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THE COUNTER-ATTACK TO RETAKE THE CITADEL CONTINUES: AN ANALYSIS OF THE CONSTITUTIONALITY OF STATUTES OF REPOSE IN PRODUCTS LIABILITY

ANDREW R. TURNER

In 1960, the year of the "fall of the citadel," in the words of Dean Prosser, approximately 50,000 products liability suits were brought. Since then, the imposition of strict liability and the elimination of the requirement of privity have enlarged the scope of a manufacturer's potential liability to consumers of his product. Due at least in part to these relaxed requirements the number of products liability suits has increased; in 1972 some 500,000 cases were filed and in 1977 over 1,000,000 were brought. The rising number of claims has led to dramatic increases in the cost of products liability insurance. Higher insurance costs in turn have led many companies to implement self-insurance programs or to accept higher figures for deductibles in their commercial products liability insurance policies as an alternative to passing the increased costs along to the consumer in the form of higher prices.

The most significant factor alleged to be the cause of the nationwide products liability insurance problem is the responsibility of manufacturers and sellers for older products—the "long-tail" prob-

1 Prosser, The Fall of the Citadel, 50 Minn. L. Rev. 791 (1966) [hereinafter cited as Fall of the Citadel]. Although Prosser referred to the citadel of privity, this paper will use the term more generally to mean the citadel of strict liability.


3 The Research Group, Inc., Interagency Task Force on Product Liability, 5 Product Liability: Legal Study 2 (1977) [hereinafter cited as Task Force Legal Study].

4 G. Sullivan, supra note 2, at 2.

5 Id. at 16.


8 G. Sullivan, supra note 2, at 17, 150.

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The long-tail problem involves manufacturers' and sellers' continued responsibility for defects in products many years after the products have left their control.\textsuperscript{9} Statistics compiled by the Insurance Services Office show that the concern of manufacturers and their insurers about the magnitude of the long-tail problem may be unwarranted.\textsuperscript{10} Nonetheless, their concern about potential losses associated with older products is an important element in the increase in the costs of liability insurance.\textsuperscript{11}

There is a fundamental difference of opinion over the issue of the need to reform tort law to resolve the long-tail problem.\textsuperscript{12} Plaintiffs' attorneys contend that the present system is satisfactory,\textsuperscript{13} while manufacturers and insurers disagree and have proposed a variety of reforms in the law of products liability.\textsuperscript{14} The most prominent of these proposals has been the call for adoption of a statute of repose, essentially a statute of limitations based on the age of the product rather than the date any loss or injury occurred.\textsuperscript{15} In its effect, a statute of repose defines substantive rights and may preclude a right to sue from coming into existence.\textsuperscript{16} Modifying existing two- or three-year statutes of limitation so that they begin to run when a product enters commerce would have a direct and


\textsuperscript{11} \textit{See} \textit{Insurance Services Office, Product Liability Closed Claim Survey: A Technical Analysis of Survey Results} 81-83 (1977) [hereinafter cited as \textit{ISO Closed Claim Survey}], indicating that over 97\% of all products liability claims arose within six years of purchase, and in situations involving capital goods over 83\% arose within ten years of manufacture. \textit{But see Senate Small Business Hearings, supra note 7, at 471, wherein the National Machine Tool Builders' Association provided information showing that almost one half of the product suits against its members involve machines over twenty years old.}

\textsuperscript{12} \textit{Task Force Legal Study, supra} note 3, at VII-21.

\textsuperscript{13} G. Sullivan, \textit{supra} note 2, at 257.

\textsuperscript{14} \textit{See, e.g., Senate Small Business Hearings, supra note} 7, at 660-83 (testimony of Robert G. Begam, President, Association of Trial Lawyers of America).

\textsuperscript{15} G. Sullivan, \textit{supra} note 2, at 257. \textit{See generally Senate Small Business Hearings, supra} note 7.

\textsuperscript{16} G. Sullivan, \textit{supra} note 2, at 257.

immediate impact on reducing products liability insurance costs.\textsuperscript{18} The statutes which have been proposed, however, would operate as “outer” statutes of limitations, abolishing the right to bring any products liability lawsuits after the passage of an extended period of years running from the date of manufacture or first sale of the product.\textsuperscript{19} Such a statutory scheme would reduce insurance underwriters’ fear of claims arising from injuries caused by very old products because it would provide a clearly delineated basis for the exercise of underwriting judgment.\textsuperscript{20} Legislatures currently have adopted products liability statutes of repose in eighteen states.\textsuperscript{21}

I. BACKGROUND: THE FALL OF THE CITADEL

The citadel of privity evolved from \textit{Winterbottom v. Wright}\textsuperscript{22}


\textsuperscript{19} \textit{See, e.g.,} 1 OR. REV. STAT. § 30.905(1) (1979), which reads: “[A] product liability civil action shall be commenced not later than eight years after the date on which the product was first purchased for use or consumption.” \textit{See also} state statutes cited in note 56 infra; \textit{DEFENSE RESEARCH INSTITUTE, PRODUCTS LIABILITY POSITION PAPER 22-23 (1976); TEXAS ASSOCIATION OF DEFENSE COUNSEL, PRODUCTS LIABILITY POSITION PAPER 14 (1978); Massery, \textit{Date-of-Sale Statutes of Limitation—A New Immunity for Product Suppliers}, 1977 INS. L.J. 535 (1977).}

\textsuperscript{20} \textit{TASK FORCE INSURANCE STUDY, supra} note 18, at 4-92. By limiting a manufacturer’s liability for defective products to a clearly defined period of years, insurance underwriters can estimate more closely the probable number of defects which will occur.


\textsuperscript{22} 152 Eng. Rep. 402, 10 M&W 109 (Ex. 1842). \textit{See} 1 PROD. LIAB. REP. (CCH) § 4500 (1970). The case held that breach of a contract to keep a mailcoach in repair gave no cause of action against the contractor to the driver who was injured when the coach collapsed due to a latent defect. Lord Abinger, Chief Baron, commented that no action would lie because:
which held that a contractor, manufacturer or vendor would not be liable in tort to third parties who were not in contractual privity with it.\textsuperscript{23} Ten years later, in 1852, the New York Court of Appeals in *Thomas v. Winchester*\textsuperscript{24} recognized a major exception to the requirement of privity, holding that a seller would be liable to a third person for negligence in the preparation and sale of inherently dangerous products.\textsuperscript{25} There the fortress of liability for negligence stood for over sixty years until, in 1916, Judge Cardozo so widened the exception for inherently dangerous products\textsuperscript{26} that the exception effectively swallowed the rule.\textsuperscript{27} In *MacPherson v. Buick Motor Co.*\textsuperscript{28} the court decided that manufacturers, by placing their products on the market, assumed a responsibility to the consumer to exercise reasonable caution in manufacturing those products, not because of any contractual relationship between the parties but because of the foreseeability of harm if proper care was not used.\textsuperscript{29}

The attack on the requirement of privity and the movement towards strict liability continued in cases based upon express warranties\textsuperscript{30} and in implied warranty cases involving food\textsuperscript{31} and prod-


\textsuperscript{24}6 N.Y. 397 (1852). See Prosser, *The Assault Upon the Citadel*, 69*Yale* L.J. 1099, 1100 (1960). *Thomas v. Winchester* held that a pharmacist was liable to a third person for negligently labeling a poison as a harmless medicine.

\textsuperscript{25}6 N.Y. at 409-10. Prosser points out that the categorizing of "inherently dangerous" products led to rather pointless disputes over whether such products as soap, chewing tobacco and beverage containers were inherently dangerous. See W. Prosser, *supra* note 23, at § 96 nn.16-19, and cases cited therein.


\textsuperscript{27}W. Prosser, *supra* note 23, at § 96.

\textsuperscript{28}217 N.Y. 382, 111 N.E. 1050 (1916).

\textsuperscript{29}Id. at 389, 111 N.E. 1054 (1916).


\textsuperscript{31}E.g., Klein v. Duchess Sandwich Co., 14 Cal. 2d 272, 93 P.2d 799 (1939);
ucts for intimate bodily use. Finally, in 1960, the citadel of privity fell. The New Jersey Supreme Court declared that a manufacturer was strictly liable when an article which it had placed on the market, knowing that it was to be used without inspection for defects, proved to have a defect that caused injury to a human. That case, *Henningsen v. Bloomfield Motors*, quickly was accepted as implying a warranty of safety for goods other than food and cosmetics. Three years later the California Supreme Court, in *Greenman v. Yuba Power Products, Inc.*, went beyond *Henningsen* and established the doctrine of strict liability in tort. *Greenman* became a precedent for cases in other jurisdictions and helped to pave the way for the adoption of section 402A of the American Law Institute’s Second Restatement of Torts.

After the fall of the citadel it appeared that consumers had won the battle. Plaintiffs no longer were required to prove negligence by the manufacturer or to show privity with the manufacturer to recover for injuries sustained through the use of defective products. In the last fifteen years, however, faced with an ever-growing

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*Henningsen* v. *Bloomfield Motors*, Inc., 32 N.J. 358, 161 A.2d 69, 77, 83 (1960). The court was unable to see the rationale for differentiating between a fly in a bottled beverage and a defective car with its greater potential for harm. *Id.* at 83. B. F. Goodrich Co. v. Hammond, 269 F.2d 501 (10th Cir. 1959), is considered by some to have been the first decision to break down the walls of the citadel. (The presentation of the development of the law of products liability in this paper is a summation of only two of the major legal barriers which were overcome, and is not intended to be a complete treatment of the development of products liability. See generally *Fall of the Citadel*, supra note 1.)


W. Prosser, supra note 23, at § 97.


Restatement (Second) of Torts § 402A (1965). See Fall of the Citadel, supra note 1, at 802-04.

number of suits, many involving older products,* and the high
costs of defending such suits,* manufacturers and insurers have
begun their counter-attack against the citadel of strict liability.

Various weapons have been suggested for use in this counter-
attack, only one of which is the statute of repose. Another alterna-
tive is an outer statute of limitations based not upon a fixed period
of years but upon the useful safe life of a product. Under this
type of statute, a manufacturer may be held liable only for harms
cased during the useful safe life of the product. The principle
problem with such a statute is that the concept of useful safe life
is unduly vague. Manufacturers are usually relieved of liability
where prolonged use of a product indicates that normal wear and
tear, and not a defect, is responsible for the injury. The question
then arises as to what constitutes the useful life of any given
product so that normal wear and tear may be analyzed and de-
defined. The common law of most states dictates that the age of
an allegedly defective product must be considered in light of its
expected useful life and the stress to which it has been subjected. The Model Uniform Product Liability Act enumerates factors
which may be helpful in analyzing this question,* but the inherent

thorough discussion of the three theories of recovery in products liability cases
(negligence, warranty, and strict liability), see id. at 150-59.

* See text accompanying notes 2-6 supra.

* An Insurance Services Office study determined that in 1976 the average
legal expense of defending a products liability suit involving bodily injury was
$3,500, and that for every dollar paid in claims thirty-five cents was expended
in defending bodily injury cases and forty-eight cents was expended in defending
cases involving property damage. G. SULLIVAN, supra note 2, at 16.

* * Task Force Legal Study, supra note 3, at 27. See also 38 Minn. Stat.
Ann. § 604.03 (West Supp. 1980).

62,714, 62,733 (1979) [hereinafter cited as UPLA Analysis].

* * Id.

* See, e.g., Gates v. Ford Motor Co., 494 F.2d 458 (10th Cir. 1974);
Kaczmarek v. Mesta Mach. Co., 463 F.2d 675 (3d Cir. 1972); Tucker v. Unit

* Comment, supra note 39, at 177-79.

* * UPLA Analysis, supra note 43, at 62,733, citing Kuisis v. Baldwin-Lima-
on crane failed after it had been in use for more than twenty years). As the
Kuisis court observed: "[I]n certain situations the prolonged use factor may
loom so large as to obscure all others in a case." Id.

* * Model Uniform Product Liability Act § 110(a)(1), 44 Fed. Reg. 62,732
vagueness of the concept poses a major obstacle. Another suggestion is to require the plaintiff to adopt and pursue only one theory of recovery, either strict liability, negligence or warranty. Other alternatives include allowing manufacturers to use the state of the art as an absolute defense, requiring courts to select non-partisan expert witnesses, and eliminating the amount of damages sought from the pleadings.

II. STATUTES OF REPOSE

The main purpose of a statute of limitations is to compel the exercise of a right of action within a reasonable time so that the opposing party has a reasonable opportunity to defend itself. The modern rule, often termed the "discovery" rule, is that the statute of limitations does not begin to run until an injury is or

(1979) [hereinafter cited as UPLA]:
(a) The amount of wear and tear to which the product had been subject;
(b) The effect of deterioration from natural causes, and from climate and other conditions under which the product was used or stored;
(c) The normal practices of the user, similar users, and the product seller with respect to the circumstances, frequency and purposes of the product's use, and with respect to repairs, renewals, and replacements;
(d) Any representations, instructions, or warning made by the product seller concerning proper maintenance, storage, and use of the product or the expected useful safe life of the product; and
(e) Any modification or alteration of the product by a user or third party.

40 TASK FORCE LEGAL STUDY, supra note 3, at 36. This suggested modification would, in effect, allow defendants to prevail because of a mistaken choice in pleading. Because it exalts form over substance, it is difficult to see any advantage to this proposal except its recognition that negligence and fault concepts have not been forgotten.

50 Id. at 38-42. This alternative may have the effect of prolonging dangerous industry practices by decreasing the incentive to change those practices. Id. at 39.

51 Id. at 44. Although there would be cost advantages to this alternative, it would entail a loss of the "partisan watchdog." Under the present system, it is up to the finder of fact to weigh the credibility of experts when they conflict. This proposal, however, could lead to full authority being vested in the expert selected by the court, allowing for little or no comparison of competing theories.


53 See generally 51 AM. JUR. 2D Limitations of Action § 17 (1970). This purpose encompasses notions of evidentiary fairness and equity and recognizes realistic problems such as the liability of a successor corporation for the liabilities of its predecessor.
should have been discovered. Because the discovery rule exposes a manufacturer to virtually open-ended liability for defects in its products, manufacturing and insurance industry spokesmen have called for statutes of repose which begin to run earlier, at the time a product is manufactured or is first sold to a consumer or user. Such statutes have been adopted in many states, and the Department of Commerce has promulgated a model uniform act cont-

84 See, e.g., Whitfield v. Roth, 10 Cal. 3d 874, 519 P.2d 588, 112 Cal. Rptr. 540 (1974); Chrischilles v. Griswold, 260 Iowa 453, 150 N.W.2d 94 (1967); Ruth v. Dight, 75 Wash. 2d 660, 453 P.2d 631 (1969). See generally W. Prosser, supra note 23, at § 30. In states not following the discovery rule, it would seem a conventional statute of limitations would provide the protection afforded by a statute of repose.

5 See, e.g., Defense Research Institute, supra note 19, at 20.

56 5 Ala. Code § 6-5-502 (Supp. 1979) ("10 years after the manufactured product is first put to use"); 4 Ariz. Rev. Stat. Ann. § 12-551 (Supp. 1979) ("twelve years after the product was first sold for use or consumption"); 6 Colo. Rev. Stat. § 13-21-403(3) (Supp. 1979) ("[ten years after a product is first sold for use or consumption"); 27 Conn. Gen. Stat. Ann. § 52-577a (West Supp. 1980) ("ten years from the date that such party last parted with possession or control of the product"); 7 Fla. Stat. Ann. § 95.031(2) (West Supp. 1980) ("12 years after the date of delivery of the completed product to its original purchaser"); 29 Ga. Code Ann. § 105-106 (Supp. 1979) ("10 years from the date of the first sale for use"); Ill. Ann. Stat. ch. 83, § 22.2(b) (Smith-Hurd Supp. 1980) ("12 years from the date of first sale, lease or delivery of possession by a seller or 10 years from the date of first sale, lease, or delivery of possession to its initial user, consumer, or other non-seller, whichever period expires earlier"); Ind. Code § 33-1-1.5-5 (Ind. Code Ann. § 34-4-20A-5 (Burns Supp. 1980)) ("ten [10] years after the delivery of the product to the initial user"); 4A Kan. Stat. Ann. § 60-513(b) (1976) ("ten years beyond the time of the act giving rise to the cause of action"); 15 Ky. Rev. Stat. § 411.310(1) (Supp. 1980) ("five (5) years after the date of sale of the first consumer or more than eight (8) years after the date of manufacture"); Neb. Rev. Stat. § 25-224 (Cum. Supp. 1978) ("ten years after the date when the product which allegedly caused the personal injury, death, or damage was first sold or leased for use"); 4A N.H. Rev. Stat. Ann. § 507-D:2 (Supp. 1979) ("12 years after the manufacturer of the final product parted with its possession and control or sold it, whichever occurred last"); 1A N.C. Gen. Stat. § 1-52(16) (Cum. Supp. 1979) ("10 years from the last act or omission of the defendant"); 5A N.D. Cent. Code § 28-01.02 (Supp. 1979) ("within ten years of the date of initial purchase for use or consumption, or within eleven years of the date of manufacture"); 1 Or. Rev. Stat. § 30.905 (1979) ("eight years after the date on which the product was first purchased for use"); 6 S.D. Comp. Laws Ann. § 15-2-12.1 (Supp. 1980) ("six years after the date of the delivery of the completed product to its first purchaser or lessee who was not engaged in the business of selling such product"); 5 Tenn. Code Ann. § 23-3703 (Cum. Supp. 1979) ("ten years from the date on which the product was first purchased for use or consumption, or within one year after the expiration of the anticipated life of the product, whichever is the shorter"); 9A Utah Code Ann. § 78-15-3 (1977) ("six years after the date of initial purchase for use or consumption, or ten years after the date of manufacture").
taining a statute of repose. While suit still must be filed within the usual statutory period running from the date of discovery of the loss or injury, the suit also must be filed within a longer period running from the date of the product's manufacture or sale to a consumer. If this requirement is not met, the statute of repose, like a conventional statute of limitations, may bar the action. Thus, a statute of repose tends to function like an "outer" statute of limitations, setting forth the maximum allowable time during which suit may be brought, without regard for the date of the plaintiff's injury. Some of the statutes contain an absolute outer limit which may expose them to constitutional challenge based

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87 UPLA, § 110(B), 44 Fed. Reg. 62,732 (1979), which reads as follows:
(B) Statute of Repose.
(1) Generally. 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 life had expired. This presumption may only be rebutted by clear and convincing evidence.
(2) Limitations on Statute of Repose.
(a) If a product seller expressly warrants that its product can be utilized safely for a period longer than ten (10) years, the period of repose, after which the presumption created in subsection (B)(1) arises, shall be extended according to that warranty or promise.
(b) The ten- (10-) year period of repose established in Subsection (B) (1) does not apply if the product seller intentionally misrepresents facts about its product, or fraudulently conceals information about it, and that conduct was a substantial cause of the claimant's harm.
(c) Nothing contained in Subsection (B) shall affect the right of any person found liable under this Act to seek and obtain contribution or indemnity from any other person who is responsible for harm under this Act.
(d) The ten- (10-) year period of repose established in Subsection (B) (1) shall not apply if the harm was caused by prolonged exposure to a defective product, or if the injury-causing aspect of the product that existed at the time of delivery was not discoverable by an ordinary reasonably prudent person until more than ten (10) years after the time of delivery, or if the harm, caused within ten (10) years after the time of delivery, did not manifest itself until after that time.

Id. See generally Twerski & Weinstein, supra note 9 (discussion of UPLA).

88 See, e.g., 5 ALA. CODE § 6-5-502 (Supp. 1979); 6 COLO. REV. STAT. § 13-21-403 (Supp. 1979); 4A KAN. STAT. ANN. § 60-513(b) (1976).

89 See generally Note, supra note 7, at 702-03.

90 Some state statutes of repose apply to strict liability and negligence suits, while statutes of repose in other states apply only to strict liability suits. Compare, e.g., 5 ALA. CODE § 6-5-501(2) (Supp. 1979) with 4 ARIZ REV. STAT. ANN. § 12-551 (Supp. 1979).
upon an alleged violation of due process. Others embody a flexible outer limit so that a person who is injured by a defective product a few days before the expiration of the statute of repose may bring suit within the applicable tort statute of limitations, notwithstanding the prohibition within the statute of repose.

A. Benefits and Detriments

Manufacturers of long-lived products, such as aircraft, would benefit from the operation of a statute of repose. Such statutes afford the manufacturer security against the accrual of claims years after its products leave its hands. Three grounds typically are offered in support of these statutes. First, statutes of repose are justified by the policy consideration that persons should be allowed to plan their affairs with a reasonable degree of certainty. This stability, achieved by limiting the time within which a claim may be brought, promotes greater accuracy in determining the costs of liability for defective products. In this way, statutes of repose also contribute to actuarial certainty in the setting of rates for insurance. Second, the statutes are intended to avoid the evidentiary problems which may face the defendant in a suit involving an old product.

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61 See text accompanying notes 171-73 infra.
63 See Massery, supra note 19, at 542-43. Massery notes an example of the possible harshness of the operation of a statute of repose in an aviation accident in which twelve Air Force personnel were killed in a crash of a 20-year-old Convair T-29. Adams v. Gen. Dynamics Corp., 385 F. Supp. 890 (N.D. Cal. 1974), aff'd, 535 F.2d 489 (9th Cir. 1976), cert. denied, 432 U.S. 905, rehearing denied, 434 U.S. 881 (1977). Discovery in the case revealed that the manufacturer had long been aware of the incidence of defective frame castings in that model of aircraft, the cause of the crash, yet failed to warn of the danger. If a statute of repose had been in force in this case the plaintiffs would have been barred from bringing suit, despite the fact that the manufacturer may have hidden the fatal defect from the aircraft's users. Massery further points out that the average age of a Boeing 707 now in fleet use is ten years.
64 Wallace, Products Liability—Current Developments and Directions, 43 Ins. Counsel J. 519, 525 (1976).
66 See UPLA Analysis, supra note 43, at 62,733.
67 See id. at 62,734. The evidentiary problems in suits involving older products
Third, some proponents assert that prolonged safe use of a product is at least an indication that it was not defective at its delivery. 68

The opponents of statutes of repose are quick to point out the major inequity inherent in the statutes—that they may bar meritorious claims. 69 This criticism is particularly true in cases where product-related injuries are not discoverable for many years after exposure to the defect or where injuries are caused by defects in durable goods. 70 Further, the opponents raise serious doubts whether any significant control of insurance costs would result from adoption of statutes of repose. 71 A study by the Insurance Services


68 UPLA Analysis, supra note 43, at 62,734; contra, Massery, supra note 19, at 543. Massery states that the fact that a product operates for a long time without any defects does not necessarily lead to the conclusion that all such products are free of defects. He points out that manufacturers can discover and have discovered defects in older products. Therefore, Massery argues, for a manufacturer to state that because it is unable to foresee defects in old products, it should not be held responsible for those defects, is "quite simply an inaccuracy." Id. See also 6 COLO. REV. STAT. § 13-21-403(3) (Supp. 1979) and 15 KY. REV. STAT. § 411.310(1) (Supp. 1980), which raise a presumption that the product was not defective if the accident occurred more than a specified time after the product was first sold.


70 In Diamond v. E. R. Squibb & Sons, Inc., 366 So. 2d 1221 (Fla. App. 1979), recovery was denied the child of a woman who had taken a drug while pregnant in 1956. In 1976 it was discovered that the drug caused cancer in the children of mothers who had taken it. Plaintiff, who filed suit in 1977, was barred by the twelve-year statute of repose which, the court ruled, had expired in 1968. Id. at 1222. See also 5 TENN. CODE ANN. § 23-3703(b) (Cum. Supp. 1979) (excepting from operation of statute of repose any action resulting from exposure to asbestos). See generally Johnson, supra note 69, at 690-91 (discussing injuries arising many years after chemical exposure and injuries caused by durable goods); Massery, supra note 19, at 544 (discussing "diseases of progress" such as asbestosis and berylliosis).

71 Johnson, supra note 69, at 680, 691; Massery, supra note 19, at 545. See also TASK FORCE INSURANCE STUDY, supra note 18, at 4-92 to 94.
Office disclosed that only 2.8% of all claims for bodily injury arise more than ten years from the date of a product's manufacture. Finally, there are fears that an absolute statutory bar would reduce the incentive for manufacturers to work for long-term product safety. Product liability lawsuits give manufacturers that incentive to ensure the long-term safety of their products. If a statute of repose were enacted, the manufacturer would no longer have as strong an economic reason to produce a product that would continue to be safe beyond the statutory period.

It has been suggested that a statute of repose does little more than codify a uniform "wearing-out time" for all products. Because of the wide variations in product life, any statutory period sufficiently long to avoid the inequity of a common limitation for all products would have little, if any, impact on insurance costs. Although similar statutes have been enacted to benefit architects and builders, the differences between buildings and other structures and manufactured goods militate against extension of statutes of repose to manufacturers of products. Buildings operate against gravity twenty-four hours a day so that any structural weaknesses are likely to appear within a short time. Some products, however, may sit unused for several years, unexposed to the risks of use. As one author noted: "To grant the same immunity to product manufacturers as that granted to architects is to deny the realities of product use and exposure."

Courts have frequently disregarded the policy of repose inherent
in statutes of limitation where the interests of justice required vindication of the plaintiff’s rights.83 Even proponents of statutes of repose have recognized that courts may liberalize negligence rules in favor of plaintiffs to avoid the harsh operation of the statutes.84 This action may be explained because of the heavy burden on a plaintiff in a products liability case. The plaintiff must show that the defect was present in the product when it left the defendant’s hands and that it was not caused by normal wear or improper maintenance.85 Realistically, he also may have to explain why other persons over the years have not been similarly injured by an old product.” In addition, the plaintiff is faced with the same evidentiary problems burdening the defendant manufacturer.86 Therefore, it appears that obtaining the two benefits stressed by proponents of the statutes—actuarial certainty and avoidance of evidentiary problems88—is uncertain given the detrimental effects such statutes may have.89

B. Tolling

There are several instances in which the running of a statute of repose is extended or tolled. A statute of repose is extended when the manufacturer expressly warrants the product for longer than the statutory period.90 In a jurisdiction with a statute of repose,

84 Note, supra 7, at 718 (prediction by commentator for the Independent Insurance Agents of America).
88 See UPLA ANALYSIS, supra note 43, at 62,733-34; Wallace, supra note 64, at 525; Comment, supra note 67, at 371.
89 See Johnson, supra note 69, at 689-91; Massery, supra note 19, at 544, 546-47; Phillips, supra note 10, at 673; Vargo & Leibman, supra note 69, at 250.
however, one may inquire whether the statute would reduce the economic incentive for manufacturers to warrant their products for such a longer period or to warn of or to repair defects discovered after the statutory period. This criticism is especially applicable to capital equipment.

9 Unless the manufacturer expressly warrants that a capital good will last beyond the statutory period, a plaintiff injured after that period will be barred from recovery. It seems illogical to afford a manufacturer a blanket exemption beyond the statutory period merely because he avoids using language establishing an express warranty.

Whether a statute of repose would be tolled by conventional tolling exceptions is unclear. A court might use such exceptions to ameliorate the harsh effects of the operation of the statute, weakening its impact. The application of the tolling exceptions would undermine the purpose of the statute by extending the time during which a manufacturer may be held liable beyond the statutory period. Several jurisdictions have incorporated tolling exceptions within the statutory language. If the statute of repose does not apply tolling provisions or is interpreted to prevent tolling,

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91 See generally Twerski & Weinstein, supra note 9, at 244-45.
92 Id. Under statutes which raise only a presumption against the plaintiff, e.g., 6 COLO. REV. STAT. § 13-21-403(3) (Supp. 1979) and UPLA § 110(B), 44 Fed. Reg. 62,732 (1979), it would seem the plaintiff may be able to overcome the presumption.
93 See Twerski & Weinstein, supra note 9, at 244.  
94 Id.
95 Likely tolling exceptions include situations involving continuing duties (such as to correct or warn) and subsequently arising duties (from continuous servicing), cumulative injuries from multiple uses of the defendant's product (such as conditions which may develop after multiple doses of drugs or repeated exposure to asbestos), contribution or indemnity, fraudulent concealment, death, infancy, insanity, imprisonment, and absence of the defendant from the jurisdiction. See Minichello & Orpett, supra note 18, at 415; Phillips, supra note 10, at 666-72. See also Moviecolor Ltd. v. Eastman Kodak Co., 228 F.2d 80 (2d Cir. 1961) (fraudulent concealment).
96 Phillips, supra note 10, at 666-72.
97 Phillips, supra note 65, at 374-75.
one commentator has suggested that it may be held to violate due process protections. 99

III. CONSTITUTIONAL ISSUES

The law dealing with constitutional issues raised in cases involving products liability statutes of repose is sparse. Only Florida has ruled explicitly on the constitutionality of a products liability statute of repose, 100 although courts in Connecticut, Oregon and North Carolina have applied statutes of repose in products liability cases. 101 In the analogous area of statutes of repose for architects and builders, courts have considered arguments based upon the equal protection and due process clauses and upon various state constitutional provisions.

In Connecticut, the Supreme Court applied a three-year tort statute of limitations running from the date of the "act or omission complained of" 102 to bar a strict liability claim for injuries arising from an automobile accident which occurred in 1961. 103 The car had been sold in 1959; the accident occurred in October of 1961, and the plaintiff did not file suit until July of 1964. To explain the anomalous possibility that an action may be barred before it accrues, the court cited a case it had decided several years earlier upholding the constitutionality of a related statute. 104

99 Massery, supra note 19, at 548. See also Ind. Code § 33-1-1.5-5 (Ind. Code Ann. § 34-4-20A-5 (Burns Supp. 1980)) ("applies to all persons regardless of minority or legal disability"); 5A N.D. Cent. Code § 28-01.1-02(2) (Supp. 1979) ("shall apply to all persons, regardless of minority or other legal disability"); 9A Utah Code Ann. § 78-15-3(2) (1977) ("shall apply to all persons, regardless of minority or other legal disability").

100 Griffis v. Unit Crane & Shovel Corp., 369 So. 2d 342 (Fla. 1979).


The Oregon Supreme Court, in a products liability setting, upheld the constitutionality of that state's ten-year negligence statute of repose.\textsuperscript{105} The court stated that there were legitimate public policies\textsuperscript{106} served by the statute which enabled it to withstand an attack based upon a provision of the Oregon Constitution guaranteeing a remedy for every injury.\textsuperscript{107} Three years later, in 1977, the Oregon Legislature passed an eight-year products liability statute of repose.\textsuperscript{108}

Prior to 1979, the North Carolina courts had avoided the typically harsh effects of the operation of statutes of repose by interpreting that state's statute\textsuperscript{109} to enlarge rather than restrict the time in which to sue where a plaintiff's injury was "not readily apparent" at the time it occurred.\textsuperscript{110} The courts interpreted the statute to remedy the failure of North Carolina to adhere to the discovery rule in tort cases.\textsuperscript{111} In jurisdictions which do not follow the discovery rule, the statute of limitations begins to run at the

\begin{center}
in which the court said:
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There is no reason, constitutional or otherwise, which prevents the legislature from enacting a statute . . . which starts the limitation on actions for negligence running from the date of "the act or omission complained of," even though at that date no person has sustained damage and therefore no cause of action has come into existence.


\textsuperscript{106} The policies the court noted were the lack of evidence after the lapse of long periods of time and the idea of allowing people after the passage of a reasonable time to plan their affairs with a degree of certainty, free from the disruptions of protracted and unknown potential liability. 530 P.2d at 56.

\textsuperscript{107} Id. at 57 (interpreting OR. CONST. art. I, § 10, which reads: "[E]very man shall have remedy by due course of law for injury done him in his person, property, or reputation").

\textsuperscript{108} 1 OR. REV. STAT. § 30.905 (1977).

\textsuperscript{109} 1A N.C. GEN. STAT. § 1-15(b) (Cum. Supp. 1977) (revised and superceded, 1A N.C. GEN. STAT. § 1-52(16) (Cum. Supp. 1979)). The pertinent provisions of the old statute read:

[A] cause of action . . . having as an essential element bodily injury to the person or a defect in or damage to property not readily apparent to the claimant at the time of its origin, is deemed to have accrued at the time the injury was discovered . . .; provided that in such cases the period shall not exceed 10 years from the last act of the defendant giving rise to the claim for relief.

\textsuperscript{111} 230 S.E.2d at 409.
date of sale of a product. The North Carolina courts interpreted the statute of repose differently. If an injury was readily apparent when it occurred, the statute would not apply; only if an injury was not readily apparent when it occurred would the statute bar any action, ten years after the date of sale. In 1979 the North Carolina Legislature repealed the statute, replacing it with one clearly worded to reverse the courts' interpretation. As yet, the North Carolina courts have not been called upon to interpret the new statute.

Florida, the only jurisdiction to address directly the constitutionality of a products liability statute of repose, has held its statute unconstitutional. In Griffis v. Unit Crane & Shovel Corp., the trial court granted the defendants' motion for summary judgment based upon the Florida products liability statute of repose. In a per curiam opinion the Supreme Court of Florida reversed the trial court's ruling, citing a case it had decided three weeks earlier, Overland Construction Co. v. Sirmons, in which it had invalidated Florida's statute of repose for architects and builders.

In an earlier case, Bauld v. J. A. Jones Construction Co., the

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113 Id.

114 7 N.C. GEN. STAT. § 1-52(16) (Cum. Supp. 1979), which reads in pertinent part: "Provided that no cause of action shall accrue more than 10 years from the last act or omission of the defendant giving rise to the cause of action." Id.

115 Griffis v. Unit Crane & Shovel Corp., 369 So. 2d 342 (Fla. 1979) (implicitly overturning 7 Fla. STAT. ANN. § 95.031(2) (West Supp. 1980)) (crane over 20 years old).

116 No. 77-6405 (Fla. Cir. Ct. Duval County Aug. 16, 1978), rev'd per curiam, 369 So. 2d 342 (Fla. 1979).

117 The statute provides: "Actions for products liability ... must be begun ... in any event within 12 years after the date of delivery of the completed product to its original purchaser ... regardless of the date the defect in the product ... was or should have been discovered." 7 Fla. Stat. Ann. § 95.031(2) (West Supp. 1980).

118 369 So. 2d 572 (Fla. 1979).
120 357 So. 2d 401 (Fla. 1978).
Florida court had upheld the products liability statute of repose based upon the specific facts of that case. At that time the applicable statute of limitations was four years, and the right to file suit would have expired on July 8, 1976. Meanwhile, the Florida Legislature had passed the products liability statute of repose which provided that the plaintiff had until January 1, 1976 to file suit in any action that would be barred under the new law but that was not barred under the old law. Bauld failed to file suit until July 6, 1976. In upholding the statute, the court pointed out that the revisions in question did not abolish any right of access to the courts, and that Bauld had been allowed a reasonable grace period in which to file suit. The key difference between Bauld and Overland Construction Co. and Griffis was that in the latter cases the plaintiffs' causes of action did not arise until after the running of the period of repose. Since no judicial forum was available to the plaintiffs, the court held that the statute violated Article I, section 21 of the Florida Constitution, which provides that "[t]he courts shall be open to every person for redress of injury, and justice shall be administered without sale, denial or delay." In construing that constitutional provision, the court required the legislature either to provide a reasonable alternative or to show overpowering public necessity before it abolished a protected statutory or common law right.

Because of the similarity of statutes of repose for architects and builders and for products liability, the law and the reasoning of cases construing the former should be equally applicable to the latter. The constitutional decisions construing statutes of repose for architects and builders are plentiful. Jurisdictions addressing the constitutionality of such statutes have split in their decisions.

121 Id. at 402. In 1961 the defendant installed a pneumatic message conveyor system which injured the plaintiff in 1972.
122 7 FLA. STAT. ANN. § 95.11(4) (West Supp. 1980).
124 Telephone interview with John Lloyd at Lloyd & Henninger, attorney for Pearl Bauld (February 20, 1980).
125 369 So. 2d at 402-03.
126 FLA. CONST. art. I § 21. See notes 174-83 infra, and accompanying text.
127 See Kluger v. White, 281 So. 2d 1 (Fla. 1973).
128 E.g., Griffis v. Unit Crane & Shovel Corp., 369 So. 2d 342 (Fla. 1979).
129 The following cases held a state statute constitutional: Smith v. Allen-
One jurisdiction, faced with varying facts, has both upheld and held unconstitutional its statute. At least forty-three jurisdictions have enacted such statutes of repose.


In Oole v. Oosting, 82 Mich. App. 291, 266 N.W.2d 795 (1978), the Michigan Court of Appeals held that the Michigan statute did not violate due process, but the court did not consider the issue of equal protection. Later that year, however, the court held that the statute violated the equal protection clause. Muzar v. Metro Town Houses, Inc., 82 Mich. App. 368, 266 N.W.2d 850 (1978). Later in 1978 the court refused to consider equal protection challenges raised by plaintiffs who were injured by design defects in products; the court stated that the plaintiffs had no standing to raise an equal protection issue. O'Brien v. Hazelet & Erdal, Consulting Engrs., 84 Mich. App. 764, 270 N.W.2d 690, 691 n.2 (1978); Bouser v. City of Lincoln Park, 83 Mich. App. 167, 268 N.W.2d 332, 335 n.5 (1978).

A. Equal Protection

The architects' and builders' statutes of repose have been successfully challenged on a variety of grounds, but the most common challenge has been that the statutes deny equal protection of the law to persons not covered by them. The arguments in architects' and builders' cases challenge the legislative classification as it denies equal protection to owners and materialmen. In products liability cases, an argument would exist that the challenged statute unreasonably includes certain persons, such as manufacturers, third-party owners of products and premises, and retailers, while it excludes others, such as distributors and repairmen. Most of the state statutes, however, are worded to avoid this infirmity, either by attempting to enumerate all the possible classes of products liability defendants or by applying the statute to all actions for damages arising in a products liability setting. It could also be argued that the statute unreasonably applies to persons who suffer injuries from defective products after the expiration of the statutory period, while it does not affect those injured by a product within the period.

None of the statutes apply expressly to actions against the owner of the product or the owner of the premises. The owner of the product which caused the accident or the owner of the premises where the accident occurred thus may be subject to lia-


134 See Vargo & Leibman, supra note 69, at 252.

135 See, e.g., ILL. ANN. STAT. ch. 83, § 22.2 (Smith-Hurd Supp. 1980) (“one who . . . sells, distributes, leases, assembles, installs, produces, manufactures, fabricates, prepares, constructs, packages, labels, markets, repairs, maintains, or otherwise is involved in placing a product in the stream of commerce.”).

136 See, e.g., 9A UTAH CODE ANN. § 78-15-3 (1977) (“where that action is based upon . . . : (a) Breach of any implied warranties; (b) Defects in design, inspection, testing or manufacture; (c) Failure to warn; (d) Failure to properly instruct in the use of a product; or (e) Any other alleged defect or failure . . . in relation to a product.”).

137 See Vargo & Leibman, supra note 69, at 252; Brief for Amicus Curiae, Academy of Florida Trial Lawyers, at 11-14, Griffis v. Unit Crane & Shovel Corp., 369 So. 2d 342 (Fla. 1979).
bility stemming from an accident involving an older product.\textsuperscript{138} The manufacturer of the injury-causing product, however, may escape liability entirely if the statutory period of repose has expired. It would thus seem that an equal protection unreasonable classification argument could be made,\textsuperscript{139} just as it could be with the statutes that fail to extend protection to no one but manufacturers and sellers.\textsuperscript{140} Third-party owners of products and premises could argue that the statute makes an unreasonable classification by immunizing the guilty manufacturer but not shielding them from liability.\textsuperscript{141}

Any definite statutory period of repose may virtually insulate manufacturers of durable goods from any products liability actions and may deny plaintiffs any chance of recovery for injuries from long-lived goods.\textsuperscript{142} Thus an equal protection argument could be made that statutes of repose make an unreasonable distinction between similarly-situated manufacturers and between similarly-situated plaintiffs.\textsuperscript{143} One may legitimately question the validity of arbitrarily distinguishing between makers of short- and long-lived products.\textsuperscript{144} It seems, however, that the legislature would be entitled to make such a classification\textsuperscript{145} as the contingencies of product life make the actual time of product breakdown a question of chance.\textsuperscript{146} Yet the class into which a manufacturer or plaintiff then may fall—one involving injuries either before or after the statutory period—would be equally a matter of chance.\textsuperscript{147}

In any equal protection case the court must decide what standard

\textsuperscript{138} Vargo & Leibman, supra note 69, at 252.
\textsuperscript{139} Id.
\textsuperscript{141} Vargo & Leibman, supra note 69, at 252.
\textsuperscript{142} See Twerski & Weinstein, supra note 9, at 244.
\textsuperscript{143} Massery, supra note 19, at 545.
\textsuperscript{144} See Twerski & Weinstein, supra note 9, at 244. Assume that two manufacturers, M1 and M2, both manufacture an identical product X. Consumer C1 is injured by X1 before the running of the statutory period, and consumer C2 is injured by X2 after the statutory period expires. C1 may sue M1, but the suit by C2 against M2 is barred even though there appears to be no reasonable basis for treating C2 differently than C1.
\textsuperscript{145} TASK FORCE LEGAL STUDY, supra note 3, at 10-11.
\textsuperscript{146} See Comment, supra note 39, at 176.
\textsuperscript{147} Id.
Three tests are used: the "strict scrutiny" test, the "rational basis" test, and the "fair and substantial relation" test. The strict scrutiny test has been held to be inapplicable to statutes of repose since no fundamental rights or suspect classifications are involved. In applying the rational basis test, courts examine not only whether a classification results in some inequality, but also whether there exists any rational or reasonable justification for the classification. Furthermore, in recent cases not involving fundamental rights or suspect classifications, some courts have inquired whether the classification bears a fair and substantial relation to the legitimate objects of the legislation. That test may require, for example, a showing that adoption of the statute of repose will lead to fewer product liability claims and lower insurance premiums; it thus subjects the statute to a higher standard of constitutional review than that applied under the rational basis test.
The rational basis test is used frequently in considering equal protection challenges to statutes of repose. Some courts have found that the immunity granted architects and builders violates this test when others similarly situated, such as property owners, are not immunized from liability. Other courts, however, have had no difficulty in sustaining such statutes against the same argument.

The Supreme Court of Arkansas and the New Mexico Court of Appeals found reasons to differentiate between owners and materialmen and the protected architects and builders. The Arkansas court stated:

[Owners and materialmen] are not in the same class with . . . [architects and builders]. Particularly is this true after construction is substantially completed and accepted by the owners. Part of acceptance is to accept some future responsibility for the condition of the premises.

The analysis of the New Mexico Court of Appeals is clearer. It distinguished owners because the liability of owners and occupiers of land under New Mexico law has a different historical background than that of architects and contractors. The court dispractice crisis existed and that the challenged legislation would substantially help to avert that crisis).

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References:


158 The Arkansas statute protects “any person performing or furnishing the design, planning, supervision or observation of the construction or the construction and repair of such improvement . . .” 3B ARK. STAT. ANN. § 37-238 (Supp. 1979).


tistinguished materialmen because defects are easier to find in a materialman's work than in a contractor's special jobs, and because the evidentiary problems facing architects and contractors are greater than those facing materialmen.\textsuperscript{164} Therefore the difference in result is partially due to the wording of the particular statutes,\textsuperscript{165} and partially due to the interpretations given the statutes by the respective courts.

B. Due Process

The principal due process argument made in any attack on statutes of repose is that the legislature cannot abolish common law rights.\textsuperscript{166} Although a vested cause of action is properly within the protection of the due process clause,\textsuperscript{167} there is no constitutional rule that prohibits a legislature from abolishing a right before it vests.\textsuperscript{168} A legislature also may modify a vested right if it provides a reasonable alternative to enforce the right;\textsuperscript{169} if it does not do so, the statute may violate due process.\textsuperscript{170} Where the legislature provided for a reasonable grace period in which suits not barred under the former law could be brought before becoming barred by the new statute of repose, the Florida Supreme Court held that

\textit{with} Wood v. Sloan, 20 N.M. 127, 148 P. 507 (1915) (liability of builder limited after project completed and accepted by owner).


\textsuperscript{165} See \textsc{Defense Research Institute}, \textit{supra} note 19, at 21.


there was no violation of due process guarantees.\textsuperscript{188} Courts uniformly have rejected due process arguments where the cause of action accrued after the expiration of the statutory period.\textsuperscript{189} After the statutory period has run, the harm is "a wrong for which the law affords no remedy."\textsuperscript{190}

Another due process problem may arise if the injury occurs shortly before the expiration of the statutory period. If the applicable legislation does not incorporate other statutes of limitation, a reasonable time in which to seek a remedy is denied.\textsuperscript{171} Since due process requires that statutes of limitation allow an individual a reasonable time in which to bring suit,\textsuperscript{172} a statute of repose which does not embody a flexible outer limit may be subject to challenge as an unconstitutional violation of due process.\textsuperscript{173}

C. Impact of State Constitutional Provisions

A products liability statute of repose has been overturned on constitutional grounds in only one state. In that case, the court held that the statute violated a provision of the state constitution requiring that the courts be open to afford a remedy for every injury.\textsuperscript{174} Other courts have rejected challenges based upon similar


\textsuperscript{173} See Wilson v. Iseminger, 185 U.S. 55, 63 (1902). See also Comment, supra note 67, at 372.

\textsuperscript{174} Griffis v. Unit Crane & Shovel Corp., 369 So. 2d 342 (Fla. 1979). See notes 113-25 supra, and accompanying text. A large number of states have similar provisions. See generally 16A C.J.S. Constitutional Law § 708 (1956).
constitutional provisions. The principal difference between the two positions is the interpretation given to the relevant constitutional provision. In the two jurisdictions which held that architects' and builders' statutes of repose violated the constitutional guarantee of open courts, the courts interpreted the provision as applying to the legislature as well as to the courts. They reached that result by reading the open courts provision in conjunction with other constitutional, statutory and common law provisions. In these jurisdictions the capacity of the legislature to abolish common law rights, such as the right to sue for injuries, is severely restricted or totally denied. The jurisdictions holding the statute

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180 See Kluger v. White, 281 So. 2d 1 (Fla. 1973), in which the court states: [W]here a right of access to the courts for redress for a particular injury has been provided by statutory law predating the adoption of the Declaration of Rights of the Constitution of Florida, or where such rights has become a part of the common law of the State pursuant to Fla Stat. § 2.01, F.S.A., the Legislature is without power to abolish such a right without providing a reasonable alternative to protect the rights of the people of the State to redress for injuries, unless the Legislature can show an overpowering public necessity for the abolishment of such right, and no alternative method of meeting such public necessity can be shown.

Id. at 4. See also Commonwealth v. Werner, 280 S.W.2d 214, 216 (Ky. 1955).

181 The Florida Supreme Court has interpreted that state's open court provision in light of the common law and the statutory rights existing when Article 1 of the Declaration of Rights of the Florida Constitution was adopted, and in light of any common law rights which became the common law of the State pursuant to FLA. STAT. ANN. § 2.01 (West 1961). See Kluger v. White, 281 So. 2d 1, 4 (Fla. 1973).

In Saylor v. Hall, 497 S.W.2d 218 (Ky. 1973), the Kentucky Court of Appeals interpreted that state's open court provision, KY. CONST. § 14, in conjunction with other constitutional provisions to deny the legislature any power to abolish common law rights of action. 497 S.W.2d at 222.

182 In Kentucky the legislature cannot abolish existing common law rights of
not violative of their state's open courts provision adhere to the proposition that a legislature may abolish any right which has not yet vested.\textsuperscript{180} These jurisdictions interpret the provision as being applicable only to the judiciary, prohibiting the courts' abolishing of common law rights.\textsuperscript{181} The latter courts framed their argument in terms of due process, however.\textsuperscript{182} Equating due process and open courts provisions in this manner has been criticized because it renders the open courts provisions meaningless.\textsuperscript{183}

Individual architects' and builders' statutes have also been held unconstitutional on grounds that the act violated constitutional provisions requiring that legislation be limited to a single subject and that the subject of legislation be clearly reflected in its title.\textsuperscript{184} Other jurisdictions have sustained these statutes against almost identical constitutional challenges.\textsuperscript{185} The principal difference in the decisions considering title-subject provisions involves an issue of interpretation.\textsuperscript{186} The objects of such a constitutional provision

action. Saylor v. Hall, 497 S.W.2d 218, 224 (Ky. 1973). The Florida Supreme Court did not entirely prohibit abolishment of common law rights. Writing for the Florida court, Justice Adkins said: "[T]he Legislature is without power to abolish such a right without providing a reasonable alternative . . . unless . . . it can show an overpowering public necessity for the abolishment . . . and no alternative method of meeting such public necessity can be shown." Kluger v. White, 281 So. 2d 1, 4 (Fla. 1973).


\textsuperscript{183} Note, The Utah Product Liability Limitation of Action: An Unfair Resolution of Competing Concerns, 1979 UTAH L. REV. 149, 156 n.42 (creating "a redundancy in the constitution").


\textsuperscript{186} Compare Bagby Elevator & Elec. Co. v. McBride, 292 Ala., 191, 291 So. 2d
are threefold. First, the title of each law should inform the general public of the subject of the pending legislation so that they may be fairly apprised of legislative actions and may make their views on the legislation known.\(^8\) Second, the title should make legislators aware of the subject of the act so that they do not perform their job "deceived or ignorant of what they are doing."\(^8\) Finally, the bill should encompass only one subject to prevent legislative log-rolling by embracing several distinct matters in one bill, some or all of which may be impossible to pass separately.\(^9\)

The use of the term "statute of limitations" when referring to statutes of repose is anomalous because statutes of repose are substantive determinations of the rights to be afforded citizens of a state. Statutes of limitations procedurally limit the time in which suit may be filed. Statutes of repose, however, cut off any right of action after passage of a certain period of years.\(^10\) The misuse of terminology to obscure the substance of the repose provisions has been criticized as an abuse of the lawmaking function.\(^11\) Nevertheless a constitutional provision requiring that an act contain only "one subject," and that the subject be clearly expressed in the title, has been interpreted to allow a legislature to include in the act any and all matters having a logical or natural connection with the title.\(^12\) Under this interpretation, a statute of repose passed under the title "Limitation on Actions . . . on Construction Projects" was held not offensive to a title-subject provision in a state constitution.\(^13\) Since the main goal of

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188 Id.
191 Comment, supra note 67, at 384.
193 Id.
the title-subject provisions is reasonable notice, however, it is unfair to expect those unfamiliar with legal terminology to comprehend that a law abolishing certain rights of action may be passed under the title of a statute of limitations or of a limitation of actions.

Finally, statutes of repose have been held unconstitutional as violative of provisions forbidding special legislation. A special law is one that favors one group over other groups similarly situated or affected. The Illinois and Wyoming Supreme Courts have declared that the effect of architects' and contractors' statutes of repose is to grant those persons a special immunity from suit. Other courts, however, have held that the class of persons included under an architects' and builders' statute is sufficiently large to avoid the statute's classification as a prohibited special law. The difference again is one of interpretation. If the statutory class is

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194 Id., Skinner v. Anderson, 38 Ill. 2d 455, 231 N.E.2d 588, 590-91 (1967); Phillips v. ABC Builders, Inc., 48 U.S.L.W. 2815 (Wyo. Sup. Ct. May 21, 1980). See also Massery, supra note 19, at 548. A typical special law provision reads: "The General Assembly shall pass no local or special law in any case which has been or can be provided for by general law . . . ." Pa. Const. art. III, § 32.


198 Interpreting identical language, Illinois and New Jersey courts reached different conclusions. Compare Skinner v. Anderson, 38 Ill. 2d 455, 231 N.E.2d 588, 590 (1967) (interpreting ILL. ANN. STAT. ch. 83, § 24f (Smith-Hurd 1966)) with Rosenberg v. Town of North Bergen, 61 N.J. 190, 293 A.2d 662, 668 (1972) (interpreting 2A N.J. STAT. ANN. § 14-1.1 (West Supp. 1979)). The Illinois court held that the effect of the section was to grant to architects and contractors a special or exclusive immunity, 231 N.E.2d at 590, whereas the New Jersey court read the statutory language broadly, 293 A.2d at 666.

defined in general terms," the statute should be upheld as not violative of constitutional prohibitions against special legislation.\textsuperscript{200}

IV. Conclusion

The loss distribution mechanism inherent in the tort system reflects a societal policy judgment that those persons best able to correct a defect and to avoid an injury should bear the costs which accompany the damage caused by the defect.\textsuperscript{201} A statute of repose represents a countervailing policy that persons should be allowed to plan their affairs with a reasonable degree of certainty,\textsuperscript{202} and is based primarily upon fears of liability for claims arising from defects in older products.\textsuperscript{203} The counter-attack on the citadel of strict liability has focused on a compromise solution which attempts to accommodate both policies, as reflected by the adoption of statutes of repose in many states.\textsuperscript{204} The Model Uniform Products Liability Act\textsuperscript{205} recently promulgated by the Department of Commerce evidences the tensions surrounding such a compromise. It attempts to assuage manufacturers' concerns by establishing a statutory presumption that a product has been used beyond its useful safe life if it causes an injury after the expiration of the statutory period.\textsuperscript{206} The UPLA also attempts to avoid the most damning objection to statutes of repose, from the standpoint of compensation and risk-

\textsuperscript{199} See, e.g., ILL. ANN. STAT. ch. 83, § 22.2 (Smith-Hurd Supp. 1980) ("one who . . . sells, distributes, leases, assembles, installs, produces, manufactures, fabricates, prepares, constructs, packages, labels, markets, repairs, maintains, or otherwise is involved in placing a product in the stream of commerce.").

\textsuperscript{200} See generally Sentell, When Is A Special Law Unlawfully Special?, 27 MERCER L. REV. 1167 (1976).


\textsuperscript{202} See notes 63-68 supra, and accompanying text.

\textsuperscript{203} See TASK FORCE INSURANCE STUDY, supra note 18, at 4-92; INTERAGENCY TASK FORCE ON PRODUCT LIABILITY, FINAL REPORT VII-21 (1977), which states: "Regardless of what the data show, our insurance study suggests it is the underwriter's concern about the potential loss regarding older products that may be an important factor of the increase in liability premiums for manufacturers of durable goods."

\textsuperscript{204} See notes 21, 131 supra.

\textsuperscript{205} UPLA § 110(B), 44 Fed. Reg. 62,732 (1979) (text reprinted at note 57 supra).

\textsuperscript{206} Id. at § 110(B)(1).
distribution, by suspending the application of the statutory bar/presumption if the injury-causing aspect of the product was not reasonably discoverable within the statutory period.207 Absent any solid documentation connecting the recent increases in the costs of products liability insurance with claims arising from older products, it would seem that the alleged products liability problem would be best solved by insurance regulators rather than by major reform of the law of torts.208

The alteration or abolishment of consumers' rights of action against manufacturers in the event of an injury caused by an older product is a question of grave concern. From a constitutional perspective the reception of statutes of repose has been mixed, varying with their judicial interpretation in light of pertinent statutory and constitutional provisions.209 The decision to shift the costs of injuries caused by older products from manufacturers and consumers to the individual who suffers the injury is not to be made lightly. Because of the complex nature of such a policy decision, and in view of the inherent constitutional difficulties surrounding statutes of repose,210 a re-examination of the alleged problem of products liability insurance is a necessity. Other alternatives, such as a statute of limitations based upon a product's useful safe life or insurance reform, should be considered.211 It is only through thorough analysis of the problem that well-reasoned policy decisions will result.

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207 Id. at § 110(B) (2) (d).
208 See Twerski & Weinstein, supra note 9, at 244. See also text accompanying note 71 supra.
209 See notes 100-200 supra, and accompanying text.
210 See notes 63-200 supra, and accompanying text.
211 See notes 42-52 supra, and accompanying text.
Comments, Casenotes and Statute Notes