

Nova Law Review

Volume 7, Issue 3

1983

Article 4

The Products Liability Statute of Repose in Florida: A Trap for the Unwary

William M. Tuttle*

*

Copyright ©1983 by the authors. *Nova Law Review* is produced by The Berkeley Electronic Press (bepress). <https://nsuworks.nova.edu/nlr>

The Products Liability Statute of Repose in Florida: A Trap for the Unwary

William M. Tuttle

Abstract

In the past two decades there has been an explosion of product liability lawsuits brought against manufacturers of defective goods due to increased manufacturers' exposure to liability. This phenomenon, referred to as the "product liability revolution," has expanded manufacturers' liability and facilitated recovery for injured plaintiffs for product-caused injuries.

KEYWORDS: repose, florida, products

The Products Liability Statute of Repose in Florida: A Trap for the Unwary

Introduction

In the past two decades there has been an explosion of product liability lawsuits¹ brought against manufacturers of defective goods²

1. The number of products liability lawsuits being filed in district courts increased 134% between 1974 and 1976 (from 1,579 to 3,696). UNITED STATES DEPARTMENT OF COMMERCE, INTERAGENCY TASK FORCE ON PRODUCT LIABILITY, FINAL REPORT, 11-44 (1977) [hereinafter cited as FINAL REPORT], cited in Donnelly, *Date-of-Sale Statutes of Limitation: An Effective Means of Implementing Change in Products Liability Law?*, 30 CASE W. RES. 123, 123 n.1 (1979).

In April of 1976, the economic Policy Board of the White House established the Interagency Task Force to investigate widespread claims by the manufacturing industry that products liability insurance had become so unavailable or unaffordable that the situation had reached "crisis" proportions. 1 L. FRUMER & M. FRIEDMAN, PRODUCTS LIABILITY § 4B at 1-64, -65 (1980). In January, 1977, the Task Force published a Briefing Report which concluded that there was no crisis. *Id.* at 1-65. The Task Force published its Final Report on November 1, 1977. *Id.* at 1-65. Three main reasons were cited as the main causes of higher products liability insurance rates: "[1] the ratemaking procedures of insurers, [2] the production of unsafe products, and [3] uncertainties as to how [products liability law] is developing." *Id.* at 1-65.

2. A "product liability claim" includes:

any claim or action brought for harm caused by the manufacture, production, making, construction, fabrication, design, formula, preparation, assembly, installation, testing, warnings, or instructions, marketing, packaging, storage, or labelling of the relevant product. It includes, but is not limited to, any action previously based on: strict liability in tort; negligence; breach of express or implied warranty; breach of, or failure to discharge a duty to warn or instruct, whether negligent or innocent; misrepresentation, concealment or nondisclosure, whether negligent or innocent; or under any other substantive legal theory.

MODEL UNIFORM PRODUCT LIABILITY ACT § 102(D), reprinted in 44 Fed. Reg. 62,714, 62,717 (1979) [hereinafter cited as MODEL ACT]. For a summary of the repose period proposed by the MODEL ACT, see *infra* note 18. The function of product liability law "is to shift the cost of an accident from a claimant to a defendant when the latter is deemed 'responsible' for the claimant's injuries." MODEL ACT, 44 Fed. Reg. at 62,715 (1979).

due to increased manufacturers' exposure to liability.³ This phenomenon, referred to as the "product liability revolution,"⁴ has expanded manufacturers' liability and facilitated recovery for injured plaintiffs for product-caused injuries.

The manufacturing industry has responded with attempts to limit their liability resulting in legislative enactment of statutes of repose. Statutes of repose are limitations of actions which eliminate the manufacturer's liability after a specified time from manufacture or sale of the product, rather than from the date of discovery of the defect. This

3. The Florida Supreme Court recently adopted the doctrine of strict liability as stated by the American Law Institute in its RESTATEMENT (SECOND) OF TORTS § 402A. *West v. Caterpillar Tractor Co.*, 336 So. 2d 80, 87 (Fla. 1976). For the text of § 402A, see *infra* note 8.

Others besides manufacturers have been adversely affected by recent developments in products liability law. Even non-negligent wholesalers, distributors and retailers of a defective product can be held strictly liable for injuries caused by a defective product. *West*, 336 So. 2d 80; *Adobe Bldg. Centers, Inc. v. Reynolds*, 403 So. 2d 1033 (Fla. 4th Dist. Ct. App. 1981). See also *Futch v. Ryder Truck Rental, Inc.*, 391 So. 2d 808 (Fla. 5th Dist. Ct. App. 1980) (where the court held that a lessor of a defective truck could be held strictly liable for resulting injuries caused by the defect). This so-called "technical" or "constructive" liability constitutes a cause of action for common law indemnity in the amount of any damages, reasonable attorney's fees, costs and expenses against the manufacturer for breach of its contractual duty to supply the wholesaler, distributor or retailer with a product reasonably safe for its intended purposes. *Insurance Co. of North America v. King*, 340 So. 2d 1175 (Fla. 4th Dist. Ct. App. 1976). See also *Pender v. Skillcraft Indus., Inc.*, 358 So. 2d 45 (Fla. 4th Dist. Ct. App. 1978) (retailers, and presumably wholesalers and distributors, are likewise entitled to indemnity for attorney's fees and costs when they have merely been passively negligent and successfully defend themselves in the main action); *Burbage v. Boiler Eng'g & Supply Co.*, 249 A.2d 563 (Pa. 1969) (where manufacturer strictly liable for defective replacement component part was found to be entitled to indemnity from component part manufacturer). There will be a different result if the party claiming the indemnity is himself negligent or is vicariously responsible for the negligence of another person which contributed to causing the injuries. *Dura Corp. v. Wallace*, 297 So. 2d 619 (Fla. 3d Dist. Ct. App. 1974); *Winn-Dixie Stores, Inc. v. Fellows*, 153 So. 2d 45 (Fla. 1st Dist. Ct. App. 1963); see also *Houdaille Indus., Inc. v. Edwards*, 374 So. 2d 490 (Fla. 1979) ("[i]ndemnity can only be applied where the liability of the person seeking indemnity is solely constructive or derivative and only against one who, because of his act, has caused such constructive liability to be imposed"). Since the liability issue under discussion is most acute for manufacturers, reference will generally be made to them.

4. Martin, *A Statute of Repose For Product Liability Claims*, 50 FORDHAM L. REV. 745, 745 (1982).

note will consider the provisions, function and practical application of this type of legislation, and explore the ramifications associated with their implementation.

Evolution of the Products Liability Statute of Repose

Due to the dramatic increase in products liability litigation in recent years, manufacturer's liability for products released into the stream of commerce has been expanded on several distinct fronts. First, the number of persons who may sue has increased because the privity requirement has been relaxed for causes of action not sounding in negligence.⁵ Florida courts can now recognize liability of a manufacturer who sells a product in a defective condition which is deemed unreasonably dangerous to the user, consumer or innocent bystander.⁶ In 1931, Judge Cardozo sounded the alarm that "[t]he assault upon the citadel of privity"⁷ was proceeding apace.

Second, the creation of strict liability⁸ and the creative application of the various warranty theories complementing the traditional com-

5. *Matthews v. Lawnlite Co.*, 88 So. 2d 299 (Fla. 1956). Prior to this decision, Florida recognized the early common law rule which inhibited recovery where there was no privity of contract. *Id.* at 300-01.

6. *West v. Caterpillar Tractor Co.*, 336 So. 2d 80 (Fla. 1976).

7. *Ultramares Corporation v. Touche*, 255 N.Y. 170, 180, 174 N.E. 441, 445 (1931). See also Prosser, *The Fall of the Citadel*, 50 MINN. L. REV. 791 (1966) [hereinafter cited as Prosser, *The Fall*]; Prosser, *The Assault Upon the Citadel*, 69 YALE L.J. 1099 (1960) [hereinafter cited as Prosser, *The Assault*].

8. W. PROSSER, RESTATEMENT (SECOND) OF TORTS, § 402A (1965) states:

(1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if

(a) the seller is engaged in the business of selling such a product, and

(b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.

(2) The rule stated in Subsection (1) applies although

(a) the seller has exercised all possible care in the preparation and sale of his product, and

(b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

mon law negligence theories⁹ have greatly increased the likelihood of recovery by victims of defective products.¹⁰ Astute plaintiffs' attorneys commonly plead negligence, breach of implied warranty and strict liability theories alternatively, and overcome previously insurmountable hurdles to recovery through the use of variations inherent in each of these theories. The once-popular doctrine of caveat emptor seems to have little utility in the present age of highly sophisticated products, when consumers are forced to rely upon the specialized knowledge and competence of manufacturers.¹¹

In addition, there has been a flood of products liability lawsuits in recent years following each revelation of another toxic man-made product, which was not previously suspected of having a toxic tendency.¹² Typically, the injury or affliction caused by exposure to this type of defective product remains latent for many years. The effects of the defective product during this dormant period often lack discernible symptoms, even to the medical profession.¹³ The peculiarities associated with

9. In *Royal v. Black & Decker Mfg. Co.*, 205 So. 2d 307 (Fla. 3d Dist. Ct. App. 1968), the court acknowledged the existence of 29 separate recovery theories related to products liability. *Id.* at 309 (citing Prosser, *The Assault* at 1124 (1960)).

10. This is especially true under a theory of strict liability, which has a lesser burden of proof than negligence or warranty theories. *See generally*, Parks, Watts-FitzGerald, & Watts-FitzGerald, *Products Liability*, 33 U. MIAMI L. REV. 1185 (1979).

11. For a general discussion, see Keeton, *Products Liability—Liability Without Fault and the Requirement of a Defect*, 41 TEX. L. REV. 855 (1963).

12. For example, the quantity of asbestosis, Dalcon Shield (birth control device) and synthetic estrogen drug diethylstilbestrol (commonly known as DES) products liability lawsuits is staggering. It is estimated that in February, 1980 there were more than 3,000 asbestosis cases pending nationally and over 500,000 more individuals "at risk." Practicing Law Institute seminar in New York City on Toxic Substances Litigation, reported in 8 *Prod. Safety & Liab. Rep. (BNA)* 142 (1980). In a class action consolidating 1,500 Dalcon Shield cases, a United States District Court noted that compensatory damages claimed in the action were "well over \$500 million and punitive damages, which combined, far exceeded the net worth of the IUD manufacturer." *In re "Dalcon Shield" I.U.D. Products Liability Litigation* (N.D. Cal. June 25, 1981), reported in 9 *Prod. Safety & Liab. Rep. (BNA)* 570, 570 (1981). Lastly, it was estimated in July, 1980, that there were approximately 1,000 lawsuits pending against DES manufacturers for cancerous vaginal abnormalities found in the daughters of the mothers who ingested this prescription drug to prevent miscarriages between 1947 and 1971. Rodgers, *DES Ruling Shakes Products Liability Field*, 66 A.B.A. J. 827 (1980).

13. This is probably best illustrated in the DES cases, where prenatally exposed

products with latent defects present many problems with the application of statutes of limitations for bringing such actions. Most notably is the often long time-lag between exposure to the defective product and discovery of the defect. Hence, the duration of the manufacturer's responsibility to answer for product-related injuries has increased because persons more remote in the privity chain—and even persons outside of it—are permitted to sue many years after the delivery of the defective product.

As a result of the manufacturer's increased exposure to liability for defective products,¹⁴ insurers impose corresponding increases in premiums for product liability insurance.¹⁵ Manufacturers view this increase as the result of more frequent product liability litigation and higher damage awards.¹⁶ Consequently, the manufacturing industry nationwide wages a vigorous lobbying campaign to convince legislators and consumers that there is a need to "reform" current product liability laws. Their goal is to reduce the costs associated with insurance coverage and products liability litigation.¹⁷

Possibly the most notable result of the manufacturing industry's efforts is the enactment of repose legislation by a number of states,¹⁸

daughters of mothers who took the drug often do not develop abnormal symptoms until sometime after puberty. Researchers are trying to establish whether sons of mothers who ingested DES were having infertility problems as late as 1980. The lack of empirical data may delay such a revelation another ten years or longer. For a well-researched reference to products with latent defects, especially in the medical field, see Stevenson, *Products Liability and the Virginia Statute of Limitations—A Call for the Legislative Rescue Squad*, 16 U. RICH. L. REV. 323 (1982).

14. See *Auburn Machine Works Co. v. Jones*, 366 So. 2d 1167 (Fla. 1979), where the Florida Supreme Court rejected the "patent danger" or "open and obvious hazard" doctrine and held:

the obviousness of the hazard is not an exception to liability on the part of the manufacturer but rather is a defense by which the manufacturer may show that the plaintiff did not exercise a reasonable degree of care as required by the circumstances. We also conclude that the principles of comparative negligence apply where this defense is raised.

Id. at 1167.

15. FINAL REPORT, cited in Donnelly, *supra* note 1, at 124.

16. Phillips, *An Analysis of Proposed Reform of Products Liability Statutes of Limitations*, 56 N.C.L. REV. 663, 663 (1978).

17. FINAL REPORT, cited in Donnelly, *supra* note 1, at 125 n.7.

18. ALA. CODE § 6-5-502(c) (Supp. 1982) ("within 10 years after the manufac-

including Florida,¹⁹ terminating a manufacturer's responsibility after a specified time elapses after delivery of the product to its original pur-

chased product is first put to use"); ARIZ. REV. STAT. ANN. § 12-551 (1982) ("twelve years after the product was first sold"); COLO. REV. STAT. ANN. § 13-21-403(3) (Supp. 1982) ("[t]en years after a product is first sold . . . it shall be rebuttably presumed that the product was not defective"); CONN. GEN. STAT. ANN. § 52-577a(a) (West Supp. 1982) ("ten years from the date that such party last parted with possession or control of the product"); GA. CODE ANN. § 105-106(b)(2) (Supp. 1982) ("10 years from the date of the first sale"); IDAHO CODE § 6-1403 (Michie Supp. 1982) ("ten (10) years after time of delivery, a presumption arises that . . . the useful safe life had expired"); ILL. ANN. STAT. ch. 83, § 22.2(b) (Smith-Hurd Supp. 1982-1983) ("12 years from the date of first sale, lease or delivery . . . by a seller or 10 years from the date of first sale, lease or delivery to its initial user"); IND. CODE ANN. § 33-1-1.5-5 (West Supp. 1982) ("ten (10) years after the delivery of the product"); 4A KAN. STAT. ANN. § 60-513(b) (1976) ("ten (10) years beyond the time of the act giving rise to the cause of action"); KY. REV. STAT. ANN. § 411.310(1) (Michie Supp. 1982) (non-defective presumption arises "five (5) years after the date of sale . . . or more than eight (8) years after the date of manufacture"); MICH. COMP. LAWS ANN. § 600.5805(9) (West Supp. 1982-1983) (after ten years, plaintiff must prove his prima facie case without the benefit of any presumptions); MINN. STAT. ANN. § 604.03 (West Supp. 1983) ("expiration of the ordinary useful life of the product"); NEB. REV. STAT. § 25-224(2) (Cum. Supp. 1982) ("ten years after the date when the product . . . was first sold or leased"); N.H. REV. STAT. ANN. § 507-D:2(II) (Supp. 1979) ("12 years after the manufacturer . . . parted with its possession and control or sold it, whichever occurred last"); N.C. GEN. STAT. § 1-50(6) (Supp. 1981) ("six years after the date of initial purchase"); N.D. CENT. CODE § 28-01.1-02 (Supp. 1981) ("ten years of the date of initial purchase . . . or within eleven years of the date of manufacture"); OR. REV. STAT. § 30.905(1) (1979) ("eight years after the date on which the product was first purchased"); R.I. GEN. LAWS § 9-1-13(b) (Michie Supp. 1982) ("ten (10) years after the date the product was first purchased"); S.D. CODIFIED LAWS ANN. § 15-2-12.1 (Supp. 1982) ("six years after the date of delivery"); TENN. CODE ANN. § 29-28-103 (1980) ("ten years from the date on which the product was first purchased . . . or within one (1) year after the expiration of the anticipated life . . . , whichever is shorter"); UTAH CODE ANN. § 78-15-3 (1977) ("six years after the date of initial purchase . . . or ten years after the date of manufacture"); WASH. REV. CODE ANN. § 7.72.060 (Supp. 1983-84) ("after the product's 'useful safe life' had expired," which is presumed to be "twelve years after the time of delivery"); *see also* MODEL ACT, *supra* note 2, 44 Fed. Reg. at 62,732 (where a uniform repose period ending at the expiration of a product's "useful safe life" is proposed, and a rebuttable presumption arises ten years after delivery that the product's useful safe life had expired).

19. FLA. STAT. § 95.031(2) (1981) ("within 12 years after the date of delivery"). As of January, 1982, twenty-two states had adopted "statutes of repose", or statutes of limitations which operate from the act or omission complained of, therefore serving as

chaser. This type of statute is commonly known as a "statute of repose".

A statute of repose is distinguishable from a statute of limitation, which "ordinarily begins to run when there has been a breach of an obligation."²⁰ A statute of limitation serves to place a time limit on the plaintiff's right to bring an action for recovery of a loss caused by a breach.²¹ On the other hand, a statute of repose limits the duration that the manufacturer's obligation remains outstanding, and, therefore, the obligation owed by the manufacturer "exists only during the statutory period."²² Thus, injuries which occur after the running of the statute of repose cannot, theoretically, be the subject of successful lawsuits, since the manufacturer's obligation to pay for the injury has since expired.

The practical difference between these two distinct types of limitations lies in the fact that the statute of limitation implicitly seeks to punish those plaintiffs who "sleep on their rights," while the statute of repose operates to bar some plaintiffs' actions no matter how diligent they have been in asserting their claims.²³ It appears necessary, therefore, to analyze the reasoning supporting a statute of repose which could limit or extinguish the rights of even the most prudent and diligent plaintiffs.

The usefulness and practical need for a statute of repose is difficult to discern. Through recent developments in products liability litigation and the "products liability revolution," manufacturers were suddenly faced with the possibility of perpetual liability for defects in the products they produced many years before. As one commentator put it, the public "which has been persuaded to buy with enthusiasm is just as eager to impose liability if the product [causes] harm."²⁴ In response, manufacturer's argue that statutes of repose protect both the courts and the defendants against the possibility of litigating claims from old product-caused injuries, which necessitate proof by stale or often un-

statutes of repose. Martin, *A Statute of Repose for Product Liability Claims*, 50 *FORDHAM L. REV.* 745, 749 n.25 (1982).

20. See Martin, *supra* note 19, at 749.

21. *Id.*

22. *Id.*

23. See Comment, *Limitation of Action Statutes for Architects and Builders—Blueprints for Non-Action*, 18 *CATH. U. L. REV.* 361, 377-79 (1969).

24. 1 L. FRUMER & M. FRIEDMAN, *supra* note 1, § 1 at 1-6 (1980).

available evidence.

The expense of litigating older claims is more costly, even when the defendant-manufacturer prevails.²⁵ Often, records and witnesses are difficult to obtain. Manufacturers contend that this cost increase is ultimately born by consumers, through higher prices. Indeed, the policy reasons supporting repose and avoiding stale claims are strong. Manufacturers also argue that there is a greater likelihood that older products have been misused or subjected to modification. In addition, there is also a real chance that the jury might wrongly evaluate a product's "defective" nature by unwittingly comparing today's standards, rather than the state of the art existing in the industry at the time of manufacture.²⁶

Statutes of repose also provide the manufacturer with a reasonable standard from which they can predict potential liability. Thus, a manufacturer may plan for future tort liability, or at least designate certain funds to cover the cost of product liability insurance premiums which theoretically will be lower due to decreased exposure to liability.²⁷ However, all of the factors supporting statutes of repose tend to prejudice defendants with the passage of time.

Application of the "Ultimate Repose" in Florida

Sensing a need for reform—the probable consequence of the various manufacturing industry lobbying efforts—beginning in 1974, the Florida Legislature extensively amended chapter 95 of the Florida

25. The cost of investigating and processing claims is obviously greater when records and witnesses take longer to assemble, such as in proving or defending allegations that an old product is defective.

26. See MODEL ACT, *supra* note 2, 44 Fed. Reg. at 62,734; Comment, *Statutes of Repose in Products Liability: The Assault Upon the Citadel of Strict Liability*, 23 S.D.L. REV. 149, 171 (1978).

27. There is at least one recent decision which indicates that empirical data has shown that statutes of repose cut down consumer's remedies without reducing insurance costs or increasing the availability of products liability insurance for business. See *Lankford v. Sullivan, Long & Hagerty*, 416 So. 2d 996 (Ala. 1982). "To say that barring claims involving products that have been used for more than 10 years will eradicate and ease the cost increases in consumer prices and product liability insurance is unreasonable in our opinion." *Id.* at 1001; see also 25 ATLA L. REP. at 295 (Sept. 1982).

Statutes, which governs the time limitations for bringing suit.²⁸ In pertinent part, section 95.11 now provides:

[a]ctions other than for recovery for real property shall be commenced as follows:

. . .

(3) Within four years.—

(a) An action founded on negligence.

. . .

(e) An action for injury to a person founded on the design, manufacture, distribution, or sale of personal property that is not permanently incorporated in an improvement to real property, including all fixtures. . . .²⁹

Further, section 95 of the Florida Statutes mandates that actions for products liability brought under section 95.11(3):

must be begun within the period prescribed in this chapter, with the period running from the time the facts giving rise to the cause of action were discovered or should have been discovered with the exercise of due diligence, instead of running from any date prescribed elsewhere in subsection (3) of s. 95.11, *but in any event within 12 years after the date of delivery of the completed product to its original purchaser . . .*, regardless of the date the defect in the product . . . was or should have been discovered.³⁰

Therefore, the Florida Legislature chose to supplement the traditional “4 year from the date of injury” limitation by tacking on a maximum specified time within which products liability actions must be brought—a “12 year from the date of delivery” limitation. Statutes of repose for products liability actions, such as this one in Florida, have thus far been adopted in twenty-three jurisdictions.³¹

28. 1975 Fla. Laws 74-382. These revisions became effective on January 1, 1975.

29. FLA. STAT. § 95.11(3)(a), (e) (1981).

30. FLA. STAT. § 95.031(2) (1981) (emphasis added).

31. For a list of these “date of sale” or “date of delivery” statute of limitation jurisdictions, *see supra* notes 18-19. In early 1980, the 22 states that had enacted product liability statutes of repose at that time provided the law for 34% of personal injury and 38% of property damage claims in the product liability area. *See, Martin, supra* note 19, at 759 n.80.

Traditionally, statutes of limitations employed in tort actions do not begin running until the injury itself is sustained.³² Section 95.031 of the Florida Statutes states that “[e]xcept as provided in subsection (2) . . . , the time within which an action shall be begun under any statute of limitations runs from the time the cause of action accrues.”³³ Recent developments in the area of products liability, however, have generated a “discovery rule,” wherein the statutory period begins running “from the time the facts giving rise to the cause of action were discovered or should have been discovered with the exercise of due diligence. . . .”³⁴

Viewing the applicable Florida Statutes together, a person injured by a defective product in Florida could bring an action against the manufacturer within four years from the date they discovered (or should have discovered) that the cause of their injury was the defective product.³⁵ This statutory period of four years would not, therefore, necessarily begin running at the date of injury if discovery of the defect was not until a later date. If the action involves a product with a latent defect, the four year period “runs from the date the defect is discovered or should have been discovered.”³⁶ However, the statute of repose states that no action would be permitted which was filed after 12 years from

32. Note, *Developments in the Law: Statutes of Limitations*, 63 HARV. L. REV. 1178, 1185 (1949).

33. FLA. STAT. § 95.031 (1981).

34. FLA. STAT. § 95.031(2) (1981). A statute of limitations begins to run “when there has been notice of an invasion of the legal right of the plaintiff” or when a person has first “been put on notice of his right to a cause of action.” *City of Miami v. Brooks*, 70 So. 2d 306, 309 (Fla. 1954). See also *Nardone v. Reynolds*, 508 F.2d 660 (5th Cir. 1975); *Creviston v. General Motors Corp.*, 225 So. 2d 331 (Fla. 1969); *Lund v. Cook*, 354 So. 2d 940 (Fla. 1st Dist. Ct. App. 1978); *Buck v. Mouradian*, 100 So. 2d 70 (Fla. 3d Dist. Ct. App. 1958). For the most part, the time at which a plaintiff’s cause of action accrues is deemed to be the time at which the injury was sustained.

35. FLA. STAT. §§ 95.031 (1981) and 95.11(3) (1981).

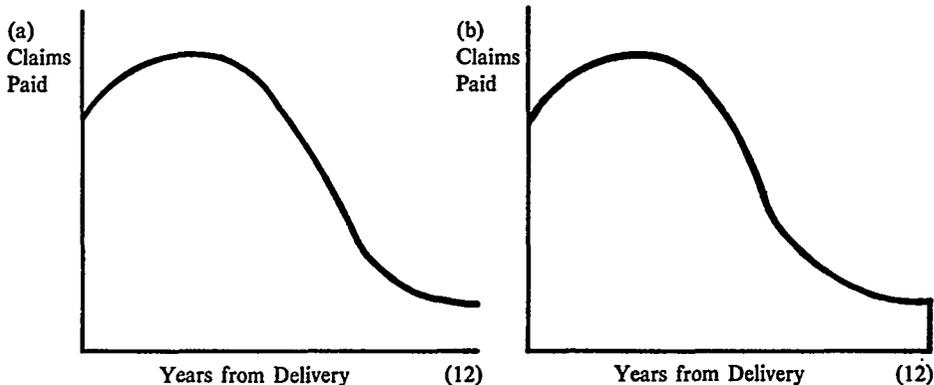
36. *Bauld v. J.A. Jones Const. Co.*, 357 So. 2d 401, 402 (Fla. 1978). However, there has been at least one decision which determined that the “accrual date” of the statute of limitations began on the date of injury, and was apparently unaffected by the plaintiff’s lack of knowledge at that time of the product’s defect which had caused the injury. *Walker v. Beech Aircraft Corp.*, 320 So. 2d 418 (Fla. 3d Dist. Ct. App. 1975) (where a Florida two year wrongful death statute of limitations barred an action brought 35 months after plaintiff’s decedent’s death).

the date of delivery of the product.³⁷ As a matter of substantive law, this statute of repose imposes an outside cut-off date beyond which no lawsuit may be instituted, irrespective of the accrual date of the cause of action.³⁸

The arguments against the implementation of such a statute of repose in products liability cases center on three principal bases: due process, equal protection and state constitutional provisions which guarantee access to the courts. The very heart of the due process argument is that a statute of repose, which cuts off the manufacturer's liability after a specified time has passed, deprives an injured person of a cause of action for his injuries.³⁹ However strong this argument may seem to be, it has enjoyed little or no success. The courts have consistently agreed that the legislature may limit, or in fact, abolish, a right of access to the courts for redress for a particular injury under certain circumstances. "The legislature unquestionably has the power to shorten statutes of limitation, which are part of the remedial law of the state."⁴⁰ "[W]here mere inchoate rights are concerned, depending for their original existence on the law itself, they are subject to be abridged

37. FLA. STAT. § 95.031(2) (1981).

38. By way of illustration, graph (a) depicts no statute of repose (manufacturers' perpetual liability) and graph (b) depicts a 12 year statute of repose, such as in Florida (cutting off the manufacturers' liability at year 12).



39. See, e.g., *Hill v. Forrest & Cotton, Inc.*, 555 S.W.2d 145, 149 (Tex. Civ. App. 1977).

40. *Carpenter v. Florida Cent. Credit Union*, 369 So. 2d 935, 937 (Fla. 1979).

or modified by law.”⁴¹

However, Florida’s statute of repose does not provide for an extension of the limitation period for someone injured shortly before the expiration period. It follows that the argument for a due process violation becomes stronger as an individual’s limitation period becomes shorter. This arbitrary aspect of the statute would presumably cause a court to hold it unconstitutional as applied to an individual who was injured on the last day of the twelve-year period. The author’s proposal is to supplement Florida’s statute of repose with a savings clause which provides for those injuries occurring near the expiration of the twelve-year period:

but in any event within 12 years after the date of delivery of the completed product to its original purchaser . . . , regardless of the date the defect in the product . . . was or should have been discovered, except that, *if the cause of action accrues more than 11 years but not more than 12 years after the initial delivery, the action may be commenced at any time within one year after the cause of action accrues.*

With respect to equal protection challenges, courts must inquire whether the statute of repose has established “a classification which has no rational relation to a proper state objective.”⁴² “A statute of limitation does not deny equal protection if it is based on a rational distinction among classes of persons,”⁴³ and rests on “some difference that bears a just and reasonable relation to the statute in respect to which the classification is proposed.”⁴⁴ Since the scope of the product liability statute of repose in Florida theoretically creates a classification which is congruent with the class of persons whose liability is intended to be limited—all plaintiffs filing suit after the statutory period has run—and the statute treats differently persons in different circumstances,⁴⁵ it has thus far withstood equal protection challenges.⁴⁶

41. *Hart v. Bostwick*, 14 Fla. 162, 180 (1872); *see also Kluger v. White*, 281 So. 2d 1 (Fla. 1973) and the text accompanying footnote 55.

42. *Purk v. Federal Press Co.*, 387 So. 2d 354, 357 (Fla. 1980).

43. *Id.* at 357.

44. *Gammon v. Cobb*, 335 So. 2d 261, 264 (Fla. 1976).

45. *Compare Overland Construction Co. v. Sirmons*, 369 So. 2d 572 (Fla. 1979), *with Bauld*, 357 So. 2d 401. *See also Purk*, 387 So. 2d at 357-58.

The Florida Constitution, however, guarantees that “[t]he courts shall be open to every person for redress of any injury. . . .”⁴⁷ Thus, relying heavily upon this constitutional mandate, the Florida Supreme Court recently declared unconstitutional a statute of repose which, when applied, presented an absolute bar to the courts.⁴⁸ Section 95.11(3)(c) of the Florida Statutes⁴⁹ absolutely barred suits for construction defects brought against contractors more than twelve years after the construction which produced the injury was completed. The court in *Overland Construction Co. v. Sirmons*⁵⁰ held that the statute violated the right of access to the courts guaranteed by Article 1, Section 21 of the Constitution of the State of Florida, as applied to persons who are injured after the expiration of the twelve-year statute of repose period.⁵¹

The *Overland* court reasoned that if such a statute of repose were given effect to provide absolute immunity to responsible parties after the statutory period, the injured plaintiff’s cause of action would already be “barred by the twelve year limitation when it first accrued—that is, when his injuries occurred.”⁵² Consequently, “[n]o judicial forum would ever have been available to [such plaintiffs] if the

46. *Purk*, 387 So. 2d at 357-58.

47. FLA. CONST. art. 1, § 21. Thirty-seven other state constitutions contain “access to the courts” guarantees. 25 ATLA L. REP. 295 (Sept. 1982).

48. *Overland*, 369 So. 2d 572. The question of interpretation and the constitutionality of a statute is a question of law for the court. *City of St. Petersburg v. Austin*, 355 So. 2d 486 (Fla. 2d Dist. Ct. App. 1978). When deciding the constitutionality of a statute which operates to limit the amount of time a claimant has to bring her action, the court should determine whether that party was afforded a reasonable time in which to act before being barred under the applicable statute. *See Atchafalaya Land Co. v. F.B. Williams Cypress Co.*, 258 U.S. 190 (1922); *Buck v. Triplett*, 159 Fla. 772, 32 So. 2d 753 (1947); *Campbell v. Horne*, 147 Fla. 523, 3 So. 2d 125 (1941).

49. FLA. STAT. § 95.11(3)(c) (1975). The portion of this statute most germane to our discussion provided that no action founded on the alleged defective design, planning or construction of an improvement to real property shall be brought against the professional engineer, registered architect, or licensed contractor after 12 years from the completion of the improvements which produced the injury. The present section 95.11(3)(c) of the Florida Statutes provides for a 15 year limitation. FLA. STAT. § 95.11(3)(c) (1981).

50. 369 So. 2d 572.

51. *Id.* at 575.

52. *Id.*

. . . prohibitory portion of the statute were given effect."⁵³ In reaching this conclusion, the *Overland* court quoted the earlier Florida Supreme Court decision of *Kluger v. White*,⁵⁴ which held:

[t]he legislature is without power to abolish such a right without providing a reasonable alternative to protect the rights of the people of the State to redress for injuries, unless the Legislature can show an overpowering public necessity for the abolishment of such a right, and no alternative method . . . can be shown.⁵⁵

The *Overland* court labored to distinguish its earlier decision in *Bauld v. J. A. Jones Construction Co.*⁵⁶ which appears, at first glance, to be in direct conflict with the holding in *Overland*. In *Bauld*, the court sustained the very provision that the *Overland* court deemed unconstitutional as applied.⁵⁷ The distinction, however, rests in the fact that the plaintiff in *Bauld* was not absolutely denied access to the courts as was the plaintiff in *Overland*.⁵⁸

In *Bauld*, the plaintiff's injury occurred two and one-half years prior to the enactment of the applicable statute of repose.⁵⁹ At the time of the enactment, the plaintiff's cause of action would have been barred by the twelve-year statute of repose because the allegedly defective construction had been completed more than twelve years before.⁶⁰ However, section 95.022 of the Florida Statutes provides a "savings clause", which states that any action that would be barred on January 1, 1975, the effective date of the statute of repose, may be brought

53. *Id.*

54. *Kluger*, 281 So. 2d 1.

55. *Overland*, 369 So. 2d at 573 (quoting *Kluger v. White*, 281 So. 2d 1, 4 (Fla. 1973)). *Kluger* is regarded as "[t]he polestar decision for the construction of [article 1, section 21 of the Constitution of the State of Florida]." *Overland*, 369 So. 2d at 573.

56. 357 So. 2d 401.

57. *Id.* at 403. See *supra* note 49 for a summary of the text of section 95.11(3)(c) of the Florida Statutes.

58. *Bauld*, 357 So. 2d at 403.

59. The plaintiff's injury in *Bauld* occurred on July 8, 1972. *Bauld*, 357 So. 2d at 401. Section 95.11(3)(c) of the Florida Statutes took effect on January 1, 1975. FLA. STAT. § 95.022 (1981).

60. *Bauld*, 357 So. 2d at 401-02. The defendant did its last construction work on the project no later than August 16, 1961. *Id.* at 401.

anytime before January 1, 1976.⁶¹ Therefore, the plaintiff in *Bauld* had a period of approximately three and one-half years in which her action could have been filed—after the date of her injury and prior to the extended deadline imposed by the statute of repose and savings clause. Consequently, the statute of repose as applied to these facts did not abolish a cause of action, but merely abbreviated the period within which suit could be commenced from four to three and one-half years.⁶²

These decisions have had profound effects in the development of products liability law, particularly with respect to health-related products. For example, the Florida Supreme Court in *Diamond v. E. R. Squibb & Sons, Inc.*⁶³ recently invalidated the twelve-year products liability statute of repose, section 95.031(2) of the Florida Statutes, as it applied to a plaintiff who filed suit twenty-one years after the delivery of the product.⁶⁴ The plaintiff in *Diamond* sought to recover damages resulting from the cancer-producing qualities of the synthetic drug Stilbetin (also known as diethylstilbestrol or DES), which was prescribed to pregnant mothers to prevent miscarriages between 1947 and 1971. In 1971, however, it was discovered that some, but not all, prenatally exposed daughters of mothers who had ingested DES were developing cancerous vaginal abnormalities.⁶⁵ Because DES does not

61. FLA. STAT. § 95.022 (1981) states:

[t]his act shall become effective on January 1, 1975, but any action that will be barred when this act becomes effective and that would not have been barred under prior law may be commenced before January 1, 1976, and if it is not commenced by that date, the action shall be barred.

Id. Hence, an additional year was given to those plaintiffs whose right to bring an action was cut off on January 1, 1975. *Id.* A one year savings period has been deemed to be reasonable. *Campbell v. Horne*, 147 Fla. 523, 3 So. 2d 125 (1941).

62. *Bauld*, 357 So. 2d at 403. Four years was the applicable statute of limitations for construction defect actions. FLA. STAT. § 95.11(4) (1971).

63. 397 So. 2d 671 (Fla. 1981).

64. *Id.* at 672.

65. See Podgers, *DES Ruling Shakes Products Liability Field*, 66 A.B.A. J. 827 (1980). It is interesting to note that the California Supreme Court has recently ruled that DES plaintiffs may proceed to trial against several drug companies that generically produced DES where it is difficult, if not impossible, to specifically determine which company produced the injury-causing drug. *Sindell v. Abbott Laboratories*, 26 Cal. 3d 588, 607 P.2d 924, 163 Cal. Rptr. 132 (1980). If found liable to the plaintiffs, each of the manufacturer-defendants would only be responsible for its approximate per-

adversely affect all prenatally exposed daughters, the statute of limitation for such an action begins to run from the time the defect (or, in this case, the injury) was or should have been discovered.⁶⁶ Determining precisely when the defect, i.e. injury, *should* have been discovered can be very difficult where, as in the DES cases, a latent defect exists which only affects a portion of those consumers exposed to the product. Ordinarily, it is a question of fact as to whether one by exercise of reasonable diligence should have known there was a cause of action against a defendant, and should be left to the jury to decide.⁶⁷

In *Diamond*, the prenatal daughter was exposed to DES on or before April 1, 1956, and "discovered" the defect in May, 1976.⁶⁸ Thus, when she instituted an action for negligence and products liability on April 1, 1976 (twenty-one years after exposure to the drug), her action would have long been barred by strict application by the statute of repose. However, applying the principle laid down in *Overland*, the court in *Diamond* held:

[t]he operation of section 95.031(2) in this case has the same effect as it had in *Overland*. . . . The statute of limitations operated there to bar the cause of action before it ever accrued, so that no judicial forum was available to the aggrieved plaintiff. . . . We therefore hold that as applied in this case, section 95.031(2) violates the Florida Constitution's guaranty of access to courts.⁶⁹

In another similar situation, the United States District Court for the Southern District of Florida in *Ellison v. Northwest Engineering Co.*⁷⁰ held section 95.031(2) of the Florida Statutes to violate the state's "access to courts" constitutional mandate where the plaintiff suffered injuries through use of a machine manufactured and delivered

centage market share. *Id.* at 613-14, 607 P.2d at 937, 163 Cal. Rptr. at 145.

66. FLA. STAT. § 95.031(2) (1981).

67. First Fed. Sav. & Loan Ass'n of Wisconsin v. Dade Fed. Sav. & Loan Ass'n, 403 So. 2d 1097 (Fla. 5th Dist. Ct. App. 1981); Rosen v. Sparber, 369 So. 2d 960 (Fla. 3d Dist. Ct. App. 1978).

68. *Diamond*, 397 So. 2d at 671.

69. *Id.* at 672.

70. 521 F. Supp. 199 (S.D. Fla. 1981) (applying Florida law in a diversity action).

twenty-three years before the action was begun.⁷¹ The *Ellison* court recognized the two part test announced by the Florida Supreme Court in *Kluger*: (1) whether an action for negligence, warranty, and strict liability existed in 1968 when the "access to courts" provision of the Florida Constitution was re-adopted, and (2) whether this constitutionally protected right would be abolished without providing any reasonable alternative if the statute of repose was strictly applied in the given case.⁷² Answering both questions in the affirmative, the court held the twelve-year products liability statute of repose, which would have terminated the plaintiff's ability to sue even before the injury occurred, to be violative of article I, section 21, of the Florida Constitution as applied to the facts of this case.⁷³ Consequently, as a result of the decision in *Overland*, other courts have declared the products liability statute of repose to be unconstitutional insofar as it provides an absolute bar to lawsuits brought more than twelve years from the date the product was delivered.⁷⁴

To complete the analysis, we must examine *Purk v. Federal Press Co.*,⁷⁵ a recently decided Florida Supreme Court decision. The *Purk* court followed the reasoning in *Bauld*,⁷⁶ decided two years before, to uphold the constitutionality of section 95.031(2) as it applied to the facts of that case.⁷⁷ As in *Bauld*, the plaintiff in *Purk* was injured before the statute of repose took effect.⁷⁸ A punch press, delivered no later than June 2, 1961, injured Mrs. Purk on April 24, 1973.⁷⁹ Finally, Mrs. Purk brought a products liability action on April 13, 1976, alleging that the press was defective and negligently manufactured.⁸⁰ Viewing the effective date of January 1, 1975, for the statute of repose and the one-year "savings clause"⁸¹ together, the action should have been

71. *Id.* at 202.

72. *Id.*

73. *Id.*

74. See *Ellison*, 521 F. Supp. 199; *Diamond*, 397 So. 2d 671; *Battilla v. Allis Chalmers Mfg. Co.*, 392 So. 2d 874 (Fla. 1980).

75. 387 So. 2d 354 (Fla. 1980).

76. *Bauld v. J.A. Jones Const. Co.*, 357 So. 2d 401 (Fla. 1978).

77. *Purk*, 387 So. 2d at 357.

78. *Id.* at 355-56; see *Bauld*, 357 So. 2d at 401.

79. *Purk*, 387 So. 2d at 355-56.

80. *Id.* at 356.

81. FLA. STAT. § 95.022 (1975). For the full text of this provision, see *supra* note

commenced on or before January 1, 1976, to be timely. Since it was not filed until April of that year, the Florida Supreme Court affirmed summary judgment for the defendant.⁸² In effect, Mrs. Purk's statute of limitation was shortened from four years to two years and eight months from the date she "discovered" the defect—the date of her injury. Hence, Mrs. Purk's cause of action was not abolished, and application of the statute in her case was held to be constitutional.⁸³ The court implicitly held, therefore, that two years and eight months was a reasonable time in which Mrs. Purk could have commenced her products liability action,⁸⁴ after which her action was forever barred.

61.

82. *Purk*, 387 So. 2d at 357.

83. *Id.*

84. *Id.*; see *Cates v. Graham*, 1982 Fla. L.W. 907 (Fla. 3d Dist. Ct. App. Apr. 20, 1982), *rev'd on rehearing*, 1983 Fla. L.W. 621 (Fla. 3d Dist. Ct. App. Feb. 22, 1983), where the time within which a medical malpractice action could be brought was shortened to approximately five months and was deemed to be reasonable. *Cates*, 1983 Fla. L.W. at 621. The Florida medical malpractice statute of limitation states:

(b) An action for medical malpractice shall be commenced within 2 years from the time the incident giving rise to the action occurred or within 2 years from the time the incident is discovered, or should have been discovered with the exercise of due diligence; however, *in no event shall the action be commenced later than 4 years from the date of the incident or occurrence out of which the cause of action accrued.*

* * * * *

FLA. STAT. § 95.11(4)(b) (1981) (emphasis added).

In *Cates*, the minor plaintiff last received medical treatment by his doctor on July 4, 1975. *Cates*, 1983 Fla. L.W. at 621. Under section 95.11(4)(b) of the Florida Statutes, the plaintiff would have had until July 4, 1979 to bring his action for malpractice, at which time his action would become time barred. Notwithstanding the plaintiff's knowledge on February 6, 1979 that the medical treatment had been wrongful (a factual finding by the court), he delayed filing his medical malpractice mediation claim until January 9, 1980. *Cates*, 1983 Fla. L.W. at 621.

In affirming summary judgment in favor of the defendant doctor, the court held that the statute, as applied to the facts of this case, did not operate as a complete bar to the plaintiff's action. *Id.* Moreover, the court held five months to be a reasonable limitation period within which plaintiff should have brought his action. *Id.* In a special concurrence by Judge Jorgenson of the Third District Court of Appeal, he writes "[w]ere I free to write upon a clean slate, I would hold that section 95.11(4)(b) is unconstitutionally applied to this minor plaintiff. Under the principles announced in *Hoffman v. Jones*, 280 So. 2d 431 (Fla. 1973), I cannot do so and, therefore, concur in this result." *Id.* The *Hoffman* court held that "a District Court of Appeal does not have

There are, however, several interrelated problems inherent in the *Purk* and *Bauld* line of cases. First, it is possible that the plaintiffs in both cases erroneously believed their statute of limitations to be four full years from discovery of the defect. This, of course, means four years from the date of injury. Failure to discover the delivery date of the machine and ending date of construction in *Purk* and *Bauld*, respectively, and failure to file their lawsuits timely proved to be fatal in both actions.

Second, in the area of products liability litigation, section 95.031(2) of the Florida Statutes imposes a duty on all plaintiffs' attorneys to promptly determine the delivery date of the injury-causing product, conceptually a difficult task. Failing to do so may be grounds for malpractice. Assuming potential defendants would cooperate in generating this information, other problems still exist. Records bearing the date of delivery of the product may not have been kept, or they may have been lost or destroyed. An alternative is to hastily file suit

the authority to overrule a decision of the Supreme Court of Florida." 280 So. 2d at 440. Judge Jorgenson was apparently referring to the prior Florida Supreme Court decision in *Bauld*, upon which reasoning the majority opinion in *Cates* was based. *Cates*, 1983 Fla. L.W. at 621.

Judge Baskin, the third member of the panel in the *Cates* decision, succinctly pinpointed the issue in her dissent: "whether the five months between discovery of [plaintiff's] injury and the absolute four-year bar to bringing suit under section 95.11(4)(b) constituted a reasonable time under the Florida Constitution [article 1, § 21] for commencement of a medical malpractice claim." *Cates*, 1983 Fla. L.W. at 621 (Baskin, J., dissenting). She went on to state:

[i]n my opinion, the date of discovery is significant in determining whether reasonable time remains for the commencement of an action. For these reasons, I would hold that the five-month period between the date of discovery and the expiration of the final four-year repose provision of section 95.11(4)(b) was insufficient to afford appellant his constitutionally guaranteed right of access to court. I would reverse.

Id. This author is aware of a similar situation involving a Broward County (dental) medical malpractice action which was to be filed the beginning of May, 1983. This case involves a plaintiff whose action was technically barred eight or nine days after he discovered that he had a cause of action. Clearly, the medical malpractice statute of repose is unconstitutional as applied to these facts. Both due process and the Florida constitutional "access to courts" guarantee are violated by strict application of the repose statute. *See also Bauld*, 357 So. 2d 401, where the court implicitly held an abbreviated period of approximately three and one-half years to bring an action for a construction defect to be reasonable. *Bauld*, 357 So. 2d at 403.

when there is legitimate concern over the running of the twelve-year statute of repose.⁸⁵ This does not comport with public policy, which discourages frivolous and non-meritorious claims.

Third, this principle presents a dichotomy in that the plaintiffs in *Bauld* and *Purk* are barred from presenting their claims which arose less than twelve years from the acts or occurrences complained of, while plaintiffs in the *Overland* and *Diamond* line of cases are permitted to bring their actions (after fourteen and twenty-one years, respectively).

Through the benefit of a hypothetical which is analogous to the situation in *Purk*, we can develop this dilemma more fully. Suppose, for example, a product (assumed to be defective) was delivered on June 2, 1963, and the plaintiff was injured by it on April 24, 1975. Since the plaintiff was injured after the effective date of the statute of repose⁸⁶ (January 1, 1975), the cause of action was not extinguished by the implementation of the statute on that date. Therefore, the one-year "savings clause" is of no benefit to her.⁸⁷

Plaintiff's cause of action, however, would terminate twelve years after the delivery date of the product (June 2, 1975), according to the tenor of the repose statute. Therefore, the plaintiff would only have forty days from her injury in which to file suit. If the plaintiff attempts to file suit after that time, the court could, of course, deem the statute of repose to be unconstitutional as applied to her, since it failed to afford her a reasonable time in which to bring her action.⁸⁸ Strict application of the statute, however, would create a *Purk trap*⁸⁹ for the un-

85. FLA. STAT. § 95.031(2) (1975).

86. *Id.*

87. See FLA. STAT. § 95.022 (1981). For the text of the "savings clause," which only provides for an additional year (until January 1, 1976) if an existing action is terminated by the statute of repose on its effective date (January 1, 1975), see *supra* note 61.

88. However, see *Cates*, *supra* note 84, where the medical malpractice statute of repose operated to limit the claimant's period within which he could bring suit to five months, which was deemed to be reasonable. This author agrees with the lengthy dissent in the *Cates* decision, and feels that the plaintiff in *Cates* suffered such a disadvantage that the statute of repose should have been declared unconstitutional as applied to the facts in that case.

89. This clever phrase has been used on numerous occasions to describe this ardent situation by Joel D. Eaton, Esq., of the law firm of Podhurst, Orseck, Parks, Josef-

From the manufacturer's point of view, statutes of repose would affect few people adversely but would permit rather substantial savings; i.e., lower consumer costs due to lower products liability insurance premiums. From the perspective of potential plaintiffs, there is still concern for the few individuals who would receive no compensation from the manufacturer for injuries caused by older defective products. Recently discovered latent defects arising long after use of the product complicate this position. Where, as in Florida, there is a constitutional guarantee of "access to the courts," this position becomes even more salient. In addition, recently available empirical data suggests that the results desired by the manufacturing industry are *not* being achieved through enactment of these statutes of repose.⁹² Thus, if insurance premiums are not significantly affected by the enactment of repose legislation, serious questions arise as to the validity of these statutes when they operate to bar an individual's right to redress for injury.

Conclusion

The Florida Legislature, persuaded by the aftermath of the "products liability revolution" witnessed in the last two decades, erred in 1975 by annexing "ultimate repose" limitations to existing products liability statutes of limitations. As it now stands, section 95.031(2)⁹³ affords disparate application, as examined in recent decisions,⁹⁴ with no significant benefit to the manufacturing industry.⁹⁵ Repeal or modifica-

92. See *Lankford*, *supra* note 27. "Although a statute of repose certainly would reduce recoveries by persons injured by products, there may not be a corresponding reduction in insurance premium rates. An eight-to-ten year statute of repose, for example, would be too long to improve the predictability of insurance claims." FINAL REPORT, cited in *McGovern*, *supra* note 91, at 595. See generally *Martin*, *supra* note 19, at 752; *Phillips*, *An Analysis of Proposed Reform of Products Liability Statutes of Limitations*, 56 N.C.L. REV. 663 (1978). One study estimates that over 97 percent of product-related accidents occur within six years of the time the product was purchased and, in the capital goods area, 83.5 percent of all bodily injury accidents occur within ten years of manufacture. MODEL ACT, *supra* note 2, at 62,733 (citing Insurance Services Office, *Product Liability Closed Claim Survey: A Technical Analysis of Survey Results*, at 105-08 (1977)).

93. FLA. STAT. § 95.031(2) (1981).

94. See *Overland*, 369 So. 2d 572; *Purk*, 387 So. 2d 354.

95. *McGovern*, *supra* note 91.

tion of this provision is recommended, because it presently imposes upon the guaranteed "access to courts" provision of the Florida Constitution.⁹⁶ In the meantime, the full ramifications of the *Bauld* and *Purk* decisions are yet to be seen.

William M. Tuttle

96. FLA. CONST., art. 1, § 21.