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BEATING THE STATUTE OF REPOSE – NEW IDEAS FOR OLD PRODUCTS

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INTRODUCTION

One of the biggest holes in the protection offered victims of defective products in Georgia is the statute of repose. This statute, found at O.C.G.A. § 51-1-11(b)(2), states:

> No action shall be commenced pursuant to this subsection with respect to an injury after ten years from the date of the first sale for use or consumption of the personal property causing or otherwise bringing about the injury.[1]

This statute operates even where the injury occurred less than ten years after the first sale if the suit is filed more than ten years after the first sale.[2] The statute of repose serves to bar a claim, and protect a manufacturer of dangerous products from liability, without any rational relationship between the ten year period and the reasonable life of the product at issue. In essence, a victim of a defective paper bag that is nine years old can bring a product liability suit against the manufacturer, even though on the surface not many of us expect a paper bag to have a long life span, while the victim of an eleven year old airplane cannot bring a

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[1] O.C.G.A. §51-1-11(b)(2) (1995).

[2] *Hatcher v. Allied Products Corp.*, 256 Ga. 100, 101, 344 S.E.2d 418 (1986) (responding to a certified question presented in *Hatcher v. Allied Products Corp.*, 782 F.2d 926 (11th Cir. 1986).

products liability suit even though we all expect an airplane to have a life far greater than ten years. This makes no sense. But there are ways to pursue a viable product liability action even in the face of this draconian statute of repose. With a little luck, compensation can be obtained. Before discussing the statute of repose, and a couple of ideas on how to avoid it, a review of basic product liability law is in order.

A. STRICT LIABILITY: O.C.G.A. § 51-1-11 IS THE BASIS FOR MOST CLAIMS.

While common law developments are an important source of product liability law, the most important basis for product liability law in Georgia is the product liability statute. O.C.G.A. § 51-1-11(b)(1) establishes Georgia's rule regarding a manufacturer's strict liability for an injury caused by one of its products:

> The manufacturer of any personal property sold as new property directly or through a dealer or any other person shall be liable in tort, irrespective of privity, to any natural person who may use, consume, or reasonably be affected by the property and who suffers injury to his person or property because the property when sold by the manufacturer was **not merchantable and reasonably suited to the use intended**, and its condition when sold is the proximate cause of the injury sustained. (emphasis added)[3]

Note that the Georgia statute is not identical to 402A of the Restatement (Second) of Torts. In Georgia, unlike states that have adopted the Restatement as the basis for strict liability, a product does not have to be unreasonably dangerous before imposition of strict liability.[4] Instead, the focus is on consumer expectations of safety and danger. This appears to be true

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[3] This imposition of strict liability is important to Georgia as a matter of public policy. An illustration of this can be found in the recent decision of Alexander v. General Motors Corp., 267 G. 339 (1996) in which it was held that strict liability would be imposed as a matter of public policy even though the injury occurred in a in a state which did not recognize strict liability.

[4] *Firestone Tire Co. v. King*, 145 Ga. App. 840, 244 S.E.2d 905 (1978).

even after the *Banks v. ICI Americas, Inc.*[5] opinion which added a risk utility analysis as one of the measures of product defectiveness[6].

Additionally, though not adopted in Georgia, it must be noted that Georgia law may be modified by the Restatement (Third) of Torts[7] which seems to require that an alternative design be shown by the plaintiff in order to recover in a defective design case. It is unclear how closely Georgia law will follow the Restatement.

(i) Elements of a Strict Liability Claim.

Simplified, the basic requirements for a strict liability cause of action are:

a. The product must be new, tangible property;

b. The product must be defective at the time it leaves the control of the manufacturer; and

c. The product must be the proximate cause of an injury to a human.[8]

B. NEGLIGENCE CAN ALSO SERVE AS THE BASIS OF A CAUSE OF ACTION.

Although the strict liability statute is the source of law and recovery for most product liability actions in Georgia, basic negligence law must also be considered. The concepts of strict liability have not completely eliminated negligence as a cause of action. Negligence principles are often applicable in determining whether a product is defective - that is, **not merchantable and reasonably suited to the use intended,** as that phrase is used in O.C.G.A. § 51-1-11(b)(1). In fact, "[p]roducts liability law in Georgia has evolved primarily as a cause of action in negligence."[9] This is not to say that the two theories are identical.

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5 *Banks v. ICI Americas, Inc.*, 266 Ga. 607 (1996)

6 Restatement (Third) of Torts: Products Liability §2, Reporter's Notes to comment c, Tentative Draft No. 2, 1995 notes this which is consistent with the history of Georgia products liability law.

7 Restatement (Third) of Torts: Products Liability §2

8 *Ellis v. Rich's, Inc.*, 233 Ga. 573, 212 S.E.2d 373 (1975); *Ford Motor Co. v. Cantor,* 23 Ga. 657, 238 S.E.2d 361 (1971).

9 Georgia Products Liability, 2nd Ed. Maleski, p. 3.

The very important decision by the Supreme Court of Georgia in *Banks v. ICI Americas, Inc.*[10], recognizes that strict liability and negligence claims remain distinct and continue to have different, although sometimes only minimal, elements.

Negligence concepts such as reasonable care and diligence are especially relevant in design defect cases. However, in a manufacturing defect case in which the product simply did not work as it was supposed to because of some assembly or material problem, the concept of strict liability is the primary theory of recovery. In classic strict liability manufacturing defect cases, manufacturers are not allowed to escape liability by showing that their quality control procedures were reasonable and appropriate. Negligence principles are irrelevant.

C. WARRANTY IS ALSO RELEVANT; THOUGH, IN MOST CASES, NOT PARTICULARLY HELPFUL.

The product liability law that we have today is rooted in warranty law. This law is an offshoot of commercial transactions and has as its primary goal to ensure that sales transactions between merchants are consummated in a fair and efficient fashion. Concepts such as notice and opportunity to cure make sense among merchants but are hardly practical when the injury is to a human being. Certainly, pain and suffering as an element of damages was not a relevant consideration in the context in which warranty law was created. "Due to the restricted recovery of damages under warranty theory the use of warranty theory in product liability is of limited utility. There are some economic damages, however, that are only available under this theory."[11] Accordingly, this body of law, while still widely pled as one of the counts in many product liability actions, adds little to the value of most cases. However, it must be kept in mind that "warranty theory may be the only way to obtain

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[10] 264 Ga. 732, 45 S.E.2d 671, 672 (1994).

[11] *The Preparation of a Product Liability Case*, Baldwin, Hare, McGovern, 2d Ed. p. 199.

recovery where the plaintiff has only sustained economic loss including damage to the product itself without any additional property damage or personal injury."[12]

Privity of contract is required in all claims based on warranties. There is no one definition of privity that is applicable to all cases. According to *Black's Law Dictionary*, privity is defined as "that connection or relationship which exists between two or more contracting parties."[13] "In its broadest sense, privity 'denotes mutual or successive relationship to the same right of property.'"[14] For an implied warranty claim, a plaintiff must have purchased the product either directly from the manufacturer or from some other person such as a wholesaler or retailer.[15]

(i) Express Warranties.

Express warranties are, as the name implies, express promises of performance. An action based on the breach of such a warranty requires reference to the wording of the particular promise involved. An express warranty is "[a]ny affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain . . . ."[16]

In cases involving express warranties which give the manufacturer a right to repair the products, there can be no claim under the warranty until the manufacturer has been given an opportunity to repair the product, then failed to do so.[17] Express warranties rarely have practical application in bodily injury cases. However, keep in mind that an express warranty is a representation that might serve as the basis for a fraud action.

(ii) Implied Warranties.

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[12] *The Preparation of a Product Liability Case*, Baldwin, Hare, McGovern, 2d Ed. p. 199-200.

[13] *Decatur North Association v. Builders Glass, Inc.*, 180 Ga. App. 862, 350 S.E.2d 795 (1986).

[14] *Rawson v. Brosnan*, 187 Ga. 624, 627 (1939).

[15] *Whitaker v. Harvell-Kilgore Corp,* 418 F.2d 1010 (5th Cir. 1969).

[16] *Eldridge's Georgia Products Liability*, McIntosh (1987) p.149 ; O.C.G.A. §11-2-313.

[17] *DeLoach v. General Motors*, 187 Ga. App. 159, 369 S.E.2d 484 (1988).

Implied warranty and strict liability are related concepts. O.C.G.A. § 11-2-314 creates an implied warranty of merchantability in sales transactions where the seller is a merchant with respect to goods of that kind. In the product liability context, the claim is that the product was not fit for the ordinary purpose for which it was intended.[18] By definition, a product that is not fit for the ordinary purposes for which it is intended involves issues of defectiveness and must be considered in conjunction with tort claims brought pursuant to O.C.G.A. § 51-1-11.[19] According to *Black's Law Dictionary*, "goods, to be merchantable, must be fit for the ordinary purposes for which such goods are to be used." The very same language is used in the applicable statute, O.C.G.A. § 11-2-314(c), and Georgia case law.[20]

An implied warranty of merchantability exists unless such a warranty is expressly, or from the nature of the transaction, excepted.[21] A waiver of the implied warranty must be clear and certain, in writing, and cannot be inconspicuous.[22] An implied warranty remains effective for a reasonable time.[23] Privity is necessary in an implied warranty claim.[24]

D. MANUFACTURERS ARE PROTECTED WHEN THE PRODUCT IS MORE THAN TEN YEARS OLD.

Now that we are refreshed on the basic law of product liability in Georgia, it's time to get to the meat of this paper – avoiding the defense of the statute of repose. Since the demise of the "open and obvious" doctrine[25] as a slam dunk defense, the statute of repose remains a

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18 O.C.G.A. §11-2-314(2)(c).

19 *See Parzini v. Center Chemical Co*., 134 Ga. App. 414, 214 S.E.2d 700, *rev'd on other grounds,* 234 Ga. 868, 216 S.E.2d 580 (1975).

20 *See, e.g., Giordano v. Ford Motor Co*., 165 G. App. 644, 645, 299 S.E.2d 897 (1983) ("not merchantable and reasonably suited to the use intended . . . means defective.").

21 *Wilson v. Eargle,* 98 Ga. App. 241, 105 S.E.2d 474 (1958).

22 *BCS Financial Corp. v. Sorbo,* 213 Ga. App. 259, 261, 444 S.E.2d 85 (1994).

23 *Wood v. Hubb Motor, Co*., 110 Ga. App. 101, 137 S.E.2d 674 (1964).

24 *Lamb v. Georgia-Pacific Corp.,* 194 Ga. App. 848, 392 S.E.2d 307 (1990).

25 *Ogletree v. Navistar International*, 269 Ga. 443, 1998 Ga. LEXIS 513 (May 18, 1998) "The open and obvious nature of the danger in a product is logically only one of many factors which affect the product's risk and, therefore, making that single factor dispositive is

manufacturer's best defense to a product's liability claim. As noted above, no matter how dangerous the product, no matter how diligent the plaintiff in getting his claim to the courthouse, if the product is more than ten years old, most of the plaintiff's product liability action is gutted. But, there is hope. First, we need to decide when the ten year period begins to run, then we have to examine the exceptions laid out in the statute, and, as a last resort we have to look elsewhere – not in the law books, but on a map, for possible relief.

(i) The Statute of Repose Begins to Run When The Product is First Sold (or Leased) for Human Use.

The ability to prove that the product was new when first sold is essentially imperative to any product liability claim. This requirement does not mean that the injured party had to purchase the product when it was new. All that is required is that the party who is sought to be held liable, sold the property as new (as opposed to used). There is no privity requirement. Product liability law absolutely applies to used products (but only against the manufacturer of the product who first sold it as new). The most important aspect of this part of the strict liability statute is the concept of when the product was first sold for use by human consumers. That it may contain recycled parts is not determinative of whether it is new, or not, so long as it was marketed as new property. The ten year statute of repose begins to run on this first sale.

The previous paragraph is a correct interpretation of Georgia law. However, a recent case seems to defy this interpretation by holding that a manufacturer can rely on the statute of repose by arguing that the first sale occurs when a component part is assembled into the product. This decision of the Georgia Court of Appeals exhibits a bizarre confusion as to the definition of "first sale" as used in O.C.G.A. § 51-1-11(b)(2) by holding that the statute of repose relating to a defective light switch in an automobile began to run when Ford installed the

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not consistent with this court's mandate in *Banks* that the product's risk must be weighed against it utility."

switch on the assembly line, as opposed to when the automobile was actually purchased by an end user for use as a mode of transportation.[26]

Strict liability principles apply to leased products if the lease is similar to a sale.[27]

(ii) The Statute of Repose Requires the Injury to Occur, and Suit to be Filed, Within Ten Years of the First Sale of the Product for Human Use.

It is imperative to move rapidly in a potential product liability suit. We cannot rely on the two year statute of limitations for tort actions as the only time limit applicable. Except in cases involving minors, the two year statute is the absolute longest a plaintiff has within which to file suit. In fact, because of the statute of repose, the time within which suit may be filed can be surprisingly short. Georgia's statute of repose, O.C.G.A. § 51-1-11(b)(2), operates as a complete bar to strict liability actions filed more than ten years from the date of sale of a product. This statute operates even where the injury occurred less than ten years after the first sale if the suit is filed more than ten years after the first sale.[28]

This ten year statute of repose applies to strict liability and negligence actions. O.C.G.A. § 51-1-11(c) states, in pertinent part:

> The limitation of paragraph (2) of subsection (b) of this Code section regarding bringing an action within ten years from the date of the first sale for use or consumption of personal property shall also apply to the commencement of an action claiming negligence of a manufacturer as the basis of liability. . . .[29]

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[26] *Johnson v. Ford Motor Co.,* 281 Ga. App. 166, 637 SE2d 202 (2006).

[27] *Advanced Computer Sales, Inc. v. Sizemore*, 186 Ga. App. 10, 366 S.E.2d 303 (1988).

[28] *Hatcher v. Allied Products Corp.*, 256 Ga. 100, 101, 344 S.E.2d 418 (1986) (responding to a certified question presented in *Hatcher v. Allied Products Corp.*, 782 F.2d 926 (11th Cir. 1986).

[29] O.C.G.A. §51-1-11(c).

Subsection (c) thus extends the ten year statute of repose to negligence actions.[30] Amazingly, the statute of repose has been found to be constitutional.[31] More shockingly, if a suit is filed within the statute of repose, but dismissed after the ten years has expired and then re-filed within what would usually be the time for renewal, the statute of repose will then serve to bar the suit.[32]

E. THERE ARE EXCEPTIONS TO THE REPOSE STATUTE.

The statute of repose does not apply to claims against products "which cause a disease or birth defect" or claims that the manufacturer's conduct was willful, reckless, or with wanton disregard for life or property [33]. Nor does Georgia's statute of repose, at O.C.G.A. § 51-1-11(a)(2), apply to claims based on the manufacturer's duty to warn of dangers relating to the use of a product it manufactures once that danger becomes known to the manufacturer.[34] In this regard, the statute of repose provides that "[n]othing contained in this subsection shall relieve a manufacturer from the duty to warn of a danger arising from use of a product once that danger becomes known to the manufacturer."[35] Failure to warn cases are:

> outside the ambit of the statute of repose, thereby precluding use of the statute to relieve manufacturers of their liability for failing to warn of a danger arising from the use of a product whenever that danger becomes known to the manufacturers.[36]

There is no requirement that the manufacturer have actual knowledge of a particular danger for it to be liable for its failure to warn. Constructive knowledge, that is, knowledge that the

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30 *Chrysler Corp. v. Batten*, 264 Ga. 723, 725, 450 S.E.2d 208 (1994).
31 *Love v. Whirlpool Corp.*, 264 Ga. 701, 449 S.E.2d 602 (1994); *Hatcher v. Allied Products Corp.*, 796 F.2d 1427 (11th Cir. 1986).
32 *Id.*
33 O.C.G.A. §51-1-11(c).
34 O.C.G.A. §51-1-11(c); *Chrysler Corp. v. Batten*, 264 Ga. 723, 452 S.E.2d 94 (1994).
35 O.C.G.A. §51-1-11(c).
36 *Chrysler Corp. v. Batten*, 264 Ga. 723, 452 S.E.2d 94 (1994).

manufacturer reasonably should know, gives rise to the duty to warn.[37] Georgia law further provides that while there may be a factual overlap between an allegation that a product is negligently manufactured, and an allegation that a product is defective for lack of warnings, the two theories are not co-existent as one claim can be legally barred and the other will still survive for resolution.[38]

IDEA NUMBER ONE **– CLAIM THE PRODUCT HAS BEEN SO SUBSTANTIALLY REBUILT THAT THE STATUTE OF REPOSE IS RESTARTED.**

The law is unclear as to how much rebuilding might be done to a product to transform it from being a used product into new one. There is certainly an argument that some level of rebuilding by the original manufacturer can make what was considered a used product a new one for purposes of application of the strict liability statute. While there is no Georgia law directly on point, it makes sense that:

> Any reconstruction or reconditioning (as distinct from a mere repair - a familiar distinction in other areas of law, see e.g., *Aero Mfg. Co. v. Convertible Top Replacement Co.,* 365 U.S. 336 (1961)) which has the effect of lengthening the useful life of a product beyond what was contemplated when the product was first sold starts the statute of repose running anew. [Cits]. Otherwise the statute would create an inefficient incentive to reconstruct or recondition old products rather than build new ones, in order to reduce expected liability costs; for under such a regime a product rebuilt after ten years would be immunized from liability.[39]

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[37] *Id.*; *Ford Motor Co. v. Stubblefield*, 171 Ga. App. 331, 225, 319 S.E.2d 470 (1984); *Stiltjes v. Ridco Exterm. Co.*, 192 Ga. App. 778, 780, 386 S.E.2d 696 (1989).

[38] *Chrysler Corp. v. Batten*, 264 Ga. 723, 724, 452 S.E.2d 94 (1994); *cf. e.g. Banks v. ICI Americas*, 264 Ga. 732, 450 S.E.2d 671 (1994).

[39] *Richardson v. Gallo Equipment Co.,* 990 F.2d 330, 331 (7th Cir. 1993) (citation omitted).

However, this is not the norm and usually rebuilders and remanufacturers are not held to the requirements of the strict liability statute.

IDEA NUMBER TWO **– FILE SUIT IN ANOTHER STATE.**

Once it becomes clear that the statute of repose will make recovery unlikely in Georgia, it's time to go down to the local forum shop and see what is available. When shopping for a better forum in which to bring a product liability action, we have to find a jurisdiction that not only has a more favorable situation with regard to the statute of repose, but that will also choose to apply its statute instead of Georgia's. This can get pretty complicated and involves not only the substantive product liability law of another state, but also requires us to understand and predict the choice of law rules that the state will follow. To illustrate the problems associated with the plan, two examples are helpful.

(i) Success in New Jersey and Iowa.

In *Gantes v. Kason Corporation*,[40] the injury in question involved a death at a chicken processing plant in Georgia, but was caused by a machine that was more than ten years old and probably manufactured in New Jersey. Because the statute of repose effectively barred recovery, suit was filed in New Jersey state court. The defendant manufacturer, as expected, argued that under the choice of law rules, Georgia's substantive law should apply and serve to bar the action on the ground it was brought too late. As the quoted language below illustrates, sometimes justice can indeed be found at the not-so-local forum shop[41].

> In 1978, the Georgia legislature enacted its statute of repose, O.C.G.A. § 51-1-11(b)(2), as an amendment to its strict products-liability statute. *Daniel v. American Optical Corp.*, 251 Ga. 166, 304 S.E.2d 383, 384

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40 145 N.J. 478, 679 A.2d 106 (1996).

41 This author is presently involved in a case in which a 20 year old product caused an injury in Georgia. The product was manufactured outside of Georgia. Suit was filed in the foreign jurisdiction of the manufacturer and when the answer was filed alleging as an affirmative defense Georgia's statute of repose a motion for summary judgment was filed to strike the defense as the jurisdiction in which the suit is pending treats statutes of limitations as procedural this rule should serve to bar the defense as irrelevant.

(Ga. 1983). In *Love v. Whirlpool Corporation*, 264 Ga. 701, 449 S.E.2d 602 (1994), the Georgia Supreme Court explained that its legislature adopted the statute of repose to serve the dual purposes of stabilizing insurance underwriting and eliminating stale claims. In so concluding, the court indicated that the statute of repose was the legislature's response to a 1978 report of the Senate Products Liability Study Committee that addressed insurance-industry problems generated by the open-ended liability of manufacturers, and recommended "that a ten-year statute of repose be enacted." *Id*. at 605. Just one month after its decision in *Love*, the Georgia Supreme Court again had occasion to address the statute of repose. *Chrysler Corp., supra*, 450 S.E.2d at 211-13. There the court reiterated: "The ten-year statute of repose was enacted in order to address problems generated by the open-ended liability of manufacturers so as to eliminate stale claims and stabilize products liability underwriting." *Id*. at 212.[42]

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The courts below acknowledged that, in this case, the only New Jersey interest implicated by its contacts with the parties is that derived from the status of the defendant as a domestic manufacturer. That interest is in deterring the manufacturing of unsafe products within its borders. However, both the trial court and Appellate Division majority determined that a deterrent interest is not significant enough to warrant the application of New Jersey's limitations law. 278 N.J. Super. at 478-49; 276 N.J. Super. at 589-90. We conclude that this State has a strong interest in encouraging the manufacture and distribution of safe products for the public and, conversely, in deterring the manufacture

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[42] 145 N.J. 478, 485; 679 A.2d 106, 109.

> and distribution of unsafe products within the state. That interest is furthered through the recognition of claims and the imposition of liability based on principles of strict products-liability law.[43]
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> The answer is clear. Georgia has no contacts with the defendant manufacturer or with this lawsuit. Hence, its special policy concerns over the impact of "open-ended liability" on its insurance industry and stale claims on its courts do not, in the context of this litigation, give rise to a governmental interest that must be protected by applying its statute of repose to foreclose this suit in New Jersey.[44]

In *Jones v. Winnebago Industries*[45], the plaintiffs were injured in Idaho, a state in which the statute of repose barred their claims. The Winnebago in question was manufactured in Iowa and suit was filed in Iowa. Relying on the Restatement (Second) Conflict of Laws §§ 6, 145 the trial court ruled that Iowa's statute of repose applied and that the suit was not barred by Idaho law.

(ii) The Forum Shop In Minnesota Was Not Quite as Fully Stocked.

This same plan of action, to file suit in the state of residence of the manufacturer the product did not work in Minnesota, although it should have. Nevertheless, it was worth the effort and the process and argument is instructive. In this case, *Muhammad v. Humphrey Manlift* (not reported), the plaintiff was injured in Georgia on a very old manlift manufactured in Minnesota. To protect the statute of limitations if the Minnesota effort did not work out, Plaintiff first filed suit in Georgia alleging defective warnings. Plaintiff's efforts to have the case heard in Minnesota involved the filing of the action there, and then, after the answer was filed, the filing of a motion for summary judgment to strike the defense

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[43] 145 N.J. 478, 487; 679 A.2d 106, 110.

[44] 145 N.J. 478, 494; 679 A.2d 106, 113.

[45] *Jones v. Winnebago Industries,* 460 F.Supp.2d 953 (N.D. Iowa 2006)

that relied on Georgia's statute of repose. The plaintiff's argument focused on two issues: first, that the statute of repose was procedural in nature and that Minnesota should apply its own procedural law; and second, that even if the Georgia statute of repose was substantive, that Minnesota courts should ignore substantive law that contradicts its own public policy. These same arguments might be available regardless of where suit is filed.

(iii) A Statute of Repose is Procedural.

The first prong of this forum shopping plan was to argue that Minnesota courts have long deemed statutes of limitation and repose to be procedural and to convince the court to hold that the law of the forum state, i.e. Minnesota, controls questions of procedure. The law, at first blush seemed in plaintiff's favor because "[s]tatutes which limit the period within which actions may be commenced are generally considered procedural, and therefore the law of the forum is applied."[46]

In *Milkovich v. Saari*[47], the Supreme Court of Minnesota declared the strict rules of *lex loci* and *lex fori* largely obsolete in favor of a more flexible five-factor test. (This is followed in most states now.) Nevertheless, the conflict of law rules governing statutes of limitation remained constant. *See, e.g., United States Leasing Corp. v. Biba Information Processing Services, Inc.*, [48]("It is the law in Minnesota that the limitation in time within which an action may be brought relates to the remedy and is governed by the law of the forum.") (quotation omitted). *See also Davis v. Furlong*,[49] (holding that the choice of law rules expounded in the *Milkovich* decision apply only to substantive rather than procedural questions and that the traditional view that questions of procedure are governed by the law of

46 *American Mutual Liability Ins. Co. v. Reed Cleaners* , 227 Minn. 334, 335-36, 35 N.W.2d 425 (Minn. 1948) (citing *Weston v. Jones*, 160 Minn. 32, 199 N.W. 431 (Minn. 1923)). *See also In re Daniel*, 208 Minn. 420, 427, 294 N.W. 465 (Minn. 1945) (applying Minnesota statute of limitation to action arising under Iowa and filed in Minnesota).

47 295 Minn. 155, 203 N.W.2d 408 (Minn. 1973)

48 436 N.W.2d 823, 825 (Minn. App. 1989)

49 328 N.W.2d 150 (Minn. 1983)

the forum state still controls).[50] In this sense, Minnesota was in accord with the majority rule, as stated by the RESTATEMENT (SECOND) OF CONFLICTS OF LAWS § 142, that limitations issues are governed by the law of the forum.

It is arguable that a statute of repose falls squarely within these rules. Georgia has characterized its statute of repose as placing "time restrictions on the bringing of a cause of action." *Daniel v. American Optical Corp.*,[51] ("A statute of limitation is a statute of repose."). Accordingly, such statutes are inherently procedural, relate to the remedy, and are accordingly governed by the law of the forum. *United States Leasing*, supra, at 825. Unfortunately, Georgia also has characterized this statute of repose as substantive. [52]

(iv) Even if the Statute of Repose is Substantive, It Should be Ignored.

The second, and more productive point of attack is to claim that even if the statute of repose is substantive, it should nevertheless be ignored and the forum state's rule followed. In fact, Georgia has chosen to do this in a product liability case in which it refused to apply Virginia law because to do so contradicted Georgia's public policy.[53] In determining what law to apply, there are multiple methods by which conflict of law issues are determined; however, Professor Leflar's conflict of law analysis is the most commonly followed approach. In tort cases, most states look only to the last two of Professor Leflar's five part conflict of law test. Accordingly, the only issues a court should consider are parts four and

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50 While the five factor analyses advocated by the *Milkovich* decision does not apply to the instant Motion, this Court should note that at least one state supreme court has refused to apply Georgia's statute of repose using a very similar analyses. *See Gantes v. Kason Corporation*, 145 N.J. 478, 679 A.2d 106 (N.J. 1996) (Supreme Court of New Jersey, applying conflict of law rules, refusing to apply Georgia's statute of repose to a lawsuit filed in New Jersey against a New Jersey defendant where the incident causing the underlying injury occurred in Georgia).

51 251 Ga. 166, 304 S.E.2d 383 (1983). *See also Poore v. Poore*, 210 Ga. 371, 80 S.E.2d 294 (1954)

52 Browning v. Maytag Corp., 401 S.E. 2d 725 (1991)

53 *Alexander v. General Motors Corporation*, 267 Ga. 339, 478 S.E.2d 123 (1996).

five of the checklist - (4) Advancement of the Forum's Governmental Interests and (5) The Better of Rule of Law.

F. ADVANCEMENT OF THE FORUM'S GOVERNMENTAL INTERESTS DEMANDS THAT THE FORUM STATE'S LAW BE APPLIED.

In the *Muhammad* case, Minnesota did not have a statute of repose that listed a finite time period. Instead, Minnesota has a useful life statute, Minn. Stat. §604.03, that differed substantially from Georgia's statute of repose, O.C.G.A. § 51-1-11, and this created a conflict which needed to be resolved. Under Minnesota's rule, the jury decides whether a defendant manufacturer is protected from liability because the product was beyond its useful life. The issue is answered on a case by case rational basis in which each product is considered individually. Georgia, on the other hand, simply bars the case outright if more than ten years has passed. The injured plaintiff is never given a chance to argue that the manufacturer should be responsible for longer than ten years. The Minnesota Supreme Court has recognized that "§604.03 is not a typical statute of repose."[54] In fact, Minnesota "first considered and abandoned a true 15-year statute of repose."[55]. The *Hodder* Court further noted the difference between a true statute of repose which absolutely bars a claim and Minnesota's useful life statute which is but a factor to be weighed by the jury, holding that the legislature "stopped short of saying it is an absolute defense . . . ." [56]

The second prong commonly considered in determining the weight to be given the forum state's governmental interest looks at whether the interests of the forum state, in our example, Minnesota, are sufficiently important to it that it should apply its law instead of Georgia's. Minnesota, like most states, has a great governmental interest in insuring that the products manufactured within its borders are safe and in insuring that the victims of torts are compensated. The product at issue was manufactured in Minnesota. Minnesota has a

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54 *Hodder v. Goodyear Tire & Rubber*, 426 N.W.2d 826, 830 (Minn. 1988).
55 *Id*. at 831
56 *Id*. at 832.

significant interest in deterring the manufacture of unsafe products in this state. It does not want such products put into the stream of commerce. Minnesota is not alone in the desire to protect the integrity of the reputation of the products its resident manufacturers put into the stream of commerce. For example, in *Mitchell v. Lone Star Ammunition, Inc*.,[57] the court was called upon to decide whether to apply North Carolina's statute of repose (the state where the event occurred) or Texas law which was more likely to allow recovery (the residence of the manufacturer). In choosing Texas law, the Court noted that:

> Texas, on the other hand, has a substantial interest in the resolution of the parties' claims and defenses. The Texas legislature and courts have developed an almost paternalistic interest in the protection of business operation in the state. . . . This interest is particularly strong when the defective product in question was manufactured and placed in the stream of commerce in the State of Texas.

Id. at 250. Similarly in *Kozoway v. Massey-Ferguson, Inc*., [58]in which a tractor manufactured in Iowa was alleged to have caused an injury in Canada under whose laws recovery was very unlikely the court applied the law of the state in which the tractor was manufactured reasoning that:

> [a] substantial degree of uniformity and predictability is created when such a domestic corporation knows that the law of the state where it is headquartered, where its products are manufactured, applies to products liability actions brought by foreign plaintiffs. Surely there is no injustice to a corporation in applying to its the laws of the state where is has chosen to locate its principle place of business.[59]

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[57] 913 F.2d 242 (5th Cir. 1990)

[58] 722 F.Supp. 641 (D. Colo. 1989)

[59] Id. 644. (*See,* Note 2 of Judge Lay's dissent in *Nesladek*. in which he lists numerous other cases supporting the widely held belief that a state takes interest in the products manufactured within its borders.)

The product liability system serves as a deterrent to unsafe products and forces manufacturers to carefully design and produce products and this creates a safer society.[60] Similarly, Minnesota, like most potential venues, has an interest in insuring that its manufacturers and citizens are treated fairly in the courts and there is really no better way to insure that than having actions against them brought here in their home state.

Minnesota, the state in this example, like most states also has a policy of insuring that tort victims are compensated. The Minnesota Supreme Court has "often stated that it is in the interest of this state to see that tort victims are fully compensated." *E.g., Bigelow v. Halloran*,[61]. In fact, "Minnesota places great value in compensating tort victims. [Minnesota has] even refused to apply [its] law when the law of another state would better serve to compensate a tort victim." *Jepson v. General Casualty Co. of Wisconsin*, 513 N.W.2d 467, 472 (Minn. 1994). If Georgia's statute of repose is allowed to bar portions of a claim, the likelihood of the plaintiff being fully compensated is greatly diminished. If the severely injured plaintiff is not eventually compensated, there is every reason to believe that he may ultimately be reliant on the government for his support instead of on the party responsible for the injuries. If that occurs, it will violate another governmental interest - to keep "individuals off of government assistance, if equitably possible."[62]

When we try to shop for a better forum, the defense is likely to argue that we should be penalized for doing so. We must counter this by arguing that the law is the law regardless of why we are in a particular venue. In fact, the Minnesota Supreme Court, like that of most states, has noted that "the courts of this state are open to those residents and nonresidents alike who properly invoke, within constitutional limitations the jurisdiction of these

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60 Testimony of Gene Kimmelman, Legislative Director, Consumer Federation of America, Consumer Subcommittee hearing, senate Hearing, 100-342, September 18, 1987, transcript at 54.

61 313 N.W.2d 10, 12 (Minn. 1981)

62 *Hodges v. Hodges*, 415 N.W.2d 62, 68 (Minn. 1987).

courts."[63] The methodology used to be used by any court "demands that choice-of-law issues be decided, not only upon 'contacts', but also policy considerations." *Id.* As noted above, policy demands the application of the forum's law if it serves the public policy of that forum better than the law of the jurisdiction in which the injury occurred. The forum state's constitutional safeguards guarantee the same justice for the plaintiff whether he or she was a citizen or not and regardless why they chose the forum. As noted by the Minnesota Court in *Lommen v. City of East Grand Forks*,[64] the court must ignore forum shopping as an issue in choosing the applicable law because "[m]ere forum preference, as such and by itself, is not a valid *reason* for any choice-of-law *result*.. Choice of forum ought not to determine the choice of law." (emphasis in original). Lastly, we must argue there is no forum *shopping* as *shopping* implies choice, and if the plaintiff is to have a day in court he or she has no choice but to go to a forum where there is a possibility of recovery.

G. MINNESOTA HAS THE BETTER RULE OF LAW.

Under this prong of the analysis we have to show that Georgia law is inferior. That is relatively easy. The arbitrary ten year statute of repose mandated by O.C.G.A. § 51-1-11(b)(2) is irrational. The Useful Life of Product statute codified at Minn. Stat. §604.03, on the other hand, is rational and reasonable and is a better rule of law. Georgia's statute of repose serves to bar negligence and strict liability aspects of a claim even though the elevator/manlift at issue is permanently installed in a parking deck and certainly has a useful life greatly exceeding ten years. Minnesota's useful life statute allows defendants relief from liability based on the type of product they make. It is certainly conceivable that certain products are intended to last less than ten years just as it makes sense that some are designed to last far longer. For example, Georgia law is the same for a paper cup as it is for a manlift installed in a multi-million dollar building. Certainly, it makes more sense to allow juries to determine to what extent a manufacturer will be liable for its products based on the

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63 *Schwartz v. Consolidated Freightways Corp.*, 221 N.W.2d 665, at 669 (Minn. 1974).
64 522 N.W.2d 148, 152 (Minn. App. 1994)

individual characteristic of the product. By taking the difference in products into consideration, Minnesota's statute is unquestionably superior.

Minnesota, like many states, simply will not apply a rule of law that is "inconsistent with our own concept of fairness and equity."[65] In cases in which a claim was time barred in the state in which the incident occurred, Minnesota has applied its better rule of law - even when the underlying cause of action had to rely on the original state's laws for its existence.[66]

H. ARGUE FOR JUSTICE.

If all else fails, be prepared to argue for justice. The demands of justice further support the application of a foreign jurisdiction's law. The Georgia statute of repose, which insulates manufacturers from liability from defects causing injury over ten years from a product's first sale or use, is patently unfair. The statute immunizes manufacturers who place dangerous, defective and unsafe products into the marketplace. Many products, such as elevators, boilers, industrial machinery, and, of course, manlifts, are designed to last far longer than ten years. Even common household tools and appliances such as power saws, lawnmowers, and snowblowers are often used well beyond ten years. Arbitrary time limits imposed by statutes of repose are especially harmful to workers such as Ms. Muhammad who are forced to deal with older equipment in a work environment and who have no meaningful choice about the equipment they use.

It is important to argue that the case is not about a plaintiff who slept on her rights and allowed the statute of limitations and repose to run in her state of domicile. Identify the inequity of having the time limit run on a claim before the claim even arises. At the time Ms. Muhammad was injured, Georgia's statute of repose, if applicable to her claims, had already lapsed. Forum shopping implies a **choice** of forums. If the defendant succeeds in convincing

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65 *Milkovich v. Saari*, 203 N.W.2d 408, 417 (Minn. 1973).

66 *See, e.g., Myers. v. GEICO*, 225 N.W.2d 238 (Minn. 1974) and note particularly Justice Kelly's concurrence in which he writes that "[i]f we are to apply the better rule of law, it seems that a 1 - year statute of limitations is much too short . . . ." The same logic holds true here - if this Court is to apply the better rule of law a statute which bars claims before the plaintiff is even injured is "much too short".

a Georgia court that Georgia's statute of repose bars the claims, the plaintiff has **no choice** as to forums. The place where the dangerous product was manufactured, is potentially the only forum in which the plaintiff can obtain recompense for the severe and debilitating injuries, and that state's court' should allow access to that forum.

<u>IDEA NUMBER THREE</u> **– CLAIM FRAUDULENT CONDUCT BY THE MANUFACTURER THAT ESTOPPS IT FROM RELYING ON THE STATUTE OF REPOSE.**

Fraudulent conduct estopps a defendant from relying on the statute of repose as a defense. All of the elements of fraud will need to be shown – a knowing or intentional misrepresentation, scienter, reasonable reliance, and damages. The "intentional misrepresentation" element will be the hardest element to satisfy but it can be met by showing gross carelessness. An example might be where a manufacturer puts a switch and label for a machine lockout without the switch actually being connected to anything with the intent to have users rely on this safety feature in making purchase and use decisions.

The law in this area is still growing but it makes senses that if doctors can be estopped from relying on the statute of repose so too can manufacturers.

<u>CONCLUSION</u>

The statute of repose is an irrational bar to recovery. We need to be creative and aggressive to find ways to avoid its case-ending effect. If the product was manufactured elsewhere, that may mean doing some travelling.