NOTES

LIMITING MANUFACTURERS' LIABILITY FOR AGING PRODUCTS

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I. INTRODUCTION

On February 24, 1989, United Airlines flight 811 departed from Honolulu for New Zealand and Australia.[1] The Boeing 747 was carrying 354 people.[2] About seventeen minutes after takeoff a hole forty feet tall and ten feet wide ripped open on the side of the jumbo jet above the cargo door.[3] Three rows of seats containing nine passengers were sucked out of the plane nearly 20,000 feet above the Pacific Ocean.[4] A defective cargo door latch handle is a suspected cause of the accident.[5] The eighteen-year-old plane was the oldest

1. *Structural Failure Suspected in United 747 Near Hawaii*, Chicago Tribune, Feb. 25, 1989, at 1, col. 3.
2. *Id.*
3. *Id.*
4. *Id.*
5. *Id.*

747 in United's jumbo jet fleet.[6]

Now suppose that the personal representatives of the estates of the nine deceased passengers bring products liability claims against Boeing, claiming the 747 was defective. How does the passage of eighteen years from the time the plane was sold by Boeing to the date the accident occurred affect the plaintiffs' causes of action? Should the manufacturer be liable indefinitely?

Incidents such as the flight 811 accident raise the topic addressed by this note: How long should a manufacturer be held liable for injuries caused by its product? If the product causes injury after several years due to weakening caused by normal wear, should the manufacturer remain liable?

This Note first examines the common law approach to these issues. Legislative attempts to address the problem are then discussed, including statutes of limitation, statutes of repose, and the more recent "useful safe life" statutes.

II. Background

A plaintiff bringing a products liability claim against a manufacturer must establish that a defect in the injury-causing product existed at the time the product left the manufacturer's hands, and that the defect proximately caused the plaintiff's injury.[7] It is easy to label a product that fails during normal use early in its life span "originally defective." As time passes and the product continues to perform, however, the reason for product failure becomes more uncertain.

A latent defect present at the time the product was put into the stream of commerce may cause the product to fail years later, or the product may have been designed to fail after a certain number of uses and the product lasted as long as was intended.[8] In the former situation, the plaintiff would assert a manufacturing defect exists.[9] If the product lasted as long as the manufacturer intended, the plaintiff would assert the product was defectively designed, i.e., that the product should have been designed to last longer.[10] In practical application, however, the concepts are not so clearly

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6. *Id.* A recent report lists the average age of the major airlines' fleets (in years, as of July 1988) as follows: American, 10.8; Continental, 12.1; Delta, 9.5; Eastern, 15.1; Northwest, 15.5; Pan Am, 14.6; TWA, 15.3; United 14.9; USAir/Piedmont 10.2. *Tarnished Wings*, Time, Mar. 13, 1989, at 41. In comparison, the average age of foreign fleets are: Lufthansa, 7.1 years; Swissair, 8.5 years; KLM, 8.4 years; and Singapore, 4.5 years. *Id.*

7. 1 American Law of Products Liability § 3:1 (1987).

8. J. Henderson Jr. & A. Twerski, Products Liability 566 (1987).

9. *Id.*

10. *Id.* Under this theory of liability, the plaintiff can argue:

(a) the materials should have been more durable;

(b) the product should have been designed to failsafe (to end its useful life in a nondangerous manner);

(c) the product should have been designed so as to indicate to the user that its productive life was coming to an end; or

distinguishable. A product may last as long as was intended due to choice of a material that fails over time. The concept of useful safe life bridges this area between the concepts of defective manufacture and defective design.

III. The Common Law

In order to determine whether a product is defective, the general common law rule provides that the age of a product is a factor to be considered by the trier of fact.[11] The mere passage of time, however, does not excuse a manufacturer of liability if a product was originally defective when it was marketed.[12] Thus, under common law principles, a manufacturer is responsible indefinitely for injuries caused by its product.

(d) the product should have been designed so as to prohibit the user from prolonging its life through repair or replacement or certain parts that kept it in service beyond the point at which it could failsafe.

Id. at 566-67.

11. *See* Gates v. Ford Motor Co., 494 F.2d 458 (10th Cir. 1974); Kaczmarek v. Mesta Mach. Co., 463 F.2d 675 (3d Cir. 1972); Mondshour v. Gen. Motors Corp., 298 F. Supp. 111 (D. Md. 1969); Tucker v. Unit Crane & Shovel Corp., 256 Or. 318, 473 P.2d 862 (1970); *see also* Pryor v. Lee C. Moore, Corp., 262 F.2d 673, 675 (10th Cir. 1958) ("prolonged use of a manufactured article is but one factor, albeit an important one, in the determination of the factual issue whether the negligent manufacture proximately caused the harm"); Hawkeye-Sec. Ins. Co. v. Ford Motor Co., 174 N.W.2d 672, 681 (Iowa 1970) ("age and type of use of a product are relevant factors to be considered . . . [by] the trier of the facts").

12. *See, e.g.*, Virgil v. "Kash N'Karry" Serv. Corp., 61 Md. App. 23, 484 A.2d 652 (1984) (two or three month interval between purchase of thermos and implosion did not amount to "substantial" time so as to bar recovery); Cryts v. Ford Motor Co., 571 S.W.2d 683 (Mo. Ct. App. 1978) (Ford was not immune from liability for design of armrest in 1957 Thunderbird). *But see* Kuisis v. Baldwin-Lima-Hamilton Corp., 457 Pa. 321, 319 A.2d 914 (1974) (over twenty years of rugged use of crane precluded a jury finding that brake-locking mechanism was defective on date of original delivery); Balido v. Improved Mach., Inc., 29 Cal. App. 2d 633, 105 Cal. Rptr. 890 (1972) (manufacturer of negligently designed molding press was not immune from liability after passage of fifteen years).

In Farmer v. International Harvester Co., 97 Idaho 742, 553 P.2d 1306 (1976), Farmer was injured while driving a tractor manufactured by the defendant. He purchased the new tractor two years before the accident occurred. *Id.* at 744, 553 P.2 at 1308. The tractor had been driven 116,000 miles at the time of the accident, and the expected life span of the tractors was between 500,000 and 700,000 miles. *Id.* at 744, 749, 553 P.2d at 1308, 1313. In reviewing Farmer's claim of a manufacturing defect, the court stated:

> Of . . . relevance are the age of a product and the length of its use, the severity of its use, the state of its repair, its expected useful life and the fact that the source of the malfunction is an enclosed system relatively immune from tampering or alteration once the product leaves the manufacturer's control. The weight of such evidence is normally for the trier of fact. . . . The evidence need only be such that it can be said: "The product itself must be of a type permitting the jury, after weighing all the evidence . . . to infer that in the normal course of human experience an injury would not have occurred at this point in the product's life span had there not been a defect attributable to the manufacturer."

Id. at 749, 533 P.2d at1312-13 (citations omitted). The court held the evidence was sufficient to permit the jury to find a manufacturing defect caused the accident. *Id.* at 751, 533 P.2d at 1315.

One case that illustrates the classical common law approach is *Mickle v. Blackmon*.[13] In *Mickle* a passenger in an automobile manufactured by Ford in 1949 was impaled on the car's gearshift lever during an accident in 1962.[14] The passenger sued Ford alleging negligence in the design of the gearshift lever, including the choice of material used for the lever's protective knob.[15] The plastic material used to make the knob, white tennite butyrate, deteriorated rapidly when exposed to sunlight, unlike the black plastic used for knobs on the 1950 models.[16] After exposure, the white knobs developed hairline cracks and shattered easily on impact.[17] An expert testified the expected life of the white knobs was six to eight years, while the black knobs did not deteriorate with age.[18] As a defense, Ford asserted it should not be liable after thirteen years of use, and the knob was not defective when the automobile was sold.[19] The court stated:

> There is no duty on a manufacturer to furnish a machine that will not wear out.[20] . . . If the chattel is in good condition when it is sold, the seller is not responsible when it undergoes subsequent changes, or wears out. The mere lapse of time since the sale by the defendant, during which there has been continued safe use of the product, is always relevant, as indicating that the seller was not responsible for the defect . . . . *[N]either long continued lapse of time nor changes in ownership will be sufficient in themselves to defeat recovery when there is clear evidence of an original defect in the thing sold.*[21]

The court found there was evidence the protective knob shattered on impact due to an inherent weakness in the material chosen, rather than due to ordinary wear and tear, and Ford knew of this weakness when it selected the material.[22] The court rejected the rule that a manufacturer is not liable for the failure of a product due to deterioration from ordinary wear and tear or misuse,[23] because the jury could find "the deterioration of the product and its consequent failure was the very risk created by the negligent choice of material."[24] The court identified the important inquiry as what caused the knob's failure rather than how long the knob lasted.[25] The court con-

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13. Mickle v. Blackmon, 252 S.C. 202, 166 S.E.2d 173 (1969).
14. *Id.* at 217, 166 S.E.2d at 178.
15. *Id.* at 217, 166 S.E.2d at 179.
16. *Id.* at 234-35, 166 S.E.2d at 187-88.
17. *Id.* at 235, 166 S.E.2d at 188.
18. *Id.*
19. *Id.* at 236-37, 166 S.E.2d at 188-89.
20. *Id.* at 237, 166 S.E.2d at 189 (quoting Auld v. Sears, Roebuck & Co., 261 A.D. 918, 25 N.Y.S.2d 491, *aff'd*, 288 N.Y. 515, 41 N.E.2d 927 (1942)).
21. *Id.* (citing W. Prosser, Prosser on Torts § 667 (3d ed. 1964)) (court's emphasis).
22. *Id.* at 235, 240, 166 S.E.2d at 188, 190.
23. *Id.* at 240, 166 S.E.2d at 188.
24. *Id.* at 240, 166 S.E.2d at 190.
25. *Id.*

cluded the "mere passage of time" did not excuse Ford since its negligent choice of material caused the plaintiff's injury.[26]

Under the *Mickle* test, the cause of the product's failure determines whether the manufacturer is liable, rather than the passage of time.[27] The passage of time, however, affects the availability and reliability of proof.[28] Evidence is lost, memories fade, and witnesses disappear.[29] The causal connection between design and injury lessens as the time for which the product is used safely increases.[30] In short, as time passes, it becomes more difficult for the plaintiff to prove a defect existed when the product was first sold or delivered. In extreme cases, the passage of time may create such a high probability of superseding causation that a court will conclude as a matter of law a defect could not have been the proximate cause of an injury.[31]

The effect of the passage of time on the availability and reliability of proof is illustrated by *Glass v. Allis-Chalmers Corp.*[32] The plaintiff in *Glass* was injured when he slipped off the deck of a combine Allis-Chalmers manufactured.[33] The plaintiff asserted the safety stripping the manufacturer placed on the deck tended to "wear away or lose its adhesion."[34] Allis-Chalmers argued the combine was not in the same condition when the plaintiff was injured as when the company put it in the stream of commerce.[35] Allis-Chalmers introduced evidence that established the combine had four strips of nonskid stripping on the deck when it was first sold.[36] Because the combine was four years old when the plaintiff purchased it,[37] the plaintiff was unable to produce any evidence concerning what had happened to the strips

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26. *Id.*

27. *See supra* text accompanying note 26.

28. *See* Balido v. Improved Mach., Inc., 29 Cal. App. 3d 633, 641, 105 Cal. Rptr. 890, 896 (1973).

29. Raymond v. Eli Lilly & Co., 117 N.H. 164, 174, 371 A.2d 170, 173-74 (1977) (quoting *Developments in the Law—Statutes of Limitations*, 63 HARV. L. REV. 1177, 1185 (1950)).

30. *See* Balido v. Improved Mach., Inc., 29 Cal. App. 3d 633, 642, 105 Cal. Rptr. 890, 896 (1973). *See generally* Framme & Sisk, *Old Products Chain of Causation*, Trial, Nov. 1989, at 28.

31. *See, e.g.*, Glass v. Allis-Chalmers Corp., 618 F. Supp. 314 (E.D. Mo. 1985); Balido v. Improved Mach. Inc., 29 Cal. App. 3d 633, 105 Cal. Rptr. 890 (1973); Siruta v. Hesston Corp., 232 Kan. 654, 659 P.2d 799 (1983); Kuisis v. Baldwin-Lima-Hamilton Corp., 457 Pa. 321, 335, 319 A.2d 914, 922 (1974); *cf.* Feil v. Challenge-Cook Bros., Inc., 473 So. 2d 1338 (Fla. Dist. Ct. App. 1985) (summary judgment for manufacturer was proper where four months passed between time of accident and expiration of twelve-year statute of repose); Hawkeye-Sec. Ins. Co. v. Ford Motor Co., 174 N.W.2d 672, 681 (Iowa 1970) ("age and type of use of a product are relevant factors to be considered . . . by the trier of facts. Only in rare cases, or in absence of other proofs, are they controlling as a matter of law").

32. Glass v. Allis-Chalmers Corp., 618 F. Supp. 314 (E.D. Mo. 1985).

33. *Id.* at 315.

34. *Id.*

35. *Id.*

36. *Id.* at 316.

37. *Id.* at 317.

between the time of initial purchase and the time of injury.[38] The court noted the stripping may have worn out, or a previous owner may have removed it, and that in either situation, the manufacturer would not be liable.[39] Relying on section 402A comment g of the *Restatement (Second) of Torts*, which provides, "The seller is not liable when he delivers the product in a safe condition, and subsequent mishandling or other cause makes it harmful by the time it is consumed,"[40] the court rejected the plaintiff's claim, stating:

> It is clear that as time goes by and a product is used, it or its parts may simply wear out. To hold a manufacturer or seller liable for unavoidable accidents or ordinary wear and tear would be to place the manufacturer or seller in the place of an insurer . . . . [A] manufacturer is not responsible just because his product is involved in an accident.[41] Because the plaintiff did not establish the combine was defective when Allis-Chalmers put it into the stream of commerce, the court granted summary judgment in favor of Allis-Chalmers.[42]

Another case that illustrates the passage of time can bar a plaintiff's claim under common law principles is *Kuisis v. Baldwin-Lima-Hamilton Corp.*[43] In *Kuisis* the brake locking mechanism became disengaged on a crane suspending a load of steel pipe.[44] The load fell onto the plaintiff, causing injury.[45] Baldwin sold the crane to Northstar, the plaintiff's employer, more than twenty years before the accident.[46] The court noted the plaintiff was required to prove the defect was present when Northstar acquired the

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38. *Id.*

39. *Id.* at 316.

40. *Id.*; *see also* Morgan v. Biro Mfg. Co., 15 Ohio St. 3d 339, 474 N.E.2d 286 (1984) (manufacturer was not liable where plaintiff was injured because original protective guard on meat grinder was removed from machine).

41. Glass v. Allis-Chalmers Corp., 618 F. Supp. at 316; *see also* Balido v. Improved Mach. Inc., 29 Cal. App. 3d 633, 640, 105 Cal. Rptr. 890, 895 (1973) ("manufacturer is not an insurer of the safety of its product").

42. Glass v. Allis-Chalmers Corp., 618 F. Supp. at 317. Summary judgment in favor of the manufacturer has also been granted in cases where the action was time-barred by the state statute of repose and no question of fact existed. *See, e.g.*, Barwick v. Celotex Corp., 736 F.2d 946 (4th Cir. 1984) (applying N.C. law); Brown v. General Elec. Co., 733 F.2d 1085 (4th Cir.) (applying N.C. law), *cert. denied*, 469 U.S. 858 (1984); Orrell v. American Hoist & Derrick Co., 602 F. Supp. 64 (S.D. Ill. 1985) (applying Ill. law); Bishop v. Firestone Fire & Rubber Co., 579 F. Supp. 397 (N.D. Ind. 1983) (applying Ind. law). Where a question of fact exists, however, summary judgment is denied. *See, e.g.*, Ede v. Mueller Pump Co., 652 F. Supp. 656 (D. Colo. 1987) (under Colorado law, where plaintiff produced affidavits sufficient to rebut statutory presumption and raise genuine issue of fact as to defectiveness of product, manufacturer was not entitled to summary judgment).

43. Kuisis v. Baldwin-Lima-Hamilton Corp., 457 Pa. 321, 319 A.2d 914 (1974).

44. *Id.* at 323, 319 A.2d at 917.

45. *Id.*

46. *Id.* at 332, 319 A.2d at 921.

crane.[47] If the product malfunctions shortly after delivery, the inference of the defect's existence is compelling.[48] However, when many years pass before the accident occurs, the origin of the alleged defect is often disputed and the sufficiency of the evidence is very important.[49]

The court concluded the jury could not reasonably infer the brake locking mechanism was defective when the crane was delivered to the employer.[50] The court recognized that section 402A of the *Restatement (Second) of Torts* "does not make manufacturers and sellers insurers of their products. They are not liable for defects caused by normal wear-and-tear [sic] or misuse of a product by its purchaser."[51] Because the crane had been used for more than twenty years, the possibility that normal wear or misuse was the source of the alleged defect was "no less likely than an error in manufacture or design."[52]

The court acknowledged that "[t]he age of an allegedly defective product must be considered in light of its expected useful life and the stress to which it has been subjected."[53] Normally, these factors should be weighed by the jury.[54] In extreme cases, however, "the prolonged use factor may loom so large as to obscure all others."[55] The court quoted Prosser's summary of the general position of the courts on the issue:

> "[Lapse of time and long continued use] in itself is not enough, even when it has extended over a good many years, to defeat the recovery where there is satisfactory proof of an original defect; but when there is no definite evidence, and it is only a matter of inference from the fact that something broke or gave way, the continued use usually prevents the inference that the thing was more probably than not defective when it was sold."[56]

Because the plaintiff presented no direct evidence of a specific defect in the brake locking mechanism at the time it was delivered and the crane was over twenty years old, the court held the plaintiff had not made out a case for the jury.[57]

Because the passage of time is only one factor to be considered in determining whether a product was defective when it left the manufacturer's hands under common law principles, a manufacturer can be liable indefi-

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47. *Id.*
48. *Id.*
49. *Id.*
50. *Id.* at 335, 319 A.2d at 923.
51. *Id.* at 334, 319 A.2d at 922.
52. *Id.* at 335, 319 A.2d at 922.
53. *Id.* at 336, 319 A.2d at 923.
54. *Id.*
55. *Id.*
56. *Id.* (quoting Prosser, *The Fall of the Citadel (Strict Liability to the Consumer)*, 50 MINN. L. REV. 791, 844-45 (1966)).
57. *Id.*

nitely for damages its product causes. Manufacturers lobbied their state legislatures to limit this open-ended liability potential. The early legislative response to the issue was the enactment of traditional statutes of limitation, which run from the date of the injury. More recently, many states enacted statutes of repose, which operate as procedural limitations on a plaintiff's claim by terminating liability after a specified period of time running from an arbitrary event, such as the date of the product's purchase. These statutes were a legislative determination that after the passage of a specified period of time, the causal connection between defect and injury would no longer be recognized.[58]

Due to dissatisfaction with the arbitrary mechanical solutions these statutes impose, useful safe life statutes have developed. These statutes generally provide that after the expiration of a specified period of time, a presumption arises that the product's "useful safe life" has expired. This presumption can be rebutted by the plaintiff. In a few states, statutes provide that the length of a product's "useful safe life" is a question of fact to be determined by considering legislatively expressed factors under the circumstances presented.

Section 110 of the Model Uniform Products Liability Act[59] ("MUPLA"), promulgated in 1979, contains a statute of limitation, a statute of repose, and a useful safe life provision. Section 110 attempts to provide product sellers and insurers with some security against stale claims, while preserving the plaintiff's right to be compensated for injuries defective products cause.

IV. Legislation

A. *Statutes of Limitation*

Legislatures initially enacted statutes of limitation to remedy the common law's open-ended liability potential for manufacturers. Statutes of limitation bar claims that are brought beyond a specified time period after the action accrues.[60] Determining when the claim accrues depends upon the type of claim pursued. Generally, tort claims accrue when the plaintiff is injured, warranty claims accrue at the date of sale, and wrongful death claims accrue at the date of death.[61] Where the plaintiff suffers from a latent disease or condition rather than a violent injury, the statute of limitation may expire before the plaintiff discovers his injury.

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58. Balido v. Improved Mach., Inc., 29 Cal. App. 3d 633, 644, 105 Cal. Rptr. 890, 897 (1973).

59. Model Uniform Products Liability Act (1979) [reprinted in 44 Fed. Reg. 62,714 (1979)] [hereinafter MUPLA].

60. *See* W. Keeton, D. Owen, J. Montgomery & M. Green, Products Liability and Safety 406 (2d ed. 1989) [hereinafter W. Keeton].

61. *Id.* at 407.

In order to avoid this result, many legislatures and courts adopted the discovery rule, which provides that the limitations period does not begin to run until the plaintiff discovered or reasonably should have discovered her injury.[62] Section 110 of MUPLA contains a discovery provision, which states, "No claim under this Act may be brought more than two (2) years from the time the claimant discovered, or in the exercise of due diligence should have discovered, the harm and the cause thereof."[63] The discovery rule removes the certainty that a statute of limitation provides to defendants by making them potentially liable for an indefinite period of time.

B. *Statutes of Repose*

Statutes of repose are a type of statute of limitation that begin to run when the product is manufactured, sold, or delivered, rather than when the injury occurs.[64] Statutes of repose focus on the age of the product rather than the plaintiff's conduct, and arbitrarily fix a number of years after which a plaintiff's action is barred. Generally, they are enacted to curb rising insurance rates, make insurance more available, and reduce the risk and uncertainty of liability for manufacturers.[65] A typical statute provides, "[A] product liability civil action shall be commenced not later than eight years after the date on which the product was first purchased for use or consumption."[66] Statutes of repose that begin to run at the time a product is first sold and distributed are in effect in approximately eleven states.[67]

There are several types of statutes of repose. Traditional statutes of repose absolutely bar all actions brought after the expiration of the repose period.[68] Other statutes contain a rebuttable presumption that the product

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62. *Id.*

63. MUPLA, *supra* note 59, § 110(C).

64. *See* W. KEETON, *supra* note 60, at 408.

65. Raithaus v. Saab-Scandia of Am., Inc., 784 P.2d 1158, 1161 (Utah 1989).

66. OR. REV. STAT. § 30.905 (1987).

67. *See, e.g.*, ALA. CODE § 6-5-502(c) (Supp. 1989) (10 years after product is first put to use); ARIZ. REV. STAT. ANN. § 12-551 (1982) (12 years after product is first sold for use or consumption); GA. CODE ANN. § 105-106 (Supp. 1989) (10 years from date of first sale for use or consumption); ILL. ANN. STAT. ch. 110, para. 13-213(b) (Smith-Hurd Supp. 1989) (12 years from date of first sale by seller or 10 years from sale to initial user, whichever period expires earlier); IND. CODE ANN. § 33-1-1.5-5 (Burns Supp. 1989) (10 years after the delivery to the initial user); NEB. REV. STAT. § 25-224 (1985) (10 years after first sale); N.D. CENT. CODE § 28-01.1-92 (Supp. 1987) (10 years after date of initial purchase for use or consumption, or 11 years after date of manufacture); N.H. REV. STAT. ANN. § 507-D:2(II)(a) (1983) (12 years after manufacturer parted with possession and control or sold the product, whichever occurred last); OR. REV. STAT. § 30.905 (1987) (8 years after first purchase for use or consumption); R.I. GEN. LAWS § 9-1-13(b) (1985) (10 years after date product was first purchased for use or consumption); TENN. CODE ANN. § 29-28-103 (1980) (10 years from the date on which the product was first purchased for use or consumption, or within one year after the expiration of the anticipated life of the product, whichever occurs first).

68. *See supra* note 67.

was not defective if the repose period or useful safe life expired.[69] A few statutes provide that an action is barred if the product's useful safe life, which must be determined by the jury after the injury occurs, expired before the plaintiff was injured.[70] Other statutes contain both a repose provision and a useful safe life provision.[71]

Three rationales support statutes of repose. First, the safe use of a product for a substantial period of time indicates the product was not defective at the time of delivery.[72] Second, the passage of time diminishes the availability of evidence, which makes the defense of a claim extremely difficult.[73] Third, as a matter of policy, manufacturers (and their insurers) should be able to know when their liability for injuries caused by a product will end.[74]

Critics of statutes of repose argue that: (1) their inflexibility produces harsh and inefficient results; (2) there is little, if any, reduction of insurance premiums; (3) "the benefits resulting from an immediate solution are outweighed by the need for both a more deliberate evolution of product liability theory and coordination with other proposed reforms"; and (4) they are not equitable.[75]

Many cases illustrate the inflexible application of traditional statutes of repose. For example, in *Dague v. Piper Aircraft Corp.*,[76] an airplane manufactured by Piper in 1965 crashed in 1978, and the personal representative of the pilot sued Piper alleging that a manufacturing defect existed.[77] The Indiana statute provided that all products liability actions must be commenced " 'within ten years after the delivery of the product to the initial user or consumer.' "[78] Although the plaintiff offered evidence of a manufacturing defect, the court held the statute of repose absolutely barred the plaintiff's claim.[79]

Only the third rationale supporting traditional statutes of repose is furthered by the application of the repose period in this case. First, although the safe use of a product for a substantial period of time may indicate that no manufacturing defect exists, if the plaintiff presents evidence of such a

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69. W. KEETON, *supra* note 60, at 408.

70. *Id.*

71. *Id.*

72. MUPLA, *supra* note 59, § 110(A) analysis.

73. *Id.*

74. *Id.*

75. Hanson v. Williams County, 389 N.W.2d 319, 331 n.2 (N.D. 1986) (citing McGovern, *The Variety, Policy and Constitutionality of Product Liability Statutes of Repose*, 30 AM. U. L. REV. 579, 593-95 (1981)).

76. Dague v. Piper Aircraft Corp., 275 Ind. 520, 418 N.E.2d 207 (1981).

77. *Id.* at 522, 418 N.E.2d at 209.

78. *Id.* at 523-24, 418 N.E.2d at 209-10 (quoting IND. CODE § 33-1-1.5-5).

79. *Id.* at 526, 418 N.E.2d at 211. The court also held the Product Liability Act did not violate the open courts provision of the Indiana Constitution, *id.* at 530, 418 N.E.2d at 213, or the provision restricting legislative enactments to one subject, *id.* at 532, 418 N.E.2d at 215.

defect, it is unreasonable to bar the claim based upon the passing of a particular number of years. Second, because the plaintiff produced evidence of a manufacturing defect, it is not unreasonable to require the manufacturer to defend the plaintiff's claim. The manufacturer has more information regarding the product in hand, and the plaintiff usually shows that a manufacturing defect exists by obtaining this information from the manufacturer through discovery and the use of expert testimony. The third rationale, however, may have some validity. Manufacturers and their insurers should not be forever liable for injuries produced by their products. Legislation that sets an arbitrary number of years after which the manufacturer is no longer liable, however, is not the best response to this concern.

Conversely, the criticisms of statutes of repose are valid in many cases. In *Dague* the result was harsh because the plaintiff produced evidence of a manufacturing defect. It is more equitable to allow a plaintiff who produces this evidence to proceed with her claim. In addition, the arbitrary limitation of the period during which a tort claim may be brought is not consistent with the progression of the law, specifically, the use of discovery provisions with traditional tort statutes of limitation.

Another case that illustrates the robotic application of the repose period is *Hatcher v. Allied Products Corp.*[80] The plaintiff in *Hatcher* was injured in 1982 while she was using a tractor manufactured by defendant Deere & Company in 1973.[81] The plaintiff filed her complaint in 1984.[82] Although the plaintiff's injury occurred less then ten years after the purchase of the tractor, she filed her complaint more than ten years after the purchase.[83] The pertinent Georgia Code section provided, "No action shall be commenced . . . with respect to an injury after ten years from the date of the [product's] first sale for use or consumption . . . ."[84] The court held the statute was "a complete bar to strict liability actions *filed* more than ten years after the 'date of the first sale for use or consumption of' the product regardless of whether the underlying *injury occurred* within the ten-year period."[85]

The harsh effect of the traditional statutes is most apparent in cases involving a latent disease or condition caused by a drug, asbestos, or other toxic substance. For example, in *Mathis v. Eli Lilly & Co.*[86] a plaintiff whose mother had taken diethylstibestrol ("DES") brought an action against the drug's manufacturer when the plaintiff discovered she had cervical cancer.[87] The ten-year statute of ultimate repose barred the action.[88] The fact that

80. Hatcher v. Allied Prod. Corp., 256 Ga. 100, 344 S.E.2d 418 (1986).
81. *Id.* at 100, 344 S.E.2d at 419.
82. *Id.*
83. *Id.*
84. *Id.* (quoting GA. CODE ANN. § 51-1-11 (1984)).
85. *Id.* at 101, 344 S.E.2d at 420.
86. Mathis v. Eli Lilly & Co., 719 F.2d 134 (6th Cir. 1983) (applying Tenn. law).
87. *Id.* at 135.
88. *Id.* at 135-36.

the cancer did not manifest itself until after the repose period had run did not toll the running of the repose period.[89] Thus, the plaintiff's claim was barred before her injury was suffered. One judge describes this as an "Alice in Wonderland" effect,[90] which is alleviated by a discovery rule applicable in cases of latent disease or condition.[91]

One court adopted the discovery rule in a products liability case involving a drug, distinguishing drug companies from other manufacturers with respect to their expectations for repose.[92] The court noted that because the harmful propensities of drugs are not usually known when they are marketed, the drug companies should anticipate that some time must pass before their drug's harmful effects manifest themselves and the consumer discovers the causal connection between his injury and the drug.[93] Therefore, a drug company cannot "reasonably expect to be immune to suit before its customer has a fair opportunity to discover the company's tortious conduct."[94] The court rejected the defendant's argument that it would be prejudiced by the effect of the passage of time on the availability and reliability of evidence, noting that the evidence necessary to prove or defend against liability is documentary.[95] Documentary evidence such as doctors'

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89. *Id.*; *see also* Brown v. General Elec. Co., 733 F.2d 1085 (4th Cir. 1984). In *Brown* the plaintiffs were injured by a fire that originated in a restaurant fryer manufactured by the defendant. The plaintiffs alleged the fryer was defectively designed and constructed, but the trial court granted summary judgment for the manufacturer based on North Carolina's statute of repose. *Id.* at 1086. The fire occurred almost seven years after the fryer's original sale, and the statutory repose period was six years. *Id.* The court also found the statute did not violate the "open courts" provision of the state constitution, the due process provision of the fourteenth amendment, or the equal protection provisions in the state and United States Constitutions. *Id.*; *see also* Bishop v. Firestone Tire & Rubber Co., 579 F. Supp. 397 (N.D. Ind. 1983) (manufacturer's motion for summary judgment was granted where action for injury caused by tire rim assembly was not commenced within statutory period).

90. Dinsher v. Marlin Firearms Co., 198 F.2d 821, 823 (2d Cir. 1952) (Frank, J., dissenting). The judge stated:

> Except in topsy-turvy land, you can't die before you are conceived, or be divorced before you ever marry, or harvest a crop never planted, or burn down a house never built, or miss a train running on a non-existent railroad. For substantially similar reasons, . . . a statute of limitations does not begin to run against a cause of action before that cause of action exists, *i.e.*, before a judicial remedy is available to the plaintiff . . . . [T]he policy behind a limitations statute is that of penalizing one who " 'sleep[s] upon his rights' ". But no student of such legal somnolence has ever explained how a man can sleep on a right he does not have.

Id. (footnotes omitted); *see also* Patterson v. Her Majesty Indus., Inc., 450 F. Supp. 425 (E.D. Pa. 1978).

91. *See, e.g.*, ALA. CODE § 6-5-502(b) (Supp. 1989); GA. CODE ANN. § 105-106(c) (Supp. 1989) (exception applies to cases in which product causes disease or birth defect); IDAHO CODE § 6-1403(2)(b)(4) (Supp. 1989).

92. Raymond v. Eli Lilly & Co., 117 N.H. 164, 371 A.2d 170 (1977).

93. *Id.* at 173-74, 371 A.2d at 176.

94. *Id.* at 174, 371 A.2d at 176.

95. *Id.*

medical records and companies' research records is not lost and does not become unreliable as time passes; rather, the amount and the accuracy of the evidence increases with the passage of time.[96] Noting that "manufacturers are in a superior position to control the discovery of the hazards of their products," the court concluded it was equitable to apply the discovery rule.[97]

Because traditional statutes of repose can bar a plaintiff's cause of action before the injury occurs or is discovered,[98] their constitutionality has been challenged in many cases.[99] The statutes have been invalidated in several instances.[100] The reader is referred to other sources concerning this is-

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96. *Id.*

97. *Id.* at 174, 371 A.2d at 176-77.

98. *See, e.g.*, Mathis v. Eli Lilly & Co., 719 F.2d 134 (6th Cir. 1983) (action for cancer occurring in daughter 25 years after mother took DES during pregnancy was barred as occurring more than 10 years after purchase of product).

99. *See infra* note 100. There are two basic constitutional challenges to statutes of repose. A plaintiff usually argues: (1) the statute violates the state constitutional provision guaranteeing open access to the courts; and/or (2) the statute denies equal protection under the fourteenth amendment. *See* Burke, *Repose for Manufacturers: Six Year Statutory Bar to Products Liability Actions Upheld—Tetterton v. Long Manufacturing Co.*, 64 N.C.L. REV. 1157 (1986).

100. *See, e.g.*, Lankford v. Sullivan, Long, & Hagerty, 416 So. 2d 996 (Ala. 1982) (statute barring claims involving products used for more than 10 years violated open courts provision and due process provision in Alabama Constitution); Heath v. Sears, Roebuck & Co., 123 N.H. 512, 464 A.2d 288 (1983) (statute barring actions brought more than 12 years after manufacturer parted with possession denied equal protection of the laws); Hanson v. Williams County, 389 N.W.2d 319 (N.D. 1986) (statute barring claims not brought within 10 years from initial purchase or 11 years from date of manufacture violated equal protection clause of the North Dakota Constitution); Kennedy v. Cumberland Eng'g Co., 471 A.2d 195 (R.I. 1984) (statute barring claims not brought within 10 years after product is first purchased for use or consumption violated open courts provision of state constitution); Burke v. Bayerische Motoren Werke Aktiengesellschaft, 471 A.2d 206 (R.I. 1984) (statute barring claims not brought within 10 years after product is first purchased for use or consumption violated remedies for wrongs provision of Rhode Island Constitution); Berry v. Beech Aircraft Corp., 717 P.2d 670 (Utah 1985) (statute barring products liability claim after 6 years from the date of purchase or 10 years after manufacture was unconstitutional as applied to the facts of the case, by denying "open courts" provision of the state constitution). *But see* Bowman v. Niagara Mach. & Tool Works, Inc., 832 F.2d 1052 (7th Cir. 1987) (under Indiana law, statute of repose barring action not brought within 10 years of delivery to initial user did not deny plaintiff's right of access to courts under state constitution); Kochins v. Linden-Alimak, Inc., 799 F.2d 1128 (6th Cir. 1986) (Tennessee's 10-year statute of repose did not violate "open courts" provision of Tennessee Constitution); Hatcher v. Allied Prod. Corp., 796 F.2d 1427 (11th Cir. 1986) (Georgia Code section providing that no action may be brought after 10 years from the date the product was first sold for use or consumption did not unconstitutionally deny the plaintiff of procedural due process or equal protection); Barwick v. Celotex Corp., 736 F.2d 946 (4th Cir. 1984) (North Carolina's 10-year statute of repose did not violate equal protection under federal constitution or due process under state constitution); Wayne v. Tennessee Valley Auth., 730 F.2d 392 (5th Cir. 1984) (Tennessee's 10-year statute of repose did not violate equal protection clause of the fourteenth amendment by excepting asbestos-related injuries from its scope); Pitts v. Unarco Indus. Inc., 712 F.2d 276 (7th Cir.), *cert. denied* 464 U.S. 1003 (1983) (Indiana statute limiting manufacturer's liability to 10 years after delivery did not violate federal or state constitutional rights to

sue, which is beyond the scope of this article.

Connecticut's statute of repose was initially construed in *Daily v. New Britain Machine Co.*[101] The statute provides that "[n]o product liability claim . . . may be brought against any party . . . later than ten years from the date that the party last parted with possession or control of the product."[102] The manufacturer, New Britain Machine Company, had leased an injection molding machine to the plaintiff's employer in May 1963.[103] In May 1964 the employer exercised an option to purchase the machine.[104] The manufacturer serviced the machine five times during seventeen years after its sale to the employer.[105] No service contract existed and the employer initiated and paid for the service calls.[106] The plaintiff was injured on April 28, 1980 when the molding machine closed on his hand.[107] The plaintiff commenced an action against the manufacturer on March 22, 1982.[108] The manufacturer moved for summary judgment, asserting the ten-year statute of repose barred the claim.[109] The trial court granted the motion, determining as a matter of law that the manufacturer's contacts with the machine after its sale did not constitute control of the machine under the statute of repose.[110]

The same statute was construed again in *Kelemen v. Rimrock Corp.*[111] The plaintiff in *Kelemen* was injured at work when a filler cap blew off a

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due process or equal protection); Lugo v. Ford Motor Co., 611 F. Supp. 789 (S.D. Fla. 1985) (under Florida law, 12-year statute of repose did not violate plaintiff's right of access to court); Groth v. Sandoz, Inc., 601 F. Supp. 453 (D. Neb. 1984) (under Nebraska law, 10-year statute of repose did not deprive plaintiff of access-to-courts clause of Nebraska Constitution or violate equal protection under the fourteenth amendment); Bryant v. Continental Conveyor & Equip. Co., 156 Ariz. 193, 751 P.2d 509 (1988) (12-year statute of repose did not abrogate substantive right of action protected by Arizona Constitution or violate equal protection or due process clauses of Arizona Constitution); Kelemen v. Rimrock Corp., 207 Conn. 599, 542 A.2d 720 (1988) (10-year statute of repose for products liability actions did not violate constitutional article guaranteeing access to courts or equal protection clause); Pullum v. Cincinnati, Inc., 476 So. 2d 657 (Fla. 1985) (statute barring products liability claims not brought within 12 years from the date of sale did not deny access to courts guaranteed by the Florida Constitution) (retracting from decision in Battila v. Allis-Chalmers Mfg. Co., 392 So. 2d 874 (Fla. 1980)); Sealey v. Hicks, 95 Or. App. 182, 768 P.2d 428 (1989) (statute barring products liability claims after eight years from first purchase for use or consumption did not violate the privileges and immunities clause of the Oregon Constitution or the fourteenth amendment).

101. Daily v. New Britain Mach. Co., 200 Conn. 562, 512 A.2d 893 (1986).

102. CONN. GEN. STAT. ANN. § 52-577a(a) (Supp. 1988). Subsection (c) of the statute contains an exception. *See infra* note 151.

103. Daily v. New Britain Mach. Co., 200 Conn. at 564, 512 A.2d at 895.

104. *Id.*

105. *Id.*

106. *Id.*

107. *Id.*

108. *Id.* at 565, 512 A.2d at 895.

109. *Id.*

110. *Id.* at 570, 512 A.2d at 896.

111. Kelemen v. Rimrock Corp., 207 Conn. 599, 542 A.2d 720 (1988).

compression tank on May 23, 1978.[112] He commenced an action against the manufacturer of the tank on May 21, 1987.[113] The manufacturer had shipped the compression tank F.O.B. to the employer on May 18, 1971.[114] The employer offered no evidence concerning the date of the tank's arrival.[115]

The court stressed the statutory language, "no action can be brought later than ten years 'from the date that the party *last parted* with possession or control of the product.' "[116] The statute had been revised in 1979.[117] Under the old statute of repose, a defendant could prevail if the product was sold more than eight years before the injured party commenced the action.[118] In construing the meaning of "possession or control" in the revised statute, the court noted the legislature did not commence the repose period from the date the *buyer* gained possession or control of the product.[119] The court concluded the legislature must have intended the distinction made between the buyer and the defendant.[120] Because more than ten years had passed from the date the manufacturer shipped the product to the date of the plaintiff's injury, the passage of the repose period barred the plaintiff's claim.[121]

In order to alleviate some of the harsh effects of traditional statutes of repose, some legislatures have enacted exceptions to the absolute limitation period, which lengthen the repose period in certain cases. These exceptions include cases of express warranty by the defendant, intentional misrepresentation or fraud, and cases in which the harm is not discoverable or does not manifest itself until after the repose period has expired.[122] In addition, Tennessee's statute does not bar claims against a seller other than the manufacturer or original seller, even though the claim would ordinarily be time-barred against the manufacturer or original seller, if the person who resells the product is engaged in the business of reconditioning and reselling such products.[123]

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112. *Id.* at 601, 542 A.2d at 721.

113. *Id.*

114. *Id.*

115. *Id.* at 602, 542 A.2d at 721.

116. *Id.* at 606, 542 A.2d at 723 (quoting CONN. GEN. STAT. § 52-577a(a) (1979)) (emphasis added by the court).

117. *Id.*

118. *Id.*

119. *Id.* at 606, 542 A.2d at 723-24.

120. *Id.* at 607, 542 A.2d at 724.

121. *Id.* The plaintiff also argued the statute was unconstitutional because it denied access to the courts guaranteed by the state constitution and violated equal protection under the state and United States Constitutions. *Id.* at 609, 542 A.2d at 725. The court held the *Daily* case controlled, and accordingly, the statute of repose was constitutional. *Id.* at 610, 542 A.2d at 725-26.

122. *See, e.g., infra* note 150.

123. *See, e.g.*, Rollins v. Cherokee Warehouses, Inc., 635 F. Supp. 136 (E.D. Tenn. 1986)

Arizona's statute provides that "no product liability action may be commenced and prosecuted if the cause of action accrues more than [twelve] years after the product was first sold for use or consumption, *unless* the cause of action is based upon the negligence of the manufacturer or seller or a breach of an express warranty provided by the manufacturer or seller."[124] The Arizona statute was examined in *Kellogg v. Willy's Motors, Inc.*[125] In *Kellogg* a 1959 Jeep hit the plaintiffs' vehicle in 1979.[126] The plaintiffs brought suit in 1981, alleging the Jeep was defectively manufactured.[127] The trial court granted a motion to dismiss the claim because the twelve-year repose period had passed.[128] The plaintiffs then amended their complaint to allege negligence, based on the theory that alternative fail-proof braking systems were available to the manufacturer in 1959, and that the manufacturer was negligent in failing to utilize such a system.[129] The trial court once again found the repose period had passed and the plaintiffs' claim was barred.[130] On appeal, summary judgment in favor of the manufacturer was reversed.[131] The Arizona Court of Appeals found the case fell within the negligence exception to the twelve-year repose period.[132]

The North Carolina statute contains an exception in the form of a discovery rule.[133] The statute was examined in *Barwick v. Celotex Corp.*[134] The plaintiff in *Barwick* was a plumber and steam fitter at an air force base in North Carolina from 1961 to 1980.[135] He filed suit in 1979 claiming that

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(defendant who is engaged in the business of selling reconditioned products is a "seller" under the Tennessee Products Liability Act of 1978, and the 10-year statute of limitation begins to run for that seller at the time of resale); Fugate v. AAA Mach. & Equip. Co., 593 F. Supp. 392 (E.D. Tenn. 1984) ("piece of machinery that is substantially rebuilt or reconditioned becomes a 'new' product for the purpose of a products liability action and . . . a new statute of limitations begins to run from the date of its sale" under Tennessee law). *But see* Reese v. National Mine Serv. Co., 672 F. Supp. 1116 (S.D. Ill. 1987) (delivery date was that of initial sale rather than time of delivery of reconditioned shuttle car because even though the manufacturer offered a new product warranty on the reconditioned product, the reconditioned shuttle car was not a new product); Orrel v. Hoist & Derrick Co., 602 F. Supp. 64 (S.D. Ill. 1985) (subsequent modification to crane did not toll statute of repose where accident could not have been result of the modification).

124. ARIZ. REV. STAT. ANN. § 12-551 (1982) (emphasis added). This statute withstood a constitutional challenge in Bryant v. Continental Conveyor & Equip. Co., 156 Ariz. 193, 751 P.2d 509 (1988).

125. Kellogg v. Willy's Motors, Inc., 140 Ariz. 67, 680 P.2d 203 (Ariz. Ct. App. 1984).

126. *Id.* at 68, 680 P.2d at 204.

127. *Id.*

128. *Id.*

129. *Id.*

130. *Id.* at 69, 680 P.2d at 205.

131. *Id.* at 70, 680 P.2d at 206.

132. *Id.* at 69-70, 680 P.2d at 205-06.

133. N.C. GEN. STAT. § 1-15(b) (1970) (repealed 1979, recodified in part at N.C. GEN. STAT. § 1-52(16) (1979)).

134. Barwick v. Celotex Corp., 736 F.2d 946 (4th Cir. 1984).

135. *Id.* at 949.

exposure to products containing asbestos, which were manufactured by the defendant, caused his injury.[136] The statute of repose provided that "a cause of action . . . which originated under circumstances making the injury . . . not readily apparent to the claimant at the time of its origin is deemed to have accrued at the time the injury was discovered . . . or ought reasonably to have been discovered . . . provided that in such cases the period shall not exceed ten years from the last act of the defendant giving rise to the claim for relief."[137] The manufacturer asserted the statute of repose barred the plaintiff's claims, and moved for summary judgment on that basis.[138] The district court found the plaintiff's action accrued in 1979 when doctors diagnosed his asbestosis, and accordingly, granted the manufacturer's motion.[139] The court interpreted the statute as requiring the plaintiff to "come forward with evidence sufficient to create a genuine issue of material fact as to whether the last act of [the] defendant giving rise to his cause of action occurred within the ten year period prior to January 10, 1979."[140] Because the plaintiff did not satisfy this burden, the court affirmed summary judgment in favor of the manufacturer.[141]

C. *Useful Safe Life Statutes*

1. *Useful Safe Life Defined*

Section 110(A) of the MUPLA defines the concept of "useful safe life":

> "Useful safe life" begins at the time of delivery of the product and extends for the time during which the product would normally be likely to perform or be stored in a safe manner. For the purposes of Section 110, "time of delivery" means the time of delivery of a product to its first purchaser or lessee who was not engaged in the business of either selling such products or using them as component parts of another product to be sold.
>
> Examples of evidence that is especially probative in determining whether a product's useful safe life had expired include:
>
> (a) The amount of wear and tear to which the product had been subject;
>
> (b) The effect of deterioration from natural causes, and from climate and other conditions under which the product was used or stored;
>
> (c) The normal practices of the user, similar users, and the product seller with respect to the circumstances, frequency, and purposes of the

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136. *Id.*

137. *Id.* at 948-49 n.1 (quoting N.C. GEN. STAT. § 1-15(b) (1970) (repealed 1979, recodified in part at N.C. GEN. STAT. § 1-52(16) (1979)).

138. *Id.* at 951.

139. *Id.* at 952.

140. *Id.*

141. *Id.* at 963. The statute also withstood a constitutional challenge. *Id.* at 958.

> product's use, and with respect to repairs, renewals, and replacements;
>
> (d) Any representations, instructions, or warnings made by the product seller concerning proper maintenance, storage, and use of the product or the expected useful safe life of the product; and
>
> (e) Any modification or alteration of the product by a user or third party.[142]

The term "useful safe life" is used because the period for which the product can have some utility may extend beyond the period for which the product is safe.[143] Under the Model Act, useful safe life is an affirmative defense.[144] The product seller[145] bears the burden of proof.[146]

2. *The Expiration of Useful Safe Life as a Rebuttable Presumption*

Due to dissatisfaction with the arbitrary limitations placed on product liability claims by traditional statutes of repose, a different type of statute has developed. The new statutes employ a presumption that the product's useful safe life has expired after a certain number of years, and list factors that may be considered in determining whether the useful safe life of a product has expired.[147] Under this type of statute, the plaintiff has the burden to prove the useful safe life of the product had not expired when the injury occurred. If the plaintiff rebuts the statutory presumption with clear and convincing evidence, his claim is not barred. An example of this type of statute is found in section 110(B)(1) of MUPLA, which provides, "In claims that involve harm caused more than ten (10) years after time of delivery, a presumption arises that the harm was caused after the useful safe life had expired. This presumption may only be rebutted by clear and convincing evidence."[148]

MUPLA contains four exceptions to the application of the ten-year period.[149] A product seller may be liable for its product beyond ten years after delivery in cases of: (1) express warranty that the product can be used safely for more than ten years; (2) intentional misrepresentation of facts or fraudulent concealment of information; (3) contribution or indemnity sought from the manufacturer by another negligent party; or (4) prolonged exposure to a defective product or a defect existing when the product was delivered that was not reasonably discoverable or that did not manifest itself until later.[150]

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142. MUPLA, *supra* note 59, § 110(A).
143. MUPLA, *supra* note 59, § 110(A) analysis.
144. *Id.*
145. "Product Seller" is defined in section 102(A) of the Model Act.
146. MUPLA, *supra* note 59, § 110(A) analysis.
147. *See, e.g.*, CONN. GEN. STAT. § 52-577a(c) (Supp. 1989).
148. MUPLA, *supra* note 59, § 110(B)(1).
149. MUPLA, *supra* note 59, § 110(B)(2).
150. MUPLA, *supra* note 59, § 110(B) provides in full:
> (2) Limitations on Statute of Repose. (a) If a product seller expressly warrants

MUPLA also provides a two-year discovery rule in section 110 (C),[151] which does not extend the statute of repose.[152]

Idaho[153] and Kansas[154] have adopted statutes that parallel MUPLA section 110(B)(1). Similarly, Kentucky's statute contains a presumption that a product was not defective if "the injury, death, or property damage occurred more than five (5) years after the date of sale to the first consumer, or more than eight (8) years after the date of manufacture."[155] The Washington statute provides that harm caused more than twelve years after delivery raises a presumption the harm was caused after the product's useful safe life expired.[156]

The Connecticut statute of repose has an exception, which provides that if the claimant proves "the harm occurred during the useful safe life of the product," the ten year repose limitation does not apply.[157] In *Nicholson v. United Technologies Corp.*[158] a federal employee was injured while he was repairing the landing gear of a helicopter. He filed a claim against the manufacturer more than ten years after the defendant designed and sold the landing gear.[159] The manufacturer, UTC, raised the ten-year limitation in

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that its product can be utilized safely for a period longer than ten (10) years, the period of repose, after which the presumption created in Subsection (B)(1) arises, shall be extended according to that warranty or promise.

(b) The ten- (10-) year period of repose established in Subsection (B)(1) does not apply if the product seller intentionally misrepresents facts about its product, or fraudulently conceals information about it, and that conduct was a substantial cause of the claimant's harm.

(c) Nothing contained in Subsection (B) shall affect the right of any person found liable under this Act to seek and obtain contribution or indemnity from any other person who is responsible for harm under this Act.

(d) The ten- (10-) year period of repose established in Subsection (B)(1) shall not apply if the harm was caused by prolonged exposure to a defective product, or if the injury-causing aspect of the product that existed at the time of delivery was not discoverable by an ordinary reasonably prudent person until more than ten (10) years after the time of delivery, or if the harm, caused within ten (10) years after the time of delivery, did not manifest itself until after that time.

The fourth exception in subsection (d) allows claims like the one in *Mickle* and the DES claims to survive the ten-year repose period. *See supra* note 91 and accompanying text.

151. This provision states: "No claim under this Act may be brought more than two (2) years from the time the claimant discovered, or in the exercise of due diligence should have discovered, the harm and the cause thereof. MUPLA, *supra* note 59, § 110(C).

152. *See* Philpott v. A.H. Robins Co., 710 F.2d 1422 (9th Cir. 1983) (applying Or. law).

153. IDAHO CODE § 6-1403(2) (Supp. 1989) (harm that occurs more than 10 years after delivery is presumed to occur after the expiration of the product's useful safe life).

154. KAN. STAT. ANN. § 60-3303 (1983) (same as Idaho).

155. KY. REV. STAT. ANN. § 411.310(1) (Michie/Bobbs-Merrill Supp. 1988).

156. WASH. REV. CODE ANN. § 7.72.060(2) (Supp. 1987).

157. CONN. GEN. STAT. § 52-577a(c) (Supp. 1989).

158. Nicholson v. United Tech. Corp., 697 F. Supp. 598, 599 (D. Conn. 1988).

159. *Id.* at 600.

the first subsection of the Connecticut statute as an affirmative defense.[160] The plaintiff argued the question whether the injury occurred within the landing gear's useful safe life was a question of fact under the statute's exception.[161] The court held the product's useful safe life was a material question of fact, making summary judgment inappropriate.[162]

Colorado's statute was examined in *Ede v. Mueller Pump Co.*[163] The statute provided: "Ten years after a product is first sold for use or consumption, it shall be rebuttably presumed that the manufacturer or seller thereof was not negligent and that all warnings and instructions were proper and adequate."[164] The plaintiff was injured in 1983 while using a windmill purchased in 1950.[165] One defendant moved for summary judgment based on Colorado's statute of repose.[166] Because the plaintiff did not rest on his pleadings, but instead responded to the motion by filing affidavits sufficient to raise a genuine issue of fact on the issue of the windmill's defectiveness, the court denied the motion for summary judgment.[167] In *Fraley v. American Cyanamid Co.*[168] the same court held the statute's rebuttable presumption was not triggered where the injury occurred within ten years of the date the product was first sold for use or consumption.

Statutes of repose are often the subject of conflict of law questions in federal diversity actions. The choice of law rules of the forum state are applied. Some states follow the "most significant relationship" test set out in the *Restatement (Second) of Conflict of Laws*,[169] while others follow *lex loci*

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160. *Id.*
161. *Id.* at 601.
162. *Id.*
163. Ede v. Mueller Pump Co., 652 F. Supp. 656 (D. Colo. 1987).
164. COLO. REV. STAT. § 13-21-403(3) (Supp. 1987).
165. Ede v. Mueller Pump Co., 652 F. Supp. at 657.
166. *Id.* at 659.
167. *Id.* at 659-60.
168. Fraley v. American Cyanamid Co., 570 F. Supp. 497, 503 (D. Colo. 1983).
169. The *Restatement* provides:

(1) The rights and liabilities of the parties with respect to an issue in tort are determined by the local law of the state which, with respect to that issue, has the most significant relationship to the occurrence and the parties under the principles stated in § 6.

(2) Contacts to be taken into account in applying the principles of § 6 to determine the law applicable to issue include:

(a) the place where the injury occurred,

(b) the place where the conduct causing the injury occurred,

(c) the domicile, residence, nationality, place of incorporation and place of business of the parties, and

(d) the place where the relationship, if any, between the parties is centered.

These contacts are to be evaluated according to their relative importance with respect to the particular issue.

RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 145 (1971). This approach was followed in Wayne v. Tennessee Valley Auth., 730 F.2d 392, 399 (5th Cir. 1984).

delecti.[170] After a court determines which state's substantive law applies, the court determines whether the statute of repose involved is substantive or procedural for conflict of law purposes.[171] The question of which statute is applied is crucial to the survival of the cause of action if a traditional statute of repose is in effect in one state that has an interest in the litigation, while a presumptive statute is in effect in the other. Under the presumptive statutes, summary judgment in favor of the manufacturer is generally denied because a material question of fact usually exists: whether the product was within its useful safe life at the time of the injury.[172] Thus, the determination of the conflicts question in these cases is often dispositive of the outcome of the litigation since the statutes vary considerably from state to state.

The new presumptive statutes are more desirable than the traditional statutes. The plaintiff's claim is not barred absolutely, yet after the repose period has passed, the plaintiff must show that a defect existed. This solution alleviates most of the problems cited by the critics of the traditional statutes of repose, while it substantially furthers rationales supporting the presumptive statutes.

3. *Useful Safe Life as a Question of Fact*

The presumptive statutes of repose are still somewhat arbitrary because they specify a time period after which the presumption arises. A useful safe life statute that makes the time period after which the plaintiff's claim is barred a question of fact for the jury's determination has been enacted in at least one state. Minnesota Statutes section 604.03[173] was the guideline used

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170. The *lex loci delecti* rule provides that in tort cases, the substantive law of the state where the injury occurred applies. W. RICHMAN & W. REYNOLDS, UNDERSTANDING CONFLICT OF LAWS § 44 (1984). One court has noted the application of this rule in airplane crash cases is potentially unfair since "the site of the accident is fortuitous and often unconnected with other relevant factors such as residence and place of business." Habenicht v. Sturm, Ruger & Co., 660 F. Supp. 52, 55 n.2 (D. Conn. 1986) (*lex loci* rule followed).

171. Habenicht v. Sturm, Ruger & Co., 660 F. Supp. at 55-56 ("Connecticut court would find the North Carolina statute to be procedural"); *see also* Menne v. Celotex Corp., 722 F. Supp. 662, 668 (D. Kan. 1989) (Kansas court would treat Kansas statute of repose as substantive); Kelley v. Goodyear Tire & Rubber Co., 700 F. Supp. 91, 93 (D. Conn. 1987) ("Connecticut court would not characterize [Connecticut repose statute] as substantive"); Wayne v. Tennessee Valley Auth., 730 F.2d 392, 402 (5th Cir. 1984) (Tennessee's statute of repose is substantive).

172. *See, e.g.*, Kelley v. Goodyear Tire & Rubber Co., 700 F. Supp. at 94 (applying Conn. law); Habenicht v. Sturm, Ruger & Co., Inc., 660 F. Supp. at 56 (applying Conn. law); Ede v. Mueller Pump Co., 652 F. Supp. at 659-60 (applying Colo. law).

173. The Minnesota statute provides:

> Subdivision 1. In any action for the recovery of damages for personal injury, death or property damage arising out of the manufacture, sale, use or consumption of a product, it is a defense to a claim against a designer, manufacturer, distributor or seller of the product or a part thereof, that the injury was sustained following the expiration of the ordinary useful life of the product.

for section 110(A)(1) of MUPLA, which states, "Except as provided in Subsection (A)(2), a product seller shall not be subject to liability to a claimant for harm under this Act if the product seller proves by a preponderance of the evidence that the harm was caused after the product's 'useful safe life' had expired."

Minnesota Statutes section 604.03 subdivision 1 provides that in a products liability action, "it is a *defense* to a claim against a designer, manufacturer, distributor or seller of the product or a part thereof, that the injury was sustained following the expiration of the *ordinary useful life* of the product."[174] Subdivision 2 of section 604.03 defines the "ordinary useful life" of the product as "not necessarily the life inherent in the product, but . . . the period during which with reasonable safety the product should be useful to the user . . . . This period shall be determined by reference to the experience of users of similar products. . . ."[175] The statute also lists factors to be taken into account in determining the useful life of a product.[176]

The Minnesota Supreme Court recently interpreted the Minnesota statute in *Hodder v. Goodyear Tire & Rubber Co.*[177] In *Hodder* the metal rim of a truck tire explosively separated while the plaintiff, a service station employee, was mounting it on a logging truck.[178] The tire was mounted on a "K-rim" that Goodyear manufactured in 1955, twenty-six years before the accident.[179] The jury found Goodyear was negligent in failing to warn of the K-rim's dangerous propensities, but also found the useful safe life of the K-rim had expired.[180] Finding that Goodyear did not provide adequate warnings, the jury concluded there was no period during which the rim was reasonably safe to the user.[181] The trial court then ruled the statute's useful life

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> Subdivision 2. The useful life of a product is not necessarily the life inherent in the product, but is the period during which with reasonable safety the product should be useful to the user. This period shall be determined by reference to the experience of users of similar products, taking into account present conditions and past developments, including but not limited to (1) wear and tear or deterioration from natural causes, (2) the progress of the art, economic changes, inventions and developments within the industry, (3) the climatic and other local conditions peculiar to the user, (4) the policy of the user and similar users as to repairs, renewals and replacements, (5) the useful life as stated by the designer, manufacturer, distributor, or seller of the product in brochures or pamphlets furnished with the product or in a notice attached to the product, and (6) any modification of the product by the user.

MINN. STAT. ANN. § 604.03 (West 1988).

174. *Id.* (emphasis added).

175. *Id.*

176. *Id.* These factors are identical to those listed in MUPLA, *supra* note 59, § 110(A). *See supra* text accompanying note 142.

177. Hodder v. Goodyear Tire & Rubber Co., 426 N.W.2d 826 (Minn. 1988).

178. *Id.* at 829.

179. *Id.*

180. *Id.* One commentator describes this result as "schizophrenic." Interview with Professor Keith Miller, Drake University Law School, Mar. 26, 1990.

181. Hodder v. Goodyear Tire & Rubber Co., 426 N.W.2d at 830.

defense did not apply, because the K-rim never had a useful life.[182]

On appeal, Goodyear asserted the useful life defense completely barred suits based on injuries that occur after the useful life of the product expires.[183] Conversely, the plaintiff argued the useful life defense was one factor for the jury to consider in determining fault.[184] The legislative history of the statute revealed that "[t]he legislature was concerned about expanding products liability and intended to limit open-ended liability for aging products."[185]

The court stated the useful safe life statute differs from a typical statute of repose, because the useful life statute does not express a number of years after which a claim is barred. Instead, the jury must determine the product's useful safe life after the injury occurs, and that period is applied as the repose period.[186] In order to make this determination, the jury must refer to users of similar products, and take into account, "among other things, natural deterioration, progress of the art, climatic and other peculiar local conditions, repair practices, the useful life as specified by the manufacturer, and any user modification."[187]

The Minnesota Supreme Court found the statute's useful life concept was ambiguous for several reasons.[188] The court stated that it was not clear: (1) "if useful life referred to the life of the particular product involved which caused the injury, or if the life of that particular product was to be measured by the useful life of all like products made by that particular manufacturer, or by the life of some generic product or industry norm";[189] (2) whether products that were originally nondefective, but which became "defective" with age, were covered by the statute;[190] (3) how long a product

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182. *Id.*

183. *Id.*

184. *Id.*

185. *Id.* The statute's legislative history is extensively discussed in Comment, *Hodder v. Goodyear: End of the Road for the Useful Life Defense?*, 73 MINN. L. REV. 1081, 1100-05 (1989).

186. Hodder v. Goodyear Tire & Rubber Co., 426 N.W.2d at 830.

187. *Id.* This provision is found in Kan. Stat. Ann. § 60-3303(a)(1) (1983) as well as MUPLA § 110(A)(1).

188. Hodder v. Goodyear Tire & Rubber Co., 426 N.W.2d at 830.

189. *Id.* at 830-31. Minnesota Code section 604.03 subdivision 2 appears to refer to the useful life of the particular product that caused the injury, as determined by the useful life of other similar products and the factors peculiar to the particular user. This seems to be an "industry norm" standard as applied to the particular user. In other words, the useful safe life of the product that caused the plaintiff's injury is determined by ascertaining the safe life of a similar product that is normal under industry standards, then varying the useful life depending on how the normal product would be affected by the plaintiff's particular circumstances. This injects subjective considerations into an ostensibly objective concept. Whether there is a workable standard is questionable.

190. *Id.* at 831. Under the *Mickle* analysis, however, a product could not be originally nondefective but become defective with age. Any defect that manifests itself later in the product's life would presumedly be caused by negligent design (choice of materials). *See supra* text

must last to avoid being labelled originally defective, or if originally defective products were covered by the statute;[191] and (4) what role the user of the product played in determining the product's useful life.[192]

Goodyear asserted section 604.03 should be viewed as a statute of repose, i.e., as a defense that focuses entirely on the condition of the product and not on the user's conduct.[193] The court rejected Goodyear's argument and determined the particular user who is using the particular product does affect the useful life defense.[194] The court quoted subsection 2 of the statute as follows: "Useful life is the period the product is 'useful to the user.' A factor to be considered is 'the policy of the user . . . as to repairs, renewals and replacements.' Another factor is 'any modification of the product by the user.' "[195]

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accompanying notes 23-27.

191. Hodder v. Goodyear Tire Co., 426 N.W.2d at 831. It seems clear that an originally defective product is covered by a products liability statute. Under *Mickle*, the length of time the product lasts before its failure does not determine whether it is defective; rather, the existence of a defect is determined by the cause of the product's failure. *See supra* text accompanying note 26.

192. Hodder v. Goodyear Tire Co., 426 N.W.2d at 831. The statute indicates that the particular user's habits factor into the useful safe life equation. However, the statute refers to "reasonable safety," which indicates that the particular user's use of the product is judged by a "reasonable user" standard. *See supra* text accompanying note 175. The statute does seem unclear, however, regarding whether the user's knowledge that the product's useful safe life had expired is a part of the analysis.

193. Hodder v. Goodyear Tire Co., 426 N.W.2d at 831.

194. *Id.*

195. *Id.* Modifications by the user can bar a claim against the manufacturer. *See, e.g.*, Morgan v. Biro Mfg. Co., 15 Ohio St. 3d 339, 474 N.E.2d 286 (1984) (manufacturer was not liable where plaintiff was injured because original protective guard on meat grinder was removed from machine). Useful safe life may vary from user to user in many ways. Maintenance performed by the user may keep the product in better condition and make it last longer. As the purpose for which the product is used varies from user to user, so does the useful safe life. A product may cease to be safe earlier when subjected to stressful circumstances or when used for stressful purposes, thus shortening its useful safe life.

Misuse by the user or abnormal handling may be a defense to a products liability claim. In Corbridge v. Clark Equip. Co., 112 Idaho 85, 730 P.2d 1005 (1986), the plaintiff was injured in 1982 while operating a forklift manufactured by the defendant in 1977. He was steering the forklift over a railroad crossing through 18 to 24 inches of snow while it was being towed by a tractor. *Id.* at 85, 730 P.2d at 1005. The forklift became stuck in the snow and the plaintiff rocked the forklift back and forth attempting to dislodge it. *Id.* The forklift tipped forward, throwing the plaintiff to the ground. *Id.*

Idaho Code section 6-1405(3)(a) defines misuse of a product as follows: " 'Misuse' occurs when the product user does not act in a manner that would be expected of an ordinary reasonably prudent person who is likely to use the product in the same or similar circumstances." *Id.* at 86, 730 P.2d at 1006. "Product misuse is an affirmative defense in an action against the manufacturer; in addition, the manufacturer has no duty to foresee, protect or warn against product misuse." *Id.* (citing McBride v. Ford Motor Co., 105 Idaho 753, 761, 673 P.2d 55, 63 (1983)).

Similarly, in Mann v. Coast Catamaran Corp., 254 Ga. 201, 326 S.E.2d 436 (1985), two boys

The court recognized that in some cases, a reasonably prudent user should know a product's useful life has expired, while in others, the user has no reason to know or any way of knowing.[196] Goodyear argued that in either case, the user was barred from recovery.[197] The court declined to adopt Goodyear's construction, stating, "Expiration of useful life is a defense but we think the legislature has stopped short of saying it is an absolute defense, and it is not for us to take that step, especially in view of the mixed signals given by the statute."[198] The court held that "the expiration of a product's useful life under section 604.03 is a factor to be weighed by the jury in determining the fault of the manufacturer and the fault of the user. In other words, the statute emphasizes to the trier of fact the importance, in determining comparative liability, of considering whether the product has outlived its useful life."[199]

Minnesota appears to be the sole state that simply labels the expiration of useful safe life as "a defense."[200] Other states, including Connecticut,[201] Idaho,[202] Kansas,[203] Tennessee,[204] and Washington,[205] have adopted statu-

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sailing in a boat manufactured by Coast Catamaran were electrocuted when the boat came into contact with an uninsulated power line traversing a lake. Plaintiffs alleged the boat was defectively designed because it was not insulated against electrical contact. *Id.* at 201, 326 S.E.2d at 436. The court affirmed the lower court's grant of summary judgment in favor of the manufacturer, since the boat as manufactured was reasonably suited for its intended purpose of sailing, and since sailing the boat into a power line was "abnormal handling." *Id.* at 202, 326 S.E.2d at 437.

196. Hodder v. Goodyear Tire & Rubber Co., 426 N.W.2d at 832.

197. *Id.*

198. *Id.*

199. *Id.*

200. *Id.* at 830 n.3.

201. The Connecticut useful life provision is an exception to the statute of repose:

> (a) No product liability . . . action may be brought against any party . . . later than ten years from the date the party last parted with possession or control of the product.
>
> . . . .
>
> (c) The ten-year limitation provided for in subsection (a) shall not apply to any product liability claim brought by a claimant who is not entitled to compensation under [the workers' compensation statute] provided the claimant can prove that the harm occurred during the useful safe life of the product. In determining whether a product's useful safe life has expired, the trier of fact may consider among other factors: (1) the effect on the product of wear and tear or deterioration from natural causes; (2) the effect of climatic and other local conditions in which the product was used; (3) the policy of the user and similar users as to repairs, renewals, and replacements; (4) representations, instructions and warnings made by the product seller about the useful safe life of the product; and (5) any modification or alteration of the product by a user or third party.

CONN. GEN. STAT. § 52-577a (Supp. 1989).

202. IDAHO CODE § 6-1403(2)(a) (Supp. 1988) ("ten years after time of delivery, a presumption arises that the harm was caused after the useful safe life had expired").

203. KAN. STAT. ANN. § 60-3303(a)(2)(b)(1) (1983).

204. TENN. CODE ANN. § 29-28-103 (1980).

tory provisions for useful life. The statutes are similar to section 110(A) of MUPLA, absolving a manufacturer of liability after the product's "useful safe life" has expired, but most of the statutes also contain presumptive periods similar to MUPLA section 110(B), after which recovery is *unambiguously* barred.[206]

For example, in *Kirk v. General Motors Corp.*[207] the court granted the defendants' motion for summary judgment, since the plaintiff did not prove by clear and convincing evidence that the product's useful safe life extended beyond the Kansas statute's presumptive period, which had expired. In addition, experts testified the multipiece wheel assembly that caused the plaintiff's injury was badly worn and corroded.[208] The plaintiff presented no expert testimony regarding the effects of the wear and tear on the wheel assembly.[209] The court concluded that "a reasonable jury could not find that the plaintiff has successfully rebutted the statutory presumption by clear and convincing evidence," so the claim was barred by the statute.[210]

Arkansas has a unique statute which explicitly provides that a consumer's use of a product beyond its "anticipated life" where the consumer knew or should have known the anticipated life of the product is an element of comparative fault.[211] This statute was enacted after the traditional statute of repose was held unconstitutional in *Lankford v. Sullivan, Long & Hagerty*.[212] The plaintiffs in *Lankford* were injured in 1980 when they were riding on a manlift that collapsed and fell.[213] The manlift was installed in 1964 or 1965 by Sullivan, the manufacturer.[214] The old Alabama statute provided that "a product liability action against an original seller must be brought within [ten] years after the manufactured product is first put to use by any person or business entity" who did not acquire it for resale.[215] Because the accident occurred fifteen years after the repose period com-

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205. WASH. REV. CODE ANN. § 7.72.060 (Supp. 1989).

206. *See supra* notes 147-168; *see also* Hodder v. Goodyear Tire & Rubber Co., 426 N.W.2d at 830 n.3.

207. Kirk v. General Motors Corp., 1989 WESTLAW 103632 (D. Kan. 1989) (not reported in Federal Supplement).

208. *Id.* at 6-7.

209. *Id.* at 7. The plaintiff did append depositions and affidavits to his response to the defendants' motion, including that of a GMC truck dealer, a coworker, the plaintiff himself, the plaintiff's brother-in-law, and the plaintiff's employer. *Id.*

210. *Id.* at 9.

211. ARK. STAT. ANN. § 16-116-105(6) (1987). The statute provides, "Use of product beyond its anticipated life by a consumer where the consumer knew or should have known the anticipated life of the product may be considered as evidence of fault on the part of the consumer." *Id.*

212. Lankford v. Sullivan, Long & Hagerty, 416 So. 2d 996 (Ala. 1982).

213. *Id.* at 998.

214. *Id.* at 999.

215. *Id.* (quoting ALA. CODE § 6-5-502(c) (1975)).

menced, the plaintiff's action would have been barred by the statute.[216] The court held, however, that the ten-year repose statute violated the Alabama constitutional provision guaranteeing access to courts, remedy by due process of law, and the administration of justice without sale, denial, or delay.[217] In its review of the harshness of the old statute of repose, the court quoted:

> Manufacturers are right in asserting that they should not be held liable for injuries that occur simply because a product wears out. But no uniform wearing out time should be enacted for all products alike by means of a statute of limitations. The lives of different products vary widely, as do the lives of similar products depending on the extent of their use and maintenance.[218]

The court compared the harshness of the traditional statute of repose with MUPLA section 110(B)(1), which provides that ten years after delivery of the product, a presumption arises that the harm occurred after the product's useful safe life expired.[219] The court recognized their standard of review as one of judicial deference, but concluded that "a law which is arbitrary on its face cannot be upheld."[220]

Washington's useful safe life statute was construed by the Washington Court of Appeals in *Morse v. City of Toppenish*.[221] In *Morse* a swimmer was injured when he dove into the Toppenish Municipal Swimming Pool from a fourteen foot "Duraflex" diving board manufactured by Arcadia Air Products ("Arcadia") and struck his head on the bottom of the pool.[222] Plaintiffs brought a products liability claim against Arcadia alleging failure to adequately warn, because the pool was not as deep as it should have been to accommodate the diving board's spring action.[223] The court found the legislature's intent in including a statute of repose in the Product Liability Reform Act of 1981[224] was "to provide some certainty in the area of manufacturers' and sellers' long term exposure for product-related claims while, at the same time, preserving claims based upon product use which is reasonable in light of the product's unique characteristics."[225] The court found the act's useful safe life provision[226] applied. Plaintiffs had submitted an affida-

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216. *Id.*

217. *Id.* at 1004; *see* ALA. CONST. art. I, § 13.

218. Lankford v. Sullivan, Long, & Hagerty, 416 So. 2d at 1003 (quoting Phillips, *An Analysis of Proposed Reform of Products Liability Statutes of Limitations*, 56 N.C.L. REV. 663 (1978)).

219. *Id.*

220. *Id.* at 1004.

221. Morse v. City of Toppenish, 46 Wash. App. 60, 729 P.2d 638 (1986).

222. *Id.* at 62, 729 P.2d at 639.

223. *Id.*

224. WASH. REV. CODE ANN. § 7.72.010-060 (Supp. 1989).

225. Morse v. City of Toppenish, 46 Wash. App. at 64-65, 729 P.2d at 641.

226. WASH. REV. CODE ANN. § 7.72.060 (Supp. 1989) provides:

vit of an expert who stated the diving board's useful safe life exceeded fifteen to sixteen years of constant use.[227] Because the plaintiff's injury occurred less than fourteen years after delivery of the board, the court concluded a question of fact existed and the trial court's summary disposition of the claim was improper.[228]

Under the useful safe life statutes, a plaintiff's claim is barred only if the jury finds the useful safe life of the product had expired when the injury occurred. This is primarily a subjective determination that lessens the degree of certainty regarding how long a manufacturer will be held liable for damages its product causes.

The statute of limitation, statute of repose, and useful life provision provided in MUPLA work together. The presumptive statute of repose places the burden on the plaintiff to show the useful safe life of the product had not expired when the action was brought. No action may be brought after the presumptive period has expired unless the plaintiff rebuts the presumption. The useful life provision is an affirmative defense the defendant must plead. This provision may bar a plaintiff's claim even though the presumptive period has not passed. The useful life of the injury-causing product then becomes a question of fact for the jury's determination. In any event, the statute of limitation is an absolute bar to a plaintiff's claim that is not brought within two years from the time the plaintiff discovered or should have discovered the harm and its cause.

V. Conclusion

Legislative responses to the manufacturer's open-ended liability potential under the common law have not been uniform. Many states do not have special products liability provisions that address the unique problems encountered in the area. A few states continue to have traditional statutes of repose on their books, while the statutes have been invalidated for constitutional infirmity in others. The useful safe life provisions are the most recent

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(1) Useful safe life. (a) Except as provided in subsection (1)(b) hereof, a product seller shall not be subject to liability to a claimant for harm under this chapter if the product seller proves by a preponderance of the evidence that the harm was caused after the product's "useful safe life" had expired. "Useful safe life" begins at the time of delivery of the product and extends for the time during which the product would normally be likely to perform or be stored in a safe manner . . . .

(2) Presumption regarding useful safe life. If the harm was caused more than twelve years after the time of delivery, a presumption arises that the harm was caused after the useful safe life had expired. This presumption may only be rebutted by a preponderance of the evidence.

(3) Statute of limitations. . . . [N]o claim under this chapter may be brought more than three years from the time the claimant discovered or in the exercise of due diligence should have discovered the harm and its cause.

227. Morse v. City of Toppenish, 46 Wash. App. at 66, 729 P.2d at 641.

228. *Id.* at 66, 729 P.2d at 641-42.

legislative response. Approximately six states have adopted this type of statute.[229] In five of these states, the useful life provision is coupled with a presumptive period.[230] Because the useful life provisions are relatively new developments in the products liability area, however, there is little case law construing them. The useful life concept may be floundering due to confusion regarding its application.[231]

The trend of adoption of the principles of MUPLA is desirable because the manufacturer's liability is limited somewhat, but it is not arbitrarily terminated. Where the useful life defense is raised, the triers of fact determine how long the particular product should have lasted under the circumstances. This is clearly more desirable than having state legislatures arbitrarily determine how long all products should last under any circumstances.

States that have not specifically addressed limitations on products liability claims should examine the evolving statutes and case law in the area, in order to fashion legislative guidance for the courts. Uniformity among the states in the products liability area is desirable since the defendant will often be amenable to suit in almost any state, and in reality, indefinitely will remain liable for damages its products cause as long as plaintiffs are able to find a forum that will apply a favorable repose statute or useful safe life statute.

This area of products liability is ripe for change. States should strive to strike an equitable balance between limiting manufacturers' open-ended liability potential, and terminating injured parties' claims only on some logical basis. This balance seems to be best achieved by a combination of presumptive statutes of repose and the useful safe life provisions.

Tami J. Johnson

229. Hodder v. Goodyear Tire & Rubber Co., 426 N.W.2d at 830 n.3.
230. *Id.*
231. *See* Comment, *supra* note 185, at 1107.