# Product Liability Statutes of Repose As Conflicting with State Constitutions: The Plaintiffs Are Winning

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Consider the following situation: in January of 1983 Frank Smith was driving his automobile along Interstate 10 between Phoenix and Tucson. He had purchased the automobile in 1971. Suddenly, it swerved and an accident occurred, causing Frank serious injury. Experts have suggested that the car's steering mechanism was defectively manufactured. Frank wishes to sue the automobile manufacturer for damages under the doctrine of strict tort liability for defective products. His claim seems viable, but it will be barred. How could this happen?

The answer may be found in Arizona's product liability statute of repose.[1] This statute is designed to limit the liability of product manufacturers and sellers by extinguishing product liability claims that accrue twelve years or more after the product is first sold. Because of the statute, Frank Smith's product liability claim will be extinguished before it ever exists. Frank Smith will not be afforded a chance to recover his damages.[2]

Due to such harsh results, product liability statutes of repose have prompted a great deal of controversy. One of the more recent and persistent questions concerning the validity of this legislation is whether statutes of repose conflict with state constitutions. The purpose of this Note is to explain the rise of product liability statutes of repose, define such statutes, review the state court decision on the constitutionality of statutes of repose, and explore possible constitutional conflicts in Arizona.[3]

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1. ARIZ. REV. STAT. ANN. § 12-551 (1982) provides:
A product liability action as defined in § 12-681 shall be commenced and presented within the period prescribed in § 12-542, except that no product liability action may be commenced and prosecuted if the cause of action accrues more than twelve years after the product was first sold for use or consumption, unless the cause of action is based on negligence of the manufacturer or seller or a breach of an express warranty provided by the manufacturer or seller.

2. Under Arizona's statute, Frank Smith could sue in negligence or breach of express warranty. *Id.* Negligence, however, is difficult to prove in product liability cases. Strict liability for defective products came into existence to alleviate this difficult proof problem. Furthermore, any claim that Frank Smith had under an express warranty will probably be barred by ARIZ. REV. STAT. ANN. § 44-2404 (1982) which provides a four year statute of limitation on warranty claims. This statute begins to run from the date of sale.

3. Although similar statutes of repose have been enacted in the areas of medical malpractice and architects' and contractors' liability, this Note will narrow its focus to those statutes relating to

## I. THE RISE OF STATUTES OF REPOSE

The expansion of product liability litigation[4] and substantial increases in awards[5] led to a product liability insurance crisis in the 1970s.[6] During this crisis, insurance companies raised their product liability insurance rates to the point where they created problems of affordability and availability.[7] The manufacturing industry immediately went to work lobbying for reform in the state legislatures.[8]

One of the manufacturers' major concerns was their potential liability for claims involving old products which had "rendered long, injury free and satisfactory service for many years."[9] A government study cited claims based on injuries caused by older products as a significant reason for increased insurance premiums.[10] Manufacturers and sellers argued that they were being penalized for making and marketing durable products.[11]

A great number of state legislatures acknowledged the manufacturers' concerns. Over twenty states have now passed a "statute of repose."[12] In

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product liability in the narrow sense. For an excellent overview and analysis of statutes of repose in other areas of the law, see McGovern, *The Variety and Constitutionality of Product Liability Statutes of Repose*, 30 AM. U.L. REV. 579 (1980/81).

4. The increase in products liability litigation has been well documented. A United States government study found that the number of cases reported during 1971-1976 was twice that reported in 1965-1970. U.S. DEPARTMENT OF COMMERCE, INTERAGENCY TASK FORCE ON PRODUCTS LIABILITY, FINAL REPORT, V. III-129 (1977) [hereinafter cited as TASK FORCE REPORT 1]. For more statements concerning the rise in products liability cases, see Hoenig, *Products Liability Problems and Proposed Reforms*, 1977 INS. L.J. 213.

5. Product liability damage awards increased from a $104,000 average prior to 1971 to a $220,000 average in 1977. TASK FORCE REPORT, *supra* note 4, at V. I-18. Of course, these increases must be read in light of inflation and increases in medical costs. *Id.* at X. II-129-30.

6. The problem was so severe that the federal government initiated consideration of the problem. President Ford established a Federal Interagency Task Force to investigate and report on the problem. *See* TASK FORCE REPORT, *supra* note 4. In 1979, the Commerce Department published a MODEL UNIFORM PRODUCT LIABILITY ACT, 44 Fed. Reg. 62,714 (1979) [hereinafter cited as UNIFORM ACT], designed to reduce uncertainties contributing to the problems in product liability. This statute is discussed briefly *infra* text accompanying note 102.

7. In many cases, insurance premiums increased at an annual rate of over 200%. Proust, *Toward Reform in Product Liability Law*, 45 INS. COUNSEL J. 346, 346 (1978).

8. The lobbying efforts of the manufacturing industry permeated state legislatures and contributed greatly to the passage of several reform acts. *See* commentary, *The Way to Ease Soaring Product Liability Costs*, BUSINESS WEEK, Jan. 17, 1977, at 62; *Product Liability—The Search for Solutions*, NATION'S BUSINESS, June 1977, at 24; *INA Advertisement*, FORBES, June 15, 1977, at 52. One commentator has asserted that a Utah reform measure not only was sponsored, but also was drafted, by the Utah Manufacturer's Association. Note, *The Utah Product Liability Limitation of Action: An Unfair Resolution of Competing Concerns*, 1979 UTAH L. REV. 149.

9. Hoenig, *supra* note 4, at 231.

10. *See* UNIFORM ACT, *supra* note 6, at 62,733.

11. Hoenig, *supra* note 4, at 231.

12. *See* ALA. CODE § 6-5-502 (Supp. 1983) (10 years after product is first put to use); ARIZ. REV. STAT. ANN. § 12-551 (1982) (12 years after product is first sold for use or consumption); COLO. REV. STAT. ANN. § 13-21-403(3) (Supp. 1983) (10 years after product is first sold for use or consumption, a rebuttable presumption arises that it is not defective); CONN. GEN. STAT. ANN. § 52-577a (West. Supp. 1983) (10 years from the date that the party last parted with possession or control); FLA. STAT. ANN. § 95-031(2) (1982) (12 years from the date of delivery of completed product to original purchaser); GA. CODE ANN. § 205-106(b)(2) (Supp. 1982) (10 years from the date of first sale for use or consumption); IDAHO CODE § 6-1403(2) (1979) (claim barred if seller can show that harm resulted after expiration of useful safe life; useful safe life presumed to expire 10 years after product is sold to first purchaser); ILL. ANN. STAT. ch. 110 § 13-213 (Smith-Hurd 1983) (12 years from date of sale to a seller or 10 years from the date of sale to the consumer); IND.

some form or another, such statutes limit a manufacturer's liability in suits involving older products.

## II. STATUTES OF REPOSE DEFINED

Courts are inconsistent and imprecise in their use of the term "statute of repose." The term has no standard definition, and several meanings are currently in use.[13] Generally, though, it can be said that "these statutes (of repose) set a designated event for the statutory period to start running and they provide that at the expiration of the period any cause of action is barred regardless of the usual reasons for tolling. . . ."[14]

Statutes of repose are analytically similar to traditional tort statutes of limitations.[15] Since the existence of the Roman Code, however, traditional statutes of limitation have generally been considered procedural in nature.[16] They begin to run at the date of the claim's accrual and limit the claim only if the plaintiff does not sue promptly.[17] Statutes of repose, on the other hand, are both procedural and substantive in nature. They are procedural in that they cut off claims which have already accrued but which are not timely filed.[18] They act substantively in that they define

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CODE § 34-4-20A-5 (1983 Supp.) (10 years after delivery of the product to the initial user, but with a two year grace period for claims accruing after 8 years), KAN. STAT. ANN. § 60-3303 (Supp. 1982) (no liability if seller proves that harm occurred after useful safe life expired; presumption of expiration after 10 years); KY. REV. STAT. ANN. § 411.310 (Supp. 1982) (presumption of safety five years after date of sale to first customer and eight years after manufacture); NEB. REV. STAT. § 25-224(2) (Supp. 1982) (10 years after date when product is first used or sold); N.H. REV. STAT. ANN. § 507-D:2, II(A) (Supp. 1979) (12 years after manufacturer of final product parted with possession or sold it); N.C. GEN. STAT. § 1-50(6) (Supp. 1983) (6 years after purchase); N.D. CENT. CODE § 28-01.1-02 (Supp. 1983) (10 years from date of purchase or eleven years from date of manufacture); OR. REV. STAT. § 30.905(1) (1979-1980) (eight years after date on which product was first produced); R.I. GEN. LAWS § 9-1-13 (Supp. 1983) (10 years after first purchase); S.D. COMP. LAWS ANN. § 15-2-12.1 (Supp. 1983) (six years after date of delivery to the first purchaser who was not a seller); TENN. CODE ANN. § 29-28-103 (Supp. 1980) (ten years from the date of purchase or one year after expiration of the anticipated life); UTAH CODE ANN. § 78-15-3 (1977) (six years after the initial purchase or ten years after date of manufacture); WASH. REV. CODE ANN. § 7.72.060 (Supp. 1983) (no liability if seller shows that harm was caused after expiration of useful safe life; rebuttable presumption of expiration 12 years after delivery of product to first purchaser or lessee).

13. McGovern cites five separate definitions of the term "statute of repose" that are in use:
1) A general definition which treats repose like other statutes of limitation. The two terms may be used interchangeably.
2) An even more general meaning encompassing various statutes which lay things to rest (*e.g.*, statutes of limitations, escheats, adverse possession).
3) A narrow term indicating merely one portion of a bifurcated statutory scheme wherein the discovery of a cause of action begins the running of a traditional statute of limitation, but a separate statute of repose places a cap on the time allowed to sue after discovery occurs.
4) A meaning which distinguishes a statute of repose from a statute of limitation because the statute of repose begins to run at a time unrelated to the traditional accrual of the cause of action. Under this definition the claim may be barred before it even arises.
5) The useful safe life provisions adopted in the Uniform Act, which makes the statute of repose a separate affirmative defense.
McGovern, *supra* note 3, at 582.

14. RESTATEMENT (SECOND) OF TORTS § 889, Comment g (1979).

15. McCormick & Asselta, *Statute of Repose*, 1982 TRIAL LAWYERS GUIDE 67, 69.

16. *Developments in the Law—Statute of Limitations*, 63 HARV. L. REV. 1177 (1950).

17. *See* W. PROSSER, HANDBOOK OF THE LAW OF TORTS 144 (4th ed. 1971).

18. In this respect they are very similar to statutes of limitations, except that the length of the

rights by abrogating claims which accrue after the statutory period has run.[19] In the product liability context, the statute extinguishes a cause of action involving a specific product after the product reaches a certain age.

The substantive nature of these statutes of repose has given rise to considerable debate over their propriety.[20] The debate has not slowed their proliferation. Nonetheless, potential plaintiffs have found substantial and persuasive legal arguments against statutes of repose within the plaintiff's respective state constitutions. The practical question in Arizona now is whether the Arizona statute can withstand constitutional scrutiny in the courts.

## III. THE CONSTITUTIONAL CONFLICT

Conflicts between constitutional principles and statutes of repose have arisen in other contexts.[21] Product liability statutes of repose, however, are a recent event. Thus, the judicial inquiry into their constitutionality is also recent. To date, eight states have ruled directly on the constitutionality of their product liability statutes of repose. Rhode Island,[22] New Hampshire,[23] Alabama,[24] North Carolina,[25] and Florida[26] have ruled their statutes unconstitutional. Oregon,[27] Indiana,[28] and Illinois[29] have upheld theirs.

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time during which the party can sue depends on when the action accrues. If the action accrues one week or one year prior to the expiration of a statute of repose period, the party has one week or one year, respectively, to sue. Under a normal statute of limitations, a period is set by statute and the clock does not begin to run until the claim accrues.

19. McGovern, *The Status of Limitation in Products Liability Actions: Present and Future*, 16 FORUM 416, 418-19 (1980-81).

20. Manufacturers argue that the statutes avert inequitities resulting from claims for injuries that occur well after the expiration of a product's useful life. McCormick & Asselta, *supra* note 15, at 69. Without a statute laying such claims to rest, strict liability can be imposed for unlimited periods of time. Manufacturers consider this protracted liability harsh when applied to those who have exercised reasonable care in the design and production of their products. *Id.* Conversely, critics argue that it is unjust to bar claims "merely because of the fortuity that a product related injurious defect did not manifest itself earlier." Phillips, *An Analysis of Proposed Reform of Products Liability Statutes of Limitation*, 56 N.C. L. REV. 663, 676 (1978). Injustice is especially likely where workmen's compensation does not cover the injury. TASK FORCE REPORT, *supra* note 4 at V-5. Some claim that the right to seek restitution is a natural right of free persons who are wrongfully harmed. Bengham, *One More Insurance "Crisis,"* v.12 n.11 TRIAL 46 (Nov. 1976). Critics also argue that the statutes of repose undermine the error reduction rationale behind strict liability because manufacturers may not make their products as safe when liability is less likely to attach. Phillips, *supra*, at 666.

21. Constitutional challenges have arisen in the context of architect and contractor statutes of repose and medical malpractice statutes of repose. For a discussion of these statutes and the constitutional implications they raise, *see generally* McGovern, *supra* note 3.

22. Kennedy v. Cumberland Eng'r Co., Inc., 471 A.2d 195 (R.I. 1984).

23. Heath v. Sears, Roebuck & Co., 464 A.2d 288 (N.H. 1983).

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

25. Bolick v. American Barmag Corp., 54 N.C. App. 589, 284 S.E.2d 188 (1981). The North Carolina Supreme Court upheld the lower court's ruling of unconstitutionality on other grounds, without ruling on the constitutionality of the statute in repose, 306 N.C. 435, 293 S.E.2d 415 (1982).

26. Batilla v. Allis Chalmers Mfg. Co., 392 So.2d 874 (Fla. 1980).

27. Davis v. Whiting Corp., 66 Or. App. 541, 674 P.2d 1194 (1983).

28. Daque v. Piper Aircraft Corp., 418 N.E.2d 207 (Ind. 1981); Scalf v. Berkel, Inc., 448 N.E.2d 1201 (Ind. App. 1983).

29. Thornton v. Mono Mfg. Co., 99 Ill. App. 3d 722, 425 N.E.2d 522 (1981).

In examining these cases, it is important to note that every decision finding a state statute of repose unconstitutional is based primarily on a specific state constitutional provision guaranteeing injured persons a right of access to the courts.[30] Other constitutional arguments, based on due process and equal protection are possible.[31] This Note will consider why some courts have overturned the statutes, and why others have upheld the statutes despite these constitutional arguments. From these considerations the Note will then explore potential constitutional defects in Arizona's product liability statute of repose.

### A. *The Conflict Between Product Liability Statutes of Repose and a Right of Access to the Courts*

Every challenge to the constitutionality of a state product liability statute of repose has been based on a specific provision in the state constitution guaranteeing a right of access to the courts.[32] The argument is that because statutes of repose extinguish a cause of action before it arises, they unconstitutionally deny the injured party judicial access. Every state court which has held its statute of repose unconstitutional has done so on the basis of this type of challenge.[33]

The recent New Hampshire decision, *Heath v. Sears, Roebuck & Co.*,[34] is representative. In *Heath*, several appeals were consolidated to challenge, among other things, the constitutionality of New Hampshire's statute of repose.[35] The New Hampshire statute required that product liability actions be brought no later than 12 years after the manufacturer parted with or sold the final product.[36] The challenge focused on New Hampshire's right of access provision, which provides in pertinent part that "[e]very subject of this state is entitled to a certain remedy, by having recourse to the laws, for all injuries he may receive in his person, property or character. . . ."[37]

The *Heath* court began its analysis by recognizing the legislative power to enact reasonable time limitations for actions, but the court warned that this power may not be exercised unconstitutionally.[38] The court then noted that New Hampshire considers the constitutional right to recover damages for personal injuries an important substantive right[39]

30. *See infra* note 33.
31. *See infra* notes 52-66 and accompanying text.
32. These right of access provisions derive from chapter 4 of the Magna Carta and have been adopted by the states in a wide variety of forms. Fourteen states have provisions which borrow almost directly from the original Magna Carta chapter and provide that justice shall be administered "without sale, denial, or delay." A.E. DICK HOWARD, THE ROAD FROM RUNNYMEDE 284-97, Appendix O (1968). Twelve other states have similar provisions. Nineteen states provide that "all courts shall be open." *See generally id.*
33. *See Kennedy*, 471 A.2d at 201; *Heath*, 464 A.2d at 296; *Lankford*, 416 So.2d at 1004; *Bolick*, 284 S.E.2d at 191; *Batilla*, 392 So.2d at 874.
34. 464 A.2d 288 (N.H. 1983).
35. The plaintiffs also challenge other portions of New Hampshire's product liability statute. *See Heath*, 464 A.2d at 291-92.
36. N.H. REV. STAT. ANN. § 507-D:2, II(A) (Supp. 1979).
37. N.H. CONST. part I, art. 14.
38. *Heath*, 464 A.2d at 294.
39. *Id.*

which cannot be infringed unless the infringement is reasonable and substantially related to the legislative objective.[40] Applying the standard of review to the New Hampshire product liability statute of repose, the court held that the statute was neither reasonable nor substantially related to the stated legislative objective.[41] The court found the statute unreasonable because it did not put a consumer on notice of any hidden defects when he purchased a product. The statute thus eliminated a claim before the consumer reasonably may discover the defect.[42] In finding the statute not substantially related to its legislative purpose of lowering product liability insurance premiums, the court cited a New Hampshire legislative study concluding that New Hampshire's statute of repose had nothing to do with the general stabilization of product liability insurance rates.[43]

Two factors in the *Heath* opinion stand out as critical to the ruling that the statute was unconstitutional. First, the court considered the right to recover for personal injury an *important* substantive right. Second, because the right to recover is important, the court applied a heightened standard of review, requiring that the statute be reasonable and *substantially related* to the legislative objective. Every court which has held a statute of repose unconstitutional has used this type of heightened standard of review in some form.[44]

The New Hampshire decision differs from the decisions of state courts which have upheld their product liability statutes of repose. These courts have not used a heightened standard to analyze conflicts between statutes of repose and constitutional right of access guarantees. For example, the Oregon Court of Appeals in *Davis v. Whiting Corp.*[45] stated that the legislature constitutionally may abolish or limit a cause of action if it does not do so arbitrarily and if such action serves a legitimate countervailing public interest.[46] The court concluded that Oregon's statute of repose was a rational response to the problem of high product liability insurance rates.[47]

The Indiana Supreme Court, in *Dague v. Piper Aircraft Corp.*,[48] was even more cursory. The court first stressed the legislature's power to modify or abrogate common law claims.[49] The court noted that Indiana recog-

40. *Id.* at 295.
41. *Id.*
42. *Id.*
43. *Id.* at 294, 296.
44. The Alabama court stated that there must be a "substantial relationship" between the statute and the eradication of evil. *Lankford*, 416 So.2d at 1001. The Florida court relied on Overland Const. Co., Inc. v. Sirmons, 369 So.2d 572 (Fla. 1979), *Batilla*, 392 So.2d at 875. *Sirmons* stated that the legislature could not abolish a common law right without providing a reasonable alternative unless there is "overpowering public necessity." *Sirmons*, 369 So.2d at 575. The Rhode Island court's analysis is not clear. The court seemed to test the Rhode Island statute's validity by asking whether it "flies in the face of the constitutional command" found in Rhode Island's right of access provision. *Kennedy*, 411 A.2d at 198. The North Carolina court applied the strictest test. The court stated that "any law which attempts to deny [redress] runs afoul of [North Carolina's right of access provision]." *Bolick*, 284 S.E.2d at 191.
45. 66 Or. App. 541, 674 P.2d 1194 (1983).
46. *Id.* at 543, 674 P.2d at 1196.
47. *Id.* For a similar decision, see *Thornton*, 99 Ill. App. 3d at 727-28, 425 N.E.2d at 527.
48. 418 N.E.2d 207 (Ind. 1981).
49. *Id.* at 213.

nizes no vested or property rights in any common law rule.[50] The court then stated that the Indiana statute of repose did not infringe any vested right of the plaintiff because at the time the plaintiff's husband died, the time limit provided for by statute had expired and no cause of action existed.[51]

### B. *The Conflict Between Product Liability Statutes of Repose and Due Process and Equal Protection*

A product liability plaintiff can make several possible due process or equal protection arguments against product liability statutes of repose. The only courts which have decided the matter, however, have upheld the statutes.[52] Thus, one cannot predict that these arguments will be successful. They are nonetheless plausible arguments and worthy of discussion.

First, one can argue that product liability statutes of repose conflict with due process by arbitrarily extinguishing a right to sue before it even arises. The Indiana Court of Appeals faced such a challenge in *Scalf v. Berkel, Inc.*[53] The court began its analysis by stressing that all legislation is afforded a strong presumption of constitutionality and that a party bears a heavy burden in challenging a duly enacted statute.[54] The court then rejected the contention that the right to bring suit is fundamental, stating Indiana's rule that common law causes of action are not specially protected.[55] The court applied a rational basis test[56] and found the statute rationally related to the legislative end of lowering insurance costs for product liability protection.[57]

Second, one can argue that product liability statutes of repose violate due process if they do not have a savings clause which provides an extension of time during which one injured shortly before the expiration of the statutory period can file a claim. In such a situation the statute could have the same effect as a very short statute of limitations.[58] The concurring opinion in the Alabama case of *Lankford v. Sullivan, Long & Hagerty*[59] suggests that, in some situations, the statute of repose may violate the due process requirement that an individual be allowed a reasonable time in which to bring suit.[60] It must be noted, however, that this is a very narrow challenge. Only one whose claim actually accrues shortly before the expi-

50. *Id.*
51. *Id.*
52. *See* Thornton v. Mono Mfg. Co., 99 Ill. App. 3d 722, 425 N.E.2d 522 (1981); Scalf v. Berkel, Inc., 448 N.E.2d 1201 (Ind. App. 1983); Davis v. Whiting Corp., 66 Or. App. 541, 674 P.2d 1194 (1983).
53. 448 N.E.2d 1201 (Ind. App. 1983).
54. *Id.* at 1203.
55. *Id.*
56. The court asked whether the statute was a "rational means to achieve the goal which the legislature through its enactment sought to reach." *Id.*
57. *Id.* at 1204. For a similar approach, see *Thornton*, 99 Ill. App. 3d at 725-27, 425 N.E.2d at 526.
58. For example, in Arizona one injured by a product eleven years and 10 months into the twelve year statutory limitation would have two months to file his claim.
59. 416 So.2d 996, 1004 (Ala. 1982) (Torbert, C.J., specially concurring).
60. *Id.* at 1005-06.

ration of the statutory period may have standing to raise the challenge.[61]

The equal protection argument against product liability statutes of repose is that the statutes arbitrarily distinguish between consumers of long-lived products, who are not afforded a product liability remedy, and consumers of short-lived products, who are able to sue in product liability.[62] The Oregon Court of Appeals addressed this issue in *Davis*.[63] The court decided that *Davis* involved neither a fundamental right nor a suspect class.[64] The court then applied a rational basis test[65] and found the statutory classification rationally related to the problem of product liability insurance rate increases.[66]

## IV. APPLICATION TO ARIZONA

### A. *The Conflict Between Arizona's Product Liability Statute of Repose and a Right of Access to the Courts*

Arizona has no specific constitutional right of access guarantee.[67] Other provisions, however, arguably have the same effect. Article 18, section 6, Arizona's "Recovery" provision, provides that the right to recover damages shall not be abrogated and that the amount recoverable shall not be subject to statutory limitation.[68] Article 2, section 31, Arizona's "Damages" provision, is similar in that it prohibits legislation limiting the

61. *See* Davis v. Whiting Corp., 66 Or. App. 541, 674 P.2d 1194 (1983), wherein the Oregon Court of Appeals refused to address the due process challenge because the party's claim had accrued after the statute of repose had run. *Id.* at 544, 674 P.2d at 1197.

62. It can also be argued that the statute impermissibly protects manufacturers of long-lived products while singling out for liability manufacturers of short-lived products. *See Lankford*, 416 So.2d at 1004-05 (Tolbert, C.J., concurring specially). This argument is analytically similar to the one proposed in the text because both focus on whether the longevity of a product constitutionally can be the factor limiting a cause of action. An injured plaintiff, however, may not properly raise an argument posed in terms of manufacturers because of the standing problem. The argument posed in terms of manufacturers would probably have to be raised by a manufacturer in a suit involving an injury occurring prior to the expiration of the statute of repose.

63. 66 Or. App. 541, 674 P.2d 1194 (1983).

64. *Id.* at 543, 674 P.2d at 1196.

65. The court asked whether a rational relationship existed between the classification and purpose of the statute creating it. *Id.*

66. *Id. See also Scalf*, 448 N.E.2d at 1205-06, which rejected an equal protection challenge on the ground that a rational relationship existed between the statute of repose and problems associated with obtaining product liability insurance.

67. Arizona's Territorial Constitution did guarantee judicial access. ARIZ. TERR. CONST. art. II, § 15 provided: "All courts shall be open and every person for an injury done him in his lands goods person or reputation shall have a remedy by due course of law." The Constitutional Convention of 1910, however, did not adopt that provision.

At the Convention, three propositions were submitted to be considered for adoption as the Declaration of Rights Article in the new constitution. Propositions 104 and 116 contained right of access provisions, but both were indefinitely postponed. Proposition 94 was the model used in forming the eventual Article, but it contained no right of access provision. J. WEINBERGER, MATERIAL PERTAINING TO THE ARIZONA CONSTITUTIONAL CONVENTION OF 1910, *UA Library Special Collection*, Az. 131 [hereinafter cited as WEINBERGER'S MATERIALS]; P. CRONIN, ARIZONA TERRITORIAL CONSTITUTIONAL CONVENTION, JOURNALS OF THE CONSTITUTIONAL CONVENTION OF ARIZONA, Nov. 1, 1925 [hereinafter cited as CONSTITUTIONAL JOURNALS]. Instead, the Convention adopted another version of the Magna Carta dictate. ARIZ. CONST. art. 2, § 11 provides: "Justice in all cases shall be administered openly, and without unnecessary delay."

68. ARIZ. CONST. art. 18, § 6 provides: "The right of action to recover damages for injuries shall never be abrogated, and the amount recovered shall not be subject to any statutory limitation."

amount of damages recoverable for death or personal injury.[69] One can argue that Arizona's product liability statute of repose abrogates judicial access and the right to recover damages. In doing so, it also necessarily limits the amount recoverable in a product liability suit. This is in direct contravention of the language of both constitutional guarantees. The historic intent of these provisions and their subsequent construction by the courts will determine the viability of this challenge.

The Recovery Clause provides that the right to recover damages shall not be abrogated.[70] Though this statement is broad, a reading of several historical documents shows that the participants in Arizona's Constitutional Convention actually intended this provision to be narrow in scope. Those at the Convention were concerned about the unjust practices of businessmen who would lure an injured employee into signing a contract of settlement for a nominal sum of money.[71] For that reason, they placed the provision in the Constitution's Labor Articles. It appears to have been designed merely to "prohibit the legislature from limiting the amount any employee may obtain from an employer as the result of a law suit. . . ."[72]

The Damages Clause is similar to the Recovery Clause in that it prohibits the passage of legislation limiting the amount of damages recoverable for death or personal injury.[73] The drafters at Arizona's Constitutional Convention seem to have intended this provision to be broad in scope. The provision derives its substance from the same proposal at the Convention which gave rise to the Recovery Clause.[74] The Damages Clause, however, appears to have been added to Arizona's Declaration of Rights Article to guarantee the right to recover damages in all contexts where death or personal injury was involved.[75]

Despite these historic differences, the Arizona courts have tended to

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69. ARIZ. CONST. art. 2, § 31 provides: "No law shall be enacted in this state limiting the amount of damages to be recovered for causing the death or injury of any person."

70. *See supra* note 68.

71. CONSTITUTIONAL JOURNALS, *supra* note 67 at 383. Proposition 50 was the only proposal for a constitutional provision referring to the right to recover damages. CONSTITUTIONAL JOURNALS, *supra* note 67; WEINBERGERS' MATERIALS, *supra* note 67, proposition 50. The proposition copied a Wyoming constitutional provision which was designed to control the problem of unjust settlement contracts by making the employee's right to recover a constitutional right. *See* WYO. CONST. art. 10, § 4. After amendment in Committee, a version of proposition 50 was enacted as the Recovery Clause. CONSTITUTIONAL JOURNALS, *supra* note 67, at 110-11.

72. WEINBERGER'S MATERIALS, *supra* note 67, newspaper clippings.

73. *See supra* note 69.

74. The text of the Damages Clause echoes the first sentence of proposition 50, *see* WEINBERGERS MATERIALS, *supra* note 67, which also gave rise to Art. 18 § 6, the Recovery Clause. *See supra* note 71.

75. Proposition 50, as originally proposed, was designed to work only in the context of employer-employee relations. *See supra* note 71. On the floor of the Constitutional Convention, however, several rose to suggest that the guarantee of a right to recover damages should be available in all contexts where death or injury was involved. *See* CONSTITUTIONAL JOURNALS, *supra* note 67, at 110, 380.

At this point in the debate, proposition 94 was being used as a basis for the Declaration of Rights Article. *See supra* note 67. As originally proposed, proposition 94 had only 30 sections. *See* WEINBERGERS MATERIALS, *supra* note 67, proposition 94. However, when proposition 94 was adopted and became Arizona's Declaration of Rights Article, section 31 was included, guaranteeing that damages not be reduced. ARIZ. CONST. art. 2, § 31. No direct language states why this provision was added. It can be inferred, however, that it was added to guarantee generally the right to recover damages where death or personal injury was involved.

construe the Recovery and Damages Clauses similarly. The Recovery Clause has not been limited to its historic purpose of regulating relationships between employers and employees.[76] In several cases, the two provisions have been considered together.[77] Thus, it appears that the historic intentions behind these provisions will not prevent their application to Arizona's product liability statute of repose. Both have been construed broadly enough to encompass product liability actions. In another way, however, the Arizona courts have narrowed the apparent scope of both the Damages and Recovery Clauses. While the Arizona Supreme Court has said that the Recovery Clause specifically guarantees the right to sue in negligence,[78] the same court has construed both clauses to protect only causes of action existing when the Constitution was adopted.[79] If this precedent is followed, it will not be possible for the courts to use either the Damages Clause or the Recovery Clause as a basis for holding Arizona's product liability statute of repose unconstitutional.[80]

A strained argument can be made that strict liability for defective products is directly related to the common law action of negligence and therefore is constitutionally protected. It could be argued that today's product liability action is merely a form of the broader theory of negligence.[81] This argument, however, would ask much of a court. A tie may exist between the common law action of negligence and today's product liability action, but the tie is merely ancestral. Products liability did not arise as a cause of action in Arizona until 1968,[82] 56 years after the adoption of Arizona's Constitution.

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76. Although the provision has been applied a great deal in the employer-employee context, it has not been restricted to that application. *See, e.g.*, Rail N Ranch Corp. v. State, 7 Ariz. App. 558, 441 P.2d 786 (1968) (dealing with statute prohibiting recovery against the state for damages resulting from dam); Smith v. Coronado Foothills Estates Homeowners Ass'n, Inc., 117 Ariz. 184, 571 P.2d 681 (App. 1977) (dealing with limitation of wrongful injunction recovery to amount of bond).

77. *See*, Harrington v. Flanders, 2 Ariz. App. 265, 407 P.2d 946 (1965); Industrial Comm'n v. Frohmiller, 60 Ariz. 464, 140 P.2d 219 (1943); Inspiration Consol. Copper Co. v. Mendez, 19 Ariz. 151, 166 P. 1183 (1917).

78. *See* Alabam's Freight Co. v. Hunt, 29 Ariz. 419, 443, 242 P. 658, 665 (1917).

79. *Frohmiller*, 60 Ariz. at 466, 140 P.2d at 221.

80. *See, e.g.*, Landgraff v. Wagner, 26 Ariz. App. 49, 546 P.2d 26 (1976). This case involved Arizona's medical malpractice statute of repose, which is very similar to Arizona's product liability statute of repose. The malpractice statute provides that medical malpractice claims must be brought within six years after the date of injury. Normally, the statute of limitations does not begin to run until the injury is discovered. In this case the Arizona Court of Appeals refused to apply the Recovery Clause to hold Arizona's medical malpractice statute unconstitutional. *Id.* at 54, 546 P.2d at 32.

81. A similar argument was proposed in Industrial Comm'n v. Frohmiller, 60 Ariz. 464, 140 P.2d 219 (1943). The plaintiff argued that the right to recovery from occupational disease existed as an incident to the greater theory of negligence. *Id.* at 468, 140 P.2d at 221. The court rejected this argument, finding that the specific claim based on an occupational disease did not exist at the time the Constitution was adopted. *Id.* at 468-69, 140 P.2d at 221.

82. O.S. Stapley Co. v. Miller, 103 Ariz. 556, 447 P.2d 248 (1968).

### B. *The Conflict Between Arizona's Product Liability Statute of Repose and Equal Protection and Due Process*

Equal protection[83] and due process[84] challenges to Arizona's product liability statute of repose are possible. It should be noted at the outset, however, that no court has held a product liability statute of repose unconstitutional on either ground.[85] This trend is likely to continue in Arizona.

The equal protection argument against Arizona's product liability statute of repose is that the statute impermissibly distinguishes between those whose claim arises before the statutory period has run and those whose claim does not arise until after the statute has run.[86] One can argue that equal protection is denied those falling into the latter class because they are not afforded a product liability remedy.

Equal protection mandates that all similarly situated individuals receive similar treatment.[87] If a statutory classification does not affect a fundamental right or suspect class, however, the courts will apply a rational basis test[88] and will uphold the statute if any conceivable legitimate state interest can justify it.[89] Arizona courts do not view recently developed claims such as product liability as specially protected,[90] and the product liability statute of repose clearly does not create a suspect class. Arizona's product liability statute of repose arguably is a reasonable response to the problem of rising product liability insurance rates;[91] thus, the statute will likely be upheld.

Two due process arguments can be made against Arizona's product liability statute of repose. First, one can argue that the statute sets an arbi-

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83. ARIZ. CONST. art. 2, § 4 provides: "No person shall be deprived of life liberty or property without due process of law."

84. ARIZ. CONST. art. 2, § 13 provides:

> No law shall be enacted granting to any citizen, class of citizens, or corporation other than municipal, privileges and immunities which, upon the same terms, shall not equally belong to all citizens or corporations.

85. McGovern, *supra* note 3, at 613. Equal protection challenges have been successful against other types of statutes of repose. *Id.* at 606-10. But in the product liability context, right of access provisions have been the source of the unconstitutionality. *See supra* note 30.

86. Another way of stating the argument is that the product liability statute of repose impermissibly distinguishes between consumers of short-lived products, who are allowed to sue in products liability, and consumers of long-lived products, who are not afforded the same opportunity. *See supra* note 62 and accompanying text. However the argument is phrased, the analysis will be the same.

87. Lindsay v. Industrial Comm'n of Ariz., 115 Ariz. 254, 256, 564 P.2d 943, 945 (App. 1977).

88. Arizona Downs v. Arizona Horsemen's Found., 130 Ariz. 550, 555, 637 P.2d 1053, 1058 (1981).

89. *Id.*; State v. Arnett, 119 Ariz. 38, 579 P.2d 542 (1978); State v. Scofield, 7 Ariz. App. 307, 438 P.2d 776 (1968).

90. *See* S.H. Kress & Co. v. Superior Court of Maricopa County, 66 Ariz. 67, 182 P.2d 931 (1947); State *ex rel.* Conway v. Glenn, 60 Ariz. 22, 131 P.2d 363 (1942).

91. The intended purpose of the statute is not clear from a reading of the statute or from its history. Some evidence, however, indicates that the insurance crisis played a role in its passage. The Arizona Trial Lawyers Association and the AFL-CIO sent representatives to argue against the measure, but the Insurance Services Office sent representatives not only to argue in favor of the bill but to answer questions concerning the practice of insurance rate-making. MINUTES OF THE MEETING, HOUSE COMMITTEE ON BANKING AND INSURANCE, March 15, 1978; MINUTES OF THE MEETING, HOUSE COMMITTEE ON COMMERCE, March 20, 1978. Given the pressure of the times, it is not unreasonable to say that the statute was passed in response to the product liability insurance crisis of the 1970's.

trary date for the extinction of the important substantive right to sue in product liability, regardless of whether the claimant knew that his right existed. The mere fortuity of the defect manifesting itself prior to the expiration of the twelve year statutory period determines a claimant's ability to sue in product liability.

The Arizona Court of Appeals considered a similar argument in the context of Arizona's medical malpractice statute of repose in *Landgraff v. Wagner*.[92] In that case, the plaintiff contended that due process is violated when a statute abrogates a claim without notice to the claimant that his claim even exists.[93] The court rejected this argument simply by stating that it assumed the legislature had weighed the conflicting policies when the statute was passed and had found the policy of bringing an end to medical malpractice claims more compelling than the claimant's interest in bringing suit.[94]

This result is likely to occur in the product liability context also. Unless the case involves a fundamental right, a court will apply a rational basis test to determine whether a statute complies with due process. The test is whether the statute is arbitrary and not rationally related to a legitimate state interest.[95] Arizona courts do not view recently developed causes of action as specially protected.[96] Thus, they involve no fundamental right to bring suit. Consequently, the courts probably will uphold the product liability of repose as a reasonable response to the problem of rising insurance rates.[97]

A product liability claimant also can argue that, because Arizona's product liability statute of repose has no savings clause, it denies an injured party whose claim has accrued shortly before the statutory period has run an adequate length of time to file his claim. In this context the statute could act as a very short statute of limitations. For example, a party's cause of action may accrue eleven years and ten months after the product is first sold. The party would then have only two months to file his product liability claim before the statute bars it.

No cases on point suggest what analysis to apply to this challenge. The United States Supreme Court, however, has stated that due process requires that statutes of limitation provide a reasonable time for the commencement of existing causes of action.[98] The legislature is free to set a time that it considers reasonable, and a court cannot scrutinize the wisdom of such a legislative determination.[99] The time period established, however, cannot be "so insufficient that the statute becomes a denial of

92. 26 Ariz. App. 49, 546 P.2d 26 (1976).

93. *Id.* at 55, 546 P.2d at 26.

94. *Id.* at 55, 546 P.2d at 31-32.

95. Sulger v. Arizona Corp. Comm'n, 5 Ariz. App. 69, 73, 412 P.2d 882, 886 (1966); Baseline Liquors v. Circle K Corp., 129 Ariz. 215, 218, 630 P.2d 38, 41 (App. 1981).

96. *See supra* note 90.

97. *See supra* note 91.

98. Wilson v. Iseminger, 185 U.S. 55, 62-63 (1901); *see* discussion in *Lankford*, 416 So.2d at 1004.

99. *Id.* at 63.

justice."[100]

It appears that Arizona's product liability statute of repose may be subject to this particular due process challenge. The statute has no savings clause allowing extra time to bring suit if a claim accrues shortly before the statutory period bars the products liability remedy. How short the time period would have to be to constitute a "denial of justice" is not certain. If the proper facts appeared, however, the challenge could be successful.

It should be noted, however, that this is a very narrow challenge. In order for a party to have standing to raise it, his claim would have to accrue before the twelve year period had run, but not be filed before the statutory limitation barred the claim.[101] Moreover, even if the challenge were successful, a court would have no reason to invalidate the entire statute. Rather, the court would probably hold the statute unconstitutional only as applied to the facts in the case presented and remand for a determination of the merits of the product liability claim.

## V. CONCLUSION

Arizona's product liability statute of repose is unquestionably harsh. When applied, it denies an injured party an otherwise valid claim merely because a product defect did not manifest itself until twelve years or more after the injury-causing product was first sold. It is not likely, however, that Arizona's product liability statute of repose will be held unconstitutional. Those states which have ruled their respective state statutes unconstitutional have done so because of specific state constitutional provisions guaranteeing a right of judicial access. Arizona has no equivalent provision. Furthermore, the right to bring a product liability claim is not specially protected in Arizona. With one narrow exception, equal protection and due process challenges will probably not succeed.

Thus, any changes in Arizona's product liability statute of repose will have to be made by the legislature. Absent a federal law preempting the product liability field,[102] the Arizona legislature might reevaluate the product liability statute of repose. The United States Commerce Department has proposed a Model Uniform Product Liability Act. This proposal creates a presumption that, after a certain period of time, a product has been used beyond its useful safe life. If this presumption is not rebutted, a product liability action will be barred. The presumption, however, has no automatic preclusive effect. Such a proposal may be the best way to remedy the unfairness inherent in the current Arizona statute. Given that the Arizona courts probably will not hold the current statute of repose unconstitutional, legislative adoption of a statute similar to the Commerce De-

100. *Id.* For further discussion of this argument, *see supra* notes 59-61 and accompanying text.

101. *See supra* note 61.

102. Although it is unlikely that federal legislation will be passed, a great deal of discussion has occurred concerning the possibility. Currently two bills are before Congress, S.44, 98th Cong., 1st Sess. (1983) and H. 2729, 98th Cong., 1st Sess. (1983). The bills take differing approaches to the problem of statutes of repose. For more information concerning federal action in the area of product liability, *see generally* Dworkin, *Federal Reform of Product Liability Law*, 57 TULANE L. REV. 602 (1983).

partment proposal may be the only way to bring fairness into Arizona's product liability scheme.