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Comment

COPING WITH THE PARTICULARIZED PROBLEMS OF TOXIC TORT LITIGATION

I. INTRODUCTION

The Manville Corporation, a building materials conglomerate, was ranked 181st on the 1982 Fortune 500 list of America's largest industrial corporations. It was also one of thirty companies included in the Dow Jones industrial average, and had reported on a recent financial statement a net worth of $1.1 billion. On August 26, 1982, however, Manville filed for reorganization under Chapter 11 of the Bankruptcy Reform Act. Manville sought protection of Chapter 11 because it anticipated the cost of future asbestos litigation would exceed its assets. Since 1968 Manville had been named as a defendant in approximately 20,000 asbestos personal injury lawsuits and had paid out fifty million dollars in claims. Experts predicted that Manville could expect about 500 new asbestos-related injury suits per month, for an eventual total of 52,000 claims. Furthermore, it was predicted that each claim would cost Manville an average of $40,000 to han-

1. The Manville Corporation is a Denver-based materials and forest products conglomerate. It has also been for some time the nation's largest producer of asbestos. An Asbestos Bankruptcy, Newsweek, Sept. 6, 1982, at 54 [hereinafter referred to as Bankruptcy]. Until 1981, the Manville Corporation was known as the Johns-Manville Corporation. Manville's Bold Maneuver, Time, Sept. 6, 1982, at 17 [hereinafter referred to as Maneuver].

Asbestos is a fibrous mineral which is known for its heat-resistant and insulating properties. Mehaffy, Asbestos-Related Lung Disease, 16 Forum 341, 341 (Winter 1980). Because asbestos does not burn, it is used to insulate pipes and machinery, to line the walls of buildings, and to make fire-resistant materials. See Maneuver, supra. During the past 15 years, asbestos has also been recognized as a major occupational health hazard because it causes severe lung disease. Id.


3. Id. The Dow Jones Industrial average is an indicator of prices on the New York Stock Exchange. See id.

4. Bankruptcy, supra note 1. In 1981, Manville showed a profit of $60.3 million from sales of $2.2 billion. Maneuver, supra note 1.

5. Bankruptcy, supra note 1. The purpose of a business reorganization under the Bankruptcy Reform Act is to restructure a business' finances so that it may continue to operate, provide its employees with jobs, pay its creditors, and produce a return for its stockholders. A. Cohen, Bankruptcy, Secured Transactions and Other Debtor-Creditor Matters ¶ 14-501, at 265 (1981). For a full discussion about the implications of filing for reorganization under Chapter 11, see id. See generally A. Cohen, Debtor-Creditor Relations Under the Bankruptcy Act of 1978 (1979).


7. Id.
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dle, and would subject the firm to a potential aggregate liability in excess of two billion dollars.

The Manville move dramatized the fact that this nation must come to grips with the dilemma created by the voluminous number of personal injury cases resulting from exposure to toxic substances. Environmental diseases are unquestionably tragic for the victims and their families, and there is a public policy interest that those injured should be compensated. On the other hand, companies face billions of dollars of potential liability, and perhaps even bankruptcy, for decisions made long ago. Yet, at present there is no consistent answer regarding who should be ultimately responsible for this enormous liability expense, or what should be done to minimize the risk of bankruptcy for companies which are charged such costs.

This comment will delineate the scope of the toxic tort problem, addressing both procedural and substantive issues raised in cases based on exposure to toxic substances, and will focus on the varied treatment of those issues in our nation's courts. The most disturbing problems which plague toxic tort litigation involve the identification of defendants, applicability of statutes of limitation and repose, use of collateral estoppel, and the extent of an insurer's liability. This comment will explore each of these problems and examine the judicial and legislative responses to them. Reference will be made to two representative toxic products, diethylstilbestrol (DES) and asbestos, to illustrate the nature of the dilemma, since these two substances

8. Bankruptcy, supra note 1, at 55; Maneuver, supra note 1. The estimated cost of handling an asbestos-related injury claim was $40,000 even though Manville was winning 40% of the cases tried. Bankruptcy, supra note 1, at 55.

9. Bankruptcy, supra note 1, at 55; Maneuver, supra note 1.

10. It is difficult to define a toxic substance because of the variety of materials which may be harmful to the health of humans. F. McGovern, Toxic Substances in Litigation in the Third Circuit, at n.1 (available on reserve Pulling Library, Villanova University School of Law). The Virginia legislature, for example, has broadly defined the term as "any substance . . . that has the capacity, through its physical, chemical or biological properties, to pose a substantial risk of death or impairment either immediately or overtime (sic), to the normal functions of humans." Id. (quoting VA. CODE § 32.1-239(d) (1979)).

11. For a discussion of procedural issues, such as those concerning statutes of limitation and repose, and the use of collateral estoppel, see notes 103-28 and accompanying text infra.

12. For a discussion of substantive issues, such as the identification of defendants and insurance problems, see notes 20-82 and accompanying text infra.

13. For a general discussion of legislative attempts to deal with these problems, see notes 72-82, 99-101 & 161-76 and accompanying text infra.


15. Asbestos-caused lung diseases can be divided into malignant and non-malignant varieties. Insurance Co. of N.Am. v. Forty-Eight Insulations, 451 F. Supp. 1230,
have been involved in much of the litigation regarding toxic torts.16

The enormity of the toxic tort problem, however, cannot fully be understood without recognizing that hundreds of chemicals used in our society are toxic, thereby creating potential health problems and causes of action for millions of consumers. These toxic time bombs may result in a flood of

1236 (E.D. Mich. 1978). Asbestosis is a non-malignant form of lung disease which results from the inhalation over a considerable period of time of asbestos fibers. Id. Asbestos fibers of a certain length often become embedded in lung tissue in areas where the alveoli—the air pockets of the lungs—are located, and where the transfer of gases in and out of the blood takes place. Id. The body reacts by walling off these particles, producing a dense scar-like material in the functional area of the lungs. Id. Each repetition of inhalation and walling off of asbestos fibers causes the formation of a scar-like tissue. Id. Eventually this scar-like tissue decreases the functional volume of the lungs and impedes the transfer of gases in and out of the blood. Id. Eventually, the functional capacity of the lungs may become too limited to support life. Id. at 1236-37. Although damage to the lungs caused by asbestosis begins with the initial embedding of the asbestos fiber, in the majority of these cases diagnosable symptoms do not appear until approximately 20 years after exposure. Id. at 1237.

Mesothelioma, a second asbestos-caused disease, is a malignant condition of cells which line the chest wall. Id. A tumor eventually grows after a latent period of over 20 years. Id. In most cases, death results within two years of the tumor’s appearance. Id. The third form of asbestos-related disease which is also malignant, is bronchogenic carcinoma or lung cancer. Id. It has a latent period of 15 to 20 years. Id.

For a full discussion of asbestos-related lung disease, see Mehaffy, supra note 1, at 341. See also Note, Asbestos-Related Diseases Trigger Insurer’s Duty to Defend and Indemnify When the Diseases Become Reasonably Capable of Diagnosis, 28 VILL. L. REV. 1335 (1983).

16. See Vagley & Blanton, supra note 14, at 647-48. Each year as many as 2,522,000 workers are exposed to products containing asbestos and thus are at risk of contracting an asbestos-related disease. NATIONAL CANCER INST. ASBESTOS: AN INFORMATION RESOURCE (1978). One study predicts that, until the year 2000, there will be 20,000 asbestos-related deaths each year in the United States. Id. at 647 (citing Address by I. Selikoff to the Delegates of the Twenty-First Convention of the International Association of Heat and Frost Insulators & Asbestos Workers (Sept. 1967)). It is also estimated that total payments of damages for asbestos exposure will range from $9.3 to $25.6 billion during the period from 1977 to 1995. Id. As of August 27, 1982, the Manville Corporation alone was faced with 16,500 asbestos-related injury claims. Wall St. J., Aug. 27, 1982, at 1, col. 6.

In contrast, the potential liability for DES-related illnesses is smaller. Vagley & Blanton, supra note 14, at 647-48. It is estimated that only between one in 250 and one in 1000 of the 1.1 to 2.2 million women exposed to DES in utero will develop adenocarcinoma, a form of cancer which has been linked to DES. Id. at 647-48. In fact, by 1980 fewer than 250 DES-related cancers had been diagnosed. See Philadelphia Inquirer, March 11, 1983 at 11-A, col. 1 (quoting urologist Grannum R. Sant of Tufts-New England Medical Center). Since DES use reached its peak in the early 1950’s and DES-related injuries usually have a 19 year latency period, the majority of DES-related injuries should have manifested themselves by 1977. Vagley & Blanton, supra note 14, at 639, 648. The awards and settlements in the DES cases have averaged around $171,000. Vagley & Blanton, supra note 14, at 648.

17. Toxic Time Bombs, NEWSWEEK, Sept. 6, 1982, at 57. The Occupational Safety and Health Administration has developed a list of 200 toxic chemicals that may pose problems to industrial workers. Consequently, the asbestos cases may just be a portent of an impending deluge of toxic tort claims. Id.

18. Comment, Occupational Carcinogenesis and Statutes of Limitation: Resolving Relevant Policy Goals, 10 ENVTL. L. 113, 113 n.1 (1979). During the time Congress was
toxic tort litigation with its particularized problems, and may require the creation of innovative legal theories.

II. RECENT CHANGES IN PRODUCTS LIABILITY LAW

Products liability law is over a century old, but since 1960 the field has witnessed significant conceptual developments. Most of these recent considering the passage of the Occupational Safety and Health Act of 1970, it had reports that every twenty minutes a new and potentially dangerous toxic chemical was introduced into industry. Furthermore, it was reported that on an annual basis 800 persons had been killed and 80,000 injured from improper use of pesticides alone.

In addition to asbestos-related diseases, other occupational diseases include byssinosis or "brown lung" disease which is caused by the inhalation of cotton dust, pneumoconiosis or "black lung" disease which miners often contract, cadmium poisoning, noise pesticide poisoning, betanapthylamine exposure, and radiation poisoning.

For a discussion of the incidence of asbestos-related disease and DES-related illnesses, see note 16 and accompanying text supra. For a discussion of black lung disease and the legal issues involves, see Black Lung Symposium, 83 W. VA. L. REV. 721 (1981).

19. See McGovern, supra note 10, at 2-4. Though toxic tort litigation is a species of product liability litigation and therefore shares many of the characteristics of such litigation, the peculiar nature of a toxic tort creates specialized problems. Id. at 2. For example, toxic substances potentially expose an enormous number of persons to harm. Id. There is generally involved a considerable time lag between the act of a manufacturer in producing a defective product and the discovery of an injury to a consumer. Id. Furthermore, the proof of injury from toxic substances may be extremely difficult because of the high degree of scientific uncertainty concerning the nature and extent of harm caused by the product. Id. at 2-3.

Due to the large number of plaintiffs and defendants in cases involving toxic substances, there are often mechanical problems of case management which have resulted in class actions, new techniques of managing discovery and trial, and new methods of organizing representation of clients and dealing with conflicts of interest. Id. Professor McGovern maintains that these unique problems stem from the nature of injuries caused by toxic substances. Id. He states that "there are simply no historic legal theories or particularistic proof available for some types of injuries." Consequently, he points out, "[C]ourts are being asked to develop new theories of liability, to relax standards of proof, to circumvent existing bars to recovery, and to follow new indices for damages." Id. at 4 (footnotes omitted).


21. These recent developments in this area of law are discussed extensively in products liability literature. For a list of recent works dealing with products liability, see generally AMERICAN BAR FOUNDATION, TORT REFORM AND RELATED PROPOSALS—ANNOTATED BIBLIOGRAPHIES ON PRODUCT LIABILITY AND MEDICAL MALPRACTICE (B. Levin & R. Coyne ed. 1979); Products Liability Law, 73 LAW LIBR. J. 958 (1981).

The federal government has also attempted to reform existing tort law as it applies to product liability. In 1979, the Interagency Task Force of the Commerce
developments have greatly increased the exposure to liability of products' manufacturers and sellers of products to liability. For example, in 1960 in *Henningsen v. Bloomfield Motors, Inc.*, the Supreme Court of New Jersey abandoned the requirement of privity of contract between a plaintiff and defendant as a prerequisite to recovery in a products liability case against an automobile manufacturer. Two years later, the California Supreme Court in *Greenman v. Yuba Power Products, Inc.*, established the rule that a manufacturer is strictly liable in tort for injuries caused by defects in its product. In 1964, the American Law Institute bolstered the effect of *Greenman* when it drafted section 402A of the Second Restatement of Torts. Section 402A held a manufacturer strictly liable in tort for injuries caused by products.
which it sold "in a defective condition unreasonably dangerous to the user or consumer or to his property." The abandonment of the privity requirement and the subsequent shift to strict liability represented a change in the philosophy underlying the law of torts. It foreshadowed the trend of some modern courts to find liability without requiring the plaintiff to prove causation.

III. IDENTIFICATION OF DEFENDANTS

While courts began to endorse this plaintiff-oriented philosophy, they still embraced the basic premise that a manufacturer was liable only for its own product. Consequently, a traditional requisite in a products liability case was the plaintiff's identification of the manufacturer or seller of the product which caused the harm or injury. However, in recent cases involving latent diseases or injuries which have developed over long periods of time

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 brought the product from or entered into any contractual relation with the seller.

Id.

27. Id.

28. Hollenshead, supra note 21, at 81. Instead of focusing on the most equitable way of distributing the loss as between the two parties, some courts began to look for the most efficient way of spreading the losses generally. Id.

29. For a discussion of liability without causation, see notes 64-67 and accompanying text infra.


31. See, e.g., Kinsey v. Coca-Cola Bottling Co., 137 Ga. App. 681, 225 S.E.2d 96 (1976). Kinsey involved an action against a bottler for injuries suffered from drinking a bottle of Coca-Cola containing glass particles. Id. at 682, 225 S.E.2d at 97. Although the store from which the plaintiff purchased the bottle was within the defendant's distribution area, the store also obtained bottles from other bottlers. Id. at 682, 225 S.E.2d at 97. Consequently, since there was no proof that the defective bottle had been manufactured by the defendant, the appellate court upheld the trial court's grant of a directed verdict for the defendant. Id. at 682, 225 S.E.2d at 97. See also W. Prosser, HANDBOOK OF THE LAW OF TORTS § 41, at 236 (4th ed. 1971) ("there must be some reasonable connection between the act or omission of the defendant and the damage which the plaintiff has suffered").

One of the characteristics of toxic tort litigation is that the range of potential defendants may be enormous. Professor Francis McGovern notes:

Suits involving a definable product may include manufacturers, suppliers, wholesalers, commercial carriers, packagers, advertisers, endorsers, franchisors and franchisees, fabricators, stokers, retailers and others. Exposure to industrial toxic substances may impose liability upon an entire industry, an area of industry, architects, contractors, maintainers, owners of land and an endless variety of providers of services. Employees exposed to toxic substances may bring suit against insurance, union, plant, government and private inspectors, co-employees, product suppliers and manufacturers, contractors, architects and employers. Health care providers such as doctors, hospitals, clinics, nurses and pharmacists are also potentially liable.
because of a defect in some generic, fungible product that could have been produced by any of a number of manufacturers, plaintiffs' counsel have sought to avoid even this basic requirement. This recent departure from traditional causation rules in products liability law has developed largely within the confines of cases involving DES. The DES cases which circumvent traditional rules of causation all share the basic premise that a plaintiff should not be precluded from recovering damages caused by fungible goods even though she cannot identify the specific source of harm.

DES first entered the marketplace in 1947 as a product used to prevent miscarriages in pregnant women. It is estimated that as many as three hundred different companies manufactured DES before the Food and Drug Administration in 1971 banned its use by pregnant women because of the high incidence of vaginal cancer in the daughters of DES users. These Federal, state and local governments and their employees may not be immune from suit. Once defendants are sued, they typically seek contribution or indemnity from an equally large variety of parties. Federal, state and local governments, entire industries, and other producers of an allegedly defective product may be joined. For example, manufacturers and sellers of asbestos who have been sued by individual plaintiffs for causing asbestosis have filed third party actions against both the United States Government and the entire tobacco industry.

McGovern, supra note 10, at 13-14 (footnotes omitted). Given the large number of potential defendants in a typical toxic tort case, the plaintiff under traditional rules of causation bears the heavy burden of identifying the appropriate defendants. Responding to the potential inequity of this heavy burden, courts have recently attempted to ease the plaintiff's burden in toxic torts cases. For a discussion of various theories courts have used to relieve plaintiffs from the burden of identifying the appropriate defendants, see notes 42-67 and accompanying text infra.


33. See Note, supra note 20, at 425 (noting that at least one court has allowed the plaintiff to shift the burden of identification to the defendants).

34. For a discussion of these theories which ease a plaintiff's burden in proving causation, see notes 42-67 and accompanying text infra. Recent medical evidence suggests that the sons of mothers who took DES during their pregnancy might develop testicular cancer. Philadelphia Inquirer, March 11, 1983, at 11-A, col. 1. DES has also been linked to urogenital abnormalities in the sons of women who took this drug. Id.


36. Comment, supra note 14, at 964 n.3. See also Fischer, supra note 35, at 1625.

daughters are now plaintiffs in approximately one hundred pending lawsuits.38

The common thread running through most DES cases is that the daughters are unable to identify which company manufactured the DES ingested by their mothers.39 This identification problem has arisen for two reasons: first, the effects of DES do not surface for a minimum of ten to twelve years after ingestion;40 and second, there was a lapse of time before DES was recognized as the cause of cancerous and pre-cancerous conditions.41 Courts have developed various theories to relieve plaintiffs from the burden of identifying the proper defendant, thus entitling DES victims to compensation that would have been denied under traditional product liability theories.

The earliest attempt to ease the plaintiff's identification problem resulted in the expansion of two traditional tort theories. The first is the alternative liability theory, which typically arises when one of two or more tortfeasors causes harm to a plaintiff. The classic fact situation is found in the 1948 case of Summers v. Tice,42 where a plaintiff was injured during a hunting trip when two companions negligently fired their guns simultaneously in his direction.43 The plaintiff in Summers was able to establish that his injuries resulted from the negligence of one of the defendants. He was, however, unable to prove which one of the defendants had fired the shot which had caused his injury.44 The alternative liability doctrine allows the plaintiff to shift the burden of proof to the defendants to establish which of them caused the alleged harm.45

38. Comment, supra note 14, at 966-67. Although there are an estimated 500,000 DES daughters, only a small number are suffering from potentially fatal clear-cell adenocarcinoma of the vagina and uterus. Id. at 964-65. See note 16 supra. The majority of DES daughters have only contracted such pre-cancerous abnormalities as adenosis. Id. at 695.

39. Dworkin & Zollers, supra note 37, at 524.

40. Id. Often because of the passage of a number of years, memories have faded and prescription records have been lost. See Note, supra note 35, at 670. Further complicating the search for the specific manufacturer is the fact that, since the drug was fungible, pharmacists often substituted one brand of DES for another. Dworkin & Zollers, supra note 37, at 524. See also Kroll, Intra-Industry Joint Liability: The Era of Absolute Products Liability, 1980 Ins. L.J. 185, 187.

41. See Comment, supra note 14, at 963-64.

42. 33 Cal. 2d 80, 199 P.2d 1 (1948).

43. Id. at 82-83, 199 P.2d at 2-3.

44. Id. at 83, 199 P.2d at 3.

45. McGovern, supra note 10, at 15.

The Summers court found that a requirement which shifts the burden of proof to the defendants was necessary to avoid unfairness to the plaintiff. 33 Cal. 2d at 86, 199 P.2d at 4. The court further noted that the defendants were in a better position than the plaintiff to offer evidence to determine which one caused the harm. Id.

The Second Restatement of Torts has adopted the Summers result. It states in relevant part as follows:

Where the conduct of two or more actors is tortious, and it is proved that harm has been caused to the plaintiff by only one of them, but there is
Some courts have applied this theory in DES cases in order to shift the burden of proof of identification to the defendants. It is questionable, though, whether the alternative liability theory should be used with DES cases because the factual situation of *Summers* and the facts of a typical DES case differ in several major respects. First of all, it is often impractical or impossible to bring all of the potential defendants into a DES lawsuit. Second, unlike the defendants in *Summers*, DES manufacturers are not in a better position than plaintiffs to identify the guilty party. Finally, unlike the defendants in *Summers*, the activities of the defendants in DES cases occurred at different times and places.

The second traditional theory proposed in order to ease the plaintiff's burden of identification is the concert of action theory. Under this approach, plaintiffs must show a common design or plan among the defendants, knowledge of a breach of duty and assistance in that breach, or an independent breach of a duty to the injured party by each of the defendants. Typically, this theory is illustrated by conceptualizing an innocent uncertainty as to which one has caused it, the burden is upon each such actor to prove he has not caused the harm.

Restatement (Second) of Torts § 433B(3) (1975). See also W. Prosser, supra note 31, § 41, at 243-44. Fischer, supra note 35, at 1630-35.

46. See, e.g., Ferrigno v. Eli Lilly & Co., 175 N.J. Super. 551, 420 A.2d 1305 (1980) (defendants in a suit alleging DES-related injuries have the burden of proving exculpation). It is interesting to note that in *Ferrigno*, the New Jersey Superior Court used the alternative liability theory to support an order that plaintiffs in a DES case need not identify a specific tortfeasor, even though all defendants who could have been responsible were not joined. 175 N.J. Super. at 565-67, 420 A.2d at 1312-13. This differs from earlier DES cases which relied upon an alternative liability theory but alleged that the defendants represented all potentially liable manufacturers of DES. See, e.g., Abel v. Eli Lilly & Co., 94 Mich. App. 59, 289 N.W.2d 20 (1979).

There are certain factual similarities between the *Summers* situation and cases involving injury from ingestion of DES which have led courts to use the alternative liability theory in DES cases. For example, in both situations all defendants are tortfeasors who owe a duty of care to the plaintiff. Comment, supra note 14, at 987. Also, in each situation, the conduct of all the defendants was identical and created the same risk. Id. Furthermore, in neither case is the plaintiff at fault for being unable to identify which defendant caused his or her injury. Id. Finally, in both cases, the defendants created the condition which makes identification impossible. Id.

47. See McGovern, supra note 10, at 15.
48. See id.
49. See id.
50. Id.
51. Restatement (Second) of Torts § 876 (1975). Section 876 defines the concert of action theory as follows:

For harm resulting to a third person from the tortious conduct of another, one is subject to liability if he

a) does a tortious act in concert with the other or pursuant to a common design with him, or
b) knows that the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other so to conduct himself, or
c) gives substantial assistance to the other in accomplishing a tortious re-
person injured by some unknown participant in an illegal drag race. 52
Under the concert of action theory, the plaintiff may sue any one, or even all
of the participants in that drag race because mere participation in such anti-
social conduct is in and of itself tortious. 53

At least one court has allowed recovery in a DES case based on the
concert of action theory. 54 It can, however, be argued that this should not
apply to DES cases because there was nothing anti-social about putting DES
on the market; it was thought to be a beneficial drug and had received gov-
ernment approval. 55 Additionally, it has been difficult to prove concerted
action—in the form of a tacit understanding—among members of such a
large and complex industry. 56

Moving even further from traditional tort concepts towards innovative
theories which avoid the identification burden altogether, some plaintiffs
have relied on a theory of industry-wide or enterprise liability similar to that
set forth in Hall v. E.I. DuPont DeNemours & Co., 57 a case brought against a

sult and his own conduct, separately considered, constitutes a breach of
duty to the third person.

Id. For a discussion of this theory and its applicability to DES cases, see Comment, supra note 14, at 978-85.


53. Id.

that all DES manufacturers consciously paralleled each other's activities, including
the failure to adequately test the drug on the fetuses of mice). But cf: Sindell v. Ab-
ott Labs, 26 Cal. 3d 588, 607 P.2d 924, 163 Cal. Rptr. 132, cert. denied, 449 U.S. 912
(1980) (finding no concerted action).

55. Id. See McGovern, supra note 10, at 16. See also note 61 and accompanying
text infra.

56. See Note, Industry-Wide Liability, supra note 20, at 427. See also McGovern,
supra note 10, at 16. For example, in Sindell v. Abbott Laboratories, the California
Supreme Court concluded that although the manufacturers of DES relied on each
other's testing and promotional methods these relationships were insufficient to show
the type of tacit understanding required under the concert of action theory. 26 Cal.
3d 588, 605, 607 P.2d 924, 932, 163 Cal. Rptr. 132, 140. The Sindell court also noted:

Application of the concept of concert of action to this situation would ex-
pand the doctrine far beyond its intended scope and would render virtually
any manufacturer liable for the defective products of an entire industry,
even if it could be demonstrated that the product which caused the injury
was not made by the defendant.

Id. at 605, 607 P.2d at 933, 163 Cal. Rptr. at 141.

57. 345 F. Supp. 353 (E.D.N.Y. 1972). This case involved a claim against all six
members of the American blasting cap industry and their trade association. Id. at
358-59. In Hall, the plaintiff alleged that the injury caused by the caps was due to a
failure to place a warning on the caps, an industry-wide practice which created an
unreasonable risk of harm. Id. at 359-60. The plaintiffs were unable to identify the
manufacturers of the caps which caused their injuries. Consequently, the court al-
lowed the plaintiffs to plead the existence of a concert of action among the six domes-
tic manufacturers of blasting caps and the industry's trade association. See id. at 386.
For a more detailed discussion of the Hall case, see Comment, supra note 14, at 981-
85; Note, supra note 20, at 431-34.
manufacturer of blasting caps. Industry-wide liability combines elements of both the alternative liability and the concert of action theories.\(^{58}\) In situations where the plaintiffs are unable to identify the individual defendant-manufacturers of an injury-causing product, “the existence of industry-wide standards or practices could support a finding of joint control of risk and a shift of the burden of proving causation to the defendants.” \(^{59}\) Those favoring the application of the industry-wide liability theory to DES cases argue that public policy would be served best by shifting the risk of loss from the injured consumer to the offending industry in situations where adherence to an inadequate industry-wide standard has resulted in the production of a fungible product which causes injury.\(^{60}\) Despite this policy argument, courts in DES cases generally have not adopted a *Hall* industry-wide liability theory, largely because the federal government was closely regulating the pharmaceutical industry while DES was being used on a nationwide basis, thus impliedly approving what plaintiffs allege was a defective standard.\(^{61}\) Furthermore, since *Hall* itself specifically noted that the industry-wide liability theory might be unfair if applied to a decentralized industry with more than five or ten producers,\(^{62}\) courts have been reluctant to use this theory with DES cases which typically involve several hundred potential defendant-manufacturers.\(^{63}\)

A unique application of a form of industry-wide liability in a DES case has been adopted, however, by the Supreme Court of California in *Sindell v. Abbott Laboratories*.\(^{64}\) This theory, known as “market share liability,” requires

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58. Note, supra note 20, at 431-34.
61. See McGovern, supra note 10, at 17.
62. 345 F. Supp. at 378. The *Hall* court stated that “[w]hat would be fair and feasible with regard to an industry of five or ten producers might be manifestly unreasonable if applied to a decentralized industry composed of thousands of small producers.” *Id.*


63. However, although there are many manufacturers who produced DES, approximately six or seven manufacturers produced 90% of the DES that was on the market. Note, supra note 20, at 433 (citing B. SEAMAN, *WOMEN AND THE CRISIS IN SEX HORMONES* 33 (1977)).

Another basic difference between *Hall* and the DES cases is that the DES manufacturers had no industry-wide trade association to which the power to formulate safety standards could have been delegated. *Id.* The DES drug industry, unlike the blasting cap industry in *Hall*, was thus highly decentralized.

the plaintiff to join enough defendants so that a substantial percentage of the market for that product is represented. Each defendant manufacturer is then held liable for the proportion of the judgment represented by its share of that market unless it demonstrates that it could not have made the product which caused the plaintiff's injuries. This "liability without causation" theory could have an enormous impact in the area of toxic torts. It has been suggested that the theory would be useful in cases involving asbestos, aluminum wiring, and Agent Orange. Arguably, market share liability might inspire manufacturers to establish higher industry standards of safety. However, opponents of market share liability argue that it would discourage the development of new products and impede the progress of research.

The impact Sindell will have on the area of toxic torts remains to

65. 26 Cal. 3d at 611-12, 607 P.2d at 937, 163 Cal. Rptr. at 145. In deciding that enough defendants had been joined, the Sindell court declined to determine what percentage of manufacturers would be sufficient to constitute a substantial percentage. Id. at 612, 607 P.2d at 937, 163 Cal. Rptr. at 145. The court observed that one commentator had suggested that 75 to 80% of the market should be represented, but it then concluded that "we hold only that a substantial percentage is required." Id. See also Comment, Beyond Enterprise Liability, supra note 62, at 720-21.

66. Sindell, 26 Cal. 3d at 612, 607 P.2d at 937, 163 Cal. Rptr. at 145.

67. It has been suggested that Sindell's extreme dilution of the causation element has broad implications for product manufacturers, especially in light of the fact that, in 1952, DES was categorized as a "safe" drug by the Food and Drug Administration. Kroll, supra note 40, at 194-95. See also Comment, Beyond Enterprise Liability, supra note 62, at 695-96, 716-17. One implication of Sindell is that manufacturers who did not test the drug after it was classified as "safe" are liable for the conduct of manufacturers who had the responsibility of conducting such tests prior to the 1952 "safe" rating. Kroll, supra note 40, at 195. As Justice Richardson noted in his dissent in Sindell, by imposing this blanket liability upon all manufacturers who are joined, "In effect, the majority requires the pharmaceutical research laboratory to install a piece of new equipment—the psychic's crystal ball." Sindell, 26 Cal. 3d at 620, 607 P.2d at 942, 163 Cal. Rptr. at 150 (Richardson, J., dissenting).

68. Reed & Davison, supra note 62, at 519. Similarly, it is likely to be useful in cases involving chemical waste, generic chemicals, and nuclear waste. Id.

69. See Coggins, supra note 60, at 1005.

70. See, e.g., Sindell v. Abbott Laboratories, 26 Cal. 3d at 619-20, 607 P.2d at 942, 163 Cal. Rptr. at 149 (Richardson, J., dissenting). As Justice Richardson noted in his Sindell dissent, "[l]iability in the manner created by the majority must inevitably inhibit, if not research or development, at least the dissemination of new pharmaceutical drugs." Justice Richardson also expressed the fear that discouragement of research and development in the drug industry would have adverse effect on society:

The social and economic benefits from mobilizing the industry's resources in the war against disease and in reducing the costs of medical care are potentially enormous. The development of new drugs in the last three decades has already resulted in great social benefits. The potential gains from further advances remain large. To risk such gains is unwise. Our major objective should be to encourage a continued high level of industry investment in pharmaceutical R & D [research and development].

Id. at 619, 607 P.2d at 941-42, 163 Cal. Rptr. at 149-50 (Richardson, J., dissenting) (quoting D. Schwartzman, The Expected Return from Pharmaceutical Research: Sources of New Drugs and the Profitability of R & D Investment 54 (1975). See also Coggins, supra note 60, at 1004 ("[i]t seems likely that the vastly increased risk of liability for product-related injuries would inevitably reduce the in-
be seen, since other jurisdictions are just beginning to determine whether they will follow a theory which is essentially one of liability without causation.)

Another criticism of the Sindell court's imposition of market share liability is that the "deep pocket" theory should not be used to pin liability upon a defendant without proof of causation. Id. Similarly, Justice Richardson in his Sindell dissent noted, "[A] system priding itself on 'equal justice under the law' does not flower when liability as well as the damage aspect of a tort action is determined by a defendant's wealth." Sindell, 26 Cal. 3d at 618, 607 P.2d at 941, 163 Cal. Rptr. at 149 (Richardson, J., dissenting) (emphasis in the original).

Opponents of the Sindell market share liability theory also note that the decision has the effect of making the manufacturer an insurer of its products. Id. at 621, 607 P.2d at 942-43, 163 Cal. Rptr. at 150-51 (Richardson, J., dissenting). Justice Richardson stated in Sindell as follows:

The majority's decision effectively makes the entire drug industry (or at least its California members) an insurer of all injuries attributable to defective drugs of uncertain or unprovable origin, including those injuries manifesting themselves a generation later, and regardless of whether particular defendants had any part whatever in causing the claimed injury. Id. For additional discussion of the opposition to Sindell's theory of market liability, see McGovern, supra note 10, at 17-18.

Finally, there are a variety of policy considerations weighing against the adoption of industry-wide liability. As one commentator has noted, industry-wide liability is unfair to manufacturers for a variety of reasons: There is no concrete requirement of identification of defendant; it favors plaintiffs who cannot satisfy the identification requirement over plaintiffs who can identify the manufacturer because the plaintiff proceeding under industry-wide liability has a larger fund from which to recover; it extends the liability of manufacturers too far and therefore diminishes the amount of money available for recovery; it makes manufacturers insurers of the safety of society; it cannot serve as a deterrent because, even after a defendant has exercised a high degree of care, unforeseen injuries may result from use of its products; and it would impose liability on the basis of injury alone, regardless of causation. See Coggins, supra note 60, at 1009-15. See also Note, A Remedy for the "DES Daughters": Products Liability Without the Identification Requirement, 42 U. PITT. L. REV. 669, 669 (1981) (identifying three concerns: manufacturers will become insurers of the safety of their products; it may not be unwise to impose such a heavy economic burden on the drug industry; and due process problems may be presented).

71. Courts have reacted differently to Sindell. For example, a district court in Texas, faced with the impossibility of identifying the exact manufacturer who was liable in an asbestos case, described industry-wide liability as a "hybrid, drawing from concepts of alternative and/or concurrent liability and the law of products liability to form a type of absolute liability." Hardy v. Johns-Manville Sales Corp., 509 F. Supp. 1353, 1357 (E.D. Tex. 1981) (rev'd on other grounds, 681 F.2d 334 (5th Cir. 1982). The Hardy court then predicted that Texas courts would adopt some form of Sindell liability in asbestos-related cases. Id. at 1359. In contrast, a New Jersey court cited the Sindell opinion, but did not embrace it, stating that adoption of the enterprise liability theory would result in total abandonment of well-settled principles of products liability. Namn v. Charles E. Froost Co., 173 N.J. Super. 19, 35, 427 A.2d 1121, 1129 (1981). The Namn court, however, noted that it was bound by the principles of law developed and declared by the New Jersey
In an attempt to protect manufacturers from industry-wide liability, legislatures at both the state and federal level have begun to consider and enact products liability legislation. For example, bills have been introduced which propose that manufacturers of products can be held liable only for injuries resulting from dangers that were scientifically discoverable at the time the product was distributed. This so-called “state of the art” defense would be a major departure from the traditional rule that industry custom does not conclusively establish whether the defendant took reasonable care of whether the product was defective and could provide manufacturers with a substantial shield. However, the recent decision of the New Jersey Supreme Court. According to the Namn court, “[E]xtensive policy shifts of this magnitude should not be initiated by an intermediate appellate court” like itself. Instead, the court stated, “The appropriate tribunal to accomplish such drastic changes is either the Supreme Court or the Legislature.” Id., 427 A.2d at 1129.

Finally, a South Carolina court expressly rejected Sindell’s theory by stating as follows:

The California court's market-share theory of liability represents a rejection of "over one hundred years of tort law which required that before tort liability was imposed a 'matching' of defendants' conduct and plaintiff's injury was absolutely essential." The courts of both Carolinas, however, still adhere to this fundamental principle.

The unequivocal law of South Carolina is the plaintiff in a negligence action has not only the burden of proving negligence, but also the burden of proving that the industry or damage was caused by the actionable conduct of the particular defendants.


In any product liability action, it shall be an absolute defense to such action that the product conformed with generally recognized and prevailing standards, designs, or methods of testing or manufacturing of the state of the art in existence at the time the manufacturer or final product parted with its possession and control or sold it, whichever occurred last. When there are two or more possible product standards, designs or methods of testing or manufacturing in customary use, in the defendant's trade or business or in allied or similar trades or businesses (sic) shall be treated as being in compliance with the state of the art.

Id. at 680 (quoting S. 527 Pa. Legis., 1977 Sess.). Insurance company lobbyists and manufacturers have actively promoted in the state legislatures these bills which create a state of the art defense. Id. at 680. Not surprisingly, the American Insurance Association has drafted a model bill that would allow an absolute defense to be available to the manufacturer when the design “is supported by any substantial body of actual practice, no matter what the dominant or preferred opinion.” Id. (quoting AMERICAN INSURANCE ASSOCIATION, PRODUCT LIABILITY LEGISLATIVE PACKAGE: STATUTES DESIGNED TO IMPROVE THE FAIRNESS AND ADMINISTRATION OF PRODUCT LIABILITY LAW 24 (REVISED DRAFT, MAR. 1977)).

74. Johnson, supra note 73, at 681. According to one commentator, [I]f state of the art defense were applied literally and absolutely, only manu-
Supreme Court in *Beshada v. Johns-Manville Products Corp.*\(^{75}\)—in which the court held that the state of the art defense is not appropriate in a strict liability cause of action\(^{76}\)—indicates that at least some courts will severely limit the utility of the state of the art defense.

A similar legislative proposal for limiting the liability of manufacturers provides for the creation of an absolute defense in situations where the industry has complied with government regulations.\(^{77}\) Small businessmen who support this proposal argue that it is economically unrealistic to expect them to do anything beyond what the government requires.\(^{78}\) Meanwhile, critics facturers whose product design was “less than” the industry average would be held liable for a consumer’s injuries sustained in a product-related accident.

The likely result is economically appropriate only if the average manufacturer will undertake all economically efficient measures to make its products safer and to prevent accidents, even without legal standards which clearly make it worthwhile for the manufacturer to do so. However, this is not likely to happen. *Id.* at 684 (quoting 4 *THE RESEARCH GROUP, INC., FINAL REPORT OF THE LEGAL STUDY* 113 (Interagency Task Force on Product Liability, Jan. 1977)).

75. *Beshada v. Johns-Manville Sales Corp.*, 90 N.J. 191, 447 A.2d 539 (1982). In this case the court addressed the issue of whether the medical community’s presumed unawareness of the dangers of asbestos is a defense to a plaintiff’s claim. *Id.* at 196, 447 A.2d at 542. The court noted that the state of the art defense is designed to provide a manufacturer with a defense to a negligence claim because a manufacturer should not be deemed culpable if it complied with existing technology. *Id.* at 204, 447 A.2d at 546. The court observed, however, that “in strict liability cases, culpability is irrelevant. . . . That [a product] was unsafe because of the state of technology does not change the fact that it was unsafe. Strict liability focuses on the product, not the fault of the manufacturer.” *Id.* at 204, 447 A.2d at 546. Since *Beshada* was a strict liability case, the state-of-the-art defense was inapplicable. *Id.* at 209, 447 A.2d at 549.

76. *Id.* at 204, 447 A.2d at 546-47.

77. Johnson, *supra* note 73, at 687. Some states currently have statutes which create a presumption that the product is not defective or unreasonably unsafe if it complies with governmental standards. For example, a Tennessee statute provides as follows:

> Compliance by a manufacturer or seller with any federal or state statute or administrative regulation existing at the time a product was manufactured and prescribing standards for design, inspection, testing, manufacture, labeling, warning, or instructions for use of a product, shall raise a rebuttable presumption that the product is not in an unreasonably dangerous condition in regard to matters covered by these standards.


One criticism of this proposal is that since manufacturers have enormous power, they frequently influence the formation of government standards. Johnson, *supra* note 73, at 687. Consequently, some government standards are merely “rubber-stamped versions of existing, voluntary standards adopted by manufacturers within an industry.” *Id.* (citing Interagency Task Force on Product Liability, Draft Final Report VII-30 (Oct. 14, 1977); 4 *THE RESEARCH GROUP INC., FINAL REPORT OF THE LEGAL STUDY* (Interagency Task Force on Product Liability 1977)).

78. Johnson, *supra* note 73, at 688. However, as one writer has noted, the policy interest in preventing injury and disease outweighs the manufacturing interests of...
of the proposal counter that this defense would adversely affect safety incentives. 79

There have been numerous other suggested statutory reforms aimed at coping with the problem of liability for toxic torts, such as the creation of a Super Fund from which plaintiffs could be compensated. 80 Because of disagreement over who should contribute to such a fund it is unlikely that such a fund will be created. 81 Yet another proposed legislative solution is the establishment of a system where compensation would not be predicated on fault. 82 The effect that this growing body of proposed and enacted legislation will have on the development of judicial doctrines that tend to ease the plaintiff's burden and impose an increase in potential liability on the defendants still remains to be seen.

small businessmen who are engaged in producing complex products without sufficient expertise. Id. at 689.

79. Id. at 687.


81. Reibstein, supra note 80, at 37. The asbestos industry wants the federal government to finance half of the fund, arguing that about half of the current plaintiffs worked in privately owned shipyards—many during World War II—under government contracts that required the use of asbestos. Id. The government has not, however, been responsive to this argument. Id. One writer has observed, "[I]n a rare agreement with organized labor and Democrats, the Reagan administration made it clear . . . that it would have nothing to do with such a proposal—its legal responsibility extended only to federal workers, not to the great majority of workers employed by privately owned shipyards." Id.

82. Coggins, supra note 60, at 1016. The proposed no-fault systems have at least two features in common. First, pain and suffering would merit no recovery, and secondly, the injured party would receive at least his medical costs. Id. at 1016-18. See also O'Connell, An Alternative to Abandoning Tort Liability: Elective No-Fault for Many Kinds of Injuries, 60 MINN. L. REV. 501 (1976); Sandler, Strict Liability and the Need for Legislation, 53 VA. L. REV. 1509, 1516-18 (1967); Schwartz, Product Liability and No-Fault Insurance: Can One Live Without the Other?, 12 FORUM 130 (1977).

There are many more proposals for reform. As one commentator has noted, It has also been suggested that size of awards be limited; non-economic awards, such as damages for pain and suffering, be limited or eliminated; punitive damages be barred; and contingency fees more strictly regulated. Provisions have also been advanced calling for installment payment of damages, payment of defendants' costs of litigation by unsuccessful plaintiffs, and the elimination of the ad-damnum clause from the complaint. Other proposed legislation would restrict the remedy for workplace accidents to worker's compensation, apply comparative fault principles to damage awards in product cases, substitute arbitration for tort litigation, and provide that compliance with government standards shall be a defense. Finally, virtually all proposed product liability tort reform bills include a statute of limitation or repose which would run from the date on which the product is introduced into the stream of commerce.

IV. STATUTES OF LIMITATIONS AND STATUTES OF REPOSE

Statutes of limitations and statutes of repose\(^3\) create special problems in the area of toxic torts because these statutes may bar recovery even before the plaintiff becomes aware of his disease or injury and its cause. Generally, however, there is an important distinction between the two. As one authority in this area explains:

Although these terms have been used in a number of different ways, a statute of limitation refers to the time between the accrual of a cause of action and the last date available for filing a lawsuit. In states that allow a plaintiff to file suit at the discovery of an injury rather than when the injury occurs, suit can potentially be filed a substantial number of years after an injury actually happens. Some state legislatures have put an outer limit or cap on the time available for a plaintiff to discover an injury and file suit. This outer limit typically begins to run from the time of actual injury. In Delaware, for example, an injured person must bring action for personal injury against a physician within two years of the time of the injury unless the injured party has not had an opportunity to discover the injury. In no event, however, can the injured party bring suit more than three years from the occurrence of actual injury. This limit of three years, called a statute of repose, refers to a time limit for bringing a lawsuit that begins to run from some other event such as the manufacture of a product.

a statute of limitations begins to run when a cause of action accrues, and is utilized in order to prevent unfairness to defendants who would otherwise have to defend against claims where "evidence has been lost, memories have faded, and witnesses have disappeared." A statute of repose, which begins to run with the happening of an event such as the manufacture of a defective product or the occurrence of injury, differs in that it potentially could bar a suit before a cause of action has accrued. Therefore, while a statute of limitation may be viewed as merely limiting a particular remedy, a statute of repose may define a substantive right by extinguishing a cause of action.

In the toxic tort area, it is often difficult to determine which of several potentially applicable statutes is relevant, since the applicability of a given statute will depend upon the theory of liability utilized, the damages sought,

84. Order of R.R. Telegraphers v. Railway Express Agency, Inc., 321 U.S. 342, 348-49 (1944). Several other reasons for the existence of statutes of limitations are often cited:

In private civil litigation, statutes of limitations act to avoid the disruption of commercial activity which could be caused by unsettled claims. This allows people to plan their future business and personal affairs secure in the knowledge that they will not be subject to unexpected liability arising out of activities engaged in at much earlier times. Related to this prejudice against actions which are unexpected due to delay is the courts' view that failure to assert a claim over a long period of time raises a presumption of its invalidity. Therefore, statutes of limitations induce due diligence on the part of plaintiffs so that potential defendants will not assume that claims have been ignored intentionally.


The terms "statute of limitation" and "statute of repose" are not used in a consistent manner by the courts. *Id.* at 587. However, it is generally true that a statute of repose is a statute which places an additional prescriptive period upon the time within which actions may be brought under traditional statutes of limitations. *Id.* As one commentator has noted, "This may be done either by setting an outer limit on the length of a tort statute of limitation that has 'discovery' provisions of potentially indefinite duration, or by setting the time at which the statute begins to run at a different time from traditional tort statutes of limitation." *Id.* (footnotes omitted).

86. McGovern, *The Status*, supra note 83, at 417. There is an on-going debate concerning the constitutionality of the statutes of repose. As one scholar in this area has observed,

The debate surrounding statutes of repose reaches high levels of abstraction—philosophical attitudes towards natural rights and utility, social and moral concerns of fault and compensation, and economic theories of free enterprise and socialism are all implicated. The constitutional issues also raise fundamental concerns regarding the roles of the Constitution, the legislatures, and the courts in our political system. Opponents of statutes of repose ask, "Can and should a legislature abolish a cause of action before it accrues?" Proponents ask, "Can and should a court deny the legislature its power to define the scope of compensable harm?" At issue is the appropriate balance between a state constitution and the federal Constitution, the role of the legislature, that represent the popular will, and the duty of the court to preserve rights without encroaching upon legislative prerogatives.

and the subject matter under dispute.87 A court must first decide whether a contract or tort statute of limitations or a statute of repose applies to a particular cause of action. Then, the court must determine the most frequently litigated issue in this area—when a plaintiff's cause of action accrued, and therefore when the limitations period actually began to run.88

In determining when a cause of action "accrued" for statute of limitations purposes, one might find the term "accrued" may be defined in a statute, or it may be left for judicial determination.89 Courts, however, have not been in agreement as to when a cause of action can be said to have "accrued".90 Moreover, if a cause of action is defined as "accruing" when the plaintiff's injury occurred, there may be difficulty because often in toxic tort...
cases a substantial period of time will have elapsed between a plaintiff’s exposure to a product and the manifestation of his injury.91

Because of the inequities that strict adherence to the traditional statutes of limitation or repose may create in the area of toxic torts,92 several courts have formulated special “discovery rules” to delay the commencement of the period of limitations.93 Uncertainty is compounded, however, as courts adopting such rules do not agree on whether the date of “discovery” refers to the date the disease is discovered or to the date the plaintiff becomes aware of the causal relationship between his disease and the defendant’s conduct.94 The

(cause of action accrues when asbestos-related disease becomes diagnosable regardless of whether plaintiff has suffered any noticeable impairment).

91. See generally Henderson, Coping With the Time Dimension in Products Liability, 69 Cal. L. Rev. 919 (1981). There are other problems associated with the time lapse between issuance of the defective product into commerce and litigation. As one writer has pointed out,

Between the time a product is distributed in commerce and the time its defectiveness is determined in court, previously unknown hazards, or techniques for reducing known hazards, may be discovered. Moreover, design and marketing decisions that were consistent with prevailing attitudes toward product-related risks at the time of distribution may be inconsistent with prevailing attitudes when the claim for recovery is litigated.

Id. at 919.

92. Birnbaum, “First Breath’s,” supra note 88, at 285. As Birnbaum has observed,

There is a growing awareness that of the thousands of commercially produced chemical compounds to which we are all, in one way or another, exposed, many are causally linked with cancer and other fatal diseases that develop over a sustained period of time with serious or fatal effects. For example, it has been reported that sixty to ninety-percent of all cancer cases can be attributed to environmental factors, and thus are potentially avoidable. It is becoming apparent that many of these products may cause ill-effects that will not manifest themselves perhaps for decades. To adhere to an obsolete “time of contact” accrual rule for statute of limitation purposes is to encourage commercial irresponsibility on the part of manufacturers.

Id.

93. Id. at 285-90. See McGovern, The Status, supra note 83, at 421. “Discovery rules” begin the limitations period at the time of “discovery” of the injury by the plaintiff, either by actual or objective knowledge, which must be proved by “some” or “substantial” evidence. Id. See also Birnbaum, “First Breath’s,” supra note 88, at 285. The reason for the formulation of these so-called “discovery rules” is that courts have believed that the injured party should be allowed to have his day in court when his injury was of an inherently unascertaintable nature. Id.

94. See Birnbaum, “First Breath’s,” supra note 88, at 287. Many courts state that under the discovery rule, the plaintiff’s cause of action accrues when he discovers or, in exercise of reasonable diligence, he should have discovered his injury. Id. Other courts hold that the statute of limitations accrues when the plaintiff is first advised that his injury probably resulted from exposure to the defendant’s product. See, e.g., Roman v. A.H. Robins Co., Inc., 518 F.2d 970 (5th Cir. 1975). Under this second approach, mere manifestation or awareness of the impairment itself is insufficient to cause the statute of limitations to run, unless there is also an awareness of a causal link between the disease and the product. Birnbaum, “First Breath’s,” supra note 88, at 287. See, e.g., Raymond v. Eli Lilly & Co., 117 N.H. 164, 170-71, 371 A.2d 170, 174 (1977). In 1981, the Pennsylvania Supreme Court held that the Pennsylvania statute of limitations did not begin to run until the plaintiff discovered or reasonably should
discovery rules also differ in their standards of proof for determining when a statute of limitations begins to run. For example, courts which accept the discovery of an injury as beginning the limitations periods, disagree as to whether this discovery may be shown by "some" or "substantial" evidence, or by objective or actual knowledge. Other courts have rejected the judicial development of these discovery rules altogether, often declaring that such an extension of the limitations period must be implemented legislatively and not by the courts.

In an attempt to circumvent the time limits imposed by the statutes of limitations, plaintiffs have often successfully asserted "secondary exposure" theories, such as continuing exposure to toxic torts—which prevents determining when the toxic tort injury occurred—or a continuing duty to warn.

In reaction to serious problems involving product liability actions and statutes of limitations, fifteen states have passed special statutes of limitation which apply solely to product liability actions. Some authorities also feel

have discovered (1) his injury; (2) its operative cause; and (3) the causative relationship between the injury and the operative conduct. Anthony v. Koppers Co., 496 Pa. 119, 436 A.2d 181, 181 (1981). The court held that the plaintiff did not need to have knowledge that he or she had a cause of action for the statute of limitations to begin to run. Id.

97. McGovern, supra note 10, at 6. See also Johnson v. Tipton, 103 Ill. App. 3d 291, 431 N.E.2d 464 (1982) (where seepage of stored manufacturing chemical waste continued to cause injuries to residents of a nearby farm property over several years, the limitations period did not begin until the date of the last injury, or when the tortious acts ceased).
98. McGovern, supra note 10, at 6. One commentator has noted that "[s]ome courts have held that once a manufacturer supplies a defective product, he is under a continuing duty either to correct the defective condition or to warn the purchaser of that condition. The evidence of this continuing duty may toll the statute of limitations." Phillips, An Analysis of Proposed Reform of Products Liability Statutes of Limitation, 56 N.C.L. Rev. 663, 666 (1978). Promises to repair, and/or continued servicing or repair of the defective product have also been held by some jurisdictions to delay the running of the statute of limitations. Id. at 667. See also Holdridge v. Heyer-Schulte Corp. of Santa Barbara, 440 F. Supp. 1088, 1099-1100 (N.D.N.Y. 1977) (where a doctor inserted prosthetic devices in a patient's breasts in 1971, and continued to treat patient for complications of the insert until 1973, the statute of limitations could be extended under the doctrine of "continuous treatment," and the manufacturer of the prosthesis could be sued under negligence and strict products liability theories).
99. McGovern, The Status, supra note 83, at 423-24. These statutes differ as to the length of the limitations periods, the parties covered by the statutes, the legal theories to which they are applicable, the amount of discovery allowed, and the time from when the statutes begin to run. For a listing of the various state product liability statutes of limitation and the length of their statutory periods, see id. at 438-43, appendix a. The Model Uniform Product Liability Act has a two year statute of limitations which runs from the time "the claimant discovered, or in the exercise of
that enacting a statute of repose which would establish a maximum period of
time after the sale of a toxic product, during which a manufacturer could be
held liable for harm, would alleviate a number of problems, especially in the
area of insurance. 100 In response to the "time lapse" problem in the product
liability area, twenty states have, in fact, passed special statutes of repose, no
two of which are identical. 101 However, the existing variation among both
state statutes of repose and of limitation can only serve to promote wide-
spread forum-shopping by toxic tort plaintiffs. Consequently, this area of
the law may be ripe for federal legislation to ensure that all parties receive
equal treatment regardless of their domicile.102

V. COLLATERAL ESTOPPEL

The doctrine of collateral estoppel precludes the relitigation of identical
issues in different lawsuits.103 Issues which were actually litigated in the first
due diligence should have discovered, the harm and the cause thereof." MODEL UNIFORM PRODUCT LIABILITY ACT §110(c), 40 Fed. Reg. at 62,732 (1979).

100. Phillips, supra note 98, at 663-64. Manufacturers have supported a reform
of the products liability statutes of limitations and repose due to the soaring cost of
products liability insurance. Id. The manufacturers favor one limitations period for
all products liability actions, despite the theory of liability used. Id. at 663. They
also favor a definite cut-off of liability by a statute of repose which would run from
the date of the sale of the product. Id. at 664. As one scholar has observed, "[T]o
allow claims for product injuries occurring long after the date of manufacture un-
fairly handicaps the manufacturer in insuring against products hazards." Id. at 674.
A manufacturer will reflect insurance premium costs in the price of its products. Id.
Consequently, it is the consumer who will ultimately bear the cost of increased pre-
miums. Id. at 675.

101. These state statutes of repose vary with respect to the time the repose pe-
riod begins to run, the length of the repose period, and the effect that the expiration
of the repose period has on a cause of action. Id. at 425. For a fuller discussion of
products liability statutes of repose, see McGovern, The Status, supra note 83, at 425-
26. The Model Uniform Product Liability Act suggests two different repose statute
approaches: 1) a "useful safe life" provision which focuses on the age of a product by
creating an affirmative defense if a product has caused harm after its "useful safe
life", as measured by such factors as wear and tear, deterioration, and alternatives to
the product, has expired; and 2) a statute of repose provision which supposes that the
useful safe life of a product will be presumed to have expired in cases where the harm
was caused more than ten years after the time of delivery of the product. MODEL UNIFORM

For a discussion of the difference between statutes of limitations and statutes of
repose, see notes 83-85 and accompanying text supra. For additional discussion re-
garding the time lapse problem which often characterizes toxic tort litigation, see
note 91 and accompanying text supra.

102. For a discussion of the desirability of federal legislation in the area of toxic
torts, see notes 161-79 infra.

noted that "[w]hen an issue of ultimate fact has been determined by a valid judg-
ment, that issue cannot be litigated again between the same parties in future litiga-
tion." Id. For a discussion of collateral estoppel, see generally Deahl, Offensive
Collateral Estoppel Under the Full and Fair Opportunity Test, 15 LAND & WATER L. REV.

http://digitalcommons.law.villanova.edu/vlr/vol28/iss6/9
action and which were essential to a valid, final judgment are subject to the collateral estoppel bar.\textsuperscript{104} Two important policy arguments support this doctrine. First, the doctrine protects individual litigants from the harassment of burdensome relitigation, and second, the doctrine promotes judicial economy.\textsuperscript{105}

Collateral estoppel has traditionally been limited by the requirement of mutuality of estoppel.\textsuperscript{106} The mutuality requirement is only satisfied if the party attempting to invoke the conclusive effect of a prior judgment would have been bound by that judgment if it had gone the other way.\textsuperscript{107} Consequently, if the second action involves different parties, the requirement of mutuality is not met, and collateral estoppel could not be applied because the first judgment would not be mutually binding on the parties in the second action.\textsuperscript{108} However, mutuality is no longer a prerequisite for the application of the doctrine of collateral estoppel in all jurisdictions.\textsuperscript{109} The requirement of mutuality was first rejected by California in Bernhard v. Bank of America National Trust & Savings Association.\textsuperscript{110} Following Bernhard, the
United States Supreme Court, the Restatement of Judgments, and at least a minority of state courts have permitted the use of collateral estoppel in the absence of mutuality.

In determining whether an application of the doctrine of collateral estoppel should be permitted, several modern courts which have abandoned issue as to the disposition of the money was identical with the issue raised in the earlier probate action. Id. at 813, 122 P.2d at 895.

Bernhard is an example of the defensive application of collateral estoppel. F. JAMES & G. HAZARD, CIVIL PROCEDURE, 581 (2d ed. 1965).

111. See Blonder-Tongue Laboratories, Inc. v. University of Illinois Found., 402 U.S. 313 (1971). The Blonder-Tongue Court held that collateral estoppel could be used defensively by a defendant in a patent infringement action where the prior judgment had declared the same patent invalid. Id. at 347. Like Bernhard, Blonder-Tongue was a case involving the application of defensive collateral estoppel. F. JAMES & G. HAZARD, supra note 110, at 581. Eight years later, the Supreme Court approved the use of offensive collateral estoppel by a plaintiff in “appropriate circumstances.” Parklane Hosiery Co., Inc. v. Shore, 439 U.S. 322 (1974). For a discussion of Parklane, see notes 117-19 and accompanying text infra.

112. See RESTATEMENT (SECOND) OF JUDGMENTS § 29 (1982). The Restatement states in relevant part:

A party precluded from relitigating an issue with an opposing party, in accordance with §§ 27 and 28, is also precluded from doing so with another person unless the fact that he lacked full and fair opportunity to litigate the issue in the first action or other circumstances justify affording him an opportunity to relitigate the issue. The circumstances to which considerations should be given include those enumerated in § 28 and also whether:

(1) Treating the issue as conclusively determined would be incompatible with an applicable scheme of administering the remedies in the actions involved;

(2) The forum in the second action affords the party against whom preclusion is asserted procedural opportunities in the presentation and determination of the issue that were not available in the first action and could likely result in the issue being differently determined;

(3) The person seeking to invoke favorable preclusion, or to avoid unfavorable preclusion, could have effected joinder in the first action between himself and his present adversary;

(4) The determination relied on as preclusive was itself inconsistent with another determination of the same issue;

(5) The prior determination may have been affected by relationships among the parties to the first action that are not present in the subsequent action, or apparently was based on a compromise verdict or finding;

(6) Treating the issue as conclusively determined may complicate determination of issues in the subsequent action or prejudice the interests of another party thereto;

(7) The issue is one of law and treating it as conclusively determined would inappropriately foreclose opportunity for obtaining reconsideration of the legal rule upon which it was based;

(8) Other compelling circumstances make it appropriate that the party be permitted to relitigate the issue.

the requirement of mutuality have distinguished between suits involving "offensive" collateral estoppel from those involving "defensive" collateral estoppel. Offensive use of collateral estoppel arises when a plaintiff attempts to preclude the defendant from relitigating issues which were previously litigated adversely to the defendant in a suit against a different plaintiff.\(^\text{114}\) Defensive use of collateral estoppel occurs when a defendant attempts to preclude the plaintiff from reasserting claims that were previously litigated adversely to the plaintiff in an action against a different defendant.\(^\text{115}\) Courts are more cautious in allowing offensive collateral estoppel, because of a heightened risk of unfairness.\(^\text{116}\) Yet, the Supreme Court in Parklane Hosiery

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115. Id. at 655-56. See also Deahl, supra note 103, at 251.

116. See, e.g., Parklane Hosiery Co. v. Shore, 439 U.S. 322, 329-31 (1979). The Parklane Hosiery Court noted that there are several basic reasons why offensive use of collateral estoppel should be permitted less frequently than defensive use of collateral estoppel. Id. at 329. First, the Court reasoned that the offensive use of collateral estoppel does not promote judicial economy. Id. The Court stated as follows: Defensive use of collateral estoppel precludes a plaintiff from relitigating identical issues by merely "switching adversaries." . . . Thus offensive collateral estoppel gives a plaintiff a strong incentive to join all potential defendants in the first action if possible. Offensive use of collateral estoppel, on the other hand, creates precisely the opposite incentive. Since a plaintiff will be able to rely on a previous judgment against a defendant but will not be bound by that judgment if the defendant wins, the plaintiff has every incentive to adopt a "wait and see" attitude, in the hope that the first action by another plaintiff will result in a favorable judgment.

Id. at 329-30. The Parklane Hosiery Court also noted that the offensive use of collateral estoppel may be unfair to a defendant. Id. at 330. For example, the Court opined that if the first action involves only nominal damages the defendant may not defend vigorously, especially if he does not foresee other suits. Id. See also Hicks v. Quaker Oats Co., 662 F.2d 1158, 1170-71 (5th Cir. 1981) (use of collateral estoppel denied because its use would be unfair to the defendant who had had little incentive to defend in the earlier suit which had only involved a small amount). The Parklane Hosiery Court said that allowing the use of offensive collateral estoppel may be unfair to a defendant if the judgment relied upon as the basis for the estoppel is inconsistent with one or more previous judgments which were in favor of the defendant. Id. Finally, the Court maintained that the offensive use of collateral estoppel might be unfair where the second action affords the defendant a procedural advantage that had been unavailable in the first action. Id. at 330-31. For a discussion of the policy rationale against the use of offensive collateral estoppel, see Deahl, supra note 103, at 254-57.

Some additional reasons given for opposing offensive non-mutual use of collateral estoppel are

1. that the ascertainment of truth is an important goal of the litigation process and unilateral collateral estoppel may bind parties to prior adjudications which did not establish the truth; 2. that the result of any given litigation is likely to be influenced by such extra-legal factors as the attractiveness of the parties, the ability of counsel, or the personal prejudices of the jurors, rendering such result a poor basis for future decisions; 3. that the party who was defeated in the prior action may have lost only because of tactical disadvantages of the forum, which the defeated party did not choose; (4) that allowing unilateral assertions of collateral estoppel, especially offensively, may undermine judicial economy, an important goal of
**Co. v. Shore** refused to limit the federal doctrine of collateral estoppel to defensive use only. Instead of totally banning the use of offensive collateral estoppel, the *Parklane* Court granted a trial court broad discretion to determine when it should be used, and cautioned against potentially unfair applications.

Plaintiffs' attorneys have championed the application of offensive collateral estoppel in toxic tort cases because a defendant who loses a case where the issue of the defectiveness or unsafe nature of a particular toxic substance is a necessary predicate to the outcome of the case, is then precluded from denying the defectiveness of that product in subsequent litigation brought by different plaintiffs. This application of offensive collateral estoppel in toxic tort cases could have a great impact on the manner in which such cases are tried. Conceivably, the only issue upon which collateral estoppel, by permitting persons who might have joined an earlier action to wait and bring separate actions, asserting an estoppel based on the first; (5) that it is unfair for one who has not risked anything in the prior action to use a favorable result against one who was a party to that action; and finally (6) that unilateral collateral estoppel, if applied mechanically, would require estopping a party who had lost in a prior action, even though other actions in which that party was involved were inconsistent with that adverse result.


118. *Id.* at 331-33. The *Parklane* case involved a stockholder's class action suit against Parklane Hosiery Company and thirteen of its officers, directors, and stockholders. *Id.* at 324. The complaint alleged that the defendants had issued materially false and misleading proxy statements in connection with a merger. *Id.* However, before the class action came to trial, a decision was rendered in a federal district court against the same defendants in a suit instituted by the Securities and Exchange Commission. *Id.* at 325. That decision resulted in a declaratory judgment which held that the proxy statement was materially false and misleading in the respects alleged. *Id.* The Supreme Court, in the ultimate appeal, approved the offensive use of collateral estoppel as long as the use of the doctrine was fair and the plaintiff asserting the doctrine could not have easily joined the earlier action. *Id.* at 331.

119. *Id.* See also *Hicks v. Quaker Oats Co.*, 662 F.2d 1158, 1170-71 (5th Cir. 1981) (use of collateral estoppel denied because its use would be unfair to the defendant who had had little incentive to defend in the earlier suit which had only involved a small amount).

120. McGovern, *supra* note 10, at 8-9. For example, in states which have abolished the doctrine of mutuality of collateral estoppel, DES victims could assert as collateral estoppel adverse judgments rendered against the major manufacturers of DES. Of course, a judgment against one manufacturer of DES would not operate as collateral estoppel against another manufacturer, because the full and fair opportunity test requires the prior judgment to have been against the individual manufacturer against whom estoppel is currently being sought. See Kroll, *Principles of Collateral Estoppel in Products Liability*, 1979 INS. L.J. 313, 322-23. See also *Hardy v. Johns-Manville Sales Corp.*, 681 F.2d 334 (5th Cir. 1982) (collateral estoppel could not be applied against DES manufacturers who were not defendants in the prior action).

121. Weinberger, *supra* note 103, at 2. As one commentator has pointed out, Reduced to its simplest elements, the application of the doctrine to this area of the law might preclude innumerable plaintiffs who have suffered per-
a manufacturer could be estopped would be that of the defectiveness or unsafe nature of the product, while all other elements of the cause of action would still be subject to proof. When considering a strict liability action, it is clear that the use of collateral estoppel would be of great value, because a plaintiff would not have to prove that the product was defective; he would only have to prove that the defect was a "substantial factor" in producing the injury sustained.

Id.

122. Kroll, supra note 120, at 319. See also Flatt v. Johns-Manville Sales Corp., 488 F. Supp. 836, 840 (E.D. Tex. 1980); Mooney v. Fibreboard Corp., 485 F. Supp. 242 (E.D. Tex. 1980). For example, in both Flatt and Mooney the plaintiffs had to establish that there had been enough exposure to asbestos to cause a disease, even though manufacturers were estopped from relitigating whether products containing asbestos were defective, and whether the asbestos dust could cause mesothelioma and asbestosis.

123. Many toxic tort suits are brought under a strict liability theory. According to § 402A of the Restatement of Torts, strict liability is applicable to products that are in a "defective condition" which causes physical harm to the user of the product. See RESTATEMENT (SECOND) OF TORTS § 402A (1975). The commentary accompanying § 402A indicates that the term "defective condition" encompasses not only products that are unreasonably dangerous to the user of the product, but also products like drugs, which are incapable of being made safe for their intended and ordinary use—the so-called "unavoidably unsafe products." Id. comments g & k. An unavoidably unsafe product is in a defective condition if the manufacturer has failed to provide proper warnings to users of the product which indicate that the product has recognizable risks. Id. comment k.

DES cases are often brought under a strict liability theory because DES manufacturers failed to warn users of the drug's potential dangers and marketed DES on an unlimited basis, rather than on an experimental basis accompanied with a warning label as authorized by the Food and Drug Administration. See, e.g., Sindell v. Abbott Laboratories, 26 Cal. 3d 588, 607 P.2d 924, 163 Cal. Rptr. 132, cert. denied, 449 U.S. 912 (1980). In suits alleging injury from inhalation of asbestos, plaintiffs also often allege, inter alia, that the defendants failed to warn of the risks inherent in asbestos products thus making the product "unreasonably dangerous" and therefore "defective." See, e.g., Borel v. Fibreboard Paper Prods. Corp., 493 F.2d 1076, 1086 (5th Cir. 1973), cert. denied, 419 U.S. 869 (1974).

It should also be noted, however, that toxic tort suits are also brought under negligence or breach of express or implied warranty theories. See, e.g., id. at 1086; Bertrand v. Johns-Manville Sales Corp., 529 F. Supp. 539 (D. Minn. 1982).

124. Kroll, supra note 120, at 319-20 (citing W. PROSSER, HANDBOOK OF THE LAW OF TORTS 656 (4th ed. 1971)). In strict liability suits plaintiffs only have to prove that the defect was a "substantial factor" in producing their injury, whereas in negligence suits, the defect must be the "proximate cause" of a plaintiff's injury. Id. Thus, where collateral estoppel is used to establish that a product is defective and
Advocates of a liberal application of collateral estoppel contend that its use would promote judicial economy, encourage safer product design and quality control practices, and help equalize the marked difference in financial resources between a consumer plaintiff and a major manufacturing defendant. Undoubtedly the expanded use of collateral estoppel would also encourage manufacturers to provide prompt, adequate warnings when research indicates that a product is hazardous.

Meanwhile, opponents of the use of collateral estoppel in product liability cases argue that its use would deal a crushing blow to the defendant manufacturers. They also contend that the common law judicial system should promote individualized justice, and claim that judicial economy will not result from the expanded use of collateral estoppel because parties would simply expend more effort litigating otherwise trivial cases or arguing the appropriateness of applying collateral estoppel in a given case. Thus far, courts have expressed differing opinions regarding the expanded use of collateral estoppel in toxic tort cases.

unreasonably dangerous, a plaintiff will have an easier time proving causation under a strict liability theory than under a negligence theory. Id. at 320.

125. See McGovern, supra note 10, at 9; Weinberger, supra note 103, at 20-21.

126. One of the major issues in asbestos litigation concerns when the manufacturers of products containing asbestos had the duty to warn their employees of the hazards of asbestos dust. See, e.g., Bertrand v. Johns-Manville Sales Corp., 529 F. Supp. 539, 542 n.2 (D. Minn. 1982). In Bertrand, the court noted that if reliable medical data that indicated that breathing asbestos dust increased the likelihood of contracting asbestosis had been available forty years ago, then manufacturers had the duty to warn about this hazard at that time. Id. Plaintiffs in suits involving asbestos-related disease have contended that the duty to warn arose long before defendants began to give such warnings. See id. If manufacturers knew that offensive collateral estoppel would frequently be applicable in products liability suits, they might more diligently keep abreast of medical research and be more likely to issue immediate warnings when reliable evidence indicated that a product had potentially serious health hazards.

127. Note, Nonmutuality, supra note 103, at 595. As one writer has observed, products liability litigation serves as an example of the crushing burden a losing defendant bears. A manufacturer is sued by a plaintiff for injuries resulting from a faulty product. Countless buyers have purchased the same product. If the manufacturer is held liable, all buyers similarly injured may avail themselves of the judgment on the defect issue because estoppel is fair in light of the factors which courts consider to determine fairness. Given the large number of customers, similar future suits are foreseeable because they may "typically follow," the charge of products liability is serious enough to expect vigorous defense, and joinder of plaintiffs is impossible because claims arise separately at the time of each injury. Thus, the defendant can be estopped ad infinitum by future users injured by the product.

Id. at 595-96.

128. McGovern, supra note 10, at 10 (citing Note, Invoking Collateral Estoppel Offensively: The Ends of Justice or the End of Justice, 4 Am. J. Trial Advocacy 75, 88 (1980)).


In Hardy, the Fifth Circuit reversed the district court which had construed a
VI. INSURANCE

Prior to the late 1960's, insurance companies had been confronted with few "pollution" claims—that is, claims resulting from the seepage of toxic substances into water, air, earth or the human body. Coverage for such claims, therefore, was generally afforded under general liability policies. Some of those policies, however, included a more particularized "occurrence coverage" which provided that the insurer would pay claims resulting from bodily injury caused by an "occurrence" within the period covered by the policy. A typical policy affording this "occurrence coverage" would define the term "occurrence" as an accident, which would encompass continuous or repeated exposure to conditions that result in bodily injury or property damage neither expected nor intended from the standpoint of the insured during the policy period. The threshold issue in claims based upon such policies thus became pinpointing the time of the "occurrence."

As lawsuits for "non-sudden" injuries began to increase, the difficulties of product liability coverage became apparent. For example, it was often unclear when the "occurrence" had taken place. Consequently, subsequent insurers would assert claims against earlier insurers, contending that the latent disease or injury should be covered under policies issued in prior years. Compounding the problem of identifying which insurer was liable, previous Fifth Circuit case—Borel v. Fibreboard Paper Prods. Corp.—as establishing, inter alia, that asbestos is in all cases a cause of asbestosis and mesothelioma, and, as such, is generally hazardous. Hardy, 681 F.2d at 347 (citing Borel v. Fibreboard Paper Prods. Corp., 493 F.2d 1076 (5th Cir. 1973), cert. denied, 419 U.S. 869 (1974)). Based upon this interpretation of Borel, the trial court had issued an order estopping the parties from presenting evidence as to whether asbestos causes asbestosis and mesothelioma. Id. at 336. The Fifth Circuit reversed the lower court's order, stating that the application of collateral estoppel was inappropriate because Borel did not establish as a matter of fact that asbestos in all products is a cause of cancer. Id. at 348.

In Bertrand, however, the Minnesota district court concluded that it was appropriate to use collateral estoppel to preclude litigation on the issue of whether asbestos dust is a cause of asbestosis and mesothelioma. Id. at 544.

132. Shea, supra note 131, at 577. Hence, insurers for chemical companies that dump toxic waste could contend that there is no liability because the property damage caused by the toxic waste was both expected and intended. McGovern, supra note 10, n.372.
133. See Shea, supra note 131, at 578.
134. Id.
135. Id. Although a product may be alleged to have been "defective" since manufacture, an "occurrence" which triggers insurance coverage does not happen until the "defect" results in bodily injury or property damage. Id. This method of coverage means that when an insurer issues or renews a policy for a particular year, it assumes the risk of sudden occurrences involving products that were sold in prior years when the manufacturer may have been self-insured or covered by another in-
was the fact that the claimed liability for latent diseases or injuries far exceeded the customary limits afforded for "occurrences" within the annual policy coverage. As a result, one of the biggest problem areas in the field of toxic tort insurance has become allocating the responsibility for insurance coverage among the various insurers, who, over the course of a number of years, have insured the defendant manufacturers.

In response to this problem of allocation among insurers, two different insurance theories have emerged. The first is the "manifestation" theory, which was adopted in *American Motorists Insurance Co. v. E.R. Squibb & Sons, Inc.* In *American Motorists*, the New York Supreme Court decided that the insurer whose policies were in effect during the years when the injuries from the toxic substance manifested themselves is liable for such injuries. In contrast is the "exposure" theory, which was adopted in *Insurance Company of North America v. Forty-Eight Insulations, Inc.* This theory states that the insurer providing coverage during the years a worker was exposed to the toxic

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136. As the 1970's progressed, the liability claimed in suits alleging latent diseases or injuries not only exceeded the limits generally afforded for "occurrences" within a policy period, but also exceeded the amount of "excess" coverage from secondary insurers that manufacturers had retained during the policy period. Shea, *supra* note 131, at 578. "Excess" coverage goes into effect only if the policy limits of the primary insurer are exhausted. *Eagle-Picher Indus., Inc. v. Liberty Mutual Ins. Co.*, 682 F.2d 12 (1st Cir. 1982) (manufacturer of asbestos products brought suit seeking a declaratory judgment as to the rights and liabilities of its various insurers).


138. 95 Misc. 2d 222, 406 N.Y.S.2d 658 (Sup. Ct. 1978). *American Motorists* was a DES case in which the New York Supreme Court, in a declaratory judgment action, was asked to construe an insurance policy to determine whether the defendant's conduct came within its coverage. *Id.* at 223, 406 N.Y.S.2d at 659.

139. *Id.* at 223-24, 406 N.Y.S.2d at 659-60. The *American Motorists* court concluded that it was the resulting injuries which triggered the policy, and not the accident or exposure. *Id.* at 223, 406 N.Y.S.2d at 659. The court noted, "It would be a strained interpretation to construe the occurrence clause as though it covered 'exposure during the policy period which results in bodily injury.' It is the result which is keyed to the policy period, and not the accident or exposure." *Id.* at 223-24, 406 N.Y.S.2d at 659-60.

140. 633 F.2d 1212 (6th Cir. 1980). *Forty-Eight* involved the question of which insurance carrier had a duty to defend and/or indemnify a defendant. *Id.* at 1213-14. The Sixth Circuit chose to delegate liability among insurers of the manufacturer via the exposure theory for several reasons. *Id.* at 1225. First, the court found that the conduct and correspondence of the insurers indicated that the meaning of their contract was supportive of the exposure theory. *Id.* at 1222. Second, the court found that medical evidence established that each deposit of scar-like tissue caused by the inhalation of an asbestos fiber was the occurrence of a disease or was bodily injury, and then reasoned that it is the occurrence and not the manifestation of the injury which creates the underlying tort liability. *Id.* at 1219, 1222-23, 1226 & n.28.
substance is liable for subsequent injuries which result from exposure. 141

While recent decisions do not indicate a trend favoring one theory over the other, they do illustrate the judiciary's tendency to choose the theory that provides the greatest insurance coverage on the facts of a particular case. 142 For example, in Eagle-Picher Industries v. Liberty Mutual Insurance Co., 143 the First Circuit adopted the manifestation theory, noting that in this case that such a theory maximized coverage. 144 The District of Columbia Circuit, in Keene Corp. v. Insurance Company of North America, 145 also sought to maximize insurance coverage in the case before it by adopting the position that both exposure and manifestation trigger coverage. 146 At present, it is

141. Id. at 1225, 1226 nn.27-28. See also Porter v. American Optical Corp., 641 F.2d 1128 (5th Cir. 1981) (adopting exposure theory and endorsing the opinion of the Sixth Circuit in Forty-Eight).

142. Shea, supra note 131, at 578.

143. 682 F.2d 12 (1st Cir. 1982). Eagle-Picher involved a declaratory judgment action in which Eagle-Picher Industries, a manufacturer of asbestos products, requested a declaration of the rights, liabilities, and obligations of itself and insurance companies under several different products liability policies. Id. at 16. After looking closely at the policy language, the court concluded that mere exposure did not result in disease until the disease manifested itself in the commonly understood way. Id. at 115. The First Circuit noted that experts testified that over 90% of all urban dwellers have some asbestos-related scarring, but only a tiny percentage of those will ever develop clinical asbestosis. Id. The court then concluded that “it is difficult to consider subclinical insults to the lung to constitute an ‘injury’ when these insults do not cause ‘loss, pain, distress, or impairment’ until, if ever, they accumulate to become clinically evident or manifest.” Id. at 19 (citing Webster’s Third New International Dictionary (3d ed. 1966)).

144. Id. at 23. The First Circuit explained that its adoption of the manifestation theory was grounded on the text of the policies themselves, and was supported by medical evidence. Id. In addition, the Eagle-Picher court observed that its conclusion was supported by the generally accepted rule of insurance policy construction that the insurance policy must be strictly construed to favor the injured. Id. at 23.

The First Circuit also pointed out that the case before it differed factually from Forty-Eight, but noted that to the extent the Forty-Eight court was “influenced by the . . . principle of maximizing coverage,” it would have difficulty rejecting the result reached by the First Circuit in Eagle-Picher. Id.

For a fuller discussion of the Eagle-Picher decision, see Note, Asbestos-Related Diseases Trigger Insurer’s Duty to Defend and Indemnify When the Diseases Become Reasonably Capable of Medical Diagnosis, 28 Vill. L. Rev. 1335.


146. Id. at 1034. The Keene court noted that the language of each policy at issue provided that an “injury” and not the “occurrence” of that injury would trigger the coverage. Id. at 1040. The court indicated that the difference between an asbestos-related disease and a normal injury was that in the former the occurrence—the inhalation which causes the injury—might take place substantially before the manifestation of the ultimate injury, which might be asbestosis, lung cancer, or mesothelioma. The language of the policies at issue, the Keene court concluded, did not indicate a preference for either the exposure or manifestation theory. Id. at 1043. The court pointed out that if manifestation were the sole trigger of coverage, the defendant would be insured only for a marginal amount of its asbestos-related injury liability. Id. at 1045-46. Furthermore, the court observed that once insurance companies realized that asbestos had a high probability of causing disease, they ceased issuing policies that adequately covered asbestos-related diseases. Id. at 1045. Consequently, the court said if it were to hold that manifestation alone triggers coverage,
unclear what direction legislatures and other courts will take on this issue. Whatever the resolution of this insurance coverage problem, it is apparent that public policy will play an important role in resolving an issue which is plaguing the manufacturers of toxic products and their insurers.147

Partially due to uncertainty in the law,148 product liability insurance rates increased rather suddenly, beginning in 1974.149 At approximately the same time, some insurers eliminated product liability insurance as it was the riskiest type of insurance.150 Consequently, it became difficult for manufac-

the insurance companies would have to bear only a fraction of Keene's total liability for asbestos-related disease. The Keene court therefore interpreted "injury" to mean any part of the single injurious process that asbestos-related diseases entail, including both exposure and manifestation. Id. at 1045-46. For a description of the development of asbestosis, see note 15 supra. Holding that both exposure and manifestation would trigger coverage, the court maintained that each insurer was liable in full, subject to the "other insurance provisions" within its contract. 667 F.2d at 1047. Since it was likely that more than one insurance policy would be triggered and since each insurer was fully liable, the court concluded that the manufacturer in Keene could not collect more than it owed in damages. Id. at 1050. However, when more than one insurance policy applied to a loss, the court held that the insurance companies could apportion according to the scheme provided by their "other insurance" provisions. Id.

147. McGovern, supra note 10, at 55 (footnotes omitted). Professor McGovern has noted, in resolving disputes among manufacturers and insurers, a high value has been placed upon the public policy concerns of fairness, administrative feasibility, certainty, availability of future insurance coverage, and the potential complexity and amount of future litigation. Id.

148. Hollenshead, supra note 21, at 84. See also Shea, supra note 131, at 578. As courts expanded the liability of manufacturers for defective products, product liability coverage became increasingly difficult to underwrite. Hollenshead, supra note 21, at 84.

149. Id. The following statistics demonstrate the magnitude of the increase in products liability rates during the 1970's:
Companies with annual sales of less than $2.5 million reported average increases of 432%. Certain industries were also particularly hard hit. Pharmaceutical companies, for example, reported rate increases averaging 429% and the increases for manufacturers of medical equipment were even higher. In one year the average rates for manufacturers of metal castings increased 165%. Manufacturers of power lawn mowers, industrial chemicals, sporting goods, and ladders also had extraordinary rate increases. Id. (citing INTERAGENCY TASK FORCE ON PRODUCT LIABILITY, FINAL REPORT III 55-56). See also Shea, supra note 131, at 578.

Experts do not agree about the reason for the rise in cost of products liability insurance. Hollenshead, supra, at 84. Some assert that it is a reaction to progressive courts' broadening theories of liability. Id. Others suggest that the insurance price increase could be a result of the general pressure of inflation, an increase in consumers' awareness of their rights, and an increasingly effective plaintiffs' bar. Id. For a discussion of the relationship between products liability statutes of limitations and rising insurance costs, see note 100 and accompanying text supra.

150. Hollenshead, supra note 21, at 85. Robert Hunter, Federal Insurance Administrator, has suggested one plausible theory as to why the insurance rates shot up suddenly in 1974. Id. at 84-85. Hunter's theory is based on the stock market activity in 1974:
In 1974 the stock market dropped, lowering the value of assets held by insurance companies. Each insurance company has a "capacity"—that is, the
uring companies to obtain adequate coverage. By the late 1970's, both insurers and manufacturers were insisting that there was a crisis in providing insurance for product liability. In response to this concern, the Ford Administration set up an Interagency Task Force under the direction of the United States Department of Commerce to study the problems caused by product liability claims. The Task Force Report, issued in 1977, concluded that a serious insurance problem did exist, and cited as evidence for this conclusion the fact that between 1974 and 1976 product liability insurance premiums had risen substantially, particularly for industries associated with industrial machinery, industrial chemicals, and high risk consumer goods. Furthermore, the Task Force found that the problem of rising insurance costs was more acute for smaller firms, some of which were conducting business without any form of product liability insurance. The Task Force also noted that concern over increasing insurance costs had delayed the introduction of new products into the market and had caused industries to spend more time and effort developing liability-prevention techniques. However, the Task Force concluded that there was no actual "crisis" per se in the insurance market, since a large sector of manufacturers was able to obtain some products liability insurance.

Since the publication of the Task Force Report, the federal government has been actively studying the insurance problem. Many in the insurance industry amount of insurance it can write safely is a multiple of the value of the surplus assets it holds. So when the assets of all insurers drop in value, the capacity of the industry as a whole drops. Up until 1974 most product liability insurance was written as a part of a general comprehensive liability policy, and the rates for that specific coverage were closely scrutinized. But in 1974 insurers with lowered capacity, looking to drop some of their business because they were over-extended, separated out product liability because it was the riskiest line of insurance around. Thus, the rest is classic supply-and-demand economics. Supply decreases, price rises.

Id. at 620.

Id. at 620.

Id. at 620.

Id. at 619-20.

Id. at 619-20.

Id. at 619-20.

Id. at 619-20.

Id. at 619-20.

Id. at 619-20.

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Id. at 619-20.

Id. at 619-20.

Id. at 619-20.

Id. at 619-20.

Id. at 619-20.

Id. at 619-20.

Id. at 619-20.
field fear that the problems of insurance underwriting will become even more complex if enterprise or industry-wide liability becomes an accepted theory of recovery.\textsuperscript{158} and it has been argued that the Sindell decision will force each insurer to assume a portion of the risks of an entire industry during the period of its policy coverage.\textsuperscript{159}

VII. CONCLUSION

The four major issues discussed above in this Comment—identification of defendants,\textsuperscript{160} statutes of limitation and repose,\textsuperscript{161} collateral estoppel,\textsuperscript{162} and insurance\textsuperscript{163}—are merely the crest of the on-coming wave of problems that can be anticipated in the products liability area in the coming decades.\textsuperscript{164} These issues, when squarely faced in pending toxic tort suits, will spur reform of the substantive law of products liability.\textsuperscript{165} Furthermore, pro-

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\textsuperscript{158} Vagley & Blanton, supra note 14, at 655-56. These two commentators have noted as follows:

Widespread application of enterprise liability coupled with market share apportionment of damages or not, would complicate the manifestation-exposure controversy even more . . . . The result of such a standard in the underlying tort suit could be to hold an insurer liable under the insurance contract even when the manufacturer he insures has not, in fact, caused the particular injury. This might effectively make each insurer the insurer of an entire industry during the period its policy covers a particular manufacturer.

\textsuperscript{159} Id. at 656.

\textsuperscript{160} For a discussion of identification of defendant problems, see notes 20-82 and accompanying text supra.

\textsuperscript{161} For a discussion of problems with statutes of limitations and statutes of repose, see notes 83-102 and accompanying text supra.

\textsuperscript{162} For a discussion of the problem of collateral estoppel in toxic tort cases, see notes 103-120 and accompanying text supra.

\textsuperscript{163} For a discussion of the insurance problems encountered in latent disease and injury cases, see notes 129-59 and accompanying text supra.

\textsuperscript{164} Other problems include the interaction between no-fault workers' compensation systems and products liability insurance, the award for punitive damages, and the use of the collateral source award. For a discussion of these problems, see Comment, Aligning Policy with Theory: The Uniform Product Liability Act's Apportionment of Responsibility in Product Liability Actions, 49 U. CIN. L. REV. 162, 176-78 (1980); Comment, The Uniform Product Liability Act: Lowering the Cost of Product Liability Actions, 49 U. CIN. L. REV. 187, 197 & 201 (1980) [hereinafter cited as Comment, UPLA]. Additionally, the extent to which a court should rely on hindsight—that is, judging yesterday's design choice on the basis of today's knowledge of hazards—is an interesting issue. See Henderson, Coping, supra note 90, at 930-31 (1981).

\textsuperscript{165} One author notes that Judge Harry A. Takiff of the Philadelphia Court of
cedural law in this area will have to be adjusted to accommodate the enormous mechanical and economic difficulties of toxic tort case management.\textsuperscript{166}

Given the confusion of the current state of the law regarding toxic torts, it is not surprising that considerable attention has been given to the possibility of federal legislation to alleviate the toxic tort problem.\textsuperscript{167} However, there is great hesitancy among experts to support federal intrusion into what has traditionally been controlled by the states' common law.\textsuperscript{168} Advocates of federal legislation counter that national uniformity in this area is both necessary and desirable.\textsuperscript{169}

Common Pleas, who presides over many asbestos suits, has stressed the need for reform in this area:

The asbestos dilemma for the court system, Takiff says, is largely a matter of too much: too many suits that are too expensive and too time-consuming, too many defendants, too many complex legal and medical issues, too few settlements compared to other civil cases, and too much paper filed.

In short, he says, "unless there is a dramatic change in what has been the experience in settling these cases, the present judicial system cannot cope. And it won't for the foreseeable future."

Riebstein, supra note 80, at 37. Judge Takiff tried to alleviate the backup of asbestos suits clogging the court system by eliminating jury trials for asbestos suits until the appeal stage. \textit{Id}. The Pennsylvania Supreme Court halted his program, though it has not yet finally ruled on it. \textit{Id}.

166. \textit{Id}.


168. See Henderson, supra note 167, at 628. For example, it has been observed that to attempt to transform products liability into a comprehensive body of federal law would present a very difficult drafting task and would, assuming general federal question jurisdiction in the district courts, thrust an enormous potential burden upon a federal judiciary already hardpressed to meet current demands for their attention.

\textit{Id}. at 628. Other reasons have also been advanced to discourage the adoption of federal legislation in the area:

First, tort law is an area that has traditionally been left to the states, and a federal law of torts would significantly affect the balance of power between the states and the federal government. Second, a federal tort law would fossilize the law—precluding state diversity and experimentation towards improving the law. Third, as an area of law that involves fundamental decisions about fairness and equity, tort law is best left to a unit of government that is closer to the people. Fourth, product liability law should be left to the courts and should not be dealt with by statute, either federal or state.

Hollenshead, supra note 21, at 78.

169. Hollenshead, supra note 21, at 78. Those who favor federal legislation argue that the flow of products across the country makes product liability an interstate problem. Insurance rates are set nationally, and principles of conservation may lead insurers to base their rates on the least favorable law to which a manufacturer might find itself subject. Furthermore, small states are nearly helpless to protect their own manufacturers, when the products are likely to end up in a different jurisdiction. As a Georgia Senate committee report stated, "until these states (California, New York, New Jersey, Illinois . . .)
The move for federal reform was led by the United States Commerce Department and an Interagency Task Force headed by Professor Victor E. Schwartz from 1976-1981. This Task Force developed the Model Uniform Product Liability Act (UPLA), which was published in its final form in October 1979. The Task Force also issued a report which contained statistics, surveys and a seven volume legal study conducted during the preparation of the Act. This report has become a main source of data for later product liability law reformers. For example, Republican Senator Kasten of Wisconsin introduced a bill on June 16, 1982, which traced much of its origin back to the UPLA. However, the UPLA has generated a great deal of criticism and its critics have commented that the UPLA, like all products of legislative compromise, is likely to attract few followers. Therefore, it appears unlikely that the UPLA or any other currently proposed uniform law in the products liability area will be easily accepted by Congress. Unfortunately, it may also be quite some time before individual states or courts get around to developing a coherent and equitable legal formula for handling the explosive toxic tort problem in a uniform fashion.

While federal legislation is not the panacea for all ills in the judicial system, uniform legislation could be advantageous to the products liability field. First, legislatures would have the advantage of drafting a law from have brought stability to their legal system, significant tort modification in Georgia will have little or no beneficial effect.” (footnote omitted). Finally, the states have done nothing so far to bring uniformity to the law, even since the publication of the UPLA, and proponents of federal action observe that state legislative reforms have virtually come to a standstill.

Id. 170. Id. at 94. For a further discussion of the role of this Interagency Task Force see notes 152-56 and accompanying text supra.
173. Reibstein, supra note 172, at 349.
174. Id.
scratch, developing new theories which are appropriate for the modern problems encountered in toxic tort cases, instead of bending and twisting old inappropriate theories to reach a desired result. 177 Secondly, a uniform law would eliminate the potential for forum-shopping in much the same way the Uniform Child Custody Jurisdiction Act has attempted to do in the area of domestic law. 178 Finally, predictability and uniformity in toxic tort decisions would not only have economic advantages for product manufacturers, insurance companies, and the court system, but would have the advantage of assuring equal treatment of plaintiffs no matter what their domicile. 179

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177. For an example of courts' attempts to analogize toxic tort problems to traditional products liability law, see notes 42-56 and accompanying text supra.


179. Uncertainty in products liability law has been blamed, at least in part, for the increase in insurance rates which began in 1974. See notes 148-56 and accompanying text supra.