ASBESTOS LITIGATION AND STATUTES OF REPOSE: THE APPLICATION OF THE DISCOVERY RULE IN THE EIGHTH CIRCUIT ALLOWS PLAINTIFFS TO BREATHE EASIER

INTRODUCTION

Asbestos has been known to man for centuries. The ability of asbestos to perform the functions of insulation and resistance to fire, while remaining relatively indestructible, has led to its use in thousands of products. Only recently has society become aware of the dangers to human health and life associated with using one of the most dangerous materials of nature. In recent years, litigation involving asbestos-related injuries has increased dramatically.

Three diseases have been positively linked with exposure to asbestos fibers: asbestosis, mesothelioma, and various cancers. The diseases associated with asbestos exposure are all characterized by long latency periods. During the latency period, the disease is dormant and not capable of being detected through routine examination. The latency period for asbestosis has been estimated at ten to forty years following exposure to large quantities of asbestos fibers.

1. Mehaffy, Asbestos-Related Lung Disease, 16 FORUM 341, 342 (1980). The use of asbestos dates back to the fifth century B.C. Early writers such as Pliny the Elder, Herodotus and Plutarch mentioned it. Benjamin Franklin owned a purse made out of asbestos and firemen wore asbestos clothing as early as 1827. Id.
2. Id. at 341-42; T. Willging, Trends in Asbestos Litigation 7 (Federal Judicial Center 1987).
3. Mehaffy, 16 FORUM at 341-42.
4. Classen, An Investigation into the Statute of Limitations and Product Identification in Asbestos Litigation, 30 How. L.J. 1, 1 (1987). The number of cases grows every year because of the long latency period associated with asbestos-related diseases. Id.
5. T. Willging, supra note 2, at 5. Asbestosis is “a pulmonary insufficiency caused by a destruction of air sacs in healthy lung tissue.” Id. at 5 n.8 (citing Selikoff, Churg & Hammond, Asbestos Exposure and Neoplasia, 188 J. A.M.A. 22, 25 (1964)). “Mesothelioma is a type of cancer . . . that affects the mesothelial cells that make up the pleural, pericardial, and peritoneal membranes enclosing the lungs, heart, and abdomen, respectively.” T. Willging, supra note 2, at 5 n.9 (citing B. Castleman, Asbestos: Medical and Legal Aspects 302 (2d ed. 1986). Asbestos exposure is associated with lung and gastrointestinal cancer. T. Willging, supra note 2, at 5. Carcinoma of the esophagus, larynx, stomach, rectum, and colon are suspected to be caused by exposure to asbestos. 5A Lawyers’ Medical Cyclopedia 33.54, at 67 (3d ed. 1986 & Supp. 1988).
6. T. Willging, supra note 2, at 5-6. Latency period refers to the period between exposure to asbestos and manifestation of the disease. Id. at 6.
7. Id.
8. Id. The latency period varies according to the age of the worker and the level of exposure. Id. at 6 n.11. Mesothelioma has been observed with increasing frequency
Mesothelioma has a latency period of at least twenty years after exposure to asbestos. Lung cancer caused by asbestos exposure has a latency period of fifteen to thirty-five years.

The lengthy latency periods associated with asbestos-related diseases have caused various problems for the legal system. The most prevalent of these problems is the conflict that arises between the policy goals of statutes of repose and the policy goals of recovery.

The analysis contained in this Comment is two-fold. First is a discussion of the legal and social issues raised by the application of statutes of repose to causes of action concerning asbestos-related diseases. Second is an examination of the states in the United States Court of Appeals for the Eighth Circuit and how they have addressed the increasing number of plaintiffs seeking compensation for asbestos-related injuries.

THE DISTINCTION BETWEEN STATUTES OF REPOSE AND STATUTES OF LIMITATIONS

The phrase “statutes of repose” has no standard definition and has been used inconsistently by courts. However, the phrase is

in those workers who have survived an average of thirty-five years after their exposure to asbestos. 5A LAWYERS’ MEDICAL CYCLOPEDIA, 33.54 at 72. Very few workers live longer than two years after being diagnosed with mesothelioma. Id. at 73.

9. Classen, 30 HOW. L.J. at 5. Mesothelioma is almost always fatal and, unlike asbestosis, may be contracted after only a single exposure to asbestos. Id.

10. T. WILLING, supra note 2, at 6. For workers suffering from asbestosis, the average latency period is twenty-five years from exposure to development of lung cancer. Many die from asbestosis before any type of cancer manifests itself. Id.

11. The lengthy latency period associated with asbestos-related diseases makes it difficult for the injured person to prove factual causation. All exposures to asbestos are relevant because no one exposure results in asbestosis. The latency period also prevents epidemiological evidence from being developed and, as a result, eliminates a needed element of proof in the plaintiff’s burden of medical causation. Id. at 6-7.


13. See infra notes 150-199 and accompanying text. The purpose of tort actions is to impose liability upon the defendant who caused the plaintiff’s injuries. Comment, 10 ENVTL. L. at 117.


15. See infra notes 200-72 and accompanying text.

generally understood to refer to statutes which limit the liability of potential defendants by circumscribing the time in which a cause of action may be sustained.\textsuperscript{17} Older case-law and treatises use the phrases "statutes of repose" and "statutes of limitations" interchangeably.\textsuperscript{18} Today, judges are forced to make distinctions between the two types of statutes because, unlike statutes of limitation, statutes of repose may affect many areas of the law.\textsuperscript{19} One distinction between statutes of limitation and statutes of repose is that the phrase "repose" refers to the purpose of the statute while the phrase "limitation" refers to the kind of statute.\textsuperscript{20}

Statutes of repose are partly substantive in nature, defining rights by extinguishing claims which accrue after the expiration of the statutory period.\textsuperscript{21} A products liability statute of repose limits the potential liability of a manufacturer by limiting the time in which an action can be commenced.\textsuperscript{22} A statute of repose can operate to bar causes of action before they even accrue.\textsuperscript{23}

Statutes of repose extinguish a cause of action after a certain time period, which is measured either from the delivery of the product or the completion of the project.\textsuperscript{24} The statute operates regardless of when the cause of action accrues\textsuperscript{25} or regardless of when notice that a legal right has been invaded is given.\textsuperscript{26} Statutes of repose extinguish the legal remedy and all causes of action which have accrued in the past, as well as those causes of action which may accrue in the future.\textsuperscript{27} Statutes of repose have been said to represent legislative decisions that "as a matter of policy there should be a specific time beyond which a defendant should no

\textsuperscript{17} BLACK'S LAW DICTIONARY 1411 (6th ed. 1990). Statutes of repose are distinguishable from statutes of limitation in that the latter merely cut off the right to maintain a cause of action after accrual of the action. \textit{Id.}


\textsuperscript{20} McGovern, 16\hspace{1pt}\textit{FORUM} at 417.

\textsuperscript{21} Note, 26 ARIZ. L. REV. at 365-66.


\textsuperscript{24} BLACK'S LAW DICTIONARY 1411 (6th ed. 1990).

\textsuperscript{25} A cause of action "accrues" when all the elements of the cause of action are in place so that the injured party can maintain a suit thereon. BLACK'S LAW DICTIONARY at 21. The date of accrual is the date at which the injured party's rights vest and become present rights or demands. \textit{Id.}

\textsuperscript{26} \textit{Id.} at 1411.

\textsuperscript{27} United States Gypsum Co., 234 Va. at ---, 360 S.E.2d at 327-28.
longer be subjected to protracted liability. Thus a 'statute of repose' is intended as a substantive definition of rights as distinguished from a procedural limitation on the remedy used to enforce rights."

In contrast, statutes of limitation prescribe a time frame within which an accrued cause of action must be brought. A statute of limitations is primarily procedural in nature and only extinguishes the right to maintain an accrued cause of action. The statute does not extinguish the substantive right itself. Statutes of limitation represent the desire of legislatures and courts to eliminate stale claims. Any repose conferred upon a defendant by a statute of limitation is merely an incidental benefit.

Statutes of limitations are designed to promote justice by precluding the revival of stale claims. The theory underlying statutes of limitations is that "even if one has a just claim it is unjust not to put the adversary on notice to defend within the period of limitation and that the right to be free of stale claims in time comes to prevail over the right to prosecute them."

THE OPERATION OF STATUTES OF REPOSE IN LATENT DISEASE CASES

Various possibilities exist for determining when an injury occurs in latent disease cases for statutes of repose purposes. Twelve jurisdictions have enacted statutes that establish the date of accrual expressly for asbestos-related injuries. Seven states have statutes of

---

28. Id. at —, 360 S.E.2d at 328 (quoting Stevenson, Products Liability and the Virginia Statute of Limitations — A Call for the Legislative Rescue Squad, 16 U. RICH. L. REV. 323, 334 n.38 (1982)).
34. Id. at 511.
36. Id. at 349.
37. Birnbaum, “First Breath’s” Last Gasp: The Discovery Rule in Products Liability Cases, 13 FORUM 279, 281 (1977). The terms “statutes of repose” and “statutes of limitations” are used inconsistently by courts and commentators. See supra note 16 and accompanying text.
38. See ALA. CODE § 6-2-30(b) (Supp. 1990) (stating that an action accrues on the date the injured party first discovers, or reasonably should have discovered, the injury); CAL. CIV. PROC. CODE § 340.2 (West Supp. 1990) (declaring that an action accrues on the later of either the date the plaintiff first suffers injury or the date when the plaintiff knows, or in the “exercise of reasonable diligence should have known,” that his injury was caused by exposure to asbestos); CONN. GEN. STAT. ANN. § 52-577a(e)
repose which do not accrue until the injured person discovers, or in the exercise of reasonable diligence should have discovered, his injury. Two states have statutes of repose which do not apply if the injury was not discoverable or did not manifest itself within the ten year period of repose. Because the date of accrual is not defined in

(1991) STATUTES OF REPOSE 969

(1990) (stating that the ten year limitation does not apply to actions involving exposure to asbestos; however, no action may be sustained more than thirty years from date of last exposure to asbestos); D.C. CODE ANN. § 12-311 (Supp. 1990) (declaring that an action accrues on the later of either the date the plaintiff first suffers injury or the date when the plaintiff knows, or in the "exercise of reasonable diligence should have known," that his injury was caused by exposure to asbestos); IND. CODE ANN. § 33-1.5-5.5 (Burns Supp. 1990) (declaring that an action accrues on date that it is known by the injured person that he has an asbestos-related injury or disease); MISS. CODE ANN. § 15-1-49(2) (Supp. 1990) (declaring that a cause of action for latent injury or disease does not accrue until plaintiff discovers, or in the exercise of "reasonable diligence should have discovered," the injury); NEB. REV. STAT. § 25-224(5) (Reissue 1983) (stating that a cause of action accrues when injured person is informed by competent medical authority of discovery of the injury and that the injury resulted from exposure to asbestos or when facts which would lead to such discovery are known, whichever is earlier); N.D. CENT. CODE § 28-01.02(4) (Supp. 1989) (declaring that a cause of action accrues when injured person is informed by competent medical authority of discovery of the injury and that the injury resulted from exposure to asbestos or when facts which would lead to such discovery are known, whichever is earlier); OHIO REV. CODE ANN. § 2305.10 (Baldwin 1990) (stating that a cause of action accrues when injured person is informed of his injury by competent medical authority and that the injury was caused by exposure to asbestos or when he should have discovered his injury, whichever occurs earlier); OR. REV. STAT. § 30.907 (1989) (declaring that a cause of action accrues on date plaintiff discovers, or in the "exercise of reasonable care should have discovered," the disease and its cause); TENN. CODE ANN. § 29-28-103(b) (Supp. 1990) (stating that the limitations of actions does not apply to actions resulting from asbestos exposure); VA. CODE ANN. § 8.01-249(4) (Supp. 1990) (declaring that an action accrues when the injured person is first informed by a physician of his asbestos-related injury).

See COLO. REV. STAT. § 13-80-108(8) (Supp. 1990) (stating that a cause of action accrues on the date both the injury and its cause are "discovered or should have been discovered by the exercise of reasonable diligence"); N.H. REV. STAT. ANN. § 507-D:2 (Supp. 1989) (declaring that an action accrues on the date the injury is discovered, or in the "exercise of reasonable diligence, [should] have been discovered by the plaintiff"); N.C. GEN. STAT. § 1-52(16) (Supp. 1990) (stating that an action accrues when the injury "becomes apparent or ought reasonably to have become apparent to the claimant"); S.D. CODIFIED LAWS ANN. § 15-2-12.2 (Supp. 1990) (declaring that an action accrues on the date the injury occurred, or when the injured party discovers, or reasonably should have discovered, his injury); UTAH CODE ANN. § 78-15-3 (Supp. 1990) (stating that an action accrues when the plaintiff discovers, "or in the exercise of due diligence should have discovered, both the harm and its cause"); VT. STAT. ANN. tit. 12, § 512(4) (Supp. 1990) (declaring that a cause of action accrues on the date the injury is discovered); WASH. REV. CODE ANN. § 7.72.060(3) (Supp. 1990) (stating that an action accrues when the plaintiff discovers "or in the exercise of due diligence should have discovered the harm and its cause").

See IDAHO CODE § 6-1303(4) (Supp. 1990); KAN. STAT. ANN. § 60.3303(2)(D) (Supp. 1989). The Kansas statute provides that the ten year period of repose does not apply if the injury-causing aspect of the product that existed at the time of delivery was not discoverable by an ordinary reasonably prudent person until more than ten (10) years after the time of delivery, or if the harm, caused within
the statutes of repose of most states, the date of accrual has been determined judicially. Three different approaches have been applied by the courts of various jurisdictions to determine the accrual date for asbestos-related injuries: the first breath rule; the last breath rule; and the discovery rule.

THE FIRST BREATH RULE

Under the first breath rule, a cause of action accrues on the date of the plaintiff's first exposure to or inhalation of the hazardous substance. Under this rule, the ignorance of the injured party that a cause of action has accrued in his favor does not toll the statute of limitations. In Scott v. Rinehart & Dennis Co., the plaintiff Scott contracted silicosis while building a tunnel for the defendant. Scott commenced his action three years after he had begun working for the company. Scott alleged that he had commenced his action immediately after the time of delivery, did not manifest itself until after that time.

KAN. STAT. ANN. § 60.3303(2)(D) (Supp. 1989).

See, e.g., Pierce v. Johns-Manville Sales Corp., 296 Md. 656, 484 A.2d 1020, 1025 (1983) (noting that cause of action accrues when claimant discovered or reasonably should have discovered the nature and cause of injury); Karjala v. Johns-Manville Prods. Corp., 523 F.2d 155, 161 (8th Cir. 1976) (holding that cause of action accrues when injury manifests itself); Louisville Trust Co. v. Johns-Manville Prods. Corp., 580 S. W. 2d 497, 501 (Ky. 1979) (holding that cause of action accrues when plaintiff knew or reasonably should have known of both the injury and the fact that defendant may have caused it). But see Olson v. Owens-Corning Fiberglas Corp., 198 Ill. App. 3d 1039, 556 N.E.2d 715, 719 (1990) (refusing to carve an exception out of the Illinois statute of repose for asbestos victims).


Id. at __, 180 S. E. 2d at 277.


Id. at __, 180 S. E. at 276.

Id. at __, 180 S. E. at 276. The applicable statute of limitations at the time the case was decided stated that all actions like that of the plaintiff’s had to be commenced within “one year next after the right to bring the same shall have accrued, and not after.” Id. at __, 180 S. E. at 276 (citing W. Va. CODE § 55-2-12 (1931)).
ately after discovering that he had contracted silicosis. The company alleged that Scott's cause of action was barred by the applicable statute of limitations. A West Virginia circuit court overruled Scott's demurrer to the company's statute of limitations defense and certified the rulings to the Supreme Court of Appeals of West Virginia.

In applying the first breath rule to Scott's case, the Supreme Court of Appeals of West Virginia stated that "'[t]he true inquiry, therefore, at law, is, when did the cause of action arise, and not when did knowledge of that fact come to the plaintiff.'" The court rejected Scott's argument that the court should change the construction of the statute under the "dictates of humanity." The court responded that a change in the construction of the statute was a matter for the legislature and affirmed the rulings of the circuit court.

In 1981, the United States District Court for the District of West Virginia declined to follow Scott and instead adopted the discovery rule in cases involving asbestos-related injuries. The court noted the inequities of requiring a plaintiff suffering from an asbestos-related disease to commence his cause of action before he has had the opportunity to discover his injury.

The only state that continues to adhere to the first breath rule in cases involving exposure to asbestos is New Mexico. In Bassham v. Owens-Corning Fiber Glass Corp., an insulation worker, who had contracted asbestosis, brought an action against the manufacturer,

50. Scott, 116 W. Va. at —, 180 S.E. at 276.
51. Id. at —, 180 S.E. at 276.
52. Id. at —, 180 S.E. at 276.
53. Id. at —, 180 S.E. at 277 (quoting Fee v. Fee, 10 Ohio 469, 475, 36 Am. Dec. 103, 106, 107 (1841)).
55. Id. at —, 180 S.E. at 277.
56. Pauley, 528 F. Supp. at 761-64. The district court stated that it was not bound to follow Scott under the *Erie* doctrine if it appeared that the highest court in West Virginia would not follow it. *Id.* at 761. *See also* Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938). The court determined that the Supreme Court of Appeals of West Virginia would not follow Scott in the instant case. *Pauley*, 528 F. Supp. at 761-64.
whose products he had been exposed to for twenty years. Although the United States District Court for the District of New Mexico did not reach the issue of whether the action was barred by the statute of limitations, the court stated that the case of Roybal v. White was controlling on the issue. In Roybal, a medical malpractice case, the Supreme Court of New Mexico held that medical malpractice actions accrued at the time of the wrongdoing and not at the time of the discovery of the injury. The court in Bassham stated that the Roybal decision governed personal injury suits and held that the statute of limitations barred actions based on exposure to asbestos occurring more than three years prior to the filing of the action.

**THE LAST BREATH RULE**

The last breath rule treats the plaintiff’s exposure to asbestos as a tort that is continuing in nature. As a result, the limitations period begins to run on the date of the plaintiff’s last exposure to asbestos. In Chase v. Cassiar Mining Corp., the United States District Court for the Northern District of New York applied the last breath rule to determine the date of accrual in an asbestos case. The court held that the plaintiff had only three years after his last exposure to asbestos to commence his action. Under New York law, as long as a plaintiff sustains an injury and commences his action within the three year statutory period, he “may recover for any cumulative effect on such injuries that may have resulted from inhalations occurring prior to the three-year period.” The New York statute of limitations begins to run on the date of the last exposure to the hazardous substance in all cases involving the inhalation, injec-

---

60. *Id.* at 1007.
64. *Bassham*, 327 F. Supp. at 1008. The applicable statute at the time this case was decided was N.M. STAT. ANN. § 23-1-8 (1953), which provided a three year limitation period.
66. *Id.*
68. *Id.* at 1028. “In an ’asbestos case’ the action accrues on the date of last exposure.” *Id.* (citing Steinhardt v. Johns-Manville Corp., 54 N.Y.2d 1008, 430 N.E.2d 1297, 446 N.Y.S.2d 244 (1981), cert denied, 456 U.S. 967 (1982)).
tion or ingestion of harmful substances.\textsuperscript{71} This rule of accrual is applied in these types of cases regardless of the date on which the injured party actually discovered his injury.\textsuperscript{72}

According to the United States District Court, the New York legislature had not intended to deny recovery to victims of exposure to asbestos when it adopted the last breath rule.\textsuperscript{73} However, the court did recognize that the last breath rule has been characterized as a very harsh rule for victims of asbestos-related injuries.\textsuperscript{74}

Three jurisdictions have abandoned the last breath rule in favor of the discovery rule for latent disease cases.\textsuperscript{75} For example, the state of Kentucky formerly adhered to the last breath rule, but abandoned it in favor of the discovery rule.\textsuperscript{76} Prior to the case of \textit{Louisville Trust Co. v. Johns-Manville Products Corp.},\textsuperscript{77} the Supreme Court of Kentucky had held that a cause of action for exposure to silica dust accrued on the date that the employee was last exposed to the dangerous substance.\textsuperscript{78} In \textit{Louisville Trust Co.}, the Supreme Court of Kentucky refused to follow its previous decision because the application of the last breath rule was not in accord with the United States Supreme Court decision of \textit{Urie v. Thompson}.\textsuperscript{79}

\textbf{THE DISCOVERY RULE}

Recently, courts have recognized the inequities of applying statutes of repose to latent disease cases.\textsuperscript{80} Under the discovery rule, a cause of action accrues when the injured party discovers, or in the exercise of reasonable diligence should have discovered, that he has

\begin{itemize}
  \item \textsuperscript{71} Id. at 666 (quoting Martin v. Edwards Laboratories, 60 N.Y.2d 417, 426, 457 N.E.2d 1150, 1154, 469 N.Y.S.2d 923, 927 (1983)).
  \item \textsuperscript{72} Ward, 771 F.2d at 667.
  \item \textsuperscript{73} Chase, 622 F. Supp. at 1029.
  \item \textsuperscript{74} Id. at 1028.
  \item \textsuperscript{75} ALA. CODE § 6-2-30(b) (Supp. 1990) (adopting the discovery rule for causes of action involving exposure to asbestos). Alabama previously adhered to the last breath rule in asbestos cases. See Tyson v. Johns-Manville Sales Corp., 399 So. 2d 263 (Ala. 1981). INDIAN CODE ANN. § 33-1-1.5-5.5 (Burns Supp. 1990) (adopting the discovery rule for causes of action involving asbestos-related injuries). The date of accrual in asbestos cases arising in Indiana used to be the date of the last exposure to the asbestos. See Braswell v. Flintkote Mines, Ltd., 723 F.2d 527 (7th Cir. 1983). See also \textit{Louisville Trust Co.}, 580 S.W.2d at 499-501 (extending the discovery rule to latent disease cases in Kentucky). Kentucky previously adhered to the last breath rule in latent disease cases. See Columbus Mining Co. v. Walker, 271 S.W.2d 276 (Ky. 1954).
  \item \textsuperscript{76} \textit{Louisville Trust Co.}, 580 S.W.2d at 499.
  \item \textsuperscript{77} 580 S.W.2d 497 (Ky. 1979).
  \item \textsuperscript{78} \textit{See Columbus Mining Co.}, 271 S.W.2d at 278.
  \item \textsuperscript{79} \textit{Louisville Trust Co.}, 580 S.W.2d at 499. See \textit{Urie v. Thompson}, 337 U.S. 163 (1949) (holding that cause of action accrues when the plaintiff knew or should have known that defendant's conduct had injured him). \textit{See infra} notes 110-22 and accompanying text.
  \item \textsuperscript{80} Birnbaum, 13 FORUM at 285.
\end{itemize}
been injured. The present trend in most jurisdictions in products liability cases involving chemicals, drugs and asbestos is to apply a variation of the discovery rule. The adoption of the discovery rule in latent disease cases corresponds with the concern “that the injured party should be allowed to have his day in court when his injury was of an inherently unknowable nature.”

The discovery rule has several variations; for example, there are four different time periods which a court could adopt to determine the date of accrual for statute of repose purposes: (1) when the plaintiff discovers, or through the exercise of reasonable diligence should have discovered, not only his injury, but that the defendant caused his injury; (2) when the plaintiff knows, or in the exercise of reasonable diligence should know, that he has been injured and that his injury may have been caused by the conduct of another; (3) when the plaintiff knows, or by the exercise of reasonable diligence should know, that he has asbestosis; and (4) when the disease manifests itself. An examination of specific case-law examples best illustrates the nuances of the discovery rule.

DISCOVERY OF INJURY AND ITS EXACT CAUSE

Under one variation of the discovery rule, a plaintiff’s cause of action accrues when he knows, or in the exercise of reasonable diligence should have known, of his injury and that the defendant caused the injury. In Pauley v. Combustion Engineering, Inc., the United States District Court for the District of West Virginia adopted the discovery rule in a claim for injuries resulting from exposure to asbestos. Pauley, an insulator, had worked for Union Carbide for thirty years; during this time he used products manufactured by Combustion Engineering, Inc. (“Company”). In 1973, Pauley was diagnosed with “occupational pneumoconiosis and/or silicosis.”

References:

81. See supra note 38.
84. Pauley, 528 F. Supp. at 764.
85. See Pauley, 528 F. Supp. at 764; Harig, 284 Md. at —, 394 A.2d at 306.
86. See Louisville Trust Co., 580 S.W.2d at 501; Cathcart, 324 Pa. Super. at —, 471 A.2d at 500.
87. Strickland, 461 F. Supp. at 218; Elmore, 673 S.W.2d at 436.
88. Karjala, 523 F.2d at 160; Woesner, 576 F. Supp. at 599-600; Sheppard, 498 A.2d at 1133; Bernier, 516 A.2d at 543.
89. See infra notes 90-149 and accompanying text.
90. Pauley, 528 F. Supp. at 765.
92. Id. at 764.
93. Id. at 765.
94. Id. at 761.
1977 Pauley sued the Company, alleging that the Company's products had caused his injuries. The Company filed a motion to dismiss contending that Pauley's complaint was barred by the West Virginia statute of limitations.

The district court denied the Company's motion to dismiss and adopted the discovery rule to determine the date of accrual for Pauley's cause of action. In determining the scope of the discovery rule that it was adopting, the court focused upon the "point in time [at which] it is realistic, fair and just to expect [a] plaintiff to discover the injury which has been inflicted upon him." The court held that Pauley's "cause of action accrued when he knew, or by the exercise of reasonable diligence should have known, of his injury and its cause."

**DISCOVERY OF INJURY AND ITS CAUSE BY CONDUCT OF ANOTHER**

The second variation of the discovery rule sets the date of accrual in latent disease cases as the date on which the plaintiff discovers, or in the exercise of reasonable diligence should have discovered, both his injury and the fact that his injury may have been caused by the conduct of another. In *Louisville Trust Co.*, the Supreme Court of Kentucky extended the discovery rule to latent disease cases. The decedent had been exposed for five years to the asbestos products manufactured by the defendant. However, the decedent did not become ill until four years after he had voluntarily terminated his employment with the company that fabricated the defendant's asbestos boards. The decedent was diagnosed with malignant mesothelioma in 1971 and died one year later. Louisville Trust Company, an appointed administrator, commenced an action in 1972 for the personal injuries and wrongful death of the decedent.

In a jury trial, the decedent's estate was awarded damages for the pain and suffering and wrongful death of the decedent. The
defendant appealed.\textsuperscript{107} The Court of Appeals of Kentucky held that the action was barred by the statute of limitations and dismissed the action.\textsuperscript{108} The decedent's estate appealed to the Supreme Court of Kentucky for discretionary review.\textsuperscript{109}

In adopting the discovery rule for latent disease cases, the Supreme Court of Kentucky relied heavily upon the reasoning used in \textit{Urie v. Thompson},\textsuperscript{110} a landmark United States Supreme Court case.\textsuperscript{111} In \textit{Urie}, a fireman diagnosed in 1940 as suffering from silicosis caused by the inhalation of silica dust brought an action against his employer in a Missouri trial court in 1941.\textsuperscript{112} Urie brought suit under the Federal Employers' Liability Act.\textsuperscript{113} The applicable statute of limitations under the Federal Employers' Liability Act was three years.\textsuperscript{114} At trial, the employer argued that Urie's action was time barred and the trial court sustained the employer's demurrer to the complaint.\textsuperscript{115} On appeal, the Missouri Supreme Court held that Urie's cause of action did not accrue until 1940 when Urie became incapacitated, reversed the judgment of the Missouri trial court, and the case was remanded for trial.\textsuperscript{116} On remand, Urie amended his complaint to include violations of the Boiler Inspection Act and the jury awarded him damages.\textsuperscript{117} On the second appeal, the Missouri Supreme Court reversed the trial court on the grounds that the Boiler Inspection Act did not apply to occupational disease cases.\textsuperscript{118} The United States Supreme Court granted certiorari to review the Missouri Supreme Court's construction of the Federal Employers' Liability Act and the Boiler Inspection Act.\textsuperscript{119}

The Supreme Court addressed the issue of whether Urie's claim was barred by the three year statute of limitations set out by the Federal Employers' Liability Act.\textsuperscript{120} The Court held that the statute of limitations began to run on the date of discovery.\textsuperscript{121} In adopting the discovery rule, the Court stated that the adoption of any other rule would mean that at some past moment in time, unknown

\textsuperscript{107} Id. at 498-99.
\textsuperscript{108} Id. at 499.
\textsuperscript{109} Id.
\textsuperscript{110} 337 U.S. 163 (1949).
\textsuperscript{111} \textit{Louisville Trust Co.}, 580 S.W.2d at 499-500.
\textsuperscript{112} \textit{Urie}, 337 U.S. at 165-66.
\textsuperscript{113} Id. at 166. \textit{See} 45 U.S.C. §§ 51-60.
\textsuperscript{115} Id. at 166-67.
\textsuperscript{116} Id. at 167.
\textsuperscript{117} Id. at 167-68. \textit{See} 45 U.S.C. § 23.
\textsuperscript{118} \textit{Urie}, 337 U.S. at 168.
\textsuperscript{119} Id.
\textsuperscript{120} Id. \textit{See supra} note 114.
\textsuperscript{121} \textit{Urie}, 337 U.S. at 169-71.
and inherently unknowable even in retrospect, Urie was charged with knowledge of the slow and tragic disintegration of his lungs; under this view Urie's failure to diagnose within the applicable statute of limitations a disease whose symptoms had not yet obtruded on his consciousness would constitute waiver of his right to compensation at the ultimate day of discovery and disability.\textsuperscript{122}

The Supreme Court of Kentucky followed the reasoning of \textit{Urie} and adopted the discovery rule.\textsuperscript{123} Under Kentucky law, a cause of action accrues when the plaintiff discovers, or reasonably should have discovered, that he has been injured and that his injury may have been caused by the conduct of another.\textsuperscript{124}

\textbf{DISCOVERY OF ASBESTOSIS}

Another variation of the discovery rule sets the date of accrual in asbestos-related disease cases as the date on which the plaintiff discovers, or should have discovered, that he had asbestosis.\textsuperscript{125} In \textit{Strickland v. Johns-Manville International Corp.},\textsuperscript{126} the United States District Court for the Southern District of Texas stated that the only practical time for a cause of action to accrue in asbestos-related disease cases is when the plaintiff discovers or should have discovered that he had asbestosis.\textsuperscript{127} Four cases were before the court on motions for summary judgment; each motion rested upon the allegation that the statute of limitations barred the plaintiff's cause of action.\textsuperscript{128} One issue was central to all of the cases pending: "When does the statute of limitations begin to run?"\textsuperscript{129}

The court examined the purpose of the discovery rule while considering whether it should be adopted in cases involving exposure to asbestos.\textsuperscript{130} The court stated that:

The purpose of the "discovery rule" is to postpone the commencement of the limitations period where there is no overt act which places the person involved on notice that there may be an injury. Although a worker may know of the dangers of asbestos dust, there is no one action that puts him on notice that he may be developing asbestosis. In fact, there is no one act that causes asbestosis. The only way the worker

\textsuperscript{122}. \textit{Id.} at 169.
\textsuperscript{123}. \textit{Louisville Trust Co.}, 580 S.W.2d at 500-01.
\textsuperscript{124}. \textit{Id.} at 501.
\textsuperscript{125}. \textit{Strickland}, 461 F. Supp. at 218.
\textsuperscript{127}. \textit{Id.} at 217.
\textsuperscript{128}. \textit{Id.} at 216.
\textsuperscript{129}. \textit{Id.}
\textsuperscript{130}. \textit{Id.} at 217.
can know an injury has occurred is some physical symptom of disease or through the report of a physician. Merely breathing the dust is not enough to establish the existence of an injury that will lead to asbestosis.\textsuperscript{131}

The court held that in the cases before it, the adoption of the discovery rule was appropriate and denied each of the defendants' motions for summary judgment.\textsuperscript{132}

**Manifestation of the Disease**

Under the fourth variation of the discovery rule, the plaintiff's cause of action accrues when some harm manifests itself in such a way as to show that it was caused by an act or omission of the defendant.\textsuperscript{133} In *Karjala v. Johns-Manville Products Corp.*,\textsuperscript{134} the United States Court of Appeals for the Eighth Circuit applied Minnesota law and adopted this form of the discovery rule which set the date of accrual as the date when the disease manifested itself.\textsuperscript{135} In this case, Karjala had been exposed to the defendant's asbestos products for eighteen years before he was informed that he had contracted asbestosis.\textsuperscript{136} Karjala commenced his action five years after he learned that he had the disease.\textsuperscript{137} Johns-Manville asserted that the action was barred by the statute of limitations.\textsuperscript{138} However, the court rejected this argument and the jury returned a verdict for Karjala.\textsuperscript{139}

Under Minnesota law, the statute of limitations begins to run when damage has occurred.\textsuperscript{140} The court in *Karjala* stated that for purposes of this statute of limitations, "damage occurs" when some harm manifests itself in such a way as to show that it has been caused by an act or omission of the defendant.\textsuperscript{141} Accordingly, the court reasoned that in a case involving exposure to asbestos, "there is rarely a magic moment when one exposed to asbestos can be said to have contracted asbestosis."\textsuperscript{142} Therefore, the court held that "[i]t is

\textsuperscript{131} *Id.*

\textsuperscript{132} *Id.* at 218.

\textsuperscript{133} *Karjala*, 523 F.2d at 160.

\textsuperscript{134} 523 F.2d 155 (8th Cir. 1975).

\textsuperscript{135} *Id.* at 160-61.

\textsuperscript{136} *Id.* at 156.

\textsuperscript{137} *Id.*

\textsuperscript{138} *Id.* at 157.

\textsuperscript{139} *Id.* at 156.

\textsuperscript{140} *Id.* at 160. The applicable statute of limitations at the time the case was decided was *Minn. Stat. Ann.* § 541.05(5) (West Supp. 1975). The statute required all personal injury actions involving defective products to be commenced within six years. *Karjala*, 523 F.2d at 160.

\textsuperscript{141} *Karjala*, 523 F.2d at 160.

\textsuperscript{142} *Id.*
when the disease manifests itself in a way which supplies some evidence of causal relationship to the manufactured product that the public interest in limiting the time for asserting a claim attaches and the statute of limitations will begin to run."\(^{143}\)

The Supreme Judicial Court of Maine has also adopted the manifestation of the disease discovery rule as the time for commencing the statute of limitations in latent disease cases.\(^{144}\) In *Bernier v. Raymark Industries Inc.*\(^{145}\) the United States District Court for the District of Maine certified questions to the Supreme Judicial Court of Maine regarding the correct interpretation of the defective products statute in wrongful death actions.\(^{146}\) The Supreme Judicial Court of Maine held that in cases involving exposure to asbestos, a legally cognizable claim arises when the injury sustained manifests itself.\(^{147}\) The court reasoned that requiring manifestation of the injury in asbestos-related disease cases best serves the purposes of tort law — compensation of injured victims.\(^{148}\) The court concluded that under the manifestation rule, the manifestation of the asbestos-related disease is the actionable harm, not the exposure to the asbestos.\(^{149}\)

**POLICY GOALS AND THE DISCOVERY RULE**

Several distinct problems arise when statutes of repose are applied to latent disease cases such as asbestosis. First, the lengthy latency period that accompanies asbestos-related injuries makes it impossible to determine which particular exposure was the first injury.\(^{150}\) The United States Supreme Court noted that in cases involving exposure to asbestos, "no specific date of contact with the substance can be charged with being the date of injury, inasmuch as the injurious consequences of the exposure are the product of a period of time rather than a point in time."\(^{151}\) Thus, the problem lies in determining at what point in time, in the course of the progressive development of a disease caused by asbestos, a person actually re-

\(^{143}\) *Id.* at 160-61.
\(^{144}\) *Bernier*, 516 A.2d at 542-43.
\(^{145}\) 516 A.2d 534 (Me. 1986).
\(^{146}\) *Id.* at 535.
\(^{147}\) *Id.* at 543.
\(^{148}\) *Id.* at 543 (quoting Schweitzer v. Consolidated Rail Corp., 758 F.2d 936, 942 (3rd Cir.), cert. denied, 474 U.S. 864 (1985)).
\(^{149}\) *Bernier*, 516 A.2d at 542-43.
\(^{150}\) *Wilder v. Amatex Corp.*, 314 N.C. 550, —, 336 S.E.2d 66, 70 (1985). One or more exposures to asbestos may not even result in disease. *Id.* "[T]he reaction of persons exposed to asbestos dust is highly individual and * * * not all persons exposed contract a disabling injury." *Neubauer v. Owens-Corning Fiberglas Corp.*, 686 F.2d 570, 573 (7th Cir. 1982).
ceives the "injury" that starts the running of the statute.¹⁵²

The inability of the courts and legislatures to determine the specific date of injury in latent disease cases prompted the United States Supreme Court to adopt the discovery rule in latent disease cases.¹⁵³ In Urie v. Thompson,¹⁵⁴ the plaintiff was exposed to silica dust for approximately thirty years before he was diagnosed with silicosis.¹⁵⁵ The Court reasoned that if it failed to adopt the discovery rule in cases such as Urie, most causes of action would be barred and plaintiffs would only be afforded a "delusive remedy."¹⁵⁶

A second problem arises when statutes of repose are applied to cases involving exposure to asbestos: plaintiffs who are suffering from diseases caused by exposure to asbestos are affected more harshly by statutes of repose than are other classes of plaintiffs.¹⁵⁷ A noted commentator has stated that plaintiffs are procedurally deprived of their right to maintain causes of action simply because they did not know, nor could they have known, that they had suffered an injury.¹⁵⁸ Plaintiffs are denied the opportunity to seek relief in many latent disease cases not because they procrastinated, but because of the latency periods involved.¹⁵⁹

In Olson v. Owens-Corning Fiberglas Corp.,¹⁶⁰ the plaintiffs sued to recover damages resulting from exposure to asbestos products which the defendant corporations had distributed, sold, or manufactured.¹⁶¹ The defendants had filed motions for summary judgment alleging that the plaintiffs' causes of action were barred by the product liability statute of repose.¹⁶² The trial court granted the defend-

¹⁵² Neubauer, 686 F.2d at 572.
¹⁵³ Urie, 337 U.S. at 169.
¹⁵⁴ 337 U.S. 163 (1949).
¹⁵⁵ Id. at 165-66.
¹⁵⁶ Id. at 169.
¹⁵⁹ Id.
¹⁶¹ Id. at —, 556 N.E.2d 717.
¹⁶² Id. The applicable statute of repose was Ill. Rev. Stat. ch. 110, para. 13-213(b) (1987). The statute provided in part:

(b) Subject to the provisions of subsections (c) and (d) no product liability action based on the doctrine of strict liability in tort shall be commenced except within the applicable limitations period and, in any event, within twelve years from the date of first sale, lease or delivery of possession by a seller or ten years from the date of first sale, lease or delivery of possession to its initial user, consumer, or other non-seller, whichever period expires earlier, of any product unit that is claimed to have injured or damaged the plaintiff, unless the defendant expressly has warranted or promised the product for a longer period and the action is brought within that period.

* * * *
ants' motions and the plaintiffs appealed.\textsuperscript{163} The Appellate Court of Illinois held that the plaintiffs' causes of action were barred by the Illinois statute of repose.\textsuperscript{164} In its opinion, the appellate court noted that its holding was unfair to those plaintiffs who were barred from bringing causes of action.\textsuperscript{165} Yet, the court followed the language of the statute, the decisional law of the state and the intent of the legislature and refused to carve out an exception from the Illinois statute of repose for plaintiffs who were suffering from asbestos-related injuries.\textsuperscript{166}

A third problem arises when statutes of repose are applied to asbestos-related disease cases: due to the nature of statutes of repose, the limitations period may begin to run before the majority of plaintiffs suffering from asbestos-related injuries have knowledge that causes of action have accrued in their favor.\textsuperscript{167} When a person is exposed to asbestos, an injury may occur in the sense that the body has been exposed to asbestos long before any asbestos-related disease manifests itself.\textsuperscript{168} If the state in which the plaintiff resides has no discovery provision in its statute of repose, the plaintiff's cause of action may be barred before he knows of his injury.\textsuperscript{169} Courts have recognized that not only is it contrary to our system of jurisprudence to require an injured plaintiff to bring a cause of action before he is aware of its existence, it also is unfair and unreasonable.\textsuperscript{170}

In \textit{Covalt v. Carey Canada, Inc.},\textsuperscript{171} the Supreme Court of Indiana created an exception to the Indiana products liability statute of repose for actions involving diseases contracted after prolonged expo-

\begin{multicols}{2}
\begin{footnotesize}
\begin{enumerate}
\item Notwithstanding the provisions of subsection (b) and paragraph (2) of subsection (c) if the injury complained of occurs within any of the periods provided by subsection (b) and paragraph (2) of subsection (c), the plaintiff may bring an action within two years after the date on which the claimant knew, or through the use of reasonable diligence should have known, of the existence of the personal injury, death or property damage, but in no event shall such action be brought more than eight years after the date on which such personal injury, death or property damage occurred.
\end{enumerate}
\end{footnotesize}
\end{multicols}
sure to hazardous substances.\textsuperscript{172} The plaintiff in \textit{Covalt} had worked with the asbestos products of the defendant for eight years.\textsuperscript{173} Fifteen years after the plaintiff's contact with these products was discontinued, the plaintiff was diagnosed with asbestosis and lung cancer.\textsuperscript{174} The United States Court of Appeals for the Seventh Circuit certified the question of the limitations period for latent disease cases to the Supreme Court of Indiana.\textsuperscript{175}

The Supreme Court of Indiana reviewed the rationale for adopting the discovery rule.\textsuperscript{176} The court stated that inherently dangerous substances like asbestos do not become safer with time and, through its reasoning, the court articulated a fourth problem with the application of statutes of repose to asbestos-related disease cases.\textsuperscript{177}

Courts have stated that the primary purpose of a statute of repose is to encourage improvements in product safety and design.\textsuperscript{178} These improvements occur over a period of time; however, in cases involving asbestos-related diseases, they may not occur at all because, asbestos is, and always will be, a dangerous product that is not likely to improve with time.\textsuperscript{179} The purpose of statutes of repose is therefore not served by cases involving exposure to asbestos.\textsuperscript{180}

Several courts, including the United States Supreme Court, have recognized that the discovery rule is the most equitable solution when dealing with plaintiffs exposed to asbestos or any other hazardous substance no matter which interpretation of the rule is used.\textsuperscript{181} One commentator states that considerations of fairness and equality

\begin{footnotesize}
\textsuperscript{172} Id. at 384. The applicable statute of repose at the time the case was decided was \textsc{Ind. Code} § 33-1-1.5-5 (1988). The statute provided in pertinent part that "any product liability action in which the theory of liability is negligence or strict liability in tort must be commenced within two (2) years after the cause of action accrues or within ten (10) years after the delivery of the product to the initial user or consumer." \textit{Covalt}, 543 N.E.2d at 383. The Indiana legislature amended \textsc{Ind. Code} § 33-1-1.5-5 while the certified question in this case was pending before the Supreme Court of Indiana. The statute of repose now contains an exception for asbestos-related injuries. \textit{Covalt}, 543 N.E.2d at 383 n.1.

\textsuperscript{173} \textit{Covalt}, 543 N.E.2d at 383.

\textsuperscript{174} Id. \textit{See supra} note 5.

\textsuperscript{175} Id. at 384.

\textsuperscript{176} Id. at 386.

\textsuperscript{177} Id. at 383-87.

\textsuperscript{178} Id. at 386 (citing Knox v. A C & S, Inc., 690 F. Supp. 752, 760 (S.D. Ind. 1988)).

\textsuperscript{179} \textit{Covalt}, 543 N.E.2d at 386.

\textsuperscript{180} Id.

\textsuperscript{181} \textit{See, e.g.}, \textit{Urie}, 337 U.S. at 169 (adopting a form of the discovery rule stating that the adoption of any other rule would afford persons suffering from latent diseases a "delusive remedy" only); Strickland v. Johns-Manville Int'l Corp., 461 F. Supp. 215, 217 (S.D. Tex. 1978) (stating that the only practical time that a cause of action for an asbestos-related injury could accrue is when the plaintiff discovers that he has asbestosis); Harig v. Johns-Manville Products Corp., 284 Md. 70, —, 394 A.2d 299, 306, (1978) (adopting the discovery rule in latent disease cases stating that plaintiffs suffering from asbestos-related injuries were "blamelessly ignorant" of the fact that a cause of
\end{footnotesize}
support the utilization of the discovery rule in cases involving exposure to asbestos.\textsuperscript{182} Fairness requires that defendants compensate plaintiffs for those acts or omissions which had foreseeable consequences.\textsuperscript{183} The discovery rule eliminates any repose conferred upon potential defendants by the traditional rule of accrual and allows plaintiffs a chance to recover.\textsuperscript{184} It has been suggested in latent disease cases that the defendant's interest in repose is outweighed by the interest of an injured plaintiff in recovery.\textsuperscript{185} Little risk exists that a defendant will be unfairly burdened by a late claim in a latent disease case because the type of business activities engaged in generally alert the defendant of potential late claims.\textsuperscript{186} One commentator has noted that because the defendant is aware of his potential liability, the discovery rule is justified in requiring defendant employers to plan for liability beyond the normal statutory period.\textsuperscript{187}

Society and the judiciary are primarily concerned with the difficulty of proof in older cases as well as the identification of fraudulent claims in such cases.\textsuperscript{188} In latent disease cases, these considerations do not support the adoption of a traditional rule of accrual.\textsuperscript{189} Where

\begin{itemize}
  \item action existed in their favor and should not be held to have slumbered on rights that were unascertainable).
  \item \textsuperscript{183} Morris v. Sanchez, 746 P.2d 184, 192 (Okla. 1987) (Opala, J., concurring in part and dissenting in part).
  \item \textsuperscript{184} \textit{See supra} notes 80-149 and accompanying text. The traditional rule of accrual starts the running of the limitations period at the time of the initial act or omission. Classen, \textit{An Investigation into the Statute of Limitations and Product Identification in Asbestos Litigation}, 30 \textit{How. L.J.} 1, 20 (1987).
  \item \textsuperscript{185} Note, 68 \textit{Va. L. Rev.} at 634-35.
  \item \textsuperscript{186} \textit{Id.} In cases involving exposure to asbestos, employers should realize that those employees who were exposed to the asbestos may develop asbestos-related diseases in the future. \textit{Id.} The Supreme Court of New Hampshire stated that manufacturers were in a better position in terms of discovery of the dangers of the products they manufacture. Raymond v. Eli Lilly & Co., 117 N.H. 164, —, 371 A.2d 170, 176 (1977). "Through the processes of design, testing, inspection and collection of data on product safety performance in the field, the manufacturer has virtually exclusive access to much of the information necessary for effective control of dangers facing product consumers." \textit{Id.} at —, 371 A.2d at 176 (quoting Owen, \textit{Punitive Damages in Products Liability Litigation}, 74 \textit{Mich. L. Rev.} 1258, 1258 (1976)).
  \item \textsuperscript{188} \textit{Pierce}, 296 Md. at —, 464 A.2d at 1026. Statutes of limitations take into account the societal interests in avoiding the consequences that stem from the maintenance of older cases, such as loss of evidence and witnesses and the fading of memories. As a result, statutes of limitations are designed to eliminate the inconvenience that is caused by delay. \textit{Id.} at —, 464 A.2d at 1026.
  \item \textsuperscript{189} \textit{Id.} at —, 464 A.2d at 1026-27. \textit{See Wigginton v. Reichold Chems., Inc.}, 133 Ill. App. 2d 776, —, 274 N.E.2d 118, 120 (1971)(court refused to adopt the defendant's reasoning that in all tort cases the passage of time would increase problems of proof or entail the danger of false, fraudulent, frivolous, speculative or uncertain claims.) \textit{See infra} notes 190-93 and accompanying text.
\end{itemize}
a disease, such as asbestosis, is at issue, problems of proof generally do not exist for many reasons. First, due to the nature of the businesses in which asbestos was used, defendant employers usually maintained records which described their business activities in great detail. The maintenance of such records provides assurance that a plaintiff will not perpetrate an error or fraud against a court. Second, in latent disease cases, evidence that pertains to the central issue in the case, such as the existence of an asbestos-related disease, the proximate cause of the disease and the damage suffered as a result of the disease, "tends to develop, rather than disappear, as time passes."

By 1991, many of the persons exposed to asbestos were nearing or had already reached retirement. Many of these people cannot afford the medical expenses that accompany asbestos-related diseases. The manufacturers of asbestos who received the profits from the sale of asbestos over the years should not be granted repose and should not be allowed to avoid compensating those who were injured. In Beshada v. Johns-Manville Products Corp., the Supreme Court of New Jersey noted that one of the most important arguments advanced in support of the imposition of strict liability upon manufacturers of dangerous products is that these manufacturers can best allocate the costs. By imposing liability upon the manufacturers of dangerous products, "the costs of the product will be borne by those who profit from it: the manufacturers and distributors who profit from its sale and the buyers who profit from its use." The court noted that this method of imposing liability upon those who profit from the use of a dangerous product is preferable to imposing liability upon those victims who suffer illness from a dangerous product.

190. Raymond, 117 N.H. at —, 371 A.2d at 176. Many companies maintain records which document their knowledge of their products, including the dangerous propensities of such products. Id. at 371 A.2d at 176. According to one commentator, records are more likely to exist in latent disease cases than in other negligence claims. Comment, 10 ENVTL. L. at 123.

191. Comment, 10 ENVTL. L. at 123.


194. Id.

195. Id.


197. Id. at —, 447 A.2d at 547.

198. Id. at —, 447 A.2d at 547.

199. Id. at —, 447 A.2d at 547.
ASBESTOS LITIGATION IN THE STATES OF THE EIGHTH CIRCUIT

As of 1990, two states in the Eighth Circuit had included in their products liability statutes of repose exceptions applying explicitly to persons exposed to asbestos. In Nebraska and North Dakota, an action for exposure to asbestos does not accrue until the injured person has been informed of both his injury and its cause by competent medical authority or has discovered facts which would lead to a discovery of both his injury and its cause, whichever occurs first. South Dakota has a discovery provision in its product liability statute of repose which applies to all product liability actions and therefore includes injuries for exposure to asbestos. Minnesota, Iowa, and Missouri have judicially-created exceptions to the dates of accrual set forth in their statutes of repose for victims of asbestos exposure. Arkansas is the only state in the Eighth Circuit which has neither legislatively nor judicially created an exception for causes of action

200. See infra notes 205-19 and accompanying text.

201. NEB. REV. STAT. § 25-224(5) (Reissue 1989); N.D. CENT. CODE § 28-01.1-02(4) (Supp. 1989). The Nebraska statute provides:

Any action to recover damages based on injury allegedly resulting from exposure to asbestos composed of chrysotile, amosite, crocidolite, tremolite, anthrophyllite, actinolite, or any combination thereof, shall be commenced within four years after the injured person has been informed of discovery of the injury by competent medical authority and that such injury was caused by exposure to asbestos as described herein, or within four years after the discovery of facts which would reasonably lead to such discovery, whichever is earlier.

NEB. REV. STAT. § 25-224(5) (Reissue 1989). The North Dakota statute provides:

Any action to recover damages based on injury allegedly resulting from exposure to asbestos composed of chrysotile, amosite, crocidolite, tremolite, anthrophyllite, actinolite, or any combination thereof, shall be commenced within three years after the person has been informed of discovery of the injury by competent medical authority and that such injury was caused by exposure to asbestos as described herein, or within three years after the discovery of facts which would reasonably lead to such discovery, whichever is earlier.


202. S.D. CODIFIED LAWS ANN. § 15-2-12.2 (Supp. 1990). This statute provides:

An action against a manufacturer, lessor or seller of a product, regardless of the substantive legal theory upon which the action is brought, for or on account of personal injury, death or property damage caused by or resulting from the manufacture, construction, design, formula, installation, inspection, preparation, assembly, testing, packaging, labeling or sale of any product or failure to warn or protect against a danger or hazard in the use, misuse or unintended use of any product, or the failure to provide proper instructions for the use of any product may be commenced only within three years of the date when the personal injury, death or property damage occurred, became known or should have become known to the injured party.


involving asbestos exposure. 204

NEBRASKA

Prior to the Nebraska legislature's enactment of the statutory exception for exposure to asbestos, a product liability action could not be commenced more than ten years after the date on which the product was "first sold or leased for use or consumption." 205 The effect of the statute was to preclude many plaintiffs who were suffering from asbestos-related diseases from maintaining actions even though no real question as to the cause of their disease existed. 206

Nebraska enacted an exception to its products liability statute of repose for persons exposed to asbestos to allow those persons the right to have their day in court. 207 Under the current Nebraska statute of repose, an action for exposure to asbestos accrues when the injured person has been informed of his injury and its cause by competent medical authority or when he discovers facts which would lead to a discovery of both the injury and its cause, whichever occurs first. 208

To date, only one Nebraska case has discussed the applicability of the Nebraska statute of repose to a case involving an asbestos-related injury. 209 While not directly on point, the case of Givens v. Anchor Packing, Inc. 210 does examine Nebraska Revised Statute section 25-224. 211 In Givens, the Nebraska Supreme Court accepted certification from the United States District Court for the District of Nebraska of this question: Whether the exception for asbestos-related injuries found in Nebraska Revised Statutes section 25-224(5) could be applied retroactively to remove the bar on causes of action which had been extinguished by the application of the 1978 enactment of Nebraska Revised Statutes 25-224(2). 212 The Nebraska Supreme

---

204. Ark. Stat. Ann. § 16-116-103 (Supp. 1989). LEXIS search executed on May 28, 1991: repose or (statute w/4 limitation) and asbestos and Arkansas in LEXIS, States library, Ark. file and in LEXIS, Genfed library, courts file. This statute provides that "[a]ll product liability actions shall be commenced within three (3) years after the date on which the death, injury, or damage complained of occurs." Id.


210. Id. at 566, 466 N.W.2d at 771.

211. Id. at 566, 466 N.W.2d at 772.

212. Id. The applicable statute of repose was Neb. Rev. Stat. § 25-224 (Reissue 1979). The statute provided in part:

(1) All product liability actions shall be commenced within four years next after the date on which the death, injury, or damage complained of occurs.

(2) Notwithstanding subsection (1) of this section or any other statutory pro-
Court held that sections 25-224 (2) and (5) could not be applied retroactively.\textsuperscript{213}

\textbf{NORTH DAKOTA}

North Dakota has also created a statutory exception to its statute of repose for injuries caused by exposure to asbestos.\textsuperscript{214} The primary consideration behind the North Dakota enactment of an exception for asbestos-related injuries appears to have been the legislature's desire to check the rising cost of products liability insurance.\textsuperscript{215} The purpose of the North Dakota statute of repose, including the exception for exposure to asbestos, was to establish a reasonable time within which a products liability action could be commenced while limiting the manufacturer's liability to a specific period of time.\textsuperscript{216} This limitation on the period of a manufacturer's liability gives the insurance industry the chance to predict the products liability insurance premiums with reasonable accuracy.\textsuperscript{217} The statutory exception for exposure to asbestos was enacted in an attempt by the North Dakota legislature to protect the public interest by encouraging insurance companies to continue providing products liability insurance.\textsuperscript{218} The North Dakota exception for asbestos-related injuries postpones accrual of the statute of repose until the injured person is informed of his injury and its cause by competent medical authority or discovers facts which would lead to a discovery of both his injury and its cause, whichever occurs first.\textsuperscript{219}

\textbf{SOUTH DAKOTA}

South Dakota has a discovery provision in its product liability statute of repose that applies to all product liability actions regardless of the substantive legal theory upon which the action is brought.\textsuperscript{220} Under the South Dakota statute, a product liability action accrues when the injury becomes known or should have become known to

\begin{itemize}
  \item vision to the contrary, any product liability action \ldots shall be commenced within ten years after the date when the product which allegedly caused the personal injury, death, or damage was first sold or leased for use or consumption.
\end{itemize}

\textit{Id.}\textsuperscript{213} \textit{Givens, 237 Neb. at 566, 466 N.W.2d at 772.}
\textsuperscript{214} \textit{N.D. CENT. CODE § 28-01.1-02(4) (Supp. 1989). See supra note 201.}
\textsuperscript{215} \textit{N.D. CENT. CODE § 28-01.1-01 (Supp. 1989) (Declaration of legislative findings and intent).}
\textsuperscript{216} \textit{Id.}
\textsuperscript{217} \textit{See id.}
\textsuperscript{218} \textit{See id.}
\textsuperscript{219} \textit{N.D. CENT. CODE § 28-01.1-02(4) (Supp. 1989). See supra note 201.}
\textsuperscript{220} \textit{S.D. CODIFIED LAWS ANN. § 15-2-12.2 (Supp. 1990). See supra note 202.}
the injured party.\textsuperscript{221} Although the statute does not deal expressly with causes of action for exposure to asbestos, a person injured by exposure to asbestos has the opportunity to maintain a cause of action under the general discovery provision.\textsuperscript{222} To date, there have been no reported asbestos-related product liability cases brought in either South Dakota state courts or federal courts sitting in South Dakota.\textsuperscript{223}

Missouri

The Missouri legislature has not created an exception for asbestos nor has it included a discovery provision in its statute of repose.\textsuperscript{224} Under the Missouri statute, all personal injury actions must be commenced within five years of the date of accrual.\textsuperscript{225} Because the date of accrual is not defined in the statute, the Supreme Court of Missouri has determined the date of accrual for personal injury actions.\textsuperscript{226} In \textit{Elmore v. Owens-Illinois, Inc.},\textsuperscript{227} the court held that in cases involving exposure to asbestos, the cause of action accrues when damages are sustained and capable of detection.\textsuperscript{228} In \textit{Elmore}, the court determined that the time at which damage was sustained and capable of detection was when the plaintiff was diagnosed with asbestosis.\textsuperscript{229} According to the Supreme Court of Missouri, the nature of the plaintiff's injury and its cause did not "come together" for the plaintiff until that time.\textsuperscript{230} The Missouri judicial determination of the date of accrual for asbestos-related injuries is very similar to the dates of accrual that are set forth in the Nebraska and North Dakota statutes of repose.\textsuperscript{231} The statutes of limitations in Missouri, Nebraska, and North Dakota do not begin to run until the injured person has been informed of the nature of his injury and its cause by a person of competent medical authority.\textsuperscript{232}

\textsuperscript{221} S.D. CODIFIED LAWS ANN. § 15-2-12.2 (Supp. 1990).
\textsuperscript{222} Id.
\textsuperscript{223} LEXIS search executed on May 20, 1991: \textit{repose or (statute w/4 limitation*) and asbestos and South Dakota} in LEXIS, States library, S.D. file and in LEXIS, Genfed library, courts file.
\textsuperscript{224} MO. ANN. STAT. § 516.120(4) (Vernon Supp. 1990). This statute provides: "Within five years: * * * (4) An action for taking, detaining or injuring any goods or chattels, including actions for the recovery of specific personal property, or for any other injury to the person or rights of another, not arising on contract and not herein otherwise enumerated." Id.
\textsuperscript{225} Id.
\textsuperscript{226} Elmore v. Owens-Illinois, Inc., 673 S.W.2d 434, 436 (Mo. 1984).
\textsuperscript{227} 673 S.W.2d 434 (Mo. 1984).
\textsuperscript{228} Id. at 436.
\textsuperscript{229} Id.
\textsuperscript{230} Id.
\textsuperscript{231} See supra note 201 and accompanying text.
\textsuperscript{232} See supra notes 201 and 227-30 and accompanying text.
MINNESOTA

The Minnesota product liability statute sets the statutory period within which an action must be commenced at four years. Although the date of accrual is not set forth in the statute, the United States Court of Appeals for the Eighth Circuit has determined the Minnesota statutory date of accrual for victims of asbestos-related diseases. In *Karijala v. Johns-Manville Products Corp.*, the plaintiff was exposed to the defendant’s asbestos products for eighteen years before he was diagnosed with asbestosis. In determining the date of accrual of the plaintiff’s injury, the United States Court of Appeals for the Eighth Circuit reviewed the law of Minnesota regarding the commencement of the statute of limitations. The court stated that in Minnesota “the statute does not begin to run until damage has resulted. It is not necessary for the final or ultimate damages to be known or predictable, however, the statute begins to run when some damage occurs which would entitle the victim to maintain a cause of action.”

Therefore, under Minnesota law, a cause of action for exposure to asbestos accrues when the “disease manifests itself in a way which supplies some evidence of causal relationship to the manufactured product.” As soon as the victim suffering from an asbestos-related disease suffers enough damage to maintain a cause of action, the statute of limitations begins to run in Minnesota.

IOWA

Like Minnesota and Missouri, Iowa has not provided a statutory exception for persons who have been injured by exposure to asbestos but has judicially applied a discovery rule to cases involving asbestos-related injuries. The Iowa statute of limitations requires all personal injury actions to be commenced within two years after the

233. MINN. STAT. ANN. § 541.05(2) (West Supp. 1991) This statute provides: “Unless otherwise provided by law, any action based on the strict liability of the defendant and arising from the manufacture, sale, use or consumption of a product shall be commenced within four years.” Id.


235. 523 F.2d 155 (8th Cir. 1975).

236. Id. at 156.

237. Id. at 160.

238. Id. (quoting Continental Grain Co. v. Fegles Constr. Co., 480 F.2d 793, 797 (8th Cir. 1973)).


240. Id. at 160.

cause of action accrues.\textsuperscript{242} The general rule of accrual in Iowa dictates that an action accrues when the plaintiff knows of all of the elements of a cause of action or, in the exercise of reasonable diligence, should have known of all of the elements.\textsuperscript{243}

A case decided by the Supreme Court of Iowa divides cases involving latent injuries into two distinct groups: one which utilizes the discovery rule and one which utilizes the time of first injury.\textsuperscript{244} In \textit{LeBeau v. Dimig},\textsuperscript{245} the plaintiff, a passenger in an automobile, sustained minor head and neck injuries in an automobile accident.\textsuperscript{246} Two years after the accident the plaintiff was diagnosed with epilepsy.\textsuperscript{247} However, the plaintiff did not commence her action against the driver of the car for another two years.\textsuperscript{248} The defendant driver raised the Iowa two year statute of limitations for personal injuries as a defense and filed a motion for summary judgment.\textsuperscript{249} The trial court held that the issue of when the plaintiff’s epilepsy was discovered was a question of fact and denied the defendant’s motion for summary judgment.\textsuperscript{250} The appellate court held that the statute of limitations began to run on the date of the accident and reversed the trial court.\textsuperscript{251} The plaintiff appealed to the Supreme Court of Iowa.\textsuperscript{252}

The Supreme Court of Iowa stated that late-discovered injuries are classified in one of two groups: the “pure latent” injury cases and the “traumatic event/latent manifestation” cases.\textsuperscript{253} According to the court, the “pure latent” injury cases arise:

in one of three situations: a suit by a worker who contracts an occupational disease, a medical malpractice suit by a patient who discovers an injury long after the negligent medical treatment has been administered, or a product liability suit by a consumer of a drug or other medically related product who discovers a side effect from the use of the defendant’s product. In each of the pure latent injury cases, the plaintiff fails to discover either the injury or its cause until

\textsuperscript{242} \textit{Iowa Code Ann.} § 614.1(2) (West Supp. 1990) “Those [actions] founded on injuries to the person or reputation, including injuries to relative rights, whether based on contract or tort, or for a statute penalty, [must be brought] within two years.” \textit{Id.}
\textsuperscript{243} \textit{Franzen v. Deere & Co.}, 377 N.W.2d 660, 662 (Iowa 1985).
\textsuperscript{244} \textit{LeBeau}, 446 N.W.2d at 802.
\textsuperscript{245} 446 N.W.2d 800 (Iowa 1989).
\textsuperscript{246} \textit{Id.} at 801.
\textsuperscript{247} \textit{Id.}
\textsuperscript{248} \textit{Id.}
\textsuperscript{249} \textit{Id.} \textit{See supra} note 242.
\textsuperscript{250} \textit{LeBeau}, 446 N.W.2d at 801.
\textsuperscript{251} \textit{Id.}
\textsuperscript{252} \textit{Id.}
\textsuperscript{253} \textit{Id.} at 802.
long after the negligent act occurred.254
In "pure latent" injury cases, the court stated that the discovery rule is applied to prevent the unfairness that would result if a plaintiff was charged with the "knowledge of facts which are 'unknown and inherently unknowable.'"255

The court categorized the plaintiff in the LeBeau case in the second group of cases involving a "traumatic event/latent manifestation."256 The Supreme Court of Iowa held that the discovery rule was inapplicable to "traumatic event/latent manifestation" cases because the plaintiff had knowledge of the necessary elements of her cause of action within the two year statute of limitations.257

The Supreme Court of Iowa stated that plaintiffs who are injured by exposure to asbestos fall into the group of "pure latent" injury cases.258 As a result, the discovery rule will be applied in these cases to allow diligent plaintiffs the opportunity to maintain causes of action.259

ARKANSAS

Neither the Arkansas legislature nor its courts have determined the date of accrual in cases involving exposure to asbestos.260 The Arkansas product liability statute requires all actions to be commenced within three years from the date that the injury is sustained.261 However, in a recent case decided by the United States Court of Appeals for the Eighth Circuit sitting in Arkansas, the court noted the Arkansas legislature's rejection of the time of initial wrongdoing as the date of accrual in products liability cases.262

In Mulligan v. Lederle Laboratories,263 the plaintiff brought a products liability action against the defendant drug manufacturer for chronic health problems she sustained as a result of a drug manufactured by the defendant.264 A jury awarded the plaintiff compen-
tory and punitive damages, and the defendant appealed. On appeal, the defendant argued that the plaintiff’s cause of action was barred by the Arkansas products liability statute of repose. The Eighth Circuit held that the plaintiff’s cause of action was not barred by the Arkansas three year statute of repose. The court reasoned that a products liability cause of action accrues when the plaintiff is aware of both the injury sustained and its cause. However, the plaintiff does not necessarily have to be aware of the full extent of his injuries before the statute will begin to run. The court defined the concept of awareness as either an informed diagnosis or knowledge of both the fact and cause of the injury.

The trend in most jurisdictions is to apply a variation of the discovery rule in product liability cases involving drugs, chemicals and asbestos. Arkansas has adopted a form of the discovery rule in products liability cases involving drugs and the six other states in the Eighth Circuit have either legislatively or judicially adopted the discovery rule in cases involving exposure to asbestos. Therefore, it seems that it is only a matter of time before Arkansas adopts a form of the discovery rule in latent disease cases.

CONCLUSION

The number of cases involving exposure to asbestos continues to grow each year. As a result of the expansion in litigation in this area of the law, the courts sitting in those jurisdictions that have not specifically provided for asbestos litigation will have to decide how they are going to deal with the increasing number of persons who will be seeking compensation. The adoption of the discovery rule, whether it is done judicially or legislatively, is the most favorable solution for those persons who are suffering from an asbestos-related disease. The form of the discovery rule that is adopted is a policy decision that each state will have to make individually depending upon the scope of the rule that best reflects that state’s policy goals of recovery.

Six of the seven states in the United States Court of Appeals for the Eighth Circuit have followed the current trend and have pro-

265. Id.
266. Id. See supra note 261.
267. Id. at 864, 867.
268. Id. at 863-64 (citing Schenebeck v. Sterling Drug Co., 291 F. Supp. 368 (E.D. Ark. 1968), aff’d, 423 F.2d 919 (8th Cir. 1970)).
269. Mulligan, 786 F.2d at 864.
270. Id. at 863-64.
272. See supra notes 108-60 and accompanying text.
vided either a statutory exception for victims of asbestos exposure or have judicially adopted a form of the discovery rule. Arkansas, the only state that has neither legislatively nor judicially created an exception for cases involving exposure to asbestos in the Eighth Circuit, has adopted the discovery rule in products liability cases involving drugs and will probably expand the rule to cover causes of action involving asbestos.

Adoption of the discovery rule in latent disease cases such as asbestos is the most equitable solution as well as a reflection of our system of jurisprudence: Those who are injured by the wrongful acts of another are entitled to have their day in court to seek redress for the injuries from which they are suffering.

Lisa K. Mehs—'92