

Withholding Justice From Toxic Tort Victims

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Abstract

Under Alabama law, victims of toxic torts may be denied access to due process as statutes of limitation begin to accrue at exposure. Due to latency periods, the statutes of limitation are tolled before resulting diseases from toxic exposure are known. This Article describes Alabama case law by which the judiciary has established a denial of access and legislative reaction to that denial.

Woe to those who make unjust laws, to those who issue oppressive decrees, to deprive the poor of their rights and withhold justice from the oppressed of my people, making widows their prey and robbing the fatherless.¹

Alabama is telling its citizens we don't think you should be able to recover.²

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¹ *Isaiah* 10:1-2 (NIV).

² University of Texas School of Law Professor William Powers, Jr. in testimony before the Texas State Senate Economic Development Committee on February 20, 1997. In 1997, the Texas State Senate was considering legislation specifically designed to eliminate or to substantially reduce the number of cases filed in Texas courts on behalf of asbestos victims in other states, and Professor Powers was explaining to the committee why thousands of Alabama cases had been filed in Texas courts. The committee hearings resulted in the enactment of legislation that amended the TEXAS CIVIL PRACTICE AND REMEDIES CODE in two ways. First, the new legislation added a borrowing statute to § 71.031, an existing provision governing claims arising out of state. Second, the new legislation amended one existing *forum non conveniens* provision, § 71.051, and added yet another, § 71.052. Texas Civil Practice and Remedies Code: Hearing on Senate Bill 220 Before the Senate Economic Development Comm., 1997 Leg., 75th Sess. (Tx. 1997). As a result of the 1997 legislation, it became virtually impossible to file and maintain in Texas any new action on behalf of Alabama toxic tort victims.

I. Introduction

Alabama ranks fourth in the nation for the production of toxic wastes and thirteenth for total toxic releases.³ It is therefore not surprising that Alabama ranks tenth in the nation in the incidence of lung cancer and sixteenth in the incidence of all cancers.⁴ It is estimated that by the end of 2004, approximately 24,270 Alabamians will have been diagnosed with cancer and 10,000 Alabamians will have died as a result of cancer.⁵ A substantial number of these cancer cases will be attributable to exposure to toxic substances, but most of these victims will find themselves locked out of Alabama courts.

This injustice stems from the Alabama Supreme Court's perverse interpretation of the applicable statute of limitations. Unlike other injury-producing events forming the basis for tort claims, exposure to a toxic substance does not immediately injure a person, but instead produces disease only after a long latency period. While the victim of an automobile accident can point to a specific date on which he sustained his injuries, a cancer patient who spent a career spanning decades working with and around toxic substances cannot. But because the Alabama Supreme Court deems toxic tort claims to accrue on exposure, the vast majority of such claims lapse before they have even manifested themselves. Literally adding insult to injury, the Alabama Supreme Court also prohibits the filing of any toxic tort claim until the victim has, in fact, been diagnosed with a disease. In essence, the court requires toxic tort victims

³ 2001 TOXICS RELEASE INVENTORY, United States Environmental Protection Agency, available at <http://www.epa.gov/tri/tridata/tri01/state/Alabama.pdf>.

⁴ THE BURDEN OF CHRONIC DISEASES AND THEIR RISK FACTORS, NATIONAL AND STATE PERSPECTIVES 2002, *Section II, The Burden of Heart Disease, Stroke, Cancer, and Diabetes, United States*, National Center for Chronic Disease Prevention and Health Promotion, Centers for Disease Control and Prevention, United States Department of Health and Human Services, available at http://www.cdc.gov/nccdphp/burdenbook2002/02_lungcancer.htm, (lung cancer incidence), http://www.cdc.gov/nccdphp/burdenbook2002/02_cancers.htm, (total cancer incidence).

⁵ CANCER FACTS & FIGURES 2004, American Cancer Society, "Estimated New Cancer Cases for Selected Cancer Sites by State, US, 2004," page 5; "Estimated Cancer Deaths for Selected Cancer Sites by State, US, 2004," page 6, available at http://www.cancer.org/downloads/STT/CAFF_finalPWSecured.pdf. The United States totals are estimated at 1,368,030 new cancers and 563,700 deaths.

to file their claims before they are entitled to do so. As a result, Alabama citizens are generally denied any meaningful opportunity to prosecute a toxic tort claim in Alabama,⁶ contrary to the due process provisions of both the Alabama and United States Constitutions. They must find other states in which to seek relief.

This interpretation of the law is so bizarre and so patently unjust that it is unique to Alabama. Starting with the United States Supreme Court's landmark decision in *Urie v. Thompson*,⁷ courts and commentators have almost universally agreed that a toxic tort claim accrues upon discovery of an illness caused by the toxic exposure:

The Supreme Court's acceptance in *Urie v. Thompson* of a discovery rule for Federal Employers' Liability Act cases was the genesis for its widespread acceptance in state-based tort claims. The reform has not been wildly controversial; beginning the statute of limitations clock at some other point, such as defendant's breach, plaintiff's initial exposure to the toxic agent, or the occurrence of some metaphysical "injury" that is neither detectable nor determinable, offends deep-seated notions of elemental fairness and justice. Unless one is willing (or desires) to deprive plaintiffs of their common law remedy in order to protect defendants, there is little to be said against adoption of a discovery rule. Virtually all commentators and the vast majority of courts are in agreement; the few ossified judges who have demurred on the adoption of a discovery rule have argued institutional function grounds—preferring to leave the matter to the legislature—rather than the merits.⁸

⁶ There are two notable exceptions, both created by federal law, to Alabama's limitations accrual problem. One exception is for cases brought under the Federal Employers' Liability Act (FELA), 45 U.S.C. §§ 51-60 (2000), which accrue on discovery. See *Urie v. Thompson*, 337 U.S. 163, 170, 69 S. Ct. 1018, 1025, 93 L. Ed. 1282, 1293 (1949). A second exception is created by section 309 of the COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION, AND LIABILITY ACT OF 1980 (CERCLA), 42 U.S.C. §§ 9601, 9658, which amends state statutes of limitations governing both personal injury and property damage actions arising out of exposure to any "hazardous substance" or "pollutant or contaminant" "released" into the "environment" from a "facility," as those terms are defined by CERCLA. Under section 309, the state statute of limitations continues to be applicable, but a federal "commencement date" (accrual date) based on discovery of the cause of action is substituted for the accrual date under the state statute, if it is earlier. However, under cases decided by the Alabama Supreme Court and other courts throughout the country, the pre-emptive accrual rule of section 309 is rarely applicable. CERCLA section 309 will be the subject of another article.

⁷ 337 U.S. 163, 69 S. Ct. 1018, 93 L. Ed. 1282 (1949). *Urie* is discussed more fully below. See *infra* section IX.

⁸ Michael D. Green, *The Paradox of Statutes of Limitations in Toxic Substances Litigation*, 76 CAL. L. REV. 965, 977-78 (1988) (citations omitted).

Sixteen years after Professor Green made this observation, the justices of the Alabama Supreme Court are now the only remaining “ossified judges who have demurred on the adoption of a discovery rule,” for Alabama is the only state in which a toxic tort claim is still deemed to have accrued, for the purposes of the statute of limitations, before there is a manifest present injury. In every one of the other forty-nine states and the District of Columbia, a toxic tort claim is deemed to accrue only after an injury has manifested itself.⁹

Alabama’s unique accrual rule in toxic tort cases has drawn the attention of other courts. For example, the Montana Supreme Court has observed that “the only state we have located which applies a continuing tort—or last on-the-job exposure—rule under any circumstances in determining when the statute of limitations begins to run in latent disease cases is Alabama.”¹⁰ Alabama earned this singular distinction through the efforts of its own Supreme Court, which just a quarter of a century ago issued perhaps the most illogical and manifestly unjust decision in the court’s entire history.

II. Precedent, Logic, and Justice Ignored: *Garrett v. Raytheon Co.*

In *Garrett v. Raytheon Co.*, the Alabama Supreme Court ruled that a cause of action for injuries caused by radiation exposure accrued, for limitations purposes, upon exposure to the radiation, even though the plaintiff’s illness did not develop until many years later.¹¹ The majority opinion begins by correctly acknowledging that a cause of action “accrues” as soon as the party in whose favor it arises is entitled to maintain an action thereon.¹² The opinion also acknowledges that under Alabama law, the act causing an injury and the injury itself may occur

⁹ For a complete listing of authorities establishing the accrual rule in other jurisdictions, see the Appendix, *infra*.

¹⁰ *Gomez v. State*, 293 Mont. 531, 539, 975 P.2d 1258, 1262-63 (1999).

¹¹ 368 So. 2d 516 (Ala. 1979), *superseded in part by statute as stated in Johnson v. Garlock, Inc.*, 682 So. 2d 25 (Ala. 1996).

¹² *Garrett*, 368 So. 2d at 518-19.

at two different times, and that the statute of limitations in such a case may accrue long after the act causing the injury.¹³

Incredibly, however, the *Garrett* decision then reasoned that because the court had previously specifically rejected the “discovery rule” in medical and professional malpractice suits,¹⁴ the cause of action brought by Jerry Kenneth Garrett for injuries resulting from his radiation exposure *must* have accrued when he was exposed to the radiation, not when he became ill, a position that was neither compelled by the cases cited by the majority opinion¹⁵ nor consistent with the court’s long-standing position on this issue. In reaching this remarkable conclusion, the majority opinion employed a tautology—that the injury occurred and the cause of action accrued on exposure because the injury “must have occurred” at that time “else defendant would not be liable.”¹⁶

This tautology provides no logical basis for failing to apply to toxic tort cases the well-established principle that an act or omission causing an injury and the injury itself do not necessarily occur on the same date. Indeed, under established precedent, discussed later in this section, the court should not have found that Jerry Kenneth Garrett’s action for radiation exposure had already accrued upon exposure unless he was entitled to bring a cause of action at that time. The majority opinion,

¹³ *Id.* at 519.

¹⁴ *Id.* at 520.

¹⁵ In concluding that the court had previously rejected the “Discovery Rule,” the *Garrett* decision relied on two earlier Alabama Supreme Court decisions involving medical malpractice. Neither of the medical malpractice opinions cited by the majority opinion was properly applicable to *Garrett*. In the first case, *Hudson v. Moore*, 239 Ala. 130, 194 So. 147 (1940), the court acknowledged that an action could have been brought at any time after the surgery that caused the injury. Thus, in contrast to *Garrett*, the cause of action in *Hudson* was immediately actionable. 194 So. at 148-49. In the second case, *Sellers v. Edwards*, 289 Ala. 2, 265 So. 2d 438 (1972), the court applied a medical malpractice statute with its own statute of limitations and a statutorily prescribed discovery accrual rule. See 1953 ALA. ACTS 766, 1027, published as Title 7, § 25(1), ALA. CODE 1940 (recompiled 1958), now codified as ALA. CODE § 6-5-482 (1975).

¹⁶ *Garrett*, 368 So. 2d at 520. To support its tautological reasoning, the majority opinion in *Garrett* mistakenly relies on *Home Insurance Co. v. Stuart-McCorkle, Inc.*, 291 Ala. 601, 285 So. 2d 468 (1973), a case in which the defendant’s tortious acts resulted in immediately identifiable and actionable damages but the plaintiff failed to bring any action until the more significant damages had become manifest. Thus, *Home Ins.* compels the result in *Garrett* only if exposure to radiation is itself actionable.

however, specifically rejected the notion that the cause of action could not have accrued until the plaintiff's injury had manifested itself.¹⁷

Significantly, the *Garrett* decision neither overruled the well-established principle that a cause of action does not accrue until the plaintiff is entitled to bring it, nor did it expressly establish a distinct exposure accrual rule for toxic tort cases. Instead the majority simply found as a matter of law that an injury had in fact occurred on exposure, without any medical or scientific basis and without any consideration of whether the plaintiff could have filed suit upon exposure. However, the effect of the *Garrett* decision has been to create a separate exposure accrual rule in toxic tort cases.¹⁸

The *Garrett* decision was invested with the authority of the court by a five-to-four margin,¹⁹ but the majority opinion was so illogical and so inconsistent with prior law that it spawned three dissenting opinions. The first of the dissenting opinions, authored by Justice Faulkner, points out that under "the majority reasoning, 'the man who buries a time bomb'

¹⁷ "The injury in this case occurred on the date or dates of exposure. This is not a case where an injury did not occur until it made itself manifest by its symptoms." *Garrett*, 368 So. 2d at 520-21. Although the majority opinion states that the plaintiff's exposure ended in 1957 and that he was first diagnosed in March, 1977, it does not indicate the date on which the plaintiff's symptoms were first manifested. Justice Faulkner's dissenting opinion clears up the mystery:

Garrett was allegedly exposed to radiation from 1955 to 1957, but his first physical problems did not appear until March, 1975. . . . In March, 1975, a solid patch of hair fell out of his head and he began to experience other physical problems such as increased aging and loss of body hair. Garrett consulted numerous doctors but the nature of his problem was not discovered until March, 1977, when a radiologist determined that the cause of his medical problems was exposure to radiation while in the Army.

Id. at 522.

¹⁸ In his dissent, Justice Faulkner concluded that this was the effect of the majority decision. *Garrett*, 368 So. 2d at 522. Two years later, in *Tyson v. Johns-Manville Sales Corp.*, 399 So. 2d 263, 268 (Ala. 1981), the court itself acknowledged that this was the effect of its holding in *Garrett*.

¹⁹ Justice James Nelson Bloodworth (elected 1968) wrote the majority opinion. Chief Justice Clement Clay Torbert, Jr. (elected 1976) and Justices Hugh Maddox (appointed 1969, elected 1970), Reneau Pearson Almon (elected 1974), and Thomas Eric Embry (elected 1974) concurred. Justices James Hardin Faulkner (elected 1972), Richard L. Jones (elected 1972), Janie Ledlow Shores (elected 1974), and Samuel Alston Beatty (elected 1976) dissented.

could argue successfully ‘that he could not be held responsible for a resulting death because the explosion and death of his victim did not occur until more than one year after he placed the bomb.’”²⁰ Justice Faulkner further observed that the court’s prior decisions did not compel the result reached by the majority, for the court had earlier determined that the date of an “injury” is not necessarily the same as the date of the injury-producing event.²¹ Ultimately, Justice Faulkner correctly concluded that because an injury “happens” only when physical damage manifests itself, a discovery accrual rule is consistent with the “traditional rule of accrual” and is necessary “to prevent a plaintiff’s remedy from being wholly elusive.”²²

In another dissenting opinion, Justice Shores argued that because mere exposure to radiation could not support a cause of action, exposure alone did not constitute an “injury.”²³ Justice Jones, in a third dissenting opinion, observed that the majority had mistakenly relied on a three-year-old holding in which the court was compelled to apply a statutory accrual rule applicable only to workers’ compensation cases.²⁴ After expressing frustration at his inability to persuade the majority that its decision in *Garrett* was illogical,²⁵ Justice Jones finally argued that the majority opinion in *Garrett* could be construed to mean that one exposed to radiation would be entitled to bring a cause of action at the time of exposure, even in the absence of any manifest injury.²⁶ In a final footnote, Justice Jones challenged the competence of the court to establish as a matter of law that the date of exposure was the date of injury.²⁷

²⁰ *Garrett*, 368 So. 2d at 522 (quoting *Ayers v. Morgan*, 154 A.2d 788 (Pa. 1959)).

²¹ *Id.*

²² *Id.* at 524.

²³ *Id.* at 526.

²⁴ In *Garren v. Commercial Union Ins. Co.*, 340 So. 2d 764 (Ala. 1976), the plaintiff claimed permanent and total disability by virtue of having continuously breathed dust and lint discharged from a contour trim machine that she had operated for many years for her employer, the principal defendant in the case. Because the claim was governed by the Workmen’s Compensation Act, the court was compelled to apply a statutorily defined exposure accrual rule applicable to claims under that act. *See* 1971 ALA. ACTS 668, 1379, 1383-1384; ALA. CODE tit. 26 § 313(42), now codified as ALA. CODE § 25-5-117 (1975).

²⁵ *Garrett*, 368 So. 2d at 527.

²⁶ *Id.* at 528.

²⁷ *Id.* at 528 n.2.

The majority opinion in *Garrett* not only made no sense, but it also contradicted well-established authority. Prior to *Garrett*, in the absence of specific statutory provisions to the contrary, a claim was not deemed to accrue until the plaintiff was entitled to maintain an action thereon. For more than a century before the *Garrett* decision, the Alabama Supreme Court had issued many decisions rejecting the notion that an injury-producing event and the injury it causes invariably occur, *ipso facto*, on the same date.

Alabama's traditional accrual rule can be traced to the ancient civil law maxim *contra non valentem agere nulla currit praescriptio*, which, according to the Louisiana Supreme Court,²⁸ literally means "prescription does not run against a person who could not bring his suit." In *Hopper v. Steele*, the Alabama Supreme Court cited this maxim to reverse a circuit court judgment holding that an action to recover a slave was time-barred because of the lapse of nineteen years.²⁹ In so ruling, the court observed that the statute of limitations "never begins to run unless there is some one in existence capable of suing."³⁰

Having borrowed this principle from the civil law, Alabama presumably should consider how it is applied to toxic tort cases arising in civil law jurisdictions. The Louisiana Supreme Court, in ruling that a toxic tort case accrues on discovery, has declared that the "doctrine of *contra non valentem agere nulla currit praescriptio* prevents the running of liberative prescription where the cause of action is not known or reasonably knowable by the plaintiff."³¹

This is consistent with the numerous cases in which the Alabama Supreme Court has found that an injury-producing event and the injury it caused did not occur on the same date. For example, in *West Pratt Coal Co. v. Dorman*, the plaintiff, who owned the surface rights to a lot, sued the owner of the mineral rights for damage resulting from subsidence of the surface.³² The plaintiff filed his action within one year after the

²⁸ *Cartwright v. Chrysler Corp.*, 255 La. 597, 603, 232 So. 2d 285, 287 (1970).

²⁹ 18 Ala. 828 (1851). The court quoted the Latin phrase as *contra non valentem agere non currit praescriptio*. *Hopper*, 18 Ala. at 831.

³⁰ *Hopper*, 18 Ala. at 831.

³¹ *Cole v. Celotex Corp.*, 620 So. 2d 1154, 1156 (La. 1993).

³² 161 Ala. 389, 49 So. 849 (1909).

subsidence of the surface, but more than one year after the mining activity that caused the subsidence. The Alabama Supreme Court ruled that the action had been timely filed.

In line with the authorities noted above, and the reasons upon which they proceed, we hold that a cause of action accrues to the owner of the upper soil when the failure of support by the underlying strata, through causes put into operation by mining them, interferes with the utility and enjoyment of the superincumbent soil.³³

Later, in *Kelley v. Shropshire*,³⁴ a case cited in the majority opinion in *Garrett*, the court distinguished between cases in which the statute of limitations is triggered by a tortious act and cases that accrue only when the plaintiff suffers some damages. The court declared that the cause of action accrues at the time of the tortious act only if that act itself constitutes a legal injury, without regard to damages.³⁵

Similarly, in *Corona Coal Co. v. Hendon*, the plaintiff sought compensation for damage to a heating plant that had rusted after the basement in which it was located had flooded.³⁶ The defendant tenant had failed to maintain the heating plant, and asserted that the plaintiff's action was untimely because it was filed more than one year after the flood. The Alabama Supreme Court sustained a demurrer to this defense, holding that the flood did not trigger the statute of limitations.³⁷

More recently, in *Brotherhood of Locomotive Firemen & Enginemen v. Hammett*, the defendant appealed a judgment rendered on a jury verdict for the plaintiff and asserted, *inter alia*, that the plaintiff's claim was untimely filed.³⁸ The plaintiff, who had continued working for a railroad during a strike, was ultimately fired by that railroad at the insistence of the defendant, the union that had organized the strike. The plaintiff filed

³³ *Id.* at 851.

³⁴ 199 Ala. 602, 75 So. 291 (1917).

³⁵ *Kelley*, 75 So. at 292.

³⁶ 213 Ala. 323, 104 So. 799 (1925).

³⁷ *Hendon*, 104 So. at 801 (stating that "time begins to run when the injury happens or damage accrues, and not from the date of the act causing the injury or damage").

³⁸ 273 Ala. 397, 140 So. 2d 832, *on subsequent appeal*, 144 So. 2d 58 (1962).

his lawsuit well within one year after he was fired, but more than one year after the strike had ended. The defendant union argued that the case had not been timely filed because it was based upon union actions that had ceased more than one year prior to the commencement of the case. In rejecting this argument, the court clearly reiterated the law that had been in place for well over a century, that “the time of limitation begins to run when the injury happens or damage accrues, and not from the date of the act causing the injury or damage.”³⁹

The *Garrett* decision ignored this established precedent,⁴⁰ was supported by a bare majority of the court, and was refuted by three compelling dissenting opinions. The stage was now set for a legislative act and a series of judicial opinions that, in an effort to make sense of *Garrett*, would compound its irrationality.

III. Reforming the Law and Deforming the Constitution: *Tyson v. Johns-Manville Sales Corp.*

After conceding that the court’s decision was contrary to “the weight of opinion generally,” the majority opinion in *Garrett v. Raytheon Co.* suggested that the legislature could change its rule.⁴¹ In 1980, the very next year, the Alabama legislature responded⁴²—at least in part—by passing legislation with a stated purpose

to assure that the statute of limitations for injuries or deaths caused by exposure to asbestos, including asbestos-containing products, does not run on any Alabama citizen before that citizen has at least the opportunity to discover that cause of action.

³⁹ *Hammett*, 140 So. 2d at 834-35.

⁴⁰ The decision in *Garrett* seems only to have affected toxic tort claims, for in subsequent decisions the court has continued to apply prior precedent. See text accompanying *infra* notes 87-96 (Section VI).

⁴¹ 368 So. 2d 516, 521 (Ala. 1979).

⁴² The Alabama legislature’s initial response occurred just six months after the January 26, 1979 *Garrett* decision. On July 30, 1979, 1979 ALA. ACTS 468, Vol. II, 855, was approved. That act, which was struck down by the Alabama Supreme Court, is discussed below. See *infra* section IX.

It is the intent of the Legislature that all Alabama citizens suffering the effects of any long-term disease process covered by this Bill should not be prevented by any statute of limitations from recovering the full measure of damages proximately caused by a third party tortfeasor which are allowable under any civil theory of liability, provided action is brought within the statutory period of limitation from the date of accrual.⁴³

To accomplish its stated objective, 1980 Ala. Acts 566 amended Alabama Code section 6-2-30 to establish a separate discovery accrual rule for asbestos cases. That section now provides that a cause of action for personal injury resulting from exposure to asbestos accrues “on the first date the injured party, through reasonable diligence, should have reason to discover the injury giving rise to such civil action.”⁴⁴ The act also expressly provided that it would apply retroactively “to all pending causes of action.”⁴⁵

Almost immediately after it was enacted, the asbestos industry challenged the new discovery accrual rule.⁴⁶ In *Tyson v. Johns-Manville Sales Corp.*,⁴⁷ the Alabama Supreme Court ruled that the retroactive application of Alabama Code section 6-2-30(b) violated section 95 of the Constitution of Alabama of 1901, which, according to the *per curiam* opinion of the court, prohibited the revival of any action already barred by law. To reach this conclusion, the court first determined that for any plaintiff whose exposure to asbestos did not continue through May 19, 1979, the defendants had a vested right to rely on the old statute of limitations as a defense to the action.⁴⁸ This conclusion, however, is

⁴³ 1980 ALA. ACTS 566, Vol. II, 876, § 1.

⁴⁴ *Id.* § 2; ALA. CODE § 6-2-30(b) (1975).

⁴⁵ 1980 ALA. ACTS 566, Vol. II, 876, 877, § 3.

⁴⁶ The asbestos industry was well represented in *Tyson*, for the list of appearances made on their behalf is a virtual Who’s Who of the premier defense firms of Alabama and the southeastern United States. No fewer than twenty lawyers and seventeen law firms represented the seventeen defendants, in contrast to the single firm and two lawyers that represented all of the plaintiffs in the consolidated appeal.

⁴⁷ 399 So. 2d 263 (Ala. 1981).

⁴⁸ *Tyson*, 399 So. 2d at 270. In contrast, the court had previously ruled that a plaintiff does not have a vested right to any particular limitations period, at least with respect to statutorily created causes of action. *Cronheim v. Loveman*, 225 Ala. 199, 142 So. 550 (1932). There is no legitimate basis for holding that a defendant has a

contrary to both the language of section 95 itself and the earliest cases interpreting it. Section 95 reads in its entirety as follows:

There can be no law of this state impairing the obligation of contracts by destroying or impairing the remedy for their enforcement; and the legislature shall have no power to revive any right or remedy which may have become barred by lapse of time, or by any statute of this state. After suit has been commenced on any cause of action, the legislature shall have no power to take away such cause of action, or destroy any existing defense to such suit.⁴⁹

Both the title of section 95, “Impairment of contracts—Revival of actions,” and its express language suggest that it is applicable in only two circumstances—where causes of action involve contract rights and where causes of action have already been commenced.

The second clause of the first sentence of section 95, upon which the *Tyson* decision relied,⁵⁰ states that “the legislature shall have no power to revive any right or remedy which may have become barred by lapse

vested right in a statute of limitations, but a plaintiff does not, and the fact that *Cronheim* concerned a statutorily-created cause of action is a meaningless distinction in light of the court’s position that even a statutorily-created cause of action may become vested once it has accrued. *Reed v. Brunson*, 527 So. 2d 102 (Ala. 1988).

⁴⁹ ALA. CONST. of 1901, art. IV, § 95.

⁵⁰ An argument may be made that the holding in *Tyson* is merited (a) by interpreting the words “pending causes of action” in section 3 of 1980 ALA. ACTS 566 to refer only to “pending actions” (*i.e.*, actions already filed and pending as of the date of enactment) and (b) by deeming the second sentence of section 95, which does not mention impairment of contracts, to apply to non-contract claims. Retroactive application of Alabama Code section § 6-2-30(b) could then be deemed to violate the second sentence of section 95, which prohibits the legislature from destroying an existing defense “[a]fter suit has been commenced on any cause of action.” ALA. CONST. art. IV, § 95 (emphasis added). In the context of *Tyson*, however, this interpretation fails. First, nothing in the language of the second sentence of section 95 or in cases interpreting it suggest that it should apply to non-contract claims. Second, the *Tyson* court itself did not interpret section 3 of 1980 ALA. ACTS 566 to apply only to actions filed as of the date of enactment. Third, such a narrow interpretation of section 3 is inconsistent with the broad legislative intent expressed in the act. Finally, such an interpretation of section 3 is inconsistent with subsequent cases, including *Cazalas v. Johns-Manville Sales Corp.*, 435 So. 2d 55 (Ala. 1983), discussed below in the section entitled “Continuing Debate About Continuous Torts: *Cazalas v. Johns-Manville Sales Corp.*” in which the court applied section 6-2-30(b) to cases filed after the enactment of 1980 ALA. ACTS 566. Thus, the holding in *Tyson* is merited only if it is consistent with the express language in the first sentence of section 95 and the cases interpreting that language.

of time, or by any statute of this state.”⁵¹ This clause is the second half of a sentence that begins with a specific prohibition against the impairment of contract rights. Indeed, the cases interpreting this language before the *Tyson* decision apply section 95 only in the context of vested contract or property rights. In *Scheuing v. State*, a candidate who lost an election for sheriff of Cullman County challenged the retroactive effect of an act of the legislature that effectively eliminated his contest of the election.⁵² The candidate argued that the retroactive application of the new statute to his existing election contest violated section 95.⁵³ In dismissing this argument, the Alabama Supreme Court specifically held that section 95 applies only to vested contract or property rights,⁵⁴ and that retroactive legislation that does not affect such rights is not prohibited by section 95.⁵⁵

In *Barrington v. Barrington*, the court noted that retroactive statutes that are remedial in nature are not disfavored by the law, and that even statutes that “impose unanticipated disabilities or alterations of legal status” are not unconstitutional unless they impair the obligation of contracts or prescribe punishment *ex post facto*.⁵⁶ Thus, under *Barrington*,

⁵¹ ALA. CONST. of 1901, art. IV, § 95.

⁵² 177 Ala. 162, 59 So. 160 (1912).

⁵³ *Scheuing*, 59 So. at 160.

⁵⁴ The author could find no case holding that there is any property interest in the bar of a statute of limitations. In contrast, it is clear that the United States Supreme Court does not consider the revival of a barred action to unconstitutionally affect property rights. *Chase Sec. Corp. v. Donaldson*, 325 U.S. 304, 65 S. Ct. 1137, 89 L. Ed. 1628, *reh'g denied*, 325 U.S. 896 (1945). But if a case has actually been dismissed based on a statute of limitations, then the party in whose favor the dismissal was granted may have a right to rely on that adjudication. “The rules of finality, both statutory and judge made, treat a dismissal on statute-of-limitations grounds the same way they treat a dismissal for failure to state a claim, for failure to prove substantive liability, or for failure to prosecute: as a judgment on the merits.” *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 228, 115 S. Ct. 1447, 1457, 131 L. Ed. 2d 328, 348 (1995).

⁵⁵ *Scheuing*, 59 So. at 162.

⁵⁶ 200 Ala. 315, 76 So. 81 (1917). *Barrington* was a divorce case in which the plaintiff wife relied upon a recently-enacted statute that authorized a divorce “when the wife without support from [her husband] has lived separate and apart from the bed and board of the husband for five years next preceding the filing of the bill, and she has bona fide resided in this state during all of said period.” *Id.* (quoting Sess. Acts 1915, at 370). Although the wife had lived “separate and apart” for five years, the statute authorizing divorce under such circumstances had not been in effect for five years at the time she

even though 1980 Alabama Acts 566 changed the accrual rule affecting asbestos personal injury actions and therefore imposed upon defendants “unanticipated disabilities or alterations of legal status,” the act did not “offend the Constitution by impairing the obligation of a contract or by creating a crime or punishment *ex post facto*,” and its retroactive effect therefore should be sustained if, “by its express terms, or by unmistakable implication, the Legislature must have so intended” such retroactive effect.⁵⁷ There is no question that the legislature intended 1980 Alabama Acts 566 to have a retroactive effect.⁵⁸

The restrictive interpretation given to section 95 by *Scheuing* and *Barrington* was not confined to early cases. Just twelve years prior to its decision in *Tyson*, the Alabama Supreme Court ruled that section 95 does not apply to matters of form or to statutes that are remedial in nature.⁵⁹ In *State Board of Optometry v. Lee Optical Co. of Alabama*, the State Board of Optometry filed a suit seeking to enjoin the defendant’s unlawful practice of optometry, but the trial court dismissed the suit because the

filed the case. The defendant husband demurred, asserting that to permit divorce under the recently-enacted statute would therefore constitute a constitutionally prohibited retroactive application of a statute that was not on its face retroactive. The court agreed, stating “We are, upon these considerations, constrained to hold that the statute in question authorizes the divorce here sought only upon the lapse of five years from and after the date of its enactment—September 10, 1915.” *Barrington*, 76 So. at 84. The statute under consideration in *Barrington*, however, is readily distinguishable from 1980 ALA. ACTS 566, which is not only expressly retroactive but also does not alter *vested* rights (*i.e.*, contract or property rights). In contrast, the statute under consideration in *Barrington* was not expressly retroactive, and it did alter vested property rights: “The legislative act here involved is not remedial in character, but gives legal effect to marital conduct and relations, by converting any complete separation between husband and wife for five years next before the filing of the bill of complaint, into an authorized ground of divorce in favor of the wife, if she has so lived without support from him. It falls fairly within the class of acts whose retrospective operation is so strongly disfavored by the law, and so consistently reprobated by the courts.” *Id.* at 82.

⁵⁷ *Barrington*, 76 So. at 82.

⁵⁸ 1980 ALA. ACTS 566, Vol. II, 876, 877, § 3.

⁵⁹ See *State Board of Optometry v. Lee Optical Co. of Alabama*, 284 Ala. 562, 226 So. 2d 623 (1969). The United States Supreme Court, in considering whether the revival of a barred claim was constitutionally impermissible, has explicitly acknowledged that “statutes of limitation go to matters of remedy, not to destruction of fundamental rights.” *Chase Sec. Corp. v. Donaldson*, 325 U.S. 304, 314, 65 S. Ct. 1137, 1142, 89 L. Ed. 1628, 1636 (1945). The Court therefore concluded “it cannot be said that lifting the bar of a statute of limitations so as to restore a remedy lost through mere lapse of time is *per se* an offense against the Fourteenth Amendment.” *Donaldson*, 325 U.S. at 316.

Board had no statutory authority to seek injunctive relief.⁶⁰ On appeal—after submission of briefs—the Board filed a motion to remand, citing a new statute⁶¹ that invested the Board with the previously lacking authority. In rejecting the defendant’s assertion that section 95 prohibited retroactive application of the new statute, the court stated, “We have held that the provisions of § 95 . . . apply only to matters of substance and not to matters of form or to statutes which are remedial in nature.”⁶²

Although the *Tyson* court did cite its earlier decisions in *State Board of Optometry* and *Barrington*, it ignored the effect of these earlier rulings and simply stated, “we have not heretofore addressed the question of whether the running of a statute of limitations creates a vested right in that defense.”⁶³ The *Tyson* court also omitted altogether any mention of its decision in *Scheuing*, the leading case interpreting section 95.⁶⁴ The decision in *Tyson* was wrong, and section 95 should not have been deemed to invalidate the retroactive application of Alabama Code section 6-2-30(b).⁶⁵

⁶⁰ *State Board of Optometry*, 226 So. 2d 623.

⁶¹ 1967 ALA. ACTS 509, Vol. II, 1225, currently codified, with minor changes, as subsections (a) and (b) of ALA. CODE § 6-6-503 (1975).

⁶² *State Board of Optometry*, 226 So. 2d at 625.

⁶³ *Tyson v. Johns-Manville Sales Corp.*, 399 So. 2d 263, 269 (Ala. 1981).

⁶⁴ The *Tyson* decision also failed to cite another important case relevant to the interpretation of section 95. In *Floyd v. Wilson*, the court sustained a demurrer to a claim added by amendment to a pending lawsuit, ruling that the enlargement of the statute of limitations after the claim had become time-barred violated section 95. 171 Ala. 139, 54 So. 528 (1911). However, section 95 was clearly applicable in that case because the new claim fit both of the two categories of legislative action governed by section 95, in contrast to toxic tort claims, which fit neither. First, the new claim was added to pending litigation, and therefore destroyed an existing defense “after suit [had] been commenced,” contrary to the second sentence of section 95. Second, the new claim was a statutorily-created claim involving property rights, and thereby subject to the first sentence of section 95 under the decision in *Scheuing v. State*, 177 Ala. 162, 59 So. 160 (1912), discussed above. To the extent that section 95 of the 1901 constitution is based on the law already in existence in 1901, its interpretation has remained consistent. *Martin v. Martin*, 35 Ala. 560 (1860), which was a contract case, the court stated: “[I]t is an established principle, that the repeal of a statute of limitations does not impair a bar perfected before the repeal.” *Id.* at 568. This decision is consistent with the express language in section 95 limiting its own application to contract claims and actions that have already been commenced.

⁶⁵ Even assuming, arguendo, that the *Tyson* decision was correct, section 95 would not preclude the retroactive application of ALA. CODE § 6-2-30(b) (1975) if the statute of limitations is constitutionally invalid. See *infra* section IX. A cause of action cannot

IV. Logic Confounded and Injustice Compounded: The *Thomas* and *Hinton* Decisions

The failed logic of the majority opinion in *Garrett v. Raytheon Co.*⁶⁶ and the injustice that has resulted from that decision have been compounded by subsequent decisions of the court. In *Thomas v. BSE Industrial Contractors Inc.*,⁶⁷ the court affirmed a summary judgment against a plaintiff that had been exposed to asbestos but had not developed any asbestos-related disease. The plaintiff had been hired to install heaters by hanging them from insulated pipe, but no one had warned him that the insulation contained significant amounts of asbestos. Because of this, the plaintiff did not wear any protective respiratory devices or protective clothing while working on the project.⁶⁸ Upon learning that he had been exposed to significant quantities of asbestos, the plaintiff sued several defendants, asserting that “given the vast amount of medical evidence now available concerning the deleterious effects of asbestos, the actions of the defendants constitute ‘extreme and outrageous’ conduct.”⁶⁹ The court, however, ruled that the defendants’ conduct “cannot be characterized as extreme and outrageous conduct.”⁷⁰ In affirming the summary judgment motion, the court found that Thomas had not been injured by his exposure, a statement that is nothing short of stunning in view of the holdings in *Garrett* and *Tyson*⁷¹ that a toxic tort claim accrues on exposure. In *Garrett*, the court had employed a tautology to find, as a matter of law, that the injury “must have occurred at the time of exposure else defendant would not be liable.”⁷² But the court in *Thomas* declared:

be “revived” if it is not time-barred. *State v. Burks*, 454 So. 2d 1038, 1040-41 (Ala. Civ. App. 1984).

⁶⁶ 368 So. 2d 516, 521 (Ala. 1979).

⁶⁷ 624 So. 2d 1041 (Ala. 1993).

⁶⁸ *Thomas*, 624 So. 2d at 1042-43.

⁶⁹ *Id.* at 1044.

⁷⁰ *Id.* at 1045.

⁷¹ 399 So. 2d 263.

⁷² *Garrett*, 368 So. 2d at 520.

Thomas presented no substantial evidence that he had suffered emotional distress so severe that a reasonable person could not be expected to endure it. Thomas alleged in his complaint that he is afraid that he will contract cancer because of his exposure to asbestos, and he testified that he feels like a “walking time bomb.” These generalized apprehensions do not rise to the level of the extreme, severe emotional distress for which an action will lie, at least because *his apprehensions are not supported by any clinical indications that he has been injured by his exposure.*⁷³

Similarly, in *Hinton v. Monsanto Co.*, a plaintiff that had been exposed to polychlorinated biphenyls (PCBs) but had not yet developed any disease sued the PCB manufacturer for medical monitoring on behalf of a class of exposed individuals.⁷⁴ Because the plaintiff had filed the case within two years after exposure, the timeliness of the complaint was not in question. Instead, the court was now considering whether an injury had occurred—a cause of action had accrued—sufficient to support a lawsuit. In an opinion authored by Justice Stuart, the Alabama Supreme Court declared that “Alabama law has long required a manifest, present injury before a plaintiff may recover in tort.”⁷⁵ In applying this principle, the court declared that, although they had been exposed to PCBs, Hinton and the other class members had not yet been *injured*.⁷⁶

⁷³ *Thomas*, 624 So. 2d at 1045 (emphasis added).

⁷⁴ 813 So. 2d 827 (Ala. 2001). “Hinton does not allege that he has sustained a physical injury or an illness as a result of his exposure to PCBs; rather, he seeks to recover the costs of medical monitoring he alleges is necessitated by that exposure. He claims that this need for medical monitoring constitutes a harm sustained by him and that this harm is a result of Monsanto’s tortious act of releasing PCBs into the environment.” *Hinton*, 813 So. 2d at 828.

⁷⁵ *Hinton*, 813 So. 2d at 829. Chief Justice Moore and Justices Houston, See, Johnstone, Lyons, Brown, Harwood, and Woodall all either concurred or concurred in the result. Justice Lyons wrote a separate concurring opinion. There was no dissent.

⁷⁶ *Id.* at 828.

The most striking aspect of Hinton’s claim is the lack of a present physical injury or illness among the putative class members. Because the class members do not purport to have a present injury or illness, we are asked to determine whether exposure to a hazardous substance, without a present injury attributable to that exposure, gives rise under Alabama law to a cognizable claim for medical monitoring of the class members. As the question is phrased by the United States District Court, we are asked to determine whether Alabama law recognizes a distinct cause

Because the majority opinion in *Hinton* does not even cite *Garrett*, it is unclear whether the court gave any consideration to the combined effect of the *Garrett* and *Hinton* opinions. Under *Garrett* and *Tyson*, the toxic tort victim's claim accrues, for statute of limitations purposes, upon exposure. Under *Thomas* and *Hinton*, however, the toxic tort victim may not bring an action until he has a "manifest present injury." And although Justice Lyons' concurring opinion in *Hinton* does cite *Garrett*, it appears that he misconstrued its principal holding⁷⁷ because he cites dicta in *Garrett* as authority for the proposition that "absent a physical injury, a cause of action has not accrued."⁷⁸

Whatever the intentions of the court, when considered in light of the fact that most toxic exposures only cause disease decades after exposure, the *Garrett*, *Tyson*, *Thomas*, and *Hinton* decisions together stand for the singularly illogical and manifestly unjust proposition that a toxic tort victim in Alabama must bring his cause of action long before he is entitled to do so.

V. Playing the Hokey Pokey with *Garrett*: *Spain v. Brown & Williamson Tobacco Corp.*

Suppose that an individual's exposure to a harmful product continues through and including the date on which he is diagnosed with disease.

of action for medical monitoring in the absence of a manifest physical injury or illness. We answer the question in the negative.

Id.

⁷⁷ That Justice Lyons misconstrued the holding in *Garrett* is suggested by the emphasis that he put on certain words quoted from *Garrett*: "We conclude that it begins to run when the plaintiff is exposed to radiation *and an injury occurs.*" *Hinton*, 813 So. 2d at 832 (quoting *Garrett*, 368 So. 2d at 517-18) (emphasis added). Justice Lyons' emphasis on the words "and an injury occurs" suggests that he interpreted *Garrett* as requiring an injury separate and apart from mere exposure to start the statute of limitations running. That Justice Lyons misconstrued the holding in *Garrett* is also suggested by his statement that "[t]he array of practical difficulties presented by a claim based on recognition of a theory of such early accrual of a cause of action should await another day." *Id.* Implicit in this suggestion is the notion that the court had not already considered "such early accrual of a cause of action." *Id.*

⁷⁸ *Hinton*, 813 So. 2d at 832.

Because his last exposure to the toxic substance is recent, his action should not be barred under *Garrett* and *Tyson v. Johns-Manville Sales Corp.*⁷⁹ And because he has a manifest present injury, his action should not be barred under *Thomas* and *Hinton*. But will the Alabama Supreme Court permit him to bring that cause of action? Unfortunately, the answer is once again “no.”

Exposure to a large number of carcinogens through smoking tobacco products is probably the most common case in which exposure to a harmful product typically continues at least through diagnosis with disease. But the Alabama Supreme Court has created yet another twist in the law in order to bar the courthouse doors to victims of disease induced by smoking cigarettes.⁸⁰ In *Spain v. Brown & Williamson Tobacco Corp.*, a wrongful death action arising out of a smoking-induced lung cancer, the decedent had started smoking in 1962, had shortly thereafter become addicted to cigarettes, had been diagnosed with lung cancer in 1998, and had died in 1999.⁸¹ A wrongful death action was filed almost immediately, well within two years after the decedent’s death.⁸² After the case was removed to federal court, it was dismissed for failure to state a claim. The plaintiff then appealed to the United States Court of Appeals for the Eleventh Circuit, which certified a number of questions to the Alabama Supreme Court, including the following question: “When does the Alabama statute of limitations for claims brought under the [Alabama Extended Manufacturer’s Liability Doctrine], and claims premised on negligence, wantonness, breach of warranty and conspiracy begin to run in a smoking products liability case?”⁸³

The Alabama Supreme Court responded by holding that “the statutory limitations period begins to run at the moment a smoker recognizes that

⁷⁹ 399 So. 2d 263 (Ala. 1981).

⁸⁰ Ironically, though the courthouse doors have been closed to smokers, the State of Alabama was not barred in its action to recover against the tobacco companies. In 1998, the State of Alabama filed suit against several tobacco companies seeking to recover tobacco-related damages and ultimately settled its claims for \$3 billion. *State v. Am. Tobacco Co.*, 772 So. 2d 417, 427 (Ala. 2000).

⁸¹ 872 So. 2d 101, 105 (Ala. 2003).

⁸² *Spain*, 872 So. 2d at 105.

⁸³ *Id.* at 103.

he or she has become addicted.”⁸⁴ The basis of this holding was the court’s conclusions that addiction to nicotine is a compensable injury⁸⁵ and that the subsequent occurrence of “other damages,” including “injury to the person” does not defeat the accrual of the claim.⁸⁶

At first examination, the decision in *Spain* appears to be consistent with the decision in *Garrett*. In both cases, the court held that a cause of action for injury caused by a toxic exposure accrued long before any injury was suffered. In fact, however, the two decisions are logically incompatible. Because the exposure to tobacco it was considering continued at least through diagnosis, the *Spain* court was bound by *Garrett* to find that the case was timely filed. Instead, the decision in *Spain* muddied the already murky waters by applying the long line of cases holding that a statute of limitations begins to run when the plaintiff is first entitled to maintain an action—cases that were cited but not followed in *Garrett*.

Under the rationale advanced in *Spain*, Jerry Kenneth Garrett should have been permitted to prosecute his claim for radiation poisoning. Under the rationale advanced in *Garrett*, Paul L. Spain should have been permitted to prosecute the wrongful death claim he brought on behalf of his deceased wife, Carolyn Watts Spain. Indeed, only one conclusion can square the decisions in *Garrett* and *Spain*—that it is the public policy of Alabama to discourage all personal injury and wrongful death claims arising out of toxic exposures.

Unfortunately, as a result of the decision in *Spain*, *Garrett* is now cited for two diametrically opposed positions in toxic tort personal injury actions. *Garrett* itself holds that in those cases in which the exposure ended long before the victim sustained an actual injury, the claim is deemed to have accrued on exposure. However, in those cases in which exposure has continued at least through diagnosis with an injury, the court does not apply the actual holding in *Garrett*, but instead cites *Garrett* for the proposition that the cause of action accrued when the plaintiff was

⁸⁴ *Id.* at 115.

⁸⁵ The decision was not without dissent, and three Justices expressed their disagreement with the notion that addiction to nicotine constitutes a compensable injury, including Chief Justice Moore, *Spain*, 872 So. 2d at 116-17, Justice Johnstone, *Id.* at 120, and Justice Woodall, *Id.* at 138.

⁸⁶ *Spain*, 872 So. 2d at 114.

first entitled to maintain an action thereon—a position that the *Garrett* court itself did not apply. In both cases, the result is that toxic tort personal injury victims are denied any remedy for their injuries in the courts of Alabama.

VI. Valuing Property Over People: *Payton v. Monsanto Co.*

The Alabama Supreme Court's apparent hostility to personal injury claims arising out of toxic exposures stands in stark contrast to its attitude toward property damage cases arising out of the same toxic exposures.⁸⁷ In property damage cases, the court cites *Garrett* as support for yet a third position—that a cause of action for property damage resulting from toxic exposure accrues not on exposure, nor even on *discovery* of an injury, but rather on *actual knowledge* of an injury. In reaching this result, the court cites as its authority not the actual decision in *Garrett*, but rather the dicta cited in that opinion.

In writing the court's opinion in *Payton v. Monsanto Co.*, Justice Lyons cited *Garrett* as controlling “the question when the statute of limitations begins to run when the date of the act differs from the date of the injury.”⁸⁸ In *Payton*, the plaintiff class members owned land on Lay Lake that had been contaminated by PCBs released from the Monsanto plant in Anniston.⁸⁹ Monsanto asserted that the plaintiffs' claims were barred both by the prohibition against double recovery and by the statute of limitations because the plaintiffs had settled identical claims against another defendant in litigation concluded in 1993, four years before they sued

⁸⁷ The court's generous attitude toward property owners is not restricted to toxic exposures. Three property damage cases decided before *Garrett* were discussed above in the first section of this Article. See *West Pratt Coal Co. v. Dorman*, 161 Ala. 389, 49 So. 849 (1909); *Kelly v. Shropshire*, 199 Ala. 602, 75 So. 291 (1917); *Corona Coal Co. v. Hendon*, 104 So. 799, 213 Ala. 323, 104 So. 799 (1925). That *Garrett* did not affect the court's continued generosity toward property owners is evidenced by several cases. See, e.g., *McWilliams v. Union Pac. Resources Res. Co.*, 569 So. 2d 702 (Ala. 1990).

⁸⁸ 801 So. 2d 829, 835 (Ala. 2001).

⁸⁹ *Payton*, 801 So. 2d at 835.

Monsanto.⁹⁰ The plaintiffs argued that, even though Monsanto's wrongful acts occurred before the plaintiffs' earlier settlement, the damages that resulted from those acts did not occur until 1997, when a "fish advisory" was issued.⁹¹ The court declined to accept Monsanto's argument that the case was time-barred, holding instead that "proof of conduct occurring within the limitations period" would trump a limitations defense because the partial summary judgment in the prior litigation "could not cut off Payton's right to claim damages for acts occurring before the settlement but first causing injury thereafter."⁹²

Justice Lyons' opinion in *Payton* thus marks a dramatic departure from the rationale in both *Garrett* and *Spain*. In *Garrett*, the court rejected discovery as the basis of accrual and ruled that a cause of action accrued at the time of exposure, regardless of the fact that the plaintiff had not yet suffered any actual injury. Although the *Spain* decision purports to rely on *Garrett*, the court rejected the notion that the cause of action accrued on exposure, ruling instead that it accrued when the plaintiff first became addicted to cigarettes. Significantly, the *Spain* decision also rejected the notion that the tort was a continuing tort, even though the decedent's exposure continued through, and her principal damages occurred at, a time well within the statutory limitations period. In stark contrast, the court in *Payton* once again cited *Garrett* as authority, but this time applied both a discovery accrual rule and a continuing tort theory to the action.

Although it does not concern toxic substances, another decision penned by Justice Lyons provides additional insight into the manner in which the court has applied *Garrett* in cases involving property. That opinion, *Ex parte Floyd*, also cited *Garrett* for the proposition that an act causing an injury and the injury itself may occur on two separate dates.⁹³ The issue in *Ex parte Floyd* was whether a mortgagee's claim against a notary

⁹⁰ *Id.* at 831.

⁹¹ *Id.* at 832. The Alabama Department of Public Health issues fish consumption advisories based on an examination of the level of contaminants found in fish by the Alabama Department of Environmental Management. Alabama Department of Public Health, "Alabama Waterways Fish Advisories," available at <http://www.adph.org/risk/default.asp?templatenbr=0&deptid=145&templateid=1349>.

⁹² *Id.* at 836.

⁹³ 796 So. 2d 303 (Ala. 2001).

public was time-barred. The mortgagor had forged the mortgagee's signature on a satisfaction of mortgage and had filed it with the probate court. The mortgagee did not discover the forged instrument until a second mortgagee foreclosed its mortgage and intervened in a lawsuit between the original mortgagee and the mortgagor. The original mortgagee filed suit against the notary and the underwriter that issued her bond, claiming that the notary had breached her duties by notarizing a forged instrument. The suit was filed within two years after the foreclosure and intervention of the second mortgagee but more than two years after the forged mortgage satisfaction had been notarized and recorded, and the defendants therefore argued that the suit was not timely filed.⁹⁴

The defendants' argument is not only consistent with Alabama law, including the dicta in *Garrett* favored by Justice Lyons, but it makes sense from a public policy perspective. First, it is not an argument that an injury always occurs on the date of the act causing the injury, but instead relies on the traditional rule that a plaintiff's cause of action accrues when the plaintiff first has the right to bring an action. Once the forged mortgage satisfaction was filed, the original mortgagee was entitled to file suit. Second, even if a more liberal "discovery" rule had been applied, the action should have been barred. The original mortgagee should have discovered the forged mortgage satisfaction when it was recorded because it had then become a matter of public record.⁹⁵ However, after conceding that the act causing the injury occurred when the mortgage satisfaction was notarized and recorded, the court departed from precedent, even the cases cited in Justice Lyons' opinion, and ruled that an injury did not occur until the plaintiff had *actual knowledge* of its injury.⁹⁶

Justice Lyons cloaks his opinion in *Floyd* in the language of the traditional rule and asserts that the original mortgagee was first injured when the second mortgagee recorded its foreclosure deed and intervened in the original mortgagee's suit against the mortgagor. However, his conclusion that no injury occurred until that time is contradicted by his own acknowledgment that the recording of the mortgage satisfaction placed "a cloud" on the original mortgagee's interest in the property.

⁹⁴ *Floyd*, 796 So. 2d at 307.

⁹⁵ *See, e.g.*, *Pittman v. Pittman*, 247 Ala. 458, 25 So. 2d 26 (1945).

⁹⁶ *Floyd*, 796 So. 2d at 308-09.

Comparing the results in *Garrett*, *Tyson*, and *Spain* against the results in *Payton* and *Floyd* yields the almost inescapable conclusion that Alabama law places a higher value on protecting property rights than it does on protecting human life. Thus, a chemical company that dumps cancer-causing chemicals into a creek over a period spanning decades, and then shuts its doors, would, under existing Alabama law, be amenable to suit in Alabama by affected property owners on discovery of the damage, but not by individuals that succumbed to diseases caused by exposure to the dumped chemicals if their exposure ended more than two years prior to diagnosis with a disease.

VII. Continuing Debate about Continuous Torts: *Cazalas v. Johns-Manville Sales Corp.*

By striking down the retroactive effect of 1980 Alabama Acts 566, the decision in *Tyson v. Johns-Manville Sales Corp.*⁹⁷ created an arbitrary distinction between asbestos personal injury plaintiffs based solely on when they were last exposed to asbestos. The court had ruled that the legislature could not lawfully revive the cases of plaintiffs whose cases were already time-barred when 1980 Alabama Acts 566 became effective on May 19, 1980. Because the statute of limitations then in effect was one year,⁹⁸ *Tyson* effectively barred the cases of plaintiffs whose exposure to asbestos occurred prior to May 19, 1979, one year prior to the effective date of the Act. Conversely, because the cases of plaintiffs whose exposure to asbestos continued after May 19, 1979 were not yet time-barred on the effective date of the Act, they were thereafter entitled to invoke the new discovery accrual rule created by that Act.

The *Tyson* decision, however, did not specifically address mixed exposures; exposures beginning before May 19, 1979 and ending sometime after May 19, 1979. It was not long before the asbestos industry,⁹⁹

⁹⁷ 399 So. 2d 263 (Ala. 1981).

⁹⁸ The one-year statute of limitations then in effect, ALA. CODE § 6-2-39 (1975), was repealed in 1984. Personal injury claims are now governed by the two-year statute of limitations contained in section 6-2-38(l). ALA. CODE § 6-2-38(l) (1975).

⁹⁹ As in *Tyson*, the asbestos industry was very well represented in *Cazalas*, in which 26 lawyers and 25 law firms entered appearances on behalf of the 23 defendants, in

flush with its victory in *Tyson*, sought in *Cazalas v. Johns-Manville Sales Corp.*,¹⁰⁰ to further limit the ability of injured Alabama plaintiffs to seek compensation by asserting that a plaintiff invoking the new discovery accrual rule could only recover for the portion of his injuries actually caused by exposure occurring after May 19, 1979. Most asbestos manufacturers had ceased producing asbestos-containing products sometime prior to 1979,¹⁰¹ and the manufacturers hoped that the court would permit each plaintiff to recover no more than the portion of his injury attributable to his exposure to asbestos after May 19, 1979. The court's decision did not fulfill the asbestos manufacturers' expectations.

In an opinion authored by Justice Faulkner, who wrote the leading dissent in *Garrett*,¹⁰² the court rejected the industry argument and ruled in *Cazalas* that a plaintiff exposed to asbestos after May 19, 1979 may recover for all injuries proximately caused by his exposure to asbestos, even those that may be attributed to exposure prior to May 19, 1979. Consequently, any plaintiff whose exposure to asbestos-containing products continued through May 19, 1979 may take advantage of the discovery accrual rule.¹⁰³ In reaching this decision, the court reasoned

contrast to the two lawyers that represented all of the 25 plaintiffs in their appeal. The 23 defendants, most of whom are now bankrupt, were Armstrong World Industries; Atlas Turner, Inc.; The Babcock & Wilcox Co.; Pittsburgh Corning Corp.; Celotex Corp.; Combustion Engineering, Inc.; Eagle-Picher Industries; Fibreboard Corp.; The Flintkote Co.; Forty-Eight Insulations, Inc.; Foster Wheeler Corp.; GAF Corp.; Garlock, Inc.; H.K. Porter Co.; Keene Corp.; National Gypsum Co.; Nicolet, Inc.; Owens-Illinois, Inc.; Owens-Corning Fiberglas Corp.; Raymark Industries; Rock Wool Manufacturing; Standard Insulations, Inc.; and United States Gypsum Co.

¹⁰⁰ 435 So. 2d 55, 58 (Ala. 1983).

¹⁰¹ Asbestos production and usage in the United States both peaked in about 1973. United States production and usage during the twentieth century are described in *WORLDWIDE ASBESTOS SUPPLY AND CONSUMPTION TRENDS FROM 1900 TO 2000*, by Robert L. Virta, U.S. Dep't of the Interior, U.S. Geological Survey Open-File Report 03-83, page 6.

¹⁰² The justices had apparently arrived at a compromise, for the other eight justices all concurred in the opinion. Chief Justice Torbert and Justices Maddox, Almon, and Embry had concurred in the majority opinion in *Garrett*. Justices Faulkner, Jones, Shores, and Beatty had dissented in *Garrett*. Justice Adams had not been on the court at the time of the *Garrett* decision, having replaced Justice Bloodworth, the author of the majority opinion in *Garrett*.

¹⁰³ Manufacturers that ceased manufacturing asbestos-containing products prior to May 19, 1979 should not presume that the discovery accrual rule contained in Alabama

that an asbestos personal injury was a continuing tort, and that the plaintiff was therefore entitled to recover *all* damages proximately caused by his injury so long as the action was brought within the statutory period of limitations.¹⁰⁴

The majority in *Garrett* had specifically rejected this reasoning,¹⁰⁵ relying on treatises and earlier cases in which the court had ruled that for a continuing tort, a plaintiff may only recover the portion of his damages incurred within the limitations period. One of the two continuing tort cases cited in the majority opinion in *Garrett*, *American Mutual Liability Insurance Co. v. Agricola Furnace Co.*, was an insurance coverage dispute arising out of a workers' compensation occupational disease claim for tuberculosis and silicosis.¹⁰⁶ The employee had been exposed to silica for the ten years preceding the filing of the claim, during the last six years of which the employer had been insured by the defendant insurer. In affirming the trial court's ruling that the policy of insurance covered the claim, the court noted, in dicta, that damages that may be recovered for a continuous tort are limited to those incurred within the applicable limitations period.¹⁰⁷

The significance of this aspect of the reasoning in *Cazalas* cannot be overstated, for it highlights the irrationality of Alabama Supreme Court

Code section 6-2-30 cannot be applied to their products. Because products may be used long after they are manufactured, it is conceivable that a plaintiff's exposure to an asbestos-containing product last manufactured before May 19, 1979 may have continued well after that date. In addition, even if an asbestos-containing product was last used at a worksite prior to May 19, 1979, dust from that product may have continued to be present at the worksite long afterwards. The Alabama Supreme Court has acknowledged that asbestos fibers remain entrained in the atmosphere of a worksite and thereafter drift, creating a danger of "bystander exposure." "The tendency of asbestos dust and fibers to 'drift' for considerable distances, creating a secondary exposure hazard to bystanders and others not working directly with the material, has been generally recognized." *Sheffield v. Owens-Corning Fiberglass Corp.*, 595 So. 2d 443, 455 (1992). It does not take much imagination, then, to conceive of a worksite at which asbestos fibers from products used during one year remain present at the plant many years later, being continually entrained and re-entrained into the atmosphere.

¹⁰⁴ *Cazalas*, 435 So. 2d at 57.

¹⁰⁵ *Garrett*, 368 So. 2d at 520-21.

¹⁰⁶ 236 Ala. 535, 183 So. 677 (1938). The other case was *Howell v. Dothan*, 234 Ala. 158, 174 So. 624 (1937).

¹⁰⁷ *Am. Mut. Liab. Ins. Co.*, 183 So. at 679.

decisions involving toxic tort claims. The *Garrett* decision cites with approval cases holding that damages in a continuing tort case are limited to those incurred within the applicable limitations period. In *Tyson*, the court ruled that it was constitutionally impermissible to revive any cause of action already barred by lapse of time. Unless a meaningful distinction can be made between the revival of time-barred *damages* and the revival of time-barred *actions*,¹⁰⁸ then the *Garrett* and *Tyson* decisions, standing alone, support the position advanced by the defendants in *Cazalas*.¹⁰⁹

The only logical way¹¹⁰ to square the conclusion in *Tyson* that the legislature cannot constitutionally revive a time-barred *action* with the conclusion in *Cazalas* that the legislature may constitutionally revive time-barred *damages* is to also conclude that continuing exposure to asbestos tolls the statute of limitations.¹¹¹ But if such a conclusion is

¹⁰⁸ Assuming that section 95 is applicable to toxic tort cases, there is no basis either in its express language or the cases interpreting it to make a distinction between reviving actions and reviving damages. As discussed above, however, section 95 never should have been applied to toxic tort cases in any event.

¹⁰⁹ The defendants' logic fails, however, when the *Garrett* and *Tyson* decisions are considered in the light of other decisions, as discussed in this Article.

¹¹⁰ Of course, the opinion in *Cazalas* may simply be an implicit recognition that there are no damages in a toxic tort case until there is a disease, but this recognition serves only to highlight the fact that *Garrett* departed radically from established precedent. Without damages, there is no injury, and no cause of action can have accrued.

¹¹¹ Such a distinction may be warranted in the case of asbestos exposure, which is qualitatively different than the radiation exposure that was the subject of the *Garrett* decision. Jerry Kenneth Garrett specifically alleged exposure to radiation from radar equipment manufactured by the defendants only during a two-year period, from 1955 to 1957. He did not—and, indeed, could not—allege any continuing exposure to the radiation. A person who is exposed to radiation from a defective product (*e.g.*, radar equipment) ceases to be exposed to radiation once he is no longer working with or around that product. Radar equipment does not release any physical substance into the atmosphere (a) to which an individual may be exposed after the equipment has been removed and (b) which may penetrate an individual's body and remain for decades, thereby causing continuing injury. In contrast, asbestos-containing products release asbestos fibers into the atmosphere and those fibers remain suspended in, and are continually re-entrained into, the atmosphere of the work place, so that individuals continue to be exposed to asbestos fibers released from specific products long after those products are no longer in use. Further, asbestos fibers, once lodged in the lungs, tend to remain there and continue to cause damage. Although the *Tyson* case specifically applied the holding in *Garrett* to asbestos personal injury cases, the court did not address (and apparently has never specifically addressed) a claim of continuing exposure to asbestos either in the work place (long after the product is no longer used) or in an

implicit in the *Cazalas* decision, how does the tolling work? Does exposure to one defendant's products after May 19, 1979 toll the statute of limitations with respect to other defendants that ceased to manufacture asbestos-containing products well before May 19, 1979? Although the court has never specifically addressed these questions, it has at least suggested that post-1979 exposure to one defendant's product would toll the statute of limitations on claims against all joint tortfeasors.¹¹²

VIII. Worth More Dead Than Alive: *Pace v. Armstrong World Industries*

The limitations period applicable to wrongful death actions is established in Alabama Code section 6-5-410(d), which states that “[s]uch action must be commenced within two years from and after the death of the testator or intestate.”¹¹³ In addition, however, a wrongful death action can be maintained only if “the testator or intestate could have commenced an action for such wrongful act, omission, or negligence if it had not caused death.”¹¹⁴ This provision takes on a bizarre twist in toxic tort cases, for the court has declared that wrongful death claims may be

individual's body. It does not appear, from the published opinions, that any party has ever urged the Court to consider the differences between radiation exposure and asbestos exposure.

¹¹² See *Johnson v. Garlock, Inc.*, 682 So. 2d 25, 26 (Ala. 1996). The *Johnson* court hinted that had the plaintiff been exposed to even one asbestos-containing product after May 19, 1979, the statute of limitations would have been tolled for all manufacturers: “None of the plaintiffs contends that he was exposed after 1979 to asbestos products manufactured by the defendant, Garlock, Inc., or by anyone else.” *Id.* at 26 (emphasis added). This reasoning, of course, creates yet another distinction in the law. On one hand, under *Cazalas*, asbestos exposure that continued after May 19, 1979 effectively tolls the statute of limitations for pre-1979 exposure, at least with respect to defendants to whose products the plaintiff was exposed after May 19, 1979, and under *Johnson v. Garlock, Inc.*, possibly even with respect to all other defendants. On the other hand, continuing exposure to other injury-inflicting substances, such as tobacco, does not toll the statute of limitations under the ruling in *Spain v. Brown & Williamson Tobacco Corp.*, 872 So. 2d 101 (Ala. 2003). Indeed, the *Spain* decision does not even treat exposure to tobacco as a continuing tort.

¹¹³ ALA. CODE § 6-5-410(d) (1975).

¹¹⁴ *Id.* § 6-5-410(a).

brought in Alabama courts on behalf of decedents that, had they lived, would be barred from every Alabama courthouse.

In *Pace v. Armstrong World Industries, Inc.*, the Alabama Supreme Court ruled that even though a decedent's asbestos personal injury action was time-barred in Alabama at the time of his death, the commencement of a wrongful death action by his personal representative was nevertheless timely because the decedent had timely filed his action in Texas, a jurisdiction with a more favorable statute of limitations.¹¹⁵ The court expressly ruled that section 6-5-410(a) does not restrict wrongful death actions to only those cases in which a decedent could have brought a personal injury action *in Alabama* had the decedent lived.¹¹⁶ In responding to the defendants' argument that the court's interpretation rendered the restrictive language of section 6-5-410(a) meaningless, the court stated that the defendants would still be able to assert all other defenses that would have been available in the personal injury action, and could also assert that the wrongful death action was time-barred if a personal injury action could not have been brought either in Alabama *or in another state*.¹¹⁷ Hence, *Pace* makes a meaningless distinction between personal injury and wrongful death claims, and effectively declares that an Alabama toxic tort victim is worth more dead than alive.¹¹⁸

¹¹⁵ 578 So. 2d 281, 286 (Ala. 1991).

¹¹⁶ *Pace*, 578 So. 2d at 285 (emphasis added) (citing ALA. CODE § 6-5-410(a) (1975)).

¹¹⁷ *Id.* at 286. To successfully invoke ALA. CODE § 6-5-410(a) (1975), a defendant would have to establish that at the time of the decedent's death, there was no jurisdiction in which the decedent could have timely filed a personal injury action. Non-availability of a particular forum might be established by proof that (1) a personal injury action would have been time-barred under the applicable limitations period for the alternative forum; (2) under the alternative forum's conflicts of laws principles, Alabama's statute of limitations, including its accrual rule, would have been applied; (3) the alternative forum had a borrowing statute that would have resulted in the application of Alabama's statute of limitations, including its accrual rule; (4) a personal injury action would have been barred by application of the alternative forum's doctrine of *forum non conveniens*; or (5) the alternative forum could not have properly exercised *in personam* jurisdiction over the moving defendant.

¹¹⁸ That the Alabama Supreme Court values dead bodies more than living people is also evident in its decision in a case involving the negligent and wanton destruction of a human body. In that case the court rejected the defendants' assertion that the case was time-barred because the funeral (and presumably the destruction of the body) had

IX. Standing in the Courthouse Door: *Garrett* and its Progeny Violate the Alabama and United States Constitutions

Beginning with its ruling in *Garrett v. Raytheon Co.*,¹¹⁹ and continuing through its decisions in *Thomas v. BSE Industrial Contractors Inc.*¹²⁰ and *Hinton v. Monsanto Co.*,¹²¹ the Alabama Supreme Court has carefully erected a great barrier that effectively prevents almost all Alabama toxic tort victims from ever having access to the courts to obtain redress for their injuries. Ironically, the court's own decisions interpreting section 13 of the Constitution of Alabama suggest that had the same barrier been erected through legislative act, the court would have struck it down as an unconstitutional denial of due process. Section 13, which is frequently referred to as the "open courts" provision, states: "That all courts shall be open; and that every person, for any injury done him, in his lands, goods, person, or reputation, shall have a remedy by due process of law; and right and justice shall be administered without sale, denial, or delay."¹²²

occurred more than twenty years before suit was filed. In so ruling, the court distinguished the "discovery" accrual rule it would apply for dead bodies from the "exposure" accrual rule announced three years earlier in *Garrett*:

Here, it was discovered in 1979 that the grave supposedly containing Emma Lee and Alzada Payne was sinking. It was then discovered that the bodily remains of Emma Lee were missing. At that particular point the plaintiff's injuries accrued, as she had nothing of which to complain until the discovery of the missing body and casket. This stands in contrast to an injury of the type found in *Garrett v. Raytheon Co.*, where the progressive nature of the injury has not made itself manifest at the time of the last exposure. In cases of that nature, the statute of limitations begins to run whether or not the full amount of damages is apparent at the time of the first legal injury. We therefore hold that the statute of limitations did not begin to run until May 13, 1979, when it was discovered that the bodily remains and casket of Emma Lee were missing and the injury to the plaintiff actually occurred.

Payne v. Ala. Cemetery Ass'n, 413 So. 2d 1067, 1072 (Ala. 1982) (citations omitted).

¹¹⁹ 368 So. 2d 516 (Ala. 1979).

¹²⁰ 624 So. 2d 1041 (Ala. 1993).

¹²¹ 813 So. 2d 827 (Ala. 2001).

¹²² ALA. CONST. of 1901, art. I, § 13.

The essence of section 13 is that it “preserves the right to a remedy for an injury.”¹²³ “This section of the Constitution preserves to all persons a remedy for accrued or vested causes of action.”¹²⁴ Thus, if the cause of action in a toxic tort case accrues upon exposure, so does the section 13 right to a remedy for that toxic tort. The origins of section 13 can be traced to the Magna Carta, and incorporates “a fundamental principle of fairness.”¹²⁵ It “guarantees every person shall have his day in court.”¹²⁶ As a consequence, the court has ruled that any legislative action that effectively eliminates a common law cause of action or its enforcement through legal process is automatically suspect under section 13.¹²⁷

Lankford v. Sullivan, Long & Hagerty, the leading decision interpreting section 13, struck down as unconstitutional Alabama Code section 6-5-502, which imposed a ten-year statute of repose for all product liability cases.¹²⁸ The trial court, applying the statute of repose, had granted summary judgment on a product liability action brought on behalf of two men injured when a man-lift they occupied collapsed fifteen years after its installation. The statute of repose was struck down as “arbitrary and capricious” and therefore unconstitutional under section 13.¹²⁹

Ironically, section 6-5-502 was enacted in response to the court’s decision in *Garrett* and specifically provided for the accrual of toxic tort claims on discovery of an injury.¹³⁰ Unfortunately, the Act of which it

¹²³ *Pickett v. Matthews*, 238 Ala. 542, 545, 192 So. 261, 263 (1939).

¹²⁴ *Mayo v. Rouselle Corp.*, 375 So. 2d 449, 451 (Ala. 1979).

¹²⁵ *Lankford v. Sullivan, Long & Hagerty*, 416 So. 2d 996, 999 (Ala. 1982) (quoting *Fireman’s Fund Am. Ins. Co. v. Coleman*, 394 So. 2d 334, 350-351 (Ala. 1980) (Shores, J., concurring)).

¹²⁶ *Tillman v. Sibbles*, 292 Ala. 355, 357, 294 So. 2d 436, 438, *appeal after remand*, 341 So. 2d 686 (Ala. 1974).

¹²⁷ “Legislation which abolishes or alters a common-law cause of action, then, or its enforcement through legal process, is automatically suspect under § 13.” *Lankford v. Sullivan, Long & Hagerty*, 416 So. 2d 996, 1000 (Ala. 1982) (quoting *Fireman’s Fund Am. Ins. Co. v. Coleman*, 394 So. 2d 334, 352 (Ala. 1980) (Shores, J., concurring)).

¹²⁸ 416 So. 2d 996 (Ala. 1982); *see* ALA. CODE § 6-5-502 (1975).

¹²⁹ *Lankford*, 416 So. 2d at 1003.

¹³⁰ 1979 ALA. ACTS 468, Vol. II, 855, 877, § 3, currently codified at ALA CODE § 6-5-502(b). The Act was approved on July 30, 1979, approximately six months after the January 26, 1979 decision in *Garrett*.

was a part also provided that in the event that any section of the Act was held unconstitutional, the entire Act would be inoperative.¹³¹ Thus, ironically, by striking down section 6-5-502, the court continued in place its own bizarre and unconstitutional interpretation of the accrual of toxic tort cases.

One year later, in *Jackson v. Mannesmann Demag Corp.*, the court struck down a statute of repose intended to limit the liability of architects, contractors, and others involved in the design and construction of buildings.¹³² In doing so, the court observed that its decision in *Lankford* was premised in part on the principle that any legislative act that prevents a cause of action from accruing violates section 13.¹³³

Through its interpretation of the statute of limitations accrual rule in toxic tort cases, the Alabama Supreme Court has done something that it says the legislature cannot do. Under *Lankford* and *Jackson*, the court would presumably strike down any legislative scheme by which the vast majority of toxic tort claims were deemed to have accrued for statute of limitations purposes long before the plaintiffs were entitled to bring suit.¹³⁴ Indeed, the court would undoubtedly chastise the legislature for denying the plaintiffs any access to the courts and, in effect, thereby abolishing a common law cause of action. But in *Garrett*, the court has done precisely what it says the legislature cannot do.

Rights that are secure against but one branch of government are not secure at all. Moreover, there is nothing in the language of section 13 to

¹³¹ 1979 ALA. ACTS 468, Vol. II, 855, 859, § 5.

¹³² 435 So. 2d 725, 729 (Ala. 1983).

¹³³ *Jackson*, 435 So. 2d at 727. Toxic tort claims are generally based on negligence and on the Alabama Extended Manufacturers' Liability Doctrine. As such, they are creatures of the common law. In addition, under *Garrett*, they are deemed to have accrued upon exposure. By refusing to give toxic tort claimants access to the courts, then, the Alabama Supreme Court is denying any remedy for accrued common law claims. Consequently, the cases holding that section 13 does not protect access to the courts for claims founded on a legislatively-created cause of action or for claims that have not yet accrued are inapplicable. See, e.g., *Mayo v. Rouselle Corp.*, 375 So. 2d 449, 451 (Ala. 1979); *Reed v. Brunson*, 527 So. 2d 102, 108-09 (Ala. 1988).

¹³⁴ In striking down the statute of repose for suits against architects, the court specifically noted that it would impermissibly bar some actions before they had even accrued: "The problem with the defendants' argument is that latent defects in a building caused by the builder may not produce injuries until the seven year period has elapsed." *Jackson*, 435 So. 2d at 728. Obviously, the same may be said of toxic tort claims.

suggest that it applies only to legislative action. The section appears under Article I, "Declaration of Rights," not under Article IV, "Legislative Department." In addition, the very language of the section itself appears to be directed as much to the judiciary as to the legislative branch. First, the section declares that "all courts shall be open" and "every person, for any injury done him . . . shall have a remedy."¹³⁵ It is the judiciary, more than the legislature, that controls access to the courts. Second, the section commands "right and justice shall be administered without sale, denial, or delay."¹³⁶ Only the courts are in a position to administer justice. Indeed, the Alabama Supreme Court itself has acknowledged that it, too, is bound by section 13.¹³⁷ Thus, as interpreted, section 13 precludes not only legislative acts that restrict access to the courts, but *any* action, including action taken by the courts. Clearly, then, the court's decisions in *Garrett, Tyson v. Johns-Manville Sales Corp.*,¹³⁸ *Thomas, Hinton*, and *Spain v. Brown & Williamson Tobacco Corp.*¹³⁹ violate this fundamental constitutional right.

Denying any opportunity to prosecute a toxic tort claim in Alabama courts violates not only Alabama's open courts guarantee, it also violates the due process clause of the Fourteenth Amendment to the United States Constitution. More than one hundred years ago, the United States Supreme Court declared:

It may be properly conceded that all statutes of limitation must proceed on the idea that the party has full opportunity afforded him to try his right in the courts. A statute could not bar the existing rights of claimants without affording this opportunity; if it should attempt to do so, it would not be a statute of limitations, but an unlawful attempt to extinguish rights arbitrarily, whatever might be the purport of its provisions.¹⁴⁰

¹³⁵ ALA. CONST. of 1901, art. I, § 13.

¹³⁶ *Id.*

¹³⁷ *Folsom v. Wynn*, 631 So. 2d 890, 898-99 (Ala. 1993).

¹³⁸ 399 So. 2d 263 (Ala. 1981).

¹³⁹ 872 So. 2d 101, 105 (Ala. 2003).

¹⁴⁰ *Wilson v. Iseminger*, 185 U.S. 55, 62, 22 S. Ct. 573, 575, 46 L. Ed. 804, 807 (1902). One commentator has suggested that application of existing statutes of limitations in toxic tort cases is not only unconstitutional, but also fails to advance any of the legitimate purposes for which statutes of limitations were originally designed:

The Alabama Supreme Court is not only aware of the foregoing declaration, but has even quoted it with approval, observing that one week would not be a reasonable time within which to bring an action.¹⁴¹ If one week is insufficient, then having no time at all within which to file an action must also be insufficient.

Due process has long required open access to the courts. In *Windsor v. McVeigh*, the United States Supreme Court invalidated a district court order authorizing war-time confiscation of property owned by an alleged Confederate officer because the lower court, after publishing notice of the confiscation proceedings, had refused to permit the property owner to appear and defend his rights.¹⁴² In so ruling, the Supreme Court stated that, although governments may reasonably restrict the periods within which individuals are permitted access to courts in order to enforce their rights, they may not deny access altogether.¹⁴³

For this reason, a state statute of limitations denies due process under the Fourteenth Amendment to the United States Constitution unless it provides for a reasonable opportunity to file a case. "This court has often decided that statutes of limitation affecting existing rights are not unconstitutional, if a reasonable time is given for the commencement of an action before the bar takes effect."¹⁴⁴

When imposed on toxic tort actions, statutes of limitations effectively destroy the only means available for vindicating the victim's constitutionally protected right to personal security. Yet the considerations of social utility and fairness that have traditionally been used to justify statutes of limitations either are inapplicable to toxic torts or are better served by providing victims with a remedy. Toxic tort statutes of limitations therefore violate fundamental principles of justice implicit in the individual's relation to society, and legislatures should repeal or modify these statutes to create some mechanism for protecting the rights of toxic tort victims. Concerns of utility and fairness also suggest that courts should adopt a quid pro quo requirement and strike down toxic tort statutes of limitations as violations of due process.

Note, *The Fairness and Constitutionality of Statutes of Limitations for Toxic Tort Suits*, 96 HARV. L. REV. 1683, 1702 (1983).

¹⁴¹ *Lankford*, 416 So. 2d at 1006 (Torbert, C.J., concurring specially).

¹⁴² 93 U.S. 274, 283-84, 23 L. Ed. 914, 918 (1876).

¹⁴³ *Windsor*, 93 U.S. at 278.

¹⁴⁴ *Terry v. Anderson*, 95 U.S. 628, 632-33, 24 L. Ed. 365, 366 (1877).

More recently, the United States Supreme Court has declared that procedural restrictions limiting access to the courts—including statutes of limitations—are valid only if they do not violate the Fourteenth Amendment requirement that such access be provided at a meaningful time and manner.¹⁴⁵ Thus, a statute of limitations “can be extended, without violating the Due Process Clause, after the cause of action arose and *even after the statute itself has expired.*”¹⁴⁶

The United States Supreme Court has further specifically rejected the notion that a statute of limitations in a toxic tort case can accrue and run long before there is any manifest injury. In *Urie v. Thompson*, the Court ruled that if it were to interpret the FELA statute of limitations as having accrued on exposure in a silicosis case, that interpretation would transform the FELA into a “delusive remedy.”¹⁴⁷

If Urie were held barred from prosecuting this action because he must be said, as a matter of law, to have contracted silicosis prior to November 25, 1938, it would be clear that the federal legislation afforded Urie only a delusive remedy. It would mean that at some past moment in time, unknown and inherently unknowable even in retrospect, Urie was charged with knowledge of the slow and tragic disintegration of his lungs; under this view Urie’s failure to diagnose within the applicable statute of limitations a disease whose symptoms had not yet obtruded on his consciousness would constitute waiver of his right to compensation at the ultimate day of discovery and disability.

Nor can we accept the theory that each intake of dusty breath is a fresh “cause of action.” In the present case, for example, application of such a rule would, arguably, limit petitioner’s damages to that aggravation of his progressive injury traceable to the last eighteen months of his employment. Moreover petitioner would have been wholly barred from suit had he left the railroad, or merely been transferred to work involving no exposure to silica dust, more than three years before discovering the disease with which he was afflicted.

We do not think the humane legislative plan intended such consequences to attach to blameless ignorance. Nor do we think those consequences can

¹⁴⁵ *Logan v. Zimmerman*, 455 U.S. 422, 437, 102 S. Ct. 1148, 1159, 71 L. Ed. 2d 265, 279 (1982) (citing *Armstrong v. Manzo*, 380 U.S. 545, 552, 85 S. Ct. 1187, 1191, 14 L. Ed. 2d 62, 67 (1965)).

¹⁴⁶ *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 229, 115 S. Ct. 1447, 1458, 131 L. Ed. 2d 328, 349 (1995) (emphasis added).

¹⁴⁷ 337 U.S. 163, 169, 69 S. Ct. 1018, 1024, 93 L. Ed. 1282 (1949).

be reconciled with the traditional purposes of statutes of limitations, which conventionally require the assertion of claims within a specified period of time after notice of the invasion of legal rights.¹⁴⁸

Based on the forgoing analysis, *Garrett* and its progeny deny Alabama toxic tort victims due process of law under both section 13 of the Constitution of Alabama and the Fourteenth Amendment to the United States Constitution.

X. Conclusion

The fact that Alabama is the only state in which the injury in a toxic tort case is deemed to have occurred accrued upon exposure would not, of itself, be sufficient justification for overruling *Garrett* if that decision had any rational underpinning. However, the fact that Alabama is the only state with such an accrual rule should cause the Alabama Supreme Court at least to question the wisdom of the *Garrett* decision and to undertake a thorough review of its decisions governing the accrual of toxic tort actions.

Upon review, it should become immediately apparent that *Garrett* and the other Alabama decisions governing the accrual of toxic tort actions have been illogical, inconsistent, and manifestly unjust, and that they have denied the citizens of Alabama due process of law under both the state and federal constitutions. The Alabama Supreme Court has it within its power to change all of this, for it was the court itself that conceived, gave birth to, and nurtured this terrible injustice. Justice could be restored if the court would simply admit that the majority decision in *Garrett* was wrong, and, at the first opportunity, reverse that decision.¹⁴⁹ “Developing case law in accord with the announced public policy of the State has always been conceded to be a proper role for [the Alabama Supreme Court].”¹⁵⁰

In so doing, the court should rule that each toxic tort personal injury claim accrues, for statute of limitations purposes, when the plaintiff is

¹⁴⁸ *Urie*, 337 U.S. at 169-70.

¹⁴⁹ As a practical matter, the court would also have to modify substantially its decisions in *Tyson*, *Thomas*, *Hinton*, *Spain*, *Cazalas*, and *Pace*.

¹⁵⁰ *Atkins v. Am. Motors Corp.*, 335 So. 2d 134, 142 (Ala. 1976).

first diagnosed with a disease. The court should further rule that if the victim is diagnosed with more than one disease, the statute of limitations for each disease accrues separately, upon the victim's diagnosis with each disease. Adoption of a multiple disease rule would not require the court to abandon its long-standing position that a cause of action accrues upon injury regardless of whether the full amount of damages is apparent at that time.¹⁵¹ All that is required is that the court distinguish between a single injury accompanied by progressive damage, on the one hand, and two or more distinct injuries caused by the same exposure.

For example, a victim of mild asbestosis may ultimately develop the rare and invariably fatal cancer mesothelioma as a consequence of the same asbestos exposure that caused his asbestosis, but that dreaded fate is fortunately not inevitable. Not every victim of asbestosis develops mesothelioma. That is why the court has not allowed recovery for an increased risk of developing mesothelioma.¹⁵² Moreover, asbestosis is not a prerequisite to developing mesothelioma. An individual who has been exposed to asbestos may develop mesothelioma even if he has never developed asbestosis. The two diseases are separate and distinct, and should be treated as such.¹⁵³

If Alabama blindly adopts the position that exposure to a toxic substance can cause but one disease, then it must be prepared to permit a plaintiff who has been diagnosed with *any* disease—even the mildest disease caused by such exposure—to recover not only for that disease, but also for any disease that he might subsequently develop, including the most serious disease caused by such exposure. And the court should not, as it did in *Garrett*, create two different accrual rules, one defining when the statute of limitations commences (*e.g.*, upon diagnosis with the first disease) and the other defining when the plaintiff may file an action (*e.g.*, upon diagnosis with the second, possibly more serious disease). All of

¹⁵¹ *Home Ins. Co. v. Stuart-McCorkle, Inc.*, 291 Ala. 601, 608, 285 So. 2d 468, 473 (1973) (stating the long standing rule that “the statute will not begin to run until some injury occurs which gives rise to a maintainable cause of action”).

¹⁵² *Southern Bakeries, Inc. v. Knipp*, 852 So. 2d 712, 718 (Ala. 2002).

¹⁵³ An excellent discussion of the distinct nature of these two diseases may be found in *Hamilton v. Asbestos Corp.*, 22 Cal. 4th 1127, 1135-36, 998 P.2d 403, 407-08, 95 Cal. Rptr. 2d 701, 705-06 (2000).

the states that have considered the issue have adopted a “multiple-disease” rule.¹⁵⁴

There is no sound policy supporting *Garrett*, and adopting a discovery rule in toxic tort cases would be consistent not only with the precedent that existed prior to the *Garrett* decision, but also with the law of Alabama’s 49 sister states and the District of Columbia. “Unless one is willing (or desires) to deprive plaintiffs of their common law remedy in order to protect defendants, there is little to be said against adoption of a discovery rule.”¹⁵⁵

The only question that remains is whether the Alabama Supreme Court has the vision and the courage to reverse a terrible injustice of its own creation.

¹⁵⁴ See *Hamilton v. Asbestos Corp.*, 22 Cal. 4th 1127, 1137, 998 P.2d 403, 408, 95 Cal. Rptr. 2d 701, 707 (2000); *Miller v. Armstrong World Indus.*, 817 P.2d 111, 112 (Colo. 1991) (en banc); *Wilson v. Johns-Manville Sales Corp.*, 221 U.S. App. D.C. 337, 684 F.2d 111 (1982); *Va Salle v. Celotex Corp.*, 161 Ill. App. 3d 808, 809, 113 Ill. Dec. 699, 700 515 N.E.2d 684, 685 (1987); *Wilber v. Owens-Corning Fiberglass Corp.*, 476 N.W.2d 74, 74 (Iowa 1991); *Pierce v. Johns-Manville Sales Corp.*, 296 Md. 656, 665, 464 A.2d 1020, 1026 (1983); *Larson v. Johns-Manville Sales Corp.*, 427 Mich. 301, 305, 319, 399 N.W.2d 1, 2 (1986); *Marinari v. Asbestos Corp.*, 417 Pa. Super. 440, 442, 612 A.2d 1021, 1022 (1992), *modified on other grounds by Simmons v. Pacor, Inc.*, 543 Pa. 664, 674 A.2d 232 (1996); *Potts v. Celotex Corp.*, 796 S.W.2d 678, 679 (Tenn. 1990); *Pustejovsky v. Rapid- Am. Corp.*, 35 S.W.3d 643, 644 (Tex. 2000); *Sopha v. Owens-Corning Fiberglas Corp.*, 230 Wis. 2d 212, 216, 601 N.W.2d 627, 629 (1999).

The author could find only two decisions in which courts have rejected a multiple-disease rule, and both of those decisions were rendered by federal courts interpreting state law. See *Joyce v. A.C. & S., Inc.*, 785 F.2d 1200, 1203 (4th Cir. 1986); *Matthews v. Celotex Corp.*, 569 F. Supp. 1539, 1542 (D.N.D. 1983).

¹⁵⁵ Green, *supra* note 8, at 977-78.

Appendix

Accrual Rules in Other Jurisdictions

Alaska: “Under the discovery rule, a plaintiff’s claim accrues at the time that he discovers, or reasonably should discover, all of the elements of his cause of action.” *Sopko v. Dowell Schlumberger, Inc.*, 21 P.3d 1265, 1271 (Alaska 2001).

Arizona: “Arizona follows the ‘discovery rule’ as far as the statute of limitations for personal injuries is concerned.” *Burns v. Jaquays Mining Corp.*, 156 Ariz. 375, 378, 752 P.2d 28, 31 (Ct. App. 1987).

Arkansas: “We hold that in product liability cases, the statute of limitations under § 16-116-103 does not commence running until the plaintiff knew or, by the exercise of reasonable diligence, should have discovered the causal connection between the product and the injuries suffered.” *Martin v. Arthur*, 339 Ark. 149, 159, 3 S.W.3d 684, 690 (1999).

California: An asbestos personal injury plaintiff is required to bring an action by the later of one year after the date he first suffered disability or one year after he “either knew, or through the exercise of reasonable diligence should have known, that such disability was caused or contributed to by such exposure.” CAL. CIV. PROC. CODE § 340.2 (Deering 1997). The general rule is stated as follows: “Generally speaking, to be actionable, harm must constitute something more than ‘nominal damages, speculative harm, or the threat of future harm—not yet realized . . .’ In California, harm or injury to the plaintiff is an essential element of a ripe cause of action in negligence or strict liability. Moreover, as a general proposition it is settled that a plaintiff’s cause of action accrues for purposes of the statute of limitations upon the occurrence of the *last* element essential to the cause of action; that is when the plaintiff is first entitled to sue.” *Buttram v. Owens-Corning Fiberglas Corp.*, 16 Cal. 4th 520, 531 n.4, 66 Cal. Rptr. 2d 438, 444, 941 P.2d 71, 77 (1997) (citations omitted).

Colorado: “[A] cause of action for injury to person, property, reputation, possession, relationship, or status shall be considered to accrue on the date both the injury and its cause are known or should have been known by the exercise of reasonable diligence.” COLO. REV. STAT. ANN. § 13-80-108(1) (West 1997).

Connecticut: “No product liability claim . . . shall be brought but within three years from the date when the injury, death or property damage is first sustained or discovered or in the exercise of reasonable care should have been discovered . . .” CONN. GEN. STAT. § 52-577a(a) (2003) (also includes a statute of repose).

Delaware: “[T]his Court and the Superior Court have applied the discovery exception to defer the running of the . . . limitations period in circumstances

where the plaintiff has been exposed to a toxic substance, but the nature of the injury involves a latency period where the harmful effects of the toxic exposure are not discoverable for several years.” *Brown v. E.I. Dupont de Nemours & Co.*, 820 A.2d 362, 367 (Del. 2003).

District of Columbia: “The precise date on which the three-year period . . . began to run is determined by the application *vel non* of the ‘discovery’ rule to this type of action.” *Owens-Corning Fiberglas Corp. v. Henkel*, 689 A.2d 1224, 1231 (D.C. 1997).

Florida: “[R]egardless of the underlying nature of a cause of action, the accrual of the same must coincide with the aggrieved party’s discovery or duty to discover the act constituting an invasion of his legal rights.” *Creviston v. Gen. Motors Corp.*, 225 So. 2d 331, 334 (Fla. 1969) (non toxic tort product liability case).

Georgia: “Georgia courts have clearly held that in a continuing tort a cause of action does not accrue so as to cause the statute of limitation to run until a plaintiff discovers or with reasonable diligence should have discovered that he was injured.” *King v. Seitzingers, Inc.*, 160 Ga. App. 318, 287 S.E.2d 252, 254 (1981). “On a tort claim for personal injury the statute of limitation generally begins to run at the time the damage caused by the a tortious act occurs, at which time the tort is complete. . . . While the [latent disease] tort is then complete in the sense that it will support a claim, it is nevertheless a tort of a continuing nature which tolls the statute of limitation so long as the continued exposure to the hazard is occasioned by the continued failure of the tortfeasor to warn the victim, and the statute of limitation does not commence to run under these circumstances until such time as the continued tortious act of producing injury is eliminated, e.g., by an appropriate warning in respect to the hazard.” *Everhart v. Rich’s, Inc.*, 229 Ga. 798, 801-802, 194 S.E.2d 425, 428, (1972), *answer to certified question conformed to*, 196 S.E.2d 475 (1973).

Hawaii: “Under Hawaiian law, an action for personal injury or property damage does not accrue, and the applicable statute of limitations does not commence, until a plaintiff ‘could reasonably have been aware that she had a claim.’” *In re Hawaii Fed. Asbestos Cases*, 854 F. Supp. 702, 706 (D. Haw. 1994) (quoting *Yamaguchi v. Queen’s Med. Ctr.*, 65 Haw. 84, 90, 648 P.2d 689, 693 (1982)).

Idaho: “[A] cause of action does not accrue at the time of the act complained of unless some damage has occurred.” *Hawley v. Green*, 117 Idaho 498, 502, 788 P.2d 1321, 1325 (1990) (medical malpractice case—the author could find no toxic tort case on point).

Illinois: “We are of the opinion that the preferred rule is that the cause of action accrues when the plaintiff knows or reasonably should know of an injury and also knows or reasonably should know that the injury was caused by the

wrongful acts of another.” *Nolan v. Johns-Manville Asbestos*, 85 Ill. 2d 161, 169, 421 N.E.2d 864, 868 (1981). But such claims are now subject to a statute of repose. 735 ILL. COMP. STAT. ANN. 5/13-213 (West 2003)).

Indiana: “A product liability action for personal injury, disability, disease, or death resulting from exposure to asbestos accrues on the date when the injured person knows that the person has an asbestos related disease or injury.” IND. CODE ANN. § 34-20-3-2(b) (Michie 1998). “[A] plaintiff may bring suit within two years after discovering a disease and its cause, notwithstanding that the discovery was made more than ten years [the period of an applicable statute of repose] after the last exposure to the product that caused the disease.” *Covalt v. Carey Canada, Inc.*, 543 N.E.2d 382, 384 (Ind. 1989).

Iowa: “[T]he cause of action shall be deemed to have accrued when the disease and such disease’s cause have been made known to the person or at the point the person should have been aware of the disease and such disease’s cause.” IOWA CODE ANN. § 614.1(2A)(b)(1) (West 1999 & Supp. 2004).

Kansas: Personal injury and wrongful death actions “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.” KAN. STAT. ANN. § 60-513(b) (1994 & Supp. 2003). The ten-year statute of repose is also not applicable in latent disease product liability cases. KAN. STAT. ANN. § 60-3303(d)(1) (1994).

Kentucky: “We therefore . . . extend the [discovery] rule as explicated herein to tort actions for injury from latent disease caused by exposure to a harmful substance whether the action be based on negligence or on a products liability theory.” *Louisville Trust Co. v. Johns-Manville Prod. Corp.*, 580 S.W.2d 497, 501 (Ky. 1979).

Louisiana: “Delictual actions are subject to a liberative prescription of one year. This prescription commences to run from the day injury or damage is sustained.” LA. CIV. CODE ANN. art. 3492 (West 1994). “Damage is considered to have been sustained, within the meaning of the article, only when it has manifested itself with sufficient certainty to support accrual of a cause of action.” *Cole v. Celotex Corp.*, 620 So. 2d 1154, 1156 (La. 1993).

Maine: “[A] judicially recognizable claim does not arise until there has been a manifestation of physical injury to a person, sufficient to cause him actual loss, damage or suffering from a defective, unreasonably dangerous product.” *Bernier v. Raymark Indus.*, 516 A.2d 534, 543 (Me. 1986).

Maryland: “For reasons that follow, we hold that a plaintiff’s cause of action for latent disease, whether framed in terms of negligence or strict liability, accrues when he discovers, or through the exercise of reasonable care and dili-

gence should have discovered, the nature and cause of his disability or impairment.” *Harig v. Johns-Manville Prods. Corp.*, 284 Md. 70, 71, 394 A.2d 299, 300 (1978).

Massachusetts: “[T]he discovery rule has been applied to causes of action based on ‘inherently unknowable’ wrongs. There is no sound reason why the same accrual rule should not apply to actions to recover damages for an insidious disease caused by negligence.” *Olsen v. Bell Tel. Labs., Inc.*, 388 Mass. 171, 175, 445 N.E.2d 609, 612 (1983) (citations omitted).

Michigan: “[W]e hold that plaintiffs who develop asbestosis may bring a suit within three years of the time they discover or should have discovered their disease.” *Larson v. Johns-Manville Sales Corp.*, 427 Mich. 301, 319, 399 N.W.2d 1, 9 (1986).

Minnesota: “An action for negligence cannot be maintained, nor does the statute of limitations begin to run, until damage has resulted from the alleged negligence.” *Dalton v. Dow Chem. Co.*, 280 Minn. 147, 153, 158 N.W.2d 580, 584 (1968).

Mississippi: “In actions . . . which involve latent injury or disease, the cause of action does not accrue until the plaintiff has discovered, or by reasonable diligence should have discovered, the injury.” MISS. CODE ANN. § 15-1-49(2) (1999).

Missouri: “[T]he cause of action shall not be deemed to accrue when the wrong is done or the technical breach of contract or duty occurs, but when the damage resulting therefrom is sustained and is capable of ascertainment, and, if more than one item of damage, then the last item, so that all resulting damage may be recovered, and full and complete relief obtained.” MO. ANN. STAT. § 516.100 (West 2002).

Montana: “The period of limitation does not begin on any claim or cause of action for an injury to person or property until the facts constituting the claim have been discovered or, in the exercise of due diligence, should have been discovered by the injured party if (a) the facts constituting the claim are by their nature concealed or self-concealing; or (b) before, during, or after the act causing the injury, the defendant has taken action which prevents the injured party from discovering the injury or its cause.” MONT. CODE ANN. § 27-2-102(3) (2004). “[I]n latent disease or injury cases, the point at which the statute of limitations begins to run is ascertained by applying the discovery rule and determining when the injured person knew or, in the exercise of due diligence, should have known of the facts constituting the cause of action.” *Gomez v. Montana*, 293 Mont. 531, 535, 975 P.2d 1258, 1260 (1998).

Nebraska: “It seems to us that it would be a Hobson’s choice to suggest, on the one hand, that one could not maintain a cause of action unless and until one could show not only a breach of duty but an injury or damage resulting from

that breach and, on the other hand, to suggest that the time for bringing that action could begin and terminate before the individual could either reasonably be aware of the injury or damage or be able in any manner to establish its existence. These rules are consistent with our own rules in such matters. It has long been recognized in this jurisdiction that a cause of action accrues and the statute of limitations begins to run when the aggrieved party has the right to institute and maintain a suit.” *Condon v. A.H. Robins Co.*, 217 Neb. 60, 64, 349 N.W.2d 622, 625 (1984) (but may be subject to a statute of repose).

Nevada: “[T]he term ‘accrued,’ as used in NRS 11.220, incorporates the same ‘diligent discovery’ rule that is present in NRS 11.190(3), 11.207, and 41A.097. As the court said, ‘[t]o hold otherwise would transmute the statute from one of limitation into one of abolition. . . . Such a result is not consonant with the legislative purpose of the statute.’ When the plaintiff knew or in the exercise of proper diligence should have known of the facts constituting the elements of his cause of action is a question of fact for the trier of fact.” *Oak Grove Investors v. Bell & Gossett Co.*, 99 Nev. 616, 623, 668 P.2d 1075, 1079 (1983) (citations omitted).

New Hampshire: “[A]ll personal actions, except actions for slander or libel, may be brought only within 3 years of the act or omission complained of, except that when the injury and its causal relationship to the act or omission were not discovered and could not reasonably have been discovered at the time of the act or omission, the action shall be commenced within 3 years of the time the plaintiff discovers, or in the exercise of reasonable diligence should have discovered, the injury and its causal relationship to the act or omission complained of.” N.H. REV. STAT. ANN. § 508:4 (2004).

New Jersey: “When personal injury is suffered without perceptible trauma and by silent and insidious impregnation as a consequence of the act or omission of another, who knows, or is charged with the responsibility of knowing that such act or omission may result in personal injury, and the injured person is unaware of the cause of his injury, and as a reasonably prudent and intelligent person could not, without specialized knowledge, have been made aware of such cause, no action for a tort resulting from such cause begins to accrue until the injured person knows or by the exercise of reasonable diligence should have discovered the cause of such injury.” *Vispiano v. Ashland Chem. Co.*, 107 N.J. 416, 434, 527 A.2d 66, 76 (1987) (quoting *Warrington v. Charles Pfizer & Co.*, 274 Cal. App. 2d 564, 569-70, 80 Cal. Rptr. 130, 133 (Ct. App. 1969)).

New Mexico: “The reason that the limitation period runs from the injury rather than from the wrongful act, is that there is no cause of action for malpractice until there has been a resulting injury. A wrong without damage or damage without wrong does not amount to a cause of action. In personal injury actions not involving malpractice, the limitation period stated in § 23-1-8

has been held to run from ‘the time of the injury not the time of the negligent act.’” *Peralta v. Martinez*, 90 N.M. 391, 393, 564 P.2d 194, 196 (N.M. Ct. App. 1977) (citations omitted).

New York: “[T]he three year period within which an action to recover damages for personal injury or injury to property caused by the latent effects of exposure to any substance or combination of substances, in any form, upon or within the body or upon or within property must be commenced shall be computed from the date of discovery of the injury by the plaintiff or from the date when through the exercise of reasonable diligence such injury should have been discovered by the plaintiff, whichever is earlier.” N.Y. C.P.L.R. 214-c(2) (McKinney 2003). *But see* *Ruffing ex rel. Calton v. Union Carbide Corp.*, 193 Misc. 2d 350, 375, 746 N.Y.S.2d 798, 818 (N.Y. Sup. 2002), *aff’d sub nom.*, *Ruffing v. Union Carbide Corp.*, 1 A.D.3d 339 (N.Y. App. Div. 2003), *appeal dismissed*, 814 N.E.2d 455 (N.Y. 2004) (“Section 214-c is preempted to the extent that the period of limitations in which the action must be commenced is one year, measured from the date on which the cause of injury has been discovered.”).

North Carolina: “[F]or personal injury or physical damage to claimant’s property, the cause of action . . . shall not accrue until bodily harm to the claimant or physical damage to his property becomes apparent or ought reasonably to have become apparent to the claimant, whichever event first occurs.” N.C. GEN. STAT. § 1-52(16) (2004) (but actions are subject to a ten-year statute of repose).

North Dakota: “An action to recover damages based on injury allegedly resulting from exposure to asbestos composed of chrysotile, amosite, crocidolite, tremolite, anthophyllite, actinolite, or any combination thereof, must be commenced within three years after the injured person has been informed of discovery of the injury by competent medical authority and that the injury was caused by exposure to asbestos as described in this subsection, or within three years after the discovery of facts that would reasonably lead to the discovery, whichever is earlier.” N.D. CENT. CODE § 28-01.3-08(4) (1995). Other actions: “The presumption that the discovery rule applies except where the Legislature specifies otherwise is consistent with the perception that the determination as to when a cause of action accrues is a judicial function in the absence of legislative definition of that term.” *Hebron Pub. Sch. Dist. No. 13 v. United States Gypsum Co.*, 475 N.W.2d 120, 125 n1.4 (N.D. 1991).

Ohio: “[A] cause of action for bodily injury caused by exposure to asbestos or to chromium in any of its chemical forms arises upon the date on which the plaintiff is informed by competent medical authority that the plaintiff has been injured by such exposure, or upon the date on which, by the exercise of reasonable diligence, the plaintiff should have become aware that the plaintiff had

been injured by the exposure, whichever date occurs first. . . . [A] cause of action for bodily injury incurred by a veteran through exposure to chemical defoliants or herbicides or other causative agents, including agent orange, arises upon the date on which the plaintiff is informed by competent medical authority that the plaintiff has been injured by such exposure [A] cause of action for bodily injury which may be caused by exposure to diethylstilbestrol or other nonsteroidal synthetic estrogens, including exposure before birth, upon the date on which the plaintiff learns from a licensed physician that the plaintiff has an injury which may be related to such exposure, or upon the date on which by the exercise of reasonable diligence the plaintiff should have become aware that the plaintiff has an injury which may be related to such exposure, whichever date occurs first.” OHIO REV. CODE ANN. § 2305.10 (West 2005). “In a line of cases. . . this court established a threshold point at which government may impose a statute of limitations on a potential claimant. That line of decisions established that a statute of limitations could not begin to run before a claimant knew or should have known of her injury. . . . [K]nowledge of the injury’s cause is a part of the knowledge required before a statute of limitations may begin to run.” *Burgess v. Eli Lilly & Co.*, 66 Ohio St. 3d 59, 61, 609 N.E.2d 140, 141 (1993) (citations omitted).

Oklahoma: “[T]he statute of limitations for such a claim does not begin to run until the plaintiff knows, or as a reasonably prudent person should know, that he has the condition for which his action is brought and that the defendant caused it.” *Daugherty v. Farmers Coop. Ass’n*, No. 58,371, 1983 Okla. Civ. App. LEXIS 158, at **6-7 (Okla. Ct. App. 1983).

Oregon: “[A] product liability civil action for personal injury or property damage must be commenced not later than . . . two years after the date on which the plaintiff discovers, or reasonably should have discovered, the personal injury or property damage and the causal relationship between the injury or damage and the product, or the causal relationship between the injury or damage and the conduct of the defendant.” OR. REV. STAT. 30.905(2) (2003) (but subject to ten-year statute of repose). “The statute of limitations begins to run when a reasonably prudent person associates his symptoms with a serious or permanent condition and at the same time perceives the role which the defendant has played in inducing that condition.” *Schiele v. Hobart Corp.*, 284 Or. 483, 490, 587 P.2d 1010, 1014 (1978).

Pennsylvania: “An action to recover damages for injury to a person or for the death of a person caused by exposure to asbestos shall be commenced within two years from the date on which the person is informed by a licensed physician that the person has been injured by such exposure or upon the date on which the person knew or in the exercise of reasonable diligence should have known that the person had an injury which was caused by such exposure, whichever

date occurs first.” PA. STAT. ANN. tit. 42 § 5524.1(a) (West 2004). “The Court also agrees that the discovery rule applies. As DEP notes, if a provision such as Section 605(c) neither expressly nor implicitly prohibits application of the discovery rule, the courts are free to employ it.” *Westinghouse Elec. Corp. v. Pa. Dep’t of Env’tl. Prot.*, 705 A.2d 1349, 1355 (Pa. Commw. Ct.), *appeal denied*, 729 A.2d 1133 (1998), *appeal denied*, 745 A.2d 1277 (Pa. Commw. Ct. 2000).

Rhode Island: “We are convinced, after reviewing the case law and weighing the equitable considerations, that the better view would be to adopt the following rule: in a drug product-liability action where the manifestation of an injury, the cause of that injury, and the person’s knowledge of the wrongdoing by the manufacturer occur at different points in time, the running of the statute of limitations would begin when the person discovers, or with reasonable diligence should have discovered, the wrongful conduct of the manufacturer.” *Anthony v. Abbott Labs.*, 490 A.2d 43, 46 (R.I. 1985). “To construe the statute narrowly so as to preclude a person from obtaining a remedy simply because the wrong of which he was the victim did not manifest itself for at least two years from the time of the negligent conduct, is clearly inconsistent with the concept of fundamental justice. To require a man to seek a remedy before he knows of his rights, is palpably unjust.” *Wilkinson v. Harrington*, 104 R.I. 224, 238, 243 A.2d 745, 753 (1968).

South Carolina: All personal injury actions other than medical malpractice “must be commenced within three years after the person knew or by the exercise of reasonable diligence should have known that he had a cause of action.” S.C. CODE ANN. § 15-3-535 (Law. Co-op. 2004).

South Dakota: Product liability actions “may be commenced only within three years of the date when the personal injury, death, or property damage occurred, became known or should have become known to the injured party.” S.D. CODIFIED LAWS § 15-2-12.2 (Michie 2004).

Tennessee: “[I]n products liability cases: (1) the cause of action for injury to the person shall accrue on the date of the personal injury, not the date of the negligence or the sale of a product.” TENN. CODE ANN. § 28-3-104(b)(1) (2004). “A personal injury cause of action accrues when the plaintiff knows, or in the exercise of reasonable care and diligence should know, that an injury has been sustained.” *Wyatt v. A-Best, Co.*, 910 S.W.2d 851, 854 (Tenn. 1995).

Texas: “The discovery rule represents an attempt to balance society’s interest to have disputes either settled or barred within a reasonable time in situations in which it is difficult for the injured party to learn of the negligent act. The discovery rule applies if: (1) the injury is inherently undiscoverable; and (2) the evidence of the injury is objectively verifiable.” *Velsicol Chem. Corp. v. Winograd*, 956 S.W.2d 529, 530-31 (Tex. 1997) (citations omitted).

Utah: “A civil action under this chapter [product liability] shall be brought within two years from the time the individual who would be the claimant in such action discovered, or in the exercise of due diligence should have discovered, both the harm and its cause.” UTAH CODE ANN. § 78-15-3 (2004).

Vermont: “[I]njuries to the person suffered by the act or default of another person . . . shall be deemed to accrue as of the date of the discovery of the injury.” VT. STAT. ANN. tit. 12 § 512(4) (2004).

Virginia: “Code § 8.01-230 specifies that a cause of action for personal injuries shall be deemed to accrue and the prescribed limitation period shall commence to run *from the date the injury is sustained*. We construe the statutory word ‘injury’ to mean positive, physical or mental hurt to the claimant, not legal wrong to him in the broad sense that his legally protected interests have been invaded. Thus, the running of the time is tied to the fact of harm to the plaintiff, without which no cause of action would come into existence; it is not keyed to the date of the wrongful act, another ingredient of a personal injury cause of action.” *Locke v. Johns-Manville Corp.*, 221 Va. 951, 957-58, 275 S.E.2d 900, 904 (1981) (emphasis added).

Washington: “In a products liability action, the statute of limitation does not begin to run until the plaintiff has discovered or should reasonably have discovered all the essential elements of the action.” *Sahlie v. Johns-Manville Sales Corp.*, 99 Wash.2d 550, 553, 663 P.2d 473, 475 (1983).

West Virginia: “In products liability cases, the statute of limitations begins to run when the plaintiff knows, or by the exercise of reasonable diligence should know, (1) that he has been injured, (2) the identity of the maker of the product, and (3) that the product had a causal relation to his injury.” *Hickman v. Grover*, 178 W. Va. 249, 252, 358 S.E.2d 810, 813 (1987).

Wisconsin: “In the interest of justice and fundamental fairness, we adopt the discovery rule for all tort actions other than those already governed by a legislatively created discovery rule. Such tort claims shall accrue on the date the injury is discovered or with reasonable diligence should be discovered, whichever occurs first. All cases holding that tort claims accrue at the time of the negligent act or injury are hereby overruled.” *Hansen v. A.H. Robins, Inc.*, 113 Wis. 2d 550, 560, 335 N.W.2d 578, 583 (1983).

Wyoming: “Wyoming is a ‘discovery’ state; therefore, the statute of limitations is triggered when the plaintiff knows or has reason to know the existence of the cause of action.” *Olson v. A.H. Robins Co.*, 696 P.2d 1294, 1297 (Wyo. 1985).

