

Approved: _____

Date

WJW 9/5

MINUTES OF THE SENATE COMMITTEE ON JUDICIARY

The meeting was called to order by _____ Chairperson Senator Wint Winter Jr. at

9:00 a.m. on April 29, 1992 in room 531-N of the Capitol.

All members were present except:
Senators Yost, Feleciano, Gaines, and Oleen, who were excused.

Committee staff present:
Mike Heim, Legislative Research Department
Judy Crapser, Secretary to the Committee

Conferees appearing before the committee:
Gary McAllister, Kansas Trial Lawyers Association
Dale Klima, Great Bend
Mary P. Lederer, Lenexa
Ron William, Kansas Association of Defense Counsel
Carl William, Straight Line Manufacturing
Dwight Benninga, Hutchinson Wil-Rich Manufacturing Co.
Randy Schlitter, Rans Company
Harry Craig, Martin Tractor Company, Inc.
Chris Durkin, Bendix-King Corp.
Judy Krueger, Regional Advocate of the US Small Business Administration
Pat Barnes, Kansas Motor Car Dealers Association
Bob Corkins, Kansas Chamber of Commerce and Industry
Brad Smoot, Kansas Civil Law Forum

Chairman Winter called the meeting to order by opening the hearing for HB 3054.
HB 3054 - Sub for HB 3054: statute of limitations on product liability claims.

Gary McAllister, Kansas Trial Lawyers Association, presented testimony in support of HB 3054.
(ATTACHMENT 1)

Written testimony from Ted Hayden, City of Sabetha, in support of HB 3054 was presented to the Committee by Mr. McAllister. (ATTACHMENT 2)

Dale Klima, Great Bend, testified in support of HB 3054. (ATTACHMENT 3)

Mary P. Lederer, Lenexa, spoke in support of HB 3054. (ATTACHMENT 4)

Ron Williams, Kansas Association of Defense Counsel, addressed the Committee in opposition to HB 3054. He expressed his opinion that after spending the majority of his career addressing product liability issues, the viability of a product over an extended period of time has less to do with the integrity of the product than with the appropriate maintenance of that product. He stressed that increasing the statute of repose would penalize Kansas small manufacturers for doing business in Kansas, adding an additional economic hardship on these small businessmen.

Mr. Williams continued by stating his belief that K.S.A. 60-3301, et seq., are complicated enough as they currently stand and would, in any case, be sufficient to address the current silicon implant problems. He concluded by stressing that no one can predict what decision the Supreme Court might promulgate on the implant issue, and passing HB 3054 would be an error in overkill.

Carl William, Straight Line Manufacturing, testified in opposition to HB 3054. (ATTACHMENT 5)

Dwight Benninga, Hutchinson Wil-Rich Manufacturing Co., spoke in opposition to HB 3054.
(ATTACHMENT 6)

Randy Schlitter, Rans Company, spoke in opposition to HB 3054. He stated that they, as a small aircraft company, do business with foreign companies and are frequently embarrassed by the foreign impression of America's litigious propensities. He stated that his company and their customers take pride in living with risks and strongly oppose the measures in HB 3054.

Harry Craig, Martin Tractor Company, Inc., testified in opposition to HB 3054. (ATTACHMENT 7)

CONTINUATION SHEET

MINUTES OF THE SENATE COMMITTEE ON JUDICIARY,
room 531-N, Statehouse, at 9:00 a.m. on April 29, 1992.

Chris Durkin, Bendix-King Corp., spoke on behalf of King Radio of Olathe in opposition to HB 3054. He expressed his agreement with the comments previously presented in opposition to the measure being heard.

Judy Krueger, Regional Advocate of the US Small Business Administration, presented testimony in opposition to HB 3054. (ATTACHMENT 8) Copies of Ms. Krueger's previous communications, which included a summary of various other states' statutes of limitations, were distributed to the Committee. (ATTACHMENT 9)

Pat Barnes, Kansas Motor Car Dealers Association, testified in opposition to HB 3054 and offered amendments if the Committee chose to take action on the bill. (ATTACHMENT 10)

Bob Corkins, Kansas Chamber of Commerce and Industry, testified in opposition to HB 3054. (ATTACHMENT 11)

Brad Smoot, Kansas Civil Law Forum, spoke in opposition to HB 3054. (ATTACHMENT 12) Mr. Smoot also presented the Committee with written materials from Cornell Law School Professor James Henderson, Jr. (ATTACHMENT 13)

This concluded the hearing for HB 3054.

The meeting was adjourned at 10:12 a.m.

Date April 29, 19.

VISITOR SHEET
Senate Judiciary Committee

(Please sign)

Name/Company	Name/Company
Martha Jenkins	AIA
Nancy Zegleman	Pfizer
Michelle Luster	Ks. Gov. Consulting
Chris Klima	
Mary P. Leaker	
Mark Atkinson	Attorney
Gary McAllister	ATTY /ICRA.
Clara Baccus	
Judy Krueger	SBA
Paul Little	RAUS
Carl Williams	StraightLine Manufacturing
Roger Franzio	Ks. Govt Consulting
IAT BARNES	Ks. Motor Car Dealer Assoc.
Kevin Lorentson	KS CONSULTING ENG'G
Harry W. Cairns Sr	Martin Tractor Corp. Inc
Austin NOTHEON	Kan Assoc EQUIPMENT DIST
S. Luckey Atkins	Kan. Assoc. Equip. Dist.
Bill Henry	Pharm Mfg Assn
Judy Cronin	Am Inst of Architects
L M CARVIST	16 Ann P/C Insurance Co
Chris Durkin	KING Repair Corp.
Lori Callahan	Kammco



KANSAS TRIAL LAWYERS ASSOCIATION

Jayhawk Tower, 700 S.W. Jackson, Suite 706, Topeka, Kansas 66603
(913) 232-7756 FAX (913) 232-7730

TESTIMONY OF THE KANSAS TRIAL LAWYERS ASSOCIATION BEFORE THE SENATE JUDICIARY COMMITTEE

April 29, 1992

Substitute for HB 3054 - Products Liability, Limitations of Action

The Kansas Trial Lawyers Association appreciates the opportunity to appear before you today presenting its testimony in support of Substitute for HB 3054, which is a bill designed to restore the statute of repose as embodied in the Kansas Products Liability Act found at K.S.A. 60-3303.

As the committee is aware, K.S.A. 60-3301, et seq., commonly known as the Kansas Products Liability Act, was thoroughly investigated and the subject of considerable debate before its enactment in 1981. This legislation provided a comprehensive and, in our view, a more restrictive than most, statutory scheme addressing products liability actions. This statute created a presumption that the "useful safe life" of a product had expired if harm to the plaintiff had been caused more than ten (10) years after the time of delivery, meaning after the time the product was delivered to its first purchaser who was not engaged in the business of either selling such products or using them as a component part of another product to be sold. This statute of repose provided that a product designer and manufacturer would not be liable if the useful safe life of the product had expired (10 years) and the rebuttable presumption created by the concept of "useful safe life" was not rebutted by the highest standard of proof, clear and convincing evidence.

Prior to 1987, K.S.A. 60-513, the statute of limitations relating to general tort actions, which included product liability claims, provided:

The cause of action in this action [section] shall not be deemed to have accrued until the act giving rise to the cause of action first causes substantial injury, or, if the fact of injury is not reasonably ascertainable until some time after the initial act, then the period of limitation shall not commence until the fact of injury becomes reasonably ascertainable to the injured party, but in no event shall the period be extended, more than ten (10) years beyond the time of the act giving rise to the cause of action.

*Senate Judiciary Committee
April 29, 1992
Attachment 1*

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RICHARD H. MASON
EXECUTIVE DIRECTOR

In 1987, K.S.A. 60-513 was amended. The 1987 amendment (HB 2386) was proposed and favorably acted upon without study and without any meaningful debate. This legislative change was proposed by representatives of the building industry. The only pertinent item appearing in the legislative history is a letter from Mr. Crockett, an attorney in Wichita, declaring that unfairness existed to contractors who were being held responsible for buildings having an age greater than ten years. It was claimed that the Ruthraff decision, which was the current law, was terribly unfair as it was applied to builders. Even though the Ruthraff case had been in existence for approximately fourteen (14) years, legislative action was taken to alter the effect of that case and, indeed, enact an absolute statute of limitations which bars the bringing of claims, including product liability actions, which did not accrue until more than ten (10) years after the act of negligence had occurred. Unfortunately, no consideration was given to what effect, if any, this legislative enactment might have upon the Kansas Products Liability Act, and in particular the ten (10) year statute of repose as found in K.S.A. 60-3303.

The 1987 change made by the Legislature to K.S.A. 60-513(b) was as follows:

"Except as provided in sub-section (c), the causes of action listed in sub-section (a) shall not be deemed to have accrued until the act giving rise to the cause of action first causes substantial injury, or, if the fact of injury is not reasonably ascertainable until some time after the initial act, then the period of limitations shall not commence until the fact of injury becomes reasonably ascertainable to the injured party. That in no event shall an action be commenced more than ten (10) years beyond the time of the act giving rise to the cause of action."

Substitute for HB 3054, as amended by the House Committee of the Whole, proposes to leave the general statute of limitations of ten (10) years, as found in sub-section (b) of K.S.A. 60-513, but excise out product liability claims so they may be interpreted, processed, and judged by the comprehensive 1981 Legislative enactment, the Kansas Products Liability Act. Product liability, as defined in this legislation, does not include any claim regarding the improvement of real estate, but it does include claims against an original manufacturer of defective equipment used in the improvement of real estate. This bill is essentially the same legislation that passed out of this committee and the Senate last year by an overwhelming margin. The enactment of Substitute for HB 3054 this year will restore

the ten (10) year statute of repose in products liability actions which was inadvertently eliminated by the 1987 Amendment to K.S.A. 60-513.

There can be little debate that many products utilized by Kansans on a daily basis are reasonably expected by both sellers and buyers to last far longer than ten (10) years. This is particularly true when these products can be renewed and made practically new with replacement and renewal parts which form a very lucrative profit center for manufacturers distributing these products. Products such as factory equipment, construction equipment, farm equipment, motor vehicles and trucks, oil field equipment, power generating engines operated by many small Kansas towns for the generation of electricity, and silicon gel breast implants are but a few examples of the type of equipment that is clearly intended to remain in service for more than ten (10) years. Regrettably, many of these products may have been designed in an inherently defective manner with latent defects that prove to be unreasonably dangerous to the user of the product resulting in a debilitating injury that occurs more than ten (10) years after the time of delivery as defined in our Products Liability Act. Indeed, the intent of the Legislature was to directly address these types of situations by the enactment of K.S.A. 60-3303 while at the same time making a public policy decision that recoveries may result in those limited circumstances where the presumption of useful safe life can be rebutted by clear and convincing evidence or in those instances where other recognized exceptions apply. Clearly, the Legislature did not intend to have an absolute ten (10) year statute of limitations apply across the board to all product liability claims where injury occurs more than ten (10) years after the act of negligence whether or not such acts of negligence can be reasonably discovered.

We anticipate there will be opponents to the bill suggesting Substitute for HB 3054 will be harmful to small Kansas manufacturers, the economy and that this legislation will be harmful to the Kansas business environment as a result of our manufacturers not being able to be competitive in domestic and international markets. On the contrary, the existing law, without adopting Substitute HB 3054, unfairly discriminates against innocent Kansas injury victims while doing nothing to promote the competitiveness any Kansas company. For example, a manufacturer located in Michigan which sends its products into all fifty (50) states submits itself to the liability laws of all fifty states. If it distributes an unreasonably dangerous product as a result of defective design into the stream of commerce and injures a person in a state contiguous to Kansas having a more liberal limitations period or, perhaps, a statute of repose similar to that in Kansas, then that state's resident may be entitled to receive compensation from the Michigan manufacturer under certain circumstances. The Kansas resident,

on the other hand, is simply out in the cold for no other reason than geography. In this scenario, how is the business environment or the competitive advantage of a Kansas business enhanced? It is not.

Conversely, in the situation where a Kansas company manufactures a product in Kansas and distributes that product into all fifty (50) states the Kansas manufacturer submits itself to the liability laws of the other 49 states. Kansas product liability law does not have extraterritorial effect and any protection which is believed to be afforded to a Kansas manufacturer by retaining the law in its current form is nonexistent. Claims brought in another state will be controlled by the limitation periods of the other state. Indeed, rights of innocent Kansans who are injured by defectively designed and manufactured products where the injury occurs more than ten (10) years after the act of negligence have been sacrificed. The statute of repose, as codified in K.S.A. 60-3303, provides no relief for this injured Kansan notwithstanding the clear intent of the legislature to provide a remedy in certain limited circumstances.

Those special interests opposing this legislation by saying it is not needed, that it will result in more lawsuits and that liability insurance costs will increase, are the same special interests that are actively lobbying the Congress for the passage of The General Aviation Accident Liability Standards Act of 1991. This proposed federal legislation embodies a compromised 20 year statute of repose. Shouldn't their positions be consistent, particularly when they are simultaneously trying to impair the rights of innocent victims by urging the defeat of state legislation and protect their financial interests by the enactment of federal legislation?

It has also been suggested by the opponents to this legislation that we cannot point to a single person or group that would be adversely affected by the existing law. In a few moments you will hear from two individuals that today would fall into the category of an innocent victim of a product defect that could not recover under our existing law. These cases are real and to exclude them from a potential recovery where the merits of the claim justify one is unfair.

To enact Substitute for HB 3054 will be to enact sound public policy as it applies to products liability actions and to utilize the Kansas Products Liability Act which has been in effect and successfully working within our state for the past decade. We urge you to recommend Substitute for HB 3054 favorably for passage at the conclusion of today's hearing. It is time to resolve this issue once and for all. Thank you.

SABETHA
Open for Expansion

Written Testimony of Ted L. Hayden,
Administrator, City of Sabetha, Kansas
on Substitute for HB 3054
Before the Senate Judiciary Committee
April 27, 1992

Mr. Chairman and Members of the Committee, my name is Ted L. Hayden. I am currently the administrator of the City of Sabetha, Kansas.

I am unfortunately not able to attend the hearing today as I am required to attend an Environmental Assessment Conference for the City that is scheduled at the same time. I did, however, want to make you aware of our City's support for the passage of Substitute for HB 3054.

A number of years ago, the City of Sabetha, Kansas suffered a substantial loss as a result of two failures of a large generating engine utilized by the City for the generation of electricity. These engine failures occurred in 1978 and 1979, but the generating engine involved was designed more than ten (10) years prior to the time the City contracted for and received the installation of the engine.

Litigation relating to this claim was commenced by the City in 1980 and was brought to a successful conclusion in favor of the City by way of a settlement in excess of \$200,000.00 late in 1982. The prosecution and settlement of this product liability action inured to the specific benefit of the City of Sabetha and helped reimburse the City for substantial costs it had incurred for

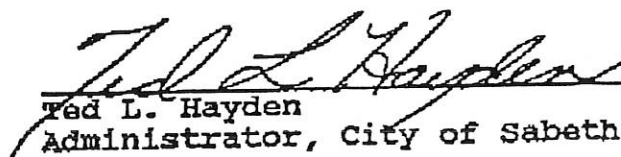
CITY OF SABETHA, KANSAS
805 Main • P.O. Box 187 • Sabetha, Kansas 66534 • (913) 284-2158

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repairs to City property as a result of these engine failures.

As I understand the current law relating to the statute of limitations which applies to products liability claims and the amendments to the law that occurred in 1987, the City of Sabetha, Kansas would not presently be able to pursue or collect upon what was proved to be a meritorious product liability claim had this incident happened today. Not only would such a result seem arbitrary but, such a result would adversely impact upon the economic well being of this small Kansas community which utilizes various types of equipment in its daily operations which are clearly designed to remain in service for in excess of ten (10) years. Because of our limited resources, we attempt to buy quality products which will have a service life in excess of ten (10) years so we can maximize our capital investments. These same budgetary considerations existed in the late 1960's when we chose to buy this very expensive engine, but we felt the investment was justified because of the expectation that the equipment would last well into the future and far in excess of ten (10) years after the time it was purchased.

Because of our past history in needing to utilize the product liability laws to our advantage for the benefit of our citizens, we strongly urge the Senate Judiciary Committee to favorably pass the Substitute for HB 3054 and urge the Senate to pass this important piece of legislation.



Ted L. Hayden
Administrator, City of Sabetha, Kansas

Dale C. Klima
Testimony in Support of Substitute for HB 3054
Senate Judiciary Committee
April 27, 1992

My name is Dale C. Klima. I live in Great Bend. I am a native Kansan and have lived in Great Bend all my life.

On May 14, 1985, I suffered a permanent and lasting injury to my spine as a result of an incident that occurred during an oil well work-over operation. As a result of this injury, I will spend the rest of my life in a wheelchair due to my paraplegia.

As a result of an investigation into this occurrence, I became aware that this accident was caused as a result of defective designs which existed in two pieces of equipment that were being utilized in this operation, a power swivel and a set of elevators utilized to pull tubing from the well. The very subtle but defective designs in each of these pieces of equipment had occurred more than ten (10) years prior to the time of my accident.

Fortunately for me, this tragic accident occurred before the court case amended the statute of limitations to provide for a maximum 10 year period. Had this event occurred today, I am told I would be prevented from bringing a products liability action against the out-of-state manufactures of these products which caused my injuries. Even though this set of circumstances has had a dramatic impact upon me and my family, the successful conclusion of my products liability case and my ongoing rehabilitative efforts have permitted me to remain a citizen who contributes to our community and the welfare of my family, rather than being the recipient of state welfare and other social programs.

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I cannot impress upon you the importance of this piece of legislation and the need for it in order for those people who are injured in an industrial setting where products frequently exist in the workplace for periods of time longer than 10 years. I trust you will do the right thing in voting in favor of this legislation not only in this Committee, but on the floor of the Senate.

Thank you for allowing me to appear here today.


Dale C. Klima

STATEMENT OF MARY P. LEDERER

My name is Mary P. Lederer. I live in Lenexa, Kansas. I was born on November 11, 1948. I have two children, ages 15 and 19. My husband works for the Santa Fe Railroad in Kansas City, Kansas. I have been a resident of the State of Kansas since 1969.

In 1974 I was diagnosed with fibrocystic disease of the breasts. I had surgery, and at that time, I had silicone gel implants as part of the surgery.

In about 1984, I started suffering from pain in the chest which radiated to my shoulder blades, muscle pain and spasms, vertigo, loss of feeling and swelling in my hands and feet, recurring low grade fevers, as well as other generalized health problems. I have had many more visits to my doctors over the last eight years, than most otherwise healthy women.

In late 1990, my doctors told me that I had "capsular contracture" of my breast implants, and that I would need surgery to correct the problem. In April 1991, I again had breast surgery. This surgery showed that the original implants had indeed ruptured.

In the fall of 1991, through the general news media, I learned of the Federal Drug Administration's moratorium on further silicone gel breast implant surgical procedures. Through the news media, I recognized that many of the potential side effects

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of breast implants were similar to the medical problems I have had over the last eight years.

I contacted an attorney. My attorney was initially reluctant to assist in helping me, stating that because of the statute of limitations law in Kansas, even if we can prove a causal relationship, I cannot file my case in Kansas as the law now exists.

However, I have been advised that because my original implant surgery, in 1974, was done at a hospital in Kansas City, Missouri, I can file my case in Missouri.

I am quite disturbed that Kansas will not allow women like me, if they have been damaged by a breast silicone implant procedure which was done more than ten years ago, to pursue a legal remedy, when women in most other states will have that opportunity. I don't think this is fair, nor logical, and would ask your support in changing the law so that potential victims in Kansas are not kept out of the courtroom, when similar victims in other states will have a legal remedy.

Thank you.



MARY P. LEDERER



Ladies and Gentlemen of the Kansas Senate Judiciary Committee...

StraightLine Manufacturing is a relatively young company, established in 1984 as a rotary tool manufacturer by Don Cary and Mike Young.

About 2 1/2 years ago, StraightLine became one of America's pioneers in the directional horizontal boring industry. These two young inventors introduced the DirectLine mini-directional horizontal boring machine.

The DirectLine installs utilities of all kinds under rivers, highways, and entire city blocks. It does this without disrupting a river's water flow, or a street's traffic...and most important to utility customers, it installs underground utilities without destroying property.

What Don Cary and Mike Young have accomplished is nothing short of phenomenal. At 35 and 34 years old respectively, these two young inventors have developed a machine that is proving in laboratory perfect comparison tests to be superior in every way to all other machines on the market--in spite of the fact that they have at their disposal only a small fraction of the resources of their competitors: a modern version of "David and Goliath."

The timing for the DirectLine's entry into the market is perfect... because today, America's underground utility infrastructure is failing.

For instance, the electrical distribution system is in need of replacing over 10,500 miles of cable in 1992 alone...and that figure will increase by 1,500 mile increments into the foreseeable future.

Gas distribution systems are also in need of replacement... with over 4,000 miles to be replaced in 1992--and increasing to 6,000 miles a year by the year 2,000.

In addition to replacement needs, there will also be the need for new gas, power, water, telephone and fiber optic cables--

The good news is: a great portion of these utilities will be put in place using the DirectLine....

Going under streets that have grown to freeways, and yards that have been lovingly landscaped...the DirectLine allows utility companies to avoid both the expense, and the public relations nightmare open-cut trenching causes.

And as rapidly as the market is embracing the DirectLine, it looks as though StraightLine will be providing jobs in Newton, Kansas, state and local tax revenues, and a positive foreign cash flow for the state of Kansas for many years to come...

Today, StraightLine Manufacturing is the second largest manufacturer of directional boring equipment in the world... and represents about 40 jobs in Harvey County with a potential for many many more.

But our continuing presence in Newton means more than just jobs and taxes. StraightLine also strives to be a good corporate citizen... For instance, we helped organize and gain sponsorship for the Win-A-Home in Newton promotion you will hear about soon...an activity that is designed to spawn dozens of new home-starts in Newton that will, in turn, stimulate industrial growth and further job opportunities.

We are proud that this modern rendition of David and Goliath has every chance to turn out as happily as the first version...Yes, David can win again...unless StraightLine falls victim to unreasonable product liability laws...

Let me give you a specific example of how product liability influences decisions:

For additional profit, StraightLine could have manufactured the trailer upon which the DirectLines are carried. Though StraightLine received permission to proceed with manufacturing our own trailers from the Department of Transportation, the decision was made to not pursue the opportunity...why? Because the product liability costs per unit would have exceeded the increased profit we would have made from manufacturing our own trailer.

Ladies and gentlemen, StraightLine Manufacturing has become the second largest manufacturer in the world of mini-directional horizontal boring systems with every indication that we will continue to grow. But a substantial liability suit against StraightLine could threaten its very existence.

As you are aware, the initial stages of a manufacturing company's life are very capital intensive. Every spare dime is going into research and development to stay ahead of this fast moving technology...and we are slowly building up our production capacity to handle the growing demand for the DirectLine. This machine is steadily becoming recognized as the best machine of its kind in the world; and happily, our sales are growing just as steadily.

Expansion is virtually guaranteed...if we are not hobbled by unfair product liability laws before we gain momentum.

On behalf of this creative young Kansas company and the bright future it represents, we respectfully ask you to defeat House Bill 3054vote against House Bill 3054 and preserve the present economic climate in Kansas.

StraightLine is only one of dozens upon dozens of similar Kansas companies...and we feel strongly there is nothing to gain and everything to loose if you extend product liability from 10 to 20 years. We urge you, for the economic well-being of the people of Kansas, to vote against House Bill 3054.



HUTCHINSON DIVISION

April 29, 1992

Members of the Senate Judiciary Committee

Topeka, Kansas

Re: House Bill 3054

Mr. Chairman, members of the Committee,

My name is Dwight Benninga. I'm employed by the Hutchinson Division of Hutchinson Wil-Rich Manufacturing Company as Vice President - Engineering. The Hutchinson Division, where I am located is in Clay Center, Kansas and the Wil-Rich Division is at a North Dakota location.

Hutchinson has been in the manufacturing business in Clay Center since the late 1950's. Manufactured products include portable grain augers and various kinds of other grain handling equipment. Most of this equipment is used on farms or at smaller commercial grain storage facilities for moving grain into and out of grain storage structures. The model I have brought with me this morning is of a 72' long portable auger manufactured in Clay Center. This is but one of a variety of products we manufacture for handling grain.

*Senate Judiciary Committee
April 29, 1992
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Our company has between 100 and 150 employees. We are the largest private employer in Clay County. We do in excess of 10 million dollars in sales annually and our 1991 payroll was over two and one half million dollars. While significant sales take place in Kansas, a majority of sales are made in other states and a few foreign countries. These dollars come to Clay County and to the state of Kansas and are used to pay our employees and to pay our taxes. Our company is a significant contributor to our area economy, particularly when we consider the population of Clay County is just over 9,000 people.

Products liability insurance has become very costly. My company does not currently have insurance, so we are self insured. We pay our costs of defense of claims and any losses that occur directly, since we do not have an insurance carrier. This approach is admittedly risky, but we believe it is the best choice we have when we consider the high cost of insurance coverage and the limitations that come with that coverage.

To extend the time period where product liability claims can be brought will add to the cost of product liability incurred by our company. There is, of course, the threat of a large loss, which if it gets into the millions of dollars, would put us out of business. The other threat is the increased number of claims that are invited by this extension of time. Each claim must be defended and defense costs are always incurred regardless of the merits of the claim. As claims are evaluated, the potential cost of defense through discovery and trial and the risk of loss at trial, no matter how slight, must be weighed against the settlement potential.

In these kinds of claims, we find ourselves either spending money on extended litigation defense or spending money to settle with the claimant to avoid the litigation expense. Either way, in effect, we lose. Extending the time a lawsuit can be brought will simply add to the cost of doing business and threaten survival.

We have a responsibility to build a safe product and we gladly accept that responsibility. We have involved ourselves with organizations and groups that promulgate safety standards and recommendations, such as The National Safety Council, trade associations and engineering societies. Involvement in the activities of these groups is just one of the ways we inform ourselves in issues of safety.

We believe the product we build is needed by the consumer. Our product handles the world's food supply and we believe the cost to handle this food is lower because our product exists.

For these many reasons we urge that you reject House Bill 3054.

Thank you, Mr. Chairman, members of the committee, for the opportunity afforded me here this morning.



Martin Tractor Company, Inc.

TO: MEMBERS OF SENATE JUDICIARY COMMITTEE
TESTIMONY OF HARRY W. CRAIG JR.,
MARTIN TRACTOR COMPANY, INC.

RE: H.B. 3054

DATE: APRIL 29, 1992

Members of the Committee:

I am Harry Craig, President of Martin Tractor Company, Inc., Topeka, Kansas, and I am here on behalf of Martin Tractor Company, Inc. as well as the Kansas Associated Equipment Distributors, which is an association of the heavy equipment distributors in Kansas. At Martin Tractor, we sell and service Caterpillar heavy equipment such as earthmovers, tractors, loaders, excavators, engines and generator sets. We have 173 employees. We have a regional selling area which includes Northern and Eastern Kansas.

We are opposed to extension of the statute of limitations from 10 to 20 years for product liability injuries as currently provided in House Bill 3054. This bill would apply to us as product sellers, and would double the already lengthy time to which we are exposed to product liability lawsuits. Already we are exposed to risk in Kansas for 10 years from the date of sale. This is far longer than most states already, and doubling the period of time to 20 years exposes us to unreasonable costs and litigation. The extension of this time period will, without doubt, increase

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the number of lawsuits which we and other Kansas retailers will be forced to defend. After a piece of heavy equipment is 10 years old, you can be sure that it has been many times repaired, rebuilt, and modified. It has been changed in many respects from the original. It is, in reality, no longer the piece of equipment which we originally sold. Yet under this bill, we will be at risk for liability with respect to that equipment for another 10 years. This is clearly unreasonable.

The cost to our business will not be only the significant increase in insurance premiums which we will have to pay, but the additional costs which business incurs when it is involved in litigation to any extent. Even though we as the retailer may ultimately have no liability whatsoever, the cost of litigation is tremendous in terms of internal personnel time and energy expended in depositions, conferences, hearings and trials, not to mention maintenance of records and files for such a period of time. These additional costs of doing business will be imposed on us and must ultimately be reflected in the price of our product, seriously diminishing our ability to compete with neighboring states.

Frankly, the Kansas business climate is already negative in many respects, and doubling the period of risk exposure for all Kansas retailers and distributors can only have a further discouraging impact upon our state's businesses.

I hope you will consider our situation and defeat this bill in its current form.

STATEMENT REGARDING
EXTENDING THE PERIOD OF LIABILITY, THE STATUTE OF REPOSE,
AS PROPOSED IN SUBSTITUTE FOR HB 3054
BEFORE THE SENATE JUDICIARY COMMITTEE

APRIL 29, 1992

BY

JUDY KRUEGER

REGIONAL ADVOCATE, US SMALL BUSINESS ADMINISTRATION

911 WALNUT - SUITE 1300 KANSAS CITY MO 64106

Senate Judiciary Committee
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Mr. Chairman, Members of the Committee. As Regional Advocate with the U.S. Small Business Administration, I am charged with representing small businesses before policymaking entities. I am here to register opposition to any legislation similar to Substitute for HB 3054 which would extend a manufacturer's or seller's exposure to liability for personal injury under a statute of limitations or statute of repose.

In recent years, small business owners have come under increasing duress caused by actual and potential liability resulting from the litigation explosion. Courts and juries have held businesses liable for injuries to persons whether or not the businesses were actually negligent or could have prevented negligent use of their products. The expansion of liability to cover totally unanticipated and unforeseeable acts has resulted in increased litigation and insurance premium costs and decreased availability of certain types of insurance. It has also impeded innovation because of high insurance costs for new products, anxiety over litigation costs, and fear of older products being called "defective" by the courts. An extension of the period of liability is also likely to see a number of insurance companies exit from the Kansas market, making insurance more difficult to obtain and driving up the cost even more. Money spent on insurance to cover unreasonable liability cannot be spent on product research, development, or testing.

The unpredictability of liability increases product costs and hampers the ability of American small businesses to compete in the global market. In this case, small businesses

in Kansas would be placed at a tremendous disadvantage in competing with businesses in the surrounding states of Iowa, Nebraska, Colorado, Oklahoma and Missouri. Actually, Kansas would have the longest statute of repose in the country if HB 3054 were passed, the next longest, twelve years, being in New Hampshire. Kansas is tied with Rhode Island with the longest statute of limitations regarding personal injury at 10 years. Businesses and potential businesses in Kansas City, given the choice of locating in Jackson County, Missouri or in Johnson County, Kansas, would have less exposure and thus, less cost for liability insurance, by locating in Jackson County, Missouri. Jobs, property tax, and sales tax revenues would be lost to Missouri. Compared to the proposed twenty-year Kansas statute of limitations for personal injury, Missouri has five years, Iowa has two years, Nebraska has four years, Colorado has two years, and Oklahoma has two years.

You and your colleagues in the Kansas legislature have been grappling with ways to contain the costs of health care and workers' compensation. Since 1980, the growth in tort costs has been more than twice that of workers' compensation or health care. In comparison to other industrial countries, our tort system costs between three and eight times the relative costs in Europe, Australia, and Japan. The costs of product liability insurance are some 20 times higher in the United States than in Europe, where we are currently trying to insure that American companies have the opportunity to compete in a \$4 trillion market. Surely the Kansas legislature does not want to hobble its own

companies with increased costs for liability insurance and for increased probability of litigation.

While on the one hand you are looking for ways to spur economic development in the state, and for ways to increase revenues for businesses and the State through exporting, it would hardly seem consistent that you would pass a bill that would surely create an exodus of companies from the state. A manufacturing base is essential for the economy of any state. Legislatures usually do what they can to stimulate growth of companies from within and to create incentives for recruitment of companies into their states. They do not try to intimidate the start-up and expansion of such companies by placing a noose around their necks and daring them to operate. Given such an invitation, not many companies will show up. The passage in Kansas of Substitute for HB 3054 would place another beam in a gallows built by those unappreciative of business.



SMALL BUSINESS ADMINISTRATION
KANSAS CITY REGIONAL OFFICE
911 WALNUT STREET, ROOM 1300
KANSAS CITY, MISSOURI 64106-2087

March 31, 1992

Honorable Wint Winter, Jr.
Kansas Senate
120-S State Capitol
Topeka, Kansas 66612

Dear Senator Winter:

The Office of Advocacy, U.S. Small Business Administration, was concerned to learn of the recent Kansas House passage of HB 3054 which would extend the statute of limitations on product liability personal claims to twenty years. According to data gathered by the Law and Economics Center at the University of Miami, Kansas is tied with Rhode Island with the longest period of time covered by its statute of limitations regarding personal injury at ten years. Doubling this at-risk period to twenty years will place Kansas companies at a further disadvantage in the marketplace and make Kansas less attractive as a place to locate, especially for manufacturers of capital goods.

Increasingly, our Nation's companies face growing competition from international companies. A significant percentage of a product's cost in the United States is due to product liability insurance costs and the costs of litigation. It is no wonder the trial attorneys backed the passage of this bill. Between 1973 and 1988, product liability suits cost \$80 billion annually - a sum equal to the combined profits of the 200 largest corporations in the United States.

These costs of product liability are some 20 times higher in the United States than in Europe, where our firms are hoping to compete in a \$4 trillion market with 320 million people. It is difficult for a large corporation to absorb or pass on these costs to customers, but for small firms it is impossible. When we are looking to small firms to make the difference in our balance of trade by increasing their participation in the international market, it would seem unwise of any state to add yet another disproportionate burden on its businesses, small or large. Increasing the length of exposure for liability for personal injury, and thus increasing the cost of product liability insurance, certainly places Kansas firms at a disadvantage in the international marketplace. It would place Kansas companies at a further disadvantage in the domestic market as well, as the average statute of limitations ranges from one to four years, with the typical period being two to three years. Kansas is already at a disadvantage in attracting and retaining companies with a statute of limitations of ten years. Doubling the period of risk will undoubtedly increase the cost of doing business in Kansas, and further discourage firms, especially manufacturing firms, from locating or staying in the state. Two years is the period proposed in the current federal legislation.

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Wint Winter, Jr.
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What would Kansas do without Cessna, Boeing, Learjet, and Beech Aircraft? In addition, many small firms depend on contracts from these larger firms for their customer base. No amount of tax abatement that communities give away hoping to attract businesses and jobs can counteract the effect of prolonged exposure to product liability risk. Companies will choose to locate in another state. The general aviation industry is a major component of the economy of Kansas. Consider that under current law, in 1979, the industry nationally paid out \$24 million in payments, claims, and legal costs. By 1985, that figure had increased to \$210 million although safety records had continuously improved during that time. Beech Aircraft Corporation reported that in a recent four-year period it was sued 203 times despite the fact that the National Transportation Safety Board found nothing wrong with any of the aircraft involved. The average cost incurred by Beech to defend itself in each of these cases was \$530,000. (Observer Times, January 2, 1992.) Imagine what doubling the period of exposure will do to those costs.

Piper Aircraft Corporation has claimed bankruptcy because of the costs of liability. Cessna has decreased its product line and its employment from over 20,000 to just 5,000. Gates Rubber Company withdrew as a supplier to the aviation industry. Businesses need the ability to assess their risk in a number of areas, but certainly in the area of liability for personal injury. Being at-risk for ten years is too long. Twenty years is to the extreme unreasonable. Insurance companies may be unwilling to assume such prolonged risk and pull out of the Kansas market. That would result in loss of businesses, jobs, money generation, and revenue from Kansas.

The long statute of limitations combined with awards of high punitive damages (as proposed in HB 3053) also retards innovation. Fear of litigation slows introduction of new products into the marketplace. In addition, companies are forced to allocate money to cover liability rather than to research, development, and testing of new products.

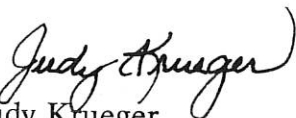
State legislatures must balance the need to thwart irresponsible behavior with the need to maintain a productive market. In order to keep a semblance of reasonability in the marketplace, punitive damages must be kept to a reasonable level and perhaps be paid as a fine into a public fund. Limiting contingency fees and placing them on a decreasing scale would also likely help to diminish the reward for unreasonable damages.

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For states interested in attracting more manufacturing firms, reform of product liability has gone in the direction of making it possible to estimate risk more accurately, and thus to have access to affordable liability insurance or coverage. This has included shorter statutes of limitation and repose (Mississippi recently reduced their statute of limitations from six to four years), limitations of joint and several liability, limits on punitive damages and on contingency fees, and actions to eliminate or decrease frivolous lawsuits.

The Kansas Senate should consider the damaging effects upon the state's business environment should an extension of the statute of limitations be imposed in Kansas. Such an extension would certainly help the recruitment of business **from** Kansas to neighboring states.

Sincerely,


Judy Krueger
Regional Advocate

Enclosed is a 1989 report from the State of Virginia which summarizes the various statutes of limitations.

cc: Brad Smoot
Jim Gregory
Anne Allen
Roy Ehrlich
Dave Kerr

9-3/23

**REPORT OF THE
JOINT SUBCOMMITTEE STUDYING**

**Statutes of Limitation
and Accrual of Actions**

**TO THE GOVERNOR AND
THE GENERAL ASSEMBLY OF VIRGINIA**



HOUSE DOCUMENT NO. 55

**COMMONWEALTH OF VIRGINIA
RICHMOND
1989**

9-4/23

GENERAL ASSEMBLY OF VIRGINIA -- 1988 SESSION

HOUSE JOINT RESOLUTION NO. 66

Establishing a subcommittee to study statutes of limitations and accrual of causes of action.

Agreed to by the House of Delegates, March 11, 1988

Agreed to by the Senate, March 9, 1988

WHEREAS, it has been over ten years since Title 8.01 of the Code of Virginia was adopted; and

WHEREAS, since that time, there have been several decisions of the Supreme Court of Virginia construing various statutes of limitations and determining the dates on which causes of action accrue; and

WHEREAS, the General Assembly of Virginia, on several occasions, has enacted legislation in response to decisions of the Supreme Court; and

WHEREAS, the public interest would be served by a legislative study and review of the laws pertaining to limitations of actions and accrual of causes of action; now, therefore, be it

RESOLVED by the House of Delegates, the Senate concurring, That a joint subcommittee be established to study Virginia's statutes of limitations and accrual of causes of action.

The joint subcommittee shall consist of seven members as follows: three members of the House Committee for Courts of Justice to be appointed by the Speaker of the House; two members of the Senate Committee for Courts of Justice to be appointed by the Senate Committee on Privileges and Elections; one member of the Virginia Trial Lawyers Association and one member of the Virginia Association of Defense Attorneys to be appointed by the Speaker of the House.

The joint subcommittee shall make its report and recommendations, if any, to the 1989 Session of the General Assembly.

The indirect costs of this study are estimated to be \$10,650; the direct cost of this study shall not exceed \$5,040.

September, 1988

State Statutes of Limitations/ReposeALABAMA

PERSONAL INJURY	<u>1 year</u> for trespass on the case (6-2-38); <u>2 years</u> malicious prosecution, libel, slander, fraud (from discovery) (6-2-38); <u>6 years</u> for trespass (6-2-39).
WRONGFUL DEATH	<u>2 years</u> (6-2-38).
PROPERTY DAMAGE	<u>1 year</u> for trespass on the case (6-2-39).
BREACH OF WARRANTY	<u>4 years</u> (6-5-502(c)).
PRODUCT LIABILITY	<u>1 year</u> ; 10 year statute of repose held unconstitutional (<u>Lankford v. Sullivan, Long & Hagarty, 416 So.2d 996 (1982).</u>

ALASKA

PERSONAL INJURY	<u>2 years</u> (09.10.070(1)); if fraud, accrues on discovery (09.10.230).
WRONGFUL DEATH	<u>2 years</u> (09.55.580(a)).
PROPERTY DAMAGE	<u>6 years</u> (09.10.050(1)).
BREACH OF WARRANTY	<u>4 years</u> (45.05.242).

ARIZONA

PERSONAL INJURY	<u>2 years</u> (12-542(1)); except <u>1 year</u> (from discovery) for libel, slander, false imprisonment (12-541) and <u>3 years</u> for fraud (12-543).
WRONGFUL DEATH	<u>2 years</u> (12-542(2)).
PROPERTY DAMAGE	<u>2 years</u> (12-542(3)-(5)).
BREACH OF WARRANTY	<u>6 years</u> - written (12-548); <u>3 years</u> - oral (12-543(1)).
PRODUCT LIABILITY	<u>2 years</u> , but no more than 12 years after the product was first sold for use and consumption (12-551).

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ARKANSAS

PERSONAL INJURY 3 years (16-56-105); 1 year for assault, battery, false imprisonment, slander (16-56-104).

WRONGFUL DEATH 3 years ().

PROPERTY DAMAGE 3 years (16-56-105).

BREACH OF WARRANTY 4 years (85-725).

CALIFORNIA

PERSONAL INJURY 1 year - general (includes libel and slander) (CCP 340(3)); if med. mal. 3 years from injury or 1 year from discovery (CCP 340.5) but if injury to minor child received before birth, within 6 years of birth (CCP 29), fraud 3 years from discovery (CCP 338); legal malpractice, 1 year from discovery, maximum 4 years from wrong (CCP 340.6).

WRONGFUL DEATH 1 year (340(3)).

PROPERTY DAMAGE 3 years (338(2)-(3)).

BREACH OF WARRANTY 4 years (CUCC 2725) - does not apply to actions for personal injury, Becker v. Volkswagon of America, Inc., 125 Cal. Rptr. 326 (1975).

COLORADO

PERSONAL INJURY 2 years for all torts (regardless of theory of recovery) (13-80-102).

WRONGFUL DEATH See PERSONAL INJURY above.

PROPERTY DAMAGE See PERSONAL INJURY above.

BREACH OF WARRANTY 4 years (4-2-7-25).

CONNECTICUT

PERSONAL INJURY 3 years for any action founded on tort (52-577); 2 years from date of injury or discovery, injury to person or property (negligence/recklessness,

APPENDIX B

wanton misconduct or malpractice), maximum 3 years from act or omission (52-584).

WRONGFUL DEATH

2 years from date injury sustained or discovered, maximum 3 years from act or omission (52-555).

PROPERTY DAMAGE

See PERSONAL INJURY above.

BREACH OF WARRANTY

4 years (42a-2-75).

PRODUCT LIABILITY

3 years from injury or discovery, but no more than 10 years from date of sale, lease or bailment, unless still within "useful life" or express warranty present (1979 Conn. Pub. Act 483 Sect. 3).

DELAWARE

PERSONAL INJURY

2 years (10.8119); if Med. Mal. and not discoverable within 2 years, 3 years from injury (18.6856).

WRONGFUL DEATH

2 years (10.8107).

PROPERTY DAMAGE

2 years - Personal property (10.8107); 3 years - Realty (10.8106).

BREACH OF WARRANTY

4 years (6.2-725).

DISTRICT OF COLUMBIA

PERSONAL INJURY

3 years (12-301(8)).

WRONGFUL DEATH

1 year (16-2702).

PROPERTY DAMAGE

3 years (12-301(2)&(3)).

BREACH OF WARRANTY

4 years (28:2-725).

FLORIDA

PERSONAL INJURY

4 years for any action founded on negligence; professional malpractice accrues on discovery (due diligence) (95-11(3)(a)); 2 years from discovery (due diligence) but not more than 4 years from occurrence/incident for Med. Mal. (95-11(4)).

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WRONGFUL DEATH 2 years (95-11(4)(d)).
PROPERTY DAMAGE 4 years (95-11(3)(g)&(h)).
BREACH OF WARRANTY 4 years (672.2-725).
PRODUCT LIABILITY 4 years, but must be within 12 years of date of delivery of completed product to original purchaser (95-11(3)(e)).

GEORGIA

PERSONAL INJURY 2 years for general injury to person; 1 year for injury to reputation; 4 years for Loss of Consortium (9-3-33).
WRONGFUL DEATH 2 years (9-3-33).
PROPERTY DAMAGE 4 years (9-3-32).
BREACH OF WARRANTY 4 years (109A-2-725).
PRODUCT LIABILITY Maximum 10 years, from first sale (105-106(b)(2)).

HAWAII

PERSONAL INJURY 2 years (657-7). Accrues when act, damage and causal connection discovered or should have been discovered (reasonable diligence), 648 P.2d 689; med. mal. subject to maximum of 6 years from act/omission (657-7.3).
WRONGFUL DEATH 2 years from death (663-3).
PROPERTY DAMAGE 2 years for personalty (657-1).
BREACH OF WARRANTY 4 years (490:2-725).

IDAHO

PERSONAL INJURY 2 years (5-219(4)) discovery accrual for fraud (5-218(4)), and med. mal. if fraudulent concealment or foreign object (5-219(4)).
WRONGFUL DEATH 2 years from occurrence, act, or omission (5-219).

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PROPERTY DAMAGE

3 years (5-218).

BREACH OF WARRANTY

4 years - Sales (28-2-725). 2 years - Personal injury or death (5-219).

ILLINOIS

PERSONAL INJURY

2 years (110-13-202); 1 year - slander or libel (110-13-201).

WRONGFUL DEATH

2 years (70-2).

PROPERTY DAMAGE

5 years (110-13-205).

BREACH OF WARRANTY

4 years (26-2-725).

PRODUCT LIABILITY

2 years from date of known injury or 8 years if unknown; in no case more than 12 years from date product leaves possession of manufacturer, or 10 years from date of first possession by initial owner, whichever period expires earlier (110-13-213); 12-year limitation not applicable to negligence actions, Dintelman v. Alliance Machine Co., 453 N.E.2d 128 (Ill. App., 1983). Constitutionality of statute of repose upheld, Thornton v. Mono Manufacturing Co., 425 N.E.2d 527 (1981)

INDIANA

PERSONAL INJURY

2 years for injury to person, character or personal property (34-1-2-2(1)); 6 years for Fraud (34-1-2-1).

WRONGFUL DEATH

2 years (34-1-1-2).

PROPERTY DAMAGE

6 years - Realty (34-1-2-1(3)). 2 years - Personalty (34-1-2-2(2)).

BREACH OF WARRANTY

4 years (26-1-2-725).

PRODUCT LIABILITY

2 years after cause of action accrues or 10 years after delivery of the product to initial user, provided that if action accrues more than 8 but less than 10 years after initial delivery, it may be brought any time within 2 years of accrual (34-4-20A-5).

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IOWA

PERSONAL INJURY 2 years for injury to person or reputation, whether contract or tort (614.1(2)); discovery accrual for med. mal (614.1(9)).

WRONGFUL DEATH 2 years (614.1(2)).

PROPERTY DAMAGE 5 years (614.1(4)).

KANSAS

PERSONAL INJURY 2 years from injury or discovery (reasonably ascertainable), maximum of 10 years from the act (60-513(4)); Med. Mal. - maximum of 4 years from act.

WRONGFUL DEATH 2 years from injury or discovery, maximum of 10 years (60-513(5)).

PROPERTY DAMAGE 2 years from injury or discovery, maximum of 10 years (60-513(1)&(2)).

BREACH OF WARRANTY 4 years (84-2-7-25).

KENTUCKY

PERSONAL INJURY 1 year (413.140(1)(a)); 5 years for fraud (413.120(12)). Accrues on discovery if fact of injury not reasonably ascertainable.

WRONGFUL DEATH 1 year (413.140(1)(a)).

PROPERTY DAMAGE 5 years (413.120(6)).

BREACH OF WARRANTY 4 years (355.2-725).

PRODUCT LIABILITY 3 years (411.1).

LOUISIANA

PERSONAL INJURY 1 year (3492).

WRONGFUL DEATH 1 year (3492).

PROPERTY DAMAGE 1 year (3492).

BREACH OF WARRANTY 1 year - Sales.

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MAINE

PERSONAL INJURY 6 years - all civil actions, except 2 years for assault and battery, false imprisonment, slander, libel and med. mal. (14 § 752).

WRONGFUL DEATH 2 years (18 § 2-804).

PROPERTY DAMAGE 6 years (14 § 752).

BREACH OF WARRANTY 4 years (11 § 2-725).

PRODUCT LIABILITY 6 years (14 § 752).

MARYLAND

PERSONAL INJURY 3 years for "all civil actions", except 1 year for assault, battery, libel, slander (5-105) and 5 years from injury or 3 years from discovery for med. mal. (5-101).

WRONGFUL DEATH 3 years (3-904).

PROPERTY DAMAGE 3 years (5-101).

BREACH OF WARRANTY 4 years (2-725).

PRODUCT LIABILITY 3 years (5-101).

MASSACHUSETTS

PERSONAL INJURY 3 years for tort, contract (personal injuries), replevin malpractice, assault, battery, libel, slander, false imprisonment, etc. (260 § 2A and 260 § 4).

WRONGFUL DEATH 3 years (229 § 2) (death must occur within two years of death--causing injury).

PROPERTY DAMAGE 3 years (260 § 2A).

BREACH OF WARRANTY 3 years (106 § 2-318).

MICHIGAN

PERSONAL INJURY 2 years, except 1 year for slander or libel (600.5805).

9-12/23

APPENDIX B

WRONGFUL DEATH	<u>3 years</u> (600.5805(8)).
PROPERTY DAMAGE	<u>3 years</u> (600.5805).
BREACH OF WARRANTY	<u>4 years</u> (440.2725).
PRODUCT LIABILITY	<u>3 years</u> (600.5805(9)).

MINNESOTA

PERSONAL INJURY	<u>2 years</u> - med. mal. and torts resulting in personal injury (541.05).
WRONGFUL DEATH	<u>3 years</u> from death, but no more than <u>6 years</u> after act or omission (573.02) except, 2 years if med. mal.
PROPERTY DAMAGE	<u>6 years</u> (541.05).
BREACH OF WARRANTY	<u>4 years</u> (336-2-725).
PRODUCT LIABILITY	<u>4 years</u> (541.05).

MISSISSIPPI

PERSONAL INJURY	<i>Reduced to 3 yrs. in 1989</i> 6 years (15-1-49) except <u>1 year</u> for assault, battery, maiming, false imprisonment, slander, libel (15-1-35) and <u>2 years</u> for med. mal.
WRONGFUL DEATH	<u>6 years</u> (15-1-49).
PROPERTY DAMAGE	<u>6 years</u> (15-1-49).
BREACH OF WARRANTY	<u>6 years</u> (75-2-725).

MISSOURI

PERSONAL INJURY	<u>5 years</u> for injury to person or rights of another (from discovery, if fraud, subject to <u>10 year maximum</u> (516.120)), except <u>2 years</u> for libel, slander, assault, battery, false imprisonment, etc. (516.140) and <u>2 years</u> for med. mal. (from discovery if foreign object) (516.105).
WRONGFUL DEATH	<u>3 years</u> (537.100).
PROPERTY DAMAGE	<u>5 years</u> (516.120).
BREACH OF WARRANTY	<u>4 years</u> (400.2-725).

APPENDIX B

MONTANA

PERSONAL INJURY

3 years for actions on liability not founded upon an instrument (27-2-204); from discovery for med. mal. (27-2-205) except 2 years for libel, slander, assault, battery, false imprisonment or seduction and fraud or mistake (27-2-203).

WRONGFUL DEATH

3 years (27-2-204).

PROPERTY DAMAGE

2 years (27-2-207).

BREACH OF WARRANTY

8 years if written obligation (27-20-202) or 4 years if contract for sale (30-2-725).

NEBRASKA

PERSONAL INJURY

4 years for injury to rights not arising on contract (from discovery for fraud) (25-207(3)) except 1 year from discovery for professional malpractice and 1 year for libel, slander, false imprisonment, malicious prosecution and 2 years for other professional malpractice (25-208).

WRONGFUL DEATH

2 years (30-810).

PROPERTY DAMAGE

4 years (25-207(2)).

BREACH OF WARRANTY

4 years (2-725).

PRODUCT LIABILITY

4 years, but within 10 years of injury or first sale, or 2 years from "being informed" if asbestos-related disease (25-224).

NEVADA

PERSONAL INJURY

2 years (11.190(4)(e)) except 3 years from discovery if fraud or mistake (11.190(3)).

WRONGFUL DEATH

2 years (11.190(4)).

PROPERTY DAMAGE

3 years (11.190(3)).

BREACH OF WARRANTY

4 years (104.2725).

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NEW HAMPSHIRE

PERSONAL INJURY 3 years for all personal actions (from discovery of injury and causal relationship) (508:4).

WRONGFUL DEATH 3 years (508:4).

PROPERTY DAMAGE 3 years (508:4).

BREACH OF WARRANTY Sales contract - 4 years (382-A:725).

PRODUCT LIABILITY 3 years from injury, but not more than 12 years after product left control of manufacturer (507-D:2). 12-year statute of repose held unconstitutional, Heath v. Sears, Roebuck & Co., 464 A.2d 288 (N.H. 1983).

NEW JERSEY

PERSONAL INJURY 2 years for injury to person from wrongful act, neglect or default (2A:14-2).

WRONGFUL DEATH 2 years (2A:31-3).

PROPERTY DAMAGE 6 years (2A:14-1).

BREACH OF WARRANTY 4 years (12A:2-725).

NEW MEXICO

PERSONAL INJURY 3 years for injury to person or reputation (37-1-8).

WRONGFUL DEATH 3 years (41-2-2).

PROPERTY DAMAGE 4 years (37-1-4).

BREACH OF WARRANTY 4 years (55-2-725). But see, Chavez v. Kitsch, 374 P.2d 497 (1962) - court applied the 3-year period in a personal injury action prosecuted under warranty.

NEW YORK

PERSONAL INJURY 3 years (CPLR 214(5)); 1 year for assault, battery, false imprisonment,

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WRONGFUL DEATH
PROPERTY DAMAGE
BREACH OF WARRANTY

slander, libel (CPLR 215); 2 years 6 months for med. mal. (from discovery for foreign object) (CPLR 214a).

2 years (EPTL 5-4.1).

3 years, (CPLR § 214(4)).

Sale - 4 years (2-725 UCC); Other - 6 years (CPLR 213(2)).

NORTH CAROLINA

PERSONAL INJURY

3 years for injury to person or rights of another; accrues when injury was or should have been apparent (1-52(5)&(16)).

WRONGFUL DEATH

2 years (1-53(4)).

PROPERTY DAMAGE

3 years from when damage is or should have been apparent (1-52(5)&(16)).

BREACH OF WARRANTY

4 years (25-2-725(1)).

PRODUCT LIABILITY

6 years from initial purchase for use or consumption.

NORTH DAKOTA

PERSONAL INJURY

6 years (28-01-16); 2 years for libel, slander, assault, false imprisonment (28-01-18) and 2 years for med. mal. (28-01-18).

WRONGFUL DEATH

2 years (28-01-18).

PROPERTY DAMAGE

6 years (18-01-16).

BREACH OF WARRANTY

4 years (41-02-104).

PRODUCT LIABILITY

Injury, death or damage occurred within 10 years from initial purchase for use or consumption or 11 years from date of manufacture (28-01.1-02).

OHIO

PERSONAL INJURY

2 years for bodily injury (2305.10); 1 year for slander, libel, malicious prosecution, false imprisonment and

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-med. mal. (maximum 4 years from occurrence) (2305.11); 4 years for fraud.

WRONGFUL DEATH

2 years (2305.10).

PROPERTY DAMAGE

2 years (2305.10); 4 years for recovery (2305.09).

BREACH OF WARRANTY

4 years if contractual relationship (1302.98); other - 2 years (2305.10).

OKLAHOMA

PERSONAL INJURY

2 years for injury to rights of another (12-95(3)); 1 year for assault, battery, libel, slander, malicious prosecution, false imprisonment (12-95(4)).

WRONGFUL DEATH

2 years (12-1053).

PROPERTY DAMAGE

2 years (12-95(3)).

BREACH OF WARRANTY

5 years (12A-2-725).

OREGON

"STATUTE OF ULTIMATE REPOSE"

Notwithstanding other longer statutory provisions as a result of tolling or delayed commencement of running of the statute of limitations, all actions for negligent injury to person or property must be brought within 10 years from the date of the act or omission complained of (12.115[1]). Constitutionality upheld, Josephs v. Burns, 491 P.2d 203 (1971). Action accrues when injury manifests if injury not previously discoverable by exercise of due diligence, O'Gara v. Kaufman, 726 P.2d 402 (1986).

PERSONAL INJURY

2 years (12.110(1)); from discovery if fraud, deceit or med. mal. (subject to 5 years max. unless fraud/deceit).

WRONGFUL DEATH

3 years from death-causing injury (30.020).

PROPERTY DAMAGE

6 years (12.080(3)&(4)).

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BREACH OF WARRANTY

4 years (72.7250).

PRODUCT LIABILITY

2 years from date on which death, injury or damage occurs (from discovery if asbestos related), but not later than 8 years after first purchase of product (30.905).

PENNSYLVANIA

PERSONAL INJURY

2 years (42 § 5524).

WRONGFUL DEATH

2 years (42 § 5524).

PROPERTY DAMAGE

2 years (42 § 5524).

BREACH OF WARRANTY

4 years (12A § 2-725). But, 2 years for third-party personal injury actions based upon warranty. See Salvador v. Atlantic Steel Boiler Co., 319 A.2d 903 (Pa. Super. 1978).

RHODE ISLAND

PERSONAL INJURY

10 years for all civil actions (9-1-13); 3 years for injuries to the person (9-1-14) - from discovery for med. mal. (9-1-14.1); 1 year for actions for words spoken.

WRONGFUL DEATH

3 years (10-7-2).

PROPERTY DAMAGE

10 years (9-1-13(a)).

BREACH OF WARRANTY

4 years (6A-2-725).

PRODUCT LIABILITY

Personal injury - 3 years (9-1-14);
Property damage - 6 years (9-1-13);
Statute of Repose - 10 years from date of first purchase for consumption (9-1-13(b)) - Unconstitutional, Kennedy v. Cumberland Co., Inc., 471 A.2d 195 (R.I. 1984).

SOUTH CAROLINA

PERSONAL INJURY

6 years for injury to person or rights of another (15-3-530(5)); 3 years from reasonable discovery if med. mal. (15-3-545); 2 years for libel, slander, assault, battery, false imprisonment (15-3-550).

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WRONGFUL DEATH 6 years (15-3-530(6)).
PROPERTY DAMAGE 6 years (15-3-530(3)&(4)).
BREACH OF WARRANTY 6 years (36-2-725).

SOUTH DAKOTA

PERSONAL INJURY 3 years for personal injury
(15-2-14(3)); 6 years for other injury
to rights of another not arising on
contract and for fraud (15-2-13); 2
years for libel, slander, assault,
battery or false imprisonment
(15-2-15); 3 years for legal
malpractice (15-2-14.2).

WRONGFUL DEATH 3 years (21-5-3).

PROPERTY DAMAGE 6 years (15-2-13(3)&(4)).

BREACH OF WARRANTY 6 years (15-2-13(1)).

PRODUCT LIABILITY 3 years from injury, death or damage
(15-2-12.2).

TENNESSEE

PERSONAL INJURY 1 year (28-3-104).

WRONGFUL DEATH 1 year (28-3-104).

PROPERTY DAMAGE 3 years (28-3-105).

BREACH OF WARRANTY 4 years (47-2-725).

PRODUCT LIABILITY Governed by personal injury and
property damage limitations periods but
must be brought within 6 years of date
of injury, 10 years of first purchase
or 1 year of expiration of anticipated
life of products; whichever is shorter
(29-28-103).

TEXAS

PERSONAL INJURY 2 years (16.003(a)); 1 year for
malicious prosecution, slander, libel
().

WRONGFUL DEATH 2 years (16.003(b)).

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PROPERTY DAMAGE

2 years (16.003(a)).

BREACH OF WARRANTY

4 years (2-725).

UTAH

PERSONAL INJURY

4 years for actions not otherwise covered (78-12-25(2)); 2 years for civil rights actions (78-12-28); 1 year for libel, slander, assault, battery, false imprisonment.

WRONGFUL DEATH

2 years (78-12-28(2)).

PROPERTY DAMAGE

3 years (78-12-26(1)&(2)).

BREACH OF WARRANTY

4 years (70A-2-75).

PRODUCT LIABILITY

Governed by personal injury and property damage limitations periods, but must be brought within 6 years of initial purchase or 10 years of manufacture (78-15-3).

VERMONT

PERSONAL INJURY

3 years from discovery (12-512(4)); Med. Mal. - 3 years from incident or 2 years from reasonable discovery (12-521).

WRONGFUL DEATH

2 years (14-1492(a)).

PROPERTY DAMAGE

3 years - Personalty (12-512(5)). 6 years - Realty (12-511).

BREACH OF WARRANTY

4 years (9A-2-725(1)).

WASHINGTON

PERSONAL INJURY

3 years for injury to person or rights of another (4.16.080(2)) - fraud accrues on discovery; 2 years for libel, slander, assault, battery, false imprisonment.

WRONGFUL DEATH

3 years (4.16.080(2)).

PROPERTY DAMAGE

3 years (4.16.080(1)&(2)).

BREACH OF WARRANTY

4 years (62A.2-725).

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WEST VIRGINIA

PERSONAL INJURY	<u>2 years</u> (55-2-12).
WRONGFUL DEATH	<u>2 years</u> (55-7-6).
PROPERTY DAMAGE	<u>2 years</u> (55-2-12).
BREACH OF WARRANTY	<u>4 years</u> - Sales (46-2-275); <u>2 years</u> - Personal injury (55-2-12).

WISCONSIN

PERSONAL INJURY	<u>6 years</u> for injury to character or rights of another (893.53); <u>3 years</u> for injuries to the person (893.54); <u>3 years</u> from injury or <u>1 year</u> from reasonably diligent discovery, subject to maximum of <u>5 years</u> from act for med. mal. (893.55); <u>2 years</u> for intentional torts (893.57). Discovery rule adopted for all torts, <u>Hansen v. A.H. Robins</u> , 335 N.W. 2d 578 (1983).
WRONGFUL DEATH	<u>3 years</u> (893.54).
PROPERTY DAMAGE	<u>6 years</u> (893.52).
BREACH OF WARRANTY	<u>4 years</u> (402A.725).

WYOMING

PERSONAL INJURY	<u>4 years</u> for injury to rights (1-3-105[a][iv]); <u>1 year</u> for slander, libel, assault, battery, false imprisonment ().
WRONGFUL DEATH	<u>2 years</u> (1-38-102).
PROPERTY DAMAGE	<u>4 years</u> (1-3-105[a][iv]).
BREACH OF WARRANTY	<u>4 years</u> (34-21-299.5).

March 7, 1991

PRODUCT LIABILITY STATUTES OF LIMITATIONS

Arizona

12 years after the product was first sold for use or consumption for claims based on strict liability

Ariz. Rev. Stat. Ann. § 12-551

Connecticut

10 years from date the defendant last parted with possession or control of the product

Conn. Gen. Stat. § 52-577a(a)

Illinois

The earlier of 12 years from date of first sale by seller or 10 years from date of sale to initial user

Ill. Rev. Stat. § 13-213

Indiana

10 years after delivery of product to initial user or consumer

Ind. Code § 33-1-1.5-5

Kansas

10 years after the act giving rise to the cause of action

Kan. Stat. Ann. § 60-513

Nebraska

10 years after product was first sold for use or consumption

Neb. Rev. Stat. § 25-224

Oregon

8 years after product was first purchased for use or consumption

Or. Rev. Stat. § 30.905(1)

Tennessee

10 years after product was first purchased for use or consumption

Tenn. Code Ann. § 29-28-103(a)

9-23/23

STATEMENT FOR THE SENATE COMMITTEE ON JUDICIARY

by

THE KANSAS MOTOR CAR DEALERS ASSOCIATION

Wednesday, April 29, 1992

Re: House Bill No. 3054, increasing the statute of limitations on product liability and other general claims

Mr. Chairman and Members of the Committee, I am Pat Barnes, Legislative Counsel representing the Kansas Motor Car Dealers Association. Our Association represents 321 new automobile and truck dealers throughout the State of Kansas.

House Bill No. 3054 increases from ten (10) to twenty (20) years the statute of limitations which would otherwise barr the actions summarized in that statute. For the most part we expect this would be in reference to product liability actions, but the scope of the change is not restricted to merely those types of actions.

There are a number of reasons we think this legislation should not be passed so as to affect us in its present form. We have survived for a considerable period of time with a ten year statute of limitations under the circumstances specified in the current law which you can see in the present bill. However, you must understand that with a bill as broad as this one, and even the current law, our liabilities are somewhat unascertainable to us, and not necessarily predictable.

Our understanding of the intent of the bill was primarily to allow for instances of silicone breast implant failure.

*Senate Judiciary Committee
April 29, 1992
Attachment 10* 1/11

However, the sweep of these changes would not only cover that type of an instance, but would include virtually any number of other instances, many of which are unpredictable. Therefore, it would appear to us that it would be unjust to sweep us into these provisions. If the true intent is to address the implant situation, then we feel a separate section of the law can be designed to deal with that situation. This is exactly what was done to deal with ionizing radiation injuries. There was a separate section of law created dealing with limitations on actions of that nature.

Nevertheless, if this particular bill is the desired product, we ask to be excluded or, at least, retained under the limitations period provided under current law. Attached to my testimony is an amendment "A" and an alternative amendment called "B". Amendment "A" is the amendment we would prefer since this takes our members out of a chain of liability when all we do is sell the product. (It still subjects our members to liability in instances where we actually produced or manufactured the product.)

There is nothing unfair about this. We have no control over the design, characteristics or other production components of a vehicle. You must also understand that the current sweep of the proposed legislation is going to encompass you, whether you are a professional or not, as well as car dealers and other businesses.

One of our concerns is especially important as one approaches retirement age. Do you realize that a sole proprietor would have to insure himself against this liability or risk loss of

everything that he had during old age for 20 years after his retirement date if he actively sold products at the time. A professional, for example, would have to carry liability insurance, assuming retirement at age 65, until the person is 85 years old - and without necessarily earning income to offset the cost.

As you can see, as simple as this proposal may seem, there are some adverse consequences which are not very pleasant, nor are they fair. The price at which most of our members presently sell their products certainly does not compensate 20 years of liability, nor liability into one's elder years. We believe a specific law should be designed to handle the problem perceived, rather than a broad brush, and if that cannot be done, then we request that we be amended out or the present law be retained as it applies to our members.

Thank you for your time and attention. I would be happy to answer any questions you may have of me.

10-3/11

HOUSE BILL No. 3054

By Committee on Judiciary

2-18

9 AN ACT concerning civil procedure; relating to the statute of lim-
10 itations; amending K.S.A. 1991 Supp. 60-513 and 60-3303 and
11 repealing the existing ~~section~~ sections.

12
13 *Be it enacted by the Legislature of the State of Kansas:*

14 Section 1. K.S.A. 1991 Supp. 60-513 is hereby amended to read
15 as follows: 60-513. (a) The following actions shall be brought within
16 two years:

- 17 (1) An action for trespass upon real property.
- 18 (2) An action for taking, detaining or injuring personal property,
19 including actions for the specific recovery thereof.
- 20 (3) An action for relief on the ground of fraud, but the cause of
21 action shall not be deemed to have accrued until the fraud is
22 discovered.
- 23 (4) An action for injury to the rights of another, not arising on
24 contract, and not herein enumerated.
- 25 (5) An action for wrongful death.
- 26 (6) An action to recover for an ionizing radiation injury as pro-
27 vided in K.S.A. 60-513a, 60-513b and 60-513c, and amendments
28 thereto.
- 29 (7) An action arising out of the rendering of or failure to render
30 professional services by a health care provider, not arising on
31 contract.

32 (b) Except as provided in subsection (a), the causes of action
33 listed in subsection (a) shall not be deemed to have accrued until
34 the act giving rise to the cause of action first causes substantial injury,
35 or, if the fact of injury is not reasonably ascertainable until some
36 time after the initial act, then the period of limitation shall not
37 commence until the fact of injury becomes reasonably ascertainable
38 to the injured party, but in no event shall an action be commenced
39 more than 10 or 20 years beyond the time of the act giving rise to the
40 cause of action. *The provisions of this subsection shall not be*
41 *interpreted to shorten the time to bring a product liability*
42 *claim, as defined in K.S.A. 60-3303, and amendments thereto,*
43 *to a period of time less than that provided in K.S.A. 60-3303,*

Note: Title of the HB 3054 should contain language pointing out
exemptions or exceptions. For example: AN ACT concerning
civil procedure; relating to the statute of limitations;
exemptions thereto and product liability, amending
K.S.A. 1991 Supp. 60-513 and 60-3303, K.S.A. 60-3306,
and repealing the existing ~~section~~ sections.

,and no more than 10 years beyond the time of the act
giving rise to the cause of action where the claim
is against a licensed new vehicle dealer or a used
vehicle dealer as defined by K.S.A. 8-2401(b) and (c),
and amendments thereto.

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1 ~~and amendments thereto~~

2 (c) A cause of action arising out of the rendering of or the failure
3 to render professional services by a health care provider shall be
4 deemed to have accrued at the time of the occurrence of the act
5 giving rise to the cause of action, unless the fact of injury is not
6 reasonably ascertainable until some time after the initial act, then
7 the period of limitation shall not commence until the fact of injury
8 becomes reasonably ascertainable to the injured party, but in no
9 event shall such an action be commenced more than four years
10 beyond the time of the act giving rise to the cause of action.

11 (d) The provisions of this section as it was constituted prior to
12 July 1, 1957, shall continue in force and effect for a period of two
13 years from that date with respect to any act giving rise to a cause
14 of action occurring prior to that date.

15 Sec. 2. K.S.A. 1991 Supp. 60-3303 is hereby amended to read
16 as follows: 60-3303. (a) (1) Except as provided in paragraph (2) of
17 subsection (a) of this section, a product seller shall not be subject
18 to liability in a product liability claim if the product seller proves
19 by a preponderance of the evidence that the harm was caused after
20 the product's "useful safe life" had expired. "Useful safe life" begins
21 at the time of delivery of the product and extends for the time
22 during which the product would normally be likely to perform or
23 be stored in a safe manner. For the purposes of this section, "time
24 of delivery" means the time of delivery of a product to its first
25 purchaser or lessee who was not engaged in the business of either
26 selling such products or using them as component parts of another
27 product to be sold.

28 Examples of evidence that is especially probative in determining
29 whether a product's useful safe life had expired include:

30 (A) The amount of wear and tear to which the product had been
31 subject;

32 (B) the effect of deterioration from natural causes, and from
33 climate and other conditions under which the product was used or
34 stored;

35 (C) the normal practices of the user, similar users and the prod-
36 uct seller with respect to the circumstances, frequency and purposes
37 of the product's use, and with respect to repairs, renewals and
38 replacements;

39 (D) any representations, instructions or warnings made by the
40 product seller concerning proper maintenance, storage and use of
41 the product or the expected useful safe life of the product; and

42 (E) any modification or alteration of the product by a user or
43 third party.

10-5/11

1 (2) A product seller may be subject to liability for harm caused
2 by a product used beyond its useful safe life to the extent that the
3 product seller has expressly warranted the product for a longer
4 period.

5 (b) (1) In claims that involve harm caused more than 10 20 years
6 after time of delivery, a presumption arises that the harm was
7 caused after the useful safe life had expired. This presumption may
8 only be rebutted by clear and convincing evidence.

9 (2) (A) If a product seller expressly warrants that its product
10 can be utilized safely for a period longer than 10 20 years, the
11 period of repose, after which the presumption created in paragraph
12 (1) of this subsection arises, shall be extended according to that
13 warranty or promise.

14 (B) The ~~ten-year~~ *twenty-year* period of repose established in
15 paragraph (1) of this subsection does not apply if the product seller
16 intentionally misrepresents facts about its product, or fraudulently
17 conceals information about it, and that conduct was a substantial
18 cause of the claimant's harm.

19 (C) Nothing contained in this subsection shall affect the right of
20 any person liable under a product liability claim to seek and obtain
21 indemnity from any other person who is responsible for the harm
22 which gave rise to the product liability claim.

23 (D) The ~~ten-year~~ *twenty-year* period of repose established in
24 paragraph (1) of this subsection shall not apply if the harm was
25 caused by prolonged exposure to a defective product, or if the
26 injury-causing aspect of the product that existed at the time of
27 delivery was not discoverable by a reasonably prudent person until
28 more than 10 20 years after the time of delivery, or if the harm
29 caused within 10 20 years after the time of delivery, did not man-
30 ifest itself until after that time.

31 (c) Except as provided in subsections (d) and (e), nothing con-
32 tained in subsections (a) and (b) above shall modify the application
33 of K.S.A. 60-513, and amendments thereto.

34 (d) (1) In a product liability claim against the product seller,
35 the ~~ten-year~~ *twenty-year* limitation, as defined in K.S.A. 60-513,
36 and amendments thereto, shall not apply to the time to discover a
37 disease which is latent caused by exposure to a harmful material,
38 in which event the action shall be deemed to have accrued when
39 the disease and such disease's cause have been made known to the
40 person or at the point the person should have been aware of the
41 disease and such disease's cause.

42 (2) The term "harmful material" means any chemical substances
43 commonly known as asbestos, dioxins, or polychlorinated biphenyls.

10-6/11

1 whether alone or as part of any product, or any substance which
2 is determined to present an unreasonable risk of injury to health
3 or the environment by the United States environmental protection
4 agency pursuant to the federal toxic substances control act, 15
5 U.S.C. & 2601 et seq., or the state of Kansas, and because of such
6 risk is regulated by the state or the environmental protection
7 agency.

8 (c) Upon the effective date of this act through July 1, 1991, the
9 provisions of this subsection shall revive such causes of action for
10 latent diseases caused by exposure to a harmful material for: (1)
11 Any person whose cause of action had accrued, as defined in sub-
12 section (d) on or after March 3, 1987; or (2) any person who had
13 an action pending in any court on March 3, 1989, and because of
14 the judicial interpretation of the ten-year limitation contained in
15 subsection (b) of K.S.A. 60-513, and amendments thereto, as applied
16 to latent disease caused by exposure to a harmful material the: (A)
17 Action was dismissed; (B) dismissal of the action was affirmed; or
18 (C) action was subject to dismissal. The intent of this subsection is
19 to revive causes of action for latent diseases caused by exposure to
20 a harmful material which were barred by interpretation of K.S.A.
21 60-513, and amendments thereto, in effect prior to this enactment.

22 Sec. 2-3-4 K.S.A. 1991 Supp. 60-513 is and 60-3303 are hereby
23 repealed.

24 Sec. 3-4.5 This act shall take effect and be in force from and after
25 its publication in the statute book.

Sec. 3. K.S.A. 60-3306 is hereby
amended to read as follows:

60-3306. Seller not subject to liability, (1)
when. A product seller shall not be subject
to liability in a product liability claim aris-
ing from an alleged defect in a product, if
the product seller establishes that: (a) Such
seller had no knowledge of the defect;

(b) such seller in the performance of any
duties the seller performed, or was required
to perform, could not have discovered the
defect while exercising reasonable care;

(c) the seller was not a manufacturer of
the defective product or product compo-
nent;

(d) the manufacturer of the defective
product or product component is subject to
service of process either under the laws of
the state of Kansas or the domicile of the
person making the product liability claim;
and

(e) any judgment against the manufac-
turer obtained by the person making the
product liability claim would be reasonably
certain of being satisfied.

History: L. 1981, ch. 231, § 6; July 1.

and K.S.A. 60-3306

(2) A product seller shall not be subject
to liability in a product liability
claim if the product seller was a
licensed new vehicle dealer or a
licensed used vehicle dealer as defined
by K.S.A. 8-2401(b) and (c), and
amendments thereto, at the time of
sale or delivery of the relevant
product and the product seller was
not the manufacturer of the relevant
product.

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HOUSE BILL No. 3054

By Committee on Judiciary

2-18

9 AN ACT concerning civil procedure; relating to the statute of lim-
10 itations; amending K.S.A. 1991 Supp. 60-513 and 60-3303 and
11 repealing the existing section sections.

12
13 *Be it enacted by the Legislature of the State of Kansas:*

14 Section 1. K.S.A. 1991 Supp. 60-513 is hereby amended to read
15 as follows: 60-513. (a) The following actions shall be brought within
16 two years:

- 17 (1) An action for trespass upon real property.
18 (2) An action for taking, detaining or injuring personal property,
19 including actions for the specific recovery thereof.
20 (3) An action for relief on the ground of fraud, but the cause of
21 action shall not be deemed to have accrued until the fraud is
22 discovered.
23 (4) An action for injury to the rights of another, not arising on
24 contract, and not herein enumerated.
25 (5) An action for wrongful death.
26 (6) An action to recover for an ionizing radiation injury as pro-
27 vided in K.S.A. 60-513a, 60-513b and 60-513c, and amendments
28 thereto.
29 (7) An action arising out of the rendering of or failure to render
30 professional services by a health care provider, not arising on
31 contract.

32 (b) Except as provided in subsection (a), the causes of action
33 listed in subsection (a) shall not be deemed to have accrued until
34 the act giving rise to the cause of action first causes substantial injury,
35 or, if the fact of injury is not reasonably ascertainable until some
36 time after the initial act, then the period of limitation shall not
37 commence until the fact of injury becomes reasonably ascertainable
38 to the injured party, but in no event shall an action be commenced
39 more than 20 years beyond the time of the act giving rise to the
40 cause of action. *The provisions of this subsection shall not be*
41 *interpreted to shorten the time to bring a product liability*
42 *claim, as defined in K.S.A. 60-3302, and amendments thereto,*
43 *to a period of time less than that provided in K.S.A. 60-3302.*

,and no more than 10 years beyond the time of the act giving rise to
the cause of action where the claim is against a licensed new vehicle
dealer or a used vehicle dealer as defined by K.S.A. 8-2401(b) and (c),
and amendments thereto.

10-8/11

and amendments thereto.

(c) A cause of action arising out of the rendering of or the failure to render professional services by a health care provider shall be deemed to have accrued at the time of the occurrence of the act giving rise to the cause of action; unless the fact of injury is not reasonably ascertainable until some time after the initial act, then the period of limitation shall not commence until the fact of injury becomes reasonably ascertainable to the injured party, but in no event shall such an action be commenced more than four years beyond the time of the act giving rise to the cause of action.

(d) The provisions of this section as it was constituted prior to July 1, 1987, shall continue in force and effect for a period of two years from that date with respect to any act giving rise to a cause of action occurring prior to that date.

Sec. 2. K.S.A. 1991 Supp. 60-3303 is hereby amended to read as follows: 60-3303. (a) (1) Except as provided in paragraph (2) of subsection (a) of this section, a product seller shall not be subject to liability in a product liability claim if the product seller proves by a preponderance of the evidence that the harm was caused after the product's "useful safe life" had expired. "Useful safe life" begins at the time of delivery of the product and extends for the time during which the product would normally be likely to perform or be stored in a safe manner. For the purposes of this section, "time of delivery" means the time of delivery of a product to its first purchaser or lessee who was not engaged in the business of either selling such products or using them as component parts of another product to be sold.

Examples of evidence that is especially probative in determining whether a product's useful safe life had expired include:

(A) The amount of wear and tear to which the product had been subject;

(B) the effect of deterioration from natural causes, and from climate and other conditions under which the product was used or stored;

(C) the normal practices of the user, similar users and the product seller with respect to the circumstances, frequency and purposes of the product's use, and with respect to repairs, renewals and replacements;

(D) any representations, instructions or warnings made by the product seller concerning proper maintenance, storage and use of the product or the expected useful safe life of the product; and

(E) any modification or alteration of the product by a user or third party.

10-9/11

1 .. (2) A product seller may be subject to liability for harm caused
2 by a product used beyond its useful safe life to the extent that the
3 product seller has expressly warranted the product for a longer
4 period.

5 (b) (1) In claims that involve harm caused more than 10 20 years
6 after time of delivery, a presumption arises that the harm was
7 caused after the useful safe life had expired. This presumption may
8 only be rebutted by clear and convincing evidence.

9 (2) (A) If a product seller expressly warrants that its product
10 can be utilized safely for a period longer than 10 20 years, the
11 period of repose, after which the presumption created in paragraph
12 (1) of this subsection arises, shall be extended according to that
13 warranty or promise.

14 (B) The ~~ten-year~~ *twenty-year* period of repose established in
15 paragraph (1) of this subsection does not apply if the product seller
16 intentionally misrepresents facts about its product, or fraudulently
17 conceals information about it, and that conduct was a substantial
18 cause of the claimant's harm.

19 (C) Nothing contained in this subsection shall affect the right of
20 any person liable under a product liability claim to seek and obtain
21 indemnity from any other person who is responsible for the harm
22 which gave rise to the product liability claim.

23 (D) The ~~ten-year~~ *twenty-year* period of repose established in
24 paragraph (1) of this subsection shall not apply if the harm was
25 caused by prolonged exposure to a defective product, or if the
26 injury-causing aspect of the product that existed at the time of
27 delivery was not discoverable by a reasonably prudent person until
28 more than 10 20 years after the time of delivery, or if the harm
29 caused within 10 20 years after the time of delivery, did not man-
30 ifest itself until after that time.

31 (c) Except as provided in subsections (d) and (e), nothing con-
32 tained in subsections (a) and (b) above shall modify the application
33 of K.S.A. 60-513, and amendments thereto.

34 (d) (1) In a product liability claim against the product seller,
35 the ~~ten-year~~ *twenty-year* limitation, as defined in K.S.A. 60-513,
36 and amendments thereto, shall not apply to the time to discover a
37 disease which is latent caused by exposure to a harmful material,
38 in which event the action shall be deemed to have accrued when
39 the disease and such disease's cause have been made known to the
40 person or at the point the person should have been aware of the
41 disease and such disease's cause.

42 (2) The term "harmful material" means any chemical substances
43 commonly known as asbestos, dioxins, or polychlorinated biphenyls.

(3) In claims where the product seller is a licensed new
vehicle dealer or a used vehicle dealer as defined by
K.S.A. 8-2401(b) and (c), and amendments thereto, who
was not the manufacturer of the product, the reference
to time limitations of 20 years set forth in the paragraphs
above in this subsection shall instead be 10 years.

10-10/11

1 whether alone or as part of any product, or any substance which
2 is determined to present an unreasonable risk of injury to health
3 or the environment by the United States environmental protection
4 agency pursuant to the federal toxic substances control act, 15
5 U.S.C. & 2601 et seq., or the state of Kansas, and because of such
6 risk is regulated by the state or the environmental protection
7 agency.

8 (c) Upon the effective date of this act through July 1, 1991, the
9 provisions of this subsection shall revive such causes of action for
10 latent diseases caused by exposure to a harmful material for: (1)
11 Any person whose cause of action had accrued, as defined in sub-
12 section (d) on or after March 3, 1987; or (2) any person who had
13 an action pending in any court on March 3, 1989, and because of
14 the judicial interpretation of the ten-year limitation contained in
15 subsection (b) of K.S.A. 60-513, and amendments thereto, as applied
16 to latent disease caused by exposure to a harmful material the: (A)
17 Action was dismissed; (B) dismissal of the action was affirmed; or
18 (C) action was subject to dismissal. The intent of this subsection is
19 to revive causes of action for latent diseases caused by exposure to
20 a harmful material which were barred by interpretation of K.S.A.
21 60-513, and amendments thereto, in effect prior to this enactment.

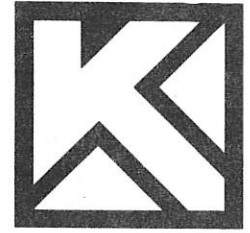
22 Sec. 23. K.S.A. 1991 Supp. 60-513 is and 60-3303 are hereby
23 repealed.

24 Sec. 24. This act shall take effect and be in force from and after
25 its publication in the statute book.

LEGISLATIVE TESTIMONY

Kansas Chamber of Commerce and Industry

500 Bank IV Tower One Townsite Plaza Topeka, KS 66603-3460 (913) 357-6321



A consolidation of the
Kansas State Chamber
of Commerce,
Associated Industries
of Kansas,
Kansas Retail Council

HB 3054

April 29, 1992

KANSAS CHAMBER OF COMMERCE AND INDUSTRY

Testimony Before the
Senate Committee on Judiciary

by

Bob Corkins
Director of Taxation

Mr. Chairman and members of the Committee:

My name is Bob Corkins, representing the Kansas Chamber of Commerce and Industry. I appreciate the chance to express our members' views today on HB 3054 regarding the product liability statute of repose.

The Kansas Chamber of Commerce and Industry (KCCI) is a statewide organization dedicated to the promotion of economic growth and job creation within Kansas, and to the protection and support of the private competitive enterprise system.

KCCI is comprised of more than 3,000 businesses which includes 200 local and regional chambers of commerce and trade organizations which represent over 161,000 business men and women. The organization represents both large and small employers in Kansas, with 55% of KCCI's members having less than 25 employees, and 86% having less than 100 employees. KCCI receives no government funding.

The KCCI Board of Directors establishes policies through the work of hundreds of the organization's members who make up its various committees. These policies are the guiding principles of the organization and translate into views such as those expressed here.

Prior to the enactment of KSA 60-3302 in 1981, KCCI was deeply involved in its legislative debate. Our support of the ultimate legislation -- as is typically the case

*Senate Judiciary Committee
April 29, 1992
Attachment 11*

-- evolved from compromises with other interested parties. Originally, KCCI supported a proposal which would have placed a definitive 10 year "cap" on the time period in which products liability claims may be filed. The law, through statutory amendments and judicial interpretation, has now come full circle back to that concept. KCCI's position remains in support of the 10 year definitive cap.

An expansion of this liability through HB 3054 would mean higher costs of doing business and ultimately a loss of jobs. This result is *at least* as certain as assertions by the bill's proponents that our present law may cause plaintiffs to suffer uncompensated losses. However, at present I will emphasize some arguments against HB 3054 which did not receive much attention from the House. For example:

- * HB 3054 does not represent a "compromise" between competing interests.
- * Most legislators agree that some definitive cutoff date for liability is good public policy.
- * The link between liability risks and improved product safety is very weak.
- * Excessive product liability curtails product innovation.
- * Some perceived drawbacks to existing law can be accommodated through state regulations.

These and other arguments are outlined on the attached exhibit. In general, they lead to the conclusion that the case for HB 3054 is unsubstantiated, the change is unwarranted, and that it would be disadvantageous.

Consequently, KCCI urges you to reject this legislation.

11-2/3

1. **Proponents' "damages" are unsubstantiated.** No example has been given illustrating a case in which *any* plaintiff has been denied *any* claim on the basis of Kansas' current statute of repose for product liability. All examples are hypothetical and prospective only.
2. **Claims regarding silicone breast implants could be permitted without any statutory changes.** Kansas provides an exemption from the filing deadline for claims pertaining to "harmful materials" which may cause latent injuries. If the state were to define silicone implants as such a harmful material -- and it could do so through KDHE regulations -- then these claims could be exempt from the 10 year filing limitation *without* any statutory change.
3. **Other claims could be exempted from the statute of repose.** The regulatory action mentioned above could be used for other substances deemed to be "harmful materials" in the future. A case-by-case approach of this kind would be preferable to penalizing *all* manufacturers with a broader statutory approach such as that in HB 3054.
4. **Legislators agree that some maximum cutoff date for liability is good public policy.** Except for the cases regarding "latent injuries," the majority of House members voting on HB 3054 agreed that *no* claim should be permitted beyond 20 years. When the 10 year limit was passed in 1987, the legislature effectively stated that *that* maximum cutoff period was justified. *What makes 20 years more reasonable than 10 years?* Will 25, 30, or 50 years be deemed "reasonable" by next year's legislature?
5. **Product liability costs are already very expensive.** Liability costs in 1987 added from \$70,000 to \$100,000 per light aircraft built and shipped during the year. The total cost of liability for domestic car makers runs into hundreds of dollars per car sold, while foreign builders typically pay such costs in the area of \$50 per car. The cost of product liability insurance, in general, has escalated due to rising claims. In the 1980-84 period, insurers paid claims of \$1.19 for every \$1 in liability premiums from *all manufacturers*. This ratio later narrowed only when premium rates rose steeply in 1984-85 and many manufacturers were denied coverage or were priced out of the market.
6. **The link between liability risks and improved product safety is very weak.** Product liability claims can compensate for past damages, but do not *prevent* accidents from occurring. While liability has led to modified product label warnings in some cases, or has reduced consumer demand for the affected products, most research analysts conclude that liability verdicts *have not* led to the development of substantially safer products.
7. **Excessive product liability curtails product innovation.** Its effect on innovations in medical treatment has been particularly repressive. Some laboratories, for example, have recently canceled the testing of promising AIDS vaccines due to risks of product liability. Passenger cars getting 80 mpg (with high performance) and which satisfy all federal safety standards are entirely feasible, but have not been built due to liability risks. In direct relation to growing product liability since 1960, three light aircraft manufacturers collectively introduced 22 new models from 1960 to 1970, 14 new models from 1970 to 1980, and seven new models from 1980 to 1990.

KANSAS CIVIL LAW FORUM

A Coalition of Professionals and Businesses Interested in the Kansas Court System

Brad Smoot, Coordinator
1200 West Tenth
Topeka, Kansas 66604-1291
(913) 233-0016 FAX (913) 233-3518

TESTIMONY OF BRAD SMOOT, COORDINATOR, KANSAS CIVIL LAW FORUM BEFORE THE SENATE JUDICIARY COMMITTEE REGARDING 1992 HOUSE BILL NO. 3054

APRIL 28, 1992

I am Brad Smoot, appearing today on behalf of the Kansas Civil Law Forum, a group of businesses and professional associations interested in the Kansas court system. Attached to my comments is a list of our 1992 membership.

The Kansas Civil Law Forum and its individual members oppose 1992 House Bill 3054 which would expand the statute of repose from the current 10 year limit to 20 years. This bill is similar to 1991 Senate Bill 103 which was defeated by the legislature last session. As previously indicated by other conferees, this proposal is both unnecessary and undesirable. There is little reason to believe that there is any real problem in Kansas civil law that requires such a drastic expansion of liability exposure for Kansas businesses. Indeed, in light of the recent ruling in the Harding case which I have attached to the Chairman's copy for the Committee records, any genuine question of access to the courts can be accomplished by more specific means. The Harding case does, after all, affirm the right of the legislature to make specific exceptions to the general statute of repose.

In order to give the Committee a better and more scholarly view of this issue, we contacted Cornell Law Professor, James A. Henderson, Jr., for his review and observations regarding the proposed increase in liability exposure. I have attached a copy of his comments to my testimony for your information. Professor Henderson, a well-recognized expert on tort law, was unable to be in Topeka today to make a presentation. However, in his written comments, he concluded that Kansas law is not out of line with other states and should not be changed to expand liability to 20 years.

The legislature properly addressed the question of latent diseases in the 1990 amendments and does not need to make further and more drastic modifications at this time. For these and other reasons previously expressed, I urge this Committee to reject House Bill 3054.

*Senate Judiciary Committee
April 29, 1992
Attachment 12 1/2*

KCLF MEMBERSHIP LIST - 1992

AIA Kansas
Alderson, Alderson, Montgomery & Newbery
Beech Aircraft Corporation
Boeing Company
The Coleman Company, Inc.
Farmers Insurance Group of Companies
Glaxo
KPL Gas Service
Kansas Associated Equipment Distributors
Kansas Association of Defense Counsel
Kansas Association of Property & Casualty Insurers
Kansas City Power & Light
Kansas Farm Bureau
Kansas Hospital Association
Kansas Independent Insurance Agents
Kansas Medical Mutual Insurance Company
Kansas Medical Society
Kansas Optometric Association
Kansas Railroad Association
Lederle Laboratories
Marion Merrell Dow, Inc.
Pharmaceuticals Manufacturers Association
Puritan Bennett Corporation
Shook, Hardy and Bacon Law Offices
Southwestern Bell
Western Retail Implement & Hardware Association



Cornell Law School

James A. Henderson, Jr.
Frank B. Ingersoll Professor of Law

April 24, 1992

Senator Wint Winter, Jr. Chairman
Senate Judiciary Committee
State house
Topeka, KS 66612

Dear Senator Winter:

Enclosed is a statement expressing my views in opposition to H.B. 3054, currently before your Committee. I regret that I am unable to testify in person on the 29th, but the statement captures my thoughts on the matter.

Sincerely,

James A. Henderson, Jr.
James A. Henderson, Jr.

JAH:jg
Enclosure

*Senate Judiciary Committee
April 29, 1992*

STATEMENT OF PROFESSOR JAMES A. HENDERSON, JR.
OPPOSING H.B. 3054

I appreciate the opportunity to comment on House Bill 3054, a proposal to change the time limitations on bringing products liability actions in this state. I am James A. Henderson, Jr., Frank B. Ingersoll Professor of Law at Cornell University. I have taught and written in the fields of torts, products liability and insurance for twenty-five years. I have authored several books and numerous law review articles on these subjects. I was asked by The Kansas Civil Law Forum to submit this written statement, but the views I express are my own and reflect insights gained over a long career working in the field of law to which House Bill 3054 relates.

Before proceeding to comment on this proposal for change, I shall briefly explain the different types of time bars to recovery and describe existing Kansas law. The two basic time bars in products litigation are statutes of limitations and statutes of repose. A statute of limitations gives injured persons a relatively short period of time (two years, typically), within which to commence legal action after they have been injured (or discover that they have been injured). In contrast, a statute of repose sets a longer period of time (typically, ten years) within which products liability actions must be brought, commencing not with the plaintiff's injury but with the defendant's giving up possession or control of the product. An injured plaintiff's claim will be time-barred if either the limitations or the repose period has run. Thus, in a typical jurisdiction a plaintiff must bring his action within ten years of the product's original distribution by the defendant and within two years of injury (or discovery of injury). In contrast to the statute of limitations period, which never begins to run prior to injury, the 10-year repose period bars some claims before the claimant has been injured.

Kansas statutes impose two distinct time limitations on the bringing of products liability actions. First, K.S.A. 60-513 establishes a two-year statute of limitations (subsection (a)¹(4)) accompanied by a so-called "discovery rule" (subsection (b)). Under these provisions, injured plaintiffs have two years, measured from the time defendant's act causes substantial injury, in which to commence legal action; but if the fact of injury is not reasonably ascertainable at the time of injury, then the cause of action accrues (the limitations period begins to run) when the fact of injury becomes reasonably ascertainable to the injured party.

¹ K.S.A. 60-513 in its terms applies more broadly to tort claims in general. But clearly it includes products liability.

The second time limitation on the bringing of products liability actions² is contained in K.S.A. 60-513(b): "[I]n no event shall an action be commenced more than 10 years beyond the time of the act giving rise to the cause of action." Clearly, this provision is intended as an outside statute of repose, barring most products liability claims that accrue more than ten years after delivery of the product by defendant into the stream of commerce.³ In this regard K.S.A. 60-3303(d)(1) establishes an exception to the 10-year outside statute of repose: that limitation shall not apply in products cases involving diseases which are latent, caused by exposure to certain defined chemical or toxic substances. In those instances, the limitations period does not begin until the claimant knows or should have been aware of the disease and the disease's cause.

A third provision relating to products liability actions under Kansas law is contained in K.S.A. 60-3303. Subsections (a) and (b) of that statute introduce the concept of a product's "useful safe life." Because of the perplexing and confusing nature of the useful safe life concept, I very much doubt that as a practical matter it provides anything in the way of a defense in most cases.⁴ In any event, the period of useful safe life begins with the delivery of the product and extends for the time during which the product would normally be likely to perform or be stored safely. If the seller proves by a

² See note 1, supra.

³ In a sequence of court and legislative decisions stretching back to 1974, the Supreme Court of Kansas and the Kansas legislature have engaged in a fascinating back-and-forth constructing and deconstructing of doctrine that applies different rules to cases accruing at different times from then to the present. See Harding v. K.C. Wall Products, Inc., No. 66513 (slip. op. April 10, 1992). In any event, the description in the text accurately reflects the existing statute and presumably will apply to the same future cases as would H.B. 3054, if it became law.

⁴ K.S.A. 60-3303 creates a presumption that a bar is appropriate after 10 years, subject to rebuttal. K.S.A. 60-513, as it stands, is an absolute bar (subject to the caveat in note 3, preceding. I find several aspects of 60-3303 confusing. First, presumably "useful life" relates to how long a product should last before wearing out and becoming dangerous. What is the relevance of subsection (b)(2)(D) to products wearing out, given that the subsection clearly is primarily concerned with exposure to toxics? And, second, can K.S.A. 60-3303 extend the outside time bar beyond the absolute 10-year bar in K.S.A. 60-513 if the plaintiff successfully rebuts 60-3303's presumption?

preponderance of the evidence that the harm was caused after the product's useful safe life had expired, liability is barred. Subsection (b) provides that in claims that involve harm caused more than ten years after delivery, a presumption arises that the harm was caused after the useful safe life had expired. The statute purports to provide that plaintiffs may succeed in that event only if they rebut the presumption by clear and convincing evidence. A subsequent subsection (D) provides exceptions for claims involving prolonged⁵ exposures, nondiscoverable defects and late-manifesting injuries.

House Bill 3054 would accomplish two objectives: first, it would amend K.S.A. 60-513 to change the 10-year outside repose time limit to 20 years; and, second, it would exclude from the definition of "product liability claim" in K.S.A. 60-3302(c) actions brought against those involved in the improvement of real property. In my comments to follow, I shall focus exclusively on the provision extending the general repose period to 20 years. I believe that House Bill 3054 would do much more harm than good and shall not be enacted into law. My observations in this regard are divided into two parts: why a statute of repose is a sensible provision in any state's system of products liability law; and why 10 years, under current Kansas law, is a much fairer, more sensible repose period than the 20-year period proposed in House Bill 3054.

Why a Statute of Repose Makes Sense in Principle

What justifies imposing an outside time limit on products liability actions? Anyone familiar with products liability litigation knows that as each year passes from the initial distribution of a product, it becomes more and more difficult to reconstruct the relevant events pertaining to a claim of original defectiveness. Five years out, the task of accurate reconstruction is difficult; eight years out, it is more difficult still; beyond ten years out -- the time limit under current Kansas law -- it often approaches the impossible.⁶ Not only are the relevant facts surrounding manufacture and distribution difficult to reconstruct, but also the relevant social attitudes and values that surrounded original distribution are difficult to understand and appreciate through hindsight.

⁵ These exceptions strike me as confusing. See note 4, supra.

⁶ Given the reality that cases often take two or more years to reach trial after filing, the time from sale to eventual trial could be 12 or more years.

⁷ See, generally, J. Henderson & A. Twerski, Products Liability: Problems and Process, 627-29 (1987); Henderson, "Coping With the Time Dimension in Products Liability," 69 Calif. L. Rev. 919 (1981).

The unfairness not only to defendants but to jurors as well is substantial. Asked to judge the product as of the time it was originally distributed many years ago, jurors attempting to do justice but lacking a time travel device face a hopeless task. And, just as jurors' reactions later on become problematic, so do the tasks of those who must predict, at the time of original distribution, what juror reactions later on will be. These unfairly imposed difficulties prevent business managers from being able to plan adequately for the future, and cause liability insurers to throw up their hands in despair.

As pointed out earlier, statutes of repose do bar some claims before the claimant suffers injury. Any costs generated by barring such claims must be weighed against the potentially enormous costs to society of countenancing a liability system in which, given the problems of judging products via hindsight many years after the relevant decisions were made, liability is imposed largely by whim.

Thus, a statute of repose strikes an appropriate balance between the plaintiff's right to bring a claim and the defendant's right to a fair chance to defend himself. A number of jurisdictions have adopted repose provisions,⁸ some with periods as short as five years.⁹ Ten years, the period of repose under current Kansas law, is the period most often chosen

8

See, e.g., Colo. Rev. Stat. § 13-21-403 (1977) (rebuttable presumption of non-defectiveness 10 years after sale); Conn. Stat. § 52-577a (1987) (ten-year repose); Ga. Code Ann. § 51-1-11 (1982) (ten-year repose); Idaho Code § 6-1403 (1980) (ten-year repose); Ill. Rev. Stat. § 13-213(b) (1979) (twelve-year repose from first sale; ten-year repose from first sale to initial user); Ind. Code § 33-1-1.5-5 (ten-year repose); Ky. Rev. Stat. § 411.310 (1978) (rebuttable presumption of nondefectiveness 5 years after sale to first consumer or 8 years after manufacture); Neb. Rev. Stat. § 25-224 (1981) (ten-year repose); N.C. Gen. Stat. § 1-51(16) (1979) (ten-year repose); Or. Rev. Stat. § 39.905(1) (1987) (eight-year repose); R.I. Gen. Laws § 6A-2-725 (1978) (ten-year repose); Tenn. Code § 29-28-103 (1978) (ten-year repose); Wash. Rev. Code § 7.72.060 (1981) (presumption after twelve years that the product exceeded useful safe life).

9

See, e.g., Ky. Rev. Stat. § 411.310 (1978) (rebuttable presumption of nondefectiveness five years after sale to first consumer).

13-5/7

by legislatures.¹⁰ The Model Uniform Product Liability Act, for example, adopts a 10-year period.¹¹

If any further support were required for the general proposition that statutes of repose make sense in principle, one need only to observe that the proponents of House Bill 3054 agree with the proposition -- they agree that a repose period is required, but differ with existing law on what the repose period should be. I do not mean to trivialize the issue of "How long?" I will argue below that 20 years would be unfairly too long. My point here is simply that, in principle, the proponents of House Bill 3054 agree that repose is a sensible approach to certain problems in products liability.

Why the Repose Period Should Not Be Extended to 20 Years

As I noted earlier, as a practical matter, the current 10-year repose period extends the outside time limit between distribution and eventual trial to twelve or more years.¹² A 20-year period for filing claims would, in similar fashion, extend the period as a practical matter to 22 or more years. As coincidence has it, I began seriously researching torts and products liability only a little more than 22 years ago. I state without qualification that in that length of time our products liability system has been completely revolutionized.¹³ When a plaintiff today attacks a several decades -- old product design under current law and public attitudes, the defendant stands a zero chance of being judge fairly, as of late 1960s-early 1970s values. Moreover, the facts necessary to defend are typically difficult (and often impossible) to marshal. Senior design engineers, in their 40s and 50s 22 years ago, have since retired; many are unavailable. Simply stated, a 20-year period of repose offers little, if any, of the protection from unfairness that a repose period rightly should provide.

One type of claim often recognized as deserving a longer period of time within which to bring legal action involves latent diseases caused by exposure to chemicals and toxics, such

¹⁰ See note 8, above.

¹¹ Section 110 establishes a presumption that a product's useful life has expired after ten years from distribution, rebuttable by clear and convincing evidence. K.S.A. 60-3303 is based on the MUPLA provision.

¹² See note 6, supra.

¹³ See, Henderson & Twerski, Closing the American Products Liability Frontier: Rejection of Liability Without Defect, 66 N.Y.U. L. Rev. 1263, 1270-1271 (1991).

13-6/7

as asbestos, dioxins and pcb's. Kansas law provides an exception for such cases in K.S.A. 60-3303(d). Indeed, were it not for that fact, I would not be here today defending the current Kansas system of time limitations. But with the exception in place, ten years is much the preferable time period than 20. As I pointed out earlier, ten years is the most opted-for period in other states.¹⁴ In my experience, ten years -- which may stretch to twelve -- is the optimum period within which minimum fairness to both plaintiffs and defendants can be maintained. Moreover, to the extent that one believes the question of "How long?" to be essentially empirical in nature, I submit that on the present record it is the supporters of House Bill 3054, seeking fairly radical change, who bear the burden of presenting convincing data.

Conclusion

For the reasons I have advanced, I urge you to reject House Bill 3054 as an unfair and unwarranted extension of the from-time-of-sale repose period during which plaintiffs may bring claims. After a decade or more of use (and possible abuse), a product's risks, in fairness, should be borne by the users who are in a position to monitor those risks and achieve their minimization. Enactment of House Bill 3054 would take Kansas out of the mainstream of American products liability law, creating an environment of unfairness to business and industry and thereby discouraging, at the margin, migration of new businesses to this state.

Respectfully submitted,

PROFESSOR JAMES A. HENDERSON, JR.

April 29, 1992

Date

¹⁴ See note 20, supra.

13-7/7