 7, 514 P.2d 568, 571-72 (1973) (statute amended extensively, but again invalidated on equal protection grounds

challenge involves a conflict between the rationale behind statutes of limitation and the manner of operation of repose statutes.<sup>9</sup> The frequency of attacks on the constitutionality of statutes of repose and the differing results of such attacks suggest that the United States Supreme Court needs to make a final determination concerning the constitutionality of such statutes.

This Comment focuses on the conflict between policies underlying statutes of limitation and those underlying statutes of repose in order to explore the validity of due process challenges to statutes of repose. Discussion first turns to the history, nature, and purpose of repose statutes. An examination of the prerequisites for the constitutionality of statutory limitations periods and an analysis of the ways in which application of repose statutes may violate these constitutional requirements then follows. The Comment concludes that statutes of repose become most vulnerable to constitutional challenge when they operate as abbreviated statutes of limitation and extinguish plaintiffs' vested rights in causes of action, but that various methods are available to conform statutes of repose to constitutional due process requirements.

## I. STATUTES OF LIMITATION AND STATUTES OF REPOSE

### A. Background of Repose Statutes

In recent years the majority of state legislatures have passed repose statutes favoring two groups of potential defendants. Construction industry professionals such as architects, engineers, and builders compose the first group protected by statutes of repose; manufacturers and vendors constitute the second group. The statutes benefiting these two groups are substantially similar in purpose and content.

During the late 1950s the American Institute of Architects, the National Society of Professional Engineers, and the Associated General Contractors of America launched lobbying campaigns in each state<sup>10</sup> for the purpose of gaining legislative adoption of statutes of repose designed to protect members of the construction industry.<sup>11</sup> Wisconsin adopted the first such statute

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in *Shibuya v. Architects Hawaii Ltd.*, 65 Hawaii 26, 647 P.2d 276, 288 (1982)); *Skinner v. Anderson*, 38 Ill. 2d 455, 231 N.E.2d 588, 590 (1967); *State Farm Fire & Casualty Co. v. All Elec., Inc.*, 99 Nev. 222, 660 P.2d 995, 997-98 (1983); *Henderson Clay Prods., Inc. v. Edgar Wood & Assoc., Inc.*, 122 N.H. 800, 451 A.2d 174, 175 (1982); *Broome v. Truluck*, 270 S.C. 227, 241 S.E.2d 739, 740-41 (1978); *Kallas Millwork Corp. v. Square D Co.*, 66 Wis. 2d 382, 225 N.W.2d 454, 459-60 (1975); *Phillips v. ABC Builders, Inc.*, 611 P.2d 821, 825-31 (Wyo. 1980). Lengthy discussions of equal protection challenges to repose statutes may be found in *Dworkin*, *supra* note 7, at 54-61, and *McGovern*, *supra* note 8, at 606-10.

9. Comment, *Limitation of Action Statutes for Architects and Builders—Blueprints for Non-action*, 18 CATH. U.L. REV. 361, 372-79 (1969).

10. Kornblut, *supra* note 7, at 49; see *Jackson v. Mannesman Demag Corp.*, 435 So. 2d 725, 726 (Ala. 1983); *Rogers, The Constitutionality of Alabama's Statute of Limitations for Construction Litigation: The Legislature Tries Again*, 11 CUM. L. REV. 1, 2 (1980).

11. Statutes of repose designed to protect the construction industry generally provide immunity for only certain specified types of potential defendants, leaving others vulnerable to suit after the repose statute has run. Most of these statutes single out architects, engineers, and contractors, but either explicitly or implicitly exclude from protection owners and materialmen. See, e.g., ARK. STAT. ANN. § 37-237 (Supp. 1985); TEX. CIV. PRAC. & REM. CODE § 16.008 (1986). Because the statutes protect only certain groups of defendants, plaintiffs have

in 1961.<sup>12</sup> By 1985 forty-six states and the District of Columbia had adopted special statutes limiting the liability of those involved in designing and erecting improvements to real property.<sup>13</sup>

The impetus for the construction industry's efforts to gain protective legislation arose from three legal developments that expanded the potential liability of those involved in improvements to real property. First, the landmark case of *MacPherson v. Buick Motor Co.*<sup>14</sup> effectively abolished the privity of contract rule, an early common law rule that denied recovery to third-party plaintiffs. Abolition of this rule meant that construction industry professionals and workers could be liable for their negligence to a variety of potential plaintiffs. A related doctrine, the completed and accepted rule, also fell into disrepute.<sup>15</sup> Under the completed and accepted rule, an owner's acceptance

claimed that the statutes violate the equal protection clause of the fourteenth amendment. See *supra* note 8; Dworkin, *supra* note 7, at 54-61; McGovern, *supra* note 8, at 606-08.

12. WIS. STAT. ANN. § 893.155 (West 1961). The Wisconsin Supreme Court subsequently held the statute unconstitutional. *Kallas Millwork Corp. v. Square D Co.*, 66 Wis. 2d 382, 225 N.W.2d 454 (1975); see *infra* text accompanying notes 125-131.

13. The District of Columbia and all states except Arizona, Iowa, Kansas, and Vermont have enacted construction industry statutes of repose. ALA. CODE § 6-5-218 (1977); ALASKA STAT. § 09.10.055 (1983); ARK. STAT. ANN. §§ 37-237 to -244 (Supp. 1985); CAL. CIV. PROC. CODE § 337.1 (West 1982); COLO. REV. STAT. § 13-80-127 (Supp. 1985); CONN. GEN. STAT. § 52-584a (1985); DEL. CODE ANN. tit. 10, § 8127 (1974); D.C. CODE ENCYCL. § 12-310 (West Supp. 1978-1979); FLA. STAT. ANN. § 95.11(3)(c) (West 1982); GA. CODE ANN. §§ 3-1006 to -1011 (Harrison 1975 & Supp. 1986); HAWAII REV. STAT. § 657-8 (Supp. 1984); IDAHO CODE § 5-241 (1979); ILL. ANN. STAT. ch. 83, § 24f (Smith-Hurd 1966) (repealed); IND. CODE ANN. §§ 34-4-20-1 to -4 (Burns Supp. 1986); KY. REV. STAT. ANN. § 413.135 (Bobbs-Merrill Supp. 1986); LA. REV. STAT. ANN. § 9:2772 (West 1965 & Supp. 1986); ME. REV. STAT. ANN. tit. 14, § 752-A (1964); MD. CTS. & JUD. PROC. CODE ANN. § 5-108 (1984); MASS. ANN. LAWS ch. 260, § 2B (Michie/Law. Co-op. Supp. 1986); MICH. COMP. LAWS ANN. § 600.5839 (West Supp. 1986); MINN. STAT. ANN. § 541.051 (West Supp. 1986); MISS. CODE ANN. § 15-1-41 (Supp. 1985); MO. ANN. STAT. § 516.097 (Vernon Supp. 1986); MONT. CODE ANN. § 27-2-208 (1985); NEB. REV. STAT. §§ 25-222 to -223 (1985); NEV. REV. STAT. §§ 11.202 to .206 (1985); N.H. REV. STAT. ANN. § 508:4-b (1983); N.J. STAT. ANN. § 2A:14-1.1 (West Supp. 1986); N.M. STAT. ANN. § 37-1-27 (1978); N.Y. CIV. PRAC. LAW § 214 (McKinney 1972 & Supp. 1986); N.C. GEN. STAT. § 1-50(5) (1983); N.D. CENT. CODE § 28-01-44 (1974); OHIO REV. CODE ANN. § 2305.31 (Page 1981); OKLA. STAT. ANN. tit. 12, § 109 (West Supp. 1985); OR. REV. STAT. § 12.135 (1983); 42 PA. CONS. STAT. ANN. § 5536 (Purdon 1981); R.I. GEN. LAWS § 9-1-29 (1985); S.C. CODE ANN. §§ 15-3-630 to -670 (Law. Co-op. 1977); S.D. CODIFIED LAWS ANN. §§ 15-2A-1 to -5 (Supp. 1986); TENN. CODE ANN. §§ 28-3-201 to -205 (1980); TEX. CIV. PRAC. & REM. CODE § 16.008 (Vernon 1986); UTAH CODE ANN. § 78-12-25.5 (1977); VA. CODE § 8.01-250 (1984); WASH. REV. CODE § 4.16.300 (Supp. 1986); W. VA. CODE § 55-2-6a (Supp. 1986); WIS. STAT. ANN. § 893.89 (West 1983); WYO. STAT. §§ 1-3-110 to -113 (1977 & Supp. 1986). Plaintiffs have challenged the constitutionality of a number of these statutes. See *supra* note 8; *infra* notes 49 & 50; *infra* text accompanying notes 108-140. Statutes of repose create limitation periods ranging in duration from as short as four years, ARK. STAT. ANN. §§ 37-237 to -244 (Supp. 1985) (personal injury and wrongful death); CAL. CIV. PROC. CODE § 337.1 (West 1982) (patent defects only), to as long as twelve years, S.C. CODE ANN. § 15-3-630 to -670 (Law Co-op. 1977); N.D. CENT. CODE § 28-01-44 (1974), within which a plaintiff may commence an action.

14. 217 N.Y. 382, 111 N.E. 1050, 1054 (1916). In *MacPherson* the court held that manufacturers owed a duty to consumers to exercise reasonable care in production. 111 N.E. at 1055. The court used foreseeability of harm rather than a contractual relationship between the parties as the basis for imposing liability. *Id.* at 1054. Courts did not, however, fully deprive architects and engineers of the privity of contract defense until the late 1950s. See Giles, *Third Party Liability: Context of the Courts*, ARCHITECTURAL RECORD, Aug. 1975, at 50, 50; Comment, *supra* note 9, at 361.

15. See, e.g., *Klein v. Catalano*, 386 Mass. 701, 708, 437 N.E.2d 514, 519-20 (1982) (stat-

of a finished product terminated the liability of those involved in the construction of the product.<sup>16</sup> Abolition of that rule extended the period of potential liability indefinitely. Third, adoption of the discovery rule as the criterion for triggering the running of a statute of limitation served to prolong potential liability.<sup>17</sup> Taken together these three legal developments meant that architects, engineers, contractors, and others involved in construction could be held liable indefinitely for property damage and personal injury caused by their work. Statutes of repose provided a means of limiting that liability to a legislatively defined period.

Statutes of repose designed to protect manufacturers and vendors from extended product liability developed more recently, and fewer have been enacted than those designed to protect the construction industry.<sup>18</sup> The primary rationale for the passage of product liability repose statutes has been

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utes of repose are a response to abolition of completed and accepted doctrine); *Totten v. Gruzen*, 52 N.J. 202, 207-08, 245 A.2d 1, 5 (1968) (rejecting the completed and accepted doctrine in construction liability cases).

16. Comment, *supra* note 9, at 363.

17. The discovery rule defines a cause of action as accruing when the injured party discovers or should have discovered the damage. See *supra* note 6 and accompanying text.

18. Approximately one-third of the state legislatures have at one time adopted product liability statutes of repose. Courts in five states have held the statutes unconstitutional; courts in three states have upheld the constitutionality of the statutes. Statutes in the following states are currently in effect, but the courts have not yet ruled on their constitutionality:

Arizona: ARIZ. REV. STAT. ANN. § 12-551 (Supp. 1979).

Colorado: COLO. REV. STAT. §§ 13-21-402, -403(3) (Supp. 1985).

Georgia: GA. CODE ANN. § 105-106(b)(2) (Harrison Supp. 1986).

Kansas: KAN. STAT. ANN. § 60-513(b) (Supp. 1985).

Kentucky: KY. REV. STAT. ANN. § 411.310 (Bobbs-Merrill Supp. 1986) (establishes rebuttable presumption against product defectiveness if injury occurs more than five years after sale or eight years after manufacture).

Nebraska: NEB. REV. STAT. § 25-224 (Supp. 1985).

Courts in the following states have upheld the constitutionality of product liability repose statutes:

Illinois: ILL. ANN. STAT. ch. 110, § 13-213(4)(b) (Smith-Hurd Supp. 1986); statute upheld against due process challenge in *Thornton v. Mono Mfg. Co.*, 99 Ill. App. 3d 722, 727, 425 N.E.2d 522, 525 (1981).

Indiana: IND. CODE ANN. § 34-4-20A-5 (Burns Supp. 1986); constitutionality of statute affirmed in *Dague v. Piper Aircraft Corp.*, 418 N.E.2d 207, 213 (Ind. 1981).

Tennessee: TENN. CODE ANN. § 29-28-103 (Supp. 1985); upheld in *Hawkins v. D&J Press Co.*, 527 F. Supp. 386, 388-90 (E.D. Tenn. 1981).

Courts in the following states have held product liability repose statutes unconstitutional:

Alabama: ALA. CODE § 6-5-502 (1975); held to violate the open courts and due process provisions of the state constitution in *Lankford v. Sullivan*, 416 So. 2d 996, 1004 (Ala. 1982).

Florida: FLA. STAT. ANN. § 95.031(2) (West Supp. 1980); held to deprive plaintiffs unconstitutionally of access to the courts in *Battilla v. Allis Chalmers Mfg. Co.*, 392 So. 2d 874 (Fla. 1980).

New Hampshire: N.H. REV. STAT. ANN. § 507-D:2 (Supp. 1979); statute held unconstitutional because it unreasonably deprived potential plaintiffs of a cause of action before the injury in *Heath v. Sears, Roebuck & Co.*, 123 N.H. 512, 519, 464 A.2d 288, 295-96 (1983).

North Carolina: N.C. GEN. STAT. ch. 99B (1979). A North Carolina court of appeals held the statute, providing a six-year time bar running from date of sale, was unconstitutional, in *Bolick v. American Barmag Corp.*, 54 N.C. App. 589, 595, 284 S.E.2d 188, 192 (1981). The state supreme court affirmed and modified this decision without reaching the question of the product liability repose statute's constitutionality. 306 N.C. 364, 372, 293 S.E.2d 415, 420 (1982). The following year, however, the North Carolina Supreme Court upheld the state's construction industry statute of repose against constitutional attack. *Lamb v. Wedgewood*

economic.<sup>19</sup> In recent years the number of defective product suits and the size of awards have increased dramatically; consequently, the costs of product liability insurance and consumer goods have skyrocketed, resulting in a negative economic climate for present and potential manufacturers.<sup>20</sup>

Product liability repose statutes operate in the same manner as construction industry statutes of repose. Both types of statutes protect certain classes of defendants from suit after a legislatively determined period of time. Each type of statute is vulnerable to due process challenges on the same grounds.<sup>21</sup>

### *B. Distinguishing Statutes of Limitation From Statutes of Repose*

Strictly speaking, "statute of repose" is a generic term of which a statute of limitation is but a variety.<sup>22</sup> The common characteristic shared by all repose statutes, erection of a time barrier to legal action, allows prospective defendants to rest free from concern that future legal liability may attach to past actions. As commonly used, however, statute of repose denotes a distinct type of statute imposing a time bar different in purpose and implementation from a statute of limitation. Unless otherwise noted, this Comment adopts the specific rather than generic usage of statute of repose.

Important differences between the types of time bars embodied in statutes of limitation and statutes of repose are evident from a comparison of the following excerpts from typical statutes:

#### *Statute of Limitation*

Actions for the recovery of compensation for damage or injury to per-

South Corp., 302 S.E.2d 868, 879-82 (N.C. 1983). The constitutional status of North Carolina's product liability repose statute is, therefore, uncertain at this time.

Rhode Island: R.I. GEN. LAWS § 9-1-13(b) (1978); ten-year product liability repose statute held to violate right of access to courts in *Kennedy v. Cumberland Eng'g Co.*, 471 A.2d 195, 199 (R.I. 1984).

See also McGovern, *supra* note 8, at 606-12 for a useful survey of statutes.

19. See A.L.A. CODE § 6-5-500 (1975) (intent of legislature; legislative findings) (legislature's analysis of social evils wrought by product liability suits); UTAH CODE ANN. § 78-15-2 (1977) (legislative findings and declarations) (discussion of reasons for restricting liability in product defect cases); Dworkin, *supra* note 7, at 33-34 (role of consumerism a key factor in spread of repose statutes).

20. Dworkin, *supra* note 7, at 33-34; see Massery, *Date-of-Sale Statutes of Limitation—A New Immunity for Product Suppliers*, 1977 INS. L.J. 535, 546. Some commentators, however, dispute that product defect repose statutes will significantly reduce liability insurance premiums. See MODEL UNIFORM PROD. LIAB. ACT § 101, 44 Fed. Reg. 62,714, 62,716 (1979) [hereinafter cited as MODEL UPLA] (model act, including analysis of and commentary on product liability issues, developed by Commerce Department); Note, *The Utah Product Liability Limitation of Action: An Unfair Resolution of Competing Concerns*, 1979 UTAH L. REV. 149, 151 (limiting products liability suits will have limited impact on insurance rates).

21. *Jackson v. Mannesman Demag Corp.*, 435 So. 2d 725, 727-28 (Ala. 1983); see *infra* part II.

22. As the United States Supreme Court said in *Wood v. Carpenter*, "[s]tatutes of limitation . . . promote repose by giving security and stability to human affairs." 101 U.S. 135, 139 (1879); see *Burnett v. New York Cent. R.R.*, 380 U.S. 424, 428 (1964); *Developments in the Law*, *supra* note 5, at 1185; see also McGovern, *supra* note 8, at 582-85 (describing several different definitions of statute of repose and the inconsistent use of these definitions by courts and commentators).

sons or property shall be instituted within two years after the cause of action accrued, and not after . . . .<sup>23</sup>

*Construction Industry Statute of Repose*

No action to recover damages, whether based upon contract or sounding in tort, resulting from or arising out of any deficiency in the design, planning, supervision, inspection or construction of any improvement to real property, or for any injury to property, either real or personal, arising out of such deficiency, or for injury to the person or for wrongful death arising out of such deficiency shall be brought against any person performing or furnishing the design, planning, supervision, inspection or construction of any such improvement after the expiration of five (5) years following the substantial completion of such improvement.<sup>24</sup>

*Product Liability Statute of Repose*

[A]ny product liability action . . . shall be commenced within ten years after the date when the product which allegedly caused the personal injury, death, or damage was first sold or leased for use or consumption.<sup>25</sup>

Suppose that in a state with statutes such as those presented above, the following scenario occurs. In 1974 Ace Breweries contracts with Big Beer Construction Services to build a new brewery. Big Beer builds the plant, subcontracts for various equipment, and hires Radiography Service to X-ray all welds in the brewing machinery. Radiography and Big Beer certify to Ace that the new plant meets all safety specifications. The brewery is substantially completed on December 31, 1979. On January 1, 1985, the brewing machinery explodes, killing several employees and demolishing the plant. Subsequent examination by engineers reveals that a faulty weld in the machinery, which gave way under heat and high pressure, caused the explosion. Their examination also shows that a pressure gauge, manufactured by Grand Gauges and sold to Big Beer in 1974, was defective and thus failed to provide warning of the impending explosion. On January 1, 1986, Ace files suit against Big Beer, Radiography, and Gauge. On the same day the decedents' beneficiaries also file wrongful death actions against Big Beer, Radiography, and Gauge, as well as against Ace.

The statute of limitation excerpted above allows two years from the time a cause of action accrues within which to commence a suit. In the proffered hypothetical the plaintiffs are well within the statutory period, having brought suit one year after the accident. Under both statutes of repose, however, the suits against Big Beer, Radiography, and Gauge are time-barred. Only nonprotected defendants such as materialmen and the owner/tenant, Ace Breweries, are subject to suit.<sup>26</sup> Thus, statutes of repose differ from

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23. HAWAII REV. STAT. § 657-7 (1976).

24. KY. REV. STAT. ANN. § 413.135 (Bobbs-Merrill 1981).

25. NEB. REV. STAT. § 25-224(1)-(2) (Cum. Supp. 1984).

26. Construction industry statutes of repose generally do not protect owners, tenants, or materialmen. Note, *Actions Arising out of Improvements to Real Property: Special Statutes of Limitations*, 57 N.D.L. REV. 43, 50-53 (1981); see *supra* note 11.



statutes of limitation in crucial respects.

The most important difference between statutes of limitation and statutes of repose is the mechanism that triggers the commencement of their limitations periods. Statutes of limitation begin to run when a cause of action accrues.<sup>27</sup> Unless tolled,<sup>28</sup> a statute of limitation runs from the date of accrual until the end of the designated period within which a plaintiff may bring the action.

Statutes of repose, on the other hand, run for a statutorily determined period of time calculated independently of an injurious occurrence or discovery of damage or injury.<sup>29</sup> The date that triggers the running of a statute of repose depends on the jurisdiction and the type of statute. Statutes of repose designed to protect those in the construction industry generally run from the date of substantial completion of the improvement to real property;<sup>30</sup> product liability repose statutes usually run from the date of sale or lease of the product.<sup>31</sup> Once a statute of repose has run, it operates to prevent a legally cognizable cause of action from arising.<sup>32</sup> Thus, the time within which a suit may be brought is unrelated to the point when injury or discovery of injury

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27. See *supra* notes 5 & 6 and accompanying text.

28. Tolling of a statute means that its application is temporarily suspended. The most common circumstance under which both statutes of limitations and statutes of repose are tolled is fraudulent concealment of a defect, wherein potential defendants conceal evidence necessary for plaintiffs to file suit. The United States Supreme Court first recognized fraudulent concealment of a defect as a basis for tolling a statute of limitations in the case of *Bailey v. Glover*, 88 U.S. (21 Wall.) 342, 349-50 (1874). In recent years plaintiffs have asserted this claim in a rapidly increasing number of cases. Marcus, *Fraudulent Concealment in Federal Court: Toward a More Disparate Standard?*, 71 GEO. L.J. 829, 833 & n.31, 915 (1983). A defendant's absence from the jurisdiction was once a rationale used by courts for tolling limitations periods. State long-arm statutes that allow courts to assert personal jurisdiction over absent defendants have reduced the legitimacy of this tolling claim. See Dworkin, *supra* note 7, at 50. For example, the Texas Supreme Court recently refused to hold that the state's medical malpractice statute of limitations, TEX. REV. CIV. STAT. ANN. art. 4590i, § 10.01 (Vernon Supp. 1985), was tolled while the defendant physician was out of state. *Hill v. Milani*, 686 S.W.2d 610, 611 (Tex. 1985). For a general discussion of tolling doctrines, see Dworkin, *supra* note 7, at 48-53.

29. See, e.g., *Bagby Elevator & Elec. Co. v. McBride*, 292 Ala. 191, 195, 291 So. 2d 306, 309-10 (1974); *Josephs v. Burns*, 260 Or. 493, 495-96, 491 P.2d 203, 204 (1971).

30. Many statutes of repose define substantial completion. E.g., CAL. CIV. PROC. CODE § 337.15(g) (West 1982); DEL. CODE ANN. tit. 10, § 8127 (1974); GA. CODE ANN. § 3-1011 (1975); MINN. STAT. ANN. § 541.051 (West Supp. 1986); WASH. REV. CODE § 4.16.310 (Supp. 1986). A common theme in these definitions is the availability of the improvement for its intended use. Some statutes define availability in such a way as to favor prospective defendants by selecting the earliest possible date of use; other statutes define substantial completion in a manner more favorable to plaintiffs. See Knapp, *Application of Special Statutes of Limitations Concerning Design and Construction*, 23 ST. LOUIS U.L.J. 351, 360 (1979). For example, the District of Columbia statute of repose begins to run from the earlier of the date on which an improvement is first used or the date on which it is first available for use. D.C. CODE ENCYCL. § 12.310(a)(2) (West Supp. 1978-1979). The New Mexico statute, on the other hand, begins to run on the latest of three alternative dates: sufficient completion to allow the intended use, actual use, or the date on which the contractor indicates the improvement is substantially complete. N.M. STAT. ANN. § 37-1-27 (1978).

31. E.g., KY. REV. STAT. ANN. § 411.310 (Bobbs-Merrill Supp. 1986); NEB. REV. STAT. § 25-224 (Cum. Supp. 1984); N.C. GEN. STAT. § 1-50(b) (1983).

32. See *Rosenberg v. Town of North Bergen*, 61 N.J. 190, 199, 293 A.2d 662, 667 (1972); *Loyal Order of Moose v. Cavaness*, 563 P.2d 143, 146 (Okla. 1977); Kornblut, *supra* note 7, at 49; *infra* notes 46-47 and accompanying text.

occurs.<sup>33</sup>

Statutes of repose never serve to extend applicable statutes of limitation.<sup>34</sup> Nor do otherwise applicable statutes of limitation override a repose statute's time limit for bringing a cause of action.<sup>35</sup> For purposes of illustration, consider the above excerpted statutes of limitation and repose and their application to the hypothetical accident. Suppose that the brewery accident occurs one year after substantial completion of the brewery. The plaintiffs then have only the two years specified by the statute of limitation within which to commence an action; the five- and ten-year statute of repose periods are irrelevant to the suits specified in the hypothetical. Thus, if a cause of action accrues well before a statute of repose has run, the plaintiff's diligence in bringing suit before the statute of limitation time-bars the action is of crucial importance.

The time sequence in the original hypothetical exemplifies the other extreme. Because the repose statute had expired before the accident occurred, the plaintiffs have no remedy against most of the defendants even though the statute of limitation period would ordinarily have commenced at the time of the accident. Thus, when an injury occurs after a statute of repose time-bars an action, the alacrity of the plaintiff's attorney in filing suit is inconsequential. The injury simply does not give rise to a legally recognized cause of action.<sup>36</sup>

A third type of situation occurs when a cause of action accrues shortly before a statute of repose runs. Under such circumstances the statute of repose operates in effect as a statute of limitation. For example, if the hypothetical accident occurs four years after the five-year statute of repose begins to run, plaintiffs have only one year within which to commence their actions, rather than the two years allowed by the regular statute of limitation. If the accident occurs four years and nine months after substantial completion, plaintiffs have only three months left to bring suit. If the explosion occurs

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33. The California and Florida construction industry statutes of repose have special provisions relating to latent defects that mitigate the harshness of the repose bars to litigation. CAL. CIV. PROC. CODE § 337.15 (West 1982); FLA. STAT. ANN. § 95.11(3)(c) (West 1982). The California statute allows only four years within which to bring actions arising from patent defects but allows ten years if a latent defect caused the damage. CAL. CIV. PROC. CODE § 337.15 (West 1982). The Florida statute extends the repose period of four years for patent defects to fifteen years for latent deficiencies in design and construction. FLA. STAT. ANN. § 95.11(3)(c) (West 1982).

34. See, e.g., *O'Connor v. Altus*, 67 N.J. 106, 122, 335 A.2d 545, 553 (1975); *Terry v. New Mexico Highway Comm'n*, 98 N.M. 119, 122-23, 645 P.2d 1375, 1377-78 (1982); *Watts v. Putnam County*, 525 S.W.2d 488, 492-94 (Tenn. 1975).

35. In *O'Connor v. Altus*, 67 N.J. 106, 335 A.2d 545 (1975), for example, the New Jersey Supreme Court refused to allow a plaintiff to recover for an injury sustained nine years after substantial completion of an apartment building even though the state's applicable repose statute had a ten-year bar because the plaintiff did not file suit until the eleventh year after substantial completion. Although the statute of limitation for personal injury did not bar the cause of action, the court held that the repose statute did. 67 N.J. at 122, 335 A.2d at 553-54; see also *Watts v. Putnam County*, 525 S.W.2d 488, 491-93 (Tenn. 1975) (construction industry statute of repose construed as placing a "ceiling" on otherwise applicable statute of limitations periods).

36. See *Rosenberg v. Town of North Bergen*, 61 N.J. 190, 199, 293 A.2d 662, 667 (1972); *infra* notes 46 & 47 and accompanying text.

four years and 364 days after substantial completion triggers the statute of repose, the operative limitations period within which plaintiffs could commence an action would be one day. In other words, when an otherwise applicable statute of limitation period exceeds the time that remains to run on a statute of repose, the statute of limitation becomes irrelevant, and the statute of repose takes over as the operative limitation statute.<sup>37</sup>

Most statute of repose cases alleging a due process violation involve the fact pattern described in the second situation: the injury occurs after the statute of repose has expired.<sup>38</sup> Due process challenges involving such circumstances have met with mixed results.<sup>39</sup> The final situation described above, however, illustrates the context in which repose statutes become most vulnerable to a due process challenge. That is, when an accident occurs shortly before the expiration of the applicable statute of repose, strict application of the time bar cuts off the period that a plaintiff would normally have to bring suit under a statute of limitation. Few courts have considered the question of due process violations in this latter situation. Those courts that have addressed the issue, however, have found serious constitutional problems in allowing a statute of repose to abolish an extant cause of action.<sup>40</sup>

## II. CONSTITUTIONAL ISSUES

### A. *Due Process Challenges to Statutes of Repose*

The most common due process challenge to repose statutes asserts that extinction of a remedy before an injury arises constitutes denial of access to the courts for redress of a wrong.<sup>41</sup> Whether framed as a violation of the due process clause of the fourteenth amendment<sup>42</sup> or a state constitution open court provision,<sup>43</sup> the arguments and issues are virtually identical.<sup>44</sup>

37. See *O'Brien v. Hazelet & Edral*, 410 Mich. 1, 9, 299 N.W.2d 336, 341 (1980); *Watts v. Putnam County*, 525 S.W.2d 488, 491-93 (Tenn. 1975); *Dworkin*, *supra* note 7, at 63.

38. See, e.g., *Hartford Fire Ins. Co. v. Lawrence*, 740 F.2d 1362, 1367 (6th Cir. 1984); *Pitts v. Unarco Indus., Inc.*, 712 F.2d 276, 279 (7th Cir.), *cert. denied*, 464 U.S. 1003 (1983); *Yarbro v. Hilton Hotels Corp.*, 655 P.2d 822, 826-27 (Colo. 1982); *Klein v. Catalano*, 386 Mass. 701, 709-10, 712-13, 437 N.E.2d 514, 521, 523-24 (1982); *O'Brien v. Hazelet & Edral*, 410 Mich. 1, 9-10, 299 N.W.2d 336, 341-43 (1980); *Reeves v. Ille Elec. Co.*, 170 Mont. 104, 106-07, 551 P.2d 647, 652 (1976); *Rosenberg v. Town of North Bergen*, 61 N.J. 190, 199, 293 A.2d 662, 667 (1972); *Freezer Storage, Inc. v. Armstrong Cork Co.*, 476 Pa. 270, 382 A.2d 715, 721 (1978).

39. See *infra* text accompanying notes 45-64.

40. See *infra* text accompanying notes 108-140.

41. *Dworkin*, *supra* note 7, at 64; see, e.g., *Overland Constr. Co. v. Sirmons*, 369 So. 2d 572, 573-75 (Fla. 1979); *Reeves v. Ille Elec. Co.*, 170 Mont. 104, 106-07, 551 P.2d 647, 652 (1976); *Rosenberg v. Town of North Bergen*, 61 N.J. 190, 199, 293 A.2d 662, 667 (1972).

42. U.S. CONST. amend. XIV, art. 1, § 17.

43. E.g., "The courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial or delay." FLA. CONST. art. I, § 21; see, e.g., ALA. CONST. art. I, § 13; KY. CONST. BILL OF RIGHTS § 14; MO. CONST. BILL OF RIGHTS art. I, § 14; OR. CONST. art. I, § 10.

44. See, e.g., *Hartford Fire Ins. v. Lawrence*, 740 F.2d 1362, 1367 (6th Cir. 1984); *Klein v. Catalano*, 386 Mass. 701, 707 n.6, 437 N.E.2d 514, 519 n.6 (1982); *Dworkin*, *supra* note 7, at 53. Some state courts have held, however, that their open courts provisions provide even greater protection to injured plaintiffs than the federal due process clause. E.g., *Overland*

The major problem with due process challenges that arise when a repose statute time-bars a cause of action before it accrues is that neither the federal nor state constitutions absolutely guarantee the right to seek a remedy for a wrong.<sup>45</sup> Due process only protects vested rights.<sup>46</sup> If a statute of repose has run, no legally recognized cause of action can accrue and, therefore, no right can vest. If no legally cognizable injury exists, no denial of a remedy can occur.<sup>47</sup>

The United States Supreme Court has upheld the authority of legislatures to abolish remedies as long as the legislature does not abrogate a vested right without providing alternative relief to the plaintiff.<sup>48</sup> Plaintiffs whose rights have not vested before the statutory time bar have thus met with only limited success in challenging the constitutionality of repose statutes. Courts are generally unsympathetic to the suggestion that legislatures may not bar a future cause of action.<sup>49</sup> The high courts of a few states have held, however,

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*Constr. Co. v. Sirmons*, 369 So. 2d 572, 573-75 (Fla. 1979); *Saylor v. Hall*, 497 S.W.2d 218, 224-25 (Ky. Ct. App. 1973). For a discussion of the relationship between due process and access to the courts in a different context see *Boddie v. Connecticut*, 401 U.S. 371, 374-83 (1971). In *Boddie* the United States Supreme Court held that a state could not, through the imposition of mandatory court fees, deny access to its courts to indigents seeking divorces because due process requires a meaningful opportunity to be heard when the state controls the only legal avenue for relief. *Id.* at 378-79, 383.

45. See *Burmester v. Gravity Drainage Dist.*, 366 So. 2d 1381, 1388 (La. 1978); *Rosenberg v. Town of North Bergen*, 61 N.J. 190, 199, 293 A.2d 662, 667 (1972); *Freezer Storage, Inc. v. Armstrong Cork Co.*, 476 Pa. 270, 382 A.2d 715, 721 (1978).

46. *Pitts v. Unarco Indus., Inc.*, 712 F.2d 276, 279 (7th Cir.), *cert. denied*, 464 U.S. 1003 (1983); *O'Brien v. Hazelet & Edral*, 410 Mich. 1, 9, 299 N.W.2d 336, 341 (Mich. 1980); *Rosenberg v. Town of North Bergen*, 61 N.J. 190, 199, 293 A.2d 662, 667 (1972); *Watts v. Putnam County*, 525 S.W.2d 488, 492 (Tenn. 1975).

47. See *Burmester v. Gravity Drainage Dist.*, 366 So. 2d 1381, 1388 (La. 1978); *Rosenberg v. Town of North Bergen*, 61 N.J. 190, 199, 293 A.2d 662, 667 (1972); *Freezer Storage, Inc. v. Armstrong Cork Co.*, 476 Pa. 270, 382 A.2d 715, 721 (1978). One commentator suggests that this reasoning may not survive the courts' consideration of product liability suits involving delayed manifestation injuries such as asbestosis. Dworkin, *supra* note 7, at 40-41, 45-48. *But see Pitts v. Unarco Indus., Inc.*, 712 F.2d 276, 279 (7th Cir.), *cert. denied*, 464 U.S. 1003 (1983) (sustaining Indiana Product Liability Act's ten-year statute of repose, IND. CODE § 33-1-1.5-5 (1981), in an asbestosis wrongful death action).

48. See, e.g., *Duke Power Co. v. Carolina Envtl. Study Group, Inc.*, 438 U.S. 59, 87, 88 n.32 (1978); *Silver v. Silver*, 280 U.S. 117, 123 (1929); *Truax v. Corrigan*, 257 U.S. 312, 329 (1921); *Canadian N. Ry. v. Eggen*, 252 U.S. 553, 561 (1920); *Halter v. Nebraska*, 205 U.S. 34, 40-41 (1906).

49. See, e.g., *Hartford Fire Ins. Co. v. Lawrence*, 740 F.2d 1362, 1373 (6th Cir. 1984) (sustaining Ohio's construction industry statute of repose over due process and equal protection challenges); *Pitts v. Unarco Indus. Inc.*, 712 F.2d 276, 279 (7th Cir.), *cert. denied*, 464 U.S. 1003 (1983) (sustaining Indiana Product Liability Act's ten-year statute of repose on due process and equal protection grounds); *Yarbro v. Hilton Hotels Corp.*, 655 P.2d 822, 826-27 (Colo. 1982) (en banc) (upholding ten-year construction repose statute over due process and equal protection challenges); *Klein v. Catalano*, 386 Mass. 701, 709-10, 712-15, 437 N.E.2d 514, 521, 523-24 (1982) (in barring accrual of cause of action that arose eight years after substantial completion, state's six-year construction industry repose statute did not violate due process or equal protection); *O'Brien v. Hazelet & Edral*, 410 Mich. 1, 9-10, 299 N.W.2d 336, 341-43 (1980) (sustaining construction industry statute of repose in case involving injuries sustained eight years after statute had run); *Reeves v. Ille Elec. Co.*, 170 Mont. 104, 106-07, 551 P.2d 647, 652 (1976) (sustaining construction industry repose statute but requiring that alternate remedies be available to plaintiffs in order to avoid due process problems); *Rosenberg v. Town of North Bergen*, 61 N.J. 190, 199, 293 A.2d 662, 667-68 (1972) (holding that statute of repose did not violate plaintiff's due process rights by preventing suit on an injury sustained

that bars to actions for injuries that have not yet occurred violate state constitutional requirements of free access to the courts.<sup>50</sup> Nevertheless, it is unlikely that the United States Supreme Court would find a due process violation from the mere fact that statutes of repose set an outside time limit on when a legally cognizable injury may arise.<sup>51</sup> The Supreme Court has thrice refused to review lower court decisions upholding state statutes of repose in the face of due process challenges. All three cases involved rights unaccrued at the time the statute of repose barred the action. In *Carter v. Hartenstein*<sup>52</sup> the Arkansas Supreme Court upheld the section of the state's construction industry statute of repose dealing with personal injury and wrongful death.<sup>53</sup> The case involved the wrongful death of a boy in an elevator accident ten years after substantial completion of the improvement. The plaintiff challenged the state's four-year repose statute on federal due process and equal protection grounds as well as on state constitutional grounds. The Arkansas Supreme Court dismissed all of the challenges, concluding that the statute was reasonable and not arbitrary or capricious.<sup>54</sup> The Texas case of

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thirty-three years after highway substantially completed); *Freezer Storage, Inc. v. Armstrong Cork Co.*, 476 Pa. 270, 382 A.2d 715, 721 (1978) (upholding construction industry statute of repose against open courts challenge; legislature may abolish common law causes of action); *Walsh v. Gowing*, 494 A.2d 543, 548 (R.I. 1985) (upholding construction industry statute of repose against access to court challenge on grounds that statute does not deprive plaintiff of all remedies).

50. The following state courts have held that statutes of repose unconstitutionally deprive plaintiffs of due process either under the federal constitution or under state access to the courts provisions:

Alabama: *Jackson v. Mannesmann Demag Corp.*, 435 So. 2d 725, 729 (Ala. 1983) (construction industry statute); *Lankford v. Sullivan*, 416 So. 2d 996, 1003-04 (Ala. 1982) (product liability statute).

Florida: *Battilla v. Allis Chalmers Mfg. Co.*, 392 So. 2d 874, 874 (Fla. 1980) (product liability statute); *Overland Constr. Co. v. Sirmons*, 369 So. 2d 572, 573-75 (Fla. 1979) (construction statute).

Kentucky: *Saylor v. Hall*, 497 S.W.2d 218, 224-25 (Ky. 1973). In *Carney v. Moody*, 646 S.W.2d 40, 41 (Ky. 1982), however, the Kentucky Supreme Court limited the holding in *Saylor* to causes of action recognized in Kentucky at the time the state adopted its constitution. The Kentucky state constitution prohibits the abolition of legal remedies for wrongful death, personal injury, and property damage, among other torts. KY. CONST. §§ 14, 54. According to the Kentucky Supreme Court, however, this prohibition applies only to causes of action in existence at the time the state adopted its constitution in 1891. *Carney*, 646 S.W.2d at 41. Hence, statutes of repose are unconstitutional under Kentucky law only in those situations when application of the statute would deprive an injured party of a remedy extant in 1891. *Id.*

New Hampshire: *Heath v. Sears, Roebuck & Co.*, 123 N.H. 512, 464 A.2d 288, 295 (1983) (product liability statute).

Rhode Island: *Kennedy v. Cumberland Eng'g Co.*, 471 A.2d 195, 199 (R.I. 1984) (product liability statute). *But see* *Walsh v. Gowing*, 494 A.2d 543, 547-48 (R.I. 1985) (sustaining construction industry repose statute).

Wyoming: *Phillips v. ABC Builders, Inc.*, 611 P.2d 821, 831 (Wyo. 1980) (construction statute).

51. *See, e.g.*, *Duke Power Co. v. Carolina Env'tl. Study Group, Inc.*, 438 U.S. 59, 87 (1978); *Silver v. Silver*, 280 U.S. 117, 123 (1929); *Truax v. Corrigan*, 257 U.S. 312, 329 (1921); *Canadian N. Ry. v. Eggen*, 252 U.S. 553, 561 (1920); *Halter v. Nebraska*, 205 U.S. 34, 40-41 (1906).

52. 248 Ark. 172, 455 S.W.2d 918 (1970), *appeal dismissed*, 401 U.S. 901 (1971).

53. 248 Ark. at 176, 455 S.W.2d at 921 (upholding ARK. STAT. ANN. § 37-238 (1967)).

54. *Id.*

*Ellerbe v. Otis Elevator*<sup>55</sup> also involved a wrongful death action resulting from an elevator accident. The elevator had been installed forty-nine years before the plaintiff's decedent fell to his death.<sup>56</sup> The Texas court of civil appeals held that the state's ten-year construction industry repose statute<sup>57</sup> did not violate equal protection or due process rights and that the statute barred recovery by the plaintiff.<sup>58</sup> Most recently, the Supreme Court refused to review a case, *Pitts v. Unarco Industries, Inc.*,<sup>59</sup> in which the Seventh Circuit upheld the Indiana Product Liability Act's<sup>60</sup> repose statute.<sup>61</sup> The plaintiff's husband died two years after Indiana passed its products liability repose statute that barred actions accruing more than ten years after the initial delivery of the product. The plaintiff's husband was exposed to asbestos for many years as part of his employment. The court held that the plaintiff's cause of action did not vest until her husband died<sup>62</sup> and that, in the absence of proof that the defendants had furnished asbestos products to the decedent within the ten years preceding his death, the plaintiff could not recover.<sup>63</sup> According to the Seventh Circuit, the statute did not deprive the plaintiff of due process because it did not bar an existing cause of action; the death of the decedent, the event giving rise to the cause of action, occurred more than ten years after the delivery of the damaging products.<sup>64</sup>

The situation posing a more serious challenge to statutes of repose involves the operation of the statutes in extinguishing an already accrued right. Once a legally cognizable cause of action accrues, the plaintiff has a vested right in that action.<sup>65</sup> The due process clause protects vested interests against unreasonable interference.<sup>66</sup> This constitutional protection is not, however, unconditional or indefinite. Statutes of limitation, for example, extinguish vested rights if a plaintiff fails to pursue a remedy with due diligence. Neither statutes of limitation nor other types of time bars, however, may extinguish vested rights without allowing the plaintiff reasonable opportunity to commence an action.<sup>67</sup> The situation in which a statute of repose operates as an abnormally abbreviated limitation period is thus the situation

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55. 618 S.W.2d 870 (Tex. Civ. App.—Houston [1st Dist.] 1981, writ ref'd n.r.e.), *appeal dismissed*, 459 U.S. 802 (1982).

56. 618 S.W.2d at 871-72.

57. TEX. REV. CIV. STAT. ANN. art. 5536a (Vernon Supp. 1981) (recodified as TEX. CIV. PRAC. & REM. CODE § 16.008 (1986)).

58. 618 S.W.2d at 873.

59. 712 F.2d 276 (7th Cir.), *cert. denied*, 464 U.S. 1003 (1983).

60. IND. CODE ANN. § 33-1.5-1 to .5-8 (Burns 1982).

61. 712 F.2d at 279.

62. *Id.*

63. *Id.* at 277-78.

64. *Id.* at 279.

65. *Gibbes v. Zimmerman*, 290 U.S. 326, 332 (1933); *Barr v. Preskitt*, 389 F. Supp. 496, 498 (M.D. Ala. 1975); *Lankford v. Sullivan*, 416 So. 2d 996, 1005 (Ala. 1982).

66. In *Gibbes v. Zimmerman*, 290 U.S. 326, 332 (1933), the Court held that the due process clause does not guarantee a particular remedy but that it does require the government to provide the plaintiff with some effective means of obtaining redress. See *Barr v. Preskitt*, 389 F. Supp. 496, 498 (M.D. Ala. 1975); *Lankford v. Sullivan*, 416 So. 2d 996, 1005 (Ala. 1982).

67. See *infra* text accompanying notes 87-97.

in which repose statutes become most vulnerable to due process challenge.<sup>68</sup> In that context the repose statute overrides the statute of limitation and violates the policies underpinning limitations legislation. Examination of the rationale for statutory time bars and the tests that they must meet in order to pass constitutional scrutiny aids exploration of the efficacy of the due process challenges in that situation.

### B. Policies Underlying Limitations on Action

Two competing policy considerations underlie statutory time bars. The first consideration is fairness to defendants.<sup>69</sup> Limitation periods serve to protect potential defendants from indefinite liability.<sup>70</sup> The United States Supreme Court, in *Burnett v. New York Central Railroad*,<sup>71</sup> explained that statutes of limitation promote justice by preventing the assertion of claims that slumbered while evidence, memories, and witnesses were lost.<sup>72</sup> The Court also pointed out that statutes of limitation promote fairness to defendants by requiring adequate notice,<sup>73</sup> for within a set period of time plaintiffs must notify defendants of damage and a pending lawsuit.

The second policy consideration related to statutory time bars embodies the requirement of justice for plaintiffs. Although defendants should not have to litigate stale claims, plaintiffs must have adequate opportunity to seek redress in the courts for wrongs against them.<sup>74</sup> In *Burnett*, although the Court considered fairness to the defendant and the courts as the basic purpose of statutes of limitation, it stressed that such considerations of fairness must be balanced against the rights of plaintiffs who have not slept on their rights, but have been unable to assert them.<sup>75</sup> In such cases the importance of preserving the plaintiffs' rights outweighs concern for the protection of defendants.<sup>76</sup>

Statutes of limitation thus represent a legislative compromise between the

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68. See *supra* text following note 39; *infra* text accompanying notes 108-140.

69. See *Burnett v. New York Cent. R.R.*, 380 U.S. 424, 428-29 (1965); Kornblut, *supra* note 7, at 49.

70. Adjudication of stale claims would be both unfair to defendants and unduly burdensome on the courts. *Walker v. Armco Steel Corp.*, 446 U.S. 740, 751 (1980); *Burnett v. New York Cent. R.R.*, 380 U.S. 424, 428 (1965).

71. 380 U.S. 424 (1965).

72. *Id.* at 428 (quoting from *Order of R.R. Telegraphers v. Railway Express Agency, Inc.*, 321 U.S. 342, 348-49 (1944)); see also *Walker v. Armco Steel Corp.*, 446 U.S. 740, 751 (1980) (limitation periods operate to prevent unfairness to defendants).

73. 380 U.S. at 428.

74. See, e.g., *Gibbes v. Zimmerman*, 290 U.S. 326 (1933) (fourteenth amendment guarantees only substantial right to redress); *Barr v. Preskitt*, 389 F. Supp. 496, 498 (M.D. Ala. 1975) (state has exclusive control over remedy short of destroying vested rights); *Lankford v. Sullivan*, 416 So. 2d 996, 1005 (Ala. 1982) (legislature must provide reasonable method to enforce rights).

75. 380 U.S. at 428-29. *Burnett* involved the Federal Employer's Liability Act (FELA) three-year statute of limitation. 45 U.S.C. § 56 (1982). The plaintiff's FELA action was dismissed in Ohio court for improper venue. By the time the plaintiff brought a federal action, the FELA limitation period had run. The Supreme Court, however, refused to bar the action, holding that to time bar an otherwise properly filed FELA action merely because venue was improper would be unfair. 380 U.S. at 430, 434.

76. 380 U.S. at 428.

competing rights and interests of plaintiffs and defendants. Such statutes provide a prescribed time period within which a plaintiff may seek redress in the courts. At the same time the statutes establish a deadline after which a defendant is free from potential claims.

Statutes of repose, like statutes of limitation, serve to protect potential defendants. Repose statutes prevent parties from being called upon to defend a negligence allegation when the passage of years suggests that the harm is more likely the result of owner or operator neglect than of any design or construction defect.<sup>77</sup> Statutes of repose, however, contain an inherent flaw: in some circumstances repose statutes cannot operate without abrogating the policies underpinning limitation statutes. When the harm occurs or is discovered immediately prior to the running of the repose statute, the statute of repose operates as a very abbreviated statute of limitation that prevents the prosecution of a fresh, rather than a stale, cause of action. A vested claim is extinguished not by procrastination on the part of the plaintiff, but by an arbitrary time bar. Similarly, the fair notice rationale for time bars<sup>78</sup> is irrelevant when an injury of which the tortfeasor is aware occurs just prior to the running of a statute of repose. Unless the injured party can bring suit immediately, the tortfeasor is immune even though he had actual notice of the damage and of his potential culpability.<sup>79</sup>

The United States Supreme Court has long recognized that fourteenth amendment due process requires that statutes of limitation must provide the plaintiff with a reasonable opportunity to bring an action.<sup>80</sup> The Court has not yet considered the question of whether statutes of repose violate this reasonableness requirement when they are strictly construed as cutting short an otherwise applicable limitations period. Lower courts considering this question, however, have found due process violated by unreasonably brief periods for filing suit.<sup>81</sup> The following section examines the reasonableness requirement the Court imposes on statutory limitation periods.

### C. *The Reasonableness Requirement*

Statutes of limitation have been a part of the common law since at least

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77. Kornblut, *supra* note 7, at 49. The author also reports a study indicating that construction industry statutes of repose generally do not work a hardship on potential plaintiffs because the vast majority of claims against architects and engineers are filed within seven years of project completion. *Id.* at 50. Some states, however, have adopted statutes with time bars considerably shorter than seven years. See *supra* note 13. Similarly, few product defect accidents occur after six years from the date of purchase or ten years from the date of manufacture. MODEL UPLA, analysis of § 101, *supra* note 20, at 62,733; see Massery, *supra* note 20, at 542.

78. See *supra* text accompanying note 73.

79. Statutes of limitation may also place harsh burdens on plaintiffs by failing to distinguish between avoidable and justifiable delays in commencing actions. Chase Securities Corp. v. Donaldson, 325 U.S. 304, 314 (1945); see United States v. Kubrick, 444 U.S. 111, 125 (1979). Many states have adopted the discovery rule in an effort to mitigate some of the unjust effects of limitation periods. See *supra* notes 5 & 6 and accompanying text.

80. See *infra* notes 87-97 and accompanying text.

81. See *infra* notes 108-136 and accompanying text.



1540.<sup>82</sup> The United States Supreme Court upheld the constitutionality of such statutes in a number of early decisions<sup>83</sup> and has reaffirmed the import and validity of limitation statutes in recent decisions.<sup>84</sup> Legislatures may constitutionally restrict remedies by providing a deadline for a plaintiff to seek redress in the courts.<sup>85</sup> Legislatures may even give retroactive effect to a reduction in the limitation period, thereby reducing the amount of time available to plaintiffs for commencing actions.<sup>86</sup> The authority of the legislature to modify rights that have already accrued, however, is subject to the constitutional requirement that plaintiffs have sufficient time within which to commence a suit. In the seminal case of *Wilson v. Iseminger*<sup>87</sup> the Court set forth the requirement that legislatures assure plaintiffs whose rights have accrued access to the courts.<sup>88</sup> According to the Court, this requirement is an absolute precondition to the constitutionality of any statute of limitation.<sup>89</sup>

The Court has frequently reaffirmed the constitutional necessity of providing plaintiffs with access to the courts.<sup>90</sup> In doing so, the Court has stipulated that an essential feature of access is a reasonable time to bring one's case to court.<sup>91</sup> In *Canadian Northern Railway v. Eggen*<sup>92</sup> the Court consid-

82. The Act of Limitation with a Proviso, 32 Hen. 8, c.2 (1540). See generally H. WOOD, A TREATISE ON THE LIMITATION OF ACTIONS AT LAW AND IN EQUITY (3d ed. 1901).

83. *Wood v. Carpenter*, 101 U.S. 135, 139 (1879); *Terry v. Anderson*, 95 U.S. 628, 632-33 (1877); *Sohn v. Waterson*, 84 U.S. (17 Wall.) 596, 599-600 (1873); *Stearns v. Page*, 48 U.S. (7 How.) 819, 828 (1849); *Hawkins v. Barney*, 30 U.S. (5 Pet.) 457, 466 (1831).

84. *E.g.*, *Walker v. Armco Steel Corp.*, 446 U.S. 740, 751 (1980); *United States v. Kubrick*, 444 U.S. 111, 125 (1979).

85. *United States v. Kubrick*, 444 U.S. 111, 125 (1979); *Terry v. Anderson*, 95 U.S. 628, 632-33 (1877).

86. See *Duke Power Co. v. Carolina Env'tl. Study Group, Inc.*, 438 U.S. 59, 87-88 (1978) (legislature may abolish a right of action before it accrues or modify an existing one if it provides a reasonable alternative for protecting the right); see also *Tennessee v. Sneed*, 96 U.S. 69, 74 (1877) (change in statute of limitation period does not impair contract so long as reasonable time allowed parties for commencement of suit).

87. 185 U.S. 55 (1902).

88. *Id.* at 62-64.

89. The Court stated:

It may be properly conceded that all statutes of limitation must proceed on the idea that the party has full opportunity afforded him to try his right in the courts. A statute could not bar the existing rights of claimants without affording this opportunity; if it should do so, it would not be a statute of limitations, but an unlawful attempt to extinguish rights arbitrarily, whatever might be the purport of its provisions.

*Id.* at 62-63.

90. See, *e.g.*, *Pickett v. Brown*, 462 U.S. 1, 11 (1983) (in equal protection challenge to paternity suit filing period for illegitimate children court held two-year statute of limitation period unconstitutional because unreasonably short; see *infra* text accompanying notes 100-104); *Burnett v. New York Central R.R.*, 380 U.S. 424, 429, 430, 434 (1965) (extending the FELA three-year statutory limitations period, 45 U.S.C. § 56 (1982), in the interest of justice to the plaintiff); *Canadian N. Ry. v. Eggen*, 252 U.S. 553, 562 (1920) (reaffirming the requirement of a reasonable time period for filing suit).

91. For example, in *Terry v. Anderson*, 95 U.S. 628 (1877), the Court said: "This court has often decided that statutes of limitation affecting existing rights are not unconstitutional, if a reasonable time is given for the commencement of an action before the bar takes effect." *Id.* at 632 (citing *Sohn v. Waterson*, 84 U.S. (17 Wall.) 596 (1873); *Hawkins v. Barney*, 30 U.S. (5 Pet.) 457 (1831)). For more recent statements see *Anderson Nat'l Bank v. Lueckett*, 321 U.S.

ered the question of an appropriate test for sufficiency of time within which to file a complaint. *Canadian Northern* involved a privileges and immunities clause<sup>93</sup> challenge to a Minnesota statute of limitations that applied only to nonresidents.<sup>94</sup> The Court upheld the constitutionality of the Minnesota statute and found the one-year statute of limitations that Minnesota had applied to the plaintiff to be fair.<sup>95</sup> According to the Court, the test of the fairness of a limitations statute is not whether the statute applies equally to all categories of persons, but whether it reasonably and adequately allows a plaintiff to enforce his rights.<sup>96</sup> This "reasonable and adequate" requirement is met when a person has free access to courts for a length of time sufficient for an ordinarily diligent person to commence legal proceedings to protect his rights.<sup>97</sup>

#### D. Judicial Review of the Sufficiency of Limitation Periods

Courts generally pay great deference to legislative determinations of what constitutes a reasonable time period within which plaintiffs may commence an action.<sup>98</sup> In *Iseminger*<sup>99</sup> the United States Supreme Court indicated that it would defer to the wisdom of the legislature as to the appropriateness of a time bar unless the time limit was so short that it constituted a denial of justice.<sup>100</sup> In later cases, however, the Court suggested that a less deferential approach by the judiciary might be in order. In *Canadian Northern*, for example, the Court affirmed that the courts have the ultimate power to determine the reasonableness and adequacy of the terms on which legislatures grant a plaintiff access to the courts.<sup>101</sup>

The Supreme Court has further affirmed its commitment to review the reasonableness of statutes of limitation in cases not involving due process challenges to the statutes. In two recent cases the Court has invalidated statutes of limitation on equal protection grounds.<sup>102</sup> In each case the state legislature had subjected child support suits involving illegitimate children

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233, 246 (1944); *Capitan Grande Band of Mission Indians v. Helix Irrigation Dist.*, 514 F.2d 465, 468 (9th Cir. 1975); *Lankford v. Sullivan*, 416 So. 2d 996, 1005 (Ala. 1982).

92. 252 U.S. 553 (1920).

93. U.S. CONST. art. IV, § 2: "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."

94. MINN. STAT. § 7709 (1913). The statute provided that nonresidents could bring actions in Minnesota courts only during the period of time allowed by the statute of limitation applicable in the state in which the cause of action arose.

95. 252 U.S. at 561-63.

96. *Id.* at 562.

97. *Id.*

98. See generally G. GUNTHER, CONSTITUTIONAL LAW ch. 8, § 4 (11th ed. 1985) (reviewing levels of scrutiny applied by the courts in considering whether legislation violates due process).

99. 185 U.S. at 60-61.

100. *Id.* at 63.

101. 252 U.S. at 562.

102. *Pickett v. Brown*, 462 U.S. 1 (1983); *Mills v. Habluetzel*, 456 U.S. 91 (1982). In *Pickett* the Court did not discuss *Pickett's* due process challenge to the statute because principles discussed in *Mills* required the Court to invalidate the limitations period in question on equal protection grounds. *Pickett*, 462 U.S. at 11.

to certain limitation periods while exempting suits involving legitimate children from similar limitation periods. The import of these decisions for due process challenges to repose statutes lies in the strong language the Court used in condemning the unreasonableness of the statutes of limitation.<sup>103</sup> The Court held that although legislatures have a legitimate interest in protecting defendants from stale claims, such an interest does not justify the imposition of unrealistically short time bars.<sup>104</sup>

The United States Supreme Court has not yet reviewed the constitutionality of statutes of repose. The Court's holdings with respect to unreasonable statute of limitation periods,<sup>105</sup> however, should apply with equal force to unreasonable repose periods. Legislatures, whether through statutes of limitation or repose, ought not to deprive plaintiffs of a reasonable opportunity to assert their claims.

### E. Lower Court Reactions to Due Process Challenges

State courts most frequently face due process challenges to repose statutes in the context of injuries sustained after the expiration of the repose time bar.<sup>106</sup> Although most state courts have refused to hold their states' statutes of repose violative of due process merely because they bar future causes of action from accruing, a few have held repose statutes unconstitutional on the basis of either due process or analogous open courts provisions of their state constitutions.<sup>107</sup> Even greater unanimity of opinion exists among courts as to the unconstitutionality of applying repose statute deadlines to injuries that occur a short time before the statute runs.

The most direct confrontation between a statute of repose and the constitutional requirement of a reasonable time within which to bring an action came in *Terry v. New Mexico State Highway Commission*.<sup>108</sup> *Terry* involved a wrongful death action resulting from a one-car accident on a public highway. The accident and death occurred nine years and nine months after the highway had been substantially completed. New Mexico's construction industry repose statute barred actions against architects, engineers, and contractors after ten years from the date of a project's substantial completion.<sup>109</sup> After the statute of repose had run, but before the applicable statute of limitation barred the action, the plaintiffs commenced a wrongful death suit against the highway contractor, engineer, and others. The defendants contended that the state repose statute shielded them from liability in that it

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103. See *Pickett v. Brown*, 462 U.S. 1, 13 (1983); *Mills v. Habluetzel*, 456 U.S. 91, 102-04 (1982) (concurring opinion by O'Connor, J., joined by Burger, C.J., and Brennan, Blackmun, and Powell, JJ.); see also G. GUNTHER, *supra* note 98, at 682-83 (analyzing the import of the *Mills* and *Pickett* opinions).

104. *Pickett v. Brown*, 462 U.S. 1, 13-14 (1983); *Brown v. Mills*, 456 U.S. 91, 100-01 (1982).

105. See *supra* notes 87-97 and accompanying text.

106. See *supra* notes 41-51 and accompanying text.

107. See *supra* notes 49-50.

108. 98 N.M. 119, 645 P.2d 1375 (1982).

109. N.M. STAT. ANN. § 37-1-27 (1978).

specifically prohibited an action for damages after the ten-year time bar.<sup>110</sup> The plaintiffs argued that the repose statute was unconstitutional on due process and equal protection grounds. The New Mexico Supreme Court rejected the equal protection argument.<sup>111</sup> The court also rejected the contention that statutes of repose violate due process when they bar future causes of action.<sup>112</sup> The court did find, however, that application of the statute to an existing cause of action was an unconstitutional deprivation of the plaintiffs' right to due process of law.<sup>113</sup> The court emphasized that the statute of repose operated as a statute of limitation in limiting the plaintiffs to an unreasonably short three-month period within which to commence an action.<sup>114</sup>

The New Mexico Supreme Court's opinion in *Terry* squarely addressed the issue raised, but not answered, by the Michigan Supreme Court in *O'Brien v. Hazelet & Edral*.<sup>115</sup> *O'Brien* also involved suits against highway architects and engineers for injuries sustained in an automobile accident. The *O'Brien* accident, however, occurred fourteen years after substantial completion of the road. Michigan's repose statute contained a six-year time bar.<sup>116</sup> The Michigan Supreme Court upheld the constitutionality of the statute,<sup>117</sup> but implied that it might reach a different result if confronted with an injury sustained shortly before the expiration of the statutory period.<sup>118</sup>

The Alabama Supreme Court held two different types of repose statutes facially invalid for failure to provide reasonable access to the courts. *Lankford v. Sullivan*<sup>119</sup> involved a challenge to Alabama's product liability statute of repose, which barred suits ten years after a product was first put into use.<sup>120</sup> The court reviewed the constitutionality of statutory time bars and found Alabama's product liability statute wanting, partly because it lacked a savings clause to suspend the operation of the time bar against suits arising out of injuries occurring near the end of the ten-year period.<sup>121</sup> The follow-

110. 98 N.M. at 120-21, 645 P.2d at 1376-77.

111. *Id.* at 121, 645 P.2d at 1377.

112. *Id.*

113. *Id.*

114. *Id.*

115. 410 Mich. 1, 15 n.18, 299 N.W.2d 336, 341 n.18 (1980).

116. MICH. COMP. LAWS ANN. § 600.5839(1) (West 1968).

117. 410 Mich. at 19-20, 299 N.W.2d at 341-43.

118. *Id.* at 15 n.18, 299 N.W.2d at 341 n.18 ("[t]o a plaintiff whose injury occurred and whose right of action thus vested shortly before expiration of the six-year period, the statute arguably might deny due process by failing to 'afford a reasonable time within which suit may be brought.'") (quoting *Pnee v. Hopkin*, 13 Mich. 318, 324 (1865)).

119. 416 So. 2d 996 (Ala. 1982).

120. ALA. CODE § 6-5-502 (1975).

121. 416 So. 2d at 1003-04 (Tolbert, C.J. concurring specially). In a lengthy and strongly worded concurring opinion, the chief justice said:

Without a savings clause to provide for those injuries occurring near the expiration of the ten-year period, this ten-year period of repose is a violation of due process . . . . Due process requires that statutes of limitation allow an individual a reasonable time in which to bring suit. Likewise, a statute of repose that does not embody a flexible outer limit to allow a reasonable time for suit when an

ing year, in *Jackson v. Mannesmann Demag Corp.*,<sup>122</sup> the court relied heavily on its *Lankford* reasoning to find Alabama's construction industry repose statute unconstitutional.<sup>123</sup> The court held that the legislature's failure to provide for plaintiffs whose cause of action vests shortly before the statute runs made the statute arbitrary and, therefore, facially invalid.<sup>124</sup>

The Wisconsin Supreme Court refused to allow that state's statute of repose to extinguish a plaintiff's vested property right in an accrued cause of action in *Hunter v. School District*.<sup>125</sup> *Hunter* involved injuries arising out of the collapse of a gymnasium wall. Contractors completed the construction of the gymnasium in 1960, the injury occurred in 1975, and the plaintiff filed suit in 1977. Several months prior to the accident the Wisconsin Supreme Court invalidated the state construction industry statute of repose on equal protection grounds.<sup>126</sup> Consequently, no statute of repose was in effect at the time of plaintiff's injury. Thus, the state's regular three-year statute of limitation for personal injury governed the plaintiff's cause of action.<sup>127</sup> The state legislature, however, amended the repose statute to conform with equal protection requirements and reenacted the statute, effective in 1976.<sup>128</sup> The new statute contained a six-year time bar to liability of construction industry personnel and was in effect at the time the plaintiff filed suit in 1977. The issue faced by the court was whether the new statute barred the plaintiff's cause of action since the injury occurred fifteen years after construction. The court held that even if it were to apply the new statute retroactively, the statute could not bar the plaintiff's cause of action.<sup>129</sup> The plaintiff had a constitutionally protected vested property right in her cause of action; to divest her of such a right would violate the due process clause of the fourteenth amendment.<sup>130</sup> Because the court found the statute inapplicable to a vested right, it did not reach the question of whether the statute of repose was constitutional in other respects.<sup>131</sup>

In *Calder v. City of Crystal*<sup>132</sup> the Minnesota Supreme Court considered a newly reenacted construction industry repose statute.<sup>133</sup> Several years ear-

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injury occurs near the end of the statutory period also denies constitutionally required due process.

*Id.* at 1005-06.

122. 435 So. 2d 725 (Ala. 1983).

123. *Id.* at 728-29 (holding ALA. CODE § 6-5-218 (1977) unconstitutional).

124. 435 So. 2d at 729.

125. 97 Wis. 2d 435, 293 N.W.2d 515 (1980).

126. *Kallas Millwork Corp. v. Square D Co.*, 66 Wis. 2d 382, 393, 225 N.W.2d 454, 460 (1975) (declaring WIS. STAT. ANN. § 893.155 (West 1961) unconstitutional on the ground that the statute violated the equal protection clause of the fourteenth amendment by protecting only certain categories of construction industry personnel).

127. WIS. STAT. ANN. § 893.205 (West 1961).

128. *Id.* § 893.155 (West 1976). The new statute also provided a six-month grace period for injuries occurring or discovered during the fifth year. For a discussion of the import of grace periods see *infra* text accompanying notes 148-151.

129. 97 Wis. 2d at 446-47, 293 N.W.2d at 519-21.

130. *Id.*

131. *Id.* at 448, 293 N.W.2d at 522.

132. 318 N.W.2d 838 (Minn. 1982).

133. MINN. STAT. ANN. § 541.051 (West 1980).

lier the court had held the original repose statute unconstitutional on equal protection grounds.<sup>134</sup> The legislature subsequently cured the defect and passed the statute anew. In *Calder* the court approved the new statute both as to equal protection and due process considerations.<sup>135</sup> The court emphasized, however, that the new statute would violate due process if, in a particular case, it failed to provide a claimant with a reasonable time to seek a remedy.<sup>136</sup>

In a diversity action the Sixth Circuit Court of Appeals recently considered the constitutionality of Ohio's ten-year construction industry statute of repose.<sup>137</sup> *Hartford Fire Insurance Co. v. Lawrence*<sup>138</sup> involved the collapse of a roof more than ten years after its completion. The court upheld the repose statute as a valid limitation on when a legally cognizable cause of action may accrue.<sup>139</sup> Within the context of its due process discussion, however, the court stated that the statute might fail scrutiny if it were applied to an injury occurring near the end of the statutory period.<sup>140</sup>

### III. THE FUTURE OF REPOSE STATUTES

The United States Supreme Court's statements on the reasonableness requirement for statutes of limitation, coupled with lower court opinions on unreasonably short repose periods, leave the Court with several alternatives for resolving a due process challenge to a statute of repose. First, the Court may hold statutes of repose per se unconstitutional. Such an approach is unlikely since the Court has frequently endorsed the policies that underlie statutory time bars.<sup>141</sup>

Second, the Court may hold repose statutes unconstitutional only in those circumstances in which such statutes act as very abbreviated statutes of limitation. Straightforward application of the constitutional principles the Court has already announced with respect to statutes of limitation leads toward such a result.<sup>142</sup> Inherent in such an approach, however, is the need for the court to resolve what constitutes a reasonable time period for a plaintiff to commence an action already accrued.

Although judges are inclined to leave the determination of the appropriate period to the legislature, the courts must ultimately pass on the constitutionality of the statutory period.<sup>143</sup> The circumstances under which a cause of action arises cannot be ignored in a judicial determination of reasonableness. Obviously, the time required to commence a personal injury claim arising out of a minor automobile collision is different from that required to investi-

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134. *Pacific Indem. Co. v. Thompson-Yaeger, Inc.*, 260 N.W.2d 548 (Minn. 1977).

135. 318 N.W.2d at 843-44.

136. *Id.* at 844.

137. OHIO REV. CODE ANN. § 2305.131 (Baldwin 1971).

138. 740 F.2d 1362 (6th Cir. 1984).

139. *Id.* at 1373.

140. *Id.* at 1367 n.7.

141. See *supra* notes 69-76 and accompanying text.

142. See *supra* notes 83-97 and accompanying text.

143. See *supra* notes 98-104 and accompanying text.

gate and analyze potential claims resulting from a major industrial explosion. The restriction placed on attorneys by Federal Rule of Civil Procedure 11<sup>144</sup> may also provide an important benchmark in the definition of a reasonable time for filing suit in federal court. Rule 11 prohibits attorneys from filing frivolous claims and subjects them to sanctions for failure to ascertain fully the validity of allegations they make on behalf of a client.<sup>145</sup> To avoid conflict with rule 11 the definition of a reasonable period within which to file suit thus must include time required for an attorney to investigate adequately the culpability of suspected tortfeasors. Even if a state's rules of procedure do not contain a provision analogous to rule 11, the state cannot ignore the federal rule. Repose statutes, like statutes of limitation, are substantive laws under *Erie Railroad Co. v. Tompkins*.<sup>146</sup> Under *Erie* federal courts sitting in diversity actions must apply state substantive law unless it directly conflicts with federal procedural law.<sup>147</sup> State legislatures thus must provide flexibility in the application of repose time bars in order to avoid a direct conflict between the statutory time deadline and the reasonable time requirement implicit in rule 11.

In the absence of a ruling on repose statutes by the high Court, state courts will increasingly require legislatures to reconsider the fairness and constitutionality of strict application of statutes of repose. In recognition of the inequities that can result from repose statutes, some states have already included grace periods that extend the repose deadline for causes of action accruing shortly before the time bar.<sup>148</sup> The Tennessee Legislature, for example, adopted a four-year statute of repose to limit liability arising out of design and construction defects.<sup>149</sup> The statute also provided, however, an additional year for commencement of suit if property damage or personal injury occurred during the fourth year after substantial completion of the

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144. FED. R. CIV. P. 11.

145. *Id.*

146. 304 U.S. 64, 78 (1938) (state substantive law applies in diversity cases); see *Hartford Fire Ins. Co. v. Lawrence*, 740 F.2d 1362, 1365 (6th Cir. 1984).

147. *Hanna v. Plumer*, 380 U.S. 460, 471 (1965) (Federal Rules of Civil Procedure govern when in direct conflict with state statute); see *Walker v. Armco Steel Corp.*, 446 U.S. 740, 749-50, 750 n.9 (1980) (reaffirming *Hanna* analysis, but applying state statute of limitations because the Court found no direct conflict between the state statute and FED. R. CIV. P. 3); see also *Affholder, Inc. v. Southern Rock, Inc.*, 746 F.2d 305, 307-09 (5th Cir. 1984) (discussion of the differences between the *Hanna* and *Erie-Walker* analyses of conflicts between federal and state procedural law).

148. *E.g.*, Illinois' statute provides that:

No action . . . may be brought . . . after 12 years have elapsed from the time of such act or omission. However, any person who discovers such act or omission prior to expiration of 12 years from the time of such act or omission shall in no event have less than 2 years to bring an action . . . .

ILL. ANN. STAT. ch. 110, § 13-214(b) (Smith-Hurd 1982). The Texas statute contains a time bar after ten years from the date of substantial completion. It provides, however, that "[i]f the claimant presents a written claim for damages, contribution, or indemnity to the architect or engineer within the 10-year limitations period, the period is extended for two years from the day the claim is presented." TEX. CIV. PRAC. & REM. CODE ANN. § 16.008 (1986). For additional examples of grace periods, see CAL. CIV. PROC. CODE ANN. § 337.1(3)(b) (West 1983); N.D. CENT. CODE § 28-01-44(2) (1974). See *supra* note 33 regarding other types of statutory provisions designed to mitigate the harsh effects of repose statutes.

149. TENN. CODE ANN. § 28-314 (1965).

construction.<sup>150</sup> Interpreting the repose statute, the Tennessee Supreme Court said that the grace period serves to prevent the patent injustice that would result if a cause of action accrues during the last year of the statutory period.<sup>151</sup>

Product liability statutes may also contain adjustments similar to such grace periods. For example, the Model Uniform Product Liability Act<sup>152</sup> and Kentucky's Product Liability Act<sup>153</sup> avoid a strict repose time bar by establishing a rebuttable presumption against product defectiveness. This presumption allows the plaintiff to commence an action after the statutory period, but also requires the plaintiff to bear the burden of proving that the injury resulted from a defect in the product itself rather than from misuse of the product.

Any statutory scheme endorsed by the Supreme Court should strike a balance between the important social policies, such as barring stale claims, that repose statutes are designed to promote and plaintiffs' due process right of reasonable access to the courts. Such a compromise would require the retention of a statutory time bar to prevent indefinite potential liability of members of the construction and manufacturing industries. The time bar must, however, be tempered by a mechanism such as a grace period or a rebuttable presumption provision in order to prevent industry members from completely escaping their liability to plaintiffs whose causes of action accrue shortly before the time bar attaches. A grace period would provide plaintiffs with a reasonable opportunity to institute a proceeding on their vested cause of action, and, thus, would preserve the plaintiffs' due process right of access to the courts. Similarly, providing plaintiffs the opportunity, after a statutory repose period has passed, to rebut a presumption of defendant nonliability should also solve the due process problem as long as the burden of proof placed on the plaintiff is not so overwhelming as to constitute a denial of access to the courts.

The grace period approach would favor defendants in that the term of their potential liability would extend for only a relatively brief time beyond

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150. *Id.* § 28-315.

151. *Watts v. Putnam County*, 525 S.W.2d 488, 491 (Tenn. 1975).

152. MODEL UPLA § 110(B)(1), *supra* note 20, at 62,732 (proposed statute of repose provides: "In claims that involve harm caused more than ten (10) years after time of delivery, a presumption arises that the harm was caused after the useful safe life expired. This presumption may only be rebutted by clear and convincing evidence."). The Model UPLA is the result of an eighteen-month study commissioned by the Commerce Department for the purpose of determining problems in, and possible solutions to, tort litigation of product liability claims. The Commerce Department presented the model code in the interest of introducing uniformity and stability into product liability tort law. MODEL UPLA, *supra* note 20, at 62,714. See generally, Twerski & Weinstein, *A Critique of the Uniform Products Liability Law—A Rush to Judgment*, 28 *DRAKE L. REV.* 221 (1979) (discussion of the Commerce Department's proposed model code).

153. KY. REV. STAT. § 411.310(1) (1978) provides:

(1) In any product liability action, it shall be presumed, until rebutted by a preponderance of the evidence to the contrary, that the subject product was not defective if the injury, death or property damage occurred either more than five (5) years after the date of sale to the first consumer or more than eight (8) years after the date of manufacture.



the statutory repose period. For example, a one-year grace period added to a five-year statute of repose would bar the commencement of a suit at six years after completion of construction or manufacture. The rebuttable presumption approach, on the other hand, would probably tend to favor plaintiffs. If a latent defect manifested itself after the repose period, the plaintiff could, with sufficient evidence, overcome the presumption that the defect was due to misuse rather than negligent manufacture or construction. The Court could allow the states latitude in selecting the grace period, rebuttable presumption, or some third approach for providing plaintiffs access to the courts. Statutes of repose without some such mechanism for ameliorating their harsh effects, however, should be declared unconstitutional as a deprivation of due process.<sup>154</sup>

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154. Implying a grace period or holding the strict application of a statute of repose unconstitutional would not violate the defendant's constitutional rights through the impermissible retroactive effect of lifting the time bar. The defendant does not have a constitutional right to be free from liability. *Chase Sec. Corp. v. Donaldson*, 325 U.S. 304, 314, 316 (1945); see *Campbell v. Holt*, 115 U.S. 620, 628-29 (1885) (state legislature may constitutionally restore to the plaintiff his remedy by repeal or extension of a lapsed statute of limitations so long as the lapse has not conferred on the defendant title to real or personal property). In *Chase* the Court declined to overrule *Campbell* and refused to find the Minnesota legislature's passage of a special retroactive statute of limitations, MINN. STAT. § 3996-24 (Supp. 1941), an unconstitutional deprivation of the defendant's fourteenth amendment rights. 325 U.S. at 315-16; see McGovern, *supra* note 8, at 615.