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Special Defenses in Modern Products Liability Law

David G. Owen

Products liability defenses may be broadly classified into three categories: (1) user-misconduct defenses; (2) no-duty defenses; and (3) other, "special," defenses. The first category of defenses, based on a product user's misconduct—contributory negligence, comparative fault, assumption of risk, product misuse, unreasonable reliance on a misrepresentation—are the subject of frequent litigation and commentary. Those are the most pervasive forms of defense, potentially applicable in nearly every type of products liability case.

The second category of "defense," the no-duty type, gives rise to defensive claims that a manufacturer may assert but which may not be affirmative defenses that a defendant must plead and on which it has the burden of proof. In most states, product misuse falls into the no-duty classification, although it is often viewed as a misconduct "defense" because it so centrally concerns consumer misconduct. Another prominent no-duty defensive issue is the state of the art "defense." Like product misuse, most courts consider the state of the art issue to be part of the plaintiff's prima facie case. So, a plaintiff ordinarily must prove that, under the prevailing state of the art at the time a product was made and sold, the manufacturer reasonably should have known of the risk and how feasibly to avoid it. Issues such as product misuse, state of the art, and other no-duty rules (such as the obvious danger rule and the...
bulk supplier and sophisticated user doctrines)\textsuperscript{5} are normally viewed by defendants as "defenses" that may cut off liability as readily\textsuperscript{6} as proof of a plaintiff's assumption of risk.\textsuperscript{7}

The third category of defenses is a catch-all classification for the remaining defenses. Some of these defenses concern litigation in special narrow areas, such as the federal preemption defense, applicable to situations where a products liability action may conflict with an act of Congress;\textsuperscript{8} the "seat-belt defense," pertinent to automotive products liability litigation;\textsuperscript{9} and the "sealed-container defense" which, in some jurisdictions, protects retailers in certain situations.\textsuperscript{10} This Article examines the most important remaining "special" defenses: the contract specifications defense, addressed in Part I.A; the government contractor defense, explored in Part I.B; the regulatory compliance defense, considered in Part II; and statutes of limitations and repose, examined in Part III. Except for the regulatory compliance defense, the other special defenses are affirmative defenses, such that a products liability claim ordinarily will be dismissed entirely if a defendant establishes the applicability of such a defense to the case.

I. RELIANCE ON PURCHASER’S DESIGN SPECIFICATIONS

A manufacturer’s responsibility for design defects has always firmly rested on the fact that the manufacturer created the bad design, even if only by including a defectively designed component into the larger product over which it had overall design responsibility.\textsuperscript{11} Hence, the manufacturer of a nondefective component that an assembling manufacturer buys and combines with other components in a dangerously defective manner is not subject to liability for resulting injuries unless the component manufacturer helped the assembler design the larger, defective product. A manufacturer’s responsibility for injuries caused by defects in its product’s design thus rests comfortably on the manufacturer's control over design decisions and, hence, design choices that are somehow flawed. Our sensibilities normally would be jarred if the law were to hold a manufacturer liable for harm for which it was in no fair way responsible.

Two important products liability defenses are based on the idea that the manufacturer, relying entirely on the purchaser's own design specifications,

\begin{itemize}
  \item[5.] On the bulk supplier and sophisticated user doctrines, see id. § 9.5.
  \item[6.] Or more so, in view of the spreading tentacles of comparative fault which may serve merely to reduce a plaintiff's damages rather than to relieve the defendant of responsibility for the harm. See id. § 13.3.
  \item[7.] On assumption of risk, see id. § 13.4.
  \item[8.] See id. § 14.4.
  \item[9.] See id. § 17.5.
  \item[10.] See id. § 15.2.
  \item[11.] See id. § 8.1.
\end{itemize}
in no way participated in decisions resulting in a design defect—a general one, based on the manufacture of a product according to a buyer's precise contractual terms, and a specific one, where the buyer is the government. The question raised in both situations is whether it is appropriate to hold a manufacturer responsible, if it merely fabricates a product to design specifications supplied by the purchaser, for injuries that result if the design proves defective? For example, General Motors may contract with a punch press manufacturer to construct a hub cap press according to precise design specifications that GM provides to the press manufacturer. If the specifications for the press do not call for guards and a GM worker is injured as a result, should the press manufacturer be subject to liability to the worker for making and selling a defectively designed machine? Or, suppose that Wal-Mart designs a toaster with a dangerously defective heating element, and contracts out production of the toaster to an appliance manufacturer. Should the toaster manufacturer be liable for the harm that results from a fire caused by the toaster when it overheats due to a design defect? Finally, consider the situation of an automotive manufacturer that contracts with the United States Army to produce a number of Jeeps according to a design provided or approved by a federal procurement official. If a roll bar designed according to the contract specifications gives way in a roll-over accident injuring the driver, should the driver be permitted to maintain a design defect claim against the manufacturer?

Normally, of course, manufacturers are responsible for the harmful consequences of design defects in the products that they make and sell. But, as mentioned above, that is because the manufacturer's own engineers ordinarily formulate the designs used to make those products. Where a manufacturer simply follows the design requirements specified by a purchaser, the design and manufacturing functions of product manufacture are separated. When a manufacturer's role is reduced to merely "fabricating" the product, the fairness and logic of holding the manufacturer liable for a dangerous design are called into question. Part I of this Article surveys the two principal defenses that have developed to address the liability issues that arise in this situation: (1) the contract specifications defense, and (2) the government contractor defense.

A. The Contract Specifications Defense

The contract specifications defense shields a manufacturer from liability for injuries caused by a design defect in products it manufactures in accordance with plans and specifications supplied by the purchaser, unless the design is obviously defective. From an early New York case, the contract

12. See id. at ch. 8.
 specifications “defense” evolved as a rule of nonliability for negligence when an independent contractor simply follows its employer’s directions on how a product should be built, when the contractor has no reason to know that the directions are unsafe.\textsuperscript{15} This widely accepted principle\textsuperscript{16} is described in the Restatement (Second) of Torts, which provides that an independent “contractor is not required to sit in judgment on the plans and specifications or the materials provided by his employer” and is not liable for their insufficiency unless the design or material specified “is so obviously bad that a competent contractor would realize that there was a grave chance that his product would be dangerously unsafe.”\textsuperscript{17}

The contract specifications defense rests on the fact that a contractor usually is not negligent in following design specifications provided by a purchaser (“employer”) pursuant to the contract.\textsuperscript{18} Accordingly, the courts have split over whether the defense should also apply to products liability claims based on strict liability, reasoning that implied warranty claims are based on a product’s failure to be in a merchantable condition, not on the seller’s fault,\textsuperscript{19} and that the defense is inconsistent with the doctrine and policies of strict liability in tort.\textsuperscript{20} A growing majority of courts have disagreed, however,

\begin{itemize}
  \item J. CORP. L. 113 (1983); Brent Nicholas Triff, Comment, Should a Non-Designing Manufacturer Be Held Strictly Liable for a Design Defect? An Approach for California, 33 SAN DIEGO L. REV. 385 (1996).
  \item 15. See, e.g., Bynum v. FMC Corp., 770 F.2d 556 (5th Cir. 1985) (applying Mississippi law); Dorse v. Armstrong World Indus., Inc., 513 So. 2d 1265 (Fla. 1987).
  \item 17. See RESTATEMENT (SECOND) OF TORTS § 404 cmt. a (1965).
\end{itemize}
holding that even in strict liability, a manufacturer who merely fabricates a product according to the purchaser’s design is not responsible, in the absence of an obvious defect, if the design proves bad.\footnote{21} "To hold [a contractor] liable for defective design would amount to holding a non-designer liable for design defect. Logic forbids any such result."\footnote{22}

In recent years, the notion of “strict” products liability in tort has withered substantially as courts and commentators have increasingly recognized the close nexus between negligence and strict liability in cases involving defects in design.\footnote{23} As the strict liability straw man continues to unravel, courts which in the past declined to allow the contract specifications defense in actions denominated as “strict” liability should now be more open to recognizing the appropriateness of this defense under modern products liability theory.\footnote{24} In short, the soundness of applying the contract specifications defense to design defect claims does not depend on the underlying theory of liability.

Some products liability reform statutes, directly or indirectly, address the effect of compliance with contract specifications. Thus, at least one state statute effectively adopts a contract specifications defense by shielding altogether defendants who manufacture products according to the design specifications of others,\footnote{25} a couple of statutes classify such manufacturers as “sell-
ers” and so relieve them from strict products liability entirely\textsuperscript{26} or contingently if the designing manufacturer is insolvent or not subject to suit;\textsuperscript{27} and a couple of others give a manufacturer a right of indemnity against a seller (such as a large retail chain like Sears or Wal-Mart) which provides plans and specifications that give rise to a products liability claim.\textsuperscript{28}

\textbf{B. The Government Contractor Defense}

The government contractor defense is a special doctrine that applies only to manufacturers who contract with the government to build a product according to specifications provided or approved by the government.\textsuperscript{29} While some form of government contractor defense has existed for several decades,\textsuperscript{30} it gained prominence in the 1980s, particularly after the Supreme Court decided \textit{Boyle v. United Technologies Corp}.\textsuperscript{31} in 1988.\textsuperscript{32} Having redefined the nature and scope of the defense and clarified its elements, \textit{Boyle} is

\begin{itemize}
  \item 28. See ARIZ. REV. STAT. ANN. § 6-12-684(C) (West 2003); IDAHO CODE § 6-1307(3) (Michie 2004).
  \item 30. See, e.g., Sanner v. Ford Motor Co., 381 A.2d 805, 806 (N.J. Super. Ct. App. Div. 1977) (passenger injured in Army Jeep accident could not maintain suit against jeep manufacturer for failing to equip vehicle with seat belts and a roll bar "since defendant had no discretion with respect to the installation of seat belts and since it strictly adhered to the plans and specifications owned and provided by the Government").
  \item 31. 487 U.S. 500 (1988).
  \item 32. The history of the defense is briefly sketched in 4 FRUMER & FRIEDMAN, \textit{supra} note 29, § 31.01.
\end{itemize}
now the starting point for determining how a products liability claim is affected if the product was fabricated according to specifications provided or approved by a federal (or possibly a state or local) governmental agency.

1. The Boyle Case

In Boyle v. United Technologies Corp., the copilot of a Marine Corps helicopter was killed during a training exercise when his helicopter crashed in the ocean. Boyle survived the impact of the crash, but, as the helicopter sank in the water, he was unable to escape and drowned. Boyle’s representatives sued the helicopter’s manufacturer, the Sikorsky Division of United Technologies, claiming that the escape hatch was defectively designed because (1) it opened out rather than in, which precluded opening the hatch in a submerged craft because of water pressure, and (2) the positioning of various instruments blocked access to the escape hatch handle. Plaintiff won at trial, but the Fourth Circuit Court of Appeals reversed on the basis of that court’s version of the “military contractor defense,” and the Supreme Court granted certiorari. The issue before the Court was whether and “when a contractor providing military equipment to the Federal Government can be held liable under state tort law for injury caused by a design defect.” As a matter of federal common law, a bare majority of the Court approved a government contractor defense.

Writing for the majority, Justice Scalia reasoned that allowing state products liability claims against military contractors who fabricate products according to designs approved by federal officials would frustrate the purposes of the discretionary function exception to governmental liability in the Federal Tort Claims Act. Because military design specifications involve a

34. Id. at 502.
35. Id.
36. Id. at 502-03.
40. Id. at 501. Because it was unclear whether the Fourth Circuit had decided whether a jury reasonably could have found each of the elements of the defense as formulated by the Supreme Court, the Court remanded for clarification. See id. at 514.
41. Id. at 511. Although Congress in 28 U.S.C. § 1346(b) (2000) waived the sovereign immunity of the United States for negligent or wrongful conduct of federal employees, 28 U.S.C. § 2680(a) (2000) retains sovereign immunity for “[a]ny claim . . . based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved was abused.” 28 U.S.C. § 2680(a).
host of choices including the "trade-off between greater safety and greater combat effectiveness," they involve discretionary decisions with which tort suits against contractors would interfere. If products liability claims challenging such choices were allowed, government contractors would raise their prices to offset this risk of liability, passing on the financial burden to the United States. "It makes little sense," reasoned Justice Scalia, "to insulate the Government against financial liability for the judgment that a particular feature of military equipment is necessary when the Government produces the equipment itself, but not when it contracts for the production." Thus, when these federal interests conflict with state products liability law that would allow a design defect claim against a military contractor, the state law must give way.

To protect these federal interests, Boyle adopted a three-part test shielding military contractors from design defect liability under state products liability law—"when (1) the United States approved reasonably precise specifications; (2) the equipment conformed to those specifications; and (3) the supplier warned the United States about the dangers in the use of the equipment that were known to the supplier but not to the United States."

2. Boyle in the Courts

"Stripped to its essentials," in the words of one court, "the military contractor defense is available only when the defendant demonstrates with respect to its design and manufacturing decisions that 'the government made me do it.'" This may be a fair summary of Boyle's underlying concept, but its interpretation has raised a number of thorny issues. For example, while it is clear that Boyle's first element, the "approval" prong, does not require that the government completely design a product by itself, the Court did not specify the requisite type or extent of government involvement in "approving" a product's design. Thus, it was early held that the defense does not ap-

42. Boyle, 487 U.S. at 511.
43. Id. at 511-12.
44. Id. at 512.
45. Id.
46. Id.
48. Boyle, 487 U.S. at 513. ("The design ultimately selected may well reflect a significant policy judgment by Government officials whether or not the contractor rather than those officials developed the design. In addition, it does not seem to us sound policy to penalize, and thus deter, active contractor participation in the design process . . . .").
ply if the government merely “rubber stamps” the contractor’s design. Yet the government need not participate at all in the actual development of a product’s design, so long as it genuinely evaluates the content of the contractor’s ultimate design decisions. And even if the government is significantly involved in and approves a product’s design as a whole, Boyle requires proof that a government officer considered the particular design feature that caused the injury giving rise to the products liability claim.

Boyle raises a host of other issues. For example, the courts are split on whether the government contractor defense applies only to manufacturers of military equipment (military contractors): some hold that the defense is so limited while others hold that Boyle’s reasoning protects manufacturers of any type of government equipment (government contractors).

49. See, e.g., Trevino v. Gen. Dynamics Corp., 865 F.2d 1474 (5th Cir. 1989) (although Navy ultimately “approved” contractor’s design of diving hangar, Navy set only general performance standards and left contractor with complete design discretion). “A rubber stamp is not a discretionary function; therefore, a rubber stamp is not ‘approval’ under Boyle.” Id. at 1480. Accord Johnson v. Grumman Corp., 806 F. Supp. 212, 217 (W.D. Wis. 1992).


52. See Sheppard, supra note 29.

53. See, e.g., In re Haw. Fed. Asbestos Cases, 960 F.2d 806, 812 (9th Cir. 1992) (asbestos insulation used in Navy ships not “manufactured with the special needs of the military in mind”); Nielsen v. George Diamond Vogel Paint Co., 892 F.2d 1450, 1454-55 (9th Cir. 1990) (civilian government employee injured by paint manufactured to specifications of Army Corps of Engineers).

types of defects covered by the government contractor defense, Boyle by its terms protects a contractor only for design defect claims. While the second prong of the Boyle test strongly suggests that manufacturing defects lie outside the government contractor defense, leaving manufacturers liable for such defects, some courts take the position that the defense may cover manufacturing defects in certain situations. Warning claims, however, are an entirely different kettle of fish. Assuming that the defendant is able to establish each of the three prongs of the Boyle test with respect to the warnings claim, most courts hold that the government contractor defense does indeed apply to (and protect the contractor from) such claims, particularly if the federal contract includes warnings requirements that significantly conflict with state products liability law. As for causes of action, the government contrac-


56. See, e.g., Snell v. Bell Helicopter Textron, Inc., 107 F.3d 744, 749 (9th Cir. 1997).

57. See, e.g., Snell, 107 F.3d at 749; Bailey v. McDonnell Douglas Corp., 989 F.2d 794 (5th Cir. 1993); Roll v. Tractor, Inc., 102 F. Supp. 2d 1200 (D. Nev. 2000) (recognizing that Boyle may apply to manufacturing defect claims but holding that manufacturer of flare failed to establish that government approved reasonably specific manufacturing specifications and that mishap could have been caused by aberrational defect that does not implicate federal interests); Bentzlin v. Hughes Aircraft Co., 833 F. Supp. 1486, 1490-92 (C.D. Cal. 1993) (when government involves itself in manufacturing process of sophisticated military weaponry such as Maverick missile, manufacturer of such equipment may be immunized from manufacturing defect claims).

58. See, e.g., Kerstetter v. Pac. Scientific Co., 210 F.3d 431 (5th Cir. 2000); Perez v. Lockheed Corp., 81 F.3d 570 (5th Cir. 1996); Tate v. Boeing Helicopters, 55 F.3d 1150 (6th Cir. 1995) (defense established where government and contractor had dialogue about warnings and government’s approval of operator’s manual was more than a rubber stamp); In re Aircraft Crash Litig., 752 F. Supp. 1326, 1365 (S.D. Ohio 1990) (Air Force required hundreds of changes to aircraft manual prior to approval), aff’d sub nom., Darling v. Boeing Co., 935 F.2d 269 (6th Cir. 1991) (table); Miller v. United Tech. Corp., 660 A.2d 810 (Conn. 1995). Compare Miller v. Diamond Shamrock Co., 275 F.3d 414, 422 (5th Cir. 2001) (Boyle only requires manufacturers of Agent Orange to warn government about dangers it actually knew and not should have known); Butler v. Ingalls Shipbuilding, Inc., 89 F.3d 582, 586 (9th Cir. 1996) (defense applicable to warnings claims only if there is a conflict between federal contract requirements and state law warnings requirements); Morgan v. Brush Wellman, Inc., 165 F. Supp. 2d 704, 717-18 (E.D. Tenn. 2001) (mem.) (defense to warning claim established where supplier of beryllium oxide to nuclear armament facility showed that government was more aware of the dangers of beryllium than the suppliers). See generally Densberger v. United Techs. Corp., 297 F.3d 66, 75 (2d Cir. 2002) (questioning whether Boyle applied to claim that manufacturer negligently
tor defense logically should apply alike to claims for negligence, breach of warranty, and strict liability in tort.59

While the Boyle government contractor defense is a federal common-law rule applicable only to manufacturers supplying equipment to federal agencies, it applies to products liability claims tried in state as well as federal courts.60 Whether contractors who manufacture and sell products to state and local governments should receive similar protection from design and warning defect claims is an entirely separate question that the individual states must answer as a matter of their local products liability law. Most state courts thus are free, as a matter of state common law, to refuse to apply a Boyle-type government contractor defense to state and local government contractors.61 Several states, however, have enacted products liability reform statutes that

failed to adequately warn Army, and not end users, of dangers that helicopter could become uncontrollable).


60. See, e.g., Miller, 660 A.2d 810; Anzalone v. Westech Gear Corp., 661 A.2d 796 (N.J. 1995) (per curiam); Feldman, 918 S.W.2d 615 (thorough review of doctrine); Graham, 999 P.2d 1264. While applicable in state courts, Boyle appears to allow defendants sued in state courts to remove the case to federal court whether or not federal claims are alleged or if there is diversity of citizenship. See, e.g., Miller v. Diamond Shamrock Co., 275 F.3d 414, 417-18 (5th Cir. 2001) (clothing an Agent Orange manufacturer protected by Boyle with the status of a "federal officer" entitled to remove cases to federal court under 28 U.S.C. § 1442(a) (1)); Madden v. Able Supply Co., 205 F. Supp. 2d 695, 699-702 (S.D. Tex. 2002) (clothing the manufacturer of turbine generator on Navy vessel with "federal officer" status under federal officer removal statute).


[T]here are a range of other considerations that would compete with protection of the government's economic interests, not the least of which is that the insulation of the Commonwealth from indirect costs on grounds of public interest has the perverse effect of permitting a government officer to minimize as a consideration in procurement decisions (at least as a matter of financial concern) external societal costs, particularly in terms of potential diminishment to public safety.

Id. at 834. See also Nicholson v. Ala. Trailer Co., 791 So. 2d 926 (Ala. 2000) (reversing summary judgment where plaintiff produced expert testimony that state's design of trailer for its power company was so obviously dangerous that no competent manufacturer would follow specifications).
II. COMPLIANCE WITH STATUTES AND REGULATIONS

A. The Dual Regulation Problem

Manufacturers of many types of products are subject to two (or even three) different forms of safety regulation—by federal (and possibly state) administrative agencies, *ex ante*, and by the judicial products liability system, *ex post*. For example, manufacturers of cars and airplanes first must meet the often detailed design safety standards of the National Highway Traffic Safety Administration or the Federal Aviation Administration only to be second-guessed by juries passing on the very same issues, years later, when a person injured in a crash complains in court. Producers of other products, such as industrial products, have to endure a third layer of regulation, first having to conform to safety standards of the federal agency, like the Occupational Safety and Health Administration, then to the standards of each state’s industrial safety department, and finally to a state’s judicial standards of “defectiveness” if the product causes harm and ends up as the subject of a products liability case in court. Thus, manufacturers understandably question the logic and fairness of having to conform to safety regulations imposed by the government’s executive-administrative branch before marketing a product only to have the government’s judicial branch declare the conforming product illegal thereafter.

The idea of a government standards (or “regulatory compliance”) defense, that would shield a manufacturer from liability in a products liability


action if the product complied with relevant regulations of a safety agency, is a "close cousin" of the federal preemption defense. However, the two defenses are fundamentally distinct. The government standards defense concerns the standard by which a state's substantive products liability law determines whether a product is deemed defective. When a manufacturer in a products liability case asserts that it complied with certain government standards of product safety, the regulatory compliance issue is whether the court should borrow the safety standards of the regulatory agency (or statute) as the formal test of product defectiveness. By contrast, the federal preemption defense concerns the constitutional issue, under the Supremacy Clause, of when federal law (normally safety regulations of federal agencies) overrides state products liability law (normally the standards set by courts in defectiveness adjudications) with which it may conflict. While the two defenses share the issue of whether statutory and regulatory safety standards should bar products liability actions, the government standards defense is a state-law defense recognized narrowly in only a small minority of jurisdictions, whereas the federal preemption defense is a federal-law defense that binds all courts when Congress so intends.

A government standards defense, that would bar a products liability action if the accident product complied with all relevant governmental safety standards at the time it was sold, has a superficial appearance of fair play and common sense. However, arguments favoring the defense are more than offset by a large number of problems: statutes (and sometimes regulations) tend to be abstract, vague, and limited in scope and so incapable of adequately addressing the myriad factual situations that may arise in individual cases; conversely, regulations may be so narrow and specific that they fail to capture related activities at the margins of the regulation, leaving large categories of similar activities unregulated; statutes and regulations are both difficult to amend to reflect changes over time, and those dealing with science and technology quickly become obsolete; statutes and regulations both are often shaped more by lobbyists for the regulated parties than by detached and objective decision makers neutrally balancing all affected interests in pursuit of optimal safety; and, unlike the inherent flexibility of the common law, the rigidity of regulatory safety standards tends to stifle creativity and innovation. For these and other reasons, the courts have never seen fit to create a

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64. See Rabin, supra note 63, at 2053; see also RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 4 cmt. e (1998). A closer cousin is the negligence doctrine governing the effect of compliance with a safety statute or regulation. See OWEN, supra note 1, § 2.4. A more distant cousin is the government contractor defense. See id. § 14.2. On federal preemption, see id. § 14.4.

65. On federal preemption, see id. § 14.4.

66. "Common law tort courts have long provided a safer haven from the corruption that can accompany the making of statutes and regulations; among institutional
common-law regulatory compliance defense. As discussed below, however, courts in rare instances do recognize a kind of government standards defense, and several states have legislated various narrow forms of the defense as a part of tort reform.

B. Judicial Rejection of Government Standards Defense

The issue of whether there should be a government standards defense is not unique to products liability law. For many years, many types of actors, in many types of situations where conduct is subjected to governmental regulation ex ante, have sought to assert a government standards defense to liability in tort ex post. Courts\(^67\) and commentators\(^68\) long ago rejected the idea that an actor whose conduct comports with a safety standard required by statute or administrative regulation is automatically protected from tort liability for harm resulting from that conduct. Courts on infrequent occasions do make an exception to the general rule in limited situations where a defendant conformed its behavior precisely as directed by an especially well-considered government standard.\(^69\) But it is fundamental law that governmental safety standards adopt only a minimum safety floor below which an actor may face criminal sanctions but above which due care may require the actor to be more cautious.\(^70\)

Following these fundamental tort law principles, virtually all courts reject the general idea of a regulatory compliance defense to products liability actions, whether based on negligence, warranty, or strict liability in tort.\(^71\)

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\(^68\) See, e.g., Clarence Morris, The Role of Criminal Statutes in Negligence Actions, 49 Colum. L. Rev. 21, 42 (1949).


\(^70\) “Such a standard is no more than a minimum, and it does not necessarily preclude a finding that the actor was negligent in failing to take additional precautions.” Id. See RESTATEMENT (SECOND) OF TORTS § 288C (1965) (“Compliance with a legislative enactment or an administrative regulation does not prevent a finding of negligence where a reasonable man would take additional precautions.”).

Compliance with a relevant governmental safety standard is some evidence of a manufacturer's non-negligence and a product's nondefectiveness, but it is not conclusive on those issues. Compliance evidence is not unimportant, but it serves in a products liability case only as "a piece of the evidentiary puzzle" rather than "as an impenetrable shield from liability." This has been the rule since the early days of modern products liability law, and, except
for some relatively minor legislative retrenchments in several states, discussed below, the rule is as firmly entrenched today as ever.\textsuperscript{76} The \textit{Restatement} provides quite simply that

a product’s compliance with an applicable product safety statute or administrative regulation is properly considered in determining whether the product is defective with respect to the risks sought to be reduced by the statute or regulation, but such compliance does not preclude as a matter of law a finding of product defect.\textsuperscript{77}

An occasional court asserts that regulatory compliance has more weight than mere evidence of due care and a product’s nondefectiveness—that compliance with government safety standards provides “strong evidence” of the manufacturer’s nonliability.\textsuperscript{78} And sometimes courts note that “where no special circumstances require extra caution, a court may find that conformity to the statutory standard amounts to due care as a matter of law.”\textsuperscript{79} While this is true, it is also tautological in saying that a defendant who complies with a statutory standard is not liable for acting more safely than required by the


77. RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 4(b) (1998). See id. cmt. a (noting that this principle concerns design and warnings defects, but not manufacturing defects).

78. See, e.g., Sims v. Washex Mach. Corp., 932 S.W.2d 559, 565 (Tex. App. 1995) (“Compliance with government regulations is strong evidence, although not conclusive, that a machine was not defectively designed.”).

statute if there was no reason to act more safely—which circles back to basing liability on the defendant’s lack of negligence, not on the defendant’s compliance with the statutory standard. 80

Denying a full-fledged regulatory compliance defense to manufacturers may appear to be unfair because it forces them to meet the safety standards of both governmental regulators and the courts, but this dual approach to product safety oversight generally makes good sense. Most product safety statutes, and most product safety regulations promulgated thereunder, are designed to prohibit (and criminalize) only the clearest and most egregious hazards. In addition to the problems with a regulatory compliance defense noted earlier, limited budgets and other resources of safety agencies generally preclude them from being effective arbiters of optimal, rather than minimal, safety. Consequently, the law allocates responsibility for product safety, first, to manufacturers, to make their products reasonably safe and so conforming to the safety obligations of both the regulators and the courts; second, to governmental regulators, to set minimum safety standards for products whose special dangers require regulatory intervention; and, finally, to the courts, to test a manufacturer’s safety decisions, in case of product accident, against the common-law safety standards based on balance, reason, and fairness. 81

Admittedly, this multi-layered allocation of safety responsibility is somewhat complicated and burdensome on manufacturers, but it normally works quite well to minimize government intrusion into product design and labeling decisions while protecting the basic safety rights of product consumers. 82

Litigation involving industrial machinery raises an interesting question of the admissibility of evidence that a manufacturer’s industrial product complied with safety regulations of the Occupational Safety and Health Administration (OSHA), the federal agency which regulates the safety of products in the workplace. 83 Manufacturers normally are eager to introduce such evidence, not only to show that their products met these safety standards, and so

80. See Restatement (Second) of Torts § 288C cmt. a (1965). Thus, in Beatty, the court, applying the statutory standard as a matter of law, ruled for the defendant because the plaintiff had failed to prove that the product, “either for negligence or strict liability purposes, was foreseeably unsafe, defective, or unreasonably dangerous.” Beatty, 625 A.2d at 1014.


It has long been the concern of this state to protect the health and safety of its citizens. . . . It is the widely held view that the FDA sets minimum standards for drug manufacturers as to design and warnings. We conclude that compliance with these minimum standards does not necessarily complete the manufacturer’s duty.

Id. at 302 (citation omitted).

are at least arguably nondefective, but also to help focus the jury’s attention, first, on the employer’s role in causing (or at least in not preventing) the injury, perhaps by failing to equip a machine with a safety device, and, second, on the possibility that the employee may have received workers’ compensation. Manufacturers normally are barred from introducing evidence or argument directly on these issues, and using evidence of compliance with OSHA standards may permit a manufacturer’s counsel to get the jury thinking about these other factors related to the larger responsibility and compensation issues present in such cases. For these same reasons, plaintiffs’ counsel seek to exclude evidence on an industrial machine’s compliance with OSHA standards, to keep attention focused on the manufacturer’s responsibility for the injury.

But cases involving compliance with OSHA regulations are different from other types of regulatory compliance cases because OSHA standards on design and warnings requirements of industrial machinery impose requirements for employers, not manufacturers. Nevertheless, such standards do set safety minimums for industrial products which would seem to have some relevance to the issue of product defectiveness in products liability litigation. Because such regulations do have at least some minimal relevance to product defectiveness, with respect to a manufacturer’s risk-benefit analysis and possibly to a user’s safety expectations, many courts allow evidence of a product’s compliance with relevant OSHA standards in a products liability action against the manufacturer. Because of the limited relevance and prob-

84. Workers’ compensation statutes bar employees from suing their own employers in tort for workplace injuries, of course, in exchange for guaranteed compensation under such insurance systems. See Owen, supra note 1, § 15.6; Paul C. Weiler, Workers’ Compensation and Product Liability: The Interaction of a Tort and a Non-Tort Regime, 50 Ohio St. L.J. 825 (1989).


able prejudice of such evidence, other courts hold that OSHA safety standards are generally inadmissible in products liability litigation.\textsuperscript{89}

\textbf{C. Special Situations Where Compliance with Safety Standards May Be Conclusive}

In certain limited situations, federal and state regulators study and regulate the safety of particular aspects of particular products especially closely. In such situations, if an agency has reasonably settled on a specific safety standard that appears optimal at the time, then much may be said for foreclosing products liability actions that demand more safety of manufacturers than the agency determined was appropriate. The CPSC, for example, after conducting a major study of the problem of injuries to operators of power mowers, adopted a regulation requiring that manufacturers design their mowers so that the blades will stop rotating within three seconds of the time an operator releases the control handle.\textsuperscript{90} Apart from the possibility of federal preemption,\textsuperscript{91} and assuming that technology has not advanced sufficiently to resolve the problem in a clearly better way, a court might reasonably decide not to permit an operator, injured when his foot slips beneath the mower, to attempt to prove that the mower’s design was defective because the blade did not stop within two seconds after the handle was released.

A good example of a situation where a court chose to adopt a regulatory standard as a matter of law is \textit{Ramirez v. Plough, Inc.}\textsuperscript{92} In this case, a four-month-old child contracted Reye’s Syndrome after his Spanish-speaking mother gave him some St. Joseph’s Aspirin for Children to relieve his symptoms of a cold.\textsuperscript{93} The aspirin’s label warned of the risk only in English, not in Spanish.\textsuperscript{94} Although the FDA specifically permitted English-only labeling, the plaintiff claimed that the failure to warn in Spanish was inadequate.\textsuperscript{95} After considering the web of rules on foreign-language labeling requirements in various other contexts adopted by the California legislature; the FDA’s


\textsuperscript{90} Details of the study and regulation are examined in \textit{Southland Mower Co. v. Consumer Product Safety Commission}, 619 F.2d 499 (5th Cir. 1980), which upheld the CPSC’s three-second blade-stop criterion.

\textsuperscript{91} See OWEN, supra note 1, § 14.4.

\textsuperscript{92} 863 P.2d 167 (Cal. 1993). \textit{Ramirez} is also examined in OWEN, supra note 1, § 9.4.

\textsuperscript{93} \textit{Ramirez}, 863 P.2d at 1169.

\textsuperscript{94} Id. at 173.

\textsuperscript{95} Id. at 173-77.
quite specific rules governing foreign-language labeling that permitted but did not require such labeling; and the multiplicity of health, social, cost, and practicability factors; the court concluded that foreign-language labeling requirements were better determined by legislatures and regulatory agencies than by the courts. For this reason, the court chose to adopt the legislative/regulatory rule permitting English-only warnings as the safety standard that properly should be applied in the case.96

The Food and Drug Administration closely reviews applications submitted by pharmaceutical manufacturers for new prescription drugs. Scrupulously evaluating the clinical data provided by the manufacturer, the agency balances the safety and efficacy of each proposed new drug and evaluates the adequacy of proposed warnings and usage information to be provided to doctors who will prescribe the drug. If the FDA fully and fairly evaluates all of this information, and approves for sale the drug and warnings, then it would seem to make little sense to let a jury reevaluate the same information and find the drug or warnings "defective."97 On this basis, at least two states have immunized manufacturers of prescription drugs from strict liability,98 and another has ruled that a manufacturer's compliance with FDA regulations for warnings in direct-to-consumer advertising of pharmaceuticals gives rise to a rebuttable presumption that the warnings satisfy the duty to warn.99 When a plaintiff is harmed by an aspect of a product that met an applicable safety standard which the FDA or other regulatory agency scrupulously investigated and approved, and the perfect agency model fits the situation quite closely, then a court may properly conclude that the product's compliance with the governmentally approved safety standard conclusively establishes that the challenged aspect of the product was not defective.100 Such cases, however, will be unusual.

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96. Id. at 177. Noting that the FDA stresses the importance of "uniformity in presentation and clarity of message," the court concluded:

To preserve that uniformity and clarity, to avoid adverse impacts upon the warning requirements mandated by the federal regulatory scheme, and in deference to the superior technical and procedural lawmaker resources of legislative and administrative bodies, we adopt the legislative/regulatory standard of care that mandates nonprescription drug package warnings in English only.

Id.

97. See Noah, supra note 63.


99. See Perez v. Wyeth Labs., Inc., 734 A.2d 1245, 1259 (N.J. 1999). "For all practical purposes, absent deliberate concealment or nondisclosure of after-acquired knowledge of harmful effects, compliance with FDA standards should be virtually dispositive of such claims. By definition, the advertising will have been "fairly balanced."" Id.

100. See, e.g., Dentson v. Eddins & Lee Bus Sales, Inc., 491 So. 2d 942, 944 (Ala. 1986) ("[I]n this context, involving school transportation, an area traditionally re-
The model of a perfect FDA—fully informed of a drug’s foreseeable hazards before the drug is marketed, kept fully informed thereafter of adverse drug-reactions, fully funded by Congress, and with no political pressure to expedite the approval of new drugs—usually does not fit the real world closely. For this reason, courts should almost always base defectiveness determinations on broader considerations than a manufacturer’s compliance with an administrative agency’s product safety regulation—even if the safety standard applies directly to the product feature of which the plaintiff complains, and even if the agency’s procedures normally are rigorous and precise—because of the probability of imperfections in the safety standard or the agency’s procedures in any particular case. Thus, courts and juries should give only such weight to a product’s compliance with a governmental safety standard as is warranted by the particular circumstances of each case.

served for the legislature, we find that the legislature’s pronouncement is conclusive: a school bus in Alabama may not be found defective . . . because it is not equipped with passenger seat belts.”). The Restatement provides:

Occasionally, after reviewing relevant circumstances, a court may properly conclude that a particular product safety standard set by statute or regulation adequately serves the objectives of tort law and therefore that the product that complies with the standard is not defective as a matter of law. Such a conclusion may be appropriate when the safety statute or regulation was promulgated recently, thus supplying currency to the standard therein established; when the specific standard addresses the very issue of product design or warning presented in the case before the court; and when the court is confident that the deliberative process by which the safety standard was established was full, fair, and through and reflected substantial expertise.


101. See Rabin, supra note 63; Schwartz, Role of Federal Safety Regulations, supra note 63. An example is Tobin v. Astra Pharmaceutical Products, Inc., 993 F.2d 528 (6th Cir. 1993), where plaintiff “presented an articulable basis for disregarding the FDA’s finding that ritodrine was effective . . . : the individual studies relied on by the FDA were insufficient to support a finding of efficacy as found by the FDA Advisory Committee, and the pooled data requested by the Advisory Committee was statistically invalid.” Id. at 538 (applying Kentucky law). Although its safety decisions may be better than those of other agencies, the FDA is not immune to criticism. See, e.g., Andrew Pollack, Drug to Treat Bowel Illness Is Approved by the F.D.A., N.Y. TIMES, July 25, 2002, at A12 (quoting Dr. Sidney Wolfe, Director of the Public Citizen Health Research Group, who characterized the FDA’s approval as “a very bad decision” because of its marginal effectiveness, the fact that it appears to increase the risk of ovarian cysts, and the availability of over-the-counter medicines to treat the condition). Despite its real-world shortcomings, the FDA’s safety standards are probably closer to optimal than any other agency. See, e.g., Green & Schultz, supra note 63, at 2122.

102. See Rabin, supra note 63.
D. State Reform Legislation

About a dozen states have enacted products liability reform statutes concerning the effect of a manufacturer’s compliance with a governmental safety standard. Commonly, the statutes create a rebuttable presumption that a product was not defective—or that a product was not defective and that the manufacturer or seller was not negligent—if the product complied with applicable state or federal safety statutes or agency regulations. For example, Michigan’s statute provides that “there is a rebuttable presumption that the manufacturer or seller is not liable if . . . the aspect of the product that allegedly caused the harm was in compliance with standards relevant to the event causing the death or injury set forth in a federal or state statute or . . . regulations.” Taking a slightly different approach, the Kansas statute provides that, if a product conforms to a governmental safety standard, the plaintiff must prove “that a reasonably prudent product seller could and would have taken additional precautions.” Three statutes restate the common law rule on compliance, stating merely that a manufacturer’s compliance with government standards may be considered by the trier of fact. Several statutes

103. Since the plaintiff has the burden of proof on negligence and product defect anyway, it is difficult to understand what if any additional proof a plaintiff must offer to rebut such a presumption. In Duffee v. Murray Ohio Manufacturing Co., 879 F. Supp. 1078 (D. Kan. 1995), aff’d, 91 F.3d 1410 (10th Cir. 1996), the court suggested that a plaintiff’s rebuttal could consist of proof that (1) the regulatory standards were outdated, or (2) that a reasonable manufacturer would know of dangers in the product’s use not contemplated by the standard. Alternatively, it would seem that rebuttal evidence could lie in the plaintiff’s proofs on negligence or defectiveness in the prima facie case. Expert testimony is not necessarily required to rebut such a presumption. See, e.g., Cansler v. Mills, 765 N.E.2d 698, 706-07 (Ind. Ct. App. 2002) (airbag that met Standard 208 failed to inflate in crash; circumstantial evidence of defectiveness sufficient to overcome presumption). A Tennessee court has held that compliance with OSHA regulations does not create a rebuttable presumption of nondefectiveness under that state’s statute because the regulations apply to employers, not manufacturers. See Hughes v. Lumbermens Mut. Cas. Co., 2 S.W.3d 218 (Tenn. Ct. App. 1999).


are directed at drugs that comport with FDA standards, one raising a rebuttable presumption that complying warnings are adequate,107 another giving manufacturers of complying drugs complete immunity,108 and several barring punitive damages for drugs marketed with FDA approval.109

III. STATUTES OF LIMITATIONS AND REPOSE

A. Nature of Time Limitation Statutes

Statutes of limitations and statutes of repose impose maximum time limits on products liability claims. Both forms of time limitation statute cut off a plaintiff's rights after a particular period of time, although the period within which a plaintiff must file a claim may be extended in certain limited circumstances. If the plaintiff files a products liability claim after the statutory period has run, the time limitation statute simply bars the claim. A statute of limitations is an affirmative defense, and the defendant must raise it in a timely manner, which ordinarily means that it must be pleaded in the answer.110 By contrast, because a statute of repose cuts off the plaintiff's rights at the expiration of the time period, rather than just the remedy, the defendant does not waive the running of a statute of repose by failing to raise it in a timely manner.111 Statutes of limitations and repose provide a potent defense to products liability actions that a plaintiff's lawyer must seek to avoid and a defendant's lawyer must be sure not to overlook.112

110. See Fed. R. Civ. P. 8(c); 2 Calvin W. Corman, LIMITATIONS OF ACTIONS § 15.2.1, at 349 (1991) (noting "the uniform requirement that when the statute of limitations is used as a defense it must be set forth affirmatively in a party's responsive pleading"). But a court in its discretion may allow the defendant to amend its answer to include the defense if doing so is not unfair or prejudicial to the plaintiff. See id. § 15.3, at 355-58. If the running of the statute is apparent on the face of the complaint, the defendant may raise the defense by a motion to dismiss. See, e.g., Albrecht v. Gen. Motors Corp., 648 N.W.2d 87, 89 (Iowa 2002). See generally 2 Corman, supra, § 15.1.3.

111. 2 Corman, supra note 110, § 15.2.3, at 355.

112. On statutes of limitations and repose in products liability litigation, see 1 Corman, supra note 110, § 5.27; 4 Frumer & Friedman, supra note 29, at ch. 26; 4 Hursh & Bailey, supra note 29, at ch. 47; Keeton et al., supra note 69, § 30; 2 Owen et al., supra note 63, § 16:1 & ch. 31; Richard A. Epstein, The Temporal Di-
As creatures of state legislation (with one exception\textsuperscript{113}), time limitation statutes vary widely in their provisions—their time periods, what starts the clock running, what stops it running, what types of claims they affect, and in many other respects. Moreover, courts vary over time in how they interpret and apply similar provisions of similar statutes. Accordingly, each state has developed its own complex set of rules, both statutory and judicial, detailing the time periods within which various types of products liability claims must be filed to escape the time limitation defenses. More so than with many other issues in products liability litigation, therefore, the law on time limitation issues in products liability cases tends to be unusually twisted and particularly localized. Thus, outcomes in particular cases involving time limitation statutes are controlled by the language of particular statutes as interpreted by courts of varying persuasions in particular jurisdictions, according to particular common-law rules, and applied in varying fashions to the facts of particular cases. Because so many cases have been decided so many different ways on limitations issues in every jurisdiction,\textsuperscript{114} little can be said about statutes of limitations and repose for which there is not contrary authority. For this reason, a lawyer must study the local statutory and case law especially closely in an attempt to fathom how a court might rule on a limitations issue in any particular case. Nevertheless, a general description of some of the recurring


\textsuperscript{114}The General Aviation Revitalization Act of 1994 (GARA), 49 U.S.C. § 40101 (2000), examined below, is the one federal time limitation statute applicable to products liability litigation. Congress has enacted a discovery rule for personal injury and property damages actions brought under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), 42 U.S.C. § 9658 (2000). For a variety of reasons, the courts have held that this statute does not apply in product liability actions. See, e.g., Rivas v. Safety-Kleen Corp., 119 Cal. Rptr. 2d 503 (Cal. Ct. App. 2002) (CERCLA federal discovery rule does not preempt state time limits in toxic tort claims asserted against third party manufacturers because Congress did not have such actions in mind when drafting the relevant CERCLA provisions). The discovery rule is discussed in more detail below.

\textsuperscript{114} "It would be a laborious and unprofitable task, to examine all the cases which have been decided, on the statute of limitations." Fries v. Boisselet, 9 Serg. & Rawle 128, 131 (Pa. 1822).
issues in this area of the law may be useful to a lawyer getting started on a limitations problem.

1. Reasons for Time Limitations

It may seem unjust for a legislature to terminate the legal responsibility of a party who has wrongfully caused harm to another person, no matter how much time has passed since the harmful event occurred. Yet the law has recognized across the ages—from early Hebrew law,\(^\text{115}\) to late Roman law,\(^\text{116}\) thence into early German law,\(^\text{117}\) in early English law,\(^\text{118}\) and in the early law of this nation\(^\text{119}\)—that there is good reason to call a halt to legal responsibility for most wrongs after some period of time. In the products liability context, a major reason for eventually calling an end to litigation about old products is the simple fact that the available proofs—of the manufacturer’s alleged wrongdoing, the product’s alleged defectiveness, the plaintiff’s alleged harms, and the alleged causal connection between them all—diminish over time. The legal system thus operates less accurately and hence less fairly in attempting to ascertain responsibility for harm as the years roll by after dam-

\(^{115}\) See Deuteronomy 15:1 (7 years—money debts should be cancelled).
\(^{116}\) See Rudolph Sohm, The Institutes: A Textbook of the History and System of Roman Private Law § 54, at 282-85 (James Crawford Ledlie trans., 3d ed. 1970) (temporal limitations on civil actions were “quite exceptional” prior to 424 C.E., but from that date forward most claims were barred after thirty years, some after forty years, and some after shorter periods). See also Leopold Wenger, Institutes of the Roman Law of Civil Procedure § 16(7), at 170, and § 29(V), at 302-03 (Otis Harrison Fisk trans., 1940).
\(^{117}\) Sohm, supra note 116, at 284.
\(^{118}\) See Theodore F.T. Plucknett, A Concise History of the Common Law 719 (5th ed. 1956) (after 1540, “no seisin could found a claim in a writ of right unless it was within sixty years of the date of the writ”).
\(^{119}\) See United States v. Kubrick, 444 U.S. 111, 117 (1979) (citing Bell v. Morrison, 26 U.S. (1 Pet.) 351, 360 (1828) and other cases):

Statutes of limitations, which “are found and approved in all systems of enlightened jurisprudence,” Wood v. Carpenter, 101 U.S. 135, 139 (1879), represent a pervasive legislative judgment that it is unjust to fail to put the adversary on notice to defend within a specified period of time and that “the right to be free of stale claims in time comes to prevail over the right to prosecute them.” Railroad Telegraphers v. Railway Express Agency, 321 U.S. 342, 249 (1944). These enactments are statutes of repose; and although affording plaintiffs what the legislature deems a reasonable time to present their claims, they protect defendants and the courts from having to deal with cases in which the search for truth may be seriously impaired by the loss of evidence, whether by death or disappearance of witnesses, fading memories, disappearance of documents, or otherwise.

See generally 1 Corman, supra note 110, § 1.1.
aging events.\textsuperscript{120} witnesses (and the parties and their agents) forget important facts, move, grow old, and eventually die; defendant manufacturers change their personnel, merge, and otherwise transform in myriad ways; and physical objects pertinent to a particular case—the product, its environment of use and failure, and documentary evidence of its creation, the accident, and the plaintiff’s injuries—deteriorate, are discarded, or otherwise disappear. In addition to these practical reasons of diminishing proof for time limitation statutes, they are substantively supported by the fact that the needs served by the justice system—deterrence, retributive justice, and even compensation—tend to lessen over time. Similarly, the economic logic of loss-shifting to manufacturers and their insurers diminishes with time, not only with respect to the goal of efficiently deterring wrongdoing but also because manufacturers and their insurers can organize their resources more efficiently if they have some reasonable basis for estimating their exposure to liability for past occurrences. Finally, the equities of providing judicial remedies to persons who have long neglected to use them—who have “sat upon their rights”—weaken as the years progress. In short, after some period of time, in fairness to potential defendants and in recognition of the limits of the courts, victims of wrongdoing who have long ignored their rights can fairly be required to accept their bygone losses as their own.\textsuperscript{121}

2. Types of Time Limitation Statutes

As further explained below, time limitation statutes come in a variety of forms. The two basic types of time limitation statutes are statutes of limita-

\textsuperscript{120} Bd. of Regents v. Tomanio, 446 U.S. 478 (1980):
The process of discovery and trial which results in the finding of ultimate facts for or against the plaintiff by the judge or jury is obviously more reliable if the witness or testimony in question is relatively fresh. Thus in the judgment of most legislatures and courts, there comes a point at which the delay of a plaintiff in asserting a claim is sufficiently likely either to impair the accuracy of the factfinding process or to upset settled expectations that a substantive claim will be barred without respect to whether it is meritorious.

\textit{Id.} at 487.

\textsuperscript{121} See, e.g., Albrecht v. Gen. Motors Corp., 648 N.W.2d 87, 91 (Iowa 2002).
The primary consideration underlying such legislation is undoubtedly one of fairness to the defendant. There comes a time when he ought to be secure in his reasonable expectation that the slate has been wiped clean of ancient obligations, and he ought not to be called on to resist a claim when “evidence has been lost, memories have faded, and witnesses have disappeared.”

and statutes of repose. While both forms of statute cut off a defendant’s products liability exposure after a period of time, they operate quite differently. The time periods of statutes of limitations are shorter—from as short as 1 year to as long as 6 years, depending on the jurisdiction—than those of statutes of repose, which run from 5 or 6 years, in a few jurisdictions, to as long as 18 or 20 years, in others. But there are a number of other important differences between these two types of time limitation statutes. For example, statutes of limitations begin to run at the time an injury occurs or is discovered (actually or constructively), whereas statutes of repose generally begin to run when a product is sold; statutes of limitations normally may be delayed or "toll" by certain equitable circumstances, such as a plaintiff’s infancy or failure to discover an injury, whereas statutes of repose ordinarily may not; a number of other important differences distinguish the two basic forms of time limitation statutes.\textsuperscript{122}

Statutes of limitations come in various forms. All states have statutes of limitations applicable to personal injury torts, and separate statutes of limitations for wrongful death. In the absence of a more specific statute, such as a products liability statute of limitations,\textsuperscript{123} these general statutes of limitations govern products liability claims for both negligence and strict liability in tort. In addition, most states have statutes of limitations in their commercial codes applicable to warranty claims. An increasing number of states, now a slight majority, have special statutes of limitations applicable specifically to products liability claims.

Statutes of repose also come in a number of forms. The most basic form of repose statute pertains to products liability claims generally, but some such statutes make exception for particular types of products, such as asbestos. A quite different form of repose statute, called a “useful-life” statute, bars a plaintiff’s claim at the expiration of the product’s useful-life rather than after a set period of time. In addition, some states apply repose statutes governing improvements to realty to cases involving products attached to land, such as large grain silos or overhead cranes. Finally, a federal statute of repose places outer time limits on products liability claims against manufacturers of small planes.

\textsuperscript{122} For example, as stated earlier, a statute of limitations defense, being remedial, may be waived if not raised in a timely manner; but a statute of repose defense, based on the termination of a plaintiff’s rights, may not.

\textsuperscript{123} Specific statutes of limitations, such as those governing products liability actions, normally take precedence over general statutes of limitations for personal injuries or wrongful death. See, e.g., Harper v. Holiday Inns, Inc., 498 F. Supp. 910, 912 n.2 (D. Tenn. 1978), aff’d, 633 F.2d 215 (6th Cir. 1980); Kambury v. Daimler-Chrysler Corp., 50 P.3d 1163, 1166 (Or. 2002) (en banc).
B. Statutes of Limitations

1. In General

a. Tort Law Statutes

Every jurisdiction has a statute of limitations governing claims for personal injuries or tortiously-caused harm, with time periods ranging from 1 year (in California, Kentucky, Louisiana, and Tennessee) to 6 years (in Maine and North Dakota). The most common periods are 2 and 3 years.124 Separate statutes of limitations governing wrongful death and survival claims normally are of the same duration as the injury statutes, but they are sometimes shorter125 and occasionally longer.126 Although a state may have a special statute of limitations for fraud or tortious misrepresentation, the statute of limitations governing personal injuries, wrongful death, or tortious misconduct may apply when the misconduct results in personal injury or death because the defendant’s misrepresentation is “wrongful” or “tortious” behavior resulting in personal injury or death.127 And if the gist or gravamen of a products liability claim is really negligence or strict liability in tort for selling a defective product, a court may not allow a plaintiff to circumvent a shorter personal injury statute by alleging fraud.128

Traditionally, tort law claims begin to run when the claim “accrues,” which is when the tort is complete because all of its elements have occurred. The last element in a tort is the plaintiff’s damage—harm that is proximately


125. See D.C. (injuries—3 years, death—1 year); Florida (injuries—4 years, death—2 years); Maine (injuries—6 years, death—2 years); Missouri (injuries—5 years, death—3 years); Nebraska (injuries—4 years, death—2 years); N.C. (injuries—3 years, death—2 years); Utah (injuries—4 years, death—2 years); Wyoming (same). Time periods for and citations to each jurisdiction’s statute of limitations for wrongful death are collected in Chart of Wrongful Death Statutes, Prod. Liab. Rep. (CCH) ¶ 3240.

126. See Minn. (injuries—2 years, death—3 years); N.H. (injuries—3 years, death—6 years); Or. (injuries—2 years, death—3 years). Chart of Negligence Statutes of Limitations, Prod. Liab. Rep. (CCH) ¶ 3210; Chart of Wrongful Death Statutes, Prod. Liab. Rep. (CCH) ¶ 3240.


caused by the defendant’s breach of duty. For this reason, the traditional rule was that a tort law statute of limitations begins to run at the time the plaintiff is injured. A number of limitations statutes, even special products liability statutes, still are phrased in terms of when the tort or products liability cause of action arises or accrues, and some actually specify that the statutory period begins when the damage occurs. However, a majority of states now have jettisoned the traditional accrual rule based on the time of injury, in favor of the discovery rule discussed below.

b. Warranty Law Statutes

State commercial law statutes contain statutes of limitations for warranty claims, based on Uniform Commercial Code § 2-725(1), Statute of Limitations in Contracts for Sale. In the absence of other agreement, this section specifies a 4-year limitation period for Article 2 breach of warranty claims. This provision is quite specific, and it would seem that courts would be bound to apply this statutory period—which often is longer than the jurisdiction’s limitation period for torts—to products liability claims brought in warranty. Duly considering themselves so bound, many courts apply the

129. See Keeton et al., supra note 69, § 30; Woods, supra note 112, § 4.
133. Except in Oklahoma (5 years), Mississippi (6 years), South Carolina (6 years), Wisconsin (6 years), and Rhode Island (10 years). Chart of Contracts Statutes of Limitations, Prod. Liab. Rep. (CCH) ¶ 3220.
134. U.C.C. § 2-725(1) (1977) provides: “An action for breach of any contract for sale must be commenced within four years after the cause of action has accrued. By the original agreement the parties may reduce the period of limitation to not less than one year but may not extend it.”
Article 2 limitations provision to products liability claims brought in warranty.\footnote{See, e.g., Hughes v. Allegiance Healthcare Corp., 152 F. Supp. 2d 667, 674-75 (E.D. Pa. 2001); Strange v. Keiper Recaro Seating, Inc., 117 F. Supp. 2d 408, 410 (D. Del. 2000), aff’d, 281 F.3d 224 (3d Cir. 2001). See generally 4 FRUMER & FRIEDMAN, supra note 29, § 26.03[4][a][iv] (noting that a majority of courts apply § 2-725 to all breach of warranty actions).} But a number of courts, sometimes drawing on the warranty law derivations of the doctrine of strict products liability in tort, reason that modern products liability actions for personal injuries (and death) sound more properly in tort than in warranty.\footnote{Courts that ignore the legislature in this respect struggle to find a convincing rationale for this imperious behavior, often attempting to justify their decisions by drawing upon such dubious factors as the nature of the injury (if the injuries are tort-like, then the tort-law statute is supposedly appropriate) and whether the parties are in privity of contract (if not, then the tort-law statute may be applied). Neither of these rationales is sound. See 1 CLARK & SMITH, supra note 132, §§ 11:14-16.} So flouting the legislature’s prerogative to define warranty statutes of limitations however it may choose,\footnote{See id. § 11.17, at 11-99 (characterizing a court’s ignoring of UCC § 2-725 as “statutory destruction”). “In all cases the court should invoke the statute of limitations applicable to the cause of action.” Id.} these courts thus have held that the tort law statutes of limitations apply to warranty as well as tort claims in ordinary products liability actions.\footnote{See, e.g., Fritchie v. Alumax, Inc., 931 F. Supp. 662, 671-72 (D. Neb. 1996); Taylor v. Ford Motor Co., 408 S.E.2d 270 (W. Va. 1991) (state’s 2-year tort law statute barred plaintiff’s breach of warranty claim for personal injuries brought within 4 years of product’s delivery). See generally 1 CLARK & SMITH, supra note 132, § 11:15, at 11-94 to 11-95 (“Unfortunately, some courts are willing to ignore the plain language of Section 2-725 when personal injury is sought under a warranty banner, thus fuzzing the line between tort and warranty.”).} Section 2-725(2) of the Code provides that the statute of limitations on breach of warranty claims under Article 2 “accrues” when the breach occurs, which generally is when the product is “tendered for delivery” unless the seller has explicitly extended the warranty to future performance:

A cause of action accrues when the breach occurs, regardless of the aggrieved party’s lack of knowledge of the breach. A breach of warranty occurs when tender of delivery is made, except that where a warranty explicitly extends to future performance of the goods and discovery of the breach must await the time of such performance the cause of action accrues when the breach is or should have been discovered.\footnote{See supra note 132. See U.C.C. § 2-725(2) (1977). See the nonuniform variations in Alabama and Maine, where claims for personal injury accrue when the injury occurs; in South Carolina, which substitutes the discovery rule.}
This means that the 4-year statute of limitations on warranty claims normally begins to run when the seller tenders delivery to a buyer—which usually is when the buyer first takes delivery of a product—whether or not the buyer or other plaintiff has reason to know at that time that the product is unmerchantable or an express warranty is false. In other words, the Code explicitly rejects the discovery rule. However, as with the 4-year time period in § 2-725(1), courts applying § 2-725(2) to personal injury cases sometimes ignore its explicit language and apply the discovery rule to warranty actions involving personal injuries.140

Section 2-725(2) contains some ambiguous wrinkles. First is the issue concerning a product’s “shelf-life,” a problem which results when a manufacturer tenders delivery of a product to a retailer who places it on a shelf for three years before selling it and tendering delivery to a buyer. If the product malfunctions and injures the buyer two years thereafter (5 years after the manufacturer tendered delivery to the retailer, but only 2 years after the retailer tendered delivery to the injured purchaser) and if the injured buyer thereupon sues the manufacturer for breach of warranty, a court will have to determine which tender of delivery started the 4-year time limitations clock ticking under § 2-725(2). On this point the courts disagree, some ruling that the period begins to run on the manufacturer’s tender of delivery141 in order to promote commercial certainty, others holding that the period begins only when delivery by somebody is tendered to the buyer142 in order to spread the risk of loss and allow an injured plaintiff at least some chance to bring an action for breach of warranty.143

A second interpretative wrinkle in § 2-725(2) concerns the question of when a seller’s warranty “extends to future performance,” in which event the 4-year time period does not begin to run until the plaintiff does or should discover the breach of warranty, (normally the time of injury). Because the discovery-rule exception applies only to warranties that “explicitly” extend to future performance, the courts are quite clear in holding that this exception cannot logically apply to implied warranties.144

140. See infra Section III.B.2.b. for discussion of discovery rule.
144. See 1 CLARK & SMITH, supra note 132, § 11:5, at 11-51 (“The courts have consistently ruled that implied warranties of merchantability and fitness do not explicitly extend to future performance.”). See, e.g., Marvin Lumber and Cedar Co. v. PPG Indus., Inc., 223 F.3d 873 (8th Cir. 2000) (applying Minnesota law) (implied warran-
would in a sense seem always to extend to a product’s future performance, most courts have been reluctant to rule that normal express warranties "explicitly" so extend. 145 Consequently, unless an express warranty (as distinguished from a remedy, such as repair or replacement) 146 provides that it will last for a specified period of time, 147 most courts hold that such a warranty does not extend to future performance, which means that the 4-year limitations period begins to run when delivery is tendered rather than when plaintiff discovers the harm. 148

c. Products Liability Statutes

An increasing majority of states have enacted special statutes of limitations, usually as part of a larger products liability reform act, that specifically govern products liability claims. 149 Because they apply specially to products liability claims, such provisions take precedence over more general statutes of limitations covering torts, personal injuries, and wrongful death. 150 Products


145. See 1 CLARK & SMITH, supra note 132, § 11:4 (noting that the great bulk of cases refuse to find that warranties extend to future performance).

146. See, e.g., Tittle v. Steel City Oldsmobile GMC Truck, Inc., 544 So. 2d 883 (Ala. 1989) ("repair-or-replacement" warranty for 36,000 miles or 36 months addresses remedy, not warranty, and so does not explicitly extend to future performance). But see Miss. Chem. Corp. v. Dresser-Rand Co., 287 F.3d 359 (5th Cir. 2002) (applying Mississippi law) (limitations period based on "repair or replace" provision did not begin to run until the promise to repair or replace failed of its essential purpose); Krieger v. Nick Alexander Imports, Inc., 285 Cal. Rptr. 717 (Cal. Ct. App. 1991) (promise to repair defects that occur within 36,000 miles or 36 months explicitly extends to future performance; discovery rule applied).

147. Such as a two-year limited express warranty, or a limited automotive warranty for the lesser of 3 years or 36,000 miles.


149. The statutes are listed and described in Chart of Negligence Statutes of Limitations, Prod. Liab. Rep. (CCH) ¶ 3210.

150. See, e.g., Kambury v. DaimlerChrysler Corp., 50 P.3d 1163, 1166 (Or. 2002) (applying ordinary canon of statutory construction, held 2-year products liability
liability statutes of limitations typically apply to all "products liability claims," including claims for breach of warranty and wrongful death. Yet, because of Article 2's special statute of limitations for warranty claims in UCC § 2-725, it is unclear whether a legislature's enactment of a statute of limitations for "products liability claims" captures warranty claims under that umbrella. Many products liability statutes cure this ambiguity by specifying the types of claims included, as by expressly including or excluding breach of warranty and possibly other types of claims, such as those for wrongful death. Colorado's products liability statute, for example, specifies that all products liability actions for personal injury or death, other than in warranty, must be brought within two years after a claim for relief arises. Some special products liability statutes combine statutes of limitations with statutes of repose.

2. Stopping the Clock

Certain conduct by a defendant, or a plaintiff's status or reasonable ignorance of an injury or a products liability claim, may "toll"—stop the running of—the statute of limitations clock. Some statutes explicitly so provide, and courts sometimes apply the doctrine of equitable tolling to achieve the same result. Moreover, a statute of limitations clock may be delayed until the plaintiff's final exposure to a toxic substance; and long after the plaintiff first suffers an initial injury from such a substance, the limitations clock may begin to run anew if the plaintiff subsequently suffers another separate type of harm.

a. Tolling

The running of a statutory limitations period may be delayed on account of certain wrongful conduct by a defendant. If a defendant fraudulently prevents a plaintiff from learning that he or she has a products liability claim against the defendant, a court may apply the equitable doctrine of tolling to delay a statute of limitations from running until the plaintiff does or should

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statute of limitations, being more specific, trumps 3-year wrongful death statute). But see Alder v. Bayer Corp., 61 P.3d 1068, 1076 (Utah 2002) (4-year statute of limitations for negligence actions, and not 2-year statute of limitations for products liability actions, governed claim that manufacturer negligently installed and serviced its machine).

151. See, e.g., ARK. REV. STAT. § 16-116-103 (Michie 1999) (3 years—all products liability actions or injury, death, or damage); NEB. REV. STAT. § 25-224(1) (1995) (4 years—all products liability actions for injury, death, or damage).


154. See 2 CORMAN, supra note 110, at chs. 8-10; 4 FRUMER & FRIEDMAN, supra note 29, § 26.07.
discover the existence of the claim.\textsuperscript{155} For a defendant’s fraudulent concealment to be sufficient to toll a limitations statute, the defendant must act affirmatively to hide facts necessary to the plaintiff’s claim and thereby prevent the plaintiff from discovering its existence.\textsuperscript{156} Silence alone, including a failure to warn of a known defect, is insufficient.\textsuperscript{157} As a predicate for tolling on the basis of fraudulent concealment, most jurisdictions require that the plaintiff prove the defendant’s intent to deceive the plaintiff.\textsuperscript{158} Even in the absence of an intent to deceive, however, a defendant whose misrepresentation is relied upon by a plaintiff may be equitably estopped from relying on a statute of limitations.\textsuperscript{159}

By statute and case law, most states toll statutes of limitations for claims by plaintiffs whose disabilities interfere with a fair opportunity to pursue a legal claim. Most states, but not all, also toll statutes of limitations for a minor’s claims until he or she reaches the age of majority.\textsuperscript{160} In addition, at least when the defendant’s product causes a person to become mentally incompetent, a plaintiff’s incompetency may toll the statute of limitations.\textsuperscript{161} Further,
federal law provides for the tolling of claims by persons on active duty in the armed services.162

Various jurisdictions toll statutes of limitations in a miscellany of other situations. Statutes in some states protect retailers and other nonmanufacturing defendants from strict liability unless, among other things, the manufacturer is (or is likely to become) insolvent.163 In a state with such a statute, if a plaintiff after diligent investigation chooses not to join a nonmanufacturing defendant because the manufacturer (or its successor) reasonably appears likely to remain solvent, a court may toll the statute of limitations against the nonmanufacturing seller until the plaintiff should discover the manufacturer’s insolvency.164 And, while a class action is pending certification, most courts toll the statute of limitations provisionally, in case the petition fails, for the individual claims of persons who would have been class members had the class action been approved.165

(Statute not tolled for plaintiff who was on nearly constant pain medication in hospital after accident and often did not know where she was).


163. See Owen, supra note 1, § 15.2.


b. The Discovery Rule

In products liability actions involving toxic substances (such as asbestos, dangerous drugs, other toxic chemicals) and medical devices implanted in the human body, a plaintiff may have no way to know that he or she has suffered injury until long after it first occurs. For example, the incubation period for mesothelioma, a form of lung cancer resulting from inhaling asbestos dust, may be as long as 40 years. If a statute of limitations begins to run on a plaintiff's claim for harm from a toxic substance at the time the plaintiff first suffers harm, the conventional accrual point for tort law claims as discussed above, then the limitations statute would bar the legal rights of many persons injured by toxic substances before they even knew that they were injured. Applying the traditional accrual rule to cases of this type, as courts used to do, snuffed out the products liability rights of many consumers and workers to recover for grievous injuries caused by the most insidious kinds of defective products.

Beginning in the 1960s and 1970s, several courts began to remedy this problem by extending the "discovery rule" from medical malpractice litigation, where it had been incubating, to products liability litigation. Under the discovery rule, a cause of action accrues not when the plaintiff is injured but when the plaintiff discovers, or in the exercise of reasonable diligence should discover, pertinent facts about the injury. Today, courts in the vast majority of jurisdictions apply the discovery rule to products liability cases, and some states have codified the rule, either for tort actions gener-

166. See Hamilton v. Asbestos Corp., 998 P.2d 403, 407 (Cal. 2000) (noting 30-
40 year latency period for mesothelioma).
168. A progenitor case was Urie v. Thompson, 337 U.S. 163 (1949) (FELA compensation claim for silicosis).
169. See KEETON ET AL., supra note 69, § 30.
ally or for products liability actions in particular. Some courts and statutes specify that the discovery rule, or some particular version of it, applies to cases involving injuries or illnesses from toxic substances, cases where the rule is needed most.

Courts and legislatures are widely split on precisely what type of facts a plaintiff must discover to trigger a limitations statute and start the clock ticking. Some jurisdictions start the clock when the plaintiff learns or should be aware that he or she is ill or injured, while others hold that the clock does on a case-by-case basis, while others hold that their states’ various statutes of limitation do not allow a discovery rule. See Colormatch Exteriors, Inc. v. Hickey, 569 S.E.2d 495 (Ga. 2002) (discovery rule does not apply to 4-year statute for damage to realty); Hoffman v. Orthopedic Sys., Inc., 765 N.E.2d 116 (III. App. Ct. 2002) (case-by-case basis); Griffith v. Blatt, 51 P.3d 1256 (Or. 2002) (discovery rule does not apply to 2-year products liability statute of limitations).


174. See, e.g., N.Y. C.P.L.R. 214-c(2) (McKinney 2003) (discovery rule applies to harm "caused by the latent effects of exposure to any substance or combination of substances, in any form, upon or within the body or upon or within property"); Carter v. Brown & Williamson Tobacco Corp., 778 So. 2d 932 (Fla. 2000) (discovery rule applies to "creeping diseases" such as lung cancer); Barnes v. A.H. Robins Co., 476 N.E.2d 84 (Ind. 1985) (discovery rule adopted for use in limited context of claims of injuries from "protracted exposure to a foreign substance"—Dalkon Shield IUD). See also OR. REV. STAT. § 30.907 (2003) (claims for asbestos injuries to be brought within 2 years of when injuries were or should have been discovered, in contrast to 2-years from date of injury for normal products liability claims under Oregon Revised Statute Section 30.905).

175. See, e.g., Adams v. Armstrong World Indus., Inc., 847 F.2d 589 (9th Cir. 1988) (applying Idaho law) (asbestos; when asbestosis or other injury was "objectively ascertainable"); Wiggins v. Boston Scientific Corp., No. CIV. A. 97-7543, 1999 WL 94615 (E.D. Pa. Jan. 7, 1999) (broken guide wire in heart; statute began to run when plaintiff learned or reasonably should have learned of objective and ascertainable injury); Bendix Corp. v. Stagg, 486 A.2d 1150 (Del. 1984) (asbestosis; when harmful effect was manifested, physically ascertainable); Condon v. A. H. Robins Co., 349 N.W.2d 622 (Neb. 1984) (Dalkon Shield; when harmful effect was reasonably discovered); Wetherill v. Eli Lilly & Co., 678 N.E.2d 474 (N.Y. 1997) (DES; discovery of primary condition), superseded by statute as stated in, Germantown Central School Dist. v. Clark, Clark, Millis & Gilson, 743 N.Y.S.2d 599 (N.Y. App. Div. 2002); Cavanagh v. Abbott Labs., 496 A.2d 154 (Vt. 1985) (DES; when vaginal cancer was discovered). Statutes to this effect include CONN. GEN. STAT. § 52-577a(a); MO. REV. STAT. § 516.100 (2000); S.D. CODIFIED LAWS § 15-2-12.2 (Michie 2004); VT. STAT. ANN. tit. 12, § 512(4) (2002).
not begin to run until the plaintiff discovers both the injury and its cause.\textsuperscript{176} Even these latter courts cannot agree on how specific the plaintiff’s discovery of “cause” must be. Some courts start the clock only when the plaintiff discovers a causal connection between the injury and a particular product;\textsuperscript{177} others start the clock only when the plaintiff discovers the identity of the party responsible for causing the injury (the defendant);\textsuperscript{178} and some require that the plaintiff must discover the defendant’s wrongdoing—that he or she has a cause of action, or at least be put on notice of that reasonable possibility.\textsuperscript{179} One reasonable way to formulate a discovery rule, capturing the es-

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\textsuperscript{176} See, e.g., Johnson v. Sandoz Pharm. Corp., 24 FED App. 533 (6th Cir. 2001) (applying Kentucky Law) (prescription drug Parlodel); statute not triggered until plaintiff has reasonable opportunity to discover causal relationship between drug and stroke); Brown v. E.I. DuPont de Nemours & Co., 820 A.2d 362 (Del. 2003) (fungicide; plaintiff knew or should have known both of the injury and that injury may have been caused by the defendant’s tortious conduct); Carter v. Brown & Williamson Tobacco Corp., 778 So. 2d 932 (Fla. 2000) (statute does not begin to run on latent injury for “creeping disease,” like lung cancer from smoking, until plaintiff is on notice of causal connection between exposure to product and an injury); Dorman v. Osmose, Inc., 782 N.E.2d 463 (Ind. Ct. App. 2003) (chromated copper arsenate used in treating wood; plaintiff must know or should have known both of his injury and that it was caused by product or acts of another); Baldwin v. Badger Mining Corp., 663 N.W.2d 382 (Wis. Ct. App. 2003) (allegedly defective respirator masks; plaintiff must know or should have known both of his injury and that injury probably was caused by defendant’s product or conduct). See generally 4 FRUMER & FRIEDMAN, supra note 29, §§ 26.04[4][b], [f] (listing, as following this rule, Arkansas, California, Connecticut, Georgia, Illinois, Kentucky, Louisiana, Massachusetts, Michigan, Minnesota, Missouri, New Hampshire, Ohio, Oklahoma, Pennsylvania, Tennessee, and Utah).

\textsuperscript{177} See, e.g., Stewart v. Philip Morris, Inc., 205 F.3d 1054 (8th Cir. 2000) (applying Arkansas law) (connection between cigarette smoking and breathing and coughing problems); Bowen v. Eli Lilly & Co., 557 N.E.2d 739 (Mass. 1990) (connection between DES and cancer).

\textsuperscript{178} See, e.g., Michals v. Baxter Healthcare Corp., 289 F.3d 402 (6th Cir. 2002) (applying Kentucky law) (breast implants; plaintiff must know or should have known that she has been wronged and by whom wrong has been committed). See generally 4 FRUMER & FRIEDMAN, supra note 29, § 26.04[4][g] (listing, as following this rule, Arizona, Kentucky, New Hampshire, Oregon, Puerto Rico, Washington, and West Virginia).

\textsuperscript{179} See, e.g., Welch v. Celotex Corp. 951 F.2d 1235 (11th Cir. 1992) (applying Georgia law) (plaintiff must discover both injury and its causal connection to wrongful conduct); Clark v. Baxter Healthcare Corp., 100 Cal. Rptr. 2d 223, 227 (Cal. Ct. App. 2000) (""Under the discovery rule, the statute of limitations begins to run when the plaintiff suspects or should suspect that her injury was caused by wrongdoing, that someone has done something wrong to her.""") (quoting Jolly v. Eli Lilly & Co., 751 P.2d 923, 927 (Cal. 1988) (en banc)). See generally 4 FRUMER & FRIEDMAN, supra note 29, § 26.04[4][h] (listing, as following this rule, Alaska, Florida, Hawaii, Iowa, Michigan, Montana, New Jersey, Nevada, North Dakota, South Carolina, and Vermont). At least South Carolina’s rule is by statute. See S.C. CODE ANN. § 15-3-535

https://scholarship.law.missouri.edu/mlr/vol70/iss1/6
sence of what many courts have ruled, is to hold a statute triggered when an injured person acquires facts reasonably suggesting that a likely cause of the injury was a particular product that plausibly may have been defective.\textsuperscript{180} Knowledge of this type should put most people on notice that they should see a lawyer to determine if they have a legal remedy.\textsuperscript{181}

As seen above, the Uniform Commercial Code is perfectly clear in stating that claims for breach of warranty under the Code accrue on breach, defined as when tender of delivery occurs, “regardless of the aggrieved party’s lack of knowledge of the breach.”\textsuperscript{182} It is hard to imagine how the Code’s drafters could have been any more explicit in rejecting the discovery rule. Yet, for whatever reason,\textsuperscript{183} some courts have ignored the clear language and applied the discovery rule to products liability claims for breach of warranty involving personal injury or death.\textsuperscript{184}


A special statute of limitations issue arises when a single defective condition in a product harms a person in two or more separate ways at different times. A problematic question in such cases is when the statute of limitations should begin to run on the second injury—at the time the plaintiff discovered the first injury, or at the time he or she discovers the second. Normally, be-

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\textsuperscript{180} See, e.g., Dennis v. ICL, Inc., 957 F. Supp. 376 (D. Conn. 1997) (focus is on plaintiff’s knowledge of facts, not discovery of applicable legal theories); Jolly v. Eli Lilly & Co., 751 P.2d 923, 927-28 (Cal. 1988) (en banc) (DES; “[o]nce the plaintiff has a suspicion of wrongdoing, and therefore an incentive to sue, she must decide whether to file suit or sit on her rights”). For a case purporting to reject “inquiry notice” as the trigger for the discovery rule, see Salazar v. Am. Sterilizer Co., 5 P.3d 357, 363 (Colo. Ct. App. 2000).

\textsuperscript{181} Demanding any greater confidence in the existence of a products liability claim might require the plaintiff to have the expertise of a reader of this article, a result which would be monstrously unfair to normal plaintiffs.

\textsuperscript{182} U.C.C. § 2-725(2) (amended in 2003).

\textsuperscript{183} For example, some courts read U.C.C. § 2-725(2) as applying only to buyers rather than third parties. See, e.g., Salvador v. Atl. Steel Boiler Co., 389 A.2d 1148 (Pa. Super. Ct. 1978) (2-year tort statute, not U.C.C. § 2–725, applicable to all third party personal injury actions, tort and warranty, because “[i]t takes a very strained reading of Section 2–725 to conclude that it was ever meant to apply to persons other than the contracting parties”), aff’d, 424 A.2d 497 (Pa. 1981). This approach itself seems rather strained. However, in a state with a special statute of limitations for products liability claims, a court might reasonably conclude that a products liability statute of limitations trumps the Article 2 statute of limitations because the former is more specific than the latter.

\textsuperscript{184} See 1 CLARK & SMITH, supra note 132, § 11.15.
cause each breach of duty by a defendant is thought to generate a single, indivisible cause of action, a plaintiff is required to seek all damages caused thereby at the time the complaint is filed; thereafter, the plaintiff is precluded from suing the defendant again for damages arising from the same transaction. 185 So, if the operator of a defective punch press recovers damages for resulting injuries to his hand and arm in an action against the manufacturer, he cannot later maintain a second action against the manufacturer for injuries from the same accident that he subsequently discovers in his back. Underlying res judicata, this principle of claim preclusion is sometimes called the single-action rule, or the rule against claim-splitting. 186

Although the claim-splitting issue can arise in traumatic injury cases, such as the punch press situation just discussed, it most frequently and acutely arises in cases involving injuries and illnesses from toxic substances like asbestos. Two decades after exposure, 187 an asbestos worker may suffer asbestosis (or pleural thickening) for which damages may be available against the asbestos supplier, perhaps for failing to warn of the risk. Another one or two decades later, 188 long after the initial asbestosis claim is resolved, the very same worker may contract a deadly form of lung cancer, mesothelioma. In this context, some courts have applied the single-action rule to bar the second claim, holding that the statute of limitations on all claims runs from the first injury or its discovery. 189 However, “[g]iven the harshness of the single-

In most tort cases, the law provides a plaintiff one indivisible cause of action for all damages arising from a defendant’s breach of duty. This hoary rule against splitting a cause of action is designed to prevent vexatious and repetitive litigation of a single underlying claim when plaintiff’s injuries eventually result in damages that are more serious than originally contemplated. [Despite the real problem of proof and risks of undercompensation facing injured plaintiffs,] the specter of repetitive litigation and the lack of finality to litigation present unacceptable costs to the legal system. Thus, the single-action rule is deeply embedded in the jurisprudence of this country.

186. See FLEMING JAMES, JR. ET AL., CIVIL PROCEDURE § 11.8 (5th ed. 2001).


188. See id. (noting the 30- to 40-year average latency period of mesothelioma).

189. See, e.g., Gideon v. Johns-Manville Sales Corp., 761 F.2d 1129, 1136 (5th Cir. 1985) (“a plaintiff may not split this cause of action by seeking damages for some of his injuries in one suit and for later-developing injuries in another”). Compare Kemp v. G.D. Searle & Co., 103 F.3d 405 (5th Cir. 1997) (applying Mississippi law) (IUD caused pelvic inflammatory disease that eventually led to infertility; held, statute ran from discovery of PID 8 years prior to diagnosis of scarred fallopian tubes that caused plaintiff’s infertility). In smoking cases, courts have likewise applied the “first injury” rule, holding that the alleged addiction to cigarettes is the injury which trig-
action rule, . . . . the overwhelming majority of courts abandoned the single-action rule and now allow separate causes of action later, when a plaintiff actually develops asbestosis, lung cancer, or mesothelioma.¹⁹⁰ Thus, in place of the old single-action rule, courts in latent or "creeping" disease cases are rapidly switching over to a converse doctrine—the separate-injury or two-disease rule—which starts the limitations clock ticking on separate and distinct diseases at the time of their discovery.¹⁹¹

C. Statutes of Repose

1. Origin

The discovery rule, which courts and legislatures widely adopted in products liability litigation in the 1970s and 1980s, protects injury victims from losing their claims before they know that they have been harmed or that they may have a means of legal redress. But by delaying the running of statutes of limitations, sometimes for many years past the time of injury (and

¹⁹⁰. Henderson, Jr. & Twerski, supra note 185, at 821 (citing cases).

¹⁹¹. The fountainhead case was Wilson v. Johns-Manville Sales Corp., 684 F.2d 111, 120-21 (D.C. Cir. 1982) (diagnosis of asbestosis did not trigger limitations statute for other injuries from same exposure to asbestos). See also Potts v. Celotex Corp., 796 S.W.2d 678, 685 (Tenn. 1990) (same; good summary of rationales). For examples of recent cases, see Hamilton v. Asbestos Corp., 998 P.2d 403, 413-15 (Cal. 2000) (use of single-action rule in asbestos cases precluded by state statute); Parks v. A.P. Green Indus., Inc., 754 N.E.2d 1052 (Ind. Ct. App. 2001) (asbestos claim did not trigger statute of limitations for cancer claim since they are separate diseases); Carroll v. Owens-Corning Fiberglas Corp., 37 S.W.3d 699, 700, 703 (Ky. 2000) (although Kentucky has never been a "two disease" state, a cancer claim accrues on date of its diagnosis, not date of asbestosis diagnosis, since the diseases are separate and distinct); Pustejovsky v. Rapid-Am. Corp., 35 S.W.3d 643, 648 (Tex. 2000) ("[T]he single action rule is a catch-22 for victims of multiple latent diseases [because] [a] plaintiff who sues for asbestosis is precluded from any recovery for a later-developing lethal mesothelioma. But the discovery rule would preclude a plaintiff with asbestosis from waiting to see if an asbestosis-related cancer later develops . . . ."); Sopha v. Owens-Corning Fiberglas Corp., 601 N.W.2d 627, 630 (Wis. 1999) ("The diagnosis of a malignant asbestos-related condition creates a new cause of action and the statute of limitations governing the malignant asbestos-related condition begins when the claimant discovers, or with reasonable diligence should discover, the malignant asbestos-related condition.")
longaftertheproductwasmanufactured),thediscoveryruleunderminesthe
centralpurposeoflimitationssstatutes. Itwillbercalledthattraditionallimitationss
aredesignedtoprovideapointintimeafterwhichbothactorsandcourts
canavoidsaddressingclaimsforsinjuriesallegedlycausedbyactorsandsufferedbyvictimsmanyyearsinthepast. So,whilepromotingfairnessfor
injuredplaintiffs,thediscoveryrulepromotesunfairnessformanufacturers
andinconvenienceforcourts.

Inanattempttoreinstatepartofthedefendant-fairnessobjectivesoflimitationssstatutesinaworldcommittedtotheplaintiff-fairness
objectivesofthediscoveryrule,manystatelegislaturesfromthe1960sthrough
theearly1980s enactedstatutesof"repose."
A major pillar of the tort "re-
form"movement,thesespeciallimitationsstatutesaddressedproblemswith
long-delayedclaimsbythreeparticulargroupsdisadvantagedbythediscovery
rule: doctors, who wanted an eventual end to the threat of malpractice
suits for medical accidents; architects, engineers, and contractors, who
wanted an end to potential liability for injuries from buildings and other
structures that might last for centuries; and manufacturers of products, who may
have to answer products liability claims for products manufacturedmany
decades in the past.

2. Distinguished from Statutes of Limitation

Likestatutesoflimitations,productsliabilityandotherstatutesofre-
pose terminate a plaintiff's right to bring a claim after a period of time; but

192. See, e.g., Robert A. Van Kirk, Note, The Evolution of Useful Life Statutes in
the Products Liability Reform Effort, 1989 DUKE L.J. 1689, 1697-1702.
193. 4 FRUMER & FRIEDMAN, supra note 29, § 26.05[5][a] n.78:
The pyramids of Egypt, the Colosseum in Rome, the Parthenon in Greece
are only now, at the end of the twentieth century, starting to succumb to
the ravages of time. Consequently, it would be easy to imagine ten-,
twenty-, fifty- or even one-hundred-year-old buildings and other
structures as potential liability problems. So too are the products that are an
integral part of them, such as elevators, furnaces, heavy machinery and the
like.
194. On statutes of repose in general, see, for example, Josephine Herring Hicks,
Note, The Constitutionality of Statutes of Repose: Federalism Reigns, 38 VAND. L.
REV. 627 (1985). On products liability statutes of repose, see 4 FRUMER & FRIEDMAN,
supra note 29, § 26.05; 4 HURSH & BAILEY, supra note 29, §§ 47:55-:64; Michael M.
Martin, A Statute of Repose for Product Liability Claims, 50 FORDHAM L. REV. 745
(1982); Francis E. McGovern, The Variety, Policy and Constitutionality of Product
Liab. Rep. (CCH) ¶ 3100; Zitter, supra note 112, § 16 (products liability statutes of
repose).
195. Statutes of limitations and repose often are contrasted on the ground that a
limitations statute merely limits a plaintiff's right to seek a remedy for a defendant's
breach of duty, whereas a repose statute limits the duty itself. That is, the former

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statutes of repose are different in two principal respects. First, statutes of repose begin to run at a time certain: products liability statutes of this type typically run from the time the manufacturer first sells the product, and realty improvement statutes normally run from when the structure is completed. This aspect of repose statutes gives manufacturers much more confidence that their potential liability eventually will stop some number of years after a product has been manufactured and sold. Second, statutes of repose have a much greater duration than statutes of limitations, varying in length from state to state, from 5 or 6 years to as long as 10 or 12 or even 20 years. The much longer periods within which a claim may be filed under statutes of repose reflect a deference to the discovery rule’s objective of providing most persons injured by most products with an opportunity to assert their claims once they discover their injuries. While repose statutes bar some claims, sometimes even before they are discovered or otherwise accrue,196 such claims normally are infrequent and generally quite old. Moreover, as time marches on after particular products are made and sold, one must weigh the decreasing hardships of barring plaintiffs from making legitimate but aging claims against the increasing burdens on manufacturers and courts in responding to such claims long after the fact—a balance that at some point tips in favor of terminating claims after a reasonable but arbitrary period of time.197 For this reason, repose statutes do not normally allow for the kind of equitable tolling applied to statutes of limitations.198

3. Choice of Law

Differences between statutes of limitations and repose may affect the choice of law.199 Limitations and repose statutes often are contrasted on the ground that statutes of limitations are “procedural,” because they merely limit a plaintiff’s right to seek a remedy for a defendant’s breach of duty, whereas statutes of repose are “substantive,” because they limit the duty itself. Stated merely limits the time for bringing a claim after it has accrued, whereas the latter extinguishes the claim after a fixed period of time. See, e.g., Albrecht v. Gen. Motors Corp., 648 N.W.2d 87, 91 (Iowa 2002) (“a statute of limitations affects only the remedy, not the right, whereas a statute of repose affects the right itself, extinguishing existing rights or preventing rights from arising”) (citation omitted); Martin, supra note 194, at 749.

196. See, e.g., Albrecht, 648 N.W.2d at 91 (15-year statute of repose barred claim before car accident involving minor plaintiff).
197. See Schwartz, supra note 112, at 842-51.
another way, this traditional view characterizes statutes of limitation as procedural because they merely limit the time for bringing claims after they have accrued, whereas statutes of repose are characterized as substantive because, after a fixed period of time, they extinguish claims altogether.\textsuperscript{200} This procedural/substantive distinction is important in states that adhere to traditional conflict of laws principles and that lack an applicable borrowing statute. Traditionally, a forum state applied its own "procedural" statute of limitation even if another state's law governed the parties' substantive rights.\textsuperscript{201} Over time, many state legislatures altered this traditional rule by enacting "borrowing statutes" which typically provide that the forum state's court will borrow the statute of limitations of another state where the cause of action arose or accrued, or where the defendant resided or was domiciled.\textsuperscript{202} Courts adhering to the traditional procedural/substantive distinction which lack an applicable borrowing statute are divided on several points: whether a statute of repose is procedural or substantive,\textsuperscript{203} whether the traditional conflict of laws rule applies to its or another state's statutes of repose;\textsuperscript{204} and whether the forum state is bound by the other state's characterization of its statute of repose.\textsuperscript{205}

\begin{itemize}
\item \textsuperscript{200} See, e.g., Albrecht, 648 N.W.2d at 91 ("a statute of limitations affects only the remedy, not the right, whereas a statute of repose affects the right itself, extinguishing existing rights or preventing rights from arising") (citation omitted); Martin, supra note 194, at 749.
\item \textsuperscript{201} See, e.g., Sun Oil Co. v. Wortman, 486 U.S. 717 (1988) (because statutes of limitation are traditionally characterized as procedural, a state may apply its own statute of limitation to a claim governed by another state's law without violating due process or the full faith and credit clause).
\item \textsuperscript{203} Compare Walls v. Gen. Motors, Inc., 906 F.2d 143, 146 (5th Cir. 1990) (applying Oregon law) (repose statute is substantive) with Baxter v. Sturm, Ruger & Co., 32 F.3d 48, 49 (2d Cir. 1994) (per curiam) (applying Connecticut law) (repose statute is procedural).
\item \textsuperscript{204} See, e.g., Thornton v. Cessna Aircraft Co., 886 F.2d 85 (4th Cir. 1989) (applying South Carolina law) (under lex loci delicti rule of forum state, substantive law of place where accident occurred applied, including its statute of repose which barred tort claim; but warranty claim could proceed according to forum state law under UCC § 1-105 "appropriate relation" test).
\item \textsuperscript{205} See, e.g., Baxter, 32 F.3d 48 (Oregon products liability statute of repose is procedural and thus inapplicable in Connecticut lawsuit governed by Oregon's substantive law); Walls, 906 F.2d at 146 (Oregon products liability statute of repose is substantive, and thus applicable in Mississippi lawsuit governed by Oregon substantive law, because Mississippi is bound to apply Oregon's view that its statute of repose is substantive); Etheredge v. Genie Indus., Inc., 632 So. 2d 1324 ( Ala. 1994) (North Carolina products liability statute of repose is procedural and thus inapplicable
\end{itemize}
Characterizing statutes of repose as procedural or substantive is less important for choice of law purposes in jurisdictions that have adopted some form of the modern "most significant relationship" or "governmental interests" tests. Under this approach, courts generally apply the statute of limitations or repose of the state where the injury occurred unless the place of the injury is insignificant or another state has a greater interest in applying its time bars.\textsuperscript{206} For breach of warranty claims, the Uniform Commercial Code contains a choice of law provision providing that the law of the forum "applies to transactions bearing an appropriate relation to this state."\textsuperscript{207} This provision is generally construed as employing a standard similar to the "most significant relationship" test described above with one significant difference:

\begin{quote}
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in Alabama lawsuit governed by North Carolina substantive law even though North Carolina characterizes its statute of repose as substantive; Boudreau v. Baughman, 368 S.E.2d 849 (N.C. 1988) (Florida's 12-year products liability statute of repose, and not North Carolina's 6-year products liability statute of repose, applied because both statutes are substantive and the North Carolina lawsuit was governed by Florida's substantive law); Terry v. Pullman Trailmobile, 376 S.E.2d 47 (N.C. Ct. App. 1989) (North Carolina's 6-year products liability statute of repose did not apply to tort claims brought in a North Carolina lawsuit governed by New York's substantive law).

206. \textit{See}, \textit{e.g.}, Nelson v. Sandoz Pharms. Corp., 288 F.3d 954 (7th Cir. 2002) (applying New Jersey law) (Indiana law on the discovery rule applied and not New Jersey law on the discovery rule where the injury occurred in Indiana and New Jersey did not have a more significant relationship); Land v. Yamaha Motor Corp., 272 F.3d 514 (7th Cir. 2001) (applying Indiana law) (Indiana's 10-year products liability statute of repose applied where injury occurred in Indiana and the place of the injury was not insignificant); Jaurequi v. John Deere Co., 986 F.2d 170 (7th Cir. 1993) (applying Texas law) (Indiana's 10-year products liability statute of repose did not apply where injury occurred outside Indiana and Indiana did not have more significant relationship); Tune v. Philip Morris Inc., 766 So. 2d 350 (Fla. Dist. Ct. App. 2000) (Florida's 4-year statute of limitations, and not New Jersey's 2-year statute of limitations, applied where injury occurred in Florida and New Jersey did not have more significant relationship); Hall v. Gen. Motors Corp., 582 N.W.2d 866 (Mich. Ct. App. 1998) (North Carolina's 6-year products liability statute of repose applied where injury occurred in North Carolina and Michigan's only connection to lawsuit was that plaintiff moved there after injury); Gantes v. Kason Corp., 679 A.2d 106 (N.J. 1996) (Georgia's 10-year products liability statute of repose did not apply even though injury occurred in Georgia because New Jersey's interest in deterring tortious conduct by New Jersey manufacturers outweighed Georgia's interest in enforcing its statute of repose); Tanges v. Heidelberg N. Am., Inc., 710 N.E.2d 250 (N.Y. 1999) (applying Connecticut statute of repose to bar claim); Martin v. Goodyear Tire & Rubber Co., 61 P.3d 1196 (Wash. Ct. App. 2003) (Washington's 12-year useful life statute of repose, and not Oregon's 8-year product liability statute of repose, applied where injury occurred in Washington state and Oregon did not have a more significant relationship). \textit{Gantes} is examined in \textit{EUGENE F. SCOLES ET AL., CONFLICT OF LAWS} § 17.70 (3d ed. 2000).

\end{footnotesize}
\end{quote}
the focus is on the place of contracting or manufacture rather than the place of the injury. 208

4. Products Liability Statutes of Repose

There are two basic types of products liability statutes of repose, depending on how the statute defines the period of time before repose. The most common type of statute, "time-certain" statutes, define the time period with certainty as a particular number of years after the sale or purchase of the product. Another form of statute, called a "useful-life" statute, measures the time period variously, according to whatever a court or jury determines the particular product's useful, safe life to be. Presently, some fifteen states 209 have time-certain products liability statutes of repose in effect, and six states 210 have some form of useful-life statute of repose. 211 The most fundamental issue regarding statutes of repose concerns their constitutionality, discussed below.

a. Time-certain Statutes

The limitations periods of most products liability statutes of repose are absolute, and a plaintiff's rights to sue are terminated after a set period of time, ranging from 6 to 15 years, but most typically 10 years after the manufacturer first sold the product. 212 For example, Indiana's statute provides that

208. See Terry, 376 S.E.2d 47 (North Carolina's 6-year products liability statute of repose did not apply to tort claims brought in a North Carolina lawsuit governed by New York's substantive law but did apply to the breach of warranty claims because the sale and distribution of the product occurred in North Carolina). For more thorough discussions of choice of law in product liability cases, including statutes of limitation and repose, see R. Felix and the great conflicts masters, McDougAL, III ET AL., supra note 199.


211. One might question the characterization of useful-life statutes as statutes of repose, but that is what they are. See 4 FRUMER & FRIEDMAN, supra note 29, § 26.05[3][a] (distinguishing time-certain statutes, which it calls "true" statutes of repose, from useful-life statutes). While the limitation period of useful-life statutes is uncertain, these statutes do indeed put an end to (and hence place in "repose") product liability claims at some point. The useful life of a flashlight battery, for example, might be 3 to 5 years. If acid from a flashlight battery leaks and causes injury after 20 years, a useful-life statute surely would preclude a claim for such an injury.

212. See 4 FRUMER & FRIEDMAN, supra note 29, § 26.05[3][a]; McGovern, supra note 194, at 598, 638; Zitter, supra note 112, § 45[a].
“a product liability action must be commenced: ... within ten (10) years after the delivery of the product to the initial user or consumer.”

This 10-year repose provision does not apply to asbestos claims, and it may be extended up to two years for claims accruing after eight years. Indiana’s statute is atypical of the repose statutes, most of which are qualified in a number of respects. For instance, Arizona’s 12-year statute does not apply to negligence or express warranty actions; Colorado’s 10-year statute establishes a rebuttable presumption that an older product was not defective; and Georgia’s 10-year statute does not bar negligence claims resulting in “disease or birth defect, or arising out of conduct which manifests a willful, reckless, or wanton disregard for life or property,” nor does it bar actions for breach of the post-sale duty to warn; Iowa’s 15-year statute does not apply to asbestos, tobacco, and other types of products; Nebraska’s 10-year statute does not apply to warranty actions subject to UCC § 2-725, nor does it apply to asbestos claims; Oregon’s 8-year statute does not apply to claims arising out of asbestos or silicone breast implants; Tennessee’s 10-year statute applies if it is shorter than that state’s useful-life statute and does not apply to minors, nor does it apply to claims from asbestos or silicone gel breast implants which have a 25-year period; and Texas’s 15-year statute applies only to the sale of manufacturing equipment that has not been warranted to last longer.

In addition, several statutes have exceptions for the defendant’s fraudulent conduct; and other statutes specify applicable causes of action, defendants, and other circumstances to which they do or do not apply.

213. IND. CODE ANN. § 34-20-3-1(b)(2) (West 1999).

214. See id. The Indiana Supreme Court has held that its repose statute’s exception for certain asbestos claims is constitutional. AlliedSignal, Inc. v. Ott, 785 N.E.2d 1068 (Ind. 2003).


224. See 4 FRUMER & FRIEDMAN, supra note 29, § 26.05[3][b]. See, e.g., Masters v. Hesston Corp., 291 F.3d 985 (7th Cir. 2002) (applying Illinois law) (construing repose exception for products modified after they were originally made and sold and holding that hay baler was not modified within meaning of exception); Vickery v. Waste Mgmt. of Ga., Inc., 549 S.E.2d 482 (Ga. Ct. App. 2001) (plaintiff failed to
exception to repose statutes allowed by a few courts has been for a manufacturer's breach of its post-sale duty to warn. The post-sale duty to warn exception rests on the reasonable hypothesis that the purpose of repose legislation is to provide a manufacturer with eventual relief from liability for any errors it may have made at the time it designed, made, and sold its products—not for the negligent failure to observe its safety obligations that arise thereafter.

Products liability statutes of repose are drafted quite differently from state to state, and the courts have passed on a large variety of interpretative issues. For example, courts have ruled that while the discovery rule does not normally apply to statutes of repose, it may apply in cases involving latent diseases such as asbestosis, that a repose statute is not tolled for mental incompetency or infancy, that it may be tolled by a continuing breach of duty to warn, that it may bar a claim by a governmental plaintiff notwithstanding a contrary rule for statutes of limitations, and that it does or does not apply in a host of other situations.

prove that defendant fell within repose exception for willful, reckless, or wanton conduct).


228. See Penley v. Honda Motor Co., 31 S.W.3d 181 (Tenn. 2000) (plaintiff, who was on constant pain medication in hospital after accident often did not know where she was).

229. See Albrecht, 648 N.W.2d at 94-95.

230. See Sherwood, 746 A.2d at 738-39 (plaintiff not warned that blood she received in transfusion had not been tested for HIV).


232. See, e.g., Richardson v. Gallo Equip. Co., 990 F.2d 330 (7th Cir. 1993) (applying Indiana law) (statute of repose clock begins again once product is reconstructed—after back-up alarm added to forklift); Henderson v. Park Homes Inc., 555
b. Useful-life Statutes

Following an approach recommended in the late 1970s by the Commerce Department’s Interagency Task Force on Products Liability,233 several states adopted some form of “useful-life” statute,234 which is a weak form of statute of repose. Standing between rigid statutes of repose (that conclusively terminate liability after a set number of years from a product’s sale) and open-ended statutes of limitations (that keep a manufacturer’s responsibility open indefinitely), “useful-life” statutes cut off a manufacturer’s liability conclusively after a period of time, but only after a product’s “useful safe life” has expired. For this reason, useful-life statutes are viewed as something of a compromise,235 but a compromise filled with interpretative land mines and subject to criticism for being ambiguous.236

First enacted in Minnesota,237 useful-life statutes have also been adopted in a handful of other states.238 Most of the statutes provide that, at the end of

S.E.2d 926 (N.C. Ct. App. 2001) (defective synthetic stucco covered by products liability statute of repose, not real property improvement statute of repose; products liability statute of repose not equitably tolled by class action filing); Jones v. Methodist Healthcare, 83 S.W.3d 739, 743-44 (Tenn. Ct. App. 2001) (human blood is “product” within meaning of products liability statute of repose even though blood otherwise exempted from strict liability claims).

233. See Model Uniform Product Liability Act § 110(A) (1979), 44 Fed. Reg. 62,714, 62,732 (1979). The Model Act provided that a seller would not be subject to products liability if it proved that the harm occurred “after the product’s ‘useful safe life’ had expired,” unless it had expressly warranted the product for a longer period. Id. § 110[A][1]. The term “‘u’seful 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.” Id. Evidence on any particular product’s “useful safe life” may include: (a) the amount of its wear and tear; (b) its deterioration; (c) the types and frequency of its use, repair, renewal, and replacement; (d) any representations, warnings, or instructions about its maintenance, storage, use, or expected life; and (e) whether it was modified or altered. Id.

234. See 4 FRUMER & FRIEDMAN, supra note 29, § 26.05[4][a]; Van Kirk, supra note 192, at 1691.

235. See 4 FRUMER & FRIEDMAN, supra note 29, § 26.05[4][a].

236. See Hodder v. Goodyear Tire & Rubber Co., 426 N.W.2d 826, 830-33 (Minn. 1988) (en banc) (“ambiguous”; although jury found that useful life of corroded 26-year-old multi-piece rim for truck tire had expired, court held that statute placed no limits on duty to warn); Schwartz, supra note 112, at 848 (expressing some sympathy for concept, but criticizing such statutes as drafted for being “incoherent both theoretically and operationally”).

237. MINN. STAT. ANN. § 604.03 (West 2000).

its period of safe life, a product is presumed nondefective. A typical useful-life statute is Washington's, which provides: "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." Among the various differences between the statutes, Connecticut's normal 10-year period is extended to 60 years for asbestos claims, and the presumption of nondefectiveness does not arise at all if workers' compensation benefits are unavailable, provided that the injury occurs during the product's useful safe life.

Tennessee, which has a one-year statute of limitations, blends a useful-life statute with a statute of repose, terminating liability at the lesser of ten years or one year after the end of a product's anticipated life. The statutes in two other states, Kentucky and Colorado, while not using the "useful-life" concept, borrow the approach of creating a presumption of nondefectiveness but apply the presumption after a set period of time.

5. Realty Improvement Statutes

Many states have another entirely different form of statute of repose that may bar products liability claims with respect to a narrow category of old products—those attached to realty. During the 1950s and early 1960s, most state legislatures enacted real property improvement statutes of repose in an effort to stem the tide of rising liability claims confronting architects, engineers, and contractors who designed and built buildings and other structures that could last for decades if not centuries. Like time-certain products li-

Olson & Sons, Inc., 40 F.3d 1063 (9th Cir. 1994) (applying Washington law) (summary judgment for manufacturer of 21-year-old dump truck reversed and remanded where plaintiff's expert's affidavit asserted useful safe life was 30 years, putting matter in contention).

239. WASH. REV. CODE. § 7.72.060(2).
240. CONN. GEN. STAT. § 52-577a(e).
241. Id. § 52-577a(c).
242. TENN. CODE ANN. § 28-3-104(b)(2).
243. Id. § 29-28-103(a).
245. See, e.g., 4 FRUMER & FRIEDMAN, supra note 29, § 26.05[5][a]; McGovern, supra note 194, at 587; Margaret A. Cotter, Comment, Limitation of Action Statutes for Architects and Builders—Blueprints for Non-action, 18 CATH. U. L. REV. 361 (1969); Pamela J. Hermes, Note, Actions Arising out of Improvements to Real Property: Special Statutes of Limitations, 57 N.D. L. REV. 43 (1981); Jane Massey Draper, Annotation, Validity and Construction, as to Claim Alleging Design Defects, of Statute Imposing Time Limitations upon Action Against Architect or Engineer for Injury or Death Arising out of Defective or Unsafe Condition of Improvement to Real Property, 93 A.L.R.3d 1242 § 2[a] (1979), superseded in part by Martha Ratnoff Fleisher, Validity, as to Claim Alleging Design or Building Defects, of Statute Imposing Time
ability statutes of repose, realty improvement statutes of repose begin to run, not on the accrual of a plaintiff’s cause of action, but upon the occurrence of a designated event—usually the substantial completion of the improvement—without regard to when the injury occurs or is discovered. The length of time before repose varies in these statutes from as short as 5 years in Virginia, to as long as 20 years in Maryland, with a number of statutes at 6 years and the great majority at 10 years before the repose begins.246

Although some of the realty improvement repose statutes expressly provide that they are applicable only to the building professions, and not to products,247 most of the statutes do not provide explicitly one way or the other, leaving their application to products liability defendants to the courts. On this issue the courts have split, some construing their statutes as not applying to products liability defendants,248 others holding that their statutes do apply to manufacturers of products that are part of improvements to land.249 Several courts apply a more contextual approach, applying this type of statute of repose to manufacturers who also participate in some manner in installing or otherwise constructing a real estate improvement.250

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Limitations upon Action Against Architect, Engineer, or Builder for Injury or Death Arising out of Defective or Unsafe Condition of Improvement to Real Property, 2002 A.L.R.5th 21 (1995).

246. The statutes are summarized, and annotated, at Statutes of Repose, Prod. Liab. Rep. (CCH) ¶ 3100.


248. These state statutes do not apply to products liability defendants: Arkansas, Montana, Nevada, New Jersey, New Mexico, and North Dakota. See 4 FRUMER & FRIEDMAN, supra note 29, ¶ 26.05[5][a] n.86.

249. Such statutes do apply to products liability defendants: Florida, Iowa, Louisiana, Maryland, Massachusetts, Minnesota, and Utah. See id. ¶ 26.05[5][a] n.87.

Perhaps the central issue litigated concerning realty improvement statutes of repose is whether a particular product qualifies as an "improvement" to real property, often generally defined as a permanent addition to realty that enhances its value. Courts have applied these statutes and barred liability after the expiration of the period of repose in cases involving such products as precast concrete used in the structural framework of a garage; an outdoor incline conveyor; a glass vestibule attached to an airport terminal building; a mounting plate for an overhead garage door in a warehouse; a larry car for shuttling coal at a coke processing plant; a custom crane; a manufactured home; an ordinary house; a home furnace; an automatic garage door opener; an in-ground swimming pool; an above-ground swimming pool surrounded by an elaborate 3-tier deck; asbestos products; a concrete block curing machine; a 27-foot grain bin structure; Div. 2002) (statute does not protect manufacturer of mass produced underground storage tanks). See also Noll v. Harrisburg Area YMCA, 643 A.2d 81, 86-87 (Pa. 1994) (statute protects manufacturer that provides "individual expertise" on appropriateness of product for incorporation into property improvement). Cf. Meneely v. S.R. Smith, Inc., 5 P.3d 49 (Wash. Ct. App. 2000) (statute did not protect trade association that promulgated safety standards for swimming pool).


252. See Two Denver Highlands, 12 P.3d at 822.


260. See Dedmon v. Stewart-Warnier Corp., 950 F.2d 244 (5th Cir. 1992) (applying Texas law).


gas transmission lines;\textsuperscript{267} a sorting conveyor at a farm;\textsuperscript{268} a glass door installed in a school;\textsuperscript{269} an escalator;\textsuperscript{270} and a "Spin Around" playground amusement ride anchored to the ground.\textsuperscript{271}

Among the many types of products held \textit{not} to be protected under various \textit{realty improvement statutes} of repose are asbestos insulation\textsuperscript{272} and asbestos fireproofing\textsuperscript{273} sold as standard (not custom) products; fiberglass insulation;\textsuperscript{274} a standardized (rather than custom) switch installed in an electrical supply system;\textsuperscript{275} a steel tube mill;\textsuperscript{276} a rubber calender machine;\textsuperscript{277} a grass-seed mixer;\textsuperscript{278} a machine for removing doors from coke-ovens at a coke steel plant;\textsuperscript{279} formaldehyde-generating plywood used as a component in a home;\textsuperscript{280} and a diving platform.\textsuperscript{281}

6. Federal Repose Statute for Small Airplanes—"GARA"

More than manufacturers of most other types of products, manufacturers of general aviation aircraft were especially hard hit by the rapid expansion of

\textsuperscript{266} See Theunissen v. GSI Group, 109 F. Supp. 2d 505 (N.D. Miss. 2000).
\textsuperscript{269} See Mahathy v. George L. Ingram & Assoc., 584 S.W.2d 521 (Tex. App. 1979).
\textsuperscript{274} See Petro Stopping Ctrs., Inc. v. Owens-Corning Fiberglas Corp., 906 S.W.2d 618 (Tex. App. 1995).
\textsuperscript{277} See McIntyre v. Farrell Corp., 97 F.3d 779 (5th Cir. 1996) (per curiam) (applying Mississippi law).
\textsuperscript{281} See Noll v. Harrisburg Area YMCA, 643 A.2d 81 (Pa. 1994).
products liability law during the 1980s, a time when the industry was facing a number of other serious problems. Within about fifteen years, from the late 1970s to the early 1990s, the general aviation industry was “decimated.”

Whereas some twenty-nine manufacturers of general aviation aircraft (led by Piper, Cessna, and Beech) had manufactured more than fourteen thousand light piston airplanes per year in the late 1970s, by 1993, the remaining nine manufacturers produced only about five hundred small planes. Congress finally responded, amending the Federal Aviation Act with the General Aviation Revitalization Act of 1994 (GARA). GARA provides an 18-year statute of repose, from the date of first delivery, for manufacturers of “general aviation aircraft and the components, systems, subassemblies, and other parts of such aircraft.”

This federal statute makes exception for (and hence does not bar) claims for fraud, breach of express warranty, and those...


283. See McAllister, supra note 282, at 306.


286. GARA § 3(3). A “general aviation aircraft” is defined as a plane having less than 20 passenger seats and not engaged in scheduled passenger-carrying operations at the time of the accident. Id. § 2(c).


288. GARA § 2(b)(1). See, e.g., Rickert v. Mitsubishi Heavy Indus., Ltd. 929 F. Supp. 380 (D. Wyo. 1996) (knowing misrepresentations exception to GARA requires plaintiff to offer evidence on knowledge, misrepresentation, concealment or withholding required information to or from FAA, materiality, relevance, and causation); Butler v. Bell Helicopter Textron, Inc., 135 Cal. Rptr. 2d 762 (Cal. Ct. App. 2003) (manufacturer’s failure to report tail rotor yoke failure in violation of FAA’s reporting...
brought by passengers being transported for medical emergencies or by persons injured or killed on the ground.\textsuperscript{289}

For each new component added to an existing aircraft, GARA's 18-year repose period starts anew, a provision aptly referred to as the statute's "rolling" feature.\textsuperscript{290} The clock thus starts ticking again for manufacturers of replacement parts,\textsuperscript{291} including a successor of a predecessor company that actually made the part,\textsuperscript{292} at the time the part is installed in an existing plane.\textsuperscript{293} In an important decision, the Ninth Circuit Court of Appeals ruled that each aircraft's \textit{flight manual} is a "part" of an aircraft falling within GARA's rolling provisions.\textsuperscript{294} Accordingly, the limitations clock for each \textit{revision} of a flight manual, if causally responsible for an accident, starts ticking on the date of the revision.\textsuperscript{295} But a manufacturer's revision of a manual on one point will not stop the clock ticking on other inadequacies in the original manual, requirement triggered fraud exception to GARA). \textit{Compare} Campbell v. Parker-Hannifin Corp., 82 Cal. Rptr. 2d 202, 210 (Cal. Ct. App. 1999) (insufficient evidence of fraudulent representations to FAA).

\textsuperscript{289} See GARA § 2(b)(2)-(4).

\textsuperscript{290} See H.R. Rep. No. 103-525(II) (1994), at 7-8, \textit{reprinted in} 1994 U.S.C.C.A.N. 1644, 1649. GARA extends the limitation period "with respect to any new component, system, subassembly, or other part which replaced another component, system, subassembly, or other part originally in, or which was added to, the aircraft, and which is alleged to have caused such death, injury, or damage." GARA § 2(a)(2). \textit{See generally} Caldwell v. Enstrom Helicopter Corp., 230 F.3d 1155, 1156-57 (9th Cir. 2000).

\textsuperscript{291} GARA § 2(a)(2). But the clock starts anew only for the manufacturer of the defective component, not for the manufacturer of the aircraft into which it is installed, even if the latter's name is stamped on the replacement parts together with that of the actual manufacturer of the parts. \textit{See Campbell}, 82 Cal. Rptr. 2d at 209 (twin 1975 Cessna 310R crashed due to failure of both engine-driven vacuum pumps, causing loss of supply to air-driven gyroscopic flight instruments which thereupon provided erroneous altitude and directional data; although Cessna did not manufacture replacement parts, "Cessna" name stamped on vacuum pumps, replaced in 1984, and gyroscopic artificial horizon, replaced in 1994).


\textit{The central objective of GARA would be materially undermined if its protection did not apply to a successor to the manufacturer who, as part of its ongoing business, acquired a product line long after the particular product had been discontinued and years after the statute of repose had run as to the original manufacturer.}

\textit{Id.} at 132.

\textsuperscript{293} See GARA § 2(a)(2). But the clock is reset only for the replaced part, not for other parts of the particular system. \textit{See} Hiser v. Bell Helicopter Textron Inc., 4 Cal. Rptr. 3d 249, 257 (Cal. Ct. App. 2003).


\textsuperscript{295} \textit{See} Caldwell, 230 F.3d at 1158.
whether misrepresentations or the absence of adequate warnings or instructions.\(^{296}\) Thus, a manufacturer’s post-sale or continuing failure to warn does not begin the clock anew, because such an interpretation of GARA could keep the limitations clock forever ticking and so undermine the basic objective of the statute.\(^{297}\)

7. Constitutionality of Repose Statutes

By imposing an absolute cut-off to products liability claims after a set period of time, time-certain statutes of repose sometimes extinguish claims before they can be discovered, and sometimes even before injuries occur and claims exist at all. For this reason, some courts\(^{298}\) and commentators have denounced statutes of repose as fundamentally illogical and unfair, often invoking Judge Jerome Frank’s celebrated critique of statutes of limitations for generating such an “Alice in Wonderland” effect:

Except in topsy-turvy land you can’t die before you are conceived, or be divorced before you marry, or harvest a crop never planted, or burn down a house never built, or miss a train running on a nonexistent railroad. For substantially similar reasons, it has always heretofore been accepted, as a sort of legal “axiom,” that 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.\(^{299}\)

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\(^{296}\) See, e.g., Caldwell, 230 F.3d at 1158; Carolina Indus. Prods., Inc. v. Learjet, Inc., 189 F. Supp. 2d 1147 (D. Kan. 2001) (manufacturer’s issuance of new maintenance manual sections did not restart repose period on owner’s claims of failing to warn owners of a defect in landing gear, and of failing to instruct on proper repair, since owner failed to allege that landing accident was proximately caused by any information in manual).

\(^{297}\) See Lyon v. Agusta S.P.A., 252 F.3d 1078, 1088 (9th Cir. 2001). The court rejected plaintiffs’ argument: that a failure to warn about a newly perceived problem also amounts to something like replacement of a component part because it breaches an alleged continuing duty to upgrade and update [which would gut GARA] because the plaintiff could always argue that an 18-year period commenced if the manufacturer did nothing at all, while simultaneously arguing that if the manufacturer did do something that, too, would start a new 18-year period running. . . . [A] failure to warn is decidedly not the same as replacing a component part with a new one. See also Burroughs v. Precision Airmotive Corp., 93 Cal. Rptr. 2d 124 (Cal. Ct. App. 2000) (limitations clock is not tolled by post-sale or continuing duty to warn).


\(^{299}\) Dincher v. Marlin Firearms Co., 198 F.2d 821, 823 (2d Cir. 1952) (Frank J., dissenting).
So reasoning, several courts have struck down products liability statutes of repose for being unconstitutional,\(^\text{300}\) sometimes as applied to particular types of products liability claims.\(^\text{301}\) The typical constitutional objection is that repose statutes violate the due process or equal protection clauses of the federal or a state constitution, or that they abrogate the open courts provision of a state constitution.\(^\text{302}\) Nevertheless, most courts have upheld products liability statutes of repose against a variety of these and other constitutional challenges.\(^\text{303}\) Similarly, while some realty improvement statutes of repose


\(^{303}\) *See, e.g.*, Land v. Yamaha Motor Corp., 272 F.3d 514 (7th Cir. 2001) (applying Indiana law) (Indiana's product liability statute of repose does not violate state's equal protection or due process provisions); *Branson*, 221 F.3d at 1064-65 (Iowa's 15-year repose statute for products liability actions does not violate equal protection, due process, or state's open courts provision); Mathis v. Eli Lilly & Co., 719 F.2d 134 (6th Cir. 1983) (applying federal and Tennessee law) (repose statute does not violate constitutional prohibition against impairing contractual obligations); McIntosh v. Melroe Co., 729 N.E.2d 972, 973 (Ind. 2000) (10-year repose statute violates neither open courts provision nor privileges and immunities provision of state constitution); Tetterton v. Long Mfg. Co., 332 S.E.2d 67, 72 (N.C. 1985) (repose statute does not violate "exclusive or separate emoluments or privileges" clause of state constitution); Seale v. Hicks, 788 P.2d 435 (Or. 1990) (repose statute does not violate minor's right to jury trial under state constitution, among other constitutional challenges).
have been held unconstitutional, most have withstood constitutional scrutiny. To date, GARA has proved immune to constitutional attack.

IV. CONCLUSION

Commentators often overlook less glamorous products liability defenses, such as reliance on a purchaser’s design specifications, the regulatory compliance defense, and statutes of limitations and repose. Compliance with a purchaser’s design specifications may protect a manufacturer from liability for defects in design, whether the manufacturer contracts to build the product for the government or a private enterprise. This result is usually only fair and logical, and here the law ordinarily lies quite close to justice. While regulatory compliance in most situations is seen to be far weaker than a true “defense,” it sometimes provides a commonsense defensive plea which may influence the trier of fact to render a decision for the defendant, and courts and lawyers need to recognize its potential significance as well as its more common limitations. Products liability litigation is usually not controlled by statutes of limitations and repose because most claims are instituted in a timely manner. Yet, when circumstances conspire to delay the filing of an action until after such a statutory period has arguably run its course, the principles of whether and how such a statute may apply are thrust into the center of the dispute. Special products liability defenses may apply less regularly than those based upon a plaintiff’s conduct, but they can control the outcome of the litigation when they do.


306. See Lyon v. Agusta S.P.A., 252 F.3d 1078, 1085-88 (9th Cir. 2001) (although GARA was not passed until after accident, it violated neither due process nor equal protection).