Study J-111 December 11, 2000

First Supplement to Memorandum 2000-61

Statute of Limitations for Legal Malpractice: Estate Planning Issues

The Commission has received the following materials relating to the proposal of the State Bar Estate Planning, Trust & Probate Law Section ("EPTPL Section"):

Exhibit p.

1. David Long, State Bar of California, (October 19, 2000) (with enclosures) 1
2 Donald Travers, EPTPL Section (December 8, 2000) 7
4. Memorandum by Mara Basile to J. Clark Kelso regarding statutes of repose (Nov. 29, 2000) 10

These materials are briefly summarized below and will be discussed at the Commission's meeting.

COMMENTS OF MR. LONG: POSITION OF THE STATE BAR

Mr. Long reports that the State Bar Board of Governors has "deferred consideration of the Estate Planning, Trust and Probate Law Section's proposal, to amend section 340.6 of the Code of Civil Procedure to limit tolling of the statute of limitations until damage has occurred to four years from the time an attorney provides a client with the proposed statutory notice, until the California Law Revision Commission has had an opportunity to consider the issues it raises." (Exhibit p. 1.) "In taking this action, the Board expressed the belief that issues relating to the potentially very long statute of limitations now applicable to estate planning matters are worthy of further study." (*Id.*) The Board "recommended that the California Law Revision Commission study these issues in connection with the Commission's study of the statute of limitations for legal malpractice actions. (*Id.*) The Board did not express an opinion on the EPTPL Section's proposal for addressing the issues. (*Id.*)

Mr. Long enclosed with his letter a summary relating to the Board's action (Exhibit p. 2), a critique of the EPTPL Section's proposal by the State Bar Litigation Section (Exhibit pp. 3-4), and a rebuttal by the EPTPL Section to the Litigation Section's critique (Exhibit pp. 5-6).

COMMENTS OF MR. TRAVERS: AVAILABILITY OF MALPRACTICE INSURANCE

In October, the staff talked with Mr. Travers of the EPTPL Section regarding the Section's proposal, and expressed an interest in obtaining concrete information on the availability of malpractice insurance, particularly malpractice insurance for retiring estate planners. Mr. Travers investigated this matter. He reports that sole practitioners and attorneys who retire from firms that continue to exist "appear to have no problem with obtaining appropriate insurance to cover claims made after retirement." (Exhibit p. 8.) "The problem is the attorney who retires from a firm which at some point ceases to exist." (*Id.*)

Mr. Travers has been informed "that there are policies endorsed by the State Bar which allow the individual retiring from a firm to obtain a policy to cover him if the firm either disbands or ceases to carry insurance." (*Id.*) However,

> the insurance industry doesn't have any uniform strategy to deal with this problem and many firms purchase policies without looking into this question because the question of disbanding the firm doesn't arise. There doesn't appear to be a stand alone policy for the lawyer who finds himself in this situation, and there may not be in the future because the demand is evidently small and the insurance industry hasn't much information about risk.
>
> In one sense this is a trap for the unwary, because insurance is available so that the practitioner can protect himself. On the other hand, such insurance has been available only during the last five years. Also, the State Bar estimates that about 40% of California attorneys practice in firms with between two and five members, and these small firms often elect to disband after which the members form new firms or become sole practitioners. There are probably very significant numbers of lawyers who retire, then discover that the firm's policy doesn't provide tail coverage if the firm later ceases to exist.

(*Id.*) Mr. Travers expects to publish an article alerting attorneys to the availability of insurance. (*Id.*)

He cautions, however, that "the availability of adequate insurance coverage does not really resolve the matter." (Exhibit p. 9.) "Claims based on alleged negligence in the distant past are very difficult to evaluate and resolve, for all the reasons which justify any statute of limitations." (*Id.*)

MEMORANDUM ON STATUTES OF REPOSE

Mara Basile, a student of Prof. J. Clark Kelso of the Institute for Legislative Practice, McGeorge School of Law, conducted research and prepared a memorandum regarding constitutional challenges to statutes of repose. (Exhibit pp. 10-14.) Prof. Kelso summarizes the findings as follows: "The cases striking down statutes of repose seem to depend upon the existence of some special state constitutional protection for access to the courts." (Email from Prof. Kelso to Barbara Gaal (Dec. 8, 2000).) "Otherwise, they appear valid so long as it does not obliterate any vested rights." (*Id.*)

The staff has not yet conducted its own research in this area, but intends to do so if the Commission decides to pursue the concept of a statute of repose, to ensure that any proposal complies with constitutional constraints.

Respectfully submitted,

Barbara S. Gaal
Staff Counsel

THE
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October 19, 2000

Nathaniel Sterling, Executive Director
California Law Revision Commission
4000 Middlefield Rd., Room D-1
Palo Alto, CA 94303

Re: Statute of Limitations for Legal Malpractice: Estate Planning Issues

Dear Nat:

It is my understanding that the California Law Revision Commission will consider whether to include the issues concerning the application of the statute of limitations for legal malpractice to estate planning matters raised by the State Bar's Estate Planning, Trust and Probate Law Section at its next meeting in December. Recently, the State Bar Board of Governors' Committee on Legislative and Court Relations and the full Board considered the Section's proposal in connection with its review of section affirmative legislative proposals for the 2001 legislative session.

The Board of Governors, at its recent meeting on October 14, 2000, deferred consideration of the Estate Planning, Trust and Probate Law Section's proposal, to amend section 340.6 of the Code of Civil Procedure to limit tolling of the statute of limitations until damage has occurred to four years from the time an attorney provides a client with the proposed statutory notice, until the California Law Revision Commission has had an opportunity to consider the issues it raises. In taking this action, the Board expressed the belief that issues relating to the potentially very long statute of limitations now applicable to estate planning matters are worthy of further study. Consequently, it recommended that the California Law Revision Commission study these issues in connection with the Commission's study of the statute of limitations for legal malpractice actions. The Board expressed no opinion on the Section's proposal for addressing these issues. An excerpt from the action summary of the Board Committee on Legislative and Court Relations which the full Board adopted is enclosed. Also enclosed is a comment submitted by the Litigation Section and the response of the Estate Planning, Trust and Probate Law Section.

Please feel free to contact me if you have questions or would like further information.

Sincerely,

David Long

DL:ec
Enclosures

Board Committee on Legislative and Court Relations
Action Summary - Excerpt from Meeting on Tuesday, October 10, 2000
Adopted by Board of Governors on October 14, 2000

2. Affirmative Legislative Proposals - Estate Planning, Trust and Probate Law Section

Amendment to section 340.6 of the Code of Civil Procedure relating to malpractice claims against attorneys to limit tolling of statute of limitations until damage has occurred to four years from time attorney provides client with proposed statutory notice (Project 00-05)

At the request of the Estate Planning, Trust and Probate Law Section, the California Law Revision Commission is currently considering whether to include this issue in a current study of related issues concerning the statute of limitations for legal malpractice. This is likely to be considered at the next meeting of the CLRC which will be held on December 8 and 9.

The Litigation Section has raised questions about the advisability of this proposal. In addition, issues relating to the difficulty of obtaining insurance coverage appear to need further exploration.

Recommendation:

The Committee recommends that action on this proposal be deferred pending consideration by the California Law Revision Commission. The Committee believes issues relating to the potentially very long statute of limitations now applicable to estate planning matters are worthy of further study and recommends that the full Board recommend that the California Law Revision Commission study these issues in connection with the Commission's existing study of the statute of limitations for legal malpractice actions. If the full Board concurs with this recommendation, adoption of the following resolution would be in order:

> RESOLVED, that the Board of Governors concurs with the recommendation of the Board Committee on Legislative and Court Relations to defer further consideration of the proposal made by the Estate Planning, Trust and Probate Law Section, to amend section 340.6 of the Code of Civil Procedure relating to malpractice claims against attorneys, pending consideration by the California Law Revision Commission; and it is
>
> FURTHER RESOLVED, that the Board believes that issues relating to the potentially very long statute of limitations now applicable to estate planning matters are worthy of further study and recommends that the California Law Revision Commission study these issues in connection with the Commission's study of the statute of limitations for legal malpractice actions.

LITIGATION SECTION
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August 25, 2000

HAND DELIVERY

Paul S. Hokokian, Esq.
Chair
Board Committee on Legislative and Court Relations
State Bar of California
180 Howard Street
San Francisco, CA 94105-1639

re: Agenda Item 5.b(4) of Your Meeting August 25, 2000

Dear Mr. Hokokian:

On the agenda of the Board Committee on Legislative and Court Relations open session for August 25, 2000, is a proposed amendment to Code of Civil Procedure section 340.6, relating to malpractice claims against attorneys. This letter will comment about that proposal on behalf of the Litigation Section.

The proposal would, in effect, create a statute of repose by permitting estate planning attorneys to send to their clients a form of notice. The statute of limitations on malpractice claims would begin to run at the time the notice has been deposited in the United States mail, whether or not the notice reaches the client and regardless of the client's circumstances.

The Litigation Section does not take a position on whether the existing statute of limitations is or is not appropriate in attorney malpractice cases. However, we suggest that the Board Committee address two issues when considering this proposal.

First, we question whether, in light of the difficult times the State Bar has endured before the Legislature in the last five years, this is an appropriate occasion for the State Bar to be proposing anti-client legislation.

Second, we question whether the proposed amendment to Section 340.6 of the Code of Civil Procedure should be proposed as now worded. If it is overbroad, it will harm consumers of legal services. One example will illustrate the point. Suppose an attorney drafts a will or trust for an elderly client, and thereafter the client becomes incompetent. The proposed legislation would allow the attorney to send the proposed new form of statutory notice to the client after the client can no longer appreciate the consequences of the notice. The attorney will have been immunized from liability, while the attorney's errors will have harmed the client or the client's intended beneficiaries, but the client and the beneficiaries will not even know that they should act to protect their own interests.

Normally, the Litigation Section would not comment on proposals regarding estate planning which come from the Estate Planning, Trust & Probate Law Section. However, the consequences to innocent clients or to their intended beneficiaries as a result of this proposal are so severe that they raise serious issues of access to justice.

If you have any questions regarding this subject, please do not hesitate to call me (415) 771-0100.

Sincerely,

Jerome Sapiro, Jr.

JS:vy
(9930.03:100)

cc: James B. Ellis, Esq.
Chair, Estate Planning Section

David Long, Esq.

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October 6, 2000

marold@aol.com

Paul S. Hokopian, Esq., Chair
Board Committee on Legislative and Court Relations
State Bar of California
180 Howard Street
San Francisco, CA 94105-1639

Re: Proposal to Amend section 340.6 of the Code of Civil Procedure

Dear Mr. Hokopian:

The undersigned have been requested to reply on behalf of the Executive Committee of the Estate Planning Trust and Probate Section to the letter of Jerome Sapiro, Jr. from the Litigation Section regarding the proposal to amend Section 340.6 of the Code of Civil Procedure. In regard to this matter, please find the following:

1. The proposal reflects the Section's desire to create legislation that will correct a problem that adversely affects both attorneys and consumers of legal services. The current system provides that the statute for malpractice claims that arise from the drafting of revocable estate planning documents, such as wills and living trusts, does not run until the document becomes irrevocable, generally at the client's demise. As a result, estate planning attorneys do not have a statute of limitations that will run from the execution of such documents. This is unlike other situations where the statute of limitations for malpractice, often one year, runs from the moment that a document is signed and binding on the client such as a contract or other agreement.

2. The present system is inherently unfair. Estate planning attorneys face an open-ended statute of limitations that may not run until his or her client is dead--in some cases years or decades after documents are signed, files have been returned or destroyed, and memories have faded. Typically the malpractice claim will be brought by a beneficiary who did not participate in the drafting of the documents, and who may not even have been born when documents were drawn. The defense of such claim is difficult if not impossible. After many years, memories

Paul S. Hokopian, Esq., Chair
Board Committee on Legislative and Court Relations
October 6, 2000
Page 2

have faded, witnesses likely are unavailable, and the client is no longer living. It is because of this disadvantage in litigation, that an estate planning attorney usually cannot obtain affordable malpractice insurance coverage upon retirement.

3. The current system does not encourage clients to find and correct mistakes in estate planning documents while time exists for any errors to be discovered and avoided. If a malpractice claim arises after an attorney retires, he is not likely to have coverage and may be unable to answer in damages. If the attorney is deceased, no claim can be brought if the attorney's demise is more than one year prior to the filing of any lawsuit or other claim. Consequently, the client may find himself with only a theoretical right of recovery and counsel will be unable to retire and be free from the worry that a claim may be surface at any time.

4. While no system can be perfect and some people may suffer as a result of a change in the law, the Section believes that the proposal will help the vast majority of persons affected by estate planning errors. The four year notice will give the consumer a substantial period of time to have his file reviewed by new counsel; the limitation will allow counsel to purchase affordable tail coverage so that he can insure for the risk that a claim may be filed within four years of giving a notice. The requirement of a notice will also place the client on notice that his attorney is no longer taking responsibility for the file and that the client should have his documents reviewed.

The Section believes this proposal is a vast improvement for the estate planning client over the current state of the law. The focus will be on the discovery and correction of estate planning errors while time is available and not on the damages that such errors create while hiding undiscovered in unreviewed documents. The current system seeks to punish rather than prevent. A system encouraging prevention and remediation of damage, is far preferable to one seeking compensation for damage through litigation.

Very truly yours,

MARSHALL A. OLDMAN

J. KEITH GEORGE

MAO:moi
cc: Betty Orvell
Jerome Sapiro, Jr., Esq.
David Long, Esq.

Litigation/Corres/Hokopian letter re LRC

ESTATE PLANNING, TRUST AND PROBATE LAW SECTION

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December 7, 2000

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Re: Statute of Limitations for Legal Malpractice

Dear Barbara:

One of the considerations behind the section's proposal of a statute of repose for legal malpractice was the difficulty a retiring attorney would have in obtaining "tail coverage." After my conversation with you in October, I did some checking on the availability of affordable malpractice tail coverage insurance for estate planning attorneys. The most useful source of information was an insurance broker, Paul Dorroh, who works with the State Bar, and most of the information I was able to obtain came from Mr. Dorroh. Mr. Dorroh (who is also an attorney) is a vice president of Seabury & Smith, 160 Spear Street, 15th Floor, San Francisco, California, 94105, telephone number (415) 983-5650. I also talked with other insurance brokers and with Kathy Hastings at the State Bar, but they didn't add much to what I learned from Mr. Dorroh.

Attorneys who retire from practice seem to fall into three categories for insurance purposes:

1. Sole practitioners;

2. Members of firms, large or small, which continue to exist; and

3. Members of firms which cease to exist, either at the time the attorney retires, or later.

Lawyers in the first two categories appear to have no problem with obtaining appropriate insurance to cover claims made after retirement. The sole practitioner can purchase tail coverage for a one-time cost of about $5,000, or perhaps more, depending on coverage limits. Some insurance companies will provide tail coverage at no cost if the attorney has been with them for several years. On the other hand, an attorney who retires from a firm which continues to exist will be covered by the firm's malpractice insurance.

The problem is the attorney who retires from a firm which at some point ceases to exist. When the firm ceases to exist the policy is not renewed, so there is no further coverage, and the attorney can't purchase coverage at that point.

Mr. Dorroh told me that there are policies endorsed by the State Bar which allow the individual retiring from a firm to obtain a policy to cover him if the firm either disbands or ceases to carry insurance. However, the insurance industry doesn't have any uniform strategy to deal with this problem and many firms purchase policies without looking into this question because the question of disbanding the firm doesn't arise. There doesn't appear to be a stand alone policy for the lawyer who finds himself in this situation, and there may not be in the future because the demand is evidently small and the insurance industry hasn't much information about risk.

In one sense this is a trap for the unwary, because insurance is available so that the practitioner can protect himself. On the other hand, such insurance has been available only during the last five years. Also, the State Bar estimates that about 40% of California attorneys practice in firms with between two and five members, and these small firms often elect to disband after which the members form new firms or become sole practitioners. There are probably very significant numbers of lawyers who retire, then discover that the firm's policy doesn't provide tail coverage if the firm later ceases to exist.

Clearly, it is important for attorneys to think about tail coverage well in advance of retirement and to be aware that coverage is available. I expect to publish an article on this subject (with Mr. Dorroh's assistance) in our California Trusts and Estates Quarterly sometime soon, and this should help.

However, the availability of adequate insurance coverage does not really resolve the matter. Claims based on alleged negligence in the distant past are very difficult to evaluate and resolve, for all the reasons which justify any statute of limitations. Memories fade, witnesses and evidence become unavailable, and in cases involving estate planning one or both of the original clients are usually deceased. Standards of practice change, and it can be quite difficult to know just when a particular technique became generally available to estate planners. For example, one problem in drafting an estate plan is whether or not to provide a bypass trust for shelter from estate tax. In large estates a bypass trust is almost always used, but in very small estates a bypass trust is not only useless (because the estate is not large enough to be subject to estate tax) but causes considerable expense and inconvenience. The problem for the planner is the estate that is not, at the time the work is done, large enough to benefit from a bypass trust. Some of those small estates will grow, or the parties will inherit or otherwise acquire additional wealth, so that when the first spouse dies a bypass trust will be very useful. Years ago, the choice for the planner was either to provide the bypass trust and risk subjecting the client to unnecessary expense if the estate did not grow, or to omit the bypass trust and subject the estate to tax liability if the estate were to grow substantially. A few years ago, someone worked out a way to provide an optional bypass trust, to be funded by means of disclaimers by the surviving spouse, if needed. At some point I remember learning about the technique in a continuing education class, and a year or two later the forms appeared in the various form books. It would be difficult to determine at just what point utilization of a "disclaimer trust" became a necessary part of good practice. That difficulty would increase greatly if the determination were to be made several years in the future.

I suggest that the proposal strikes a reasonable balance of the interests of the attorney and the client, and enables the client to protect himself by simply exercising reasonable diligence and reviewing his estate plan at reasonable intervals.

At least one of our litigators, who will be better informed about the practical problems involved in these types of cases will be in touch with you. If at any time I can provide information or assistance, please let me know.

Very truly yours,

Donald R. Travers

DRT:km
cc: Betty J. Orvell
Terence Nunan
Marshal A. Oldman
Christopher M. Moore

H:\WPDOCS\DRT\CLIRC\JGAAL1.LTR

To: J.Clark Kelso
From: Mara Basile
Re: Statutes of repose
Date: 11/29/00

MEMORANDUM

This memo is in response to questions regarding statutes of repose. Statutes of repose are found in many different arenas and have been challenged on occasion. This memo will focus on cases that uphold statutes of repose, and those that do not. Then those cases will further be broken down into state cases and federal cases. The idea behind this memo is to give some background on these types of statutes so that they can be evaluated in the area of probate malpractice. If a statute of repose is developed in this area as part of proposal to reform the now existing problem with the statute of limitations, it is helpful to know what objections or benefits of the statute of repose would be. This is done by comparison through other areas of law.

Some of the areas of law where statutes of repose are used are as follows: Products liability, toxic torts (asbestos), medical malpractice, and construction. Within the several states there have been challenges to the statutes based on state constitutional grounds as well as general federal constitutional challenges. Some of these researched will be discussed below.

CASES THAT INVALIDATE STATUTES OF REPOSE

A. State Constitutional Challenges

In Ohio, there is a statute of repose that starts the clock on a plaintiff's cause of action at the date a product is introduced into the market. When an arbitrary designated number of years pass after the product-initiated date, no cause of action may be brought against a manufacturer for injuries caused by the manufacturer's product. Ohio Revised Code §§2305.10,2307.72-78. Following the adoption of strict liability, more injured consumers became aware of their rights and filed suits. Therefore, personal injury attorneys more frequently achieved recovery for their clients. This resulted in a crisis. Both manufacturers and insurers were upset by the fact they had to defend costly lawsuits and they were tired of paying greater numbers of claims. The

legislature in Ohio responded by diminishing the uncertainty that surrounded a continually evolving common law through codification of the state's product liability law. The statutes of repose were popular reform measures.

The products liability statute of repose is a legislative creation intended to protect product providers from what is viewed as unlimited, unfair exposure to legal liability. The statute of repose in Ohio does not go unchallenged. Ohio predicts that the products liability statute of repose, as enacted, will not likely survive an attack based on the Ohio Constitution. Both because of due process, and equal protection challenges.

One common challenge is a challenge to the state's open-courts provision. This provision guarantees a state's citizens access to the courts for redress of injuries. Because statutes of repose can operate to deny court access and right to remedy, some courts invalidate repose statutes. Hazine v. Montomery Elevator Co., 861 P.2d 625 (Ariz.1993). Another case that discusses the open-courts provision is Kennedy v. Cumberland Eng'g Co., 471 A.2d 195 (R.I. 1984). If the legislation eliminates all theories of recovery upon expiration of the time limit, but fails to provide an alternate remedy the statute may also be found unconstitutional under the open courts provision. Lankford v. Sullivan, 416 So.2d 996 (Ala. 1982).

Other courts strike down repose statutes when the courts decide there is no sufficient correlation between the state's repose statute and the legislature's goal of reducing insurance premiums. Berry v. Beech Aircraft Corp., 717 P.2d 670 (Utah 1985).

In the area of medical malpractice and construction improvements, statutes of repose did not withstand the state constitutional challenges. The medical malpractice statute of repose suffered when a particularly unfair operation barred a minor's cause of action against a doctor's malpractice. Schwan v. Riverside Methodist Hosp., 452 N.E.2d 1337 (Ohio 1983). The medical malpractice statute of repose contained a special clause that addressed minors. But, rather than providing for the statute of limitations or repose on all minors' actions to be tolled until the age of majority, the statute distinguished between minors above and below the age of ten. The court found that the distinction between minors violated Ohio's equal protection provision and thereby

rendered that portion unconstitutional. Two more cases that struck down these statutes of repose in the medical malpractice arena are, Hardy v. VerMeulen, 512 N.E.2d 626 (1987),and Gaines v. PretermCleveland, Inc., 514 N.E.2d 709 (1987).

There has also been an Ohio Constitution due process challenge. In the case of Mominee v. Scherbarth, 503 N.E.2d 717 (Ohio 1986). The court completely invalidated the operation of the four-year medical malpractice statute of repose upon minors on due process grounds.

B. Federal Consitutional Challenges

The Federal constitutional challenges that have succeeded in invalidating statutes of repose are few and far between. These challenges often are grounded in due process violations, and equal protection clauses. However the challenges are rarely successful under Federal law. The situation where statutes of repose become most vulnerable to due process challenges is when it operates as an abnormally abbreviated limitation period. In this context, the statute of repose overrides the statute of limitation and violates the policies underpinning limitations legislation.

In two cases the Court has invalidated statutes of limitation on equal protection grounds. In each case, the state legislature had subjected child support suits involving illegitimate children to certain limitation periods while exempting suits involving legitimate children from similar periods. In the decisions, the strong language the court used for condemning the unreasonableness of the statutes of limitation, can be imported for due process challenges to repose statutes. The court held that although legislatures have a legitimate interest in protecting defendants from stale claims, such an interest does not justify the imposition of unrealistically short time bars. Pickett v. Brown, 462 US 1, 13-14 (1983). The United States Supreme Court's holdings with respect to unreasonable statute of limitation periods, should apply with equal force to unreasonable repose periods since there are few cases where the Court has constitutionally reviewed statutes of repose.

CASES THAT UPHELD STATUTES OF REPOSE

A. State Cases

Initially, statutes of repose survived the constitutional attacks in the same state of Ohio. They were considered in a variety of cases, and these decisions were based upon the facts of the cases as well as the subject of the statute. In the field of medical malpractice a case involved retroactive application of the statute of repose. This was challenged on the grounds of possible violation of the Ohio Constitution's bar against retroactive laws. The statute was upheld even though the plaintiff's actions accrued prior to the statute's effective date and were barred if the four-year limit applied. The plaintiffs were afforded a reasonable time in which to bring their claims after the statute's effective date. Baird v. Loeffler, 433 N.E.2d 194. Courts however are still divided on this area as to whether these statutes are unconstitutional or not.

In the area of construction, courts deferred to the legislation's wisdom. The construction statute of repose provided protection to architect and engineer tort defendants that the legislature did not extend to other tort defendants, but the courts found the distinction rational and not offensive to equal protection. Hartford Fire Ins. Co. v. Lawrence, 740 F.2d 1362, 1371 (6th Cir. 1984). Additionally, no violation of the Ohio open courts provision arose in this field (construction) because of the existing or vested rights distinction.

In Tennessee, within the toxic tort arena, the court held that the ten-year statute of repose in the Tennessee Product Liability Act barred the claims by plaintiffs. Winningham v. Ciba-Geigy Corp., 156 F.3d 1234 (6th Cir. Tenn. 1998). The plaintiffs failed to produce sufficient evidence to support their argument that the statute of repose did not run. The sixth circuit also rejected plaintiffs' argument that applying the statute of repose to bar their claims, in light of the TPLA's exceptions for silicone breast implants and asbestos, would violate the US Constitution's Equal Protection Clause.

B. Federal Cases

The United States Supreme Court has rarely struck down a statute of repose based on US constitutional grounds. The major problem with past due process challenges that arise when a

repose statute time-bars a cause of action before it accrues is that neither the federal nor state constitutions absolutely guarantee the right to seek a remedy for a wrong. 40 SWLJ 997. Due process only protects vested rights. The US Supreme Court has upheld the authority of legislatures to abolish remedies as long as the legislature does not abrogate a vested right without providing alternative relief to the plaintiff. Duke Power Co. v. Carolina Envtl. Study Group Inc., 438 US 59, 87, 88 n. 32 (1978).

Plaintiffs alleged due process violations are often based on the ground that denying an individual's right to sue violates due process guarantees. No court has invalidated a statute of repose solely on the basis of the "rational basis" due process analysis. 38 VNLR 627. Another line of cases asserts that due process protects only vested rights and that the legislature is free to abrogate nonvested rights. State Farm Fire and Casualty Co. v. All Elec. Inc., 660 P.2d 995 (1983). These courts reason that statutes of repose do not prevent a plaintiff from bringing a cause of action, rather, they prevent a cause of action from ever arising. Thus, plaintiffs' due process rights are not violated because there is no denial of the nonvested right.

Another type of federal constitutional challenge is equal protection. Under the rational basis standard, courts have had little difficulty concluding that a statute of repose serves legitimate legislative objectives. Jeweson v. Mayo Clinic, 691 F.2d 405 (8th Cir. 1982). Normally since a fundamental right is not abrogated, courts use the rational basis standard. Typically, statutes of repose are not struck down by federal courts therefore there are more challenges at the state level based on the state's constitution.