An Alternative to the Absolute Bar Effect of Statutes of Repose

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INTRODUCTION

This Note discusses two time-to-file requirements in the context of toxic tort litigation: statutes of limitation and statutes of repose. Plaintiffs first must file on time according to the relevant statute of limitation. However, toxic torts often involve latent injuries, where injuries do not manifest until many years after the initial exposure to some hazardous substance. A federal statute addresses this latency problem—the limitation period begins to run only when a plaintiff's injuries manifest (or once the plaintiff should have realized that the injury has manifested). This is the discovery rule.

While the federal discovery rule preempts state statutes of limitation, the U.S. Supreme Court held, in *CTS Corp. v. Waldburger*,[1] that the federal discovery rule did not preempt *the other* timeliness barrier: statutes of repose. In short, a statute of repose prohibits some injured persons from ever filing on time. Such a rule should be reconsidered and amended by statute.

This Note proposes one such amendment, namely that if injured parties can show that a party acted recklessly in creating the risk of exposure to hazardous substances, the injured parties should have access to the courts.

I. THE PLAINTIFFS WHO NEVER COULD HAVE FILED ON TIME

First, consider the facts from *CTS Corp. v. Waldburger*.[2] CTS Corporation ("CTS") and its subsidiaries opened an electronics plant in Asheville, North Carolina in 1959.[3] At the plant, CTS both manufactured and disposed of electronics and their component parts, a process that required the use of hazardous chemicals, namely trichloroethylene ("TCE") and cis-1,2-dichloreathane ("DCE").[4] CTS closed the plant in 1983 and sold the underlying property to a broker in 1987, "with a promise

1 134 S. Ct. 2175 (2014).

2 *Id.*

3 *Id.* at 2181.

4 *Id.*

that the site was environmentally sound."[5] In turn, the broker eventually sold the property to several individual families.[6]

But that promise might not have been true. Beginning in the 1990s, those families and owners of adjacent properties began to experience a wide variety of suspicious injuries.[7] For example, a mother learned that her son had cancer, and just three months later, learned that her other son developed a large but benign tumor.[8] During the diagnoses, the oncologist asked whether these boys had ever been to Chernobyl.[9] No, the mother responded, but the boys grew up playing in the creeks behind the old plant.[10] Others members of the community also developed cancers and cysts and experienced severe pregnancy complications.[11]

In 2011, these landowners filed a state-law nuisance action against CTS in the U. S. District Court for the Western District of North Carolina.[12] Their complaint alleged that CTS contaminated the well-water surrounding the old plant with TCE and DCE; it also included a 2009 report from the U.S. Environmental Protection Agency ("EPA") that alleged the same facts.[13] Other tests demonstrated that a well in the area contained TCE at levels thousands of times higher than what is safe to drink.[14]

Given the timeline of these events (CTS closed the plant in 1983, the subsequent landowners allegedly discovered their injuries in the late 1990s and the 2000s, and the landowners filed their complaint in 2011), the litigation hinged first and foremost on timeliness. Whether the landowners filed the complaint on time depended on the interplay between two legal doctrines: the statute of limitations and the statute of repose. Ultimately, in *CTS Corp. v. Waldburger*, the U.S. Supreme Court held that the suit was untimely because the statute of repose constituted an absolute bar to the action. Before fully considering that holding, however, it is important

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5 *Id.*

6 *Id.*

7 Jeremy P. Jacobs, *Obama Admin, Company Align Against N.C. Dump's Neighbors in Supreme Court Showdown*, E&E NEWS (Apr. 8, 2014), https://www.eenews.net/stories/1059997532.

8 *Id.*

9 *Id.*

10 *Id.*

11 *Id.*

12 CTS Corp., 134 S. Ct. at 2181.

13 Jacobs, *supra* note 7.

14 *Id.*

to recognize the history and development of these two doctrines in the context of toxic tort litigation.

A. Statutes of Limitation and the Discovery Rule in Toxic Tort Litigation

Toxic tort litigation often involves latent harms, or injuries that manifest many years after the initial exposure to a hazardous substance. In the earliest toxic tort litigation cases in the United States, courts recognized that if the statute of limitations began to run at the moment of exposure to the hazardous substance, it is quite possible (even likely) that potential plaintiffs would not discover their injuries until after the statute of limitation expires.[15] To address this problem and postpone the moment when the limitations period begins to run, courts and legislatures began importing the discovery rule into statutes of limitation.[16] More specifically, under the discovery rule, courts and legislatures created different standards to determine when the plaintiff discovered, or should have discovered, the injury.[17] At that moment, the statute of limitations begins to run.[18]

The U.S. Supreme Court first recognized the discovery rule at the federal level in *Urie v. Thompson*.[19] In that case, a railroad company= assigned its employees to spread a highly toxic compound known as silica onto the railroad tracks, consistent with common practice of the day.[20] After years of exposure and inhalation of silica, one railroad employee filed suit, alleging that he had developed silicosis, "a permanently disabling affliction."[21] The employee sued the company for negligence and sought to recover under the Federal Employer's Liability Act and the Boiler Inspection Act.[22]

The Court restated the basic issue: "whether, without regard to the legal sufficiency of [plaintiff's] claim under either Act, that claim is barred as to both Acts by operation of the Federal Employers' Liability Act's

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15 *See generally* Robert F. Blomquist, *American Toxic Tort Law: An Historical Background, 1979-87*, 10 PACE ENVTL. L. REV. 85 (1992)

16 *Id.*

17 *Id.*

18 *Id.*

19 Urie v. Thompson, 337 U.S. 163 (1949).

20 *Id.* at 166.

21 *Id.*

22 *Id.* at 165.

[three-year] statute of limitations."[23] According to the defendant's argument, the plaintiff "contracted" silicosis while working on the rails just after 1910, giving the plaintiff until 1913 to file; indeed, the defendant hoped for the mechanical application of statutes of limitation where the period begins to run at the moment of exposure.[24] In contrast, the plaintiff argued that "each inhalation of silica dust" refreshed the statute of limitation, meaning that the statute of limitation began running on the plaintiff's last exposure to silica. [25]

Rejecting both arguments, the Court decided instead to read the discovery rule into both federal statutes. The Court recognized that the mechanical application of the statutes of limitation would disserve the purpose of common law negligence and remedial statutes generally, namely to allow plaintiffs to find redress for their injuries, latent or not.[26] Drawing on language from a California Court of Appeals decision, the Court held that "the afflicted employee can be held to be 'injured' only when the accumulated effects of the deleterious substance manifest themselves."[27] Moreover, the employee in *Urie* learned of the injuries in 1940, and "there is no suggestion that [the employee] should have known he had silicosis at an earlier date."[28] From this holding, the Court established the traditional formula for the discovery rule: the statute of limitations begins to run when the plaintiff discovers the injury or when the plaintiff reasonably should have discovered the injury.[29]

Courts and legislatures around the country continued to adopt the discovery rule. As more federal courts followed the Supreme Court's holding in *Urie*, some state courts also adopted the rule under state laws.[30] In some instances, the discovery rule was rejected or otherwise applied with a more limited scope.[31] Notably, the discovery rule was even adopted in settings entirely unrelated to toxic tort litigation, where latent harms posed the same problems of timeliness.[32] And state legislatures were free

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23 *Id.* at 169.

24 *Id.*

25 *Id.*

26 *Id.*

27 *Id.* at 170 (quoting Associated Indemnity Corp. v. Industrial Accident Commission, 124 Cal. App. 378, 381 (1932)).

28 *Id.*

29 *Id.*

30 *See, e.g.*, Ayers v. Morgan, 397 Pa. 282, 291 (Pa. 1959).

31 *See, e.g.*, Anthony v. Koppers Co., 425 A.2d 428 (Pa. Super. Ct. 1980), rev'd on other grounds, 436 A.2d 181 (Pa. 1981).

32 *See, e.g.*, McCollum v. D'Arcy, 638 A.2d 797 (N.H. 1994) (holding that the discovery rule applies to a child's sexual assault action against her parents, where the child

to enact the discovery rule through tort legislation.[33] However, by 1982, both Idaho and Virginia had expressly rejected the discovery rule by statute, and four other states had rejected the rule by judicial decision.[34]

In 1986, Congress amended the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA") to include a discovery rule that preempted any state statute of limitations that did not already include the rule. Indeed, Section 9658 of CERCLA is titled "Actions under State law for damages from exposure to hazardous substances" and states:

> In the case of any action brought under State law for personal injury, or property damages, which are caused or contributed to by exposure to any hazardous substance, or pollutant or contaminant, released into the environment from a facility, *if the applicable limitations period for such action (as specified in the State statute of limitations or under common law) provides a commencement date which is earlier than the federally required commencement date, such period shall commence at the federally required commencement date* in lieu of the date specified in such State statute.[35]

And most importantly, the "federally required commencement date" is defined as "the date the plaintiff knew (or reasonably should have known) that the personal injury . . . [was] caused or contributed to by the hazardous substance or pollutant or contaminant concerned."[36]

The breadth of Section 9658's preemptive effect is immediately apparent. It applies to injuries caused by exposure to any "hazardous substance," referring to hazardous substances and toxic pollutants designated under the Federal Water Pollution Control Act ("FWPCA"), hazardous substances designated under CERCLA itself, hazardous wastes designated under the Solid Waste Disposal Act ("SWDA"), hazardous air

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discovered "the abuse and its causal connection to [her] injuries" decades after the incident).

33 *See, e.g.*, 42 PA. CONS. STAT. § 5524 (2014) (this Pennsylvania statute specifically targets asbestos-related injuries, stating that "an action to recover damages . . . 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 . . . or [when] the person knew or in the exercise of reasonable diligence should have known that the person had an injury . . .whichever date occurs first").

34 Senate Committee on Environment and Public Works, SUPERFUND SECTION 301(E) STUDY GROUP, INJURIES AND DAMAGES FROM HAZARDOUS WASTES - ANALYSIS AND IMPROVEMENT OF LEGAL REMEDIES, 97th Cong., 2d Sess., (Comm. Print 1982) (hereinafter, "SUPERFUND STUDY").

35 42 U.S.C. § 9658(a)(1) (1986) (emphasis added).

36 *Id*. § 9658(b)(4)(A) (1986).

pollutants designated under the Clean Air Act ("CAA"), and imminently hazardous substances designated under the Toxic Substances Control Act ("TSCA"), but not to petroleum, crude oil, or any variation of natural gas.[37] It also applies to injuries caused by exposure to a "pollutant or contaminant," which in turn:

> shall include, *but not be limited to*, any element, substance, compound, or mixture, including disease-causing agents, which after release into the environment and upon exposure, ingestion, inhalation, or assimilation into any organism, either directly from the environment or indirectly by ingestion through food chains, will or may reasonably be anticipated to cause death, disease, behavioral abnormalities, cancer, genetic mutation, physiological malfunctions (including malfunctions in reproduction) or physical deformations, in such organisms or their offspring.[38]

And it applies anytime a hazardous substance, pollutant, or contaminant is released from a "facility," which in turn has an equally broad definition, even including "aircraft."[39]

The picture was clear. Congress understood the discovery rule as a vital aspect of fairness in toxic tort litigation and therefore created a preemptive law that imposes the discovery rule on an extremely broad range of toxic torts. If the state does not have a discovery rule, then Section 9658 ensures that it does. Seemingly whatever hazardous substance Congress could think of (other than petroleum, crude oil, or variations of natural gas) would be subject to the federal discovery rule.

B. The Tension Between the Discovery Rule and Statutes of Repose

Compared to the discovery rule, which gives plaintiffs with latent harms understandable leeway under the statute of limitations, state statutes of repose are less lenient. As the name suggests, a statute of repose sets a moment in time some years after an incident when a party may find "repose" and cannot ever be held responsible for its previous actions. Colorado's statute of repose is illustrative: "all actions against any [contractor] performing . . . construction or any improvement to real property shall be brought within the time provided in [Colorado's statute of limitations] . . . *but in no case shall such an action be brought more*

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37 *Id*. § 9658 (a)(1) (1986) (referring to definition in 42 U.S.C. § 9601(14) (2002)).

38 *Id*. (referring to definition in 42 U.S.C. § 9601(33) (2002) (emphasis added)).

39 *Id*. (referring to definition in 42 U.S.C. § 9601(9) (2002)).

than six years after the substantial completion of the [real estate improvement]."[40]

Consider, too, the staggering number of states with statutes of repose on the books. Forty-six states have statutes of repose covering improvements to real estate, each with different exceptions, repose periods, and scopes. For example, some statutes expressly do not provide repose to manufacturers of products used in real estate improvement.[41] And nineteen states have statutes of repose covering products liability.[42]

There is a clear tension between the discovery rule and statutes of repose in the context of toxic torts. If a person's injury manifests many years after exposure, Section 9658 ensures that the person will have a chance to file suit before the statute of limitations expires. But if the relevant defendant is already relieved from liability because of a statute of repose, then the injured person will have no one to sue. The question, then, is whether Section 9658 preempts both statutes of repose *and* statutes of limitation. If not, Section 9658 has little impact.

Before the U.S. Supreme Court decided this question in *CTS Corp. v. Waldburger*, the federal courts of appeals gave conflicting answers. The Fourth Circuit held that Section 9658 preempted statutes of repose.[43] The court acknowledged that Section 9658 references statutes of limitation four times but never mentions statutes of repose.[44] Nonetheless, the court found Section 9658 ambiguous because it expressly applies to the state's "applicable limitations period," which could include both statutes of limitation and repose.[45] Moreover, the court noted that in other statutes, Congress had used the words limitation and repose interchangeably and inconsistently.[46] Given these ambiguities, the Fourth Circuit relied on congressional intent and held that reading Section 9658 to apply only to

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40 COLO. REV. STAT. § 13-80-104 (1)(a) (2001) (emphasis added). Colorado's statute of repose has some wrinkles too. *See* COLO. REV. STAT. § 13-80-104(2) (2001) ("[i]n case any such cause of action arises during the fifth or sixth year after substantial completion of the improvement to real property, said action shall be brought within two years after the date upon which said cause of action arises"). So, defendants falling under this statute may find repose six years after the incident or at most eight years after the incident.

41 *See* FRANCIS P. MANCHISI & LORRAINE E.J. GALLAGHER, A NATIONWIDE SURVEY OF STATUTES OF REPOSE, (Wilson Elser Moskowitz Edelman & Dicker LLP 2006), https://www.wilsonelser.com/files/repository/NatlSurveyRepose_March2006.pdf.

42 *Id.*

43 CTS Corp. v. Waldburger, 723 F.3d 434, 444 (4th Cir. 2013), *rev'd*, 134 S.Ct. 2175 (2014).

44 *Id.* at 442–43.

45 *Id.* at 443.

46 *Id.*

statutes of limitation would "thwart[] Congress's unmistakable goal of removing barriers to relief from toxic wreckage . . . [and] *allow[] states to obliterate legitimate causes of action before they exist*."[47]

The Ninth Circuit reached the same holding with similar reasoning.[48] It said: "Congress's primary concern in enacting [Section 9658] was to adopt the discovery rule in situations where a plaintiff may lose a cause of action before becoming aware of it . . . [such as] where statutes of repose operate."[49]

The Fifth Circuit reached the opposite conclusion by focusing on "a fundamental principle of statutory construction—common sense."[50] The court found that Section 9658 unambiguously referenced preemption of state statutes of limitation but *not* statutes of repose.[51] Congress, according to the court, understood the different policy goals and substantive rights associated with the two doctrines and clearly intended to preempt one but not the other.[52]

Scholars also began offering their perspective on the question. For example, Peter Seley and Coral Shaw questioned the constitutionality of the Ninth Circuit's holding in *McDonald v. Sun Oil*.[53] The authors suggested that unlike statutes of limitation, which bar a remedy for plaintiffs through a procedural mechanism, statutes of repose offer a substantive right to defendants.[54] The authors suggested that courts cannot read Section 9658 to take away the substantive right of repose, or at the very least, courts should conduct a substantive due process analysis before holding that Section 9658 preempts statutes of repose.[55]

The legislative history also sheds light on the issue, too. Before enacting Section 9658, Congress directed the Committee on Environment and Public Works to conduct a study addressing the adequacy of state toxic tort laws.[56] The Committee recommended the discovery rule for all states and expressly stated: "[t]he [r]ecommendation is intended also to cover

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47 *Id.* at 444 (emphasis added).

48 *See* McDonald v. Sun Oil Co., 548 F.3d 774 (9th Cir. 2008).

49 *Id.* at 783.

50 *See* Burlington N. & Santa Fe Ry. Co. v. Poole Chem. Co., 419 F.3d 355, 364 (5th Cir. 2005).

51 *Id.* at 362–63.

52 *Id.* at 363–65.

53 Peter E. Seeley & Coral A. Shaw, *McDonald v. Sun Oil: The Ninth Circuit's Constitutionally Questionable Expansion of CERCLA's Toxic Tort Discovery Rule*, 39 ENVTL. L. REP. NEWS & ANALYSIS 10197 (2009).

54 *Id.* at 10199.

55 *Id.* at 10200.

56 *See generally* SUPERFUND STUDY, *supra* note 34.

the repeal of the statutes of repose which, in a number of states have the same effect as some statutes of limitation in barring [a] plaintiff's claim before he knows that he has one."[57] But whatever the Committee might have intended, the real preemptive scope depended on what Congress actually enacted. Before any more ink could be spilled over the question of Section 9658's preemptive scope, the Supreme Court heard *CTS Corp. v. Waldburger* and provided an answer.

C. Settling the Question—CTS Corp. v. Waldburger

CTS did not object to the timeliness of the suit based on the statute of limitation. The landowners discovered their injuries in 2009 and filed suit in 2011, well within North Carolina's three-year statute of limitation.[58] Rather, CTS filed a motion to dismiss and cited North Carolina's statute of repose.[59] Repose under that statute comes ten years after "the last act or omission of the defendant giving rise to the cause of action;" this suit came almost thirty years after CTS' last act.[60] The Court restated the question: while it is "undoubted" that Section 9658 preempts state statutes of limitation, the more difficult question is "whether [Section] 9658 also preempts state statutes of repose."[61]

The Court held that it did not and that the landowners were untimely. The Court began by pointing out the distinctions between statutes of limitation and repose. While statutes of limitation and discovery rules offer leeway for the accrual of plaintiffs' causes of action, statutes of repose nevertheless create "an outer limit on the right to bring a civil action."[62] In other words, regardless of the statute of limitations, statutes of repose are "an absolute bar."[63] Moreover, while both statutes of limitation and repose encourage plaintiffs to pursue claims diligently, statutes of repose are a policy choice targeted more specifically at defendants, who "should be able to put past events behind [them]" after a certain period.[64]

According to the Court, because statutes of limitation and repose are distinct, Section 9658 would need explicit reference to statutes of repose to preempt them. Instead, Section 9658 preempts the "applicable

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57 *Id.* at 256.

58 CTS Corp. v. Waldburger, 134 S. Ct. 2175, 2184 (2014).

59 *Id.* at 2181.

60 *Id.* (quoting N.C. GEN. STAT. ANN. § 1-52(16) (Lexis 2013)).

61 *Id.* at 2180.

62 *Id.* at 2182.

63 *Id.* (citations and quotation marks omitted).

64 *CTS Corp.*, 134 S. Ct. at 2183.

limitations period" and defines that period as the state's "statute of limitations."[65] The Court found little support in the statute's text for the landowners' argument: "[i]ndeed, [Section] 9658 uses the term 'statute of limitations' four times (not including the caption), but not the term 'statute of repose.'"[66] Moreover, Section 9658 covers a singular period by using the phrase "the applicable limitations *period*," which in the Court's view demonstrates that Congress did not intend to preempt two different doctrines.[67]

This textual reasoning carried the day, much like in the Fifth Circuit's earlier opinion, but the Court also acknowledged Section 9658's context and purpose. For instance, the Court recognized that Section 9658 is intended to remedy deficiencies in state toxic tort law, but that its remedial purpose was not intended to cover *all* areas of state toxic tort law. Congress left many areas of the law untouched, such as causes of action and burdens of proof, and the landowners could not demonstrate why "statutes of repose pose an unacceptable obstacle to the attainment of [Section 9658's] purposes."[68]

The Court concluded by turning to the presumption against preemption. Even if Section 9658 is ambiguous, in the Court's view, the narrower reading should be followed.[69] The presumption is necessary to effectuate principles of federalism, particularly given the states' historical responsibility over tort law.[70]

Justice Ginsburg dissented, and Justice Breyer joined. First, Justice Ginsburg noted that North Carolina's statute of repose and limitations both appear in the same article, entitled "law prescribing 'periods for the commencement of actions [for personal injury or damage to property].'"[71] Under a "straightforward reading," according to Justice Ginsburg, Section 9658 preempts that *entire article* by providing a different period for the commencement of actions, namely the discovery rule.[72] Second, Justice Ginsburg reminded the Court of the legislative history—the Committee explicitly recommended that Section 9658 should preempt statutes of repose, and Congress again expressed similar concerns in the Conference Report, stating that "certain State statutes deprive plaintiffs of their day in

65 *Id.* at 2185.

66 *Id.*

67 *Id.* at 2186–87.

68 *Id.* at 2188.

69 *Id.* at 2188–89.

70 *CTS Corp.*, 134 S. Ct. at 2188–89.

71 *Id.* at 2189 (Ginsburg, J., dissenting).

72 *Id.*

court."[73] Third, Justice Ginsburg noted the policy implications of "thwart[ing] Congress' clearly expressed intent."[74] If statutes of repose provide contaminators with a light at the end of the tunnel, they are now incentivized to conceal known hazards until that day comes.[75]

II. THE BENEFITS AND CONTINUING NEED FOR TOXIC TORT LITIGATION

It is surprising and somewhat concerning that some injured parties may never have their day in court by no fault of their own. Indeed, the two sections below discuss two separate reasons why there should be an alternative to that absolute bar effect. First, toxic tort litigation has historically served as an important avenue for injured parties to find redress and for the courts to discourage risky behavior. The benefits are entirely thwarted when plaintiffs cannot access the courts. Second, exposure to hazardous substances and subsequent latent harms will continue to be a reality in the coming years. The absolute bar, then, will continue to affect injured parties.

A. The Benefits of Toxic Tort Litigation

Advocating for a rule that eases access to the courts in toxic tort litigation rests on the premise that toxic tort litigation is desirable because it benefits plaintiffs and society generally. No doubt, certain scholars and policy advocates have argued just the opposite point over the last several decades, arguing that plaintiffs in toxic tort litigation and in all types of tort litigation are accessing courts too easily under current procedural and substantive laws.[76] This ease of access has created externalities, they say, that far outweigh any benefits to plaintiffs and society.[77] This movement has been dubbed "tort reform."[78] However, it is equally clear that other scholars and policy advocates continue to advise against broad strokes tort reform. The intricacies of that debate are outside the scope of this Note, but again, to advocate for a rule easing access to the courts means at least

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73 *Id.* at 2190.

74 *Id.*

75 *Id.*

76 *See* Roisman et al., *Preserving Justice: Defending Toxic Tort Litigation*, 15 FORDHAM ENVTL. L. REV. 191, 192–93 (2004).

77 *Id.*

78 *Id*. at 192.

acknowledging the premise that accessing the courts in toxic tort litigation is an attractive outcome.

Proponents of toxic tort litigation typically point out two primary benefits: compensating victims and deterring bad actors. Admittedly, litigation may not be a perfect system for compensating victims. Litigation costs are generally high due to barriers in the substantive law such as proof of causation,[79] and recovery tends to be disparate across the country because damage awards often turn on subjective assessments of similar evidence.[80] Without toxic tort litigation, however, injured parties would pay for medical expenses out of pocket; assuming they carry quality health insurance, they would still be unable to recover the full cost of their injury, such as lost wages, pain and suffering, and diminished quality of life.[81]

Similarly, toxic tort litigation may not be a perfect system for deterring bad actors. Critics argue that an actor may not be willing to change behavior now if he realizes that injuries and potential adverse judgments would not arise until many years in the future, when he may not even be around to pay.[82] But that argument seems misguided. The potential for future judgments will shape the actor's behavior because the potential for future judgments also affects the actor's *current* economic position. Insurance companies will charge higher premiums *now* if the insured's behavior creates a notable risk of future liability. Similarly, a corporation will sell for less *now* if their *future* value is predicted to drop. In short, toxic tort litigation can shape the actor's behavior today by creating the looming risk of liability in the future. These two reasons, compensation and deterrence, are arguably desirable and justify limiting the absolute bar created by statutes of repose.

B. Continuing Potential for Latent Harms and Bad Actors

Several examples demonstrate the continuing potential for latent harms in the United States, beginning with the continued use of asbestos. Countries across the globe have banned the use of asbestos in every setting, except the United States.[83] The EPA banned asbestos in a limited category of products: (1) flooring felt; (2) commercial paper; (3) specialty paper; (4) rollboard; (5) corrugated paper; (6) spray-applied asbestos; and

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79 *Id.* at 203, 212.

80 *Id.* at 208–09.

81 *Id.* at 214–15.

82 *Id.* at 222.

83 Karen Selby, *No Asbestos Ban in the US*, ASBESTOS.COM (Jan. 15, 2018), https://www.asbestos.com/legislation/ban.

(7) any new asbestos uses.[84] Other uses of asbestos, such as brake pads in cars, are still permitted.[85] The Bruce Vento Ban Asbestos and Prevent Mesothelioma Act—the most recent of many attempts to ban asbestos and related minerals—also failed to pass Congress.[86]

The need to dispose of an ever-growing amount of electronic waste ("e-waste"), such as old telephones, televisions, and other gadgets, also demonstrates the continued potential for latent harms. Disposing e-waste that contains hazardous substances such as TCE is exactly how CTS allegedly caused the injuries in *CTS Corp*. According to the EPA, about twenty million computers became e-waste in 1998.[87] In 2005, the EPA estimated that U.S. households threw out 304 million electronics.[88] Given the absolute proliferation of electronics, that number has no doubt continued to rise.

Nonetheless, the EPA still has not banned the use of TCE in the United States, which is used in several other manufacturing and processing industries in addition to the disposal of e-waste.[89] This is true even though the EPA recognizes the link between TCE and cancer, birth defects, liver-disease, and kidney-disease.[90] The EPA proposed banning the use of TCE in January 2017 under the Toxic Substances Controlled Act ("TSCA"), but that rule has not yet been finalized.[91] To its credit, the EPA has made efforts to encourage companies to use alternatives to TCE and has conducted workshops to teach methods of risk-reduction. However, those efforts concluded in 2014. Currently, under the "Significant New Use Rule," the EPA must approve new uses of TCE in consumer products, *with exceptions* including solvent degreasers, film cleaners, hoof polishes, lubricants, mirror edge sealants, and pepper spray.[92]

Nanomaterials are another example that harkens back to the asbestos litigation of the 1970s. Indeed, one white paper even refers to

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84 *Id.*

85 *Id.*

86 *Id.*; *see also* H.R. Rep. No. 110-3339 (2007).

87 *Fact Sheet: Management of Electronic Waste in the United States*, ENVIRONMENTAL PROTECTION AGENCY (July 2008), https://nepis.epa.gov/Exe/ZyPDF.cgi/P1000ZT5.PDF?Dockey=P1000ZT5.PDF [https://perma.cc/W5KH-4S3W].

88 *Id.*

89 *Risk Management for Trichloroethylene (TCE*), ENVIRONMENTAL PROTECTION AGENCY, https://www.epa.gov/assessing-and-managing-chemicals-under-tsca/risk-management-trichloroethylene-tce (last updated Dec. 14, 2017).

90 *Id.*

91 *Id.*

92 *See* 40 C.F.R. § 721.10851 (2016).

nanomaterials as potentially "The Next Asbestos."[93] The umbrella term nanomaterials refers to the use of matter at dimensions between approximately 1 and 100 nanometers, "where unique phenomena enable novel applications."[94] In 2011, companies created more than 1,000 products using nanomaterials, ranging from "medicine (e.g., molecular targeted therapies, diagnostic imaging), consumer goods (e.g., cosmetics, electronics, baby products), and building materials (e.g., concrete, steel, windows)."[95] Generally, there is a concern that companies are putting nanomaterials into products faster than scientists can be certain about the health effects.[96] Nonetheless, some scientists point out that nanomaterials could have hazardous effects on humans and the environment.[97] The EPA has not promulgated any rules regarding the use of nanomaterials, but has begun gathering information from companies that use nanomaterials in their products.[98] Today, the EPA has not stated with certainty that nanomaterials are harmful, but is looking to determine whether certain nanomaterials should be addressed under the TSCA.[99]

Finally, the Trump Administration's environmental deregulation agenda could give a variety of industries more leeway in their handling of hazardous substances and thus create a variety of increased risks for latent harms. Although most of the deregulation has yet to be implemented—the deregulation is either in the rule-making process or subject to litigation—scholars have begun documenting how the proposed rules might affect the handling of hazardous substances. As an oft-cited example, several scholars have flagged the Trump Administration's efforts to rollback Obama era regulations on how electric utilities dispose coal ash, a

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93 *White Paper Explores Risks That Could Become 'The Next Asbestos,'* BUSINESS INSURANCE (May 17, 2011), https://www.businessinsurance.com/article/20110517/STORY/110519944/White-paper-explores-risks-that-could-become-the-next-asbestos [https://perma.cc/FD68-3LW8].

94 Joseph A. Clark, *Potential Human Health Risks of Nanomaterials*, INT'L RISK MGMT. INST., INC. (Mar. 2011), https://www.irmi.com/articles/expert-commentary/potential-human-health-risks-of-nanomaterials.

95 *Id.*

96 *Id.* (over 1,000 products using nanomaterials in 2011 and growing at a rate of two or three products a day).

97 J. Lee et al., Abstract, *Nanomaterials in the Construction Industry: A Review of Their Applications and Environmental Health and Safety Considerations*, 4 ACS NANO 73580 (2010).

98 *Control of Nanoscale Materials Under the Toxic Substances Control Act*, ENVTL. PROT. AGENCY (Nov. 30, 2017), https://www.epa.gov/reviewing-new-chemicals-under-toxic-substances-control-act-tsca/control-nanoscale-materials-under.

99 *Id.*

combination of toxic byproducts from coal combustion.[100] The Trump Administration also seeks to rollback several other regulations of hazardous materials, such as the mercury and air toxics standards, landfill methane rules, toxicity standards in the brick and clay industries, and pesticide standards.[101] The extent, specifics, and final results of this deregulation effort will eventually come to fruition in Congress, at the EPA, and in the courts. However, the current administration has one goal: in President Trump's words, rollback all "job-crushing regulations."[102] This policy undoubtedly means that federal law will leave more room for potentially risky behavior.

Again, without intending to sound alarmist, this section simply observes that there is a legitimate risk of future toxic tort plaintiffs suffering latent harms. If their injuries manifest too late, the plaintiffs themselves will bear the cost of injuries potentially caused by another.

III. ADDRESSING THE ABSOLUTE BAR EFFECT

Eliminating statutes of repose is neither feasible nor recommended. Adding a recklessness exception, however, allows injured persons access to the court only against the most nefarious defendants. One note before diving into those two subjects: equitable tolling would seem a good candidate for an injured party to circumvent the absolute bar effect of statutes of repose, particularly in the most egregious of cases. Indeed, courts may toll statutes of limitation when "a litigant has pursued his rights diligently[,] but some extraordinary circumstance prevents him from bringing a timely action."[103] However, the Supreme Court has stated that "[a] period of repose [is] inconsistent with tolling," so equitable tolling is not an option.[104]

A. To Eliminate Statutes of Repose is Unlikely and Unwise

Given the division of federal politics, Congress is unlikely to remove statutes of repose through legislation, such as amending Section 9658's

100 *See, e.g.*, Jeremy Dillon, *Piles of Coal Ash Threaten Water Systems Across the Country*, 2018 CQFENRPT 1489 (2018); Bob Sussman, *Back to Basics or Slash and Burn? Scott Pruitt's Reign as EPA Administrator*, 47 ENVTL. L. REP. NEWS & ANALYSIS 10917 (2017) [hereinafter, "*Slash and Burn"*].

101 *See generally Slash and Burn*.

102 *Id.*

103 Lozano v. Montoya Alvarez, 134 S.Ct. 1224, 1231–32 (2014).

104 Lampf, Pleva, Lipkind, Prupis, & Petigrow v. Gilbertson et al., 501 U.S. 350, 363 (1991).

discovery rule to explicitly preempt state statutes of repose. The political climate in some states might be slightly more suitable for an outright removal of statutes of repose, but as explained below, that approach is perhaps not the best policy.

There are good reasons for keeping statutes of repose on the books. First, statutes of repose create a necessary level of certainty in commercial dealings.[105] States have historically pursued certainty in commercial dealings as a way to ensure job growth and tax revenue, both of which benefit the public.[106] States have also relied on this certainty to keep insurance rates down—when insurance companies have clients who could face perpetual liability, their rates skyrocket.[107] Second, statutes of repose help avoid stale simple negligence claims based on loose evidence and faded memories.[108] Toxic tort litigation is already difficult and nebulous, but it becomes even more so when the case is filed twenty years after the incident. Third, and arguably most important, statutes of repose serve to promote innovation.[109] Without statutes of repose, a party may be unwilling to take the risks associated with innovation knowing that they could be held liable decades later under much different standards of care.[110]

B. The "Reckless" Exception

Plaintiffs should be allowed to overcome statutes of repose by proving reckless conduct, intentional or reckless misrepresentation, or fraudulent concealment (the "Rule"). Others have suggested similar versions of the Rule in different areas of law. For instance, in products liability, one scholar suggested that "statutes of repose [should] ' . . . not apply if the product seller intentionally misrepresents facts about its product, or fraudulently conceals information about it, and that conduct was a substantial cause of the claimant's harm.'"[111]

The Rule would apply similarly to toxic torts, which could cover products liability cases and/or real property cases. For instance, if a company continues to use TCE today, consciously disregards the known

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105 Brief for American Chemistry Council et al. as Amici Curiae Supporting Petitioner, CTS Corp. v. Waldburger, 573 U.S. 1 (2014) (No. 13-339) at 11.

106 *Id.*

107 *Id.* at 13–14.

108 *Id*. at 11–12.

109 *Id.* at 8–10.

110 *Id.*

111 Mark W. Peacock, *An Equitable Approach to Products Liability Statutes of Repose*, 14 N. Ill. Univ. L. Rev. 223, 240 (1993) (quoting Model Unif. Prod. Liab. Act §§ 110(A)(1), 110(B)(1), 44 Fed.Reg. 62,714, 62, 732 (1979)).

health effects, and dumps it into water sources (and perhaps tells nearby residents that its property is environmentally sound), then the company would not be able to rely on statutes of repose as injuries pop up twenty years down the road. Or, if the EPA identifies certain nanotechnologies as hazardous and makes those effects clear to the relevant industries, then those industries would be incentivized to move away from those materials or risk being liable for reckless conduct.

Legislatures might be amenable to enacting the Rule because, most importantly, it gives plaintiffs an avenue for redress against the most nefarious defendants, rather than against merely negligent defendants. A party recklessly or knowingly releasing hazardous substances into the environment, into consumer products, or directly into someone's home would *not* have the luxury of staying quiet about it just long enough to find relief under a statute of repose. If someone suffers latent injuries from those acts and can connect the evidentiary dots, then that person would have access to the courts. Without the Rule, the laws of several states would instead command this person to suffer from their injury in silence, pay for their own medical care, and throw away their clear evidence of reckless behavior.

Legislatures also might be amenable to the Rule because it mostly preserves the benefits of statutes of repose. First, the Rule would not substantially diminish certainty in commercial fair dealings. Relatively few plaintiffs would have evidence to satisfy the Rule, and therefore even fewer defendants would wind up paying judgments. No doubt, the Rule would make it more costly and more involved to defend against claims many years after an alleged incident, since defendants couldn't simply point to statutes of repose and instead would need to make substantive arguments indicating their non-recklessness. But again, given that relatively few plaintiffs would have enough evidence to satisfy the Rule, the cost of showing non-recklessness should be low in most cases. On the other hand, if a defendant does need to spend substantial resources and time demonstrating their non-recklessness, perhaps that's exactly the type of claim that should be litigated on the merits. That is, perhaps some nefarious behavior is lurking.

Second and relatedly, the Rule sets a high evidentiary burden and therefore litigants with weak evidence and faded memories would struggle to overcome pleading requirements and struggle to win at trial. To be meritorious under the Rule, Plaintiffs will need strong evidence and credible witnesses.

Third, the Rule will not discourage innovation. Consider a hypothetical. A company innovating with nanomaterials learns that a particular form or use of nanomaterials has hazardous effects on health or the environment. At that point, the company has two choices, (1) turn away from the harmful innovation, finding repose X number of years later, or

(2) continue to use a hazardous substance and face perpetual liability. Under the Rule, that company is free to innovate until their work becomes clearly hazardous *under current standards.*

CONCLUSION

Perhaps legislatures should do away with statutes of repose altogether. As mentioned, that would be unlikely in today's political climate and create problems for both the economy and innovation. Perhaps legislatures should leave statutes of repose as is, but an absolute bar thwarts the purposes of the civil justice system and more specifically of toxic tort litigation. Perhaps the Rule is an unwise alternative. Indeed, one scholar has taken substantial issue with the recklessness standard, arguing that it produces wildly variant results and fails to capture how the human mind processes risk.[112] According to that same scholar, while courts and juries generally find guidance in defining recklessness from the statute at issue, they ultimately "substitute an evaluative, or moral gauge."[113]

But perhaps that is exactly how these cases should be decided. The recklessness standard gives factfinders some acceptable levels of freedom. If the evidence demonstrates that an actor behaved with a level of carelessness that goes beyond mere negligence and veers towards recklessness, a factfinder *should* have some evaluative flexibility. The alternative, allowing statutes of repose to create an absolute bar in all cases, seems far worse.

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112 *See generally* Geoffrey Christopher Rapp, *The Wreckage of Recklessness*, 86 WASH. U. L. REV. 111 (2008).

113 *Id.* at 171.