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An Equitable Approach to Products Liability Statutes of Repose

INTRODUCTION

Suppose a consumer purchased a control valve for his liquified petroleum gas water heater in 1957. The manufacturer knew at the time of manufacture and sale that the control valve was defective. Even after the defect caused numerous deaths and serious injuries, the manufacturer did not make reasonable and good faith efforts to recall the product or warn unsuspecting consumers. In fact, the manufacturer took active steps to conceal the defects and dangers the control valve presented. The consumer was severely burned following a gas leak caused by the defective control valve in 1993. Under a plain reading of most products liability statutes of repose, the consumer would be prevented from bringing an action against the manufacturer.

Statutes of repose terminate any right of action after a specified time following manufacture or first sale of the product, regardless of whether or not there has yet been an injury. In general, these enactments were the legislative response to the perceived sky-rocketing...
cost of products liability insurance. Although the result is manifestly unfair, the consumer’s claim in the introductory example would be absolutely barred because the control valve exceeded the statutory repose period. His claim would have been extinguished prior to his injury. In short, the consumer would be completely deprived of any legal recourse for his injuries resulting from the manufacturer’s wrongs merely because he was injured by an older product.

Courts have long recognized the applicability of equitable principles to statutes of limitations where the defendant induced the plaintiff to forego suit or concealed a cause of action from the plaintiff until the limitations period had run. Thus, courts are willing to equitably toll statutes of limitations to allow the plaintiff’s cause of action. However, courts have not been so willing to apply the equitable principles of estoppel to the fairly recent legislative creation of statutes of repose. When analyzing the applicability of equitable estoppel to statutes of repose, there are two distinct situations which must be addressed.

In the first situation, the injury occurs within the repose period, but because of the wrongful conduct of the defendant, the plaintiff forgoes the bringing of suit until after the repose period has expired. In these situations, the courts are generally inclined to allow the application of the doctrine of equitable estoppel to prevent the defendant from asserting the statute of repose as a defense.

In the second situation, the injury occurs after the repose period has ended, but the manufacturer previously misrepresented its product or fraudulently concealed from the consumer its knowledge of the unreasonably dangerous and defective condition of its product to the detriment of the consumer. In this second situation, the courts have been disinclined to bend the rigid rule of repose on account of


7. See discussion infra part III.A-B.

8. See infra notes 63, 64 and accompanying text.
equitable considerations. This unwillingness to apply equitable principles to statutes of repose is partly because of deference to the legislative intent to extinguish causes of action which arise after a given number of years and partly because of the argument that since the statutes mark the absolute limit of manufacturer liability, any right the consumer had to redress is extinguished once the repose period has expired.

The particular problem addressed in this comment is the applicability of equitable principles to products liability statutes of repose in the second situation, when the injury caused by a defective product occurs after the repose period has ended and it is alleged that the manufacturer fraudulently concealed from the consumer its knowledge of the defect. Part I examines the distinction between statutes of limitations and statutes of repose, the history of strict products liability, and the rationale for the enactment of products liability statutes of repose. Part II discusses the doctrine of equitable estoppel and its application. Part III analyzes the current status of the law, particularly the different treatment given to situation one cases and situation two cases by the courts. After balancing the interests of the manufacturers and injured consumers in light of the present case law in part IV, the conclusion reached is that the principles of equitable estoppel should be applied to bar the manufacturer from asserting the statute of repose as a defense where the manufacturer intentionally withheld its knowledge of the unreasonably dangerous defects of its product from the consumer.

I. BACKGROUND INFORMATION

A. STATUTES OF LIMITATIONS VS. STATUTES OF REPOSE

As a preliminary matter, it is necessary to distinguish between the terms "statutes of limitations" and "statutes of repose." Often

9. See infra note 67 and accompanying text.
10. See infra note 70 and accompanying text.
11. See infra notes 86-92 and accompanying text.
courts are inconsistent with their use of these terms. A statute of limitations cuts off the plaintiff's right to bring suit after a given period of time after the cause of action has accrued. A cause of action accrues at the time of the injury or when the plaintiff, through the exercise of due diligence, should have discovered the injury. Such statutes require that a suit be filed within a specified period of time after a legal right has been violated or the remedy for the wrong is deemed waived.

Most products liability statutes of repose, in contrast, begin to run at the date of manufacture or first sale to a consumer and extinguish a cause of action after a set number of years. Since these

13. Raithaus v. Saab-Scandia of Am., Inc., 784 P.2d 1158, 1161 (Utah 1989). The term "statute of repose" does have several different meanings. McGovern, supra note 3, at 582-87. McGovern cites five distinct definitions of the term "statute of repose" which are in use:
1) A general definition which treats statutes of limitations and repose as identical. Any legislative enactments which prescribe the period of time in which an action may be brought. Id. at 582.
2) An even more general term which encompasses various statutes which prescribe time periods, such as statutes of limitations, escheats, and adverse possession. Id. at 583.
3) That portion of a statute of limitations which begins to run at the time of discovery of the injury or cause of action. Id.
4) A statute of repose is distinct from a statute of limitations because it begins to run at a time unrelated to the traditional accrual of the cause of action. Id. at 584-86.
5) A useful safe life provision which provides that a defendant may be relieved of liability upon a showing that the allegedly unsafe product has been used beyond its useful safe life. Id. at 586.

14. The Illinois products liability statute of limitations provides that if the injury occurs within the repose period, the plaintiff may bring an action within 2 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 8 years after the date on which such personal injury, death or property damage occurred. 735 ILCS 5/13-213(d) (1992).


16. See, e.g., Ala. Code § 6-5-502(c) (Supp. 1992) (products liability action must be brought within 10 years after date of first use by initial consumer); Ariz. Rev. Stat. Ann. § 12-551 (1992) (no action may be commenced if cause of action accrues more than 12 years after product was first sold for use); Ga. Code Ann. § 51-1-11(b)(2) (Michie Supp. 1992) (no action shall be brought after 10 years from date of first sale for use); 735 ILCS 5/13-213(b) (1992) (no action shall be commenced after 10 years from date of first sale or 12 years from date of first sale to initial user, whichever period expires earlier); Ind. Code Ann. § 33-1-1.5-5 (West Supp.
statutes begin to run from a date unrelated to the date of injury, they are not designed to allow a reasonable time for the filing of an action once it arises. In fact, as in the introductory example, a statute of repose may bar an action if the injury occurred after the repose period no matter how diligent the injured person is in seeking a judicial remedy. In order to bring a valid claim against a manufacturer, a claimant must file suit within the applicable statute of limitations period, but in no event may suit be brought after expiration of the repose period.

Some states have passed “useful safe life” statutes of repose. See infra note 31 and accompanying text.

The wording and applicability of products liability statutes of repose vary. For example, the Illinois statute only pertains to actions based on strict products liability. 735 ILCS 5/13-213(b) (1992). Other statutes seek to extinguish suits based on either strict products liability or negligence. See, e.g., IND. CODE ANN. § 33-1-1.5-5 (West Supp. 1992).

1992) (action must be commenced within 10 years after delivery to initial user); Neb. Rev. Stat. § 25-224(2) (1989) (action must be commenced within 10 years after first sale for use); N.C. Gen. Stat. § 1-50(6) (Supp. 1992) (no action shall be brought more than six years after date of initial purchase for use); N.D. Cent. Code § 28-01.1-02(1) (1991) (no action may be maintained unless harm occurred within 10 years after date of initial purchase for use, or within 11 years of date of manufacture of product); Or. Rev. Stat. § 30.905(1) (1988) (action shall be commenced no later than eight years after first purchase for use); R.I. Gen. Laws § 9-1-13(b) (1985) (action shall be commenced within 10 years after date product was first purchased for use).

17. Berry, 717 P.2d at 672. It is important to note that statutes of repose also exist relating to other types of liability, including construction liability and medical malpractice liability. The analysis of these statutes of repose is similar to that given to products liability statutes of repose.

For a discussion regarding the constitutionality of construction statutes of repose, see Canton Lutheran Church v. Sovik, Mathre, Sathrum & Quanbeck, 507 F. Supp. 873, 875-79 (S.D. 1981). There is an interesting question as to when the medical malpractice statute of repose applies rather than the products liability statute of repose. For instance, cases involving intrauterine devices have applied the products liability statute of repose. See Givens v. A.H. Robbins Co., 751 F.2d 261 (8th Cir. 1984); MacMillen v. A.H. Robbins Co., 348 N.W.2d 869 (Neb. 1984). Pharmaceutical drugs have fallen under the products liability statute of repose. See Groth v. Sandoz, Inc., 601 F. Supp. 453 (D. Neb. 1984). However, an allegedly defective hip prosthesis was held to be governed by the medical malpractice statute of repose. Elke v. Zimmer Inc., 596 N.E.2d 661 (III. App. Ct. 1992). In Elke, the court held that the four-year statute of repose in 735 ILCS 5/13-212(a) (1992) applied to all actions brought against a health care provider, regardless of the plaintiff’s asserted theory. Elke, 596 N.E.2d at 662.

18. Berry, 717 P.2d at 672.

19. However, if the claimant was injured nine years after the first sale of the
B. THE HISTORY OF PRODUCTS LIABILITY STATUTES OF REPOSE

The industrialization of the American economy and the growth of mass production and marketing in the nineteenth and twentieth centuries resulted in widespread injury and death caused by unreasonably dangerous and defective products. Responding to these developments, the courts allowed injured consumers to bring actions against product manufacturers based on fault (i.e. negligence), and eventually shifted the risk of loss from consumers to manufacturers through the development of strict products liability.

The purpose of strict products liability “is to insure that the costs of injuries resulting from defective products are borne by the manufacturers that put such products on the market rather than by the injured persons who are powerless to protect themselves.” The rationale is that the manufacturer stands in the best position to protect product, and the repose period is 10 years, even if a four-year statute of limitations is applicable, the claimant must bring his or her claim within one year (before the end of the repose period). Some states’ statutes of repose contain a grace period, providing that if the claimant is injured in the last two years of the repose period, the injured party has additional time to bring suit. See, e.g., IND. CODE § 33-1-1.5-5 (West Supp. 1992) (Repose period of 10 years after delivery of the product to the initial user, but a two-year grace period for claims accruing after eight years.).

The following is the view of most courts regarding the effect of the repose statutes depending upon when the injury accrues:

Where the injury occurs within the [repose] period, and a claimant commences his or her action after the [repose] period has passed, an action accrues but is barred. Where the injury occurs outside the [repose] period, no substantive cause of action ever accrues, and a claimant’s actions are likewise barred.


22. See, e.g., Greenman v. Yuba Power Prods., Inc., 377 P.2d 897, 900 (Cal. 1963); see also OLIVER WENDELL HOLMES, THE COMMON LAW 117 (1881). Strict liability was by no means a “new idea” as Oliver Wendell Holmes noted in 1881 that “the safest way to secure care is to throw the risk upon the person who decides what precautions shall be taken.” Id.

23. Greenman, 377 P.2d at 901; see also Escola v. Coca Cola Bottling Co., 150 P.2d 436, 440 (Cal. 1944) (“Even if there is no negligence . . . public policy demands that responsibility be fixed wherever it will most effectively reduce the hazards to life and health inherent in defective products that reach the market.”); William L. Prosser, Strict Liability to the Consumer, 69 YALE L.J. 1099, 1119-24 (1960) (discussing the various policy rationale for strict product liability); McGovern, supra note 3, at 590-91 (same); FRANK J. VANDALL, STRICT LIABILITY: LEGAL AND ECONOMIC ANALYSIS 20-22 (1989) (same).
against the harm and is best able to spread and bear the loss. It is hoped that the effect of strict products liability is to encourage safer manufacturing practices and product designs, thereby reducing the incidence of death and injury.

In an effort to "dampen the rapid escalation of insurance rates" following an "explosion" in products liability litigation since the advent of strict products liability, many states adopted products liability statutes of repose in the late 1970s and early 1980s. Gener-


[T]he seller, by marketing his product for use and consumption, has undertaken and assumed a special responsibility toward any member of the consuming public who may be injured by it. . . . [T]he consumer of such products is entitled to the maximum of protection at the hands of someone, and the proper persons to afford it are those who market the products. Id.; see also Escola, 150 P.2d at 441 ("[T]he risk of injury can be insured by the manufacturer and distributed among the public as a cost of doing business."); Camacho v. Honda Motor Co., 741 P.2d 1240, 1247-48 (Colo. 1987) (en banc) (citing John W. Wade, On the Nature of Strict Tort Liability for Products, 44 Miss. L.J. 825, 837-38 (1973) (listing the manufacturer's ability to spread the loss as one of the seven factors used in determining whether a product design is unreasonably dangerous)); Prosser, supra note 23, at 1120 (discussing the risk-spreading rationale).

25. Berry v. Beech Aircraft Corp., 717 P.2d 670, 673 (Utah 1985); see also Restatement (Second) of Torts § 402A cmt. c (1977); McGovern, supra note 3, at 590.


Some have argued that the so-called insurance crisis is a "myth" created by the insurance companies and product manufacturers. See Jerry J. Phillips, Attacks on the Legal System: Fallacy of 'Tort Reform' Arguments, Trial, Feb. 1992, at 106 ("Trends and suspected trends in tort liability were blown out of proportion by the [insurance] industry to justify its massive rate hikes."); Joan Claybrook, Products Liability: Serving All Americans, Trial, Oct. 1990, at 29 (noting that restrictive tort legislation has not reduced insurance rates). These assessments are well-founded. One report maintains that the cost to American businesses for product liability insurance is under one-half of one percent of retail sales. Nat'l Ins. Consumer Org., Product Liability: 1991 Calendar Year Experience 4 (1992).

Similarly, others argue that there has been no products liability litigation "explosion" in the United States. See Philip H. Corboy, Corboy Disputes Quayle's
ally, the legislative intent in enacting these statutes was to provide an absolute cutoff date for bringing suit.\textsuperscript{27} The legislatures passed products liability statutes of repose to protect product manufacturers and insurance companies from what is frequently referred to as the "long-tail" liability problem, where manufacturers of defective products could be held liable many years after the manufacture and sale of a product.\textsuperscript{28}

Not all statutes of repose attempt to deal with this long-tail problem the same way. The Model Uniform Product Liability Act's statute of repose presumes that a product's "useful safe life" is ten years.\textsuperscript{29} For example, if a consumer is injured by a product over ten years old, he has the burden of proving that the product's useful safe life has not yet expired.\textsuperscript{30} Although the Model Act's presumption of a ten-year safe life is rebuttable, the majority of the states' statutes of repose are absolute in their terms and provide for no rebuttal.\textsuperscript{31}

\textit{ABA Arguments About 'Litigation Explosion', CHI. DAILY L. BULL., Aug. 30, 1991, at 2 (viewing the litigation explosion as a "myth that is especially useful for diverting attention from genuine problems"); Ralph Nader & Joan Claybrook, \textit{Preserving a Pillar of Our Democracy: Tort System Protects the Injured}, TRIAL, Dec. 1991, at 45 (contending that the insurance companies and manufacturers created the myth of a litigation crisis); Talbot D'Alemberte, \textit{Justice for All: A Response to the Vice President}, TRIAL, May 1992, at 58 (noting that the courts are not overloaded with product liability cases, but rather with family law, landlord-tenant, and drug cases).


\textsuperscript{28} Michael M. Martin, \textit{A Statute of Repose for Product Liability Claims}, 50 \textit{Fordham L. Rev.} 745, 746-47 (1982). Some in the general aviation industry, for example, joke that if the airplane flown by the Wright brothers at Kitty Hawk was still flying today, Orville and Wilber would continue to be liable for it if statutes of repose were not enacted. Gregory P. Wells, \textit{General Aviation Accident Liability Standards: Why the Fuss?}, 56 J. AIR L. & COM. 895, 895 (1991).


\textsuperscript{31} Some states have enacted useful safe life products liability statutes of repose. See \textit{Colo. Rev. Stat. Ann.} § 13-21-403(3) (West 1989) ("Ten years after a product is first sold for use or consumption, it shall be rebuttably presumed that the product was not defective and that the manufacturer or seller thereof was not negligent and that all warnings and instructions were proper and adequate."); \textit{Conn. Gen. Stat. Ann.} § 52-577a(c) (West 1991) (10-year presumption); \textit{Idaho Code} § 6-1403(2) (1990) (10-year presumption); \textit{Kan. Stat. Ann.} § 60-3303(b)(1) (Supp. 1992)
However, many consumer products, especially capital goods, are intended to be used well beyond the legislatively-imposed limit.32

Two main rationales are often cited for statutes of repose.33 First, difficulty exists in locating reliable evidence and defending claims many years after the product’s manufacture when “evidence has been lost, memories have faded, and witnesses have disappeared.”34 Second, after the passage of a reasonable length of time, manufacturers should be free from the burdens of disruptive and protracted liability and able to plan their affairs with a degree of certainty.35

Other related rationales for enacting statutes of repose include: to reduce court congestion;36 to avoid the possibility of juries unfairly imposing current legal and technological standards on products manufactured many years prior to suit;37 to prevent certain product manufacturers from being discouraged from producing goods due to

(10-year presumption after time of first delivery); KY. REV. STAT. ANN. § 411.310(1) (Michie/Bobbs-Merrill 1992) (presuming product not defective if harm occurs either more than five years after date of sale to first consumer or more than eight years after date of manufacture); MINN. STAT. ANN. § 604.03(1) (West 1988) (providing for a useful safe life defense “that the injury was sustained following the expiration of the ordinary useful life of the product”); WASH. REV. CODE ANN. § 7.72.060(2) (West 1992) (12-year presumption after time of first delivery).

Tennessee’s repose provision is a unique hybrid between statutes which declare an absolute bar to actions arising after a given number of years and those which contain useful life provisions. It provides that an action must be brought within 10 years from the date on which the product was first purchased for use or consumption or within one year after the expiration of the anticipated life of the product, whichever is shorter. TENN. CODE ANN. § 29-28-103(a) (Supp. 1993).


36. McGovern, supra note 3, at 588. However, most studies conclude that current “court congestion” is caused by an overload of asbestos, family law, and criminal cases, not product liability cases. Talbot D’Alemberte, Justice for All, TRIAL, May 1992, at 58; see supra note 26; see infra note 117.

the high cost and unavailability of products liability insurance;\textsuperscript{38} and
to promote the public goal of certainty and finality in the administra-
tion of commercial transactions by terminating liability at a set time.\textsuperscript{39}

The rationale behind statutes of repose have not gone without
criticism or constitutional challenge.\textsuperscript{40} The opponents of these meas-
ures argue that it is not just the manufacturer's case which suffers
with the passage of time, both the plaintiff and the defendant must
find lost evidence and missing witnesses. Furthermore, it is the
plaintiff who ultimately carries the additional burden of proving his
or her claim.\textsuperscript{41} Another frequent argument is that these statutes do


the rise of stale claims. *Id.* at 905. Although the "stale claims" rationale is a reason
for the enactment of statutes of limitations, such is not the case with statutes of
repose. As the Utah Supreme Court in *Sun Valley* stated, "a claim cannot logically
be 'stale' before it accrues." 782 P.2d at 189.

40. Long before the inception of statutes of repose, the "explosion" of products
liability litigation and the insurance "crisis" of the 1970s, the constitutionality of
The *Wilson* Court stated that a statute which failed to allow a claimant an opportunity
to bring suit would not be a statute of limitations, but rather, "an unlawful attempt
to extinguish rights arbitrarily, whatever might be the purport of its provisions." *Id.*
at 62. The constitutionality of products liability statutes of repose has been challenged
on the basis of the due process and equal protection clauses as well as "open courts
provisions" of some states' constitutions. For a general discussion on the constitu-
tionality of statutes of repose, see Thomas J. Dennis, *Products Liability Statutes of
Repose as Conflicting with State Constitutions: The Plaintiffs are Winning*, 26 Ariz.
L. Rev. 363 (1984); *McGovern*, supra note 3, at 600-20; Laurie T. Shield, Comment,
*Product Liability Statutes of Repose: On Denying an Injured Plaintiff His or Her
Day in Court*, 9 U. Dayton L. Rev. 503 (1984). For cases dealing with constitutional
challenges to products liability statutes of repose, see *Berry v. Beech Aircraft Corp.*, 717 P.2d 670 (Utah 1985) (involving a wrongful death action for the fatal crash of a
23-year-old plane, in which the Utah Supreme Court struck down the state's product
liability statute of repose as unconstitutional under the state constitution's open court
provision); *Thornton*, 425 N.E.2d at 525-26 (Ill. App. Ct. 1981) (upholding the
constitutionality of Illinois' products liability statute of repose under due process
challenge); *Dague v. Piper Aircraft Corp.*, 418 N.E.2d 207 (Ind. 1981) (upholding
statute of repose under the state's open courts provision).

41. *Sun Valley*, 782 P.2d at 190. In addition, it is the defendant manufacturer
which controls all relevant documents regarding the design, testing, and manufacture
of the product. For a discussion of corporate document destruction, see Richard L.
Whitworth & James L. Gilbert, *Punishing Evidence Destruction: Keeping Discovery
Fair and Open*, Trial, Nov. 1992, at 66.
little to make product liability insurance rates affordable. While the purpose of strict products liability is to place the loss on the party best able to avoid and spread the cost of the injury, the effect of statutes of repose is to place the risk of loss on the injured consumer, the party least able to afford it. It is important to remember that "[e]quity had its origin in granting relief from frauds when the old common law courts were too rigid in their reasoning to grant relief from grave injustices." 44

II. THE DOCTRINE OF EQUITABLE ESTOPPEL

As Justice Black stated, equitable estoppel is a "principle of law, older than the country itself." 45 Equitable estoppel is based on the facts and circumstances of a particular case, thus, any attempted definition usually amounts only in a declaration that estoppel should be applied under the facts of a given case. 46 The purpose of equitable estoppel is to prevent fraud and injustice, 47 and to ensure that "no man may take advantage of his own wrong." 48 Although equitable estoppel is based upon preventing fraud, the conduct of the party claiming the defense of the statute of repose need not have committed a common law fraud in the strictest sense. 49 If applied, the doctrine of equitable estoppel precludes a litigant from asserting an otherwise

42. Sun Valley, 782 P.2d at 190; see supra note 26; see also Berry, 717 P.2d at 681-82; Martin, supra note 28, at 745-761.
43. Wells, supra note 28, at 924.
48. Guy, 138 N.E.2d at 896; see also Glus, 359 U.S. at 232; Insurance Co. v. Wilkinson, 80 U.S. 222, 233 (1871). The Wilkinson Court stated:
The principle is that where one party has by his representations or his conduct induced the other party to a transaction to give him an advantage which it would be against equity and good conscience for him to assert, he would not in a court of justice be permitted to avail himself of that advantage.
Id.
The Illinois Supreme Court in *Vaughn v. Speaker* reiterated the six elements of equitable estoppel. First, as applied to a typical products liability suit, there must be words or conduct by the manufacturer amounting to a misrepresentation or concealment of material fact. Second, the manufacturer must have had knowledge at the time the representations were made that the representations were untrue. Third, the injured claimant must not know the truth regarding the manufacturer's representations at the time the representations were made or at the time he acted on them. Fourth, the manufacturer must have intended or reasonably expected that its conduct or representations would be acted upon by the claimant or the public generally; the conduct and representations must be such as would ordinarily lead to the complained of results. Fifth, the claimant must have, in good faith, reasonably relied upon the misrepresentations to his detriment. Sixth, the claimant would be prejudiced if the manufacturer is permitted to deny the truth of such representations or conduct.

50. *See* Johnson v. Neel, 229 P.2d 939, 944 (Colo. 1951) ("A statute cannot stand in the way of waiver or equitable estoppel when the facts demand their application in the interest of justice and right."); City of Chetopa v. Board of County Comm'rs, 133 P.2d 174, 177 (Kan. 1943) ("Equitable estoppel is a rule of justice which in its proper field prevails over all other rules... It may, in proper cases, operate to cut off a right or privilege conferred by statute or even by the Constitution."). An oft cited rule of equity is that "[o]ne who is silent when he ought to speak will not be heard to speak when he ought to be silent." 28 AM. JUR. 2D Estoppel and Waiver § 53, at 666 (1966).

51. 533 N.E.2d 885 (Ill. 1988).

52. Id. at 890; see also Anane v. Pettibone Corp., 560 N.E.2d 1088, 1092 (Ill. App. Ct. 1990) (applying elements of estoppel to products liability case); 28 AM. JUR. 2D Estoppel and Waiver § 35, at 641 (1966) (listing the elements of equitable estoppel).

53. *Vaughn*, 533 N.E.2d at 890. Such misrepresentation need not be made directly to the injured party; it can take the form of suppression, concealment or other failure to disclose material facts when a duty to disclose exists. *Id.*; see infra note 129.

54. *Vaughn*, 533 N.E.2d at 890. Knowledge can be implied. *Id.* Further, misrepresentations made with gross negligence can form a basis for equitable estoppel. *Id.*

55. *Id.*

56. *Id.*

57. *Id.* The claimant's reliance must be reasonable and not reckless. However, one guilty of fraudulent misrepresentation cannot assert that the person defrauded was negligent in failing to discover the truth. *Id.*

58. *Id.*
III. CURRENT STATUS OF THE LAW

Courts have not hesitated to apply equitable tolling to bar the defendant from relying on the statute of limitations when the defendant has concealed a cause of action from another or prevented the discovery of such a cause of action.\textsuperscript{59} Statutes of limitations do not begin to run until the time of injury or from the time when the injury should have been discovered through the exercise of due diligence.\textsuperscript{60} Since the defendant withheld from the plaintiff notice of a cause of action, it would be inequitable for the defendant to assert that the plaintiff “sat on his rights.”

With respect to statutes of repose there are two distinct time-frames in which there are issues as to whether the principles of equitable estoppel may come into play. The first time-frame is when the injury occurs \textit{within} the repose period, but because of the representations of the would-be defendant, the injured party is “lulled into a sense of false security” and forgoes the bringing of suit.\textsuperscript{61} In contrast, the second time-frame is when the injury occurs \textit{following} the running of the repose period, but because of the defendant’s wrongful conduct it would be inequitable for the defendant to assert a defense, namely the statute of repose.

A. SITUATION ONE: INJURY OCCURS WITHIN THE REPOSE PERIOD

Usually, if a product injures the plaintiff within the repose period, the plaintiff immediately or soon thereafter discovers the injury and suit is brought. There are instances, however, when the injury occurs within the repose period, but either the injury itself is not discovered or the cause of the injury is unknown. Only after the repose period has lapsed is the cause discovered and suit brought.\textsuperscript{62}


The doctrine of equitable estoppel is applied with respect to representations of a party, to prevent their operating as a fraud upon one who has been led to rely upon them. They would have that effect, if a party who, by his statements as to matters of fact, or as to his intended abandonment of existing rights, had designedly induced another to change his conduct or alter his condition in reliance upon them, could be permitted to deny the truth of his statements, or enforce his rights against his declared intention of abandonment.

\textit{Id.} at 547-48.

\textsuperscript{60} See \textit{supra} note 14.

\textsuperscript{61} Schroeder v. Young, 161 U.S. 334, 344 (1896); Insurance Co. v. Wilkinson, 80 U.S. 222, 233 (1871).

Most courts, regardless of the seemingly absolute language of the statutes of repose, are willing to apply equitable principles when the injury has occurred within the repose period but, due to the defendant's wrongful misrepresentations, the cause of action has not been brought until after the statute of repose would bar the action. Similar to the rationale used when courts allow the equitable tolling of statutes of limitations, courts generally hold that "the doctrine of equitable estoppel precludes a defendant from raising the defense of the statute of ultimate repose where there is evidence of fraud or other conduct on which the plaintiff reasonably relied in forbearing the bringing of a lawsuit." In either case, the injured party would have brought suit but for the defendant's conduct. Fairness and equity demand that the risk of loss be shifted from the innocent plaintiff to the defendant whose wrongful conduct induced the plaintiff to postpone bringing suit.

However, some courts refuse to apply the doctrine of equitable estoppel to statutes of repose in this situation, focusing solely on what is considered to be the purpose of the statutes — to impose an
absolute cutoff date.65 Such rigid and harsh applications of statutes of repose would seem to encourage product manufacturers to commit frauds upon their consumers in the hope that the truth will not be discovered by the consumers until the repose period has lapsed. Not only does this approach encourage such wrongful conduct, it rewards it. By barring the plaintiff’s suit, the courts allow the defendant to profit from its wrongs.

B. SITUATION TWO: INJURY OCCURS AFTER REPOSE PERIOD

In the second situation, on which this comment focuses, the injury from the product occurs after the repose period, but the plaintiff alleges that the manufacturer fraudulently concealed information concerning the dangerous attributes of its products from the plaintiff.66 During this time-frame, a majority of courts are unwilling to recognize an exception to the legislatively created statutes of repose.67 This refusal is based on the courts’ strict interpretation that statutes of repose were intended to be absolute, and thus, no exceptions apply.

The starting point in interpreting a statute is the plain language of the statute itself.68 Absent a clearly expressed legislative intention

65. E.g., Thorton v. Mono Mfg. Co., 425 N.E.2d 522, 527 (Ill. App. Ct. 1981); Beals, 833 P.2d at 350 (The court held that equitable estoppel did not apply to repose period when damage occurred within the repose period. “[T]o hold otherwise, would thwart the legislature’s intent to provide an absolute cutoff date for bringing such actions.”). In Thorton, the appellate court stated, “where the language of a statute is certain and unambiguous, the only legitimate function of the courts is to enforce the law as enacted by the legislature.” Thorton, 425 N.E.2d at 527. However, the Illinois Supreme Court has noted that “the principal of equitable estoppel applies to the repose period as well as the limitations period.” Witherell, 515 N.E.2d at 73; Mega, 490 N.E.2d at 669. Witherell and Mega both involved the medical malpractice statute of repose (four years) and cases in which the injury occurred within the repose period, but suit was not brought until the repose period had lapsed.

66. This argument presumes a duty of manufacturers to recall and warn consumers of product defects. See supra note 12.

67. Peterson v. Fuller Co., 807 F.2d 151, 153 (8th Cir. 1986); Brown v. Eli Lilly & Co., 690 F. Supp. 857, 859 (D. Neb. 1988) (estoppel not available in DES case as the injury was not discovered within the repose period); Groth v. Sandoz, Inc., 601 F. Supp. 453 (D. Neb. 1984); Kush v. Lloyd, 616 So. 2d 415 (Fla. 1992). Although Florida provided a fraud exception to its now-repealed products liability statute of repose, the medical malpractice statute of repose contained no such exception. The court dismissed the case noting, “[w]hether public policy supports such a distinction is a matter for the legislature, not this court, to determine.” Id. at 419-20.

to the contrary, that language must ordinarily be regarded as conclusive.69 Most statutes of repose are written in clear, unambiguous language suggesting the legislatures did not intend for any exceptions to apply.70 The legislative history of these statutes seems to support this reading since the legislatures sought to sever the "long tail" of liability which manufacturers faced.71 If read as prescribing an ultimate cut-off of liability, then the usual reasons for tolling the statutes would not apply, as the focus would be on the age of the product rather than the conduct of the manufacturer.72

The following two cases followed this literal application rule. In Peterson v. Fuller Co.,73 the plaintiff suffered a hearing loss in 1984 and brought suit against the manufacturer of air compressors which were used below the deck of a barge where he worked.74 The compressors were sold for use in 1967, seventeen years prior to the alleged injury.75 The district court dismissed the case, holding the action was clearly barred by the ten-year period of repose.76 The plaintiff on

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69. Id. The Illinois Supreme Court also recited the age-old rule of statutory construction that: "We recognize that in construing the Act we must ascertain and give effect to the legislature's intent in enacting the statute and, accordingly, we look to the language of the statute itself as the best indication of the intent of the drafters." Kirwan v. Welch, 549 N.E.2d 348, 349 (Ill. 1989). See Johnson v. Star Mach. Co., 530 P.2d 53, 57-58 (Or. 1974) (noting that in interpreting statutes, the legislative intent controls).

70. See, e.g., 735 ILCS 5/13-213(b) (1992). The Illinois statute of repose states: 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 12 years from the date of first sale, . . . or 10 years from the date of first sale . . . to its initial user . . . whichever period expires earlier . . .

Id. (emphasis added). See Scott v. Archer-Daniels-Midland, Co., 551 N.E.2d 776, 777 (Ill. App. Ct. 1990) (holding that where the language is clear and unambiguous, the courts must enforce the law as enacted without resort to other aids); Thorton v. Mono Mfg. Co., 425 N.E.2d 522, 527 (Ill. App. Ct. 1981) ("[W]here the language of a statute is certain and unambiguous, the only legitimate function of the courts is to enforce the law as enacted by the legislature."); Johnson, 530 P.2d at 57 (holding a court cannot ignore the plain meaning of unambiguous words in a statute).

71. See supra note 28 and accompanying text.


73. 807 F.2d 151 (8th Cir. 1986) (applying Nebraska law).

74. Id. at 152.

75. Id.

appeal argued that the repose statute was equitably tolled as he alleged that the manufacturer had fraudulently concealed information regarding the compressor's dangers. The court of appeals refused to apply the principles of equitable estoppel because the plaintiff's injuries occurred after the expiration of the ten-year repose period.

Similarly, in *Groth v. Sandoz, Inc.*, suit was brought against a drug manufacturer for kidney damage allegedly caused by a prescription drug. The plaintiff used the drug from January 1971 until her injury was diagnosed in February 1981. The plaintiff alleged that the manufacturer fraudulently misrepresented the drug's effectiveness and safety. The court granted the defendant's summary judgment motion and dismissed the cause of action, because the claim was brought more than ten years following the first sale of the drug.

In addition to strictly honoring the legislative intent by applying the literal application rule, both *Peterson* and *Groth* cited the reasoning of *Rosenberg v. Town of North Bergen* in reaching their conclusions. In *Rosenberg*, the plaintiff brought suit against the municipality and contractors to recover for personal injuries she sustained as a result of alleged negligence in repaving a public street thirty-four years earlier. The court upheld the grant of the defendant's summary judgment motion based on the ten-year construction statute of repose. The court rejected the plaintiff's contention that the statute deprived her of due process in that it barred her cause of action before it accrued. In upholding the statute of repose, the court concluded that the legislature must have broad latitude and its enactments must be extended a presumption of constitutionality. More importantly, the court held that a statute of repose does not bar a

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77. 807 F.2d at 153.
80. Id. at 454.
81. Id.
82. Id.
83. Id. at 456.
84. 293 A.2d 662 (N.J. 1972).
86. Rosenberg, 293 A.2d at 663.
87. Id. at 668.
88. Id.
89. Id. at 666.
cause of action, but rather "prevent[s] what might otherwise be a cause of action from ever arising."\textsuperscript{90}

Thus, following the reasoning of \textit{Rosenberg}, injuries which occur after the repose period do not constitute breaches of any obligation, since the manufacturer only has an obligation to the consumer within the statutory period.\textsuperscript{91} If the injury occurs after the repose period has expired, no matter how egregious the misrepresentation or fraudulent concealment may be, such conduct can in no way interfere with the would-be plaintiff's suit since he or she "literally has no cause of action."\textsuperscript{92} The injured party could not in any way have been induced to postpone the filing of suit, because the plaintiff had no cause of action which could be brought.

\textbf{IV. Proposal}

In contrast to the statute involved in \textit{Peterson} and \textit{Groth}, the Model Uniform Product Liability Act provides that the statute of repose "does not apply if the product seller intentionally misrepresents facts about its product, or fraudulently conceals information about it, and that conduct was a substantial cause of the claimant's harm."\textsuperscript{93} However, most states do not provide this statutory exception.\textsuperscript{94} In the absence of a statutory exception, courts should not hesitate to apply the doctrine of equitable estoppel to prevent a defendant from raising the statute of repose when the manufacturer knowingly concealed information concerning the unreasonably dangerous defects of its

\textsuperscript{90} \textit{Id.} at 667.

\textsuperscript{91} Martin, \textit{supra} note 28, at 749 (discussing the effects of statutes of repose).

\textsuperscript{92} \textit{Rosenberg}, 293 A.2d at 667.


The Georgia ten-year statute of repose does not apply to actions "arising out of conduct which manifests a willful, reckless, or wanton disregard for life or property." \textit{Ga. Code Ann.} § 51-1-11(c) (Michie Supp. 1992). The Georgia statute expressly notes that the repose statute does not "relieve a manufacturer from the duty to warn of a danger arising from use of a product once that danger becomes known to the manufacturer." \textit{Id.} See also \textit{Ala. Code} § 6-5-502(e)(1) (Supp. 1992) and \textit{N.D. Cent. Code} § 28-01.1-02(3) (1991), which both provide for a failure to recall or warn exception.
product knowing that such conduct would be relied on by the consumer to his or her detriment. Specifically, there are two reasons why equity should apply to this second time-frame. First, the reasoning used in Rosenberg may be semantically correct, however, the duty of a court of justice is to insure that no fraud is rewarded — regardless of whether the injury occurs within the repose period or not. Second, the interests of injured consumers and society greatly outweigh the interests of manufacturers who engage in wrongful conduct. Further, this exception would neither "swallow up the rule" nor negate the policy behind statutes of repose, as the number of claims fitting into this exception would be relatively small.

A. ROSENBERG AND THE DUTY OF THE COURTS

Rosenberg held that the effect of a statute of repose is to extinguish a cause of action at an ascertainable time, regardless of whether a claim had yet accrued.95 The Utah Supreme Court, in deciding the constitutionality of Utah's statute of repose, stated that the Rosenberg argument begs the question:

The question, in our view, is whether there is a remedy by due course of law, and that question is not answered by arguing that a cause of action is not abrogated but is only defined to be temporally limited. In short, the constitutional protection cannot be evaded by the semantic argument that a cause of action is not cut off but only defined to exist for a specified period of time.96

Likewise, the courts' duty to insure, to the extent possible, that justice is done and that no fraud is rewarded cannot be skirted by

95. Rosenberg v. Town of North Bergen, 293 A.2d 662, 667 (N.J. 1972); see supra notes 86-92 and accompanying text.


Except in topsy-turvy land, you can't die before you are conceived, or be divorced before you marry, or harvest a crop never planted, or burn down a house never built, or miss a train running on a nonexistent railroad. For substantially similar reasons, it has always heretofore been accepted, as a sort of legal 'axiom,' that a statute of limitations does not begin to run against a cause of action before that cause of action exists, i.e., before a judicial remedy is available to the plaintiff. Id.
holding that this duty only exists within the statutory period. The rule requiring the courts to mechanically apply a statute’s unambiguous language is not so strict as to be without exception. If a literal application of the statute produces an unreasonable result, “it is the duty of the court to construe the act, if possible, so that it is a reasonable and workable law and not inconsistent with the general policy of the legislature.”\(^{97}\) Indeed, the courts have always, out of fairness and justice, been disinclined to give one who has engaged in fraudulent conduct the benefit of the misrepresentation made.\(^{98}\) It has been suggested that equitable estoppel applies in instances where a plain reading of the statute may indicate that no exceptions are available.\(^{99}\)

The six elements of the doctrine of equitable estoppel\(^{100}\) can be harmonized into one basic issue for determining the applicability of equitable estoppel: whether, under the circumstances, it would be against good conscience and fair and honest dealing to allow a party to repudiate the consequences of his representations or conduct.\(^{101}\) One purpose of the principle of equitable estoppel is to protect a party who has been lulled into a sense of false security through the fraudulent representation of another.\(^{102}\) Similarly, purchasers of prod-

\(^{97}\) Johnson v. Star Mach. Co., 530 P.2d 53, 58 (Or. 1974) (citing cases). Although it can be argued that the specific policy of legislatures in passing statutes of repose was to provide an absolute cut-off date, the better argument is that it is the general policy of the legislatures and courts to insure that fraudulent and wrongful acts not be rewarded. \(\text{E.g.}, \) United States v. Bethlehem Steel Corp., 315 U.S. 289, 326 (1942) (Frankfurter, J., dissenting); Guy v. Schuldt, 138 N.E.2d 891, 896 (Ind. 1956).

\(^{98}\) \(\text{See, e.g.}, \) Insurance Co. v. Wilkinson, 80 U.S. 222 (1871). The Court stated:

> The principle is that where one party has by his representations or his conduct induced the other party to a transaction to give him an advantage which it would be against equity and good conscience for him to assert, he would not in a court of justice be permitted to avail himself of that advantage. . . . [T]he general doctrine is well understood and is applied by courts of law as well as equity where the technical advantage thus obtained is set up and relied on to defeat the ends of justice. . . .

\(\text{Id.}\) at 233 (emphasis added).

\(^{99}\) \(\text{See Bomba v. W.L. Belvidere, Inc.}, 579 F.2d 1067, 1070 (7th Cir. 1978) (Equitable estoppel “might apply no matter how unequivocally the applicable limitations period is expressed.”); Hecht v. Marsh, 181 N.W. 135, 138 (Neb. 1920) (“[Estoppel] is a principle of equity, superior to any technical or artificial legal rules, which takes effect whenever the assertion of such a rule would result in perpetrating or ratifying a fraud.”).

\(^{100}\) \(\text{See supra}\) notes 51-58 and accompanying text.

\(^{101}\) \(\text{Hecht}, 181 N.W. at 138.

\(^{102}\) \(\text{E.g.}, \) Schroeder v. Young, 161 U.S. 334, 344 (1896). The Court pointed
ucts containing latent defects which are revealed many years following its sale or manufacture are lulled into a false sense of security believing that no defects or hazards are present in the product and that the product is reasonably safe. Having no notice of defects through manufacturer warnings or recalls, the consumer stands innocently uninformed of the unreasonably dangerous aspects of the product. The consumer can be said to reasonably rely in good faith on the defendant's conduct, here, the manufacturer's silence, which indicates that the product is not defective or unreasonably dangerous. 103

In addition to extinguishing a cause of action regardless of whether the injury has yet accrued, products liability statutes of repose may also have other negative effects. The Utah Supreme Court in Berry v. Beech Aircraft Corp. 104 suggested that such statutes may be counterproductive in terms of public safety as they are “likely to provide less incentive to manufacturers to take adequate safety precautions in the manufacture and design of products having a useful life of more than [the repose period], thereby increasing the already substantial number of persons who have been injured or killed by shoddy design or workmanship.” 105 It is also possible that statutes of repose might encourage some manufacturers of defective goods to withhold warning of their products’ unreasonably dangerous attributes in hope that the repose period will run before many lawsuits are filed. 106 These negative effects of products liability statutes of repose, the disincentive to take adequate safety precautions and the encouragement to withhold critical information from consumers, necessitate the application of the principles of equitable estoppel to such enactments when manufacturers use these provisions to shield themselves from the effects of their own wrongdoing.

out that in “such circumstances the courts have held with great unanimity that the purchaser is estopped to insist upon the statutory period . . . upon the ground that the debtor was lulled into a false security.” Id.


[O]ne cannot justly or equitably lull his adversary into a false sense of security, and thereby cause his adversary to subject his claim to the bar of the statute, and then be permitted to plead the very delay caused by his course of conduct as a defense to the action when brought.

Id. (citing Howard v. West Jersey & S.S.R. Co., 141 A. 755, 757-58 (N.J. Eq. 1928)).

104. 717 P.2d 670 (Utah 1985).

105. Id. at 683; see also JEROME MIRZA, ILLINOIS TORT LAW AND PRACTICE 297 (1988) (calling the Illinois construction statute of repose “a license for the negligent designing and construction of buildings and other structures in our state to the detriment of the public”).

106. See infra note 130.
In *Wilson v. Robertshaw Controls Co.*, a case similar to the introductory example of this comment, the plaintiff was injured by a defective water heater control valve after the repose period had expired. The manufacturer had intentionally taken active steps to conceal the defect and the resulting number of serious injuries and deaths from consumers, the Consumer Product Safety Commission and others. The court denied the defendant’s summary judgement motion holding that, “[t]he plaintiffs have alleged more than passive silence. The record in this case is sufficient to pry open our courthouse door to permit proof of these allegations to the trier of fact.” In reaching its conclusion that the statute of repose is not a valid defense in cases where the manufacturer has actively concealed the dangers inherent in its product from the consumer, the court relied on the reasoning of *Guy v. Schuldt*, in which the court held that:

*Fraud vitiates anything.* Courts will not uphold fraud, or presume the Legislature intended to do so by allowing one in a confidential relationship to conceal an injury done another until the statute of limitations has run. The language of the statute should be so plain that there is no question as to its meaning if the Legislature intends to give a wrongdoer the advantage and benefit of his fraudulent concealment of an injury done another. Equity had its origin in granting relief from frauds when the old common law courts were too rigid in their reasoning to grant relief from grave injustices.

B. PUBLIC POLICY CONSIDERATIONS

The foundation of an argument either for or against the application of the doctrine of equitable estoppel to bar a manufacturer from asserting the statute of repose as a defense is based on one's view of liability. From the manufacturers' point of view, there is a claim for fairness; liability cannot go on indefinitely — at some point,


108. *Id.* at 12.

109. 138 N.E.2d 891, 896 (Ind. 1956).

110. *Id.* (emphasis added). Note that although the *Guy* court used the term "statute of limitations," the *Wilson* court used *Guy* as authority in holding that equitable estoppel was applicable to *Ind. Code Ann.* § 34-4-20A-5 (Burns 1983), Indiana's products liability statute of repose. *Wilson*, No. S 83-312, slip op. at 10-11.
"the right to be free of stale claims . . . comes to prevail over the right to prosecute them."\textsuperscript{111} The injured consumer's position is that the one who has superior knowledge of the defect and the product's dangers, who placed the product in the stream of commerce, and who is in the best position to prevent defects in the product should bear the loss. Out of fairness and justice, the innocent consumer should not have to shoulder the entire loss when the injury is caused by a product's defects — especially when the manufacturer fraudulently concealed the defects which caused the injury. Society has an interest in this as well; it wants justice to be done, but recognizes the price and toll of litigation.

The courts are left in a quandary. On one hand, a basic principle in our system of jurisprudence — "older than the country itself"\textsuperscript{112} — is that "no man may take advantage of his own wrong."\textsuperscript{113} On the other hand, if too many equitable exceptions are made to the repose provisions, the certainty of these statutes will be lost if their application is "up for grabs" in every case.\textsuperscript{114} In short, there is the potential that the exception will swallow up the rule.\textsuperscript{115}

A 1977 Insurance Services Office study indicates that of all capital goods claims, 21.5\% involve injuries which occur more than eight years after the product is manufactured, while 14.0\% involve injuries by products more than twelve years old.\textsuperscript{116} However, when capital goods are not isolated, the survey suggests that a statute of repose of eight years would bar fewer than four percent of all products liability claims.\textsuperscript{117} Another report indicates that 97\% of bodily injuries occur


\textsuperscript{113} \textit{Id.} at 232.

\textsuperscript{114} Olson v. Mobil Oil Corp., 904 F.2d 198, 201 (4th Cir. 1990) (citing English v. Pabst Brewing Co., 828 F.2d 1047, 1049 (4th Cir. 1987)).

\textsuperscript{115} \textit{Id.}

\textsuperscript{116} Insurance Services Office, \textit{Product Liability Closed Claim Survey: A Technical Analysis of Survey Results} 82 (1977). Although dated, the ISO survey offers an untainted account of the number of products liability cases brought after manufacture since it was conducted before most states enacted statutes of repose. For a discussion of the ISO survey and a general discussion of statutes of repose, see Martin, \textit{supra} note 28, at 745-55.

\textsuperscript{117} Insurance Services Office, \textit{Product Liability Closed Claim Survey: A Technical Analysis of Survey Results} 81 (1977). Further, the actual number of
within five years of purchase.118 Thus, a statute of repose would have little effect on most claims.119 Yet cases involving older products generally account for more than their proportionate share of damages incurred.120 The reason for this can be attributed to the type of products involved at different times.121 For example, claims involving disposable consumer goods are usually brought soon after manufacture, while capital goods tend to cause injury later in their useful life and generally have a greater capacity for serious injury.122

Although these figures demonstrate that proportionally, the number of claims which arise after the repose period are few, the injuries received by would-be plaintiffs are great.123 Furthermore, one court has noted that such figures are "double-edged."124 If the claims brought against manufacturers after the repose period are so few, then the burden in defending, or insuring against, those claims should be slight when weighed against the loss a plaintiff might suffer as a result of a product defect.125

Of the four percent of all claims which are brought after eight years, it is probably safe to assume that the majority did not involve claims of intentional misrepresentation or fraudulent concealment. Thus, the number of cases which would be eligible for consideration of this proposed exception would be relatively small. Further, in order to restrict that number, a high standard should be required for the plaintiffs to meet. In order for the principles of equitable estoppel to apply, the courts should insist on more than passive silence or

tort cases filed in 1989 was 447,374 — less than half of one percent of all cases filed in state courts. Roxanne Barton Conlin, 'Litigation Explosion:’ Tempest in a Teapot?, TRIAL, Nov. 1991, at 114. The author noted that of that small percentage, such routine litigation as auto accidents is included. Id. After labeling the litigation explosion as a myth, Chicago attorney Philip H. Corboy noted that 18 million new civil suits are filed each year. However, "more than 97% of those are divorces and custody cases, wills and probate contests, contract and real estate disputes, and even small claims cases." Philip H. Corboy, Corboy Disputes Quayle's ABA Arguments About 'Litigation Explosion', CHI. DAILY L. BULL., Aug. 30, 1991, at 2 ("Plaintiffs filed 16,166 product liability suits in federal courts in [1990]. Of these, 10,715 involved a single product: asbestos.").

118. INTERAGENCY TASK FORCE FINAL REPORT, supra note 26, at VII-20.
119. VANDALL, supra note 23, at 163.
120. Martin, supra note 28, at 755.
121. Id.
122. Id.
123. Id.
125. Id.
negligent representations on the part of the manufacturer. The standard should be one of intentional or fraudulent concealment of material information regarding the product's latent dangerous attributes and such concealment must be the proximate cause of the resulting harm. The manufacturer must engage in some type of willful and wanton conduct, purposely seeking to defraud consumers and lull them into a sense of false security knowing that in doing so, the potential of death or serious injury is great. In applying such a standard, the courts will not nullify the legislative attempt to protect manufacturers from perpetual liability, but will take reasonable steps to protect the legitimate rights of consumers whose injuries could have been avoided had the manufacturer not engaged in such wrongful conduct.

To illustrate how the doctrine of equitable estoppel would be applied to the facts of a products liability suit, the introductory example regarding the defective water heater control valve (the Wilson case) can again be utilized. The facts of Wilson satisfied the six elements of the doctrine of equitable estoppel. First, there was conduct by the manufacturer amounting to a misrepresentation or concealment of material facts. Although equitable estoppel requires a misrepresentation or concealment, silence, where there exists a legal duty to speak is sufficient. Here, however, the defendant engaged in an active concealment under circumstances where the manufacturer owed a duty to warn the plaintiff or otherwise recall its defective product. Additionally, the defendant manufacturer violated the

126. Miers v. Central Mine Equip. Co., 604 F. Supp. 502, 507-08 (D. Neb. 1985) (holding that the plaintiff must prove more than a misrepresentation or failure to warn under an equitable estoppel theory). There must be some element of moral turpitude connected with the silence or inaction by which the other party is misled as to his injury. 28 AM. JUR. 2D Estoppel and Waiver § 53, at 667 (1966).

127. One purpose of strict liability is to place the liability on the party who stands in the position of cheapest cost-avoider. See supra note 23 and accompanying text.

128. See supra notes 51-58 and accompanying text listing the elements of equitable estoppel.

129. See Milligan v. Miller 97 N.E. 1054, 1057 (I11. 1912) ("Estoppel may arise from silence . . . where there is a duty to speak, and the party on whom the duty rests has an opportunity to speak and, knowing the circumstances, keeps silent."); Bodine v. Bodine, 489 N.E.2d 911, 913 (Ill. App. Ct. 1986) ("Silence may constitute conduct inducing detrimental reliance if there is a duty to speak."); 28 AM. JUR. 2D Estoppel and Waiver § 53, at 665 (1966) ("The authorities make it abundantly clear that an estoppel may arise under certain circumstances from silence or inaction as well as from words or actions.").

130. A plaintiff in a similar case expanded on the actions of the defendant taken
regulations promulgated pursuant to the Consumer Product Safety Act by its false and misleading reporting of the true nature and extent of the hazard, including the number of deaths and serious injuries which resulted from its product's defects. This conduct would be sufficient under this comment’s proposed exception as the manufacturer took affirmative and calculated steps to defraud the consuming public.

Second, the defendant had knowledge that its representations were untrue. Third, the plaintiff was unaware of the unreasonably dangerous condition of the water heater control valve and the dangers inherent in his continued use and operation thereof by reason of the concealment practiced upon him by the defendant. Fourth, the manufacturer intended or reasonably expected that its conduct would be relied upon by the plaintiff. The manufacturer knew that without recalling the product or warning of its dangers, consumers would continue to use the defective control. Fifth, the plaintiff can be said to have relied upon the defendant’s misrepresentations to his detriment. It was entirely reasonable for the consumer, who was unaware of the dangers inherent in the continued use of the defendant’s product, to believe that the product would safely operate for the purposes for which it was designed. Sixth, the plaintiff would be prejudiced if the manufacturer was permitted to deny the truth of the misrepresentation by asserting the statute of repose. Therefore, because of the control valve manufacturer’s wrongful and fraudulent actions, it should be equitably estopped from relying on the statute of repose.

in regards to the defective water heater control valve:

[For a number of years prior to decedent’s death defendant was aware its control valve was defective and represented a real danger to the public (there had apparently been more than 100 accidents resulting in 32 deaths and 77 injuries), yet it did not recall the controls nor attempt to alert the public to the risk, but embarked instead upon an affirmative course of conduct designed and calculated to conceal the problems with the control. Allegedly this concealment, which continued for several years after decedent’s death, was undertaken with the intention of deceiving the public at large as to the continued fitness for use of this control valve which defendant had placed in commerce and minimizing recoveries in lawsuits generated by the faulty control.

Young v. Robertshaw Controls Co., 481 N.Y.S.2d 891, 893-94 (N.Y. App. Div. 1984) (emphasis added). See Cover v. Cohen, 461 N.E.2d 864, 871 (N.Y. 1984) (“Although a product be reasonably safe when manufactured and sold and involve no known risks of which warning need be given, risks thereafter revealed by user operation and brought to the attention of the manufacturer or vendor may impose upon one or both a duty to warn.”).
CONCLUSION

Assuming there is a significant long-tail problem facing manufacturers and the rationale behind statutes of repose is reasonable, the courts should not permit manufacturers who have fraudulently concealed defects from consumers to raise statutes of repose as a defense. To do so would reward those companies for concealing their products’ dangers beyond the repose period. This is the very situation the doctrine of equitable estoppel is intended to prevent. Is it possible that the legislatures intended that manufacturers who are “successful” in hiding a product’s defect for the repose period be rewarded by extinguishing all claims against them? To the contrary, the legislatures and the courts have always been careful to never reward fraud.

The function of tort law will likely be frustrated where manufacturers know that liability for their products, known to be unreasonably dangerous or defective, will end on a set date. These manufacturers will have a strong incentive to conceal such defects from their consumers with the hope that few claims will arise and the defects will not be discovered before the statutory period ends. By passing statutes of repose, the legislatures have, in reality, created a situation where manufacturers are encouraged to defraud their consumers. It is the duty of the courts to insure that such fraud will not be rewarded. Justice Frankfurter in United States v. Bethlehem Steel Corp. asked, “Is there any principle which is more familiar or more firmly embedded in the history of Anglo-American law than the basic doctrine that the courts will not permit themselves to be used as instruments of inequity and injustice?”

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131. See Wichita Fed. Sav. & Loan Ass’n v. Jones, 130 P.2d 556, 559 (Kan. 1942) (“The proper function of ‘equitable estoppel’ is the prevention of fraud, actual or constructive, and the doctrine should always be so applied as to promote the ends of justice and accomplish that which ought to be done between man and man.”).  
133. See Hill v. Fordham, 367 S.E.2d 128 (Ga. Ct. App. 1988). In a medical malpractice suit against a dentist who allegedly concealed the plaintiff’s true condition, the court stated: “The statute of ultimate repose should not provide an incentive for a doctor or other medical professional to conceal his or her negligence with the assurance that after five years such fraudulent conduct will insulate him or her from liability. The sun never sets on fraud.” Id. at 131-32 (emphasis added).  
134. 315 U.S. 289 (1942).  
135. Id. at 326 (Frankfurter, J., dissenting).