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A Practitioner's Guide to the Statutes of Limitations in Product Liability Suits

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A PRACTITIONER'S GUIDE TO THE STATUTES OF LIMITATIONS IN PRODUCT LIABILITY SUITS

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The requirements of the statutes of limitations applicable to each theory of recovery that might provide the basis for a product liability suit are outlined in this article. Differences among these statutes are highlighted and the author identifies the problems that may result from a multi-count declaration when a different statute of limitations applies to each count.

It can truthfully be said that there are as many viable concepts for recovery in the product liability field[1] as there are injury-producing occurrences. In virtually every case, however, the theories employed can normally be classified under one of the following four potential causes of action: common law negligence, breach of the warranties under the Uniform Commercial Code, fraud and strict liability in tort. In each cause of action, a primary concern to both plaintiff and defendant is the statute of limitations.

At the outset, it should be noted that one basic rationale underlies most statutes of limitations. That rationale has been described as follows:

> The primary consideration . . . is undoubtedly one of fairness to the defendant. There comes a time when he ought to be secure in his reasonable expectation that the slate has been wiped clean of ancient obligations, and he ought not to be called on to resist a claim when "evidence has been lost, memories have faded, and witnesses have disappeared."[2]

Ideally, a statute of limitations represents a healthy compromise between the interest of insuring a diligent plaintiff his or her day in court and the interest of protecting a defendant against stale claims.[3]

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1. While the term "product liability" might be literally understood to embrace all actions involving defective products, including those in which only a commercial loss is alleged, the term as here employed refers only to those cases in which an allegedly defective product results in personal injury.
2. *Developments in the Law—Statute of Limitations*, 63 HARV. L. REV. 1177, 1185 (1950) (footnotes omitted) (quoted in Feldman v. Granger, 255 Md. 288, 297, 257 A.2d 421, 426 (1969).
3. Ryser v. Gatchel, 151 Ind. App. 62, 278 N.E.2d 320, 324 (1972).

The terms of this compromise may vary significantly depending upon the nature of the cause of action involved. The result is that the statute of limitations for one cause of action may differ from that applicable to another cause of action.

In a typical product liability suit, the plaintiff normally brings a multi-count declaration that incorporates as many theories as the facts of his particular case will accommodate. Since the statute of limitations might differ for each theory, a thorough understanding of the different limitation periods and the time when each begins to run is essential to a plaintiff who wishes to preserve his option to proceed on different theories.[4] A working knowledge of the statutes of limitations is equally essential to a defendant in that it will enable him to recognize when his opponent's otherwise viable remedies are barred.

This article will discuss the periods of limitations applicable to the theories most commonly employed in product liability litigation, analyze problems commonly encountered in their application, and comment briefly on the manner in which some of these common problems have been handled by the courts. While the focus will be on Maryland law, decisions from other jurisdictions and the authorities will also be examined, particularly as they bear on points for which there is no Maryland precedent.

NEGLIGENCE

The statute of limitations for an action sounding in negligence is provided by Section 5-101 of the Courts and Judicial Proceedings Article of the Annotated Code of Maryland, which states:

> A civil action at law shall be filed within three years from the date it accrues unless another provision of the Code provides a different period of time within which an action shall be commenced.[5]

As the statute indicates, the period expires three years from the date when the cause of action accrues. Although limitations statutes in some

4. A plaintiff who anticipates that one theory will be sufficient for his use and who consequently neglects to insure that other remedies are not barred may be in for a surprise. For example, one who expects to proceed on a theory of breach of warranty might subsequently find his warranty remedy barred if he has failed to give the defendant the timely notice of the alleged breach of warranty required by Md. Ann. Code, Comm. L. Art., § 2-607(3)(a) (1975). Likewise, one who pursues a remedy on a theory of fraud because of the possibility of recovering punitive damages may discover that he is unable to meet the vigorous burden of proof for recovery in fraud. In both cases, the plaintiff will be without any remedy if he has failed to comply with the statutes of limitations applicable to other potential theories of recovery.

5. Md. Ann. Code, Cts. & Jud. Proc. Art., § 5-101 (1974). The predecessor of this statute, Law of May 7, 1951, ch. 679, § 1, [1951] Laws of Md. 1987 has been held to govern negligence actions. Doughty v. Prettyman, 219 Md. 83, 88, 148 A.2d 438, 440 (1959).

states have expressly fixed the time of accrual of a cause of action in negligence,[6] there is no such statute in Maryland. The question of when a cause of action accrues in a particular case is a question of law.[7] While no Maryland case has expressly fixed the time of accrual of a cause of action in negligence in a product liability context,[8] the general rule is that the cause of action accrues at the time of *injury*,[9] notwithstanding the fact that the negligent act or omission occurred sometime before

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6. In Connecticut, for example, the applicable statute of limitations formerly read as follows:

> No action to recover damages for injury to the person . . . shall be brought but within one year from the date of the act or omission complained of. CONN. GEN. STAT. § 8324 (1949).

In Dincher v. Marlin Firearms Co., 198 F.2d 821, 823 (2d Cir. 1952) (applying Connecticut law), this statute was construed to mean that an action against the manufacturer of a defective rifle began to run at the time of sale to a dealer although the plaintiff was not injured until four years later. In Vilcinskas v. Sears, Roebuck and Co., 144 Conn. 170, 175, 127 A.2d 814, 816 (1956), a Connecticut appellate court adopted the *Dincher* holding in a similar case. The court noted that the statute did not fix the commencement of the limitations on the date when the injury occurs but, instead, on the date of the act complained of, notwithstanding the fact that the commission of the act would not have been actionable in the absence of some injury.

Under a Tennessee statute similar to the Connecticut statute quoted above, a cause of action for negligence producing injury was deemed to accrue on the date of the sale of the product by the defendant even where the plaintiff was not the purchaser. Jackson v. General Motors Corp., 223 Tenn. 12, 14-15, 441 S.W.2d 482, 483 (1969), *cert. denied*, 396 U.S. 942 (1969). However, in 1972, an amendment to this statute expressly fixed the date of accrual for personal injury actions as the date of the injury. TENN. CODE ANN. tit. 28, § 304 (1972). Subsequently, in McCroskey v. Bryant Air Conditioning Co., 2 CCH PROD. LIAB. REP. ¶ 7452 (Tenn. 1975), the Tennessee Supreme Court held that a cause of action for personal injuries accrues on the date when the injury occurs or is discovered notwithstanding the fact that the injury occurred before the effective date of the 1972 amendment.

7. Jones v. Sugar, 18 Md. App. 99, 105, 305 A.2d 219, 223 (1973).

8. Indeed, there is no Maryland case which expressly fixes the time of accrual of a cause of action in negligence in *any* context except malpractice. As the latter part of this article indicates, a cause of action for malpractice normally accrues when the wrong was or should have been discovered.

In Mattingly v. Hopkins, 254 Md. 88, 94, 253 A.2d 904, 907 (1969), a medical malpractice case, the court of appeals described the "discovery rule" as a departure from the general rule that the statute begins to run at the time of the commission of the wrongful act. A literal application of the general rule to many personal injury actions grounded in negligence, however, would prove troublesome. Particularly in product liability litigation, the commission of a wrongful act (e.g. negligent manufacture) and the occurrence of harm are not simultaneous. In such cases, limitations on any cause of action against the wrongdoer would begin to run (and perhaps expire) before any injury was sustained. However, in Emerson v. Gaither, 103 Md. 564, 582, 64 A. 26, 32 (1906) in which a bank receiver brought suit against its directors for losses resulting from unlawful loans, the court of appeals cited with approval this language from 19 Am. & Eng. Ency. of Law, which might apply by analogy:

> When the act complained of might or might not be injurious, and the plaintiff's right of action must depend upon its proving injurious [as in negligence actions], the cause of action cannot be considered as accruing until the injury has developed, and until then the statute does not begin to run.

This language was also quoted by the U.S. District Court for Maryland in a case involving the negligence of a bank in applying funds to the payment of a loan. Smith v. Sherwood, 308 F. Supp. 895, 898 (1970). *But see* note 64, *infra*.

the accident or occurrence producing the injury.[10] This is logical since an essential element of any action based on a negligence theory is injury proximately resulting from some act or omission.[11]

It should be noted that it is the date of the *initial* injury that is relevant for purposes of determining the date of accrual of a cause of action in most jurisdictions that follow the general rule that the date of accrual is the date of injury. The mere fact that all consequential damage is either not incurred or not discovered until a later time does not normally postpone the running of the statute of limitations.[12]

For example, in *Cheney v. Syntex Laboratories, Inc.*,[13] a consumer attempted to recover in negligence after she allegedly suffered a pulmonary embolism as the result of taking a drug manufactured by the defendant. The complaint indicated that before she suffered the embolism, the plaintiff was hospitalized because of side effects from taking the drug. The limitations period was held to run from the date of the initial hospitalization instead of the date when the embolism developed, and the plaintiff's action was barred because she failed to file suit within the required time.

Some courts, on the other hand, take the position that the statute of limitations does not start to run until the maturation of harm.[14] The Maryland Court of Appeals, however, has expressly rejected this doctrine on a number of occasions.[15] Thus, it is probably safe to conclude that in Maryland a product liability action grounded in negligence would be deemed to accrue on the date of the injury caused by the alleged defect and not at some earlier time, and that the date of the injury refers to the date on which the first "trivial injuries" [16] occur, notwithstanding the fact that more serious or other types of injury flowing from the same act or omission might develop at a later time.

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9. Fixing the time of injury can also prove to be troublesome. A consumer who purchases a defective product arguably suffers some legally cognizable harm on the date of purchase. Thus, it might be argued that any cause of action he possesses against the defendant accrues on the date of purchase notwithstanding the fact that personal injury results at a later time. This reasoning, applicable only to the purchaser, has more theoretical than practical appeal.
10. 3 L. Frumer & M. Friedman, Products Liability § 39.01[2] (1975) [hereinafter cited as Frumer & Friedman].
11. Garbis v. Apatoff, 192 Md. 12, 16-17, 63 A.2d 307, 309 (1949).
12. *E.g.*, Cheney v. Syntex Laboratories, Inc., 277 F. Supp. 386, 387 (D. Ga. 1967).
13. *Id.*
14. *E.g.*, Fort Myers Seafood Packers, Inc. v. Steptoe & Johnson, 381 F.2d 261, 262 (D.C. Cir. 1967) *cert. denied*, 390 U.S. 946 (1968).
15. Feldman v. Granger, 255 Md. 288, 294, 257 A.2d 421, 424 (1969); Mattingly v. Hopkins, 254 Md. 88, 95-96, 253 A.2d 904, 908 (1969). These cases did not involve product liability.
16. Southern Md. Oil Co. v. Texas Co., 203 F. Supp. 449, 452 (D. Md. 1962).

BREACH OF WARRANTY

In Maryland, actions for breach of warranty are governed by this state's version of the Uniform Commercial Code (hereinafter referred to as the "UCC") which is found in the Commercial Law Article of the Maryland Annotated Code. Section 2-275 of that Article provides in part:

> (1) An action for breach of any contract for sale must be commenced within four years after the cause of action has accrued.[17]

The majority view is that these limitations provisions apply to all actions brought for breach of a UCC warranty,[18] including actions for personal injury.[19] The only circumstance in which the UCC limitations period has been held inapplicable occurred when a general statute of limitations specifically applied to all personal injury actions, regardless of the theory of recovery advanced by the plaintiff.[20]

Although the Maryland courts have not ruled on the issue, it is difficult to escape the conclusion that the limitations provisions set forth in the UCC govern all warranty actions brought pursuant to that Act, including personal injury actions. First, Section 2-715 of the UCC expressly provides that consequential damages recoverable in connection with a breach of warranty include personal injury proximately caused by the breach.[21] Secondly, the four-year period set forth in

17. MD. ANN. CODE, Comm. L. Art., § 2-725(1) (1975).
18. The warranties created by the UCC are contained in MD. ANN. CODE, Comm. L. Art., § 2-313 (express warranties by affirmation, promise, description, sample), § 2-314 (implied warranty, merchantability, usage of trade) and § 2-315 (implied warranty, fitness for particular use) (1975).
19. *E.g.*, Reid v. Volkswagen of America, Inc., 2 CCH PROD. LIAB. REP. ¶ 7413, at 13,772 (6th Cir. Mar. 21, 1975) (applying Michigan law); Nichols v. Eli Lilly Co., 2 CCH PROD. LIAB. REP. ¶6995, at 12,112 (10th Cir. 1973) (applying Okla. law) (expressly rejecting the view that the gravamen of the cause of action rather than the wording of the complaint determines the applicable limitations period); Stanford v. Lesco Associates, Inc., 10 UCC REP. SERV. 812, 813-14 (D.D.C. 1972); Hoffman v. A.B. Chance Co., 339 F. Supp. 1385, 1387 (M.D. Pa. 1972); Sinka v. Northern Commercial Co., 491 P.2d 116, 118 (Alas. 1971); Redfield v. Mead, Johnson & Co., 266 Ore. 273, 275, 512 P.2d 776, 777 (1973).
20. *E.g.*, Heavner v. Uniroyal, 63 N.J. 130, 153-56, 305 A.2d 412, 420-26 (1973). In *Heavner*, the Supreme Court of New Jersey held that a truck driver's action for personal injuries suffered when a tire blew out on his rig was barred by New Jersey's two-year statute of limitations for personal injury actions, notwithstanding the fact that the plaintiff pleaded his cause of action, *inter alia*, in breach of warranty. The court held that the nature of the damage rather than the form in which it was pleaded determines which statute of limitations (personal injury or UCC) would apply. It should be noted, however, that the personal injury statute under consideration in *Heavner* was broad and apparently all-encompassing. The statute states in part:
    > Every action at law for an injury to the person caused by the wrongful act, neglect or default of any person . . . shall be commenced within 2 years next after [it accrues]. N.J. STAT. ANN. tit. 2, § 2 A:4-2 (1952).
21. MD. ANN. CODE, Comm. L. Art., § 2-715(2)(b) (1975).

Section 2-725 of the UCC nowhere indicates that its application is to be restricted to cases involving commercial loss only. Additionally, there is no statute of limitations in Maryland which purports to apply across the board to all personal injury actions. Indeed, the only limitations statute other than that contained in the UCC which is even conceivably applicable to a personal injury claim based on a breach of warranty is the general limitations statute contained in Section 5-101 of the Courts and Judicial Proceedings Act.[22] That Section expressly states that it does not apply when another provision of the Code provides a different period of time within which an action shall be commenced. Thus, a literal reading of the UCC provision and Section 5-101 compels the conclusion that the four-year period in the Maryland version of the UCC applies to all warranty actions, even those involving personal injury.[23]

A more troublesome problem concerns the date when a cause of action for breach of warranty accrues. Paragraph two of Section 2-725 of the Maryland version of the UCC provides:

> A cause of action accrues when the breach occurs, regardless of the aggrieved party's lack of knowledge of the breach. A breach of warranty occurs when tender of delivery is made, except that where a warranty explicitly extends to future performance of the goods and discovery of the breach must await the time of such performance the cause of action accrues when the breach is or should have been discovered.[24]

These express dictates of the UCC have been given effect apparently without exception[25]—despite the fact that in some cases they lead to the apparently anomalous result that a plaintiff's cause of action is barred before he has even suffered the injury of which he complains.[26]

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22. Md. Ann. Code, Cts. & Jud. Proc. Art., § 5-101 (1974).
23. In Redfield v. Mead, Johnson & Co., 266 Ore. 273, 277, 512 P.2d 776, 778 (1973), the Supreme Court of Oregon construed statutory provisions internally identical to the relevant Maryland statutes and concluded that the limitations period in the UCC applies to all breach of warranty actions.
24. Md. Ann. Code, Comm. Law Art., § 2-725 (1975).
25. Weinstein v. General Motors Corp., 2 CCH Prod. Liab. Rep. ¶ 7396, at 13,719 (N.Y. Sup. Ct. Feb. 21, 1975); General Motors Corp. v. Tate, 516 S.W.2d 602, 605 (Ark. 1974); Redfield v. Mead, Johnson & Co., 226 Ore. 273, 512 P.2d 776 (1973); Hoffman v. A.B. Chance Co., 339 F. Supp. 1385, 1389 (M.D. Pa. 1972); Stanford v. Lesco Associates, Inc. 10 UCC Rep. Serv. 812 (D.D.C. 1972); Thalrose v. General Motors Corp., 8 UCC Rep. Serv. 1257, 1258 (N.Y. Sup. Ct. 1971), *aff'd.*, 41 App. Div. 2d 906, 343 N.Y.S.2d 303 (1973).
26. *E.g.*, General Motors Corp. v. Tate, 516 S.W.2d 602, 606 (Ark. 1974); Hoffman v. A.B. Chance Co., 339 F. Supp. 1385, 1387 (M.D. Pa. 1972). While there are some cases holding that a cause of action for breach of warranty involving personal injury does not accrue until the date of the injury, none of these cases appears to involve application of the UCC. *E.g.*, Klondike Helicopters, Ltd. v. Fairchild Hiller Corp., 334 F. Supp. 890, 895 (N.D. Ill. 1971) (applying California statutes); Metal Structures Corp. v. Plains Textiles, Inc., 470 S.W.2d 93, 99 (Tex. Civ. Ct. App. 1971) (sale before effective date of

In *General Motors v. Tate*,[27] for example, an automobile warranty claim was held barred more than two years before the injury occurred. The plaintiff had purchased an allegedly defective second-hand automobile more than four years after the first retail sale. More than two years after the plaintiff had acquired the used car, it was involved in an accident allegedly caused by a manufacturing defect. After ruling that the four-year limitations period ran from the date of the *first* retail sale, and not the date of the sale to the second-hand purchaser, the Supreme Court of Arkansas held that the plaintiff's warranty action was barred not only before the accident occurred but before the plaintiff came into possession of the allegedly defective product.

While there have been some mutterings about the "obvious unfairness"[28] of this result, close scrutiny discloses that it is not so inequitable as might appear. First, a plaintiff whose remedies for breach of warranty are barred will normally be able to proceed in negligence or, perhaps, strict liability, since the remedies provided in the UCC are *in addition* to any other common law or statutory remedies available to an injured party.[29]

Secondly, the elements of proof in a UCC breach of warranty action are less burdensome than those required for negligence. An essential element for a cause of action in negligence is proof that the defendant's lack of reasonable care caused the injury.[30] However, a plaintiff alleging breach of warranty need prove only the existence of a warranty, that the product did not conform to the warranty and that it proximately caused injury.[31] The time of accrual of the UCC breach of warranty action represents a considered judgment that the seller's exposure to this form of absolute liability should be limited to a definite period of four years after he tenders the goods in question.[32] The statute of limitations contained in the UCC constitutes an integral part of the risk apportioning scheme created by that statute.[33]

It is important to note that the cause of action accrues on the date of sale *regardless of whether the plaintiff knew or should have known of*

UCC); Hornung v. Richardson-Merrill, Inc., 317 F. Supp. 183, 184 (D. Mont. 1970); Creviston v. General Motors Corp., 225 So. 2d 331, 333 (Fla. 1969); Caudill v. Wise Rambler, Inc., 210 Va. 11, 12, 168 S.E.2d 257, 259 (1969).

27. 516 S.W.2d 602, 606 (Ark. 1974).
28. *E.g.*, 3 FRUMER & FRIEDMAN, *supra* note 6, § 40.01(2), at 12-25.
29. MD. ANN. CODE, Comm. L. Art., § 1-103 (1975); Redfield v. Mead, Johnson & Co., 266 Ore. 273, 277-78, 512 P.2d 776, 778-79 (1973).
30. Livingston v. Stewart & Co., 194 Md. 155, 159, 69 A.2d 900, 901 (1949).
31. Sheeskin v. Giant Foods, Inc., 20 Md. App. 611, 620-21, 318 A.2d 874, 880 (1974), *aff'd*, 273 Md. 592, 332 A.2d 1 (1975); Berry v. G.D. Searle & Co., 56 Ill. 2d 548, 555, 309 N.E.2d 550, 552 (1974).
32. *See* Redfield v. Mead, Johnson & Co., 266 Ore. 273, 278, 512 P.2d 776, 779 (1973); Berry v. G.D. Searle & Co., 56 Ill. 2d 548, 553, 309 N.E.2d 550, 554 (1974); W. HAWKLAND, A TRANSACTIONAL GUIDE TO THE UNIFORM COMMERCIAL CODE § 1.5202 (1964).
33. *See* Berry v. G.D. Searle & Co., 56 Ill. 2d 548, 554, 309 N.E.2d 550, 554 (1974).

the existence of the breach.[34] The only exception to this rule occurs when a warranty explicitly extends to future performance of the goods.[35] In that case, the cause of action accures when the plaintiff discovered or should have discovered the breach.[36]

This exception has been construed narrowly. Only when the warranty makes *express* reference to the performance of the goods on the happening of some future event or at some postponed time will it fall within the parameters of this exception. *Implied* warranties are, by definition, excluded from the exception.[37] Even those warranties expressed in terms of the ability of the product to withstand use for a period of years have uniformly been held to relate to the present condition or fitness of the product and not to "explicitly extend to future performance of the goods."[38]

For example, in *Thalrose v. General Motors Corp.*,[39] the New York Supreme Court held the warranties given in connection with the sale of a new automobile not to relate to future performance:

> The warrants granted with respect to automobiles are not prospective in nature, even though they represent that the car will work well for two or five years. That merely constitutes a representation of the present condition of the product and that it will be capable of enduring use for that period of time.[40]

In *Binkley Co. v. Teledine Mid-America Corp.*,[41] an express warranty that welding equipment would be capable of welding 1000 feet per fifty-minute hour was held not to explicitly extend to future performance. The court recognized in other decisions "a judicial

34. Md. Ann. Code, Comm. L. Art., § 2-725(2) (1975).
35. *Id.*
36. *Id.*
37. An implied warranty, by definition, does not *explicitly* extend to future performance. Any reference which an implied warranty makes to the prospective operation is implicit. For this reason, the Arkansas Supreme Court held in General Motors Corp. v. Tate, 516 S.W.2d 602, 606 (Ark. 1974), that an implied warranty of merchantibility did not explicitly extend to future performance. For other cases similarly denying this effect to implied warranties, see Everhardt v. Rich's, Inc., 128 Ga. 319, 321, 196 S.E.2d 475, 476 (1973); Ibach v. Grant Donaldson Services, Inc., 38 App. Div. 2d 39, 44, 326 N.Y.S.2d 720, 725 (1971); Rufo v. Bastian-Blessing, Co., 417 Pa. 107, 113, 207 A.2d 823, 826 (1965).
38. Thalrose v. General Motors Corp., 8 UCC Rep. Serv. 1257, 1258 (N.Y. Sup. Ct. 1971), *aff'd*, 41 App. Div. 2d 906, 343 N.Y.S.2d 303 (1973). *But see* Rempe v. General Electric Co., 28 Conn. Supp. 160, 254 A.2d 577 (1969), in which the Connecticut Superior Court stated in dictum that a lifetime guarantee given with a garbage disposal unit extends to future performance. Messers White and Summers concur with the Connecticut Court's conclusion. J. White & R. Summers, Uniform Commercial Code § 11-8, at 342 (1972) [hereinafter cited as White & Summers].
39. 8 UCC Rep. Serv. 1257 (N.Y. Sup. Ct. 1971), *aff'd*, 41 App. Div. 2d 906, 343 N.Y.S. 2d 303 (1973).
40. *Id.* at 1258.
41. 333 F. Supp. 1183 (E.D. Mo. 1971), *aff'd*, 460 F.2d 276 (8th Cir. 1972).

reluctance to infer from the language of express warranties terms of prospective operation that are not clearly stated."[42]

Similarly, a guarantee to correct any defect in material or workmanship in gasoline engines for three months from the sale was determined not to be a warranty of future performance in *Matlack, Inc. v. Butler Manufacturing Co.*[43]

The type of warranty which does explicitly extend to future performance of the goods is illustrated by *Perry v. Augustine*.[44] The warranty was that a heating system installed in the summer would heat the defendant's residence to 75° when the temperature outside was minus 25°. The court reasoned that since the warranty related to what the system (sold and delivered in the summer) would do in the future (the winter, when subzero conditions would first occur) a breach of the warranty would have to await future events. Accordingly, a cause of action did not accrue until the breach was discovered.[45]

Mittasch v. Seal Lock Burial Vault, Inc.,[46] presents the most interesting example of a warranty which has been held to extend to future performance. In 1958, plaintiff purchased from a retailer a casket manufactured by the defendant. The defendant's "certificate of assurance" accompanied the goods: "We hereby certify that this vault is free from material defects or faulty workmanship and *will give satisfactory service at all* times."[47] In 1970, when the casket was disenterred for reburial elsewhere, it was discovered that the casket and its contents had been damaged by leakage, and the New York Supreme Court held that the plaintiff's cause of action for breach of warranty accrued upon discovery of the leakage and damage in 1970, twelve years after the purchase, because "defendant's warranty explicitly extended to future performance."[48]

While it is not difficult to conceive of warranties that explicitly

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42. *Id.* at 1186.
43. 253 F. Supp. 972, 976 (E.D. Pa. 1966).
44. 37 Pa. D.&C.2d 416 (C.P. 1965).
45. *Id.* at 418. Perry v. Augustine has been criticized for its circuitous rationale. The court held that because the breach, practically speaking, could not be discovered until the future, the warranty therefore explicitly extended to future performance, and thus the cause of action did not accrue until discovery. Under the exception in Section 2-725(2) a cause of action accrues upon discovery of the breach *if* the warranty explicitly extends to future performance. WHITE & SUMMERS, *supra* note 38, at 342.
46. 42 App. Div. 2d 573, 344 N.Y.S.2d 101 (1973).
47. *Id.* at 573, 344 N.Y.S.2d at 102.
48. *Id.* at 574, 344 N.Y.S.2d at 103. In buttressing the rationale, the court stated:
> Moreover, the very nature of the product *implies* performance over an extended period of time. *Id.*

As noted at p. 30 & note 37 *supra*, Section 2-725(2) leaves no room for implication of extension of warranties to future performance. It also should be noted that in *Mittasch*, the New York Supreme Court ignored a contrary, and apparently binding holding of the New York Court of Appeals on the same point in Citizens Utilities Co. v. American Locomotive Co., 11 N.Y.2d 409, 415, 184 N.E.2d 171, 173, 230 N.Y.S.2d 194, 197 (1962) (sale before effective date of UCC in New York). Thus, it is doubtful that *Mittasch* represents the law of New York on this question.

extend to future performance, in practice they are the exception rather than the rule. Thus, this distinction should be kept in mind: in negligence actions, the date of injury is the critical date in determining the limitations period, while in warranty actions the critical date is the date of tender of delivery to the first retail consumer, unless the warranty falls within the future performance exception.

Finally, it should be noted that the buyer's cause of action, if any, against those other than the retailer who are in the distributive chain also accrues upon tender of delivery of the product to him, although the transaction involving these potential defendants occurred prior to delivery.[49]

FRAUD

The three-year limitations period set forth in Section 5-101 of the Courts and Judicial Proceedings Article of the Annotated Code of Maryland governs actions in fraud[50] as well as negligence.[51] The question of when a cause of action for common law fraud accrues, however, has long troubled the courts. Early cases held that a cause of action to recover damages for fraud ordinarily accrues, and the statute of limitations begins to run, when the fraud is successfully consummated.[52] However, the rule was qualified by an exception, recognized either by decision[53] or statute,[54] that where the defendant fraudulently

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49. For the purposes of the warranty provisions of the UCC, " 'seller' includes the manufacturer, distributor, dealer, wholesaler, or other middleman or the retailer." MD. ANN. CODE. Comm. L. Art., § 2-314(1)(a) (1975). Compare this result with the old minority rule that a cause of action in negligence accrues when the defendant introduces the defective goods into the market. For example, in Dincher v. Marlin Firearms Co., 198 F.2d 821, 823 (2d Cir. 1952) (construing a Connecticut statute), the plaintiff's cause of action in negligence against the manufacturer was held to have accrued on the date of sale to the retailer.

    The rules applicable to the accrual of a buyer's cause of action similarly govern warranty actions brought by third party beneficiaries pursuant to MD. ANN. CODE, Comm. L. Art., § 2-318 (1975). Under this Section, a "seller's" warranty extends to members and guests of the buyer's household, as well as others who "it is reasonable to expect . . . may use, consume or be affected by the goods. . . ." *Id.*

50. *See* Baumel v. Rosen, 283 F. Supp. 128, 143 (D. Md. 1968), *rev'd in part on other grounds*, 412 F.2d 571 (1969), *cert. denied*, 396 U.S. 1037 (1970) (construed predecessor, Law of May 7, 1951, ch. 679 § 1, [1951] Laws of Md. 1987). In those states where there is a limitations period specifically applicable to all actions for personal injury which differs from the period covering actions for fraud or deceit, it could be argued that the period prescribed for fraud generally is inapplicable. *See* page 27 & note 20 *supra*.
51. Page 24 & note 5 *supra*.
52. American Indemnity Co. v. Ernst & Ernst, 106 S.W.2d 763, 765 (Tex. Civ. App. 1937); Nelson v. Petterson, 229 Ill. 240, 247-48, 82 N.E. 229, 231 (1907); Smith v. Middle States Utilities Co. of Delaware, 224 Iowa 651, 275 N.W. 158, 166 (1937), *rev'd on other grounds after remand*, 228 Iowa 686, 293 N.W. 59 (1940); Dunn v. Dent, 169 Miss. 574, 153 So. 798 (1934); Rice v. White, 9 Va. Rep. Ann. (4 Leigh) 1006, 1008 (1833). *See also* Wear v. Skinner, 46 Md. 257, 265 (1877).
53. *E.g.*, Rice v. White, 9 Va. Rep. Ann. (4 Leigh) 1006, 1008 (1833).
54. *E.g.*, American Idemnity Co. v. Ernst & Ernst, 106 S.W.2d 763, 765 (Tex. Civ. App. 1937); Dunn v. Dent, 169 Miss. 574, 153 So. 798 (1934).

conceals the plaintiff's cause of action, the statute does not begin to run until discovery of the fraud. Section 5-203 of the Courts and the Judicial Proceedings Article of the Annotated Code of Maryland codifies this exception:

> If a party is kept in ignorance of a cause of action by the fraud of an adverse party, the cause of action shall be deemed to accrue at the time when the party discovered, or by the exercise of ordinary diligence should have discovered the fraud.[55]

In *Wear v. Skinner*,[56] the Maryland Court of Appeals, held that the predecessor of this statute[57] did not require a plaintiff to prove that the defendant had committed a fraud distinct from and independent of the original fraud, for the purpose of keeping the plaintiff in ignorance of his cause of action.[58] Rather, it was held that:

> Where a party has been injured by the fraud of another, and *such fraud is concealed*, or *is of such character as to conceal itself*, whereby the injured party remains in ignorance of it without any fault or want of diligence on his part the bar of the statute does not begin to run, until the fraud is discovered, though there be no special circumstances or efforts on the part of the party committing the fraud to conceal it from the knowledge of the other party.[59]

Later cases demonstrate the continuing vitality of the *Wear* holding.[60] With the caveat that the party alleging fraudulent concealment of his cause of action has the burden of proof,[61] the effect of Section 5-203 is that a cause of action for fraud will be deemed to accrue at the time when the party discovered or should have discovered the fraud.

STRICT LIABILITY

To date, the doctrine of strict liability in tort[62] has not been incorporated into the common law of Maryland. In every case in which

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55. Md. Ann. Code, Cts. & Jud. Proc. Art., § 5-203 (1974).
56. 46 Md. 257 (1877).
57. Law of March 30, 1868, ch. 357, § 1, [1868] Laws of Md. 646.
58. 46 Md. at 267.
59. *Id.* at 265.
60. *E.g.*, Brack v. Evans, 230 Md. 548, 555, 187 A.2d 880, 884 (1963). *See also* Piper v. Jenkins, 207 Md. 308, 317, 113 A.2d 919, 923 (1955). Both of these cases were decided under Law of March 30, 1868, ch. 357, § 1, [1868] Laws of Md. 646, predecessor to § 5-203.
61. Piper v. Jenkins, 207 Md. 308, 319, 113 A.2d 919, 924 (1955).
62. The doctrine of strict liability in tort derives from Restatement (Second) of Torts § 402A (1965), which provides:

the court of appeals has been asked to adopt strict liability, that court has determined either that the facts[63] or the theory of the particular case did not warrant application of the doctrine.[64] However, while strict liability has not been adopted in this state, neither has it been expressly rejected.[65]

In view of the burgeoning popularlity of the doctrine in other jurisdictions,[66] strict liability must be recognized as a potentially viable theory upon which to bring a product liability action in Maryland. Thus, it is appropriate to attempt to anticipate which statute of limitations would be held applicable to an action for strict liability and how that limitations period might be applied.

There has been some confusion over the proper statute of limitations to be applied in an action for strict liability.[67] The dispute involves whether the general tort limitations period should be applied, as opposed to the limitations period applicable to actions for breach of contract or breach of warranty.[68]

Mendel v. Pittsburgh Plate Glass Co.[69] is popularly viewed as the seminal case to hold that the limitations period applicable to an action in strict liability is the period prescribed for warranty actions.[70] However, a cursory reading of the *Mendel* opinion discloses that it involved an action for breach of warranty and not strict liability in tort. The defendant moved to dismiss the warranty counts in a multi-count declaration on the ground that the limitations period had expired. The plaintiffs sought to characterize their warranty allegations as sounding in tort and argued that the tort limitations period be held applicable

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Special Liability of Seller of Product for Physical Harm to User or Consumer

(1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if

(a) the seller is engaged in the business of selling such a product, and

(b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.

(2) The rule stated in Subsection (1) applies although

(a) the seller has exercised all possible care in the preparation and sale of the product, and

(b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

63. *E.g.*, Bona v. Graefe, 264 Md. 69, 77, 285 A.2d 607, 611 (1972); Myers v. Montgomery Ward & Co., 253 Md. 282, 297, 252 A.2d 855, 864 (1969); Telak v. Maszczenski, 248 Md. 476, 487-88, 237 A.2d 434, 441 (1968).
64. Volkswagen of America, Inc. v. Young, 272 Md. 201, 220-21, 321 A.2d 737, 747 (1974) (doctrine of strict liability has no proper application to liability for design defects in motor vehicles); Frericks v. General Motors Corp., 20 Md. App. 518, 539, 317 A.2d 494, 505 (1974), *vacated on other grounds*, 274 Md. 288, 336 A.2d 118 (1975).
65. *See* cases cited notes 63-64 *supra*.
66. W. Prosser, Law of Torts § 98 at 657-58 (4th ed. 1971).
67. *See* 2 Frumer & Friedman, *supra* note 6 § 16.A[5][g], at 3-365 to 3-366.
68. *Id.*
69. 25 N.Y.2d 340, 253 N.E.2d 207, 305 N.Y.S.2d 490 (1969).
70. 2 Frumer & Friedman, *supra* note 6, § 16.A[5][g], at 3-365 to 3-368.

and that it should run from the date of injury. The New York Court of Appeals expressly rejected the argument that New York law provided a remedy in strict liability that was wholly independent of any available remedies for breach of warranty. The court held that the limitations period applicable to an action for breach of warranty was the six-year contract limitations period and that the cause of action accrued when the product was sold even though the one plaintiff who was injured was only a beneficiary of the warranty and had no connection with the sale.[71]

Mendel therefore does not state, nor does it purport to state, what limitations period applies to an action in strict liability and when that period begins to run. The result in *Mendel* has been the subject of considerable discussion and criticism,[72] the latter largely unfounded.[73]

The majority view is that the concept of strict liability is essentially a tort concept; that the general statute of limitations applicable to torts applies to an action for strict liability; and, that the limitations period runs from the date of injury, and not from the date of sale of the product.[74] However, from a policy standpoint, the rationale for applying the contract limitations period in actions for breach of warranty, and for deeming the action to accrue on the date of sale,[75] is equally applicable to actions for strict liability. One of the reasons cited by the *Mendel* court for applying the contract limitations period to actions for breach of warranty was that:

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71. 25 N.Y.2d at 344, 253 N.E.2d at 209, 305 N.Y.S.2d at 493 (1969) (UCC statutory period inapplicable because sale occurred prior to its effective date in New York). Subsequent to the *Mendel* case, the New York Court of Appeals did adopt strict liability in tort. Codling v. Paglia, 32 N.Y.2d 330, 339, 298 N.E.2d 622, 628-29, 345 N.Y.S.2d 461, 469-70 (1973). And recently, in Rivera v. Berkeley Super Wash, Inc., 44 App. Div. 2d 316, 354 N.Y.S.2d 654, 663 (1974) the Appellate Division of the New York Supreme Court held that the three-year tort limitations period commenced to run on the date of injury.
72. *E.g.*, Comment, 36 BROOKLYN L. REV. 499 (1970); Note, 11 B.C. IND. & COM. L. REV. 1038 (1970); Note, 21 SYRACUSE L. REV. 1308 (1970); Note, 39 FORD. L. REV. 152 (1970); Note, 39 U. CIN. L. REV. 413 (1970); 2 FRUMER & FRIEDMAN, *supra* note 6, § 16A[5][g], at 3-366 to 3-368.
73. What the commentators fail to recognize about *Mendel* is that the New York Court of Appeals ruled only that the two warranty counts in the plaintiffs' suit were barred by limitations. There were two negligence counts that were not subject to a motion to dismiss since the action was instituted within the required three years for negligence actions. The plaintiffs were, therefore, permitted to proceed with their action for negligence. 25 N.Y.2d at 346, 253 N.E.2d at 210, 305 N.Y.S.2d at 495 (1969).
74. *E.g.*, Kirkland v. General Motors Corp., 521 P.2d 1353, 1361 (Okla. 1974); Hodge v. Service Machine Co., 438 F.2d 347, 351 (6th Cir. 1971) (applying Tenn. law); Anderson v. Fairchild Hiller Corp., 358 F. Supp. 976, 978 (D. Alas. 1971); Giglio v. Connecticut Light & Power Co., 29 Conn. Supp. 302, 284 A.2d 308, 309 (1971); Holifield v. Setco Industries, Inc., 42 Wis. 2d 750, 756, 168 N.W.2d 177, 180 (1969); Williams v. Brown Mfg. Co., 93 Ill. App. 2d 334, 236 N.E.2d 125, 131 (1968), *rev'd on other grounds*, 45 Ill. 2d 418, 261 N.E.2d 305 (1970); Rosenau v. City of New Brunswick, 51 N.J. 130, 137, 238 A.2d 169, 176 (1968); Arrow Transp. Co. v. Fruehauf Corp., 289 F. Supp. 170, 172 (D. Ore. 1968).
75. *See* p. 29 *supra*.

> An injury resulting from a defective product many years after it has been manufactured, presumptively at least, is due to operation and maintenance.[76]

That position applies with equal force to strict liability and is not unreasonable, especially since the potential plaintiff will normally still have a remedy in negligence. It seems fair to circumscribe the period within which a manufacturer or seller is absolutely liable (liable without proof of fault) and to condition his liability thereafter only upon a showing that he has breached some standard of care owed to the potential plaintiff.

Whatever the appeal of this argument, the adoption of a rule that a cause of action in strict liability accrues on the date of the sale of the product would be inconsistent with the rationale underlying the doctrine of strict liability. The thrust of Section 402A of the Restatement,[77] and of statutes modeled thereon, is that a plaintiff whose personal injuries were caused by his use of a product that is unreasonably dangerous due to the existence of a defect may recover from the seller or manufacturer without any showing of fault. Under the terms of the doctrine, liability does not arise until a person has suffered personal injury as a result of the use of a product.[78] Thus, a cause of action cannot accrue until injury occurs. Moreover, Comment *M* to Section 402A expresses quite clearly the intent of the drafters of that Section that strict liability is a tort concept and should not be shackled by contract concepts. From an analytical standpoint, the argument that a period other than the general tort limitations period should apply to an action in strict liability makes as little sense as the argument that the general tort statute of limitations period applies to an action for breach of a UCC warranty.

Should the Maryland Court of Appeals recognize an independent cause of action for strict liability, it is altogether likely that the cause of action will be deemed to accrue on the date of the alleged injury. The limitations period would be that applicable to other tort actions—the three-year period prescribed in Section 5-101 of the Courts and Judicial Proceedings Article of the Maryland Annotated Code.[79]

DISCOVERY RULE

Although it is the general rule that a cause of action accrues when harm first results from a breach of duty,[80] there are some important exceptions that may apply in the area of product liability. One of these

76. 25 N.Y.2d 340, 346, 253 N.E.2d 207, 210, 305 N.Y.S.2d 490, 495 (1969).
77. Restatement (Second) of Torts § 402A (1965).
78. *Id.* § 402A(1).
79. Of course, if the legislature were to adopt strict liaibility, that body could adopt a special limitations period for that tort.
80. *See* p. 25-26 and note 10 *supra*.

exceptions is the discovery rule. The discovery rule was first articulated in Maryland, albeit somewhat crudely, in *Hahn v. Claybrook*,[81] wherein the court of appeals established the concept that a cause of action for negligence in medical malpractice cases accrues when the wrong is discovered or should have been discovered. Since the *Hahn* opinion, the discovery rule has been consistently extended to all actions involving forms of professional malpractice.[82]

Although no Maryland case has applied the rule in any other context,[83] one of the concerns that induced the courts to adopt the discovery rule in the malpractice area is likewise present in certain product liability actions. That is the fact that the plaintiff, even though exercising due diligence, may not be able to discover the initial wrong until after the limitations period has run.[84] For that reason, other jurisdictions have recently extended the application of the discovery rule to the product liability area.[85]

In an appropriate case, the discovery rule might save a cause of action for negligence which would otherwise appear lost due to the passage of time since the occurrence of some injury. For example, *Thrift v. Tenneco Chemicals, Inc.*[86] involved an action by a patient who was treated for an adverse reaction immediately after an injection of the drug Thorostrast. Eleven years later it was discovered that the plaintiff had a thorium granuloma, which he alleged was proximately caused by the drug. In denying the defendant's motion for summary judgment, which was brought on the ground that limitations had run, the U.S. District Court for the Northern District of Texas held that the plaintiff's claims against the manufacturer for negligence and breach of warranty did not accrue until the plaintiff discovered or should have discovered the injury.[87] The district court recognized that the Texas Supreme Court had theretofore applied the discovery rule only in foreign object and vasectomy malpractice actions,[88] but divined from

81. 130 Md. 179, 100 A. 83 (1917).
82. *E.g.*, Leonhart v. Atkinson, 265 Md. 219, 224, 289 A.2d 1, 4 (1972) (accountant malpractice); Watson v. Dorsey, 265 Md. 509, 512, 290 A.2d 530, 533 (1972) (attorney); Mattingly v. Hopkins, 254 Md. 88, 94-95, 253 A.2d 904, 908 (1969) (engineering firm).
83. In Atwell v. Retail Credit Co., 431 F.2d 1008, 1010 n.1 (4th Cir. 1970), Chief Judge Haynsworth noted that the discovery rule exception for professional malpractice "cannot fairly be described as a possible opening wedge to a general change" in Maryland law.
84. The reasons for the discovery rule have been described as follows:
> [T]he relation of trust [between professional and client], reliance on professional expertise, and the likelihood that injury will not occur simultaneously with the wrongful act or omission. *Id.*
85. *E.g.*, Thrift v. Tenneco Chemicals, Inc., 2 CCH PROD. LIAB. REP. ¶ 7432, at 13,842 (N.D. Tex. 1974); Gilbert v. Jones, 2 CCH PROD. LIAB. REP. ¶ 7350, at 13,524 (Tenn. Ct. App. 1974); Goodman v. Mead, Johnson & Co., 2 CCH PROD. LIAB. REP. ¶ 7360, at 13,575 (D.N.J. 1974).
86. 2 CCH PROD. LIAB. REP. ¶ 7432 (N.D. Tex. 1974).
87. *Id.* at 13,842-43.
88. *Id.* at 13,843.

the Texas case of *Hays v. Hall*[89] an indication that Texas would extend the discovery doctrine to situations where "it is difficult if not altogether impossible to discover the existence of a legal injury."[90] Concluding that the case before it might meet this criterion[91] the court held that the plaintiff's claim for that injury was not barred.

Goodman v. Mead, Johnson & Co.[92] offers an interesting contrast to the *Tenneco* case. In *Goodman*, the plaintiff brought an action against the manufacturer of the drug Oracon, contending that use of the drug had caused her to contract thrombophlebitis and cancer. The plaintiff's last use of the drug was three and one-half years prior to suit; the applicable period of limitations was two years. The plaintiff contended that her action was not barred since she had brought suit within two years of discovery of her illness. The United States District Court for New Jersey applied the discovery rule but concluded that the plaintiff was aware of both the fact that she had thrombophlebitis and of the possible correlation between that condition and the defendant's allegedly defective drug more than two years prior to suit.[93] The court deemed the date on which the plaintiff discovered the cancer to be "academic because the New Jersey discovery rule commands that the date which governs the phlebitis claim also governs the cancer claim."[94] Although it was possible that the plaintiff did not know the full extent of her injuries at the time she discovered the thrombophlebitis, the allegedly wrongful act of a defendant gave the plaintiff but one cause of action on which suit could be maintained.[95]

One might hazard a guess that had the *Goodman* court been faced with the facts in *Tenneco*, the plaintiff's claims in the latter case would also have been barred. It is apparent that the plaintiff in *Tenneco* was aware of some injury immediately after the injection of the allegedly harmful drug, and it is equally apparent that she was aware of a correlation between the use of the drug and her injury at that time.

One other case in which the discovery rule was applied in a product liability context is *Gilbert v. Jones and Orthropharmaceutical Corp.*[96] There, the use of birth control pills brought an action against the

89. 488 S.W.2d 412 (1972) (vasectomy case).
90. Thrift v. Tenneco, 2 CCH Prod. Liab. Rep. ¶ 7432, at 13,843 (N.D. Tex. 1974).
91. It is interesting to note that in *Tenneco*, the district court makes express reference to the fact that the plaintiff suffered, and was treated for, an adverse reaction to the drug immediately after the injection in 1950. *Id.* at 13,841. Was he not then aware of the existence of a legal injury?
92. 2 CCH Prod. Liab. Rep. ¶ 7360 (D.N.J. 1974).
93. *Id.* at 13,576.
94. *Id.*
95. *Id.* "We find no authority to support the . . . conclusion that lack of knowledge of the extent of the injury tolls the running of the statute. Quite to the contrary, . . . any wrongful act resulting in an injury to a person, *though slight*, gives rise to a right to institute an action and the cause of action accrues at that time." *Id.*, quoting from Rankin v. Sowinski, 119 N.J. Super., 393, 400, 291 A.2d 849, 853 (App. Div. 1972).
96. 2 CCH Prod. Liab. Rep. ¶ 7350 (Tenn. Ct. App. 1974).

manufacturer of the pills and the prescribing physician for injury (high blood pressure) allegedly suffered from use of the pills. Although the discovery rule apparently had been limited previously to professional malpractice actions in that jurisdiction,[97] the Court of Appeals of Tennessee applied the rule to the claims against both the prescribing physician and the manufacturer of the pills, the latter without discussion.

While all of the cases discussed involve drugs, one can conceive of countless situations in which a diligent plaintiff might not become aware of the fact that he has suffered actionable injury until some time after the injury actually occurred or was inflicted. Insofar as product liability cases and malpractice cases are similar in that respect, the discovery rule should be recognized as a potentially helpful tool in connection with limitations problems.

However, the differences between a product liability action and a medical malpractice action should not be overlooked. Perhaps the most telling distinction is that in a medical malpractice action the wrongdoer is in a position to know of the injury to the patient whereas in a product liability action the defendant will frequently be unaware of any injury.[98] Presumably, knowledge of the injury by the defendant in the malpractice suit alleviates the unfairness of holding him accountable for an untimely claim. While at least one court was "unpersuaded" by this distinction[99] it might well be significant to a conservative court fearful of opening a wedge in prior law.

The discovery doctrine would appear to apply to a strict liability action to the extent that, and in the manner in which, it would apply to a product liability action sounding in negligence. On the other hand, it is clear that even were the discovery rule to be made applicable to certain product liability actions sounding in tort, it can have no application to any action for breach of warranty regardless of whether the claim involves personal injury or simply commercial loss. Section 2-725(2) of the Commercial Law Article of the Maryland Code Annotated explicitly fixes the accrual of a cause of action for breach of warranty as the time of delivery of the goods "*regardless of the aggrieved party's lack of knowledge of the breach.*"[100] That section provides that the only exceptional instance in which the knowledge of the aggrieved party is relevant in a warranty action occurs when the

97. Teeters v. Currey, 518 S.W.2d 512 (Tenn. 1974).

98. This is particularly true when the defect is alleged to relate to improper assembly or manufacture as opposed to improper design. Note also that in the typical malpractice action, there normally exists a confidential relationship which imposes on the professional the duty to disclose to his client any matter material to the client's interests. *See* 70 C.J.S. *Physicians and Surgeons* § 36 (1951). *See also* Herring v. Offutt, 266 Md. 593, 597, 295 A.2d 876, 879 (1972). Normally, no such relationship and corresponding duty is extant in the product liability situation.

99. Thrift v. Tenneco, 2 CCH Prod. Liab. Rep. ¶ 7432, at 13,843 (N.D. Tex. 1974).

100. Md. Ann. Code, Comm. L. Art., § 2-725(2) (1975) (emphasis added.)

warranty in question "explicitly extends to future performance of the goods."[101] Thus, whatever viability the discovery rule has in product liability litigation in Maryland will be confined to actions sounding in negligence and, perhaps, strict liability in tort.

IGNORANCE OF CAUSE OF ACTION INDUCED BY FRAUD

As was noted in connection with the discussion of the limitations period applicable to an action for fraud,[102] Section 5-203 of the Courts and Judicial Proceedings Article of the Maryland Annotated Code provides:

> If a party is kept in ignorance of a cause of action by the fraud of an adverse party, the cause of action shall be deemed to accrue at the time when the party discovered, or by the exercise of ordinary diligence should have discovered the fraud.[103]

While no Maryland case has applied this statute in a product liability context, courts in other jurisdictions have so applied similar statutes.[104] Maryland case law makes it clear, however, that the party relying on the statute to toll the running of the statute of limitations has the burden of proving the fraudulent concealment.[105] In *Jones v. Sugar*[106] the Court of Special Appeals of Maryland delineated the magnitude of that burden as follows:

> For fraudulent concealment to be invoked, the replication of the plaintiff to a plea of limitations must affirmatively show that the plaintiff was kept in ignorance of his right of action by the fraud of the defendant, and specifically aver:
>
> (1) How the defendant kept the plaintiff in ignorance of his right of action; and

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101. *Id. Cf.* Thrift v. Tenneco Chem., Inc., 2 CCH Prod. Liab. Rep. ¶ 7432, at 13,842-4 (N.D. Tex. 1974); and Goodman v. Mead, Johnson & Co., 2 CCH Prod. Liab. Rep. ¶ 7360, at 13,575-7 (D.N.J. 1974), where the discovery rule was applied, *sub silentio*, to allegations of breach of warranty as well as negligence. In both cases, however, it is indicated that the UCC limitation provisions had previously been held not applicable to actions for breach of warranty involving personal injury. Instead, in each case the tort limitation statute was applied to the warranty counts as well as the tort counts. Thrift v. Tenneco Chem., Inc., *supra* at 13,841; Goodman v. Mead, Johnson & Co., *supra* at 13,574-7.
102. *See* p. 32-33 *supra*.
103. Md. Ann. Code, Cts. & Jud. Proc. Art., § 5-203 (1974).
104. A Pennsylvania case applying the fraudulent concealment doctrine in a product liability action is Hoeflich v. William S. Merrell Co., 288 F. Supp. 659, 661 (E.D. Pa. 1968).
105. *See e.g.*, Jones v. Sugar, 18 Md. App. 99, 101, 305 A.2d 219, 221 (1973).
106. 18 Md. App. 99, 305 A.2d 219 (1973).

(2) How the plaintiff made the discovery of the fraud; and

(3) Why the plaintiff did not make the discovery sooner than he did; and

(4) What diligence the plaintiff exercised to discover the fraud.[107]

As one might infer from this test, the fraudulent concealment exception has proved to be a narrow one.[108] Even assuming a plaintiff can demonstrate fraudulent concealment, he still carries the heavy burden of proving how he discovered the fraud and why he did not make the discovery sooner than he did.[109] In the absence of the existence of a confidential relationship between the plaintiff and the defendant, which will ameliorate to some extent the difficulty of proof,[110] this burden may well be almost insurmountable. Thus, except for a very rare case, the provisions of Section 5-203 will not prove to be of much help to the dilatory plaintiff.

TOLLING

Another aspect of the law of limitations which should not be overlooked is that represented in Section 5-201 of the Courts and Judicial Proceedings Article of the Maryland Annotated Code.[111] That Section provides:

> Persons under a disability.
> (a) *Extension of time*—When a cause of action subject to a limitation under Subtitle 1 accrues in favor of a minor or mental incompetent, that person shall file his action within the lesser of three years or the applicable period of limitations after the date of disability is removed.
>
> • • • •
>
> (c) *Disabilities abolished*—Imprisonment, absence from the state, or marriage are not disabilities which extend the statute of limitations.[112]

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107. *Id.* at 101-02, 305 A.2d at 221.
108. *See* Mettee v. Boone, 251 Md. 332, 338-40, 247 A.2d 390, 394 (1968) Law of March 30, 1868, ch. 357, § 1 [1868] Laws of Md. 646; Brack v. Evans, 230 Md. 548, 555, 187 A.2d 880, 884 (1963) Law of March 30, 1868, ch. 357, § 1 [1868] Laws of Md. 646; Piper v. Jenkins, 207 Md. 308, 319, 113 A.2d 919, 924 (1955) Law of March 30, 1868, ch. 357, § 1 [1868] Laws of Md. 646. *But see* p. 33 and notes 56-60 *supra*.
109. Mettee v. Boone, 251 Md. 332, 338-39, 247 A.2d 390, 394 (1968); Piper v. Jenkins, 207 Md. 308, 319, 113 A.2d 919, 924 (1955).
110. *See* Republic Realty Co. v. Phoenix Sav. & Loan Ass'n., 250 Md. 549, 558, 243 A.2d 858, 863 (1968):
> [A]bsent a fiduciary relationship, fraud is never presumed . . . .
111. Md. Ann. Code, Cts. & Jud. Proc. Art., § 5-201 (1974).
112. *Id.*

As the statute expressly indicates, infancy and mental incompetency are the only disabilities which will arrest the running of the statute of limitations.[113] A minor is anyone who has not attained the age of eighteen years.[114] However, there is little Maryland authority indicating precisely what is meant by the term "mental incompetent." The Revisor's Note to Section 5-201 uses the expression "insanity" when referring to this disability.[115] Of course, the term "insanity" is no more susceptible of abstract definition than is "mental incompetent." Since no Maryland court has had occasion to construe the meaning of either term in the context of the disability statute, one is left to guess precisely what meaning the legislature intended the terms to carry.

This predecessor to Section 5-201(a)[116] employed the term "non compos mentis" instead of the term "mental incompetent." There is some Maryland authority construing "non compos mentis," albeit in another context. In *Purdum v. Lilly*,[117] for example, the Maryland Court of Appeals stated:

> Under the generic legal term, *non compos mentis* is comprehended every species of mental derangement which incapacitates a man from assenting to, or making a legal contract.[118]

The definition given "non compos mentis" in the *Purdum* case must presently suffice as the only *Maryland* guideline for determining what constitutes the disability of mental incompetency. On the other hand, there is considerable discussion of the meaning of insanity in this context in other jurisdictions.[119] In *Sobin v. M. Frisch & Sons*,[120] for example, the word "insane" in the tolling section of the New Jersey statute of limitations was interpreted to include, *inter alia*, a temporary mental incapacity to protect one's rights resulting from a physical injury.[121]

Aside from the definitional difficulties, there are other obstacles to invoking the tolling statutes. Whether the alleged disability be infancy

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113. Hogan v. Stumper, 257 Md. 520, 521, 263 A.2d 571-72 (1970) (construing predecessor of 5-201(c), Law of April 6, 1894, ch. 661, § 6A [1894] Laws of Md. 1059); Rettaliata v. Sullivan, 208 Md. 617, 622, 119 A.2d 420, 422 (1956) (construing ch. 661, § 6A [1894] Laws of Md. 1059).
114. Md. Ann. Code art. 1, § 24 (1973).
115. Md. Ann. Code, Cts. & Jud. Proc. Art., § 5-201, Revisor's Note, p. 183 (1974).
116. Law of April 6, 1894, ch. 661, § 6A [1894] Laws of Md. 1059.
117. 182 Md. 612, 35 A.2d 805 (1944).
118. *Id.* at 618, 35 A.2d at 808 (quoting from Owing's Case, 1 Bland 370, 385 (High Ct. of Chancery 1826)).
119. *E.g.*, Hurd v. County of Allegany, 39 App. Div. 2d 499, 502-03, 336 N.Y.S.2d 952, 956-57 (1972); Sobin v. M. Frisch & Sons, 108 N.J. Super. 99, 104, 260 A.2d 228, 231-32 (1969).
120. 108 N.J. Super. 99, 260 A.2d 228 (1969).
121. *Id.* at 104, 260 A.2d at 231. Even this definition leaves much room for speculation. For example, would a coma caused by a third person's negligence qualify as insanity? Would retrograde amnesia qualify as insanity?

or mental incompetency, it must exist when the cause of action accrues; once the statute has begun to run, "no subsequent disability will arrest it."[122] Secondly, by the express terms of the Section, the disabilities created in Section 5-201 apply only to those causes of action subject to a limitation under Subtitle one of the Article.[123] While Subtitle one includes the three-year catch-all period contained in Section 5-101,[124] it does not include the statute of limitations applicable to an action for breach of warranty. As noted above, that statute of limitations is contained in Section 2-725 of the Maryland UCC.[125] Accordingly, the disabilities set forth in Section 5-201 do not apply to an action for breach of warranty.[126]

WRONGFUL DEATH

Since death, as well as injury, is occasionally the unfortunate consequence of the use of defective products, some discussion of the provisions of Maryland's Wrongful Death Statute[127] and the limitations period contained therein is appropriate.

Historically, no cause of action existed at common law for wrongful death.[128] In 1852, however, the Maryland legislature adopted[129] what has been recognized as "almost a literal transcript of the English

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122. Maurice v. Worden, 52 Md. 283, 295 (1879). What if a person injured by another's negligent act goes into a comatose state a few days after the injury-producing occurrence? Will the running of the statute be tolled? Kyle v. Green Acres at Verona, Inc., 44 N.J. 100, 106, 207 A.2d 513, 519 (1965) (condition of "insanity" which developed a short time after occurrence held sufficient to toll running of statute, even though condition did not actually arise until after cause of action accrued).

123. Md. Ann. Code, Cts. & Jud. Proc. Art., § § 5-101 to 5-304 (1974) sets forth various limitation periods applicable to certain enumerated causes of action. In Redfern v. Holtite Mfg. Co., 209 Md. 106, 111, 120 A.2d 370, 372 (1956), the Maryland Court of Appeals held that the predecessor of Section 5-201(c), Law of April 6, 1894, ch. 661 § 6A [1894] Laws of Md. 1059, had no application to claims for Workmen's Compensation:

> [The statute] is in terms limited to the causes of action specified in that Article.

124. Md. Ann. Code, Cts. & Jud. Proc. Art., § 5-101 (1974). This, of course, includes negligence, fraud and, perhaps, strict liability if it is ever adopted in this state.

125. Note 17 *supra*.

126. *See* Redfern v. Holtite Mfg. Co., 209 Md. 106, 111, 120 A.2d 370, 372 (1956) and note 123 *supra*. While this result may appear at first to be inadvertent, it is arguably not the result of legislative oversight. It may well be that the failure to extend the disability provision of Section 5-201 to actions for breach of warranty is further evidence of the legislature's intention that UCC "sellers" be exposed to the form of absolute liability created by the UCC for a period of four years from the date of sale and no more—no matter what the circumstances. *See* p. 29 *supra*. On the other hand, if this be the case, it is difficult to appreciate the need for Subsection four of Section 2-725 of the Maryland UCC, which provides:

> (4) This section does not alter the law on tolling of the statute of limitations. . . . Md. Ann. Code, Comm. L. Art., § 2-725(4) (1975).

127. Md. Ann. Code, Cts. & Jud. Proc. Art., § § 3-901 to 3-904 (1974).

128. Zitomer v. State, 21 Md. App. 709, 715, 321 A.2d 328, 331 (1974).

129. Law of May 25, 1852, ch. 299, 1-4, 1852 Laws of Md. The successor to this enactment is now codified in Md. Ann. Code, Cts. & Jud. Proc. Art., 3-901 to 904 (1974).

Statute—known as the 'Lord Campbell's Act' "[130]—which altered the common law rule to permit recovery for wrongful death in certain circumstances. The present version of Maryland's "Lord Campbell's Act"[131] provides a right of action in certain designated persons for damages for the death of another when that death is caused by a "wrongful act."[132]

A wrongful act is defined as:

> [A]n act, neglect, or default including a felonious act which would have entitled the party injured to maintain an action and recover damages if death had not ensued.[133]

An action for wrongful death must be commenced within three years after the death of the injured person.[134] Thus, the Wrongful Death Act creates a cause of action, fixes the date when that cause of action shall accrue and fixes the period after the date of accrual within which the suit must be brought.

The provisions of the Act are, perhaps, best suited for application to negligence actions.[135] The limitations period for negligence is the same as that for wrongful death (three years)[136] and a cause of action for wrongful death based on negligence will normally accrue on or about the same time that an action for negligence would have accrued had the injured person not died.[137]

While the limitations period applicable to a cause of action for fraud is likewise three years,[138] the accrual date of an action for fraud is likely to differ from the date on which a death action accrues.[139] Thus, the possibility that a wrongful death action for the death of the deceased based on fraud will exist after the fraud limitations period has expired is probably greater than the same possibility where negligence is concerned. At the same time, a wrongful death action based on fraud is rare and this potential accrual problem is unlikely to become a reality.

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130. State v. B.&O. R.R., 126 Md. 497, 501, 95 A. 65, 67 (1915).
131. Md. Ann. Code, Cts. & Jud. Proc. Art., § 3-904 (1974).
132. *Id.* § 3-902(a).
133. *Id.* § 3-901(e).
134. *Id.* § 3-904(f). The period was formerly two years but it was changed in 1971 to "bring the statute of limitations for wrongful death actions in uniformity with other negligence actions."
135. The Act is also suited for application to strict liability if and when it becomes the law in this state.
136. *See* p. 24 and note 5 *supra*.
137. As noted at p. 25-26 *supra*, a cause of action for negligence normally accrues on the date of injury. Of course, if a person is injured and "lingers" for a period before dying, the time at which a negligence action accrued in his favor and the time at which a wrongful death action accrues in favor of his relative may differ considerably. Indeed, were the injured person to linger for more than three years, his negligence action might be barred whereas on his death, his relatives would have three years within which to bring an action.
138. *See* p. 32 and note 50 *supra*.
139. *See* pp. 32-33 *supra*.

The most difficult problem with the application of the Wrongful Death Act arises when a death allegedly results from a breach of warranty. A threshold question, not yet decided in this jurisdiction, is whether a breach of warranty can serve as the basis for a wrongful death action at all. The answer depends on whether a breach of warranty is a "wrongful act" within the meaning of the statute. The cases from other jurisdictions that have construed statutes similar to Maryland's are not in agreement on this point.[140]

Assuming, arguendo, that a breach of a UCC warranty constitutes a "wrongful act," the application of the wrongful death statute of limitations could lead to some bizzare results. As noted above, the period of limitations for a breach of warranty is four years and the period commences to run on the date of the sale of the product in question.[141] Thus, assuming one were to purchase a product in 1980 and suffer an injury in 1985 as a result of a defect in the product a cause of action for breach of warranty would be time-barred. However, if the occurrence in 1985 resulted in death instead of mere injury, those persons designated in the wrongful death statute would have three years from the date of the death in which to institute a death action based on the same breach of warranty for which the deceased could not have sued.[142] Even assuming that it was the intention of the legislature to provide an action for wrongful death based on a breach of warranty, it is difficult to imagine that such an anamoly was anticipated.

CONCLUSION

A thorough understanding of the statutes of limitations is particularly important in the area of product liability litigation. It is essential

140. *Compare* the following cases, all of which hold that a wrongful death action is not maintainable on a theory of breach of warranty, *e.g.*, Lashley v. Ford Motor Co., 480 F.2d 158, 159 (5th Cir. 1973) (applying Ga. law); Horne v. Armstrong Prod. Corp., 416 F.2d 1329, 1330 (5th Cir. 1969) (applying Ga. law); Mascuilli v. U.S., 411 F.2d 872 (3d Cir. 1969) (applying Pa. law); Sterling Aluminum Prod., Inc. v. Shell Oil Co., 140 F.2d 801, 804 (8th Cir. 1944) (applying Mo. law), *cert. denied*, 321 U.S. 761 (1944); Knight v. Collins, 327 F. Supp. 97, 98 (N.D. Ala. 1971) (action for breach of contract without "warranty" language); Necktas v. General Motors Corp., 357 Mass. 546, 549, 259 N.E.2d 234, 236 (1970); Goelz v. J.K. & Susie L. Wadley Research Institute & Blood Bank, 350 S.W.2d 573, 577 (Tex. Civ. App. 1961); Goodwin v. Misticos, 207 Miss. 361, 42 So. 2d 397, 398 (1949) (dictum), *with, e.g.*, Schnabl v. Ford Motor Co., 54 Wis.2d 345, 358, 195 N.W.2d 602, 609 (1972), *reh. denied*, 54 Wis. 2d 345, 198 N.E.2d 161 (1972); Zostautas v. St. Anthony De Padua Hospital, 23 Ill. 2d 326, 334, 178 N.E.2d 303, 307 (1961) (action for breach of contract without "warranty" language); Greco v. S.S. Kresge Co., 277 N.Y. 26, 27, 12 N.E.2d 557, 561-62 (1938), all holding that a wrongful death action is maintainable on theory of breach of warranty.

141. *See* pp. 29-31 and notes 17-19, 24-36 *supra*.

142. While, as noted above, p. 44 and notes 135-139 *supra*, similar results might occur in connection with death actions based on negligence, fraud or strict liability, they are more likely to occur where breach of warranty is the basis of the death action since the date of accrual of an action for breach of warranty will almost always differ from the date on which a cause of action for wrongful death based on the same warranty would accrue. The only instance in which both causes of action would accrue at the same time is where death resulting from a breach of warranty occurs on the date of sale.

to the plaintiff who desires to maintain all available options for recovery. In many cases, the availability of more than one remedy for the same injury will prove crucial. Likewise, limitations can be a devastating tool in the arsenal of the defense attorney, if he is aware of the different statutes, the manner in which they are applied and the rationale for the manner of application.

Recognition of every conceivable limitations problem posed by a particular case is difficult. The need for a comprehensive legislative review of limitations statutes as applied to product liability litigation is illustrated by the facts that, currently, the limitations applicable to negligence, breach of warranty, and wrongful death are contained in different statutes; the period of the statute applicable to breach of warranty differs from the periods applicable to negligence, fraud and wrongful death; and the statutes applicable to negligence, fraud, breach of warranty and wrongful death all commence running on different dates. Until a legislative review is undertaken, however, the product liability attorney faced with a statute of limitations problem can rely on only a handful of seemingly irreconcileable statutes, scant Maryland case law and his own vivid imagination.