SYMPHONY
PRODUCTS LIABILITY

THE VARIETY, POLICY AND
CONSTITUTIONALITY OF PRODUCT
LIABILITY STATUTES OF REPOSE

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INTRODUCTION

The development of theories of common law liability in product liability actions has both facilitated recovery for injured plaintiffs and generated new attempts by defendants to limit that recovery. One of the most popular methods of restricting liability in these actions has been the enactment of statutes of repose—statutes that further restrict the period of time in which a plaintiff may bring an action under applicable tort or contract statutes of limitation. When the Federal Interagency Task Force on Product Liability requested comments on its proposed Draft Uniform Product Liability Law, it received more correspondence concerning statutes of repose than any other section of the draft act.2

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The author was a mediator between the Alabama Trial Lawyers Association and the Associated Industries of Alabama during the debate concerning Alabama’s product liability legislation. Due to his intimate involvement in the negotiations surrounding these statutes, the author will not express an opinion regarding the constitutionality of product liability statutes of repose. The article, however, does contain an extensive review of the constitutional arguments raised in connection with these statutes.

1. In response to allegations that product liability insurance had become either unavailable or unaffordable, the White House established a Federal Interagency Task Force to investigate the problem. See INTERAGENCY TASK FORCE ON PRODUCT LIABILITY, FINAL REPORT (1977) [hereinafter cited as TASK FORCE]. In November 1977, the U.S. Department of Commerce published its Interagency Study on Product Liability. In July 1978, the administration announced a program aimed at the product liability problem. This program included the drafting of a model uniform product liability law. See 44 Fed. Reg. 62,714 (1979).

2. See Comments on Opinion Paper, 43 Fed. Reg. 40,438 (1978). The draftsmen of the Model Uniform Product Liability Act suggested two approaches: First, a “useful safe life” provision that focuses upon the age of a product, beginning at the time of delivery to the first purchaser or

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There are now ninety-eight statutes in forty-eight states that can be considered product liability statutes of reposer. Product liability statutes of reposer have generated numerous constitu-

lessee; second, a "statute of reposer" that presumes the useful safe life of a product to expire ten years after delivery of the product. This presumption may be rebutted by "clear and convincing" evidence. In addition, the draftsmen delineated several exceptions to the presumption: (1) express warranty of a safe life greater than ten years; (2) intentional misrepresentation or concealment of facts that contribute substantially to later harm; (3) contribution or indemnity actions; and (4) a defect or injury-causing aspect of the product not reasonably discoverable until the expiration of the statutory period.


For general and social statutes of reposer, see CONN. GEN. STAT. ANN. § 52-584 (West Supp. 1980); IDAHO CODE § 5-243 (1979); KAN. STAT. ANN. § 60-513(b) (1976); N.C. GEN. STAT. § 1-56
tional challenges. Supreme courts in twenty-nine states have ruled on the constitutionality of these statutes. Forty-eight states consistently have held them constitutional; nine states have found them unconstitutional; and two states have held some statutes of repose constitutional and others unconstitutional.

Challenges to the constitutionality of these statutes raise basic philosophical and jurisprudential issues that deserve considerable attention in the judicial process. The debate surrounding statutes of repose reaches high levels of abstraction—philosophical attitudes towards natural rights and utility, social and moral concerns of fault and compensation, and economic theories of free enterprise and socialism are all implicated. The constitutional issues also raise fundamental concerns regarding the roles of the Constitution, the legislatures, and the courts in our political system. Opponents of statutes of repose ask, “Can and should a legislature abolish a cause of action before it accrues?” Proponents ask, “Can and should a court deny the legislature its power to define the scope of compensable harm?” At issue is the appropriate balance between a state constitution and the federal Constitution, the role of the legislature to represent the popular will, and the duty of the court to preserve rights without encroaching upon legislative prerogatives.

The treatment of these issues by state appellate courts generally has been unilluminating. The opinions tend to be conclusory and founded upon unarticulated rationales. The definition that a court gives to the statute under constitutional attack often is dispositive. Although it is not uncommon for decisionmakers to focus upon simplistic and readily comprehensible analyses, such reasoning frequently results in unsatisfactory opinions. The purpose of this article is to discuss some of the complexities infrequently seen in the reported cases and to suggest modes of legal analysis for resolving the issues raised.


5. These states are Arizona, Arkansas, California, Colorado, Delaware, Indiana, Michigan, Missouri, Montana, Nebraska, New Jersey, New Mexico, Oregon, Pennsylvania, Tennessee, Utah, Virginia, and Washington. See Chart I infra.

6. These states are Florida, Hawaii, Illinois, Kentucky, New Hampshire, Oklahoma, South Carolina, Wisconsin, and Wyoming. See Chart I infra.

7. These states are Alabama and Minnesota. See Chart I infra.

I. Definitions

This article is not restricted solely to statutes of repose that contain "product liability" in their titles. The concept of product liability includes not only various theories of recovery,9 but also a wide range of products.10 Medical malpractice, architects' and contractors', and other statutes of repose may be applicable in a particular product liability action. "Medical institutions," "pharmacists," or "health care providers," for example, could conceivably "sell" a "product."11 "Contractors," "builders," or "other entities that 'perform improvements to real property'" might come under both product liability and architects' and contractors' statutes of repose.12

The term "statute of repose" itself can create analytical difficulties unless there is an understanding of its meaning. Although courts may conclude that semantics is irrelevant to a consideration of statutes of repose,13 there are substantial reasons to use precise labels for underlying statutes.14 These reasons become particularly compelling when at least five definitions of "statute of repose" are in use.15 In the most general sense, a statute of repose and a statute of limitation are identical—"legislative enactments prescribe the periods within which actions may be brought."16 Older treatise writers and judges often used "repose" and

9. Concepts of liability include "[s]trict liability in tort; negligence; breach of express or implied warranty; breach of, or failure to, discharge a duty to warn or instruct, whether negligent or innocent; misrepresentation, or concealment, or nondisclosure, whether negligent or innocent; or under any substantive legal theory." Model Uniform Product Liability Act § 102(D), 44 Fed. Reg. 62,714, 62,717 (1979).
10. Product liability also includes "any object possessing intrinsic value, capable of delivery either as an assembled whole or a component part or parts, and produced for introduction into trade or commerce." Model Uniform Product Liability Act § 102(C), 44 Fed. Reg. 62,714, 62,717 (1979).
13. See, e.g., Carter v. Hartenstein, 248 Ark. 1172, 1174, 455 S.W.2d 918, 920 (1970), appeal dismissed, 461 U.S. 901 (1971): "This Statute, whether it be one of 'vested right' and a means of remedy and recovery, or whether it be characterized as a 'statute of limitation,' is largely a question of semantics and manipulation of legal theory."
15. Although the following five definitions can be distinguished rather easily, courts have not been consistent in using these distinctions.
16. BLACK'S LAW DICTIONARY 835 (5th ed. 1979). An alternative definition would be "a legislative act whereby the state declares that after the lapse of a specified time, a claim shall no longer be enforceable in a judicial proceeding." MASSACHUSETTS SENATE REPORT, A STATUTE OF LIMITATIONS FOR MALPRACTICE AGAINST ARCHITECTS, ENGINEERS AND SURVEYORS 20 (1968).
"limitation" interchangeably.\textsuperscript{17} A second definition suggests that a statute of repose is a general term that encompasses various statutes, including statutes of limitation.\textsuperscript{18} A statute of repose is an act that promotes a policy of finality in legal relationships, and it can include any number of statutory devices that accomplish this purpose.\textsuperscript{19} Various types of prescriptive time periods—statutes of limitation, escheat, adverse possession, and others—would be defined as repose periods.\textsuperscript{20} A statute of limitation, however, is designed to accomplish the more limited function of reducing the evidentiary inequities created when defendants are forced to defend stale claims.\textsuperscript{21} A third approach indicates that a statute of repose is merely one type of statute of limitation. This definition suggests that a statute of repose is the portion of a statute of limitation that places a cap or outer limit on a statute that begins to run when a party discovers the existence of an injury or a cause of action.\textsuperscript{22} For example, a tort statute of limitation might run for two years, with an exception that the statute would not begin to run until a plaintiff discovers, or through the exercise of reasonable diligence should discover, an injury.\textsuperscript{23} A statute of repose would be

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17. \textquotedblleft[T]he statutes 32 Hen. 8, c. 2 and 21 Jac. 1, c. 16 . . . were made for the purpose of quieting the titles to estates and avoiding suits generally; and have hence been denominated statutes of repose.\textquotedblright J. ANCELL, A TREATISE ON THE LIMITATION OF ACTIONS AT LAW, AND SUITS IN EQUITY (1829). \textquotedblleftStatutes of limitations are now quite generally looked upon as statutes of repose . . . .\textquotedblright Gorman v. Judge of Newaygo Circuit Court, 27 Mich. 139, 141 (1873).


\textit{[I]t is useful to note that a statute of limitations effectuates two quite different policies. First, such a statute is intended to protect defendants from false or fraudulent claims that might be difficult to disprove if not brought until after relevant evidence has been lost or destroyed and witnesses have become unavailable. Second, entirely apart from the merits of particular claims, the interest in certainty and finality in the administration of our affairs, especially in commercial transactions, makes it desirable to terminate contingent liabilities at specific points in time. It is this interest in finality which underlies the description of a limitations act as a \textquoteleft statute of repose.\textquoteright}\textit{.}

\textit{Id. at 611.}

19. \textit{See} Rosenberg v. Town of North Bergen, 61 N.J. 190, 201, 293 A.2d 662, 667 (1972) (\textquoteright All statutes limiting in any way the time within which a judicial remedy may be sought are statutes of repose.\textquoteright).\textit{.}

20. \textit{See} Pillow v. Roberts, 54 U.S. 472, 476 (1851) (\textquoteright Statutes of limitation are founded on sound public policy. They are statutes of repose, and should not be evaded by a forced construction.\textquoteright).

21. \"This rationale for a statute of limitation has enjoyed varied degrees of acceptance. Statutes of limitations were formally regarded with little favor, and the courts devise numerous theories and expedience for their evasion; but latterly they are considered as beneficial, as resting on sound public policy, and as not to be evaded except by the methods provided therein.\" 


22. \textit{See} N.D. CENT. CODE § 28-01.1-01(3) (Supp. 1980) (legislature stated its intent \textquoteleft to provide a reasonable time within which actions may be commenced against manufacturers . . . .\textquoteright).

23. \textit{See} N.C. GEN. STAT. § 1-52(16) (Supp. 1979).\textit{.}
the additional statutory language providing that in no event should a cause of action be brought more than ten years after the elements of a cause of action have accrued.24 These statutes also have been termed “bifurcated”25 or “two-tier”26 statutes.

The fourth definition holds that a statute of repose is distinct from a statute of limitation because it begins to run at a time unrelated to the traditional accrual of the cause of action.27 A typical tort statute of limit-

24. Id. See also Harrison v. Schrader, 569 S.W.2d 822 (Tenn. 1978).
27. See Rosenberg v. Town of North Bergen, 61 N.J. 190, 293 A.2d 662 (1972) (unlike a statute of limitation, this statute mandates time for bringing suit unrelated to accrual of cause of action). It is extremely important to note that the definition of repose in this sense depends upon many factors other than the wording of the statute. For example, the facts of a given case may play a significant role in determining the interpretation of a given statute. Compare Bauld v. J.A. Jones Constr. Co., 357 So. 2d 401 (Fla. 1978) (twelve-year statute of limitation upheld because statute did not operate to abolish claimant's cause of action which commenced prior to effective date of the Act); with Overland Constr. Co. v. Sirmons, 369 So. 2d 572 (Fla. 1979) (identical statute of limitation violated state constitution because it provided an absolute bar to claimant's cause of action). Similarly, a court's interpretation of the statutory language may determine a statute's function. See Thomas v. Niemann, 397 So. 2d 90 (Ala. 1981). Another important factor might be the existence of a non or of alternative defendants. See Skinner v. Anderson, 38 Ill. 2d 206, 231 N.E.2d 588 (1967). The theory of a case—tort or contract—may also be of importance in this regard. See Layman v. Keller Ladders, Inc., 224 Tenn. 396, 455 S.W.2d 594 (1970). Thus, the definition of repose can be of utmost importance.

tation begins to run when all the elements of a cause of action have accrued, whereas a statute of repose begins to run at a much earlier time, such as the time a product is manufactured. The effect of a statute of repose, therefore, may be to bar a cause of action before it accrues. For example, if a state has both a two-year tort statute of limitation in product liability actions and a ten-year product liability statute of repose running from the sale of a product, it is conceivable that a person injured by a defective product purchased eleven years earlier would have no legal recourse for damages sustained. In this sense, the statute of repose has been defined as an “absolute bar,” “grant of immunity,” “statute of abrogation,” and “hybrid statute.”

Under this fourth definition, there also is a material distinction between a statute of repose and a tort statute of limitation that has no “discovery” provisions. These tort statutes of limitation may begin to

prehensive bibliographical treatment, see TORT REFORM AND RELATED PROPOSALS (B. Levin & R. Coyle eds. 1979).


Connecticut has a statute of limitation of potentially indefinite duration: An action must be brought “within three years from the date when the injury is first sustained, discovered or in the exercise of reasonable care should have been discovered . . . .” The statute, however, sets an outer limit for this statute of limitation. An action must be brought within eight years of the “date of sale, lease or bailment” of the allegedly defective product. CONN. GEN. STAT. § 52-577a (1979).

North Carolina has established a three-year statute of limitation with a discovery provision. The statute does not commence to run “until harm to the claimant or physical harm to his property becomes apparent or ought reasonably to have become apparent to the claimant, whichever first occurs . . . .” This section, however, sets an outer limit on the statute of limitation. It provides that “no cause of action shall accrue more than 10 years from the last act on commission of the defendant giving rise to the cause of action.” Section 1-50 of the statute sets an additional limitation for actions based on defective products: “six years after the date of initial purchase for use or consumption.” N.C. GEN. STAT. § 1-50(6) (Supp. 1979).

29. It is from the perspective of barring a cause of action before it accrues that the statute of repose may differ most from a statute of limitation. It can be argued that such a statute of repose is more similar to the civil law doctrine of prescription. Statutes of limitation defeat a remedy, whereas the civil law doctrine of prescription defeats the right itself. See Billings v. Hall, 7 Cal. 1 (1857). A statute of repose, therefore, changes the substantive law while a statute of limitation is merely procedural. See Regents of Univ. of Cal. v. Hartford Accident & Indemn. Co., 21 Cal. 3d 624, 561 P.2d 197, 147 Cal. Rptr. 486 (1978); Oole v. Oosting, 82 Mich. App. 291, 266 N.W.2d 795 (1978) aff’d sub nom. O’Brian v. Hazelt & Erdall, 410 Mich. 1, 299 N.W.2d 336 (1980). A statute of repose would not be affected by the various tolling provisions applicable to statutes of limitation. See O’Connor v. Atlas, 61 N.J. 106, 335 A.2d 545 (1975).

30. See GA. CODE ANN. § 105-106(2) (Supp. 1980).


run at the time of injury, but before the plaintiff is aware of an injury.\textsuperscript{36} In cases involving exposure to toxic substances, for example, there may be injury in the sense of bodily contact long before the deleterious effects of that contact become apparent. The statute of limitation would bar recovery before the plaintiff had sufficient knowledge to bring suit. A statute of repose, however, may bar a cause of action before an injury even occurs.

A similar distinction may not exist between a contract statute of limitation and a statute of repose. If a contract statute of limitation and a statute of repose begin to run at the tender of delivery of the product, there would be no conceptual distinction between the contract statute of limitation and a statute of repose.\textsuperscript{37} If the statute of repose begins to run at the time the product is manufactured or at the time the product is put to use, however, there would be a material difference.\textsuperscript{38}

A fifth definition of "statute of repose" has been found in the "useful safe life" provisions of product liability statutes.\textsuperscript{39} These provisions indicate that a defendant may be relieved of liability upon proof that an allegedly defective product has been used beyond its useful safe life.\textsuperscript{40} These statutes are more properly viewed as establishing a separate affirmative defense rather than as statutes of limitation or repose.\textsuperscript{41}

\textsuperscript{36} The Uniform Model Product Liability Act identifies three situations in which the injured party is not adversely affected until long after his initial contact with the injury-causing product. First, a party may be harmed by prolonged exposure to a defective product. See, e.g., Eric v. Thompson, 337 U.S. 163 (1949) (plaintiff allowed to recover after having inhaled silica dust for over 30 years); Karjala v. Johns-Manville Prod. Corp., 323 F.2d 155 (8th Cir. 1963) (plaintiff, after having been exposed to asbestos dust for 18 years, sued manufacturer); Michie v. Great Lakes Steel Div., Nat'l Steel Corp., 493 F.2d 213 (6th Cir. 1974) (plaintiffs claimed that defendants' prolonged pollution of atmosphere caused personal and property damage). Second, a party may be harmed if the injury-causing aspect of the product was not discoverable by an "ordinary reasonably prudent person" within the time prescribed by the statute of repose. See, e.g., Mickle v. Blackmon, 252 N.C. 202, 166 S.E.2d 175 (1969) (plastic knob on gearshift deteriorated after exposure to sun, causing injury to plaintiff during collision). Third, a party may be harmed even though the harm did not manifest itself until after the statute of repose was tolled. See, e.g., Sindicelli v. Abbott Laboratories, 26 Cal. 3d 588, 607 P.2d 924, 163 Cal. Rptr. 132 (drug administered to pregnant women did not cause injury to their children until long after infancy), cert. denied, 449 U.S. 912 (1980); Harig v. Johns-Manville Prod. Corp., 284 Md. 70, 394 A.2d 299 (1979) (mesothelioma did not manifest itself until 20 years after last exposure to defendant's asbestos). Model Uniform Product Liability Act § 110(2)(d), 4 Fed. Reg. 62,714, 62,717, 62,732, 62,734 (1979).

Under the Act, the statute of repose is inapplicable in the above-mentioned situations. Id. See generally Birnbaum, First Breath's Last Gasp: The Discovery Rule in Products Liability Cases, 13 FORUM 279 (1977).

\textsuperscript{37} See ILL. ANN. STAT. ch. 26, § 2-725 (Smith-Hurd 1973); ILL. ANN. STAT. ch. 83, § 22.2(b) (Smith-Hurd 1980).

\textsuperscript{38} See KY. REV. STAT. ANN. § 411.310(1) (Baldwin 1969); N.D. CENT. CODE § 28-011-02(1) (Supp. 1979); UTAH CODE ANN. § 78-15-3(1) (1953).

\textsuperscript{39} See IDAHO CODE § 6-1403 (Supp. 1980); TENN. CODE ANN. § 23-303(a) (Supp. 1979).


\textsuperscript{41} Under Idaho's Product Liability Law, IDAHO CODE § 6-1403 (Supp. 1980), the manufacturer of a product over 10 years old will benefit from the presumption that the harm was caused after the product's useful safe life. Thus, the manufacturer will escape liability unless the plaintiff
Most courts do not use the term "statute of repose" with consistent precision. For purposes of this article, therefore, the term "statute of repose" will refer to a statute that places an additional prescriptive period upon the time in which actions may be brought under traditional statutes of limitation. This may be done either by setting an outer limit on the length of a tort statute of limitation that has "discovery" provisions of potentially indefinite duration, or by setting the time at which the statute begins to run at a different time from traditional tort statutes of limitation.

II. VARIETY AND STATUS OF PRODUCT LIABILITY
STATUTES OF REPPOSE

In the late 1950's and early 1960's, many architects and contractors felt threatened by the abolition of the privity requirement and the advent of "discovery" provisions in tort statutes of limitation. In response, various architects' and contractors' trade associations sponsored legislation to curtail the time period during which an architect or contractor might be held liable for a negligent act. A total of forty-four architects' and contractors' statutes of repose have been passed by various state legislatures. Although nine of these statutes have been declared unconstitutional by state supreme courts, legislatures in five states have reenacted architects' and contractors' statutes of repose. None of the second generation architects' and contractors' statutes of repose has been declared unconstitutional.

The more widely publicized "medical malpractice crisis" sparked the enactment of medical malpractice statutes of repose. These statutes constitute one of the most popular means of limiting liability of those who provide health care. Only one of the twenty-seven medical malpractice statutes of repose passed by the various state legislatures has been

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42. See notes 22-25 & accompanying text supra.
43. See notes 27-29 & accompanying text supra.
46. See note 3 infra; Chart 1 infra.
47. See Chart I infra.
48. See note 3 supra; Chart III infra. For a more comprehensive bibliographical treatment, see TORT REFORM AND RELATED PROPOSALS, supra note 27.
declared unconstitutional.\textsuperscript{49}

Statutes of repose intended specifically for product liability cases have been enacted relatively recently. The first product liability statute of repose was passed in 1977.\textsuperscript{50} Twenty-one states currently have some form of a product liability statute of repose.\textsuperscript{51} To date, there are two state supreme court decisions concerning the constitutionality of product liability statutes of repose.\textsuperscript{52}

A few states have either general statutes of repose that apply to product liability cases or special statutes of repose that control a specific type of product. Connecticut, Kansas, North Carolina, North Dakota, and Oregon have general statutes of repose, varying from three to ten years, that apply to all product liability cases.\textsuperscript{53} Idaho and Vermont have statutes of repose that apply to ionized radiation.\textsuperscript{54}

III. Policy Analysis of Product Liability Statutes of Repose

Although Anglo-American jurisprudence has long accepted limitations on the period in which civil actions can be brought, the role and propriety of statutes of repose in product liability actions have been the subject of substantial debate.\textsuperscript{55} The typical analysis of product liability statutes of repose focuses on the policy questions of whether the benefits of encouraging diligence, eliminating potential abuses from stale claims, and fostering personal certainty offset the effects of denying certain plaintiffs a remedy at common law for injury from a product. Indeed, this rationale has been constant for over 350 years.\textsuperscript{56} A more detailed analysis discusses the economic effects of a statute of repose, the role of tort law in our injury compensation systems, and the proper role of various institutions in the legal system. Because ample legal literature has been devoted to the subject of a "product liability crisis,"\textsuperscript{57} the present discussion will be limited to selected arguments involving the logic of

\textsuperscript{49} See Chart I infra.
\textsuperscript{51} See note 3 supra; Chart IV infra.
\textsuperscript{52} See Chart I infra.
\textsuperscript{55} See, e.g., Note, Developments in the Law: Statutes of Limitations, 63 Harv. L. Rev. 1178 (1949); note 27 supra. See generally J. Angell, supra note 17.
\textsuperscript{56} The first statute of limitations for personal injury actions was passed in 1623 as a reaction to changes in the common law that made recovery easier for plaintiffs. See W. Ferguson, The Statutes of Limitation Saving Statutes 11 (1978).
strict liability in product liability actions and some institutional aspects of compensation for injury in our federal system.

A. Legal Theory

There are numerous theoretical problems in limiting the time for bringing product liability actions. In part, these problems arise from the time span during which the various elements necessary to satisfy a theory of strict liability in tort occur. The design of a product, its manufacture and subsequent entry into the stream of commerce, the occurrence of injury, and the manifestation of injury typically occur at widely different times. Moreover, notice of the lawsuit, the trial, and the appeal are all likely to occur long after various elements of the cause of action arise.

The abnormally long period of time between the manufacturer's involvement with a product and the trial of a product liability lawsuit creates unique conceptual and practical problems, particularly for the defense. These problems include the admissibility of evidence, the concept of defect, the proof of defect, the availability of defenses, the proof of defenses, and damages. In addition, a jury's natural tendency to employ hindsight makes it virtually impossible to ensure that a 1950 product is judged by 1950 standards. Evidence gathered after the sale of a product, even if admitted with a limiting charge, forces a jury to make judgments based upon retroactive and "unrealistic" standards. Further, a manufacturer might refrain from making a product safer and more efficient out of fear that any design changes might be used against him at trial. Although a product may have been used safely over a ten- or twenty-year period, the defendant still faces enormous problems in proving the defenses of alteration, modification, or misuse.

The inherent unfairness to a defendant manufacturer, in a trial occur-

59. In a typical product liability case, a product may be designed during 1968, sold on August 24, 1970, and involved in an accident on June 11, 1971. The case may be brought to trial on October 30, 1974, and the appellate process not completed until 1977. See General Motors Corp. v. Hopkins, 548 S.W.2d 344 (Tex. 1977), overruled, Turner v. General Motors Corp., 584 S.W.2d 844 (Tex. 1979).
62. Id.
63. The rationale for statutes of limitation reflect these problems. Records, design drawings, personnel, and even manufacturing plants may be either unavailable or no longer in existence. In addition, the concept of foreseeability might create problems for the defense. The defense might find it difficult to assert that some type of change in a product was unforeseeable. For example, one court's definition of misuse indicates that a plaintiff may engage in foreseeable misuse, but may have an award reduced by unforeseeable misuse. See General Motors Corp. v. Hopkins, 548 S.W.2d
ring long after its involvement with a product, bolsters the argument for statutes of repose. Proponents argue that these statutes neither are inequitable nor unique to our system of jurisprudence, and that other legal theories contain similar concepts that provide finality to the threat of litigation. The counter argument is that the “passage of time” factor is not unique to product liability actions.\textsuperscript{64} Virtually every other theory of liability—tort, property, or contract—presents the same problems. Indeed, the plaintiff often is confronted by an array of proof problems in the establishment of his case because of the unavailability of evidence and witnesses. Although manufacturers complain that their products are being judged by retroactive standards, many cases indicate that safety problems are disregarded until social and economic pressures force the redesign of products.\textsuperscript{65} Thus, opponents of statutes of repose argue that any unfairness to the defendant would likely be outweighed by the unfairness to an injured plaintiff who is barred from court.\textsuperscript{66}

The foregoing arguments for and against statutes of repose suggest a reconsideration of the policy behind the adoption of a theory of strict liability in tort. Various approaches have been advanced to justify the reallocation of risk of loss for product-related injuries that accompanied a change from a negligence standard to a strict liability standard.\textsuperscript{67} Courts have cited the following policies for adopting strict liability: (1) to provide incentives (and corresponding deterrence) for the parties who are in the best position to appreciate and minimize potential risks in the design of products; (2) to spread risks and actual losses more equitably and economically; (3) to simplify recovery by injured parties while providing adequate compensation; and (4) to encourage accountability among sellers based upon their representations concerning products or their fault in causing injury.\textsuperscript{68}

Contradictions in the application of these policies create major difficulties in defining the scope of strict liability in tort. These policies often conflict when determining whether strict liability in tort should apply in a specific situation.\textsuperscript{69} The availability of a contributory or comparative

\textsuperscript{64} See S. BALDWIN, F. HARE & F. MCGOVERN, supra note 61.
\textsuperscript{68} See P. KEETON, D. OWEN & J. MONTGOMERY, PRODUCTS LIABILITY AND SAFETY (1980); Owen, supra note 67.
negligence defense in strict liability in tort, for example, would raise a conflict between the policies of incentive/deterrence and the policy of compensation. Under a logical extension of the policy of compensation, a manufacturer compensates injured parties for all losses sustained by the use of his products.70 Thus, a consumer who uses a product negligently may still recover for his losses. Under an incentive/deterrence rationale, however, there should be a defense of contributory or comparative negligence to provide users of products with an incentive to prevent accidents. A user who knows that he will be unable to recover damages (or as much damages) from a manufacturer for injuries caused by a product defect presumably would have a greater incentive to use the product carefully.

From a different perspective, the conflicts concerning strict liability in tort reflect the differences between a view of society that focuses on the individual and a view of society that places more emphasis on society as a whole. Under the former approach, “social good” is achieved by allowing the individual to make private choices concerning the allocation of resources. Under the latter, “social good” is achieved when decisions are made by society in its entirety. Instead of relying upon individuals to make “right” decisions, proponents of the second view advocate permitting society, operating through government, to make those decisions.71

Courts have relied upon specific social policies in deciding cases involving the common law doctrine of strict liability in tort, but have neglected both the ramifications of those policies and alternative policies. Indeed, courts frequently have been accused of not examining the costs and consequences of their decisions.72 Decisions that explicitly rely upon social policy should involve a comprehensive analysis of all relevant policies and data, not only those that are readily understandable without extensive analysis. Thus, easily comprehensible policies such as individual “equities” should not be emphasized to the exclusion of technical data, such as cost-benefit analyses that study the effects of common law decisions.73 Even if a court ultimately places more weight on easily

70. Note, however, that if the sole purpose of the law of product liability is to ensure that persons suffering injuries caused by products receive some form of compensation through the judicial system, then the manufacturer would be the insurer or the guarantor of his product’s safety. See Berkebile v. Brantly Helicopter Corp., 462 Pa. 83, 337 A.2d 893 (1975).
73. See Green, Cost-Risk-Benefit “Assessment” and the Law: Introduction and Perspective, 45 GEO. WASH. L. REV. 901 (1977); Green, The Risk-Benefit Calculus in Safety Determinations, 43 GEO. WASH. L. REV. 791 (1975); Merrill, Risk-Benefit Decision Making By the Food and Drug Administration, 45 GEO.
understood aspects of a case, it should still examine the more complex factors.

As a result of the debate on the product liability "crisis" in general and statutes of repose in particular, there has been an increased emphasis on comprehensive policy analysis.74 Recent formulations of the definition of defect indicate greater attention to the economic and externality issues.75 An increased interest in scholarly and rational treatments of these issues hopefully will lead to a more satisfactory common law solution to problems of product defects.76 In particular, courts that rely upon social policy in formulating their product liability decisions should develop a greater interest in the available social science information concerning those policies.77 A number of social science disciplines are available to assist courts in analyzing product liability cases.78 Personal injury attorneys have tended to rely on their skills as trial lawyers to win individual cases;79 the social sciences that might be helpful in policy analysis are not commonly used tools in the litigators' trade.80 Trial judges typically are inclined to rely on available precedent rather than to venture into policy choices.81 Appellate judges, however, appear to be more inclined to confront those policy questions,82 but often are denied the data necessary for an informed policy choice due to an unilluminating trial court record.

B. Compensation System

Another form of policy analysis regarding statutes of repose focuses on the role of product liability actions in the institutional framework of the injury compensation system. The key issues in product liability cases are who should bear the risk of loss or harm and who should decide that question. Two effects of a statute of repose are to shift the risk of loss

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74. See generally Task Force, supra note 1.
75. See Birnbaum, Unmasking the Test for Design Defect from Negligence (to Warranty) to Strict Liability to Negligence, 33 Vand. L. Rev. 593 (1980).
76. See Owen, supra note 67.
77. See D. Rosen, supra note 72; Sperlich, Social Science Evidence and the Courts: Reaching Beyond the Adversary Process, 63 Jud. 280 (1980).
81. See Sperlich, supra note 77.
82. See H. Glick & K. Vines, STATE COURT SYSTEMS 58 (1973) ("Appellate court judges . . . may strive to formulate significant state policy in their decisions . . . ".)
from the manufacturer to the consumer and to shift decisionmaking about compensation from the judge and jury to the legislature.

Proponents of statutes of repose contend that the most significant problem for industry in product liability actions is the long "tail," or period of potential liability, facing manufacturers and sellers of products. Permitting a person to bring a product liability action within an indefinite period of time after the product reaches the stream of commerce subjects the seller or manufacturer to potential liability for an unlimited time after his contact with the product has ended. Manufacturers favor statutes of repose because they eliminate the "tail" problems of older products.

Although the number of cases involving products over ten years old is relatively small, proponents of statutes of repose contend that their effect upon business planning and insurance ratemaking is significant and out of proportion to the number of cases that have arisen.\(^{83}\) Sellers are not able to set realistic prices on products because they cannot calculate either the potential product liability costs over the next fifty years or the cost of liability for products sold fifty years ago.\(^{84}\) Insurance ratemakers indicate that the lack of a sound basis for statistical analysis forces them to set rates by purely "judgmental" reasoning.\(^{85}\) According to this argument, statutes of repose would provide greater certainty to both manufacturers and insurance companies and would reduce insurance premiums to meaningful cost-effective levels.\(^{86}\)

A related economic argument for a statute of repose concerns the transaction costs of deciding product liability cases.\(^{87}\) The costs of litigating the small number of cases involving products over ten years old, for example, outweigh the benefits to plaintiffs who would recover in those

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\(^{83}\) One estimate of the length and size of the products liability "tail" is that 83.3% of bodily injury claims involving capital goods arose within 10 years of the date of purchase, while over 97% of product-related accidents occurred within 5 years of the date of purchase. See Uniform Product Liability Act, 44 Fed. Reg. 62,714, 62,733-34 (1979) (citing CLOSED CLAIM SURVEY, supra note 60, at 105-08 (1977)). The validity of the data base used to obtain these figures has been criticized. See TASK FORCE, supra note 1, at VII-20; RETORT, INC., RETORT'S RESPONSE TO THE NOVEMBER 1977 FINAL REPORT OF THE INTERAGENCY TASK FORCE ON PRODUCT LIABILITY 29 (1978). For comments concerning the disproportionate effect of large claims for injuries sustained in connection with older products, see TASK FORCE, supra note 1, at VII-21, 23.

\(^{84}\) See, e.g., Calabresi, Some Thoughts on Risk Distribution and the Law of Torts, 70 YALE L.J. 499, 529 (1961).

\(^{85}\) See TASK FORCE, supra note 1, at IV-92. A handful of "shock" losses, or large losses from old products may cause underwriters to overcompensate far out of proportion to the statistical significance of such losses. Id. at V-10.


\(^{87}\) Each time a suit is filed in our legal system, substantial costs are borne by the plaintiff, the defendant, and society. These costs are expressed not only in money but also in time and a loss of other opportunities.
Legislation that draws inflexible time lines barring individual litigation will inevitally result in some inequity in cases arising close to those lines. Any line-drawing that causes such a result, however, cannot be justified on the basis of an analysis of a small number of difficult cases. Justification for a statute of repose should rest upon its effects on all product liability cases and all costs incurred. The litigation expenses that manufacturers would otherwise incur in defending actions involving older products would be calculated in the societal savings generated by the statute. Moreover, a statute of repose would contribute to judicial economy by reducing the number of cases on crowded judicial dockets. All of these benefits, according to this theory, would exceed the costs to a small number of plaintiffs.

Another argument in favor of a statute of repose involves the speed of its effects. A statute of repose would immediately affect causes of action arising after the statute's effective date. The enactment of a statute of repose in product liability actions also would parallel reforms implemented in industries with similar problems, such as health care and construction.

A statute of repose, therefore, has strong emotional appeal to industry: it bars claims immediately; it eliminates the perceived inequity of liability for old products; and, it is consistent with the solutions to similar problems found in other areas. Manufacturers have thus suggested that statutes of repose constitute the best single form of legislation to solve their perceived problems with product liability law. Their arguments note that: (1) management would be able to establish more cost-effective prices due to the greater predictability of financial losses from product design; (2) product liability insurance rates and transaction costs would be lowered; (3) an immediate effect would be experienced; and (4) greater equity would result.

Critics of statutes of repose argue that: (1) their inflexibility produces harsh and inefficient results; (2) there would be little, if any, reduction of insurance premiums; (3) the benefits resulting from an immediate solution are outweighed by the need for both a more deliberate evolution of product liability theory and coordination with other proposed reforms;

89. A person injured 9 years and 364 days after the sale of a product might recover for damages under a statute of repose while a person injured several days later would not be able to recover.
90. See, e.g., ILL. ANN. STAT. ch. 83, § 22.1 (Smith-Hurd Supp. 1979) (action for medical malpractice must be brought within four years after date of act or omission causing the injury); S.D. CODIFIED LAWS ANN. § 15-2-9 (Supp. 1980) (action against architect or contractor must be brought within six years of date of completion of construction).
91. See Comments on Opinion Paper, supra note 2.
and (4) equity would not be served.\textsuperscript{92}

These arguments suggest that statutes of repose would be unfair because they do not account for the extreme variety of consumer and workplace products, differences in the expected life of products, and the differences in short term and long term product defects. Moreover, there is too much diversity among the types of injuries caused by defective products to support a single, inflexible time period for liability.\textsuperscript{93} Although a statute of repose certainly would reduce recoveries by persons injured by products, there may not be a corresponding reduction in insurance premium rates.\textsuperscript{94} An eight- to ten-year statute of repose, for example, would be too long to improve the predictability of insurance claims.\textsuperscript{95} In addition, critics of statutes of repose contend that the “tail” problem cited by industry is grossly overstated.\textsuperscript{96}

Product liability statutes of repose lack uniformity because they have been passed on a state-by-state basis.\textsuperscript{97} Insurance rates, however, are set on a national scale that would not fully reflect the reduced liability in any given jurisdiction. A product liability statute of repose, therefore, could create the worst of all possible worlds: a denial of recovery to persons injured by defective products without a decrease in the cost of product liability insurance. In states that enacted product liability statutes of repose, injured citizens would be barred from court and manufacturers would pay insurance premiums based upon more costly experiences in other states.

One of the theses of this article is that some of the subtle and unpredictable consequences that would result from a change in an important legal rule have not been carefully examined. Three potential long-term effects of the enactment of statutes of repose on the tort compensation system deserve analysis.

The first possible consequence involves the respective roles of courts and legislatures in the tort system. Industry’s proposals and rationales in support of statutes of repose point directly to a legislative solution—the

\textsuperscript{92} Id.
\textsuperscript{93} The application of a statute of repose to injuries caused by toxic substances such as polychlorinated biphenyls (PCB) or diethylstilbestrol (DES) illustrates these inequities. See generally M. SHAPIRO, A NATION OF GUINEA PIGS (1979).
\textsuperscript{94} See TASK FORCE, supra note 1, at VII-21, 23.
\textsuperscript{95} See notes 84-86 & accompanying text supra. See also R. NEBB, J. LAURIE, N. ROSES & N. BAGLINO, INSURANCE COMPANY OPERATIONS (1978).
\textsuperscript{96} See Gingerich, The Interagency Task Force "Blueprint" for Reforming Product Liability Tort Law in the United States, 8 GA. J. INT’L & COMP. L. 279, 289 (1978) (manufacturers claim problems may be receiving attention not justified by the situation); Model Uniform Product Liability Act, 44 Fed. Reg. 62,714, 62,733 (1979) (insurers’ apprehension about liability of older products may be exaggerated); TASK FORCE, supra note 1, at II-52, III-60.
\textsuperscript{97} Compare ARIZ. REV. STAT. ANN. § 12-551 (Supp. 1980) (12 years after product first sold for use or consumption) with UTAH CODE ANN. § 78-15-4 (1977) (6 years after initial purchase date and 10 years after date of manufacture).
enactment of a statute. Legislatures are more responsive than the courts to the concerns and economic arguments of industry.\textsuperscript{98} Legislatures are better equipped to gather the type of information necessary to resolve the conflicting choices involved in the enactment of a statute.\textsuperscript{99} Legislatures also appear to be more adept at obtaining feedback concerning the consequences of their decisions and reacting accordingly in order to update relevant laws.\textsuperscript{100} Moreover, by drawing a clear line between liability and nonliability through the enactment of a statute,\textsuperscript{101} legislatures can provide greater predictability than the courts.

It may, however, be difficult for legislatures to focus dispassionately on this issue over the extended period of time necessary to gather the appropriate feedback. There has been more emotional than rational discussion on the issue of statutes of repose in state legislatures. Virtually no information has been gathered concerning the effects of existing statutes of repose for architects, contractors, and health care providers.\textsuperscript{102} The failure of legislatures to take advantage of their institutional assets substantially dilutes the strength of an argument in favor of a legislative solution to the product liability crisis. Unless a positive correlation is established between the delineations made by a statute of repose and the stated objectives of that line-drawing—primarily a reduction in insurance costs—the statute of repose loses one of its main reasons for existence.

Arguments against enactments of statutes of repose often focus on the institutional assets of the judicial system. Courts apply rules of liability to specific cases and address the complexities of product safety in a flexible manner. The thousands of product liability cases filed each year provide ample information for updating judicial decisions and accommodating both the consequences of those decisions and any changes in basic social policy. One line of thought suggests that the common law decisionmaking process results in the most economically efficient solutions to the issues presented.\textsuperscript{103} The judicial adversary system also provides for more equality between the parties than does the legislative process. For example, an injured plaintiff represented by a capable trial lawyer in a suit against a corporate defendant has rough equality in

\textsuperscript{99} See Horowitz, supra note 72, at 294-95.
\textsuperscript{100} Id.
\textsuperscript{101} See H. Glick & K. Vines, supra note 82, at 89-91.
\textsuperscript{102} See Task Force, supra note 1, at VII-21, 23.
representation before a jury, whereas in a state legislative forum, consumers and consumer groups often are underarmed and outmanned by business interests.

Common law courts, however, have demonstrated institutional weaknesses in their handling of product liability cases. Courts have not been effective in using available data concerning the consequences of their decisions, and have tended to focus on only one of the many available policy choices. If courts are to base their decisions explicitly upon social policy, then data concerning that policy should be gathered and assimilated.104 Product liability lawsuits historically have not been forums for the use of the latest social science studies on the effects of changes in legal doctrine.105 In addition, lawyers litigate cases on specific facts; therefore, the record on appeal may not contain information conducive to an informed policy choice.

Although courts should be more capable than legislatures of obtaining feedback concerning the ramifications of their decisions in specific cases, trial and appellate courts have tended to focus more on the facts of a given case than on policy consequences. Courts should be able to individualize and particularize cases, but they have tended to overgeneralize. For example, judicial decisions only recently have begun to focus on the underlying differences in types of defects—manufacture, design, and marketing—and to treat them with different legal standards.

Professor James Henderson argues that conscious design choice liability cases are not suitable for resolution by adjudication because they are polycentric in nature.106 Such design defect cases involve complex interrelated issues that require reasoning beyond the capacity of our jury system.107 Professor Henderson suggests nonjudicial methods, perhaps legislative or administrative standard setting to give guidance in the determination of product safety.108

If the judicial trend continues to expand liability so that manufactur-

104. See Sperlich, supra note 77, at 284.
105. Id. at 288.
108. Id. at 1573-77. The establishment of the Consumer Product Safety Commission, which has the authority to set design safety standards for consumer products, is an example of legislative action taken to provide alternative means of standard setting instead of the judiciary. Id. at 1574-75.
ers become virtual insurers of their products, more legislative intervention can be expected. Industry will certainly ask legislatures to change the common law by spreading the cost of injuries to parties other than manufacturers and by reducing compensation for injuries. There is a strong institutional argument that legislatures are the most capable of fashioning rules under a true strict liability system. Although legislatures currently are being solicited to become involved in the law of product liability, the product liability reforms that have been enacted indicate an institutional reluctance to make massive alterations in tort law. Historically, legislatures have delegated the reform of tort law to the judiciary; but, because legislatures traditionally have enacted statutes of limitation, statutes of repose should be acceptable reform mechanisms.

A second potential institutional ramification of the application of statutes of repose to product liability cases concerns the incentives of sellers to maintain an optimum level of safety in their products. A generally accepted asset of common law product liability doctrine is its role in fostering incentives for individuals to act in a socially acceptable manner. Product liability laws create more incentives than either a system of no compensation for product injuries, where injured parties bear all the risk of loss, or a no-fault system of strict compensation for product injuries, where a large segment of society or society as a whole bears the risk of loss. The imposition of a statute of repose, however, could reduce long term incentives for product safety by shifting the risk of loss from producers to consumers for causes of actions arising after the prescribed period of time. If manufacturers are not held responsible for the safety of their products after ten years from the date of sale of a product, both the normal economic incentives for the safety of, and the financial responsibility for, older products might be reduced.

In contrast, one writer has argued that the current system of common law offers little incentive to corporate management to devote substantial resources to product safety when long term risks are involved. Business decisionmakers often are perceived to be responsible only for the short term consequences of their decisions, and therefore, they tend to

110. See Judicial Review, supra note 106, at 1574.
115. See M. Shapo, supra note 93, at 253.
focus primarily upon short term uncertainties. Proponents of general compensation schemes and of governmental regulation of long term risks contend that the lack of long term incentives for safety in the common law system necessitates a more comprehensive no-fault insurance compensation scheme to solve the inequities of catastrophic loss and to regulate against future losses.

These arguments, however, do not take into account the positive corporate incentives to correct previous errors in judgment that may have caused substantial injury. Mechanisms such as statutes of repose, or even insurance, allow businesses to escape liability for past decisions concerning product safety. There are at least two potential effects of these mechanisms on incentives: First, the need to focus on long term risks may be reduced; and, second, the financial responsibility for damages caused by long term risks may be eliminated. These possible effects suggest the presence of at least some incentives for product safety in the remote future.

Professor Guido Calabresi has discussed a third potential consequence of realocating the risk of loss from manufacturers to consumers by the use of statutes of repose or other mechanisms. Professor Calabresi applies the analogy of normal risk taking by entrepreneurs in the production of products in a free enterprise system to risk taking in the manufacture, design, and sale of products that may cause accidents.

According to Professor Calabresi, in a free enterprise system, the entrepreneur is best able to manage the risk, uncertainty, and innovation associated with product safety. The entrepreneur is best capable of deciding what and how many new goods are worth producing, as well as how to manufacture, design, and label products to reflect the optimal mix of availability, utility, and safety.

Business attempts to influence the passage of product liability laws that shift the risk of loss to consumers will lead to corresponding efforts by consumer groups to place the risk elsewhere. When neither industry nor consumers are willing to bear the risk of loss, the costs inevitably will be placed on the government. If government controls the uncertainty

118. See TASK FORCE, supra note 1, at V-46, VI-47 to -52. See also note 113 supra.
120. Id. at 324.
121. Id. at 320.
122. Id. at 323.
of product accidents by regulating safety and compensating injured persons, the management of risk generally will neither be effective nor desirable. Moreover, even if government control of risk is desirable, such regulation is fundamentally inconsistent with a free enterprise approach.\textsuperscript{123}

Professor Calabresi suggests that businesses should be wary of shifting the risk of major, uncompensated product-related injuries to either consumers or the government. If businesses relinquish to government the management of risk, uncertainty, and innovation—functions that private enterprises perform better than government—they may find that they have lost their classic justification for existence.\textsuperscript{124} The unwillingness of the private sector to bear the risks of enterprise suggests that the free enterprise system is being jeopardized for the short term economic advantage of shifting the risk of loss.\textsuperscript{125}

IV. CONSTITUTIONALITY

State court decisions concerning the constitutionality of product liability statutes of repose express judicial views that closely parallel those of the U.S. Supreme Court. Most of the cases that discuss concepts such as equal protection or due process rely heavily upon Supreme Court decisions.\textsuperscript{126}

There are, however, notable differences between state and federal constitutional decisionmaking. Although a majority of the state courts reflect a strict constructionist or more conservative view of constitutional decisionmaking,\textsuperscript{127} some state courts are more “activist” in reviewing socio-economic issues, especially when interpreting state constitutional provisions unknown to the Federal Constitution.\textsuperscript{128} The Constitution grants affirmative authority to the federal government, whereas state constitutions generally restrict the plenary power of government.

\textsuperscript{123} Id. at 323-24. Government control of risk would involve collective regulation of what goods and which producers would be allowed or desirable. Id. at 324. A society that readily presumes that government regulation and compensation comprise the best management of accident risks casts “deep doubts on the utility, and hence, inevitably, on the viability of private enterprises” by such an assumption. Id. at 316.

\textsuperscript{124} Id. at 322.

\textsuperscript{125} Id. at 323.

\textsuperscript{126} For example, many decisions involving the constitutionality of statutes of repose discuss federal and state equal protection provisions. In some of these decisions, it is virtually impossible to distinguish between the two analyses. See Kallas Millwork Corp. v. Square D Co., 66 Wis. 2d 382, 388-89, 223 N.W.2d 454, 458 (1975); Phillips v. ABC Builders, Inc., 611 P.2d 821, 827 (Wyo. 1980).

\textsuperscript{127} The direction of the Burger Court prompted comments that state supreme courts might become more liberal. See, e.g., Howard, State Courts and Constitutional Rights in the Day of the Burger Court, 62 Va. L. Rev. 83 (1976).

role of state supreme courts in judicial review arguably is different from the role of the U.S. Supreme Court. State supreme courts must be more responsive and accountable to the public will. Most state court judges are subject to popular vote; state constitutions are amended more easily; and state legislatures may be more susceptible to control by special interests that do not necessarily reflect the ideals of democratic institutions. According to these considerations, a state supreme court would scrutinize legislative action more carefully than the U.S. Supreme Court. A contrary view, however, suggests that the theory of judicial review in the U.S. Supreme Court and the state supreme courts should be identical.

A coherent analysis of state appellate court decisions on the constitutionality of product liability statutes of repose involves substantial difficulties. Statutes and the applicable constitutional provisions vary considerably among the states. In addition, the issues on appeal and the appellate posture of each case may vary substantially and appellate arguments and opinions often are cursory. Related constitutional decisions provide limited guidance. In the state appellate and federal cases examined, the discussion of the constitutionality of product liabil-

129. See Howard, supra note 127.
130. “In interpreting our State Constitution, however, we are not confined to federal constitutional standards and are free to grant individuals more rights than the Federal Constitution requires.” Carson v. Maurer, 424 A.2d 825, 831 (N.H. 1980).
131. This argument suggests that there should be greater uniformity in the decisionmaking process.
132. For an indication of how these statutes have been tailored in virtually every state, either through legislative change or judicial interpretation, see Charts II-IV infra.
133. An examination of decisions on the constitutionality of statutes in related areas is helpful both in clarifying the rationale used by courts that have confronted constitutional challenges to statutes of repose, and in predicting how the other state courts will rule when presented with those issues. The following citations are divided between those states in which the appellate courts have ruled on the issue of constitutionality and those in which the courts have not. See Chart I for a breakdown of the states.

ity statutes of repose included approximately seventeen different types of


Other decisions from states that have ruled upon the constitutionality of statutes of repose cover a myriad of areas. See Mayo v. Rouselle Corp., 375 So. 2d 449 (Ala. 1979) (commercial code war-
constitutional provisions and more than 150 separate constitutional sec-


Many states have not yet ruled upon the constitutionality of statutes of repose. The following citations represent decisions in the above-mentioned areas from these states.


6. Enforcement of provisions in deeds or conveyances: Tesdell v. Hanes, 248 Iowa 742, 82
The most frequently discussed provisions were "equal protection," "special laws," "due process," and "remedies." Approximately two-thirds of the cases focused on the uniform treatment and classification of the parties affected by the statutes; approximately two-thirds of the cases contained an analysis of an individual


134. See Chart I infra.

135. If state and federal equal protection provisions are counted together, they were discussed in more than 25 cases.

136. This provision was discussed in approximately 15 cases.

137. By counting state and federal due process provisions together, they were discussed in approximately 25 cases.

138. This provision was discussed in approximately 15 cases.

"right" to sue for personal injury; and less than one-third of the cases contained a discussion of legislative drafting techniques. A few cases either did not contain clearly definable issues or contained a discussion of issues unrelated to these general categories.

Another factor adding to the difficulty in analyzing these cases is the failure to present fully articulated constitutional challenges. Most of the appellate decisions do not contain either their underlying assumptions or their potential impact, thus making analysis much more difficult. Terms such as "statute of limitation" or "statute of repose" often are used without an explanation of their meaning or rationale. Once

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143. See, e.g., Clark v. Gulesian, 429 F.2d 405 (1st Cir. 1970), cert. denied, 400 U.S. 923 (1971); Taylor v. Karrer, 196 Neb. 581, 244 N.W.2d 201 (1976); Joseph v. Burns, 260 Or. 493, 491 P.2d 203 (1971); Hill v. Forrest & Cotton, Inc., 553 S.W.2d 143 (Tex. Civ. App. 1977). A review of the briefs submitted in these cases reveals that the constitutional issues were not presented in a manner that would afford proper resolution. In Silver v. Silver, 280 U.S. 117 (1929), the Court failed to articulate fully the constitutional challenge because the record did not disclose the constitutional grounds on which the petitioner challenged the validity of the statute.
affixed, however, these terms may be outcome determinative. Constitutional standards such as "substantial relation" and "rational basis" are presented in broad terms, without a precise explanation of their application to the pending case.

A lack of discussion and precision in judicial analysis also frustrates a coherent analysis of the case law under examination. Aside from a few major exceptions, the constitutional and public policy analysis in these cases contains significantly less amplification than does the analysis contained in U.S. Supreme Court decisions. Presumptions, definitions, and burdens of proof often are phrased so strongly that they virtually dictate a particular conclusion. One judge noted that the "unfortunate continued citation of cases that do not come to grips with the constitutional problem fool some of the courts some of the time, but not all of the courts all of the time." This is not to imply that a more completely reasoned approach would alter the outcome of these cases. The lack of discussion concerning each issue, however, does present difficulties both in isolating the crucial factors in a decision and in predicting future decisions.

A. Equal Protection

State courts devote substantial attention to state and federal equal protection challenges in determining the constitutionality of product liability statutes of repose. Violations of the uniform treatment provisions of state constitutions provide the most common grounds for invalidating a statute of repose. Courts usually concentrate on the statute's effects upon classes of protected defendants, classes of affected plaintiffs, and varieties of regulated subject matter. Should an architect or contractor be given constitutional immunity from suits involving personal injuries caused by the design or fabrication of a building when the owner of that building or a materialman who provided products in the design

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145. One court held that statutes of repose "must be upheld unless their constitutionality clearly, positively and unmistakably appears." Eden v. Van Tine, 83 Cal. App. 3d 879, 886, 148 Cal. Rptr. 215, 219 (1978). A strong presumption such as this will almost inevitably govern the outcome of a case.


147. Of the twelve decisions holding product liability statutes of repose unconstitutional, eight cited uniform treatment provisions.

148. Application of equal protection standards to product liability statutes of repose typically involve judicial inquiries into the validity and reasonableness of the distinctions among entities potentially involved in the classification (plaintiff, defendant, and subject matter), the uniformity of treatment within that classification, and the relationship between the classification and the object or purpose of the legislation. See Harrison v. Schrader, 569 S.W.2d 822 (Tenn. 1978).
and fabrication of that building would not be immunized? Is there constitutional justification for denying recovery to a person injured by the design of a building but allowing recovery to a person injured by the design of a component product in the same building? Can injuries caused by real property be treated any differently from injuries caused by personal property? Should immunity apply only to certain theories of recovery such as tort or contract, but not to other theories of recovery? Questions of this type concerning statutes of repose often appear in an equal protection context.

State court standards for deciding these equal protection issues generally are consistent with the standards enunciated by the U.S. Supreme Court. Although various courts have noted the standards of "fundamental rights," "suspect categories," and "strict scrutiny," no court has yet applied a "strict scrutiny" analysis to product liability statutes of repose. Some courts focus on an intermediate level of review. The most commonly used constitutional standard for equal protection review is the "rational basis test." According to this test, a classification will be upheld if it rests upon some "reasonable basis." Generally a classification should be reasonable and the classification's relationship to legislative objectives served by the statute should also be reasonable. Because "reasonableness" depends upon the facts of any given case, there is considerable flexibility in its application. Mere inequality of treatment, however, will not typically render a classification unconstitutional. Courts often defer to partial solutions to problems and experimentation.

When the classification pertains to economic regulation, a strong presumption of constitutionality has traditionally attached, and the

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150. In New Orleans v. Duke, 427 U.S. 297, 303 (1976), the Court noted that, unless a legislatively enacted classification "trammels fundamental personal rights" or was drawn upon inherently "suspect distinctions" such as race, religion, or alienage, the classification need only be rationally related to a legitimate state interest. In McGowan v. Maryland, 366 U.S. 420 (1961), the Court held that a classification is subject to attack only if it rests on grounds wholly irrelevant to achieving the state's objective.


152. Carson v. Maurer, 424 A.2d 825, 831 (N.H. 1980). This court also added the element of reasonable restrictions on private rights. Id. at 832.


154. See Dandridge v. Williams, 397 U.S. 471 (1970); Metropolis Theatre Co. v. Chicago, 228 U.S. 61 (1913); Lindsey v. Natural Carbonic Gas Co., 220 U.S. 61 (1911). "At present the statute remains experimental social legislation and is entitled to the deference usually given enactments of that type. After it has been enforced for a sufficiently long period of time that all the rationales likely to be advanced in its support have been developed, a court should fully examine those rationales and determine whether they are sound." O'Brien v. Hazelet & Erdal, 410 Mich. 1, 19-20, 289 N.W.2d 336, 343 (1980).
amount of evidence needed to support legislative rationality is small.155 This presumption is usually upheld because courts only have to find a "rational relationship to a conceivably legitimate state purpose."156 Other states supplement the "rational basis" standard with an "arbitrary, capricious, and invidious" standard. According to this standard, "[o]nly if the classification is arbitrary and has no reasonable purpose or reflects no justifiable public policy will the classification be held violative of constitutional guarantees of equal protection."157

At least one state has adopted an equal protection test designed to lie between the "strict scrutiny" and "rational basis" standards of review.158 In Carson v. Maurer, the New Hampshire Supreme Court found that the right to recover for personal injuries was not a "fundamental right" but was deserving of "a more rigorous judicial scrutiny than [was] allowed under the rational basis test."159 In addressing the issues of whether the New Hampshire medical malpractice statute has a "fair and substantial relation" to its legitimate legislative objective and whether the statute "imposes unreasonable restrictions on private rights," the New Hampshire court found the entire statute, including a statute of limitation running from act or failure to act and thereby arguably a statute of repose, unconstitutional.160 The court reasoned that the class of persons injured by medical malpractice could not be consti-

155. Commentators have noted that "[t]he modern (Supreme) Court has not drawn from Lochner the lesson that all judicial intervention via substantive due process is improper. Rather, it has withdrawn from careful scrutiny in most economic areas but has maintained and increased intervention with respect to a variety of non-economic liberties." G. Gunther & N. Dowling, Cases and Materials on Individual Rights in Constitutional Law 379 (1970). There is evidence, however, that some state supreme courts have not totally eliminated careful scrutiny from this socio-economic area. See Carson v. Maurer, 424 A.2d 825 (N.H. 1980).


159. 424 A.2d 825, 830 (N.H. 1980).

160. The New Hampshire medical malpractice statute of limitation required "that a medical malpractice plaintiff bring his action within two years of the alleged negligence or, if the action is based upon the discovery of a foreign object in the body . . ." then the plaintiff could bring his action within two years of discovery. The court held that "the legislature may not abolish the discovery rule with respect to any one class of medical malpractice plaintiffs." Carson v. Maurer, 424 A.2d 825, 833 (N.H. 1980). The court also held the limitation provision unconstitutional insofar as it limited an infant or minor to bring a personal action two years after the removal of the disability. Id. at 833-34. The court went on to hold the entire statute unconstitutional. Id. at 839. It can be argued, however, that the response period in the statute was not specifically overruled and that it fell because the entire statute was declared unconstitutional.
tutionally subdivided into plaintiffs injured by "foreign objects" and by other malpractice for purposes of the statute of limitation.

Although it is difficult to generalize, there typically are three judicial inquiries made concerning the contested product liability statutes of repose in the application of the equal protection standards: the validity and reasonableness of the distinctions among entities potentially involved in the classification (plaintiff, defendant, and subject matter); the uniformity of treatment within that classification; and the relationship between the classification and the object or purpose of the legislation. Supporters of product liability statutes of repose have focused upon some of the following suggested distinctions between the parties protected by the statute and parties not protected: (1) distinctions drawn by laws in other contexts such as licensing requirements; (2) insurance coverage and cost problems; (3) nature of the work performed or services rendered; (4) applicable theories of liability and defenses; (5) problems in defending claims; (6) number of potential plaintiffs; (7) availability of quality control techniques; (8) continuing involvement with the product, building, or patient; and (9) control over the product, building, or patient.

Critics of the constitutionality of product liability statutes of repose attempt to direct the focus of the inquiry away from the various standards of review employed by courts by concentrating on the purposes of statutes of repose and their relationship to the classification involved. Opponents of statutes of repose contend that their objectives either are not achieved by a product liability statute of repose or are unworthy of being served at all. They concede, nonetheless, that many businesses and activities serving the public interest would benefit from immunity against liability. For example, if the purpose of the statute is to promote the economic welfare of the real estate industry, the medical profession, or the manufacturing business, critics would argue that there are other enterprises or groups who likewise should be immunized. If, however, the purpose is to protect only architects, doctors, and manufacturers, critics charge that there is no rational relationship between the

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161. Proponents of statutes of repose contend that such statutes would reduce the financial burdens of recordkeeping, insurance, and legal costs; benefit the public welfare by making the desired services more readily available; reduce the effects of changes in common law liability; retain all potentially liable parties; treat professions differently; and punish plaintiffs who are late in filing their claims. See Howell v. Burk, 90 N.M. 688, 568 P.2d 214 (Ct. App.), cert. denied, 91 N.M. 3, 569 P.2d 413 (1977); McCarty v. Goldstein, 151 Colo. 154, 376 P.2d 691 (1962); Anderson v. Wagner, 79 Ill. 2d 295, 402 N.E.2d 560 (1979), appeal dismissed, 449 U.S. 807 (1980); Freezer Storage, Inc. v. Armstrong Cork Co., 478 Pa. 270, 382 A.2d 715 (1978).

162. There is little discussion of the uniformity within a classification. There is also little discussion of the equal protection infirmities of the subject matter covered.

classification and the object of the legislation.\textsuperscript{164}

\textbf{B. Special Legislation}

"Special legislation" provisions of various state constitutions raise concerns regarding the constitutionality of product liability statutes of repose.\textsuperscript{165} Although closely related to equal protection issues, the arguments of constitutionality are often conceptually distinct. The "special legislation" provisions may take several forms: a simple statement suggesting that no special law shall be passed where a general law can be made applicable,\textsuperscript{166} or a list of prohibited special laws that grant immunity or limit civil actions of particular parties.\textsuperscript{167} Although these provisions generally receive the same treatment as equal protection provisions,\textsuperscript{168} there have been instances of varied treatment.\textsuperscript{169}

In \textit{Rosenberg v. Town of North Bergen},\textsuperscript{170} the New Jersey Supreme Court upheld an architects' and contractors' statute of repose\textsuperscript{171} as not viola-

\textsuperscript{164} \textit{See} Fujiosa v. Kam, 55 Haw. 7, 12, 514 P.2d 568, 571 (1973).


\textsuperscript{166} \textit{Ibid}. See, e.g., Ark. Const. of 1858, art. V, § 25 (1874) ("In all cases where a general law can be made applicable no special law shall be enacted . . . .")

\textsuperscript{167} \textit{Ibid}. See, e.g., Colo. Const. art. V, § 25 ("The general assembly shall not pass local or special laws in any of the following enumerated cases, that is to say . . . for limitation of civil actions . . . granting to any corporation, association or individual any special or exclusive privilege . . . .").

\textsuperscript{168} \textit{Ibid}. See Laughlin v. Forgrave, 432 S.W.2d 306 (Mo. 1968) (special provision regarding limitation period specifically applicable to medical malpractice actions did not create a denial of equal protection or constitute a proscribed class legislation).

\textsuperscript{169} \textit{Ibid}. See, e.g., Burmaster v. Gravity Drainage Dist. No. 2, 366 So. 2d 1381 (La. 1978) (architects' and contractors' statute of repose not an impermissible special law; rather, classification established by statute similarly affects all persons and interests and, therefore, does not offend equal protection guarantee of the Constitution).

\textsuperscript{170} 61 N.J. 190, 293 A.2d 662 (1972).

\textsuperscript{171} The statute provides:

No action whether in contract, in tort, or otherwise to recover damages for any deficiency in the design, planning, supervision or an improvement to real property, or for any injury to property, real or personal, or for an injury to the person, or for bodily injury or wrongful death, arising out of the defective and unsafe condition of an improvement to real property, nor any action for contribution or indemnity for damages sustained on account of such injury, shall be brought against any person performing or furnishing the design, planning, supervision of construction or construction of such improvement to real property, more than 10 years after the performance or furnishing of such services and construction. This limitation shall not apply to any person in actual possession and control as owner, tenant, or otherwise, of the improvement at the time the defective and unsafe condition of such improvement constitutes the proximate cause of the injury or damage for which the action is brought.


Between 1964 and 1969, 30 states adopted identical or similar statutes. \textit{See} Rosenberg v. Town of
tive of constitutional proscriptions against the enactment of special laws. The statute granted favorable relief to a class of persons who were subject to possible extensions of potential liability. Although the court refused to enumerate all the classes of persons coming within this statutory group, the court nevertheless found no justification for finding that the statute fell within the “special law” prohibition of the state constitution. Furthermore, the court held that such a classification did not violate the equal protection clause of the state constitution.

Although the Rosenberg holding has been quoted extensively, in Skinner v. Anderson, the Illinois Supreme Court examined a virtually identical statute and state constitutional provision, and held the statute unconstitutional. The court reasoned that the statute singled out only architects and contractors for immunity, to the exclusion of manufacturers of building materials and owners or persons in control of property. By protecting the negligent actions of only one class of persons, the selection was arbitrary and, therefore, discriminatory.

In Anderson v. Wagner, the Illinois Supreme Court did not find Skinner controlling in its examination of the constitutionality of the medical malpractice statute. The court held that setting medical malpractice apart from other professional malpractice and protecting physicians and hospitals but not other medical health providers was constitutionally permissible. Noting that “much empirical data has established that physicians and hospitals must be set apart from other members of the health-care class insofar as medical malpractice insurance is con-

173. The New Jersey Constitution does not permit the legislature to “enact any private, special or local law granting to any corporation, association or individual any exclusive privilege, immunity or franchise.” N.J. CONST. art. IV, § 7, ¶ 9.
175. 38 Ill. 2d 455, 231 N.E.2d 588 (1967).
176. The architects' and contractors' statute of repose violated art. IV, § 22 of the Constitution of Illinois, which states that: “The General Assembly shall not pass local or special laws in any of the following enumerated cases, that is to say: . . . [g]ranting to any corporation, association or individual any special or exclusive privilege, immunity or franchise whatever.” ILL. CONST. art. IV, § 22.
178. The court indicated that a legislative classification must be reasonably related to the legislative purpose to be constitutional. Id.
179. 79 Ill. 2d 295, 402 N.E.2d 560 (1979). Note a change, however, in the applicable constitutional provisions. Section 22 of article IV of the 1870 Constitution provides: “The General Assembly shall not pass local or special laws in any of the following enumerated cases, that is to say: . . . [g]ranting to any corporation, association or individual any special or exclusive privilege, immunity or franchise whatever.” Section 13 of article IV of the 1970 Constitution provides: “The General Assembly shall pass no special or local law when a general law is or can be made applicable. Whether a general law is or can be made applicable shall be a matter for judicial determination.” The Anderson court did not find this change important. Id. at 315, 402 N.E.2d at 569.
cerned" and existing legislation making similar distinctions, the court concluded that the statute was drawn very narrowly and "encompassed within the classification to whom the statute applied only those segments of the health-care providers most acutely affected . . .".

The Supreme Court of Arkansas also distinguished *Skinner* in *Carter v. Hartenstein*, and upheld an architects' and contractors' statute of repose. Unlike the court in *Skinner*, the court in *Carter* refused to find the distinction between owners or suppliers and architects or contractors to be arbitrary or unreasonable, notwithstanding distinctly worded equal protection language in the Arkansas Constitution. Reasoning that all statutes or laws tend to work for some and against others, the court found the statute valid, reasonable, and not designed to grant special privileges and immunities.

The Wyoming Constitution provides that "all laws of a general nature shall have a uniform operation." In *Phillips v. ABC Builders, Inc.*, the Wyoming Supreme Court declared unconstitutional an architects' and contractors' statute of repose that was similar to those in Arkansas and New Jersey. The court held that the statute, by insulating a narrow class of defendants from suit, operated as a grant of immunity, not a statute of limitation. After finding no rational basis for protecting such a limited class, the court concluded that the statute was a special law and, therefore, impermissible. Unlike the court in *Carter*, the court in *Phillips* adopted *Skinner*'s pronouncement that arbitrary grants of immunity to architects and contractors render such statutes of repose contrary to constitutional provisions requiring a uniform application of laws.

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180. *Id.* at 317, 402 N.E.2d at 570.
181. *Id.* at 319, 402 N.E.2d at 571.
182. 248 Ark. 1172, 455 S.W.2d 918 (Ark. 1970).
183. ARK. STAT. ANN. § 37-238 (1967) provides:
No action in tort or contract (whether oral or written, sealed or unsealed) to recover damages for personal injury or wrongful death caused by any deficiency in the design, planning, supervision or observation of construction or the construction and repairing of any improvement to real property shall be brought against any person performing or furnishing the design, planning, supervision or observation of construction or the construction and repair of such improvement more than four (4) years after substantial completion of same.
185. ARK. CONST. of 1868, art. II, § 18 (1874) ("[T]he general assembly shall not grant to any citizen or class of citizens privileges or immunities which upon the same terms shall not equally belong to all citizens.").
188. 611 P.2d 821 (Wyo. 1980).
191. *Id.*
192. *Id.* at 825-26.
Due process arguments concerning product liability statutes of repose are somewhat more common than those based on equal protection concepts. On occasion, the two issues are discussed simultaneously. No state appellate court, however, has relied solely upon due process to overturn a product liability statute of repose.

The primary thrust of the due process argument typically involves the effect of a product liability statute of repose upon an individual's right to sue for personal injury. Opponents contend that such statutes withdraw protected rights, thus barring "causes of action before they have accrued or before an injured party has a reasonable opportunity to sue." Proponents of statutes of repose contend, however, that due process protects only vested rights and that product liability statutes of repose do not affect vested rights any more than do statutes of limitation. Supporters maintain that instead of barring a cause of action, these statutes prevent what otherwise might be a cause of action from ever arising.

The U.S. Supreme Court has provided much of the due process analysis upon which state appellate courts rely. The standards most frequently used by state courts contain the familiar language of the "rational basis" and "arbitrary and capricious" approaches. Some courts are careful to note that there will be no application of *Lochner* style "substantive due process." Most courts rely explicitly upon

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194. See Howell v. Burk, 90 N.M. 688, 568 P.2d 214 (Ct. App.), cert. denied, 91 N.M. 3, 569 P.2d 413 (1977). In his strong dissent, Judge Sutin noted that not only did the statute prevent a cause of action from arising, but it also "abrogate[d] a remedy for a very real wrong, even though a plaintiff normally has a claim for relief." Id. at 699, 568 P.2d at 225 (Sutin, J., dissenting).


196. See Rosenberg v. Town of North Bergen, 61 N.J. 190, 199, 293 A.2d 662, 667 (1972). The court indicated that the function of a statute of repose is to define substantive rights, not to alter or modify a remedy. Id.


Thus the relevant test of due process here is basically the test of reasonableness. If in balancing the conflicting interests of the parties reason can be established in the selection of the date of the wrongful act or the date of the sale of a defective product as the inception date for the running of the statute of limitations in a personal injury action, no constitutional attack on such legislation would lie.


199. As a result of *Lochner* and similar decisions, the Supreme Court was criticized for substituting the economic philosophy of a majority of its members for the policy intentions of legislative bodies. For example, in *Lochner*, the New York Legislature was barred from enacting legislation regulating the number of hours a bakery employee could work on the grounds that such a law
dicta from Silver v. Silver.\textsuperscript{200} "[T]he Constitution does not forbid the creation of new rights, or the abolition of old ones recognized by the common law, to attain a permissible legislative object."\textsuperscript{201} Some courts have considered the necessity of alternative remedies or a quid pro quo if a statute alters an individual's ability to sue for personal injury.\textsuperscript{202}

In Reeves v. Ille Electric Co.,\textsuperscript{203} the Montana Supreme Court upheld a statute of repose for architects and builders, and the court noted that the deprivation of a common law right did not impair a plaintiff's due process guarantees as long as alternate remedies were available.\textsuperscript{204} In Owen v. Wilson,\textsuperscript{205} the Arkansas Supreme Court provided a new dimension to the applicable due process analysis. In Owen, the court noted that a statute of repose must allow a reasonable amount of time for a plaintiff to seek redress for personal injury.\textsuperscript{206} Despite the Owen sentiment, the basic policy reasons for such statutes, expressed in terms of expediency, necessity, and convenience,\textsuperscript{207} have been found to justify their retention.\textsuperscript{208}

Due process of law also requires that a statute's terms be clear and definite.\textsuperscript{209} In Taylor v. Karrer,\textsuperscript{210} the Nebraska Supreme Court found a professional malpractice statute of repose not so "imperfect or deficient

\textsuperscript{200} 280 U.S. 117 (1929). In Silver, the Court noted that whether there had been a serious increase in the "evils of vexatious litigation" in the pertinent class of cases was for legislative determination. If the legislature found that such a situation had arisen, it "may well be the basis of legislative action further restricting the liability. Its wisdom is not the concern of courts." Id. at 123.

By upholding the constitutionality of Connecticut's automobile guest statute, the Court permitted a legislature to circumvent what had traditionally been viewed as an important right: the right to seek recovery for personal injuries. The Court, however, was careful to emphasize the gravity of this exception to the general rules for bringing a negligence suit. Nevertheless, the Supreme Court concluded that the legislature had examined the problem and had decided that a guest should be treated differently for general policy reasons.

\textsuperscript{202} Id. at 121.


\textsuperscript{204} 170 Mont. 104, 551 P.2d 647 (1976).

\textsuperscript{205} Id. at 113, 551 P.2d at 652.

\textsuperscript{206} 260 Ark. 21, 537 S.W.2d 543 (1976).

\textsuperscript{207} Id. at 25, 537 S.W.2d at 545.

\textsuperscript{208} See Chase Sec. Corp. v. Donaldson, 325 U.S. 304 (1945) (statutes of repose are by definition arbitrary, representing public policy concerns regarding the privilege to litigate).

\textsuperscript{209} See Owen v. Wilson, 260 Ark. 21, 26, 537 S.W.2d 543, 545 (1976).

\textsuperscript{210} The [U.S.] Supreme Court has recognized that a noncriminal statute is unconstitutionally vague under the due process clause of the fifth or fourteenth amendments when its language does not convey sufficiently definite warning as to the proscribed conduct when measured by common understanding or practice." Horn v. Burns & Roe, 536 F.2d 251, 254 (8th Cir. 1976) (citations omitted). In Horn, the plaintiff unsuccessfully challenged a two-year Nebraska statute of limitation for actions based on professional negligence. The plaintiff alleged that "professional negligence" and "professional service" were fatally vague because the terms subjected him to a limitation period so indefinite as to be incapable of application.

\textsuperscript{210} 196 Neb. 581, 244 N.W.2d 201 (1976).
as to render its enforcement impossible and, therefore, upheld its constitutionality. The Alabama Supreme Court, however, in *Plant v. R.L. Reid, Inc.*, declared that state's architects' and contractors' statute of repose void for "vagueness, indefiniteness and uncertainty."éroden et al. 

In addition to the numerous constitutional issues emerging from the institution of product liability statutes of repose, a number of cases have addressed the constitutional impairment caused by the retroactive application of product liability statutes of repose. The retroactivity issue usually has been included as part of the due process analysis. Courts generally have concluded that as long as the statute does not adversely affect vested rights, retroactive application is constitutionally permissible. In *Buckner v. GAF Corp.* a plaintiff was not given the benefit of the retroactive application of a legislative provision exempting asbestos-related injuries from a statute of repose because it would deprive a defendant of a vested statute of limitation defense.

D. Remedy, Access to the Courts and Common Law Rights

One of the most interesting and least noted state constitutional provisions applicable to product liability statutes of repose is the "remedy," "access to courts," or "open court" clause contained in many state constitutions. These remedy clauses, traceable to the Magna Carta, guarantee that the courts of justice shall be open to every person for

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211. *id.* at 586, 244 N.W.2d at 205.
212. 294 Ala. 155, 313 So. 2d 518 (1975).
214. In *Hunter v. School Dist. of Gale-Ettrick-Trempealeau*, 293 N.W.2d 515, 519-20 (Wis. 1980), the court held that the appellant had acquired a vested right in a cause of action as the result of her injury and that the due process clause protected this cause of action. As a result, the court ruled that the statute of limitation at issue was applicable only to those causes of action accruing on or after its effective date, and thus would not apply to causes of action accruing prior to that date. *See* Wallace v. Homan & Primen, Inc., 584 S.W.2d 322, 328 (Tex. Civ. App. 1979) (if limitations statute is so applied as not to allow reasonable time after law goes into effect to bring suit upon actions that are not yet barred, it would be unconstitutional). *See also* Norman v. Liddell, 596 P.2d 879 (Okla. 1979) (statute of limitation that could bar remedy before cause of action accrued would be unconstitutional).
217. *id.* at 353.
218. Thirty-seven state constitutions have some form of the following language: all courts shall be open; every person for injury done to him in his goods, lands, or person shall have remedy by due process of law; and right and justice shall be administered without self-denial or delay. *See, e.g.,* ALA. CONST. art. I, § 13; FLA. CONST. art. I, § 21; KY. CONST. Bill of Rights, § 14; LA. CONST. art. I, § 22; MO. CONST. art. I, § 14; MONT. CONST. art. II, § 16; OR. CONST. art. I, § 10; PA. CONST. art. I, § 11.
219. These clauses, as well as better-known due process provisions, probably originated in the Magna Carta: "[N]o free man shall be taken or imprisoned or dispossessed, or outlawed, or banished, or in any way destroyed, nor will we go upon him, or send upon him, except by the legal judgment of his peers or by the law of the land" and "to no one will we sell, to no one will we deny, or delay right or justice." *STATUTES OF THE REALM* (1963). Sir Edward Coke's gloss on Chapter 29
redress of any injury without denial or delay.220 The jurisdictions reviewing the remedy clause's effect upon statutes of repose have given this issue varied treatment.

Three major legal theories have supported decisions holding that statutes of repose are not subject to a right of remedy challenge. Some jurisdictions have determined that the power to enact statutes of repose that preclude a cause of action221 is implicit in a legislature's power to abolish rights that have not yet vested.222 Other jurisdictions have concluded that the remedy clause applies only to the judiciary, not to the legislature.223 As a result, the clause is precluded from operating as a bar to any legislative statute of repose. Finally, some courts have limited the application of the remedy clause to statutes denying redress for "legal injury."224 These jurisdictions have determined that because statutes of repose prevent what might otherwise be a cause of action from arising, no legal injury can be sustained after the passage of a certain period of time. Thus, a person injured after the fixed period of liability suffers only *dannum absque injuria.*225

Despite the differences in these legal theories, a common element permeates decisions that uphold the constitutionality of product liability statutes of repose. The courts have expressed concern that a rigid interpretation of the remedy clause could constrain the legislature's ability to enact new laws and repeal old ones.226 Such an encumbrance upon the

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226. One court expressed its concern as follows:

This court would encroach upon the Legislature's ability to guide the development of the law if we invalidated legislation simply because the rule enacted by the Legislature rejects some cause of action currently preferred by the courts. To do so would be to place certain rules of the 'common law' and certain non-constitutional decisions of courts above all change except by constitutional amendment. Such a result would offend our notion of the checks and balances between the various branches of government, and of the flexibility required for the healthy growth of the law.

legislature would freeze common law rights in perpetuity.227

In contrast to a flexible approach, some courts have interpreted the remedy clause strictly and have held statutes of repose unconstitutional. These jurisdictions have determined that with respect to the remedy clause, statutes of repose “perform an abortion on the [plaintiff’s] right of action, not in the first trimester, but before conception.”228 Thus, the legislature is prohibited from acting to limit or repeal the application of certain common law rights, regardless of whether the rights conferred by those laws have vested.229 Relying on this analysis, some jurisdictions have held that the legislature lacks the authority to eclipse certain established common law rights through statutes of repose unless an alternative remedy accompanies the legislature’s action or a potential plaintiff is given a quid pro quo.230

These divergent approaches are evident in the first two state supreme court cases ruling upon the constitutionality of product liability statutes of repose. In Dagwe v. Piper Aircraft Corporation,231 the Indiana Supreme Court held that the statute had a strong presumption of validity, there is no vested or property right in a rule of common law, the right to bring a common law action is not a fundamental right, and the legislature has the power to abrogate common law rights and remedies.232 The court rejected the argument that the “open court” clause requires an alternative remedy or a quid pro quo.233

The Florida Supreme Court declared its product liability statute of repose unconstitutional because it violated the “access to court” clause.234 Florida courts have allowed statutes restricting common law rights if the statute provides some reasonable alternative form of recovery. In the absence of an alternative the statute must be “grounded both in an overpowering public necessity and an absence of any less

229. Id. at 225.
230. See Overland Constr. Co. v. Sirmons, 369 So. 2d 572, 573-75 (Fla. 1979) (legislature may not limit liability of persons performing construction work without providing plaintiff substitute remedy after expiration of defendant’s liability). Some states have specific constitutional provisions protecting common law rights. See, e.g., Mich. Const. art. III, § 7. These provisions, however, do not seem to have affected the outcome of cases challenging the constitutionality of product liability statutes of repose.
232. Id. at 213.
233. Id. The court relied heavily upon Gallagher v. Davis, 183 A. 620 (Del. Super. 1936). The Gallagher court was reviewing an automobile guest statute. A previous statute had been held unconstitutional because “it denied a right of action to a guest in an automobile in all circumstances of injury.” Gallagher upheld the statute in part because it provided for a willful or wanton cause of action.
onerous alternative means. 235

E. Title and Subject

State constitutions typically contain provisions to the effect that each law passed by the legislature shall encompass but one subject, and that that subject must clearly be expressed in the title. 236 The function of these provisions is to ensure that both the legislature and the public are fully apprised of the nature of legislation being considered. 237

Most title and subject challenges to statutes of repose involve cases in which the legislature has incorporated ordinary statute of limitation language into a product liability statute of repose. For example, if a court determines that the title of a law refers to "statute of limitation" or limitations on actions after causes of action accrue, and also finds that the subject of the law is a "statute of repose" or a limitation of actions before they accrue, some states will hold that statute unconstitutional. 238 Other states, however, have allowed the mixture of statute of repose and statute of limitation language provided that the wording of the law gives "reasonable notice" 239 of its subject matter to the legislature and the public.

F. Standing and Other Issues

Challenges to the constitutionality of statutes of repose based on equal protection or "special legislation" provisions often raise questions of standing. 240 A plaintiff may want to argue that the statute unreasonably discriminates among the members of the class of potential defendants. 241 The question of standing focuses on the plaintiff's interest in the outcome of the decision. 242 Generally, most courts that have addressed

236. See, e.g., Ala. Const. art. IV, § 45 ("Each law shall contain but one subject, which shall be clearly expressed in its title . . . .").
237. See Gayle v. Edwards, 261 Ala. 84, 86, 72 So. 2d 848, 850 (1954).
240. In response to the argument that the applicable two-year statute was discriminatory and denied equal protection of the law to attorneys, scientists, engineers, nurses, x-ray technicians, and other professionals, one trial court ruled that the plaintiffs, not being persons within any category that might claim to be discriminated against by the statute had no standing to raise the constitutional issue. See McCarty v. Goldstein, 151 Colo. 154, 376 P.2d 691 (1962).
241. See id.; Pacific Indem. Co. v. Thompson-Yaeger, Inc., 260 N.W.2d 548, 555 (Minn. 1977) (statute held discriminatory and unconstitutional because it granted immunity from suit to a certain class of defendants without a reasonable basis for that classification).
242. See McClanahan v. American Gilsonite Co., 494 F. Supp. 1334, 1342-44 (D. Colo. 1980) (employing test for standing cited in Singleton v. Wolff, 428 U.S. 106, 112 (1976)). A plaintiff's recovery could depend upon his ability to obtain judgment against all defendants. The plaintiff has a stake, therefore, in establishing the unconstitutionality of the statute and will present the court with a vigorous argument for including the exempted defendants.
the issue of standing have permitted the plaintiff to proceed.

In discussing the constitutionality of statutes of repose, some courts begin with an analysis of the police power of the state. To avoid attack, the statute must be enacted “in order to eradicate a perceived social evil or attain a perceived social objective.” Courts traditionally have defined the scope of those police powers in broad terms, and have found legislatures to be the proper forums for selecting the means to promote the well-being of society. Fujisaka v. Kam demonstrated that the reasonable exercise of the police power includes the enactment of a statute of repose.

Generally, a legislature may abolish a cause of action provided the legislature acts in a reasonable and nondiscriminatory manner, and does not violate a constitutional mandate. Specific constitutional prohibitions arguably would invalidate a statute of repose. For example, the New York Constitution provides: “The right of action now existing to recover damages for injuries resulting in death, shall never be abrogated . . . .” Such a provision would compel a court to undertake an especially careful analysis of a statute’s constitutionality.

The application of statutes of repose to causes filed by minors has created both equal protection and due process problems. Minors traditionally have been granted additional time to commence suits by applicable tolling provisions. The typical medical malpractice statute of repose, however, will not exempt minors from its operation. A California trial judge has found that this unreasonably discriminates against minors on the basis of the cause of their injuries. A due process argument would likely emphasize that minors require exemption from the operation of such statutes because of their dependence on others to enforce their rights. Whenever possible, courts have attempted to ex-

243. In analyzing the reach of a state’s police power, the court inquires whether the granting of immunity from liability is justified as a reasonable exercise of that power. See Fujisaka v. Kam, 55 Hawaii 7, 514 P.2d 568 (1973).
246. Id. at 11, 514 P.2d at 571.
247. Loyal Order of Moose, Lodge 1785 v. Cavaness, 563 P.2d 143, 147 (Okla. 1977) (legislature has wide latitude to create statutory classifications, although any discrimination must be reasonable and satisfy important legislative objectives).
248. N.Y. CONST. art. I, § 16.
249. If wrongful death claims are excluded from the application of a statute of repose, plaintiffs bringing suits for personal injuries or property damage suffered by decedents will have a strong equal protection argument with which to attack the statute.
250. See Paxton v. Fund, No. 420199 (San Diego County Sup. Ct. Apr. 23, 1979). The judge compared twins who were injured on the same day, one because of a doctor’s malpractice and the other in an automobile accident. Under California’s repose statute, the former has only three years in which to bring his suit, whereas the latter is given one year and ninety days after reaching majority.
251. See Reich v. State Highway Dep’t, 396 Mich. 617, 194 N.W.2d 700 (1972) (60-day notice
empt minors from the effects of statutes of repose by means of statutory construction.252

By enacting statutes of repose that bar actions brought after the passage of time from a certain event, such as date of sale or manufacture, legislatures may run afoul of the Supreme Court's "irrebuttable presumption doctrine."253 Courts will have to examine the underlying assumptions made by policymakers to determine whether it is proper to apply a single rule to all products.254 Inflexibility in its operation could invalidate an otherwise constitutionally acceptable statute of repose.255

V. OVERVIEW

It is too early to conclude whether product liability statutes of repose have achieved their intended objectives. Neither the courts nor interested parties have raised the issue of the effectiveness of these statutes. As a result, cases contesting the constitutionality of statutes of repose tend to be decided on alternative grounds.256

Decisions concerning the constitutionality of product liability statutes of repose appear to rely upon vague standards, case law from other jurisdictions, and outcome-determinative labels and presumptions. In all probability, however, the final outcomes of these constitutional challenges represent the byproducts of balancing a number of values that courts wish to promote by their holdings.257 If this analysis is correct, the presentation of the issue on appeal becomes the crucial battleground for cases challenging the constitutionality of statutes of repose.

If the central issue is equal protection, then judges placing a premium upon ensuring that all members of society are treated equally will examine the degree of existing evidence to justify a classification that is

requirement of general highway statute is constitutionally infirm when applied to a plaintiff rendered mentally or physically incapacitated by the alleged acts of the tortfeasor).


At issue are the legislature's conclusions that all products have identical useful safe lives and that all products should last for the same amount of time. Even if the plaintiff can demonstrate that the useful safe life of a product exceeds the statutory limit, a statute of repose may prevent the plaintiff from presenting such evidence.

255. The problem may be avoided by making the bar a rebuttable presumption or by basing the repose limitation on the specific product's useful safe life.

256. One alternative ground for resolving challenges to statutes of repose involves the allocation of the burden of proof. Generally, the side that bears the burden of proof will lose.

invalid on its face. There being none, the statute fails. In contrast, judges believing that legislatures should have the widest discretion in regulating economic matters will place the burden of proof upon the party challenging the statute's constitutionality, and the statute probably will be upheld.

Alternatively, if the key issue is whether a protected right is implicated, then judges feeling strongly in common law causes of action for personal injuries will require proponents of the statute to disprove its unconstitutionality. This burden of proving a negative rarely will be met. Conversely, judges feeling strongly that the legislature possesses institutional strengths that command greater deference than judicial decrees will usually uphold the statute's constitutionality.

VI. Conclusion

A primary source of confusion regarding product liability statutes of repose has been semantic. Although familiar labels such as "statute of limitation" or "statute of repose," "procedural," "remedial," or "substantive" are helpful, they can also create confusion. The precise meaning attributed to that statute in a particular set of circumstances is far more important than its label. Although most product liability statutes of repose have a common origin, they have been treated inconsistently by the courts. Thus, great care should be exercised in determining the precise meaning and applicability of any given statute of repose.

Policy discussions on the advisability and constitutionality of product liability statutes of repose have been superficial. It would appear that the pressing desire for legislation of this nature has contributed to the absence of sophisticated research in this area. The lack of research, however, also indicates a willingness on the part of special interest groups, legislatures, and courts to reach conclusions without demanding substantial evidence. If decisionmakers are to base their actions upon public policy choices, then they would be well served to obtain all available evidence concerning the assumptions and ramifications of those policies. In particular, courts that insist on basing their decisions upon public policy foundations, without sound data to support their holdings, are extremely vulnerable to attack.

State court decisions concerning the constitutionality of statutes of repose often reflect the underlying biases of judges rather than an examination of the complex nature and ramifications of these statutes. Future decisions concerning statutes of repose, particularly those initially ruled unconstitutional but subsequently reenacted to meet constitutional objections, will be most helpful in determining the roles of courts and legislatures in making product liability law.
### Chart I
Constitutionality of Statutes of Repose in Product Liability Actions (State Appellate and Federal Decisions)

<table>
<thead>
<tr>
<th>State</th>
<th>General Statutes of Repose</th>
<th>Medical Malpractice</th>
<th>Product Liability</th>
<th>Architects’ and Contractors’</th>
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**Code:**
- C = Constitutional
- U = Unconstitutional
- M = Mixed
- RD = Ruling Declined

3. Landgraf v. Wagner, 26 Ariz. App. 49, 546 P.2d 26, appeal dismissed, 429 U.S. 806 (1976). The Arizona Legislature has since passed a new statute, the constitutionality of which has yet to be decided.


to court); Battista v. Allis Chalmers Mfg. Co., 392 So. 2d 874 (Fla. 1980); Purk v. Federal Express Co., 387 So. 2d 354 (Fla. 1980) (statute held unconstitutional where injury occurred prior to
to court).


13. Fujikawa v. Kam, 55 Hawaii 7, 514 P.2d 568 (1973). The Hawaiian Legislature has since passed a new statute, the constitutionality of which has yet to be decided.


15. Skinner v. Anderson, 38 Ill. 2d 455, 231 N.E.2d 588 (1967). The Illinois Legislature has since passed a new statute, the constitutionality of which has yet to be decided.


18. Saylor v. Hall, 497 S.W.2d 218 (Kan. 1973) (statute held to violate open court provision
of state constitution). But see Lee v. Fister, 413 F.2d 1296 (6th Cir. 1969) (court suggests that statute would withstand equal protection assault).


25. Laughlin v. Forgrave, 432 S.W.2d 308 (Mo. 1968).


30. Deschamps v. Camp Dresser & McKee, Inc., 113 N.H. 944, 347-48, 306 A.2d 771, 774 (1973) (because of exception contained in statute, court found it unnecessary to rule on


unconstitutional for cases in which there is an insufficient grace period after passage of the law).

35. City of Norman v. Liddell, 596 P.2d 879 (Oklahoma 1979); Loyal Order of Moose, Lodge 1785 v. Cavaness, 563 P.2d 143 (Okla. 1977). The Oklahoma Legislature has since passed a new statute, the constitutionality of which has yet to be decided.


49. Kallas Millwork Corp. v. Square D Co., 66 Wis. 2d 382, 225 N.W.2d 454 (1975). The statute was amended subsequently, but an appellate court declined to rule on its constitutionality when confronted with the issue. See Hunter v. School Dist., 90 Wis. 2d 523, 280 N.W.2d 313 (Ct. App. 1979).

### Chart II

Architects' and Contractors' Statutes of Limitations and Repose

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<tr>
<th>Legal Theory</th>
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**Code:**
- S = Specified
- N = Not Specified
- G = General
1. Tort, contract, or otherwise, including actions for contribution or indemnity.
2. Any deficiency in the design, planning, supervision, or observation of construction of such an improvement; or injury to real or personal property caused by any such deficiency; or injury to or wrongful death of a person caused by any such deficiency. (Designated hereinafter as GEN.).
3. Substantial completion.
4. No defense for persons in actual possession or control of such improvement, such as owner, tenant, or otherwise.
5. Contract (oral or written, sealed or unsealed), tort, or otherwise.
6. See note 2 supra.
7. Substantial completion.
8. Six years generally, but in case of injury to property or person or injury causing wrongful death, which occurred during sixth year after substantial completion, tort action may be brought within two years after date injury occurred, but in no event more than eight years after substantial completion.
9. See note 4 supra.
10. Contract (oral or written, sealed or unsealed) for property damage; tort or contract for personal injury or wrongful death.
11. General statutory provisions do not specify defendants, but surveyors and persons doing engineering or architectural work are specifically mentioned as being included in a subsequent section.
12. See note 2 supra.
13. Substantial completion.
14. Five-year limitation for contract action for property damage; four-year limitation for tort or contract action for personal injury or wrongful death. In case of personal injury or injury causing wrongful death that occurred during third year after substantial completion, action may be brought within one year after date of injury, not to extend more than five years after substantial completion. Time cannot be extended by contract among the parties.
15. Statute is tolled in the event of fraudulent concealment; no defense for person in actual possession or control; and no action permitted against anyone who furnishes designs or plans not used within three years of furnishing.
16. Includes surety of person in cases of latent defects.
17. Both latent or patent deficiency in design, specifications, surveying, planning, supervision or observation of construction, or construction of an improvement to, or survey of, real property; injury to property, real or personal, arising out of either latent or patent deficiency; and injury to person or wrongful death arising out of a patent deficiency.
18. Substantial completion.
19. Four-year limitation for patent deficiency; ten-year limitation for latent deficiency. (Tort action may be brought within one year after date of injury arising out of patent defect that occurs during the fourth year after such substantial completion, irrespective of the date of death, but not to exceed five years after substantial completion).
20. Latent deficiency provisions do not apply to willful misconduct or fraudulent concealment. See note 4 supra, which applies to both patent and latent deficiencies. Patent deficiency provisions do not apply to owner-occupied single-unit residences.
21. Architect, contractor, engineer, or inspector.
22. Injury to person or property caused by design, planning, supervision, inspection, construction, or observation of construction of any improvement to real property.
23. Statue of limitation commences when claim for relief arises. Statue of repose commences upon substantial completion, which is defined as degree of completion at which the owner can conveniently utilize the improvement for the intended purpose.
24. Within two years after claim arises, not to exceed ten years after substantial completion. (If injury to person or property occurs during tenth year after substantial completion, action may be brought within one year after date of injury).
25. See note 4 supra.
26. Contract, tort, or otherwise (includes action for contribution or indemnity).
27. Architect or professional engineer.
28. See note 2 supra.
29. Substantial completion (either when first used or when first available for use, whichever occurs first).
30. Seven years generally, but eight years after substantial completion when case involves
injury to property or personal injury causing wrongful death, which injury occurred during seventh year after substantial completion.

31. See note 4 supra.

32. Contract (oral or written, sealed or unsealed), tort, or otherwise.

33. Deficiency in construction or manner of construction of improvement to real property and/or in designing, planning, supervision and/or observation of such construction; injury to property, real, personal, or mixed, arising out of any deficiency; personal injuries arising out of deficiency; wrongful death arising out of deficiency; trespass arising out of deficiency; injury unaccompanied with force or resulting from deficiency.

34. Whichever of following dates shall be earliest: (a) date of purported completion as agreed in contract; (b) date statute of limitations commences to run in relation to particular phase of work provided in contract; (c) date statute commences to run in relation to contract where specified in contract; (d) date when payment in full received by person against whom action is brought for particular phase in which deficiency occurred; (e) date person against whom action is brought received final payment in full for contract; (f) date of substantial completion; (g) date of injury for personal injury; or after period of limitations provided in contract, if contact so provides and if period expires prior to expiration of two years from whichever of foregoing dates is earliest.

35. See note 4 supra. Improvements do not include those made to residential property.

36. Does not apply to express or implied contract, but includes actions for contribution or indemnity.

37. See note 2 supra.

38. Injury must occur within ten years from date of substantial completion, which is defined as date first used or first available for use after completion in accordance with contract, whichever is first.

39. See note 4 supra.

40. Professional engineer, registered architect, or licensed contractor.

41. Design, planning, or construction of an improvement to real property.

42. Date of actual possession by owner, date of abandonment of construction, or date of completion or termination of contract.

43. Except for actions involving latent defects, the four-year statute of limitation applies. In cases of latent defects, twelve-year statute of repose applies.

44. Discovery is permitted to allow the plaintiff to uncover latent defects.

45. Deficiency in survey, planning, design, specifications, supervision or observation of construction, or construction of improvement to real property; injury to property, real or personal, arising out of deficiency; injury to person or wrongful death arising out of deficiency.

46. Substantial completion (defined as date when construction was sufficiently completed in accordance with the contract, as modified by any change agreed to by the parties, so that the owner could occupy the project for the intended use).

47. Eight years generally, but in case of injury to person or property or injury causing wrongful death, which injury occurred during seventh or eighth year after substantial completion, tort action may be brought within two years after date of injury, not to exceed ten years from date of substantial completion.

48. See note 4 supra.

49. Owner of real property or other person having an interest therein or in improvement, or against person constructing, altering, or repairing improvement, or manufacturing or furnishing materials incorporated in improvement, or performing or furnishing services in connection with improvement.

50. See note 2 supra.

51. Within two years of acquisition; not to exceed six years after date of substantial completion or abandonment of improvement unless injury occurs in fifth or sixth year after date of completion; if so, action must be brought within two years of injury, but in no event more than eight years after date of completion.

52. Id.

53. Does not apply to actions for damages against owner or other person having interest in real property or improvement based on negligent conduct in repair or maintenance of improvement, or to actions against surveyors for errors in boundary surveys.

54. Contract or tort.

55. See note 2 supra.

56. (a) Tort actions accrue and statute commences to run six years after final completion of construction; (b) contract actions accrue and statute commences to run at time of final completion of construction.
57. Applies only to tort actions that do not accrue within six years after final completion of construction.
58. See note 4 supra.
59. Work or service on real property or any product incorporated therein to become part of real property that does not cause injury or property damage within six years after performance, manufacture, assembly engineering, or design.
60. If no injury or damage within six-year period, there is presumptive proof of reasonable care by person doing any of the said acts.
61. All written guarantees.
62. Contract, tort, nuisance, or otherwise.
63. See note 2 supra.
64. See note 3 supra.
65. Contract or tort.
66. See note 2 supra.
67. Substantial completion defined as date when owner first occupied or commenced use.
68. Five years generally, but in case of injury to property or person or wrongful death from injury occurring during fifth year after substantial completion, action may be brought within one year from date injury occurred, not to exceed six years after substantial completion.
69. See note 4 supra.
70. Ex-contractu, ex-delicto, or otherwise.
71. Deficiency in design, planning, supervision, inspection or observation of construction, or in construction of an improvement to immovable property; damage to property, movable or immovable, arising out of deficiency; action against a person for action or omission of employees.
72. Ten years after (1) date of registry in mortgage office of acceptance by owner; or (2) if no such acceptance filed within six months of date owner occupies or takes possession, then after occupation by owner.
73. In cases of injury to property or person or wrongful death that occurs during ninth year of ten-year period, action may be brought one year after date of injury, not to exceed eleven years. Any cause of action existing prior to July 29, 1964 will not be preempted until July 29, 1965 or by the provision established in this statute, whichever is later.
74. Licensed or registered architects or engineers.
75. Professional negligence or malpractice.
76. Four years after discovery of malpractice or negligence, not to exceed ten years after substantial completion of construction contract or substantial completion of services, if no construction contract involved.
77. See note 77 supra.
78. Not applicable if parties have entered into valid contract which provides for different limitation periods.
79. Specifically includes actions for contribution or indemnity.
80. Architects or professional engineers are given special treatment but all persons are covered by general provision.
81. See note 2 supra.
82. Entire improvement became available for intended use.
83. Three years from date of injury but not more than twenty years after availability, except that actions against architects or professional engineers must be brought within ten years.
84. See note 4 supra.
85. Tort.
86. Deficiency or neglect in design, planning, construction, or general administration of improvement to real property.
87. Three years after cause of action accrues, not to exceed six years after performance or furnishing of design, planning, construction, or general administration.
88. State-licensed architect, professional engineer, or land surveyor, including an individual, corporation, partnership, or business entity on behalf of whom architect, engineer, or surveyor is performing or directing performance of architectural, engineering, or surveying service.
89. See note 2 supra.
90. Time of occupancy of completed improvement, use of acceptance of such improvement (for surveyors, at time of delivery of report).
91. See note 4 supra.
92. See note 2 supra.
93. See note 46 supra.
94. See note 47 supra.
95. Cases involving fraud or breaches of statutory warranties.
97. Injury to real or personal property, injury to person, or wrongful death, arising out of patent deficiency in design, planning, supervision, or observation of construction or construction of improvement to real property.

98. Written acceptance of construction by owner.

99. No action for contribution or indemnity unless there was a prior written agreement providing for such action. Limitation does not apply to persons in actual possession and control for which it is proposed to bring an action as heretofore controlled by other statutes or the laws of the state regarding tort or negligence actions.

100. Tort, including contribution and indemnity.

101. Architects, engineers, or builders of defective improvements to real property where sole connection with improvement is performing or furnishing in whole or in part the design, planning, or construction of improvement.

102. See note 2 supra.

103. Date of completion of improvement.

104. See note 4 supra. Does not apply where defendant conceals defect or deficiency that directly caused the defective or unsafe condition.

105. Excluding actions upon any contract, obligation, or liability founded upon a written instrument.

106. Damages resulting from or arising out of design, planning, supervision, inspection, construction, or observation of construction, or of land-surveying performed in connection with improvement to real property.

107. Completion of improvement (degree of completion at which owner can utilize improvement for intended purpose or when completion certificate is executed, whichever is earlier).

108. Ten years generally, but action for injury that occurred during tenth year after completion may be commenced within one year after injury occurred.

109. Breach of warranty of improvements to real property, or deficiency in design, planning, supervision, or observation of construction, or construction of improvement to real property.

110. Act or omission giving rise to action.

111. Within four years, unless breach of warranty or deficiency is not or could not be reasonably discovered within five years. In that instance, two years from discovery, but for breach of warranty, not more than ten years after act or omission.

112. Tort, contract, or otherwise.

113. See note 2 supra.

114. See note 3 supra.

115. Six years in all cases, except for action for injury to property or person, or wrongful death, in which case action may be brought within one year after date of injury, not to exceed seven years after substantial completion of improvement.

116. See note 4 supra.

117. Including contribution indemnity.

118. See note 2 supra.

119. Performance or furnishing of services and construction.

120. See note 4 supra.

121. Contract, tort, or otherwise, including contribution or indemnity.

122. See note 2 supra.

123. See note 3 supra.

124. See note 4 supra.

125. See note 117 supra.

126. See note 2 supra.

127. Substantial completion (date construction sufficiently completed so that property can be used for intended purpose, or date owner occupies or uses, or date established by contractor, whichever occurs last).

128. Not applicable to action based on contract, warranty, or guarantee expressly inconsistent with statute. See also note 4 supra.

129. See note 117 supra.

130. See note 2 supra.

131. Performance or furnishing of services and construction.

132. See note 4 supra.

133. Contract (oral or written, sealed or unsealed), tort or otherwise.

134. See note 2 supra.

135. See note 3 supra.

136. Ten years generally, but in case of injury to property or person, or wrongful death from injury, which injury occurred during tenth year after substantial completion, tort action may be
brought within two years after date of injury, not to exceed twelve years after substantial completion.

137. See note 4 supra.
138. See note 2 supra.
139. Performance or furnishing of services and construction.
140. See note 4 supra.
141. Tort.
142. Includes any person owning, leasing, or in possession of improvement, or performing or furnishing the design, planning, supervision, or observation of construction.
143. See note 2 supra.
144. See note 3 supra.
145. Injury to person or property arising from another person having performed construction, alteration or repair of improvement to real property, or supervision or inspection thereof, or from furnishing design, planning, surveying, architectural, or engineering services.
146. Two years from date of injury, not to exceed ten years from substantial completion (written acceptance of improvement, or, if none, date of acceptance of construction, alteration, or repair).
147. See note 4 supra.
148. See note 2 supra.
149. Completion of construction.
150. Twelve years, except in cases of injury or wrongful death occurring between ten and twelve years after completion, where action may be commenced within the time otherwise provided but not later than fourteen years after completion.
152. See note 4 supra.
153. Tort, including arbitration proceedings, and contribution or indemnity.
154. Architect, professional engineer, contractor, subcontractor, or materialman.
155. See note 2 supra.
156. See note 3 supra.
157. Architects, professional engineers, or contractors.
158. Deficiency in design, planning, supervision, observation of construction, construction of or surveying in connection with improvement to real property; injury to property, real or personal, arising out of deficiency; injury to person or wrongful death arising out of deficiency.
159. Substantial completion defined as “when useable for intended purpose,” but may be established by written agreement between contractor and owner.
160. Ten years after substantial completion, except in cases of injury to property or person, or wrongful death, which injury occurred during ninth or tenth year after substantial completion, action may be brought within two years after date of injury, not to exceed twelve years after substantial completion.
161. Provisions of any guarantee, bonds, or other similar instruments or agreement of parties for the bringing of any action. Not available to person guilty of fraud in performance or of concealing a cause of action. See also note 4 supra.
162. See note 2 supra.
163. Substantial completion (date construction sufficiently completed for occupation or intended use).
164. Six years, except in cases involving injury to property or person, which injury occurred during sixth year after substantial completion, or death, action may be brought within one year of date of injury, not to exceed seven years.
165. See note 4 supra.
166. Deficiency in design, planning, supervision, observation of construction, construction of or surveying in connection with improvement to real property; injury to property, real or personal, arising out of deficiency; injury to person or wrongful death arising out of deficiency.
167. See note 3 supra.
168. Four years, except where injury to property or person, which injury causes wrongful death, occurs during fourth year after substantial completion, then action may be brought within one year after date of injury, not to exceed five years.
169. See note 117 supra.
170. Registered or licensed engineer or architect, and anyone performing or furnishing construction or repair or improvement to real property.
171. Injury, damages, or loss to real or personal property, injury to person or wrongful death.
arising out of defective or unsafe condition of real property, equipment, or improvement attached thereto.

172. See note 3 supra.

173. Ten years after substantial completion; two years from date of injury, loss, damage, or death where such occurs during tenth year after substantial completion.

174. There is a two-year extension from time written claim is presented to potential defendant if presented within ten years of substantial completion. Statute will not apply to a suit on a written warranty, guarantee, or other contract that expressly is effective for a greater period, or an action based on willful misconduct or fraudulent concealment. See also note 4 supra.

175. See note 2 supra.

176. Completion of construction (date of issuance of certificate of substantial completion, or date of owner's use or possession).

177. See note 4 supra.

178. See note 117 supra.

179. See note 2 supra.

180. Performance or furnishing of services and construction.

181. Manufacturer or supplier of equipment or articles installed upon real property. See also note 4 supra.

182. All claims arising out of construction, alteration, or repair of improvement upon real property, including design, planning, surveying, architectural or construction or engineering services, supervision or observation of construction, or administration of construction contracts.

183. Substantial completion, or termination of services, whichever is later (substantial completion defined as time improvements may be used for intended purpose).

184. Time allowed under applicable statute of limitation, or six years for substantial completion or termination of services, whichever is later.

185. See note 4 supra.

186. Injury to property or person; bodily injury or wrongful death, arising out of defective and unsafe condition of improvement to real property, including design, surveying, planning, supervision, supplying materials, or construction.

187. Substantial completion.

188. Extension of six months where injury or defect occurs or is discovered between five and six years after substantial completion.

189. Tort, contract, or otherwise.

190. See note 2 supra.

191. Substantial completion (degree of completion at which utilization of improvement for intended use is possible).

192. Ten years generally, but if the injury to property or person causes death and occurs during ninth year after substantial completion, action may be brought within one year after date of injury.

193. See note 4 supra.
### Chart III

#### Medical Malpractices Statutes of Repose

<table>
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<tr>
<th>Legal Theory</th>
<th>Defendants</th>
<th>Subject Matter</th>
<th>Commencement</th>
<th>Length</th>
<th>Constitutionality</th>
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**Code:**  
- S = Specified  
- N = Not Specified  
- G = General

1. Contract or tort.  
2. Physicians, surgeons, dentists, medical institutions, or other health care providers.  
3. Liability, error, mistake, or failure to cure.  
4. Act or omission giving rise to claim.  
5. Constitutionality is suspect; prior statute before amendment held unconstitutional.  
6. Minor under four years old has until eighth birthday. Any error, mistake, act, omission, or failure to cure that gave rise to a claim and accrued before September 23, 1975 cannot be barred before September 23, 1976.  
7. Health care provider defined as licensed or certified person, clinic, health dispensary, or health facility, including legal representatives of a health care provider.  
8. Professional negligence defined as negligent act or omission to act that is the proximate cause of a personal injury or wrongful death, provided that such acts are within the scope of services
for which the provider is licensed and are not within any restriction imposed by the licensing agency or licensed hospital.
9. Date of injury.
10. Statute is tolled upon proof of fraud, intentional concealment, or presence of foreign object in person. Actions on behalf of minor under six years shall be commenced within three years or prior to eighth birthday, whichever provides a longer period.
11. Tort or contract.
12. Licensed hospital, health care facility, dispensary, or other institution for treatment of sick or injured; or any person licensed in medicine, chiropractics, physical therapy, podiatry, veterinary medicine, dentistry, pharmacy, optometry, nursing, or other healing arts.
13. As to institutions, negligence, or breach of contract in providing care, lack of providing care, or lack of informed consent. Individuals also are liable for actions based on failure to possess or exercise that degree of skill actually or impliedly represented, promised, or agreed that they possess and would exercise.
14. Act or omission that gives rise to claim.
15. Statute does not apply if defendant knowingly conceals act or omission, or if the action is based on the leaving of an unauthorized foreign object in the patient’s body. Minors under six have until age eight to bring suit. Time does not run against minors under eighteen who do not have a natural or legal guardian; such persons have two years from appointment of guardian or eighteenth birthday to commence action.
16. Physician, surgeon, dentist, podiatrist, chiropractor, hospital, or sanitarium.
17. Negligence, reckless or wanton misconduct, or malpractice.
18. Date of the act or omission.
19. A counterclaim may be interposed at any time before the pleadings in such action are finally closed.
20. Tort or breach of contract.
22. Health care malpractice resulting in personal injury or death.
23. Date upon which injury occurred.
24. Action for personal injury only must be brought within three years of date injury occurred, and only if during the first two years the injury was unknown and could not have been discovered through the exercise of reasonable diligence.
25. Minors under six have three years from injury or until sixth birthday, whichever is longer, to bring suit.
26. Contract or tort.
27. Provider of health care; privity required.
28. Death, injury, or monetary loss arising out of medical, dental, or surgical diagnosis, treatment, or care.
29. Date of incident or occurrence out of which cause of action accrued.
30. If fraud, concealment, or intentional misrepresentation prevent discovery within four-year limit, period is extended two years forward from discovery, but in no event is to exceed seven years from incident.
31. Persons authorized by law, or others acting under the supervision and control of such lawfully authorized persons and hospitals, nursing homes, clinics, hospital authorities, facilities or institutions.
32. Claims for damages resulting from death of, or injury to, any person, arising out of health, medical, dental, or surgical service, diagnosis, prescription, treatment, or cure.
33. Date upon which the negligent or wrongful act or omission occurred.
34. Does not apply if a foreign object has been left in a patient’s body.
35. Chiropractor, clinical laboratory technician, dentist, naturopath, nurse, nursing home administrator, dispensing optician, optometrist, osteopath, physician, surgeon, physical therapist, podiatrist, psychologist, or veterinarian licensed by state, or licensed hospital as the employer of any such person.
36. Professional negligence, rendering services without consent, error, or omission.
37. Date of the alleged act or omission causing injury or death.
38. Limitation is tolled for any period during which defendant has failed to disclose any act, error, or omission which is known to him.
39. Provision is contained in general statute for all professional malpractice, but hospitals, physicians, or other persons or institutions practicing any of the healing arts are specified in an exception for foreign objects.
40. Damages for professional malpractice, for an injury to the person, or for the death of one caused by wrongful act or neglect of another.
41. Time of the occurrence, act, or omission complained of (limitation period shall not be extended by reason of any continuing consequences or damages resulting therefrom, or by any continuing professional or commercial relationship between the injured party and the alleged wrongdoer).

42. Does not apply to actions based on foreign objects left in patient's body, or if wrongdoer has fraudulently and knowingly concealed facts from the injured party.

43. Tort, breach of contract, or otherwise.

44. Any physician or hospital duly licensed under laws of state.

45. Action for damages for injury or death arising out of patient care.

46. Date upon which the act, omission, or occurrence alleged in such action to have been cause of injury or death occurred.


48. Under eighteen, insane, mentally ill, or imprisoned on criminal charges; period of limitations does not run until disability is removed.

49. Licensed physician and surgeon, osteopath, osteopathic physician and surgeon, dentist, podiatrist, optometrist, pharmacist, chiropractor, nurse, or licensed hospital.

50. Personal injury or wrongful death arising out of patient care.

51. Date upon which the act, omission, or occurrence alleged to have been the cause of injury or death occurred.

52. Cases in which foreign object left in body caused injury or death are subject to limitations.

53. Exemptions arising from contract.

54. A health care provider is defined as one who is licensed to practice any branch of healing arts, one who holds a temporary permit to practice any branch of healing arts, or one who is engaged in a postgraduate program approved by state board of healing arts; a licensed medical care facility, a health maintenance organization, a licensed dentist, a licensed professional nurse, a licensed practical nurse, a licensed optometrist, a registered podiatrist, a professional corporation authorized to provide health care, a registered pharmacist, or a registered physical therapist.

55. Rendering of, or failure to render, professional services.

56. Act giving rise to the cause of action.

57. Person under eighteen years of age, incapacitated, or imprisoned for a term less than life must bring action within one year after disability is removed, but in any case no more than eight years beyond time of act giving rise to cause of action.

58. Physician, surgeon, dentist, or licensed hospital.

59. Negligence or malpractice.

60. Date on which negligent act or omission is said to have occurred.

61. Tort, contract, or otherwise.

62. Physician, chiropractor, dentist, or licensed hospital.

63. Arising out of patient care.

64. Date of alleged act, omission, or neglect.

65. "Health care provider" includes hospitals, related institutions, physicians, osteopaths, optometrists, registered or licensed practical nurses, dentists, podiatrists, and physical therapists.

66. Action for damages for injury arising out of rendering of or failure to render professional services by health care provider.

67. Date injury was committed.

68. For minors under the age of sixteen, time commences to run at sixteenth birthday.

69. Physicians, hospitals, dentists, registered or licensed practical nurses, optometrists, podiatrists, pharmacists, chiropractors, professional physical therapists, and any other entity providing health care services, and employees of foregoing acting in course and scope of employment.

70. Malpractice, negligence, error, or mistake related to health care; special provision for introducing and negligently permitting any foreign object to remain within the body of a living person.

71. Date of act of neglect giving rise to cause of action.

72. Section has two repose limitations. With the exception of cases involving foreign objects, action must be brought within two years of act or omission, regardless of when injury occurs. Actions for foreign objects must be filed within ten years of act or omission.

73. Prior statute upheld in Laughlin v. Forgrave, 432 S.W.2d 308 (Mo. 1968).

74. Physician, surgeon, dentist, registered nurse, nursing home administrator, dispensing optician, optometrist, licensed physical therapist, podiatrist, psychologist, osteopath, chiropractor,
clinical laboratory bioanalyst, clinical laboratory technologist, pharmacist, veterinarian, licensed hospital, or long term care facility as employer of any such person.

75. Injury or death arising out of alleged professional negligence, error, or omission, or for rendering service without consent.

76. Date of injury.
77. Limitation is tolled for any period during which health care provider failed to disclose act, error, or omission upon which action is based and which is known, or which would have been known through use of reasonable diligence.

78. General statute covering all professionals.
79. Rendering or failure to render professional services, or breach of warranty.
80. Date of rendering or failure to render professional service that is basis for cause of action.

81. "Provider of health care" includes licensed physician, dentist, registered nurse, dispensing optician, optometrist, registered physical therapist, podiatrist, licensed psychologist, chiropractor, doctor of traditional Oriental medicine, medical laboratory director or technician, or licensed hospital as employer of any such person.

82. Professional negligence, professional services rendered without consent, error, or omission resulting in personal injury or death.

83. Date of injury.
84. Limitation is tolled for period during which health care provider has concealed any act, error, or omission upon which action is based and which is or should have been known to him. Minors are excepted from the statute only in case of brain damage or birth defect (until age ten) or sterility (two years from discovery of condition).

85. Tort, contract, or otherwise.
86. Physician, physician's assistant, registered or licensed practical nurse, hospital, clinic, or not-for-profit home health care agency licensed by the state or otherwise lawfully providing medical care or services.

87. Actions for adverse, untoward, or undesired consequences arising out of or sustained in the course of professional services rendered; failure to diagnose; premature abandonment of a patient or of a course of treatment; or failure to maintain properly equipment or appliance necessary to render professional services.

88. Act, omission, or failure complained of.

89. Actions based on discovery of a foreign object in the body of the injured person. Minors under eight years have until their tenth birthday.

90. Tort or contract.
91. Doctor of medicine, hospital, outpatient health care facility, doctor of osteopathy, chiropractor, podiatrist, nurse anesthetist, or physician's assistant.
92. Medical treatment, lack of medical treatment, or other claimed departure from accepted standards of health care that proximately results in injury to patient.

93. Date of act of malpractice.
94. Minors under six years have until their ninth birthday.
95. Statute is broadly worded.
96. By case law, does not include dentist.
97. Act, omission, or failure.
98. Time of the act, omission, or failure complained of, or date of the last treatment in cases of continuous treatment for the same illness.

99. Actions based on the discovery of a foreign object in patient's body.
100. General statute covering all professionals.

101. Causes of action for malpractice arising out of the performance of or failure to perform professional services.

102. Last act of defendant giving rise to cause of action.
103. Ten-year limitation applies to actions involving foreign objects left in body; four-year limitation applies to all other actions.

104. Physician or licensed hospital.
105. Act or omission.
106. Date of act or omission of alleged malpractice.
107. Exception if discovery was prevented by fraudulent conduct of physician or hospital. State statute on disabilities, extending limitations on filing actions, apply.

108. "Hospital" includes any person, corporation, association, board, or authority responsible for operation of any hospital licensed or registered in state. "Physician" includes all persons licensed to practice medicine and surgery or osteopathic medicine and surgery by state medical board.

109. Diagnosis, care, or treatment of any person.
110. Date of act constituting malpractice.
111. Civil action for nonconsensual abortion must be commenced within one year after the abortion.
112. A minor under ten years of age has until fourteenth birthday to commence action. Written notice, prior to expiration of specified time period, given to any person involved in a medical malpractice case by plaintiff, indicating that plaintiff is considering bringing an action, extends time period one hundred and eighty days after notice is given.
113. Medical, surgical, or dental treatment, omission, or operation resulting in personal injury.
114. Date of treatment, omission, or operation upon which action is based.
115. If no action is commenced within five years due to fraud, deceit, or misleading representation, action may be brought within two years from date that fraud, deceit, or representation is discovered or should have been discovered.
116. Licensed health care provider.
117. Treatment, omission, or operation giving rise to personal injury.
118. Date of occurrence.
119. Applies only to causes of action that arose after June 10, 1977. If there is fraudulent concealment by defendant, or a foreign object has negligently been left in a patient’s body, plaintiff has one year from date of discovery.
120. Contract or tort.
121. Physician, surgeon, dentist, hospital, sanitarium, registered nurse, licensed practical nurse, chiropractor, or other practitioner of the healing arts.
122. Malpractice, error, mistake, or failure to cure.
123. Time of alleged malpractice, error, mistake, or failure to cure.
124. Exception for filing counterclaim if cause was not barred at the time the suit was originated.
125. Contract or tort.
126. Date upon which negligent act or omission occurred.
127. If there is fraudulent concealment by defendant, or a foreign object has negligently been left in a patient’s body, plaintiff has one year from discovery.
128. Action in contract, tort, breach of warranty, wrongful death, or otherwise, based upon alleged personal injuries relating to or arising out of health care.
129. “Health care provider” includes any person, partnership, association, corporation, or other facility or institution that causes to be rendered or that renders health care of professional services as a hospital, physician, registered nurse, licensed practical nurse, nurse-midwife, dentist, dental hygienist, optometrist, clinical laboratory technologist, pharmacist, physical therapist, podiatrist, psychologist, chiropractic physician, naturopathic physician, osteopathic physician and surgeon, audiologist, speech pathologist, certified social worker, social service worker, social service aide, marriage and family counselor, or practitioner of obstetrics, and others rendering similar care and services, including officers, employees, or agents of any of the above acting in course and scope of employment.
130. Act, omission, neglect, or occurrence giving rise to personal injuries.
131. Date of alleged act, omission, neglect, or occurrence.
132. Actions in which plaintiff alleges that defendant wrongfully left a foreign object in the patient’s body, or the defendant affirmatively acted fraudulently to conceal the alleged omission.
133. Medical or surgical treatment or operation giving rise to personal injury.
134. Date of the incident.
135. No repose limitation if fraudulent concealment has prevented the patient’s discovery of the negligence, or if a foreign object in the patient’s body is not discovered. There is a specific section for injury due to ionizing radiation (twenty-year repose period). Tolling of statute for persons under a legal disability is not affected.
136. Includes, but is not limited to, a physician, osteopathic physician, dentist, nurse, optometrist, podiatrist, chiropractor, physical therapist, psychologist, pharmacist, optician, physician’s assistant, osteopathic physician’s assistant, nurse practitioner, physician’s trained mobile intensive care paramedic, or an employee or agent of above, acting in course, and scope of employment; or an entity, facility, or institution, including, but not limited to, a hospital, clinic, health maintenance organization, or nursing home, or an officer, director, employee or agent thereof, acting in course and scope of employment.
137. Professional negligence, act, or omission.
138. Date of act or omission.
139. Does not apply to persons under legal disability, or to services provided before June 25, 1976.
140. General statute of limitation.
141. Damages for injuries to person.
142. Time of such injury.
### Chart IV

**Product Liability Statutes of Repose**

<table>
<thead>
<tr>
<th>Legal Theory</th>
<th>Defendants</th>
<th>Subject Matter</th>
<th>Commencement:</th>
<th>Sale for Use or Consumption (years)</th>
<th>Other Event (years)</th>
<th>Complete bar to recovery</th>
<th>Presumptive bar to recovery</th>
<th>Effective date &amp; application</th>
<th>Exceptions</th>
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**Code:**  
- S = Specified  
- N = Not Specified  
- D = Defined  
- G = General

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* This chart only includes states which have enacted statutes of repose specifically for product liability actions. Some states have general statutes of repose that would apply to such actions, or have provisions that may have similar impact. For example, Michigan law denies the plaintiff the benefit of any presumption in proving a prima facie case in actions in which a product has been in use for less than ten years.

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1. Bases of action limited to negligence, innocent or negligent misrepresentation, the manufacturer's liability doctrine, the Alabama Extended Manufacturer's Liability Doctrine, breach of implied warranty, or breach of oral express warranty. Eliminated by omission are intentional misrepresentation and breach of express written warranty.

2. Original seller, meaning any person, firm, corporation, association, partnership, or other legal or business entity selling or distributing manufactured product; excludes those who acquired manufactured product for resale or distribution in unused condition or as component of unused product to be sold in unused condition.

3. Actions limited to those arising from manufactured products.

4. Action must be brought within ten years after federal or state governmental agency has imposed requirement to alter, repair, recall, inspect, or issue warnings about product, and injury or disease has resulted from original seller’s failure to comply.

5. July 30, 1979 (no retroactive application).

6. By written agreement, original seller expressly may waive or extend limitation in statute.

7. All legal theories, except limitation, do not apply to actions based on negligence or breach of express warranty by manufacturer or seller.

8. Manufacturer defined as a person or entity who designs, assembles, fabricates, produces, constructs, or prepares product or component prior to sale; seller includes wholesaler, distributor, retailer, or lessor.

9. An individual product or component part of a product.
10. September 3, 1978 (applicable only to causes of action accruing after this date).
11. Action may be brought regardless of legal theory, except that no action based on strict liability in tort may be brought against seller unless seller is also manufacturer of product.
12. Manufacturer or seller, if seller had actual knowledge of the defect, furnished specifications relevant to the alleged defect, exercised some significant control over the manufacturing process, significantly altered product before sale, or is owned by manufacturer.
13. Ten years after the date the product was sold for use or consumption, it shall be rebuttably presumed that product was not defective, manufacturer or seller was not negligent, and all warnings and instructions were proper and adequate.
15. Includes, but is not limited to, strict liability in tort, negligence, expressed or implied breach of warranty, breach of or failure to discharge a duty to warn or instruct, whether negligent or innocent misrepresentation or nondisclosure.
16. Product sellers, including manufacturers, wholesalers, distributors, or retailers engaged in the business of selling products, whether the sale is for resale, use, or consumption; lessors or bailors of products.
17. Product or component part of product, whether for sale, use, or resale; privity not required.
18. Action must be brought within ten years from date defendant last parted with possession or control of product.
19. All actions brought on or before October 1, 1979.
20. Ten-year limit shall not apply to claimant who is not entitled to compensation under Chapter 558, provided such claimant can prove that harm occurred during useful safe life of product.
21. Statute of repose declared unconstitutional. Battilla v. Allis Chalmers Mfg. Co., 392 So. 2d 874 (Fla. 1980). Limitation may be extended by terms of any express written warranty that the product can be used for more than ten years.
22. Manufacturer or seller of a product.
23. Twelve years from date of delivery of completed product to original purchaser, or twelve years from date of commission of alleged fraud, regardless of date of discovery of defect or fraud.
24. Applicable only to causes of actions accruing on or after October 1, 1978.
25. Tort or contract. Abrogates privity requirements for tort actions; confines actions for breach of duty under contract to actions in contract.
26. Manufacturers of personal property sold as new property.
27. Personal property sold as new property.
29. Specifically prohibits manufacturers from excluding or limiting operation of statute.
30. Product sellers (person or entity), including lessors, bailors, and manufacturers.
31. Objects possessing intrinsic value, capable of delivery, and produced for introduction into trade or commerce.
32. From delivery (but not more than the useful safe life of the product).
33. In claims that involve harm caused more than ten years after delivery, a presumption arises that the harm was caused after the useful safe life had expired. This presumption may be rebutted only by clear and convincing evidence.
34. July 1, 1980.
35. Statutes of repose inapplicable for express warranties providing for greater period; for intentional misrepresentation or fraudulent concealment of information; for claims for contribution or indemnity; if the harm was caused by prolonged exposure to a defective product; 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 years after the time of delivery; or, if the harm, caused within ten years after the time of delivery, did not manifest itself until after that time.
36. Strict liability in tort.
37. Seller, defined as one who sells, distributes, leases, assembles, installs, produces, manufactures, fabricates, prepares, constructs, packages, labels, markets, repairs, maintains, or otherwise is involved in placing product in the stream of commerce.
38. Product: any tangible object or goods distributed in commerce.
39. Period is twelve years from date of first sale, lease, or delivery of possession by a seller, or ten years from date of first sale, lease, or delivery of possession to initial user, consumer, or nonseller, whichever period expires earlier. If there is any alteration, modification, or furnishing of materials for such change, and there is proof that changed defective materials, workmanship, or specifications caused the injury, action must be brought within ten years of such alteration. Notwithstanding these limitations, if the injury complained of occurs within any of those periods, suit may be
brought within two years after discovery of or, when through the use of reasonable diligence, the plaintiff should have discovered the injuries, but in no event more than eight years after the date on which such injury occurred.

40. June 1, 1979.

41. Period of limitation does not apply if defendant has expressly warranted or promised the product, or authorized alteration, for a longer period. If person entitled to bring action was at the time of injury under eighteen years, insane, mentally ill, or imprisoned on criminal charges, period of limitation does not run until disability is removed. Illinois has provisions requiring a defendant other than a manufacturer to identify the manufacturer; statute may be tolled to permit proper implementation of these provisions. See also note 38 supra.

42. All theories, including negligence and strict liability in tort, but excluding actions based on alleged breach of warranty.

43. Sellers, defined as manufacturers, wholesalers, retailers, or distributors.

44. Action must be commenced within ten years from delivery to initial user or consumer, but if injury occurs more than eight years but less than ten years after delivery, action may be commenced at any time within two years after cause of action accrues.

45. June 1, 1978 (does not apply to a cause of action that accrues before that date).

46. Does not affect the right of any person found liable to seek and obtain indemnity from any other person whose actual fault caused a product to be defective.

47. Manufacturers and product sellers. The latter are liable if their actions are involved or if the claimant is unable to obtain satisfaction from the manufacturer.

48. There is a rebuttable presumption that useful safe life expires after ten years from delivery.

49. There is no liability if the product seller "proves by a preponderance of the evidence that the harm was caused after the product's 'useful safe life' had expired."

50. Upon publication in the 1981 code.

51. Manufacturers: excludes wholesalers, distributors, and retailers selling product in original condition or package unless they knew of defective condition or breached expressed warranty.

52. Product presumed not defective if injury occurs either more than five years after sale to first customer or more than eight years after date of manufacture. Presumption is rebuttable by preponderance of evidence.


54. Manufacturers, sellers, or lessors of product; no action based on strict liability in tort shall be brought against seller or lessor unless he is also the manufacturer of product.

55. July 22, 1978. Any cause of action or claim that any person may have on that date may be brought not later than two years following such date.

56. Transactions governed by U.C.C. § 2-725, and cases involving asbestos injuries.

57. Any legal theory whatsoever, except for actions based on fraudulent misrepresentation, concealment, or nondisclosure; actions based on written contract providing a different period of limitation; and actions based on express or implied warranty that do not seek damages because of injury to person or property.

58. After manufacturer of the ultimate product parted with possession and control, or sale, whichever occurred last.

59. If defendant is lessor, bailor, or licensor who has legal duty to inspect, maintain, modify, or improve, then twelve years from the time that duty ceases; or if duty is imposed by governmental agency to alter, recall, inspect, or issue warnings or instructions after plaintiff is in possession of product, then six years after defendant incurred such legal duty. This latter provision does not shorten the existing twelve-year period.

60. August 22, 1978 (applies to all product liability actions accruing after this date and to all causes accruing prior to this date on which no action has been instituted as of its effective date, except that the time shall be computed from effective date).

61. See note 58 supra.

62. Specifically includes actions based on implied warranty; absence of privity is no bar.

63. Manufacturers and sellers, including lessors and bailors. No action, except breach of express warranty, shall be maintained against seller if product was acquired and sold in sealed container or seller had no opportunity to inspect. Provision does not apply if manufacturer is insolvent.

64. October 1, 1979; does not affect pending litigation.

65. Act specifies actions based on breach of implied warranties, defects in design, inspection, testing, or manufacture, failure to warn, or failure to instruct properly.

66. Manufacturers or sellers, if seller had actual knowledge of defect; furnished specification
with defect; exercised significant control over manufacturer; modified product; or is owned by manufacturer.


68. Limitation applies regardless of legal disability, but shall not apply to any cause of action arising within two years of effective date of act. If manufacturer, wholesaler, or retailer issues recall, modifies product, or becomes aware of defect and fails to warn user, limitation shall not bar action arising from defect.

69. Actions arising out of any design, inspection, testing, manufacturing, or other defect in a product; any failure to warn regarding a product; or any failure to instruct properly in the use of a product.

70. Manufacturer, distributor, seller, or lessor.


72. Implied warranty, failure to warn or instruct.

73. Manufacturers or sellers.

74. Act applies to all causes of action accruing after effective date (July 1, 1978).

75. Manufacturers, lessors, or sellers.

76. Date of delivery of completed product to first purchaser or lessee not engaged in business of selling such product.

77. July 1, 1978 (does not apply to causes of action that have arisen prior to that date).

78. Manufacturer or seller, including lessor or bailor; no action may be maintained against seller if product was acquired or sold in sealed container, or if seller has no opportunity to inspect. Seller excluded from actions based on strict liability in tort unless seller is manufacturer or unless manufacturer is insolvent or cannot be served process.

79. Tangible object or goods produced.

80. Under limitation provisions, action must be brought within six years of injury but not more than ten years after date first purchased for consumption or one year after expiration of product’s anticipated life (which is placed on product by manufacturer, but does not run until purchase), whichever is shorter.


82. Minors must bring action one year after reaching majority. Limitations do not apply to action resulting from exposure to asbestos.

83. Actions based on breach of implied warranty; defects in design, inspection, testing, or manufacture; failure to warn or instruct properly or any other alleged defect or failure of whatever kind or nature in relation to a product.

84. Manufacturers or sellers. Immunity is given if alterations made subsequent to sale were a substantial cause of injury.

85. May 10, 1977 (provisions of section on limitations shall not apply to any cause of action if the personal injury, death, or damage to property occurs within two years of effective date of act).

86. Manufacturers and product sellers. The latter are liable if their actions are involved or if the claimant is unable to obtain satisfaction from the manufacturer.

87. "Object possessing intrinsic value, capable of delivery either as an assembled whole or as a component part or parts and produced for introduction into trade or commerce."

88. There is no liability if the product seller "proves by a preponderance of the evidence that the harm was caused after the product’s 'useful safe life' had expired." There is a rebuttable presumption that useful safe life expires after twelve years from delivery of product to first purchaser or lessee.

89. July 26, 1981 (applies to all actions in which trial has not occurred prior to this date).