THE STATUS OF STATUTES OF LIMITATIONS AND STATUTES OF REPOSE IN PRODUCT LIABILITY ACTIONS: PRESENT AND FUTURE

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The legal and social issues raised by statutes of limitations and statutes of repose in product liability actions have continued to confront the legislatures and judiciaries of both federal and state governments. Although there are a number of identifiable trends regarding such statutes, it is perilous to predict how these issues may be resolved in the future. This article will indicate the status of state statutes of limitations and statutes of repose applicable in product liability actions and suggest several potential developments that may arise in the near future.

DEFINITIONS

The concept of "product liability" includes not only various theories of liability—"strict 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"[1]—but also a particular theory of "product"—"any object possessing intrinsic value, capable of delivery either as an assembled whole or a component part of parts, and produced for introduction into trade or commerce.[2] There are various statutes of limitations and statutes of repose that may be applicable in any "product liability action." (See Appendix A, p. 438.) The statutes of limitations for product liability cases may be found under various theories of recovery—tort, contract, property, fraud, wrongful death—or under a particular sub-

1. Model Uniform Product Liability Act § 102(d), 40 Fed. Reg. 62,717 (1979).
2. *Id.* § 102(c).

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ject matter–product liability, or special product liability. A number of different statutes of repose are also potentially applicable–product liability, medical malpractice, architects and contractors, general, or special. The discussion herein concerns itself exclusively with the tort-related state personal injury statutes.

A threshold requirement in any analysis of the role of statutes of limitations and statutes of repose in product liability actions is to determine the particular statute applicable in any given fact situation. Substantial discussion has been devoted to the relationship between tort and the contract statutes of limitations in product liability actions.[3] This process of applying the appropriate statute also involves rules of statutory interpretation and conflict of laws. The former is illustrated by the rule that the most recent and most specific statute controls,[4] while the latter is exemplified by the rule that the procedure of the forum applies.[5] This discussion will assume at least some degree of applicability in some jurisdictions of medical malpractice and architects' and contractors' statutes to the area of product liability. Medical institutions, pharmacists, or health care providers, for example, could conceivably "sell" a "product." Contractors, builders, or other entities that "perform improvements to real property" might come under both product liability and architects' and contractors' statutes. Likewise there may be some overlap between wrongful death and product liability statutes.[6]

The distinction between a "statute of limitation" and a "statute of repose" is another issue of initial concern. From a broad perspective, there may be no distinction; both are such "legislative enactments as prescribe the periods within which actions may be brought."[7] Older treatise writers and judges have used "repose" and "limitation" interchangeably. "Limitation of actions" often refers to the type of statute; "repose" relates to the function of that statute. One interpretation of these authors'

3. *See Statutes of Limitations: Their Selection and Application in Products Liability Cases*, 23 VAND. L. REV. 775 (1970). Freedman, *Statutes of Limitation in Products Liability Actions*, 1964 INS. L.J. 328 (1964). Burch, *Practitioner's Guide to the Statute of Limitations in Product Liability Suits*, 5 U. BALT. L. REV. 23 (1975). Comment, *Products Liability–Statute of Limitations–Tort Statute of Limitations Applied in Strict Products Liability Actions*, 43 FORDHAM L. REV. 322 (1974). Comment, *Products Liability–New Jersey Holds UCC Statute of Limitations Inapplicable to Products Liability Actions for Personal Injury and Property Damage*, 6 RUTGERS CAMDEN L.J. 203 (1974). Comment, *Statute of Limitations in Strict Products Liability Actions*, 24 BUFFALO L. REV. 477 (1975).

4. 2A C. SANDS, SUTHERLAND ON STATUTORY CONSTRUCTION § 51.05 (4th ed. 1923).

5. *See* Wurfel, *Statutes of Limitations in the Conflict of Laws*, 52 N.C.L. REV. 489 (1974); Comment, *Choice of Law: Statutes of Limitation in the Multistate Products Liability Case*, 48 TUL. L. REV. 1130 (1974); Note, *Date-of-Sale Statutes of Limitation: An Effective Means of Implementing Change in Products Liability Law?* 30 CASE W. RES. L. REV. 123 (1979); Note, *Conflict of Laws: Statutes of Limitation*, 29 OKLA. L. REV. 385 (1976). Millhollin, *Interest Analysis and Conflicts Between Statutes of Limitation*, 27 HASTINGS L.J. 1 (1975).

6. *See* Hamilton v. Turner, 377 A.2d 363 (Del. Super. Ct. 1977); Pacific Indemnity Co. v. Thompson-Yager, Inc., 260 N.W.2d 548 (Minn. 1977).

7. BLACK'S LAW DICTIONARY 835 (5th ed. 1979).

concept of a repose statute would define *all* types of prescriptive time periods–statutes of limitations, escheat, adverse possession, and others–generically as repose periods.[8]

The recent debate concerning the advisability of statutes of repose, however, has suggested that there is another distinction–statutes of limitation bar suits after a cause of action accrues; statutes of repose potentially bar suits *before* a cause of action accrues.[9] If, for example, a

8. ". . . [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." ANGELL, A TREATISE ON THE LIMITATION OF ACTIONS AT LAW AND SUITS IN EQUITY AND ADMIRALTY (1829) at 25. "Statutes of limitations are founded on sound public policy, are statutes of repose, and are not to be evaded by a forced construction." Roberts v. Pillow, 20 F. Cas. 905, 1 Hempst. 642 (E.D. Cir. Ark. 1851). Rev. Pillow v. Roberts, 54 U.S. (13 How.) 472 (1851).

9. Comment, *Limitation of Action, Statutes for Architects and Builders–Blueprints for Non-action*, 18 CATH. U.L. REV. 361 (1969); Note, *supra* note 5; Bivins, *The Products Liability Crisis: Modest Proposals for Legislative Reform*, 11 AKRON L. REV. 595 (1978); Comment, *Statutes of Repose in Products Liability:* The Assault Upon the Citadel of Strict Liability, 23 S.D.L. REV. 149 (1978); Birnbaum, *Statutes of Limitations in Environmental Suits: The Discovery Rule Approach*, 16 TRIAL 38 (1980); Comment, *When the Product Ticks: Products Liability and Statutes of Limitations*, 11 IND. L. REV. 693 (1978); Note, *Limiting Liability: Products Liability and a Statute of Repose*, 32 BAYLOR L. REV. 137 (1980); Products Liability Position Paper, 1976 Def. Res. Inst. No. 9 (1976); United State Dep't of Commerce, Interagency Task Force on Product Liability (1977); Vandall, *Architects' Liability in Georgia: A Special Statute of Limitations*, 14 GA. S.B.J. 164 (1978); Note, *Legislation: Oklahoma's Statute Limiting Actions Against Designers and Builders of Improvements to Real Property*, 27 OKLA. L. REV. 723 (1974); Massery, *Date-of-Sale Statutes of Limitations–A New Immunity for Product Suppliers*, 1977 INS. L.J. 535 (1977); Phillips, *Analysis of Proposed Reform of Products Liability Statutes of Limitations*, 56 N.C.L. REV. 663 (1978); Comment, *Torts–Limitations of Actions–Accrual of Cause of Action in Products Liability and Other Tort Actions*, 42 TENN. L. REV. 593 (1975); Comment, *Professional Malpractice–Statutes of Limitation–Cause of Action Accrues in Professional Malpractice Tort Claims From the Date the Alleged Injury is Discovered*, 25 DEPAUL L. REV. 568 (1976); Comment, *Torts–Limitation of Actions–Accrual of Cause of Action in Products Liability and Other Tort Actions*, 42 TENN. L. REV. 593 (1975); Houlihan, *Limitations of Action: Strict Liability in Tort–The Legislature has Intervened*, 67 ILL. B.J. 214 (1978); Kelley, *Discovery Rule for Personal Injury Statutes of Limitation: Reflections on the British Experience*, 24 WAYNE L. REV. 1641 (1978); American Insurance Association, Product Liability Legislative Package (1977); National Product Liability Council, Proposed National Product Liability Act 19___; National Product Liability Council, Proposed Uniform State Product Liability Act 19___; American Machine Tool Distributors Association, *A State Legislator's Guide to Product Liability Problems* (1977); and numerous other legislative proposals from trade associations such as the American Mutual Insurance Alliance, National Association of Independent Insurers, National Association of Insurance Brokers, Western Association of Insurance Brokers, International Association of Insurance Counsel, Federation of Insurance Counsel, Association of Insurance Attorneys, Risk and Insurance Management Society, Retort, Inc., Sporting Goods Manufacturers Association, Sporting Goods Representatives Association, Meat Machinery Manufacturers Institute, and Meat Industry Supply and Equipment Association. *See also* Birnbaum, *Legislative Reform or Retreat? A Response to the Product Liability Crisis*, 14 FORUM 251 (1978); Comment, *State Legislative Restrictions on Product Liability Actions*, 29 MERCER L. REV. 619 (1978); Epstein, *Products Liability: The Search for the Middle Ground*, 56 N.C.L. REV. 643 (1978); Gordon Associates, Inc., Products Liability: Industry Study (U.S.D.O.C. I.T.F.P.L., NTIS No. PB-265-542, 1977); Henderson, *Manufacturer's Liability for Defective Product Design: A Proposed Statutory Reform*, 56 N.C. L. REV. 625 (1978); Herrington, *Products Liability: Model Proposals for Legislative Reform*, 43 J. AIR L. 221 (1977); Hoenig, *Products Liability Problems and Proposed Reforms*, 1977 INS. L.J. 213 (1977); I.S.O., Insurance Services Office Product Liability Closed Claims Survey: A Technical Analysis of Survey Results (1976); Jaeger, *Emerging Concept: Consumer Protection in Statutory Regulation, Products Liability and the Sale of New Homes*, 11 VAL. U.L. REV. 335 (1977); Johnson, *Products Liability Reform: A Hazard to Consumers*, 56 N.C.L. REV. 677 (1978); McKinsey & Company, Inc., Product Liability: Insurance Study (U.S.D.O.C. I.T.F.P.L.,

state has a two-year tort statute of limitations applicable in product liability actions and a ten-year product liability statute of repose running from the initial sale of a product, it is conceivable that a person injured by a defective product purchased eleven years before may have no legal recourse for damages sustained. Indeed, one precise function of a statute of repose is to set an inflexible cut-off date for lawsuits based upon a product seller's involvement with the product.

In terms of current usage and from a more precise perspective, a statute of repose may be viewed either as a separate entity or as a subspecies of statute of limitations. The statute of repose may place an additional prescriptive period upon the time when actions may be brought under more traditional statutes of limitations either (1) by beginning to run at a different time from a traditional statute of limitatations or (2) by setting an outer limit on the length of a traditional statute of limitation that has "discovery" provisions of potentially indefinite duration. This paper will use both concepts when referring to statutes of repose. Although the suggested distinctions may not be readily obvious, the following discussion may make them more clear.

Unlike a typical tort statute of limitations that may begin to run at the time a product causes an injury to person or property, a statute of repose may commence to run at a much earlier time, such as the time the product is manufactured. A major distinction between a statute of limitations and a statute of repose arises in this context because of differences in potential effects upon an underlying cause of action. A statute of limitations may be viewed as merely limiting a particular remedy; a statute of repose, on the other hand, may define a substantive right by extinguishing a cause of action.

Some tort statutes of limitations have no "discovery" provisions, that is, no provisions that indicate the statute of limitations begins to run upon the plaintiff's discovery of some event such as discovery of injury or discovery of facts giving rise to a cause of action. In those states the statute may begin to run at the time of injury but before the plaintiff *knows* of that injury. 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. Even in states without discovery rules, however, there is a potential distinction between a tort statute of limitations and a statute of repose because the latter may bar a cause of action before *any* form of injury occurs.

NTIS No. PB-263-600, 1977); Nader, *Corporate Assault on Products Liability: A Call to Action*, 13 TRIAL 38 (1977); Smith, *Products Liability: A Compenduim of Reform*, 15 How. L. REV. 871 (1978); Sherman, *Legislative Responses to Judicial Action in Strict Liability: Reform or Reaction*, 44 BROOKLYN L. REV. 359 (1978); Siegel, *Procedure Catches Up—and Makes Trouble*, 45 ST. JOHN'S L. REV. 62 (1970). For a more comprehensive bibliographical treatment, *see* TORT REFORM AND RELATED PROPOSALS (Levin & Coyne ed. 1979).

Similar distinctions may be raised between contract statutes of limitations and statutes of repose. A warranty statute of limitations traditionally begins to run at tender of delivery, but a statute of repose may begin to run at the time the product is first put to use. If, of course, a statute of repose begins to run at the tender of delivery and are otherwise identical, there would be no conceptual distinction between the contract statute of limitations and a statute of repose.

A second commonly used definition of statute of repose includes a statute that (1) begins to run at the same time as a traditional tort or contract statute of limitations, (2) has a longer limitation period than the traditional statute of limitation, and (3) has no discovery provisions. A traditional tort statute of limitations might be for two years with an exception that the statute does not begin to run until a plaintiff discovers, or through the exercise of reasonable diligence should discover, an injury. Additional statutory language providing that in no event should a cause of action be brought more than six years after the running of the statute of limitation could be called a statute of repose.

Although the differences between statutes of limitations and statutes of repose may seem more semantic than real, any distinction may be of enormous importance in discussions of conflict of laws and constitutionality. Statutes of limitations historically have met state and federal constitutional standards, while statutes of repose that alter traditional statutes of limitations and bar causes of action before they accrue have faced serious constitutional challenges.[10]

Tort Statutes of Limitation

Tort statutes of limitations have existed in Anglo-American jurisprudence since 1623. The first statute [of limitations] relating to actions "on the case" provided a limitation period of ". . . *six years after the cause of such actions or suit,* and not after [emphasis added]."[11] These statutes have historically been justified on the basis of a policy of encouraging diligence, eliminating potential abuses from stale claims, and fostering personal certainty and have not always been regarded favorably by the courts.[12] More recent justifications have taken into account

10. A full discussion of the constitutionality of product liability statutes of repose is beyond the scope of this article. *See* McGovern, *The Constitutionality of Product Liability Statutes of Repose,* 30 AM. U.L. REV. ___ (1980); Rogers, *The Constitutionality of Alabama's Statute of Limitations for Construction Litigation,* 11 CUM. L. REV. ___ (1980); note 9 *supra.*

11. 21 JAC. I.C. 16 (1623). Problems in defining the precise time when a statute of limitations begins to run are not new, *supra* note 8.

12. "Statutes of limitations were formerly regarded with little favor, and the courts devised numerous theories and expedients 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." WOOD, A TREATISE ON THE LIMITATION OF ACTIONS AT LAW AND IN EQUITY (3d ed. 1901) at 5; Note, *Developments in the Law—Statutes of Limitations,* 63 HARV. L. REV. 1177 (1950).

economic and social effects of the presence or absence of limitations of actions.[13]

Tort statutes of limitations apply to the majority of product liability actions. There is considerable variety and ambiguity in both the statutory language and the judicial construction of these statutes that create substantial difficulties in analysis. There are, for example, numerous concepts of the time when a statute of limitations may begin to run, such as: when the defendant breaches a duty to a plaintiff; when a plaintiff is first injured; when a plaintiff is last injured; when a plaintiff is aware of injury; when a plaintiff is aware of the full extent of injury; when a plaintiff is aware of the cause of injury; when a plaintiff is aware of the defendant's conduct; when a plaintiff is aware of a causal connection between the injury and the defendant's conduct; and when a plaintiff is aware of facts that give rise to a claim.

Superimposed upon these differing commencement times is a variety of standards of proof for determining when a statute of limitations has begun to run. Discovery of injury for example, may be shown by "some" evidence or "substantial" evidence, by objective knowledge or by actual knowledge. Attempting to apply these variables to anticipated fact situations creates even more problems. Although the effects of rules that provide for no discovery exceptions are predictable, it is most difficult to determine which of the discovery provisions will be most conducive to a plaintiff's recovery or to a defense oriented ruling until the specific facts of a given case are applied to these combinations of factors.

The following discussion presents oversimplified accounts of each state in an attempt to determine some future trends and developments. The prescriptive time periods of tort statutes of limitations vary from one year to six years. (See Appendix A, p. 438.) A general survey reflects that the statutes can be roughly categorized as beginning to run at (1) the time of existence of all the elements of a cause of action

13. Birnbaum, *supra* note 9; Birnbaum, *"First Breath's" Last Gasp: the Discovery Rule in Products Liability Cases*, 13 FORUM 279 (1977); Annot., *Statute of Limitations: Running of Statute of Limitations on Products Liability Claim Against Manufacturer As, Affected by Plaintiff's Lack of Knowledge of Defect Allegedly Causing Personal Injury or Disease*, 91 A.L.R.3d 991 (1979); Scott, *For Whom the Time Tolls–Time of Discovery and the Statute of Limitations*, 1976 ILL. BAR. J. 326 (1976); Comment, *Accrual of Statutes of Limitations: California's Discovery Exceptions Swallow the Rule*, 68 CAL. L. REV. 106 (1980); Comment, *Torts–Limitation of Actions–Accrual of Cause of Action in Products Liability and Other Tort Actions*, 42 TENN. L. REV. 593 (1975). Comment, *Professional Malpractice–Statutes of Limitation–Cause of Action Accrues in Professional Malpractice Tort Claims From The Date the Alleged Injury Is Discovered*, 25 DEPAUL L. REV. 568 (1976). Comment, *Torts–Limitation of Actions–Accrual of Cause of Action in Products Liability and Other Tort Actions*, 42 TENN. L. REV. 593 (1975). Houlihan, *Limitations of Action: Strict Liability in Tort–The Legislature Has Intervened*, 67 ILL. B.J. 214 (1978). Kelley, *Discovery Rule for Personal Injury Statutes of Limitation: Reflections on the British Experience*, 24 WAYNE L. REV. 1641 (1978).

(nine states);[14] (2) the time of existence of all the elements of a cause of action but with certain exceptions (twenty-seven states);[15] or (3) the discovery or ascertainment of injury, defendant's conduct, or other elements of a cause of action (fourteen states).[16] There is enormous variety in the second category. Some states have such a large number of exceptions that the general rule rarely applies; other states have very limited exceptions for specific torts such as legal malpractice.

Commentaries and decisions have noted that courts are increasingly inclined to find discovery provisions in statutes of limitations.[17] More recently courts seem to be likely to engraft exceptions to a general rule of no discovery rather than to adopt a discovery rule applicable to all cases.

Legislatures have not been noted for adding discovery provisions to tort statutes of limitation even though specifically requested by the judiciary. To the extent that discovery provisions have been added, the legislature has usually also included a repose provision. On the other hand, legislatures have been active in passing discovery rules in specialized areas such as product liability but also generally with repose periods added. It would seem that future legislative developments will result

14. *Alabama:* Statute begins to run when plaintiff was last exposed to radiation; court said legislature alone has power to change. Garrett v. Raytheon Co., 368 So. 2d 516 (Ala. 1979).

Delaware: Discovery rule rejected in McNutt v. Delaware Racing Assoc., 294 A.2d 838 (Del. 1972) (personal injury); Hood v. McConemy, 53 F.R.D. 435 (D. Del. 1971) (legal malpractice); and Bradford, Inc. v. Travelers Indemnity Co., 301 A.2d 519 (Del. 1972) (insurance agent negligence). Discovery rule allowed only in medical malpractice actions: Layton v. Allen, 246 A.2d 794 (Del. 1968) (now controlled by statute).

Idaho: Discovery rule rejected in Owyhee County v. Rife, 100 Idaho 91, 593 P.2d (1979) (accountant malpractice); and Martin v. Clements, 98 Idaho 906, 575 P.2d 885 (1978) (legal malpractice).

Maine: Discovery rule specifically rejected in Tantish v. Szendey, 158 Me. 228, 182 A.2d 660 (1962). *See also* Bazzuto v. Ovellette, 408 A.2d 697 (Me. 1979); Millett v. Dumais, 365 A.2d 1038 (Me. 1976). Cause of action accrues at time plaintiff entitled to seek judicial vindication. Williams v. Ford Motor Co., 342 A.2d 712, 714 (Me. 1975).

Mississippi: Wilson v. Retail Credit Co., 325 F. Supp. 460 (S.D. Miss. 1971), *Aff'd* 457 F.2d 1406 (5th Cir. 1972).

Montana: Cassidy v. Finley, ___ Mont. ___, 568 P.2d 142 (1977).

North Dakota: Discovery rule was adopted in medical malpractice actions, now controlled by statute. Iverson v. Lancaster, 158 N.W.2d 507 (N.D. 1968).

South Dakota: Maise v. Delaney, 81 S.D. 306, 134 N.W.2d 770 (1965). Discovery rule was used by federal court in medical malpractice prior to present statute, Shinabarger v. Jatoi, 385 F. Supp. 707 (D.S.D. 1974), but statute does not provide discovery rule, § 15-2-14.1 (Supp. 1979).

Wisconsin: Peterson v. Roloff, 57 Wis. 2d 1, 203 N.W.2d 699 (1973) (medical malpractice, foreign object); Denzer v. Rouse, 48 Wis. 2d 528, 180 N.W.2d 521 (1970) (legal malpractice, accrual at act of malpractice). In recent case of architect malpractice, court distinguishes construction cases from other malpractice, saying that in legal and medical cases, negligent act and injury are at the same time but here the cause of action does not accrue until time of injury. Crawford v. Shepherd, 86 Wis. 2d 362, 272 N.W.2d 401 (1978).

15. *See* Appendix B, p. 444.

16. *See* Appendix C, p. 449.

17. *Id.*

from efforts expended by specialized segments of society rather than more generalized attempts at change.

Notwithstanding a trend toward discovery, fourteen state supreme court decisions and one general state statute that provide a new focus on this issue since 1977 indicate a noticeable counterflow.[18] In eleven relatively clear decisions during this period, seven states allowed at least some form of exception or discovery while four did not.[19] The new statute provides for discovery of injury, but it also has a repose provision.

The judicial momentum toward recognizing discovery rules in statutes of limitations may not have ceased, but it has diminished considerably. It is logical to expect that states that have not adopted extensive discovery provisions would be less fertile for the alteration of existing doctrine. Yet these cases do reflect some additional resistance to change. It is interesting to note, however, that there is no judicial momentum toward eliminating previously recognized discovery provisions.

Wrongful Death Statutes of Limitations

There was no common law action for wrongful death.[20] All fifty states have, however, passed laws allowing actions for wrongful death and providing for limitations periods that apply to these actions. These time limitations vary from one to six years and are typically the same length as the tort statutes of limitations applicable in the same jurisdiction. (See Appendix A, p. 438.) Although various states have some variations, most of the wrongful death statutes of limitations begin to run at the death of a person. The other states commence the wrongful death statute of limitations at the negligent act, the accrual of a cause of action, or a combination of commencement times. Although courts have been consistently reluctant to add discovery provisions to these statutes, there is a host of other variations in these statutes that may relate to product liability actions.[21]

Product Liability Statutes of Limitations

Statutes of limitations that apply to solely product liability actions are a recent phenomenon. Fifteen states have passed these statutes during the last three years. (See Appendix A, p. 438.) They vary in length from one to four years. Some of the statutes codify existing cases and statutes; others overrule judicial decisions allowing discovery; some shorten the existing limitations period; and others add discovery provisions. In each

18. *See* note 14 *supra*, and Appendices B and C.
19. *Id.*
20. Cadieux v. Int'l Telephone & Telegraph Corp., 593 F.2d 142 (1st Cir. 1979).
21. *See* Szlinis v. Moulded Fiber Glass, 80 Mich. App. 55, 263 N.W.2d 282 (Mich. Ct. App. 1977).

instance that the legislature provided for discovery, however, it added an outer limit on the discovery period.

The product liability statutes of limitations will usually have (1) a section that defines the scope of the statute in terms of legal theory, subject matter, and parties covered; (2) a defined event that triggers the running of the statute, (3) a length of limitation; (4) an effective date and application provision; and (5) occasionally a listing of exceptions.

Statutes in five states specifically apply to all legal theories. Other states exclude express warranty, implied warranty, negligence, or fraud. In at least one state the statute applies only to strict liability in tort cases. Most of the statutes list the parties covered such as manufacturers, sellers, suppliers, entities placing a product into the stream of commerce, lessors, and others. Other potential defendants, such as reconditioners, are excluded. Eight states define the type of products covered: manufactured product, tangible object or goods produced, product or component part of product. All of the statutes apply to actions for damages for personal injury, death, and property damage. Two states include damages specifically for diseases, and one state included economic loss and other damage.

Most of the statutes begin to run at the occurrence of injury. Other states have at least one form of a discovery provision including discovery of death or property damage, discovery of facts giving rise to a cause of action, and discovery of "latent" injury. A few of the product liability statutes of limitation contain specific exceptions, typically for minors, mental incompetents, prisoners, and persons absent from the United States. One statute has an exception for asbestos cases. Thirteen of the statutes contain provisions concerning the effective date of the act. Only one statute covers pending claims; the rest of the statutes apply to causes of action that accrue on or after the effective date of the act.

The Draft Uniform Product Liability Law contains a statute of limitation of three years commencing from "the time the claimant discovered, or in the exercise of due diligence should have discovered, the facts giving rise to the claim."[22] This provision was superseded in the Model Uniform Product Liability Act by a two year statute of limitations from "the time the claimant discovered, or in the exercise of due diligence should have discovered, the harm and the cause thereof."[23] Aside from the reduction in one year, the discovery provision was restricted to the issues of causation and damages. The comments to the Code suggest that the issue of causation refers to "the causal connection to a defective

22. Draft Uniform Product Liability Law § 109 (C), Fed. Reg. 2996, 3000 (1979).
23. Model Act § 110 (C), *supra* note 1, at 62,732.

product."[24] It would appear that the statute does not begin to run upon mere discovery that a "product" caused an injury; the discovery provision would be triggered upon discovery that a "defective product" caused the injury.

Product Liability Statutes of Repose

Product liability statutes of repose have even more variety than the statutes of limitations. Product liability legislation has been enacted in thirty states during the past three years, while twenty of these states have passed a statute of repose—the most popular form of legislation in this area.[25] No two of them are identical. These statutes are generally part of a legislative package similar to the "reforms" proposed by physicians and architects. Over ten national trade organizations have developed proposals for legislation in this area.

A product liability statute of repose will usually have: (1) a section that defines the scope of the statute in terms of legal theory, subject matter and defendants; (2) a defined event that triggers the running of the statute, (3) a length of repose period; (4) the consequences of suit after the passage of the repose period; (5) an effective date and application provision; and (6) at least several exceptions. The provisions that define the scope of the statutes are virtually identical to the provisions described above under product liability statutes of limitations.

The trigger time, or moment at which the repose period begins to run, varies considerably and includes: accrual of cause of action, occurrence of damage, initial use of product, sale of product to initial user, delivery of product to initial user, date of manufacture of product, occurrence of governmentally imposed duty on a defendant, end of a defendant's duty to inspect or repair a product, expiration of expected or useful life of a product, end of possession or control of a product, or date of modification of a product. The length of the various statutes of repose varies from five to twelve years with the majority being ten years.

The effect that the expiration of the repose period has upon a cause of action also varies among the states. In twelve statutes there is a complete bar to recovery, while in most of these there is a bar but with several exceptions. In four states the running of the statute of repose creates a presumption that a product is not defective. This presumption may be rebutted by a preponderance of the evidence or by clear and convincing evidence. An enormous variety of exceptions to the statutes of repose excludes waivers, recalls, failures to warn, asbestos exposure, minors, individuals with various disabilities, cases of governmental in-

24. *Id.* at 62,734.
25. FEDERAL-STATE PRODUCT LIABILITY LEGISLATION FOR CLIENT AND COUNSEL (1977).

tervention, express warranty or other special authorizations, contribution and indemnity and others.

This issue of "open-ended" liability has been the subject of a large number of legislative solutions. It is interesting to note that the original provisions of the Draft Uniform Product Liability Law received more written public comment than any other single provision of the proposal —comments which were generally directed at making the repose period shorter with fewer exceptions and greater predictability.[26] The draftsmen of the Model Uniform Product Liability Act suggest two different approaches: (1) a "useful safe life" provision, and (2) a "statute of repose."[27] The "useful safe life" provision focuses upon the age of a product by creating an affirmative defense if a product has caused harm after its useful safe life has expired. The useful safe life begins at the time the product is delivered to its first purchaser or lessee who is not engaged in the business of either selling such products or using them as component parts of another product to be sold. In determining the issue of useful safe lifetime, the trier of fact may consider the following factors: wear and tear; deterioration; normal use and repair; representations by the manufacturer concerning use and care; and modifications and alterations of the product.

The Model Uniform Product Liability Act statute of repose provides that the useful safe life of a product will be presumed to have expired in cases where harm was caused more than ten years after the time of delivery of the product. This presumption may be rebutted by "clear and convincing" evidence. There are four general exceptions where this presumption does not arise: (1) express warranty by a manufacturer or seller that the product can be utilized safely for more than ten years; (2) intentional misrepresentation or fraudulent concealment of facts about a product by a manufacturer or seller that constitute "a substantial cause" of the harm; (3) contribution or indemnity actions; and (4) harm caused by prolonged exposure to a defective product or harm which does not manifest itself until after the statutory period, or the injury-causing aspect of the product that existed at the time of delivery was not discoverable by an ordinary reasonably prudent person until after the statutory period.

This final version of the Model Uniform Product Liability Act does contain several stylistic and substantial changes from the draft version. The language was made more uniform and precise with slight changes of emphasis in various areas. Changes were made in the definition of the type of product to be covered and the trigger time for commencement of the concept of "useful safe life" was defined more precisely.

26. Comments on the Draft Uniform Product Liability Law, U.S. Dep't of Commerce, Washington, D.C.
27. Model Act, *supra* note 1, at 62,732 *et seq.*

The two most substantial changes were a deletion of the original provisions creating a separate category for workplace injuries and the addition of an exception for product defects that were not discoverable before the end of the ten year period.

Architects' and Contractors' Statutes of Limitation and Statutes of Repose

During the 1950s and 1960s various professions associated with the design and construction of improvements to real property became concerned about potential exposure to liability because of the gradual erosion of common law defenses.[28] The trade associations representing architects, engineers, and contractors began to suggest legislation that would reduce the perceived spectre of open-ended liability for personal injury resulting from the design or construction of buildings and other structures. Their proposals included a statute of limitations or statute of repose that would place a definite limit on potential liability running from a certain date related to involvement with the construction process. Some forty-five states have passed statutes of limitations or statute of repose for architects and contractors. (See Appendix A, p. 438.) Decisions in ten states, however, have held these statutes unconstitutional.[29] Legislatures in five of these states have passed new statutes, so there is some doubt concerning the number of effective statutes.[30]

Various commentators have described these statutes as statutes of limitations, statutes of repose, or a combination of the two.[31] Unlike the medical malpractice statutes of repose that typically begin to run at the time of injury or act or omission of the physician, the architects' and contractors' statutes begin to run before an actual personal injury, usually at the substantial completion of a construction project. As was indicated above[32] these statutes can be viewed either as a subspecie of statute of limitations or as a different type of legislation—a statute of repose.

The architects' and contractors' statutes of limitations and statutes of repose contain provisions that define their scope based upon legal theory, parties, and subject matter. The statutes apply to tort, contract, nuisance, or other legal theories. Parties protected include architects, contractors, engineers, inspectors, land surveyors, builders, owners or lessors of improvements to real property, materialmen, individuals, corporations, partnerships, or other legal entities.

The statutes vary in length from two to ten years. Twenty-one states have a single limitations period and twenty-four states have two or more

28. *See* note 9 *supra.*
29. *See* McGovern, note 10 *supra.*
30. *Id.*
31. *See* note 9 *supra.*
32. At 3 *et seq.*

applicable time limits. The statutes begin to run at substantial or final completion, at actual possession by owner, when available for intended use, at acceptance of consrtuction, at performance of act or omission, and a variety of other events. Five of the statutes have a "discovery" provision. One of the statutes creates a presumption of non-liability after the passage of a time limit rather than constituting a complete bar to recovery. Exceptions to the statutes of limitations and statutes of repose include willful misconduct, fraudulent concealment, repair or maintenance by owner, surveyors, contractual commitments, statutory and written warranties, and manufacturers and suppliers of equipment.

The legislative changes incorporated in architects' and contractors' statutes of limitations and statutes of repose have almost inevitably resulted in more restrictive limitation periods than existing tort and contract statutes of limitations. To the extent that these statutes do provide new "discovery" provisions, they also reduce the application of these provisions by a repose clause.

Medical Malpractice Statutes of Limitations and Statutes of Repose

When medical malpractice insurance premiums began to rise precipitously in the 1960s, various legislative proposals were made on behalf of medical care providers to limit their personal injury liability exposure. Legislation was passed in forty-eight states directed at a "medical malpractice crisis." Forty-four states have medical malpractice statutes of limitations and twenty-eight states have both statutes of limitations and statutes of repose for medical actions. (See Appendix A, p. 438.)

"Medical malpractice" in these statutes is defined according to legal theory, parties, and subject matter. Statutes cover actions for professional malpractice, tort, tort and contract, or all available legal theories. Parties protected by these statutes are extremely varied–from the obvious (physicians, dentists, nurses) to the less expected (pharmacists, social service workers and aides, and nursing home administrators). Virtually all the statutes include hospitals and other health care institutions.

The medical malpractice statutes of limitations vary in length from one to three years. Of the forty-four statutes, five are longer than the otherwise applicable tort statute of limitations, sixteen are shorter, and twenty-three are the same. (See Appendix A, p. 438.) Thirty-six include a provision that allows for some type of discovery or other exception and eight have no discovery or other exceptions. Most of the states with discovery or other exceptions have a repose period. Most of the medical malpractice statutes of limitations have specified exceptions which include minors, incompetents, prisoners, injury involving foreign objects,

fraud, various forms of concealment, or general exceptions applicable to all statutes of limitations.

The medical malpractice statutes of repose contain definitions similar or identical to the statutes of limitations. They begin to run from the date of the act or omission, date of injury, performance of procedure, or incident or occurrence and they vary in length from three to ten years. (See Appendix A, p. 438.) Exceptions to the statutes of repose are generally the same as the medical malpractice statutes of limitations.

Medical malpractice statutes of limitations and statutes of repose have had significantly more success in meeting constitutional challenges than the architects' and contractors' statutes. Courts in fourteen states have found them constitutional and there have been no decisions of unconstitutionality. One state has mixed intermediate court decisions.[33]

General and Special Statutes of Limitation and Statutes of Repose

Five states have statutes of repose which apply generally to tort actions. There are a number of special statutes of limitation and statutes of repose for asbestos, ionized radiation, and other specific products and activities. (See Appendix A, p. 438.) None of these statutes has been found unconstitutional.

THE FUTURE

As indicated above, the perils of predicting future developments in product liability statutes of limitation and statutes of repose are considerable. There is no script from which to read developments in political, social and economic affairs, changes in juror attitudes, or the intervention of legislatures into what has previously been a judicial domain. There are, however, several recent legislative and judicial developments that may be indicative of future trends.

Legislature

Legislatures have become increasingly involved in tort law in general and in product liability law in particular. Thirty-one states have enacted fifty-six laws specifically dealing with the area of product liability: seven in 1977; eighteen in 1978; twenty-eight in 1979; and two in 1980. The number of bills filed in state legislatures has been roughly constant for the last two years.[34]

On the surface the trend toward product liability legislation has been waning. The support for product liability statutes of repose has been

33. *See* McGovern, note 10 *supra.*
34. *See* note 25 *supra.*

undercut by the passage of other arguably more equitable and effective "reforms."[35] Product liability insurance premiums have not escalated substantially in the last two years and there has been a corresponding dimunition of demands for more restrictive liability laws. Indeed, there is already a countermove to minimize the effect of previously enacted legislation. There will be considerable pressure exerted on states without discovery provisions in their statutes of limitation and with complete bars in their statutes of repose to modify those laws. Several states have already passed laws that create exceptions to these rules for specific types of injuries.[36] There are also proposals to create alternatives to the traditional tort compensation system for both general and specific injuries.

The underlying trends that originally generated product liability legislation are still present, however. Although there are judicial decisions indicating that courts have moderated or even regressed in their attempt to reallocate the risk of loss in product liability actions from consumers to manufacturers,[37] some courts have continued to expand liability concepts so that manufacturers may be considered virtual insurers of their products. Manufacturers have been held to be the guarantors of the safety of their products,[38] held liable regardless of whether their specific product caused injury,[39] and held estopped from asserting the nondefectiveness of a product because of a verdict in a single case.[40] As long as courts make it easier for plaintiffs to recover, businesses persist in being motivated by short term goals and government continues to expand its role in society, we can expect more legislation in the future.

There has been substantial activity at the federal level that may affect the future of product liability statutes of limitation and statutes of repose. Not only is there the Model Uniform Product Liability Act proposed by the U.S. Department of Commerce that includes a statute of limitations and a statute of repose,[41] but there are also several bills that propose federal preemption of the law of product liability.[42] Most observers indicate, however, that federally mandated changes in state tort law will not be passed in the near future.

Other federal legislation relating to changes in statutes of limitations and statutes of repose in product liability actions, however, has been either passed or seriously proposed. Most of this legislation relates to injuries or circumstances where there is an initial low risk of harm with a

35. *Id.* Changes in collateral source rules and evidentiary presumptions are examples.
36. *See* Appendix A, p. 438.
37. *See e.g.* Birnbaum, *Nnmasking the Test for Design Defect from Negligence [to Warranty] to Strict Liability to Negligence*, 33 VAND. L. REV. 681 (1980).
38. Azzarello v. Black Brothers Co., 480 Pa. 547, 391 A.2d 1020, (1978).
39. Sindell v. Abbott Laboratories, 163 Cal. Rptr. 132, 607 P.2d 924 (1980).
40. Ezagui v. Dow Chemical Corp., 598 F.2d 727 (2d Cir. 1979).
41. *See* note 1 *supra.*
42. *See, e.g.*, H.R. 4000.

potential for long-term catastrophic harm—so-called insidious disease or toxic substances cases. Legislation has carved out exceptions to general product liability law for black lung disease, swine flu, and nuclear incidents.[43] Bills have been introduced to create alternative compensation systems for asbestosis, byssinosis, and radiation exposure.[44] It is even conceivable that a national health insurance law might affect the role and function of statutes of limitations and statutes of repose in product liability actions.[45]

Along with any increase in legislation we will have both anticipated and unexpected second and third level ramifications. The following two consequences are illustrative. The use of legislatures to effect change in tort law reflects the institutional limitations of those legislatures.[46] In the context of product liability law, there is approximate equality of representation in the judicial process. A seriously injured plaintiff can be expected to compete on a roughly equivalent level with a large corporation during trial and appellate decision-making. In state legislatures however, more traditional special interest groups have been viewed as having a greater ability to achieve their goals.

Because legislation is designed to deal with problems in a general and universal manner, statutes are not tailored to the peculiarities of each individual case. As a result, certain persons will feel that the broad strokes and harshness of legislation will not further a sense of fairness and equity in the tort system.

The availability of more extensive and flexible information gathering methods should allow legislatures to be more capable than courts in obtaining feedback and updating laws to meet unanticipated consequences. Because government seems to have a vested interest in not repealing existing statutes and because it is difficult for legislatures to focus repeatedly upon the same subject matter, the chances of altering product liability legislation to meet changing social conditions are reduced.

A second consequence of using legislatures to reallocate the risk of loss in product liability accidents from manufacturers to consumers has been suggested by Professor Guido Calabresi.[47] He 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.[48]

43. 30 U.S.C. §§ 901–945 (1976); 42 U.S.C. § 2476 (1976); 42 U.S.C. § 2210 (1976).

44. H.R. 366, 1435, 1524, 2106, 6840, 3282, 2740, 2622, 3400, 1852, 3010, 4019, 4074, 5934, 6023, 6057, 6745, 7017, and S. 381, 500.

45. National Health Insurance Act, H.R. 16. *See also National Worker's Compensation Act of 1978, Hearings before the Subcommittee on Labor of the Committee on Human Resources, United States Senate*, 95th Cong., 2d Sess.

46. Peck, *The Role of the Courts and Legislatures in the Reform of Tort Law*, 48 MINN L. REV. 265 (1963); HOROWITZ, THE COURTS AND SOCIAL POLICY (1977).

47. Calabresi, *Products Liability: Curse or Bulwark of Free Enterprise?*, 27 CLEV. ST. L. REV. 313 (1978).

Professor Calabresi suggests generally that changes in product liability law should attempt to increase incentives for business to assume the risks of harm rather than to shift those risks to consumers. There are great uncertainties concerning "safety" in the design, manufacture, and sale of products. Indeed, insurance companies reflect the high degree of uncertainty of how "safe" is "safe" by their admitted inability to develop a sound actuarial basis for setting product liability insurance premiums. The fact that insurance companies rely so heavily upon "judgmental" factors in setting rates illustrates the difficulty of evaluating product liability risks. Because of these indefinite risks, businesses, including insurance companies, have attempted to shift the risk of loss in product liability cases back onto the consumer. (The statute of repose would be one example of an attempt to shift losses from manufacturers to consumers instead of providing incentives to the appropriate portion of society to prevent losses.)

In a free enterprise system, argues Professor Calabresi, it is the entrepreneurs who are best capable of managing the risk, uncertainty, and innovation associated with product safety. Just as the entrepreneur is best capable of deciding what and how many new goods are worth producing, so the entrepreneur is best capable of making decisions so that the manufacture, design, and warnings of products reflect the optimal mix of availability and safety.[49]

If the short-term interests of business lead to the passage of product liability laws which shift too much of the risk of loss to consumers, then we can expect a corresponding effort by consumer groups who will seek to place that risk elsewhere. "It is at this point, with no one willing to bear 'the uninsurable risk,' that such catastrophic costs will, inevitably, be placed on the government."[50] If government controls the uncertainty of product accidents by regulating safety and compensating persons injured by products, the management of risk will be "neither effective nor desirable, at least when applied across the board, and whether desirable or not, it is fundamentally inconsistent with a free enterprise approach."[51] "Any society which too readily assumes that accident risks are best managed and borne by government, is by that assumption casting deep doubts on the utility, and hence inevitably on the viability of private enterprise."[52]

Professor Calabresi suggests that businesses should be wary of shifting the risk of "major, uncompensated product-related injuries" either to consumers or to the government. The existence of free enterprise is de-

48. *Id.* at 324.
49. *But see* SHAPO, A NATION OF GUINEA PIGS (1979).
50. Calabresi, *supra* note 47, at 323.
51. *Id.*
52. *Id.* at 316.

pendent upon its ability to perform various functions in society better than any other institutions. If businesses persist in relinquishing to government all of these functions which businesses do best, private enterprise will be left to do only those things which it does not do especially well.[53] An argument can be readily constructed which would "jeopardize [the] long run survival of free enterprise."[54]

Judiciary

Whereas the forces supporting restrictions upon liability have resorted to legislatures, those interested in an expansion of liability for product-related accidents have sought judicial recourse. Instead of definite rules with predictable results, they desire rulings tailored to individual cases—a task more suited to courts. The judiciary has, however, sent mixed messages concerning statutes of limitation and statutes of repose. Some courts are eager to reduce the harshness of legislative line-drawing and others seem to defer to the legislature in this area. Courts will continue to be asked to soften both statutes of limitation and statutes of repose in product liability cases. The inventiveness of the plaintiff's bar and the willingness of courts will create a range of new exceptions to these statutes. Courts will be asked to permit recovery in cases which by literal interpretation may be barred by statutes of limitation or statutes of repose. These recoveries will be based upon such questions as: (1) constitutional issues, (2) relaxed definitions in statutory provisions, (3) expansion of tolling exceptions, (4) application of alternative theories of recovery, (5) alternative defendants, (6) alternative subject matter, and (7) a range of other means that may circumvent a statutory bar.

The complete legal arguments and rationales on the constitutionality issue are beyond the scope of this paper.[55] It should be helpful to note that there has been little consistency in the logic and underpinnings of decisions on this issue. Statutes of repose have been attacked and found violative of state constitutions on one or more of the following grounds: equal protection, due process, "open courts," special legislation, multiple subjects, and vagueness.[56] New cases can be expected to raise issues concerning the "contract clause" of state constitutions, "irrebutable presumptions," "least restrictive alternatives," exclusion of exceptions for minors and incompetents, conflict with wrongful death provisions, and constitutional infirmities in the application of a statute of repose to existing "claims" for recovery.[57]

53. *Id.* at 323.
54. *Id.*
55. *See* notes 9 and 10 *supra.*
56. Caudill v. Wise Rambler, Inc., 210 Va. 11, 168 S.E.2d 257 (1969); Wilson v. Iseminger, 185 U.S. 55 (1902); Aylor v. Hall, 497 S.W.2d 218 (Ky. 1973); Broome v. Truluck, 270 S.C. 227, 241 S.E.2d 739 (1978); Bagby Elevator & Electric Co. v. McBride, 292 Ala. 191, 291 So. 2d 306 (1974); Plant v. Reid, 294 Ala. 155, 313 So. 2d 518 (1975).
57. *See* notes 9 and 10 *supra.*

Courts will be asked to define the scope of statutes of limitations and repose and their terms and provisions in a manner more favorable to plaintiffs. The concept of "injury" and other terms may be broadened to allow for discovery provisions.[58] Other courts may limit the scope of the statutes of repose to allow for the applicability of less restrictive statutes.[59] Efforts will be made to engraft exceptions such as those in the Model Uniform Product Liability Act onto existing statutes.

Long existing doctrines that serve as a means for circumventing a statute of limitation will be increasingly applied. Such doctrines are exemplified by: fraudulent concealment, various forms of estoppel, defendant's absence from jurisdiction, and disability in the form of infancy, incapacity, incarceration, or military service.[60] Attempts will be made to broaden these doctrines and to apply them to statutes of repose.

Plaintiffs will select legal theories, subject matter, and defendants that eliminate a statutory bar from recovery. Various fraud, contract, and property theories are available: future warranty, nuisance, trespass, and ultrahazardous activity.[61] Plaintiffs will select admiralty law, federal common law torts, and less accepted theories such as "public trust" law.[62]

Novel concepts of party plaintiffs and defendants will be developed and parties who historically have been overlooked will be joined. Plaintiffs barred from recovery by statutes of repose will attempt to identify with a group or class that may have suffered a compensible harm within the applicable period. Defendants will be viewed in their various capacities to identify a type of conduct not barred by a statute of repose. Any potential defendants who are connected with the plaintiff's injury, albeit remote, and who are not protected by a statute of limitation or repose will be subject to increasing numbers of lawsuits. Doctors, medical technicians, and other health care providers who maintain continuing relationships with potential plaintiffs will face increasing numbers of suits. Defendants who deal in goods or services not covered by the applicable statutes–safety engineers, employees of insurance companies, unions, government personnel–are likely candidates.

New legal theories of recovery will be proposed and accepted that are not barred by statutes of limitation or statutes of repose. These are best exemplified in the host of "continuing" and "secondary exposure" theories: continuing duty to warn, continuing exposure, continuing negli-

58. City of Aurora, Colorado v. Bechtel Corp., 599 F.2d 382 (10th Cir. 1979).

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

60. Note, *Fraudulent Concealment of a Right of Action and the Statute of Limitation*, 43 HARV. L. REV. 471 (1929); Annot., *Fraud, Misrepresentation or Deception as Estopping Reliance on Statute of Limitation*, 43 A.L.R.3d 429 (1972); Annot., *Absence as Tolling Statute of Limitation*, 55 A.L.R.3d 158 (1974).

61. U.C.C. § 2–725; RESTATEMENT (SECOND) OF TORTS § 822 (1977); RESTATEMENT (SECOND) OF TORTS § 157-165 (1977); RESTATEMENT (SECOND) OF TORTS § 519 (1977).

62. Harville v. Johns-Manville Products Corp., C.A. # 78–642–H (S.D. Ala. 1979); YANNACONE, *et al.*, ENVIRONMENTAL RIGHTS AND REMEDIES, (1972).

gence, and imputation of a continuing relationship.[63] Statutory violations that occur repeatedly will be used both for statutory remedies and for establishing a standard of care under doctrines such as negligence per se.[64] Even the Federal Civil Rights Acts may prove to be alternative sources of recovery.[65]

Arguments will be made for the expansion of the various elements of a cause of action. Plaintiffs who are at risk or who have an enhanced risk of injury, but who have not sustained an actual injury, will seek to recover damages before they are barred by a statute of limitation or statute of repose. Types of injuries not precluded by statutes of repose, such as consortium and loss of income for offspring, may be expanded. The possibilities here are virtually unlimited.[66]

Attorneys will be more active in forum shopping, in consolidating cases in favorable jurisdictions, and in handling conflict of laws issues. Some courts will even react favorably to obvious attempts to circumvent the harshness of laws in sister states.[67]

At the same time, there will be extensive efforts on the part of the defense bar to limit dilution of the statute of limitations and statute of repose defenses. Aside from the usual arguments grounded in stare decisis which will be used to uphold a literal interpretation of statutes of repose, defense attorneys will devise more innovative approaches for arguing their positions.[68] Heretofore plaintiffs have monopolized the discussion of the policy issues underlying theories of product liability. Because courts initially used social policies favorable to the expansion of liability to adopt a legal theory strict liability in tort, the continued application of these policies has led almost inevitably to a greater expansion of liability. Those courts that grounded their strict liability in tort doctrines in public policy, however, are now subject to the use of counter-policies that suggest a restriction of liability.[69]

The mere existence of product liability legislation suggests a strong

63. *See, e.g.*, Phillips v. ABC Builders, Inc., 611 P.2d 821 (Wyo. 1980); Zimmerer v. General Elec., 126 F. Supp. 690 (1954); Jet America, Inc., v. Gates Lear Jet Co., 243 S.E. 2d 584 (Ga. App. 1978); Karjala v. Johns-Manville Products Corp., 523 F.2d 155 (8th Cir. 1979); Yturbide v. Reynolds Metal, 258 F.2d 321 (9th Cir. 1958); Holdridge v. Heyer-Schulte Corp., 440 F. Supp. 1088 (N.D.N.Y. 1977).

64. *See* Model Act, note 1 *supra*.

65. Maine v. Thiboutot, 48 U.S.L.W. 4859 (1980).

66. Gomes v. Taylor, Case No. 770228 (D.C.R.I. 1980) (on appeal); Plummer v. U.S., 580 F.2d 72 (3d Cir. 1978); Feist v. Sears Roebuck and Co., 267 Or. 402, 517 P.2d 675 (1973); Coover v. Painless Parker, Dentist, 105 Cal. App. 110, 286 P. 1048 (1930); Schwegel v. Goldberg, 209 Pa. Super. Ct. 280, 228 A.2d 405 (1967); *See also* Steeves v. United States, 294 F. Supp. 446 (D.S.C. 1968); McCall v. United States, 206 F. Supp. 421 (E.D. Va. 1962); and Jordan v. Bero, 210 S.E.2d 618 (W. Va. 1974), (Neeley, J., concurring).

67. Vick v. Cochran, 316 So. 2d 242 (Miss. 1975).

68. Baldwin, Hare, McGovern, Preparation of a Product Liability Case (1981) (in progress).

69. *See e.g.*, Owen, *Rethinking the Policies of Strict Products Liability*, 33 VAND. L. REV. 681 (1980).

alternative public policy. It will be argued that if there is a policy that strict liability in tort promotes incentives for industry to design "safe" products, then that policy should also support defenses such as comparative negligence that provide similar incentives to consumers. Carrying the counter-policies even further, the defense bar will begin to use social science research to exhibit perceived harmful social effects resulting from the application of a theory of strict liability in tort.[70] They may show, for example, that design changes suggested by legal judgments concerning a given product would make that product unmarketable to international purchasers because of increased price or decreased utility. Their analysis will become much more sophisticated and in tune with the latest techniques of public policy and decision-making research.[71]

Defense attorneys will become more adept at encouraging the jury to identify with the problems encountered by defendants in the manufacture, design, and sale of products.[72] New trial techniques will be developed by defendants for focusing upon the plaintiff's responsibility in discovering and avoiding risks of harm. It is extremely difficult to convey a fact issue concerning a statute of limitations or statute of repose to a jury. There is a great inclination for jurors to view such an issue as a procedural attempt to take advantage of a "technicality" or "loophole." Defense attorneys will become more sophisticated at seeking instructions from judges that will soften this criticism and alert jurors during *voir dire* for the appearance of those issues.

These efforts by the defense bar will also generate other innovative trial and discovery techniques. The new Federal Rules of Civil Procedure for example, provide for a "discovery conference" that may become an important tool in limiting plaintiffs' discovery and narrowing the plaintiff's case to certain specific allegations of defect.[73]

CONCLUSION

The role and future of statutes of limitation and statutes of repose in product liability actions cannot be viewed in a vacuum. These statutes constitute one of many available techniques for allocating the risk of loss for product liability injuries. The strengths and weaknesses of these statutes come from their lack of flexibility in this allocation process. By increasing the predictability of losses and reducing the cost of deciding risk of loss questions, these statutes also increase the chances of inequity

70. ROSEN, THE SUPREME COURT AND SOCIAL SCIENCE (1972).
71. Sperlich, *Social Science Evidence and The Courts: Reaching Beyond the Adversary Process*, 63 JUDICATURE 280 (1980).
72. Baldwin, Hare, McGovern, note 68 *supra*.
73. FED. R. CIV. P. 26(f) (1980).

in certain cases and reduce the flexibility and individuality of the common law tort system.

The adaptability of the common law tort system to individual cases has been one of its prime assets in settling disputes involving personal injury. There are, however, political, economic, and social limits to the excesses of the common law system. In curbing those excesses, the common law system would be best served by having courts draw socially acceptable lines defining the scope of liability based upon doctrines internal to tort theory. If courts are unable or unwilling to draw those lines, then legislative intervention is inevitable.

Legislatures historically have had great difficulty in codifying the common law of torts without creating some degree of injustice in individual cases. Before passing a statute of limitation or a statute of repose, a legislature should insure that the proposed legislation will be effective in curbing the perceived excesses of the common law system; extensive efforts should be made to analyze other similar statutes and their effects in the context of each state's legal and governmental system. If a legislature does decide to pass a statute of limitation or a statute of repose, then some of the harshness of that statute can be softened by both the contents of the statute and the innovativeness of the judiciary.

APPENDIX A—OVERVIEW

Length of Various Statutes of Limitations and Statutes of Repose in Product Liability Actions

	1 AL	2 AK	3 AZ	4 AR	5 CA	6 CO	7 CT	8 DE	9 DC	10 FL	11 GA	12 HI	13 ID	14 IL	15 IN	16 IA	17 KS
A Tort Statute of Limitations	1	2	2	1	1	6	2	2	3	4	2	2	2	2	2	2	2
B Wrongful Death Statute of Limitations	2	2	2	3	1	2	2/3	2	1	2	2	2	2	2	2	2	2
C Product Liability Statute of Limitations	1		2	3		3	3			4			2	2	2		
D Product Liability Statute of Repose	10		12			10	10			12	10		10	8 10/12	10		
E Medical Malpractice Statute of Limitations	2		3	2	3	2	2	2		2	2	2	2	2	2	2	2
F Medical Malpractice Statute of Repose	4				3	6	3	3		4/7		6		4		6	4
G Architects and Contractors Statute of Limitations and Repose	7	6/8		4/5	4/10	2/10	7/8	6	10	4/12	8/10	2/6	6	6	10		
H General Statute of Repose							3										10
I Special Statute of Limitations or Repose (Selected)	yes				1								3/30				2/10

	18 KY	19 LA	20 ME	21 MD	22 MA	23 MI	24 MN	25 MS	26 MO	27 MT	28 NB	29 NV	30 NH	31 NJ	32 NM	33 NY	34 NC
A Tort Statute of Limitations	1	1	6	3	3	2	6	6	5	3	4	2	6	2	3	3	3
B Wrongful Death Statute of Limitations	1	1	2	3	3	3	3/6	6	1	3	2	2	2	2	3	2	2
C Product Liability Statute of Limitations						3	4				4		3				
D Product Liability Statute of Repose	5/8					6/12					10		12				6
E Medical Malpractice Statute of Limitations	1	1	2	3	3	2	2	2	2	3	2	2	2		3	2 1/2	3
F Medical Malpractice Statute of Repose	5	3		5					10	5	10	4					4/10
G Architects and Contractors Statute of Limitations and Repose	5/6	10/11	4/10	3 10/20	3/6	6	2/10	10	10	10	4/10	6/7	6	10	10		6
H General Statute of Repose																	10
I Special Statute of Limitations or Repose (Selected)																	

APPENDIX A—OVERVIEW *(Continued)*

Length of Various Statutes of Limitations and Statutes of Repose in Product Liability Actions

	35 ND	36 OH	37 OK	38 OR	39 PA	40 RI	41 SC	42 SD	43 TN	44 TX	45 UT	46 VT	47 VA	48 WA	49 WV	50 WI	51 WY
A Tort Statute of Limitations	6	2	2	2	2	3	6	3	1	2	4	3	2	3	2	3	4
B Wrongful Death Statute of Limitations	2	2	2	3	2	2	6	3	1	2	2	2	2	3	2	3	2
C Product Liability Statute of Limitations				2					1								
D Product Liability Statute of Repose	10/11			8		10		6	6/10		6/10						
E Medical Malpractice Statute of Limitations	2	1	2	2		1/2	3	2	2	2	2	3		3			2
F Medical Malpractice Statute of Repose	6	4	3	5			6		3		4	7		8			
G Architects and Contractors Statute of Limitations and Repose	10/12	10	7/10	2/10	12/14	10	10/12	6/7	4/5	10	7		5	6		6	10
H General Statute of Repose	10			10													
I Special Statute of Limitations or Repose (Selected)									yes			3/20					

APPENDIX A—STATUTES

1. ALA. CODE (Supp. 1979) A—§ 6-2-39; B—§ 6-5-410(d); C—§ 6-5-502; D—§ 6-5-5021; E—§ 6-5-482; F—§ 6-5-482; G—§ 6-5-218; I—§ Ala. Acts 80-566 (asbestos).
2. ALASKA STAT. (1979) A—§ 09.10.070; G—§ 09.10.055.
3. ARIZ. REV. STAT. ANN. (Supp. 1979) A—§ 12-542; B—§ 12-542; C—§ 12-551; D—§ 12-551; E—§ 12-564; F—§ 12.564.
4. ARK. STAT. ANN. (Supp. 1979) A—§ 37-206; B—§ 37-206; C—§ 34-2803; E—§ 34-2616; G—§ 34-237, -239.
5. CAL. CIV. PROC. CODE (West Supp. 1980) A—§ 340; B—§ 340; E—§ 340.5; G—§§ 337.1, .15; I—§ 340.2 (asbestos).
6. COLO. REV. STAT. (Supp. 1978) A—§ 13-80-110; B—§ 13-21-204; C—§ 13-80-127.5; D—§ 13-80-127.5; E—§ 13-80-105; F—§ 13-80-105; G—§ 13-80-127.
7. CONN. GEN. STAT. ANN. (West Supp. 1980) A—§ 52-584; B—§ 52-555; C—§ 52-577(a) D—§ 52-577(a); E—§ 52-584; F—§ 52-584; G—§ 52-584; H—§ 52-584.
8. DEL. CODE ANN. (Supp. 1978) A—§ tit. 10, § 8119; B—tit. 10, § 8107; E—tit. 18, § 6856; F—tit. 18, § 6856; G—tit. 10, § 8127.
9. D.C. CODE ANN. (1973) A—§ 12-301; B—§ 16-2702; G—§ 12-310.
10. FLA. STAT. (1979) A—§ 95.11(3); B—§ 95.11(4)(d); C—§ 95.031; D—§ 95.031; E—§ 95.11(4); F—§ 95.11(4); G—§ 95.11(3).
11. GA. CODE ANN. (Supp. 1979) A—§ 3-1004; B—§ 3-1004; D—§ 105-106 (b)(2); E—§ 3-1101; G—§ 3-1006.
12. HAWAII REV. STAT. (Supp. 1979) A—§ 657-7; B—§ 663-3; E—§ 657-7.3; F—§ 657-7.3; G—§ 657.8.
13. IDAHO CODE (1979) A—§ 5-219; B—§ 5-219; C—H.577; D—H.577; E—§ 5-219; G—§ 5-241; I—§ 5.243 (ionizing radiation injury).
14. ILL. ANN. STAT. (Smith-Hurd Supp. 1980) A—ch.83, § 15; B—ch.70, § 2; C—ch. 83, § 22.2; D—ch. 83, § 22.2; E—ch. 83, § 22.2; E—ch. 83, § 22.1; F—ch. 83, § 22.1; G—ch. 51, § 58.
15. IND. CODE ANN. (Burns Supp. 1979) A—§ 34-1-2-2; B—§ 34-1-2-2; C—§ 34-4-20A-4; D—§ 34-4-20A-4; E—§ 16-9.5-3-1; G—§ 34-4-20-2.
16. IOWA CODE ANN. (West Supp. 1980) A—§ 614.1; B—§ 614.9; E—§ 614.1; F—614.1(9).
17. KAN. STAT. ANN. (1976) A—§ 60-513(a)(4); B—§ 60-513(a)(5); E—§ 60-513(a)(7); F—§ 60-513(c); H—§ 60-513(b); I—§ 60-513 a-d.
18. KY. REV. STAT. ANN. (Baldwin 1979) A—§ 413.140(1); B—§ 411.130; D—§ 411.310; E—§ 413.140(i)(e); F—§ 413.140(1)(e); G—§ 413.135.
19. A and B—LA. CIV. CODE ANN. (West Supp. 1979) art. 3536; E and F—LA. REV. STAT. ANN. (West Supp. 1979) § 9:5628; G—LA. REV. STAT. ANN. (West Supp. 1979) § 9:2772.

20. ME. REV. STAT. ANN. (1980) A—tit. 14, § 752; B—tit. 18, § 2552; E—tit. 14, § 753; G—tit. 14 § 752-A.
21. MD. CTS. & JUD. PROC. CODE ANN. (1980) A—§ 5-101; B—MD. ANN. CODE art. 3, § 904; E—§ 5-109; F—§ 5-109; G—§ 5-108.
22. MASS. ANN. LAWS (Michie/Law Co-op 1980) A—ch. 260, § 2A; B—ch. 229, § 2; E—ch. 260, § 4; G—ch. 260, § 2B.
23. MICH. COMP. LAWS ANN. (Supp. 1980) A—§ 600.5805; B—§ 600.5805; C—§ 600.5805(9); D—§ 600.5805(9); E—§ 600.5805(4); G—§ 600.5839.
24. MINN. STAT. ANN. (West Supp. 1980) A—§ 541.07; B—§ 573.02; C—§ 541.05; E—§ 541.07; G—§ 541.051.
25. MISS. CODE ANN. (Supp. 1979) A—§ 15-1-49; B—§ 15-1-49; E—§ 15-1-36; G—§ 15-1-41.
26. MO. ANN. STAT. (Vernon Supp. 1980) A—§ 516.120; B—§ 537.100; E—§ 516.105; F—§ 516.105; G—§ 516.097.
27. MONT. REV. CODES ANN. (1979) A—§ 27-2-204; B—§ 27-2-204(2); E—§ 27-2-205; F—§ 27-2-205; G—§ 27-2-208.
28. NEB. REV. STAT. (1979) A—§ 25-207; B—§ 30-810; C—§ 25-224; D—§ 25-224; E—§ 25-222; F—§ 25-222; G—§ 25-223.
29. NEV. REV. STAT. (1979) A—§ 11.190(4)(e); B—§ 11.190(4)(e); E—§ 41A.097; F—§ 41A.097; G—§ 311.205.
30. N.H. REV. STAT. ANN. (Supp. 1979) A—§ 508:4; B—§ 508:4; C—§ 507-D:2; D—§ 507-D:2; E—§ 507-C:4; G—§ 508:4-b.
31. N.J. STAT. ANN. (West Supp. 1979) A—§ 2A:14-2; B—§ 2A:31-1; G—§ 2A:14-1.1.
32. N.M. STAT. ANN. (1978) A—§ 37-1-8; B—§ 41-2-2; E—§ 41-5-13; G—§ 37-1-27.
33. N.Y. CIV. PRAC. LAW (McKinney Supp. 1979) A—§ 214(5); B—N.Y. EST., POWERS & TRUSTS LAW § 5-4.1; E—§ 214-2.
34. N.C. GEN. STAT. (Supp. 1979) A—§ 1-52(16); B—§ 1-53; D—§ 1-50(6); E—§ 1-15(c); F—§ 1-15(c); G—§ 1-50(5); H—§ 1-56.
35. N.D. CENT. CODE (1974) A—§ 28-01-16; B—§ 28-01-18; D—§ 28-01.1-02; E—§ 28-01-18(3); F—§ 28-01-18(3); G—§ 28-01-44; H—§ 28-01-22.
36. OHIO REV. CODE ANN. (Baldwin 1975) A—§§ 2305.10, .10; B—§ 2125.02; E—§ 2305.11; F—§ 2305.11; G—§ 2305.131.
37. OKLA. STAT. ANN. (West Supp. 1979) A—tit. 12, § 95; B—tit. 12, § 1053; E—tit. 76, § 18; F—tit. 76, § 18; G—tit. 12, § 109,110.
38. OR. REV. STAT. (1979 A—§ 12.110(1); B—§ 30.020; C—§ 30.905(2); D—§ 30.905(1); E—§ 12.110(4); F—§ 12.110(4); G—§ 12.135; H—§ 12.115.
39. PA. STAT. ANN. (Purdon 1980) A—tit. 42, § 5524; B—tit. 42, § 5524; G—tit. 42, § 5536.
40. R.I. GEN. LAWS (Supp. 1979) A—§ 9-1-14; B—§ 10-7-2; D—§ 9-1-13; E—§ 9-1-14.1; G—§ 9-1-29.
41. S.C. CODE (Supp. 1979) A—§ 15-3-530; B—§ 15-3-530; E—§ 15-3-545; F—§ 15-3-545; G—§ 15-3-640, -650, -660, -670.

42. S.D. COMP. LAWS ANN. (Supp. 1979) A—§ 15-2-14; B—§ 21-5-3; D—§ 15-2-12.1; E—§ 15-2-14.1; G—§ 15-2-9, 15-2-11.
43. TENN. CODE ANN. (Supp. 1979) A—§ 28-304; B—§ 28-304; C—§ 28-304, 28-3703; D—§ 23-3703; E—§§ 28-304, 23-3415; F—§ 23-3415; G—§ 28-314, -315; I—§ 23-3703(b) (asbestos).
44. TEX. REV. CIV. STAT. ANN. (Vernon Supp. 1980) A—tit. 91, art. 5526; B—tit. 91, art. 5526; E—tit. 71, art. 4590i § 10.01; G—tit. 91, art. 5536a.
45. UTAH CODE ANN. (Supp. 1979) A—§ 78-12-25(2); B—§ 78-12-28; D—§ 78-15-3; E—§ 78-14-4; F—§ 78-14-4; G—§ 78-12-25.5.
46. VT. STAT. ANN. (Supp. 1979) A—tit. 14, § 512; B—tit. 14, § 1492; E—tit. 12, § 521; F—tit. 12, § 521; I—tit. 12, § 518 (ionizing radiation injury).
47. VA. CODE (1977) A—§ 8.01-243(A); B—§ 8.01-244; G—§ 8.01-250.
48. WASH. REV. CODE ANN. (1979) A—§ 4.16.080(2); B—§ 4.16.080; E—§ 4.16.350; F—§ 4.16.350; G—§§ 4.16.300, .320.
49. W. VA. CODE (Supp. 1979) A—§ 55-2-12; B—§ 55-7-6.
50. WIS. STAT. ANN. (West Supp. 1979) A—§ 893.205; B—§ 893.205; G—§ 893.155.
51. WYO. STAT. (1977) A—§ 1-3-105(a); B—§ 1-38-102; E—§ 1-3-107; G—§ 1-3-111.

APPENDIX B

Alaska: Austin v. Fulton Ins. Co., 444 P.2d 536 (Alaska 1968) (discovery allowed in negligence action against insurance agent).

Arkansas: Field v. Gazette, 187 Ark. 253, 59 S.W.2d 19 (1933); Faulkner v. Huie, 206 Ark. 332, 168 S.W.2d 839 (1943) (no discovery). *But see* exceptions: Schenebeck v. Sterling Drug, Inc., 423 F.2d 919 (8th Cir. 1970) (negligent prescription of drug); Midwest Mutual Ins. Co. v. Arkansas National Co., 260 Ark. 352, 538 S.W.2d 574 (1976) (insurance agent's negligence).

California: See Comment, *Accrual of Statutes of Limitations: California's Discovery Exceptions Swallow the Rule,* 68 CAL. L. REV. 106 (1980). *See also* Oakes v. McCarthy Co., 267 Cal. App. 2d 231, 73 Cal. Rptr. 127 (1968) (property damage); Neel v. Magana, Olney, Levy, Cathcart, & Gelfand, 6 Cal. 3d 176, 98 Cal. Rptr. 837, 491 P.2d 421 (1971) (legal malpractice); Velasquez v. Fibreboard Paper Products Corp., 97 Cal. App. 3d 881, 159 Cal Rptr. 113 (1979) (asbestosis, now controlled by statute); Searle & Co. v. Superior Court, 49 Cal. App. 3d 22, 122 Cal. Rptr. 218 (1975) and Sindell v. Abbott Laboratories, 85 Cal. App. 3d 1, 149 Cal. Rptr. 138 (1978) (undiscovered pathological effect); Allred v. Bekins Wide World Service, Inc., 45 Cal. App. 3d 984, 120 Cal. Rptr. 312 (1975) (personal injury and injury to property); Warrington v. Pfizer & Co., 274 Cal. App. 2d 564, 80 Cal. Rptr. 130 (1969) (insidious disease).

Colorado: See City of Aurora v. Bechtel Corp., 599 F.2d 382 (10th Cir. 1979) (engineering negligence). *Dicta:* Trend indicates "discovery rule will be applied to other actions against professionals [such as] accountants, attorneys, dentists, and insurance agents." *See also* Owens v. Brochner, 172 Colo. 525, 474 P.2d 603 (1970) (medical malpratice, now controlled by statute).

District of Columbia: Burke v. Wash. Hosp. Ctr., 293 F. Supp. 1328 (D.D.C. 1968); Jones v. Rogers Memorial Hospital, 442 F.2d 773 (D.C. Cir. 1971) (both medical malpractice cases allowing discovery rule). *But see* rejection of discovery rule in Hanna v. Fletcher, 231 F.2d 469 (D.C. Cir. 1956), *cert. denied,* 351 U.S. 989 (1956) (negligence, personal injury); Poole v. Terminix Co. of Md. & Wash., 200 F.2d 746 (D.C. Cir. 1952) (damage to dwelling by exterminator).

Florida: Creviston v. General Motors Corp., 225 So. 2d 331 (Fla. 1969) (product liability action, now controlled by statute, discovery rule allowed); Seaboard Air Line R.R. Co. v. Ford, 92 So. 2d 160 (Fla. 1956) (occupational disease, accrual when disease discoverable); Lund v. Cook, 354 So. 2d 940 (Fla. App. 1978) (negligently made survey, discovery allowed); Steiner v. Ciba-Geigy Corp., 364 So. 2d 47 (Fla. App. 1978). *But see* Carter v. Cross, 373 So. 2d 81 (Fla. App. 1979) (dicta that there is no discovery rule in Florida).

Georgia: Everhart v. Rich's Inc., 299 Ga. 798, 194, S.E.2d 425 (1972) (denying discovery rule but using continuing tort theory for harmful fiberglass curtains); Piedmont Pharmacy v. Patmore, 144 Ga. App. 160, 240 S.E.2d 888 (1977) (continuing tort theory allowing recovery in use of steroid causing glaucoma).

Hawaii: Yoshizaki v. Hilo Hospital, 50 Hawaii 150, 433 P.2d 220 (1967) (discovery allowed for medical malpractice, now controlled by statute); Basque v. Yuk Lin Liau, 50 Hawaii 397, 441 P.2d 636 (1968) (damage to property from leaking sewer, discovery allowed). *But see* Higa v. Mirikitani, 55 Hawaii 167, 517 P.2d 1 (1973) (legal malpractice suit in which Supreme Court of Hawaii speaks of discovery rule trend but declines to decide that issue here).

Illinois: Williams v. Brown Manufacturing Co., 45 Ill. 2d 418, 261 N.E.2d 305 (1970) (product liability, now controlled by statute); Rozny v. Marnul, 43 Ill. 2d 54, 250 N.E.2d 656 (1969) (negligent surveying); Nolan v. Johns-Manville Asbestos and Magnesia Materials Co., 74 Ill. App. 3d 778, 392 N.E.2d 1352 (1979) (on appeal) (asbestosis); Hames v. Northern Illinois Gas Co., 70 Ill. App. 3d 628, 388 N.E.2d 1127 (1979) (personal injury); Korvette v. Esko Roofing Co., 38 Ill. App. 905 (1976) (faulty construction and design of roof); Kohler v. Woollen, 15 Ill. App. 3d 455, 304 N.E.2d 677 (1973) (legal malpractice); Wigginton v. Reichold Chemical, Inc., 133 Ill. App. 2d 776, 274 N.E.2d 118 (1971) (defective chemical causing illness). *But see* Berry v. G. D. Searle, 56 Ill. 2d 548, 309 N.E.2d 550 (1974) (*contra*).

Kentucky: Louisville Trust Co. v. Johns-Manville Products Corp., 580 S.W.2d 497 (1979) (discovery rule for latent injuries caused by drugs, chemicals, or asbestos).

Maryland: Discovery rule allowed for latent disease: Harig v. Johns-Manville Products Corp., 284 Md. 70, 394 A.2d 299 (1978) (asbestosis). Also used in professional malpractice: Cotham v. Board of County Commissioners, 260 Md. 556, 273 A.2d 115 (1971) (medical malpractice, now controlled by statute); Mumford v. Staton, 264 Md. 697, 255 A.2d 359 (1969) (legal malpractice); Steelworkers Holding Co. v. Menefee, 255 Md. 440, 258 A.2d 177 (1972) (construction malpractice) Leonhart v. Atkinson, 265 Md. 219, 289 A.2d 1 (1972); Mattingly v. Hopkins, 254 Md. 88, 253 A.2d 904 (1969) (civil engineer). The general rule is that cause accrues at time of injury and not discovery with above exceptions. Goldstein v. Potomac Electric Power Co., 285 Md. 673, 404 A.2d 1064 (1979); Allentown Plaza v. Suburban Propane Gas Corp., 43 Md. A337, 405 A.2d 326 (1979).

Massachusetts: Discovery rule allowed in legal malpractice, Hendrickson v. Sears, 365 Mass. 83, 310 N.E.2d 131 (1974); affirmed in action regarding defective roofing materials, Town of Mansfield v. GAF Corp., ___ Mass. App. Ct. ___, 364 N.E. 2d 1292 (1977); but specifically not in Pasquale v. Chandler, 350 Mass. 450, 215 N.E.2d 319 (1966) (medical malpractice). *Pasquale* court said it would have considered applying discovery rule in light of recent trends but could not do so because the legislature had specifically rejected an amendment that would have instated the rule in 1965.

Michigan: Discovery rule was allowed in medical malpractice in Dyke v. Richard, 390 Mich. 739, 213 N.W.2d 185 (1973). This is now controlled by statute (since 1975); no further exceptions.

Minnesota: No discovery allowed; however, federal court ruled, using Minnesota law, that cause of action accrues when injury manifests itself to plain-

tiff. Karjala v. Johns-Manville Products Corp., 523 F.2d 155 (8th Cir. 1975) (asbestosis).

Nebraska: Discovery rule was allowed in early medical malpractice case, now controlled by statute. Spath v. Morrow, 174 Neb. 38, 115 N.W.2d 581 (1962). Federal court allowed discovery as time of accrual in berylliosis case, Sylvania Electric Products v. Barker, 228 F.2d 842 (1st Cir. 1955). Supreme Court of Nebraska said expanding rule would defeat purpose of statutes of limitations in Omaha Paper Stock Co. v. Martin K. Eley Constr. Co., 193 Neb. 848, 230 N.W.2d 87 (1975) but more recently indicated approval of discovery concept. Grand Inland School Dist. v. Celotex, 203 Neb. 559, 279 N.W.2d 603 (1979).

Nevada: Discovery rule adopted for legal malpractice. Sorenson v. Pavlikowski, 591 Nev. 1152, 581 P.2d 851 (1978).

New Hampshire: Decision of whether to apply discovery depends upon "equitable consideration." Discovery rule used in legal malpractice action. McKee v. Riordan, 116 N.H. 729, 366 A.2d 472 (1976). Discovery rule used in medical malpractice, Shillady v. Elliott Community Hosp., 114 N.H. 321, 320 A.2d 637 (1974); and in drug products liability action, Raymond v. Eli Lilly & Co., ___ N.H. ___, 471 A.2d 170 (1977). Both of these decisions were modified by statute.

New Mexico: In medical malpractice, now controlled by statute, case law says accrual "at time injury manifests itself in an objective manner and is ascertainable." Peralta v. Martinez, 90 N.M. 391, 564 P.2d 194 (1977). *Peralta* court says this is not discovery rule. Blurring of distinction in legal malpractice case allowing accrual at time "injury is ascertainable or discoverable." Jaramillo v. Hood, 93 N.M. 433, 601 P.2d 66 (1979). In Bassham v. Owens-Corning Fiber Glass Corp., 327 F. Supp. 1007 (D.N.M. 1971), federal court held action accrued at last exposure to asbestos, not discovery of asbestosis.

New York: No discovery rule except for foreign object left in body, by statute exclusively for medical malpractice, N.Y. CIV. PRAC. LAW § 214-a (McKinney Supp. 1979). Foreign object rule was held not to apply to drug product liability action in which defective drug injected into body. Thornton v. Roosevelt Hospital, 47 N.Y.2d 780, 391 N.E. 1002, 417 N.Y.S.2d 920 (1979). *See also* Victorson v. Bock Laundry Machine Co., 37 N.Y.2d 395, 335 N.E.2d 275, 373 N.Y.S.2d 39 (1975). However, "continuous treatment" theory has been extended to other malpractice cases; statute does not accrue until termination of professional relationship. *See* County of Broome v. Vincent J. Smith, Inc., 78 Misc. 2d 889, 358 N.Y.S.2d 998 (1974) (architect); Wilkin v. Dana R. Pickup & Co., 74 Misc. 2d 1025, 347 N.Y.S.2d 122 (1973) (accountant); Siegel v. Kranis, 29 A.D.2d 477, 288 N.Y.S.2d 831 (1968) (attorney). *See also* Cubito v. Kreisberg, 69 A.D.2d 738, 419 N.Y.S.2d 578 (1979) (architect negligence, accrual at time of injury).

Ohio: Case law allows discovery rule for foreign objects left in body in medical malpractice actions, now under separate statute, OHIO REV. CODE ANN. § 2305.11 (Baldwin 1975). Melnyk v. Cleveland Clinic, 32 Ohio St. 2d 198, 290 N.E.2d 916 (1972). This principle has recently been extended to include a drug product liability action. McKenna v. Ortho Pharmaceutical

Corp., 48 U.S.L.W. 2641 (1980). In all malpractice actions not dealing with foreign object, accrual is at termination of professional relationship by case law. Keaton Co. v. Kolby, 27 Ohio St. 2d 234, 271 N.E.2d 772 (1971) (attorney); Woodegard v. Miami Valley Hospital Society of Dayton, 47 Ohio Misc. 43, 354 N.E.2d 720 (1975) (medical malpractice). Discovery rule not allowed in berylliosis case in federal court. Brush Beryllium Co. v. Meckley, 284 F.2d 797 (6th Cir. 1960).

Pennsylvania: Discovery allowed in medical malpractice actions. Ayers v. Morgan, 397 Pa. 282, 154 A.2d 788 (1959); Acker v. Palena, ___ Pa. Super ___, 399 A.2d 1230 (1978). *See also* Bayless v. Philadelphia Nat'l League Club, 579 F.2d 37 (3d Cir. 1978) (drug liability action); Mitchell v. Hendricks, 431 F. Supp. 1295 (E.D. Pa. 1977) (personal injury and civil rights action brought by prisoner); and Armacost v. Winters, 258 Pa. Super. 424, 392 A.2d 866 (1978). The 1978 personal injury statute of limitation eliminates the words "from the time injury was done" regarding accrual. PA. STAT. ANN. tit. 42, § 5524 (Purdon 1980), replacing tit. 12, § 34 (Purdon 1953). Although there is no case which specifically holds a discovery provision generally applicable to all tort actions, recent decisions have consistently allowed some form of discovery.

Rhode Island: Wilkinson v. Harrington, 104 R.I. 224, 243 A.2d 745 (1968) (discovery allowed in medical malpractice case, later affirmed by statute). *But see* Cadieux v. Int'l Tel. & Tel. Corp., 593 F.2d 142 (1st Cir. 1979) (wrongful death action, discovery rule not allowed); Plouffe v. Goodyear Tire & Rubber Co., 118 R.I. 288, 373 A.2d 492 (1977) (product liability action, accrual at time of injury).

Texas: Supreme Court has held that cause of action accrues at time that the plaintiff has been injured. Atkins v. Crosland, 417 S.W.2d 150 (Tex. 1967). Discovery rejected in Lyles v. Johnson, 585 S.W.2d 778 (Tex. Civ. App. 1975). Discovery rule has been applied in medical malpractice actions now modified by statute, TEX. REV. CIV. STAT. ANN. tit. 71, art. 4590i (Vernon Supp. 1980). Conerly v. Morris, 575 S.W.2d 633 (Tex. Civ. App. 1978). Federal court allowed discovery rule in noxious substance case, Strickland v. Johns-Manville Int'l Corp. 461 F. Supp. 215 (S.E. Tex. 1978) (asbestos), citing a prior ruling regarding radiation in medical malpractice case, Grady v. Faykus, 530 S.W.2d 151 (Tex. Civ. App. 1975); *see also* Thrift v. Tenneco Chem. Corp., 381 F. Supp. 543 (N.D. Tex. 1974) (discovery allowed in negligent marketing of drug).

Utah: Discovery rule, adopted by statute for medical malpractice, UTAH CODE ANN. § 78-14-4 (Supp. 1979). Discovery rule was extended to legal malpractice in Hansen v. Petrof Trading Co., 527 P.2d 116 (1974). *But see* Smoot v. Hydro Flame Corp., 522 P.2d 709 (1974) (running of statute not delayed until discovery of irregularities in stock transaction).

Virginia: In medical malpractice actions, under general torts statute, accrual of cause of action is at termination of continuous treatment of patient. Fenton v. Danaceau, 200 Va. 1, 255 S.E.2d 349 (1979); Farley v. Goode, 219 Va. 969, 252 S.E.2d 594 (1979).

Washington: Discovery rule used in Ohler v. Tacoma General Hospital, 92 Wash. 2d 507, 598 P.2d 1358 (1979) (products liability); Peters v. Sim-

mons, 87 Wash. 2d 400, 552 P.2d 1053 (1976) (attorney malpractice); Gazija v. Nicholas Jerns Co., 86 Wash. 2d 215, 543 P.2d 338 (1975) (insurance agent); Hunter v. Knight, Vale & Gregory, 18 Wash. App. 640, 571 P.2d 212 (1977) (accountant); Hermann v. Merrill Lynch, Pierce, Fenner & Smith, 17 Wash. App. 626, 564 P.2d 817 (1977) (stockbroker); Kundahl v. Barnett, 5 Wash. App. 227, 486 P.2d 1164 (1971) (surveyor).

West Virginia: Discovery rule adopted for medical malpractice actions in Hill v. Clarke, ___ W. Va. ___, 241 S.E.2d 572 (1978); and Morgan v. Grace Hospital, Inc., 149 W. Va. 783, 144 S.E.2d 156 (1965). Rule was extended to legal malpractice in Family Savings & Loan, Inc. v. Ciccarello, ___ W. Va. ___, 207 S.E.2d 157 (1974).

Wyoming: Discovery rule by statute for medical malpractice actions, WYO. STAT. § 1-3-107 (1977). Discovery extended to engineering in Banner v. Town of Dayton, 474 P.2d 300 (Wyo. 1970).

APPENDIX C

Arizona: Sato v. VanDenburgh, 123, Ariz. 225, 599 P.2d 181 (1979); Yazzie v. Olney, Levy, Kaplan & Tenner, 593 F.2d 100 (9th Cir. 1979); Nielson v. Arizona Title Ins. & Trust Co., 15 Ariz. App. 29, 485, P.2d 853 (1971).

Connecticut: By statute, CONN. GEN. STAT. ANN. § 52-584 (Supp. 1980): ". . . from the date when injury is first sustained or discovered, or in the exercise of reasonable care should have been discovered, and except that no such action may be brought more than three years from the date of the act or omission complained of. . . ."

Indiana: Cause of action accrues at time one has suffered (1) a legal injury and (2) resulting damages capable of ascertainment. Montgomery v. Crum, 199 Ind. 660, 161 N.E. 251 (1928) (alienation of affections); Gahimer v. Virginia-Carolina Chemical Corp., 241 F.2d 836 (7th Cir. 1957) (defective fertilizer); Essex Wire v. M. H. Hilt Co., 263 F.2d 599 (7th Cir. 1959) (negligent injury to property). *But see* Withers v. Sterling Drug, Inc., 319 F. Supp. 878 (S.D. Ind. 1970) (accrual at time difficulty linked to drug, not time of discovery that visual impairment was permanent).

Iowa: Williams v. Vick Chemical Co., 279 F. Supp. 833 (S.D. Iowa 1967) (drug product liability); Cameron v. Montgomery, 225 N.W.2d 154 (Iowa 1975) (legal malpractice); Chrischilles v. Griswold, 150 N.W.2d 94 (Iowa 1967) (architect's professional malpractice). In *Chrischilles,* court officially adopted discovery rule for negligence actions.

Kansas: By statute, KAN. STAT. ANN. § 60-513(b): "[Accrual when] act giving rise to the cause of action first causes substantial injury, or, if the fact of the injury is not reasonably ascertainable until sometime after the initial act, then the period of limitation shall not commence until the fact of the injury becomes reasonably ascertainable but in no event shall the period be extended more than ten (10) years beyond the time of the act giving rise to the action."

Louisiana: Perrin v. Rodriquez, 153 So. 555 (La. App. 1934). However, discovery rule has been limited in application because of requirement that plaintiff's ignorance must neither be "willful nor negligent." Cartwright v. Chrysler Corp., 255 La. 598 232 So. 2d 285 (1970); Neyrey v. LeBrun, 309 So. 2d 722 (La. App. 1975). Burden of proof is on plaintiff to explain his ignorance. Dauzat v. St. Paul Fire & Marine Ins. Co., 336 So. 2d 540 (La. App. 1976). This also holds true in noxious substances causing latent disease. Yarbrough v. Louisiana Cement Co., 370 So. 2d 602 (La. App. 1979).

Missouri: "Capable of ascertainment" test rather than discovery rule is used. Mo. ANN. STAT. § 516.100 (Vernon Supp. 1980). Krug v. Sterling Drug, Inc., 416 S.W.2d 143 (Mo. 1967) (defective drug). But test is strictly applied. Jepson v. Stubbs, 555 S.W.2d 307 (Mo. 1977) (legal malpractice).

New Jersey: "Discovery of existence of the cause of action" is accrual time by New Jersey case law. Burd v. New Jersey Tel. Co., 76 N.J. 284, 386 A.2d 1310 (1978) (personal injury); Fox v. Passaic General Hosp., 71 N.J. 122, 363 A.2d 341 (1976) and Lopez v. Swyer, 62 N.J. 267, 300 A.2d 563 (1973) (medical malpractice). Also used in New Market Poultry Farms, Inc. v. Fellows, 51 N.J. 419, 241 A.2d 633 (1968) (engineering malpractice); Diamond

v. N.J. Bell Telephone Co., 51 N.J. 594, 242 A.2d 622 (1968) (injury to property). *Swyer* court *dicta:* judges should decide whether or not it is equitable to use discovery rule on a case-by-case basis.

North Carolina: By statute, N.C. GEN. STAT. § 1-52(16) (Supp. 1979), enacted in 1979: ". . . [T]he cause of action . . . shall not accrue until bodily harm to the claimant or physical damage to his property becomes apparent or ought reasonably to have become apparent to claimant. . . ." There is a repose factor of ten years.

Oklahoma: Discovery allowed in Seitz v. Jones, 370 P.2d 300 (Okla. 1962) (medical malpractice, now controlled by statute); but not in Kirkland v. General Motors Corp., 521 P.2d 1353 (Okla. 1974). Most recent case in Supreme Court, a tort action, allowed discovery rule, citing *Seitz supra.* Smith v. Johnston, 591 P.2d 1260 (Okla. 1979).

Oregon: Discovery rule provided by statute in § 12.110(4) for medical malpractice, has also been used in product liability case. Schiele v. Hobart Corp., 284 Or. 483, 587 P.2d 1010 (1978). Discovery also allowed in action for negligent injury to property by herbicide. Dowers Farms v. Lake County, 288 Or. 669, 607 P.2d 1361 (1980) (under state Tort Claims Act).

South Carolina: By statute, S.C. CODE § 15-3-530(5): "An action . . . for any other injury to the person or rights of another, not arising on contract and not hereinafter enumerated." § 15-3-535: ". . . [A]ll actions initiated under Item 5 of § 15-3-530 . . . shall be commenced within six years after the person knew or by the exercise of reasonable diligence should have known that he had a cause of action."

Tennessee: Supreme Court of Tennessee adopted discovery rule in McCroskey v. Bryant Air Conditioning Co., 524 S.W.2d 487 (Tenn. 1975), "in tort actions, including but not restricted to products liability actions . . . predicated on negligence, strict liability or misrepresentation. . . ." 524 S.W.2d at 491.

Vermont: By statute, VT. STAT. ANN. tit. 12, § 512(4) (Supp. 1979): Except as otherwise provided in this chapter, injuries to the person suffered by the act or default of another person, provided that the cause of action shall be deemed to accrue as of the date of the discovery of the injury.