SUPREME COURT OF FLORIDA

FIRESTONE TIRE & RUBBER CO., et al.,

Petitioner,

vs.

MARIA ACOSTA, etc.,

Respondent.

Case No. 70,255

District Court of Appeal
3rd District No. 90-2024

BRIEF OF AMICUS CURIAE PRODUCT LIABILITY ADVISORY COUNCIL, INC. IN SUPPORT OF PETITIONERS, FIRESTONE TIRE AND RUBBER CO. AND THE KELSEY-HAYES CO.

Discretionary Proceedings
On Review of the Decision of the District Court
of Appeal, Third District

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STATEMENT OF PROCEEDINGS

To minimize repetition, Amicus Product Liability Advisory Council (hereinafter **"PLAC"**) adopts the Statement of Proceedings which appears in the brief for the Defendant-Appellant, Kelsey Hayes.

STATEMENT OF FACTS

PLAC also adopts the Statement of Facts in Kelsey-Hayes' brief. For convenience, however, we include this chronology:

Date	Event
1966	Delivery of completed product to original purchaser
1975	Enactment of Statute of Repose
1978	The twelve year period expired without either accident or lawsuit
1980	Supreme Court held statute unconstitutional (Battilla)
1985	Supreme Court held statute constitutional (Pullum)
1986	Repeal of Statute of Repose
1987	The accident happened and suit was filed
1990	Circuit Judge Korvick dismissed the suit, finding that it had been barred by the Statute of Repose and the Court's analysis in Melendez.
1991	The Fourth **DCA** adopted Judge Korvick's reasoning in Miller Electronics but the Third **DCA** reverses Acosta itself.

Introduction: Judge Korvick's decision is well-founded in common sense and legal doctrine. PLAC will point to considerations of

public policy which buttress her analysis still more and make the case deserving of the Court's discretionary conflicts jurisdiction.

SUMMARY OF ARGUMENT

(1) The potential for unfairness and the severe practical impact of such a change in the law require that the amendment or repeal of a statute not be given retrospective effect unless the Legislature explicitly called for that result. There is no such clear-cut language in Chapter 272, the amendment of section 95.031(2).

(2) Melendez held that the text of chapter 272 and the legislative history did not show that the Legislature intended that the amendment of section 95.031(2) should have retrospective effect.

(3) That being so, the required "strong evidence" of intent could not possibly exist for the plaintiffs' still more technical assertions that the Legislature had intended that the amendment should have retrospective effect if the accident happened after July 1, 1986 but that it was **not** to have retrospective effect if the accident happened before that date.

(4) The manufacturer acquired a right of freedom from suit when the twelve year period of repose expired. That right is protected by constitutional law: judicial concern for fairness; the express statement in § 11.2425, Fla. Stat. (1987) that repeal was not to override accrued rights; and settled principles of statutory interpretation alike.

(5) Indeed the serious consequences of retroactivity suggest that the Court should interpret the statutory amendment in a manner

which would not produce an unnecessary constitutional issue. The Court can do that by reaffirming Melendez and refusing to carve out the exception which the Plaintiffs demand--one which could not be reconciled with the nature of a Statute of Repose because it would make the date of accrual control rather than the date of the first sale.

(6) In addition to its importance to the individual defendants, the Third DCA's ruling would create uncertainty as to many other legal safeguards. That, in turn, must encourage, if not require, higher prices for products and insurance--to the loss of the general public.

ARGUMENT

I. FOR THE COURT NOW TO REOPEN A BARRED CLAIM WOULD BE TO GIVE THE AMENDMENT EXACTLY THE RETROSPECTIVE EFFECT WHICH MELENDEZ SAID IT WAS NOT TO HAVE.

The Court already has decided the question at the heart of this case. Melendez v. Dreis & Krump Mfg. Co., 515 So.2d 735 (Fla. 1987) stressed that the amendment of the Statute of Repose is not to have retrospective effect, id. at 736 and, more specifically, that a lawsuit was barred where the product had been sold twelve years before. The question, then, is whether the fact the accident happened after the repeal date is enough to distinguish this case.

The answer is that it is not.

The reason is that Plaintiffs' theory would change the legal effect of past events.

A "retrospective" statute is one which gives new legal consequences to an event which occurred before it was enacted.

DeMars, Retrospectivity and Retroactivity of Civil Legislation Reconsidered, 10 Ohio N.U.L. Rev. 253, 274 (1983). The effect of the Third District's ruling in the present case, Acosta, is exactly that. It would give new legal consequences to an event which occurred before the enactment of § 95.031(2) and, more specifically, subject the manufacturer to a potential liability which the Statute of Repose had ruled out.

II. THERE IS NO EVIDENCE OF LEGISLATIVE INTENT THAT THE REPEAL SHOULD HAVE RETROSPECTIVE EFFECT UNDER THE CIRCUMSTANCES OF THIS CASE.

If the question is whether the Legislature intended that the amendment of the Statute of Repose should apply to a case where the cause of action accrued after the amendment, the best evidence as to what the Legislature intended is:

(a) what the draftsmen did say about the relationship among the critical dates and which of them should control the applicability of the Statute of Repose:

(b) what the draftsmen did not say in Chapter 272 as to the retrospective effect of the amendment, if any, on past sales as to which the statutory period had run:

(c) the legislative history; and

(d) other steps the Legislature took at the same time.

Each of these considerations supports Judge Korvick and her conclusion that this case, too, is governed by the general principle of Melendez.

In terms of logic, the express language of 95.031(2) and the nature of a Statute of Repose alike, it did not matter when the cause of action accrued.

A. **The statute said the date of the accident did not control.**

Section **95.031** begins by an explicit statement that the Statute of Repose is an exception to the generality that the time in which suit must be brought begins to run when the accident occurs:

> Except as provided in subsection (2) and in S. **95.051** and elsewhere in these statutes, the time within which an action shall be begun under any statute of limitations runs from the time the cause of the action accrues.
>
> (Emphasis supplied).

Section 2 carries that theme a step further:

> Actions for product liability and fraud must begin within the prescribed period and that period runs from the discovery date or the date the defect should have been discovered by the exercise of due diligence, but in any event, within twelve years after the date of delivery of the completed product to the original purchaser . . . regardless of the date the defect in the product or the fraud was or should have been discovered."
>
> (Emphasis supplied).

Thus the draftsmen expressly referred to the normal accrual date--the accident itself--and also to the exceptions embodied in the "discovery rule." They then stated--in black and white--that neither the normal accrual nor the exceptional "discovery" served

to start the period of repose running in the instance of a product liability claim. Instead, that period began with the original sale.

B. If the Legislature had intended that accidents which might occur after the repeal should not be barred, it would have said so.

The Florida Legislature could have said that the change in the scope of the Statute of Repose would apply to cases in which the cause of action accrued after the effective date of July 1, 1986 if that had been what they meant.

The Third DCA itself relied upon Wesley Theological Seminary of the United Methodist Church v. U.S. Gypsum Co., 876 F.2d 119 (D.C. Cir. 1989). There the District of Columbia repealed a statute of limitations, but the amendment itself contained a clause which exempted cases pending on a specific date,' from the effect of the repeal. For the same drafting technique, see Martinez v. Scanlan, 16 F.L.W. S427, 428 (Fla. June 6, 1991) ("the Legislature also expressly provided that these two acts would be applied retroactively to July 1, 1990, the original effective date of Chapter 90-201 . . . .")

Further, the Court itself has recognized, only recently, that the Legislature sometimes is willing to use the Statute of Repose

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[1] See also State Department of Transportation v. Knowles, 402 So.2d 1155 (Fla. 1981) where the Legislature expressly granted partial rather than full retroactivity and Regency Wood Condo., Inc. v. Bessent, Hammack & Ruckman, Inc., 405 So.2d 440 (Fla. 1st DCA 1981) (a state court opinion which Judge Ryskamp cited in Daniell v. Baker-Roos, Inc., No. 89-CIV-14100 (S.D. Fla. July 13, 1990), where the Legislature stated its intention that the statutory change should have partial retroactive effect by explicit, affirmative language.

technique even where the result might seem harsh. See University of Miami v. Boqorff, 16 F.L.W. S149 (Fla. Jan. 18 1991) (seven year Statute of Repose valid and effective even against the fraud of a physician concealing malpractice).

It follows that there is no reason to assume--as the plaintiffs' analysis would suggest--that the Legislature wished that the amendment should reopen barred claims but that the draftsmen did not grasp the necessity of stating that unusual intention.

C. The Legfslative History.

The transcript of the House debates (Appendices "D" and "E") does not show any legislator saying the proposed change in the statute would have retrospective effect.

Similarly the staff analyses which were prepared for the House of Representative (Appendices "F" and "G") do not discuss the possibility of retroactive effect.

Note in particular, the sections on "economic impact." The authors spoke of the likelihood that the legislation would result in a greater number of judgments and "an increase in the number of cases which would be filed and which may proceed to trial." But there is not a single reference to a possibility that old cases would be revived or that plaintiffs were to be permitted to sue on products where the twelve year period already had expired.

Yet those would be the consequences of a "repeal" under the Plaintiffs' view.

D. The context of Chapter 272 gives still more evidence that the Legislature intended that the amendment of the Statute of Repose should not have retrospective effect.

Later in the session, the Legislature, itself, ruled out any argument that the amendment could override rights which earlier had come into being.

Section **11.2425,** Fla. Stat. **(1987)** provides that:

> [The] repeal of any statute by the adoption and enactment of Florida Statutes 1987. . . shall not affect any right accrued before such repeal . . . .

Remember, also that the amendment, Ch. 272, was adopted during a perceived insurance "crisis" and against the backdrop of other massive tort litigation reforms, most of which even became effective on July 1, 1986, the same day the amendment took effect.

If both the Tort Reform and Insurance *Act* and Chapter **272** operate prospectively, the Legislature would have made adjustments to the position of each side **as** to future cases. On the other hand, it would not have changed the position of either side as far **as** the older cases were concerned.

If, however, Chapter 272 were to be transformed and made retroactive for a class of cases identified by their accrual dates, consistency would vanish. The Legislature would have removed existing protection for older products even though **it** gave more protection to new products--on almost the same day.

Note also Smith v. Department of Insurance, **507** So.2d 1080, **1093 (Fla. 1987).** The Court rejected the challenge to the excess profits provision **of** the Insurance and Tort Reform Act. The reason was concern that "unanticipated windfalls" would benefit the

insurance companies. That ruling could not be reconciled with the idea that the same session of the Legislature had subjected the same insurers to unanticipated disasters (e.g., the unknowable, unpredictable claims which might arise if the Statute of Repose were repealed retrospectively).

Similarly, section 66 of the Insurance and Tort Reform Act contains a special rebate for the last quarter of 1986 and other temporary measures to provide immediate relief for insurance policy holders. These were justified by findings that the savings would reduce policy costs by at least ten percent. Moreover, the Court wrote that "the provisions were clearly intended to ensure that the policy holders and the insurance companies would equally benefit from the tort reforms." Id. at 1095. That intended equity would be thwarted if the repeal of the Statute of Repose were a retrospective "wild card" which could subject insurers to significant new liabilities with disproportionately great impact.[2]

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[2]Scholarly studies confirm the common sense expectation:

> Although the number of cases involving products over ten years old is relative small, proponents of statutes of repose contend that the impact upon business planning and insurance rate-making is significant and out of proportion to the number of cases that have arisen. Sellers are not able to set realistic prices on products because they cannot calculate either the potential product liability cost over the next 50 years or the cost of liability for products sold 50 years ago. Insurance rate makes indicate that the lack of assume bases for statistical analysis forces them to set rates purely judgmental reasoning. (Task Force at L4-92. A handful of shock losses, or large losses, from whole products may cause underwrites to over-compensate far out of proportion to the statistical significance of such losses. Id.

The Court, of course, already has recognized these facts of life.[3]

III. THE ATTACKS ON JUDGE KORVICK'S RULINGS IGNORE THE EXPRESS STATEMENT IN 95.031(2) THAT THE ACCIDENT DATE OR THE DATE OF DISCOVERY WERE NOT TO CONTROL AS WELL AS THE NATURE OF ANY STATUTE OF REPOSE AND THE LOGICAL IMPLICATIONS OF MELENDEZ.

The Third District opinion in this case relies almost entirely on Federal District Judge Ryskamp's opinion in Daniell v. Baker-Roos, Inc., No. 89-Civ-14100 (S.D. Fla. July 13, 1990). (Appendix "C"). A decision by a trial level federal judge could not be binding on the Florida Supreme Court under any circumstances. The precedential weight is even less in this instance where it purports to say what the Supreme Court "meant" in Melendez.

A. The Federal Court's Discussion of the Text is Unrealistic and Contrary to the Supreme Court's Rulings on State Law.

The federal court "assumes" the answers to several questions and then bootstraps to its conclusion. The Supreme Court, however, has given different answers.[4]

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at 10) [formal citation to follow]

[3]In Smith v. Department of Insurance, 507 So.2d 1080 (Fla. 1987), the Court stressed the close link between changes in tort law and the availability of insurance. In his concurrence, Justice Ehrlich added that the majority had recognized that the object of 86-160 "is to increase the affordability and availability of liability insurance. Id. at 1097. For a discussion of the severity of the crisis see, Schulte, Availability, Affordability and Accountability; Regulatory Reform of Insurance, 14 Fla. St.U.L.Rev. 7 (1986) cited approvingly in Smith v. Department of Insurance, supra.

[4]Once the Florida Supreme Court showed that the relationship between the date of the enactment and the date of the accident is not controlling, the federal court, of course, has no power to use

1. The amendment did not eliminate all past effects of the Statute of Repose.

The law on June 30, 1986--the day before the amendment of 95.031(2)--was that there could be no product liability claim against the manufacturer. The straightforward reasons were that the product was old and the Statute of Repose had run.

The Court could not ignore those facts and their existence before the amendment took effect unless it were to approach the case as if there never had been a Statute of Repose. That might be permissible if the change in § 95.031(2) had constituted a formal "repeal" and the legislature had intended that it should wipe out the statute and all its past effects. But the Supreme Court rejected that argument; and it took pains in Melendez to identify the change as an "amendment"--avoiding the technical ramifications of the word repeal.

2. The date of enactment does not control.

The federal court also says that it is significant that "the Statute of Repose did not exist when the allegedly defective scaffolding was delivered . . ." ("C" at 3). Unfortunately, the Court's reasoning is not clear. The date the Statute of Repose was enacted does not seem to have any bearing on the question whether a repeal should reopen barred claims.

In any event, other plaintiffs have attempted to base their positions upon such contentions--that the product had been sold

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the contrary view as the premise for its own interpretation of the Florida statute. Erie R. Co. v. Tompkins, 304 U.S. 64, 58 S. Ct. 817 (1938).

before the enactment of the Statute of Repose or that the statute had eliminated any right to sue before the accident happened.[5]

They have not succeeded.

For authority that the sale of the product before the enactment of the statute does not matter[6] see Melendez (where the product was sold in 1963, twelve years before the enactment of the Statute of Repose: also note Lamb, infra at n.7, (car sold eight years before enactment of 95.031(2)).

These rulings on Florida law leave no room for a federal analysis which begins with the premise that the amendment had been meant to obliterate all past effects of the Statute of Repose.

B. The Third DCA disreaards the elements which Section 95.031(2) specifies to be controlling.

The DCA's argument (Appendix "B") that the Statute of Repose "should not be applied" after its repeal might have some appeal on the surface. If, however, the reader takes the time to analyze the text and its implications, it will be clear that Judge Korvick did not "apply" Section 95.031(2) in the strange fashion that language suggests.

The first question is the time each statute is to be applied.

'That question lay at the root of Battilla v. Allis Chambers Mfq. Co., 392 So.2d 874 (Fla. 1980). Ultimately, the Court answered it affirmatively in Pullum v. Cincinnati, Inc., 476 So.2d 657 (Fla. 1985), by deferring to the Legislature's right to decide the question.

[6]This is true, provided that reasonable time be allowed for suit.

The second question is whether the events which are necessary conditions to the applicability of 95.031(2) had occurred at that critical time.

As to the amendment, the Court already has held that Chapter 272 is not to have prospective effect, Melendez, 515 So.2d at 736. Therefore, it can only be applied to events which occurred after July 1, 1986.

The amendment, moreover, consists of nothing but the deletion from the Statute of Repose of the reference to product liability cases. If, then, the Statute of Repose was not governed by the accident date in the first place--as 95.031(2) says--the legislative decision to delete the product liability references from the Statute of Repose could have nothing to do with the significance of the accident date. The two things are unrelated--apples and oranges.

The Statute of Repose itself, 95.031(2), was enacted in 1975. Chapter 272, the amendment removing product liability cases from its scope took effect as of July 1, 1986. Therefore, the Statute of Repose would govern events between 1975 and 1986, provided that the requirements for its application had been satisfied within that time period.

Those required elements were (1) the sale of the product and (2) the expiration of a twelve year period without a lawsuit having been filed.

Each of those necessary events occurred in the Acosta case before July 1, 1986.

It is true that a different event--the accident--did not occur within that time period. But the statute also said--just as unmistakably--that unless a lawsuit were filed, any possible liability would end twelve years later, no matter what else might happen.

In addition, 95.031(2) says, expressly and unequivocally, that the accident date does not control the application of the Statute of Repose. Indeed, the accident date could not be treated as controlling without transforming the repose provision into something different--a statute of limitations.[7]

Thus, Judge Korvick did not apply the Statute of Repose "after it had been repealed'' (Appendix "A" at 1). Instead, the Judge recognized that the Statute of Repose governed events which were within its scope and had occurred while the statute was in effect. Conversely, she refused to give retrospective effect to the amendment--obeying the Supreme Court's authoritative statement in Melendez.

C. Melendez did not say that its rule was limited to the case where the injury had occurred before the repeal.

Those who favor the Plaintiffs position try to minimize the scope of Melendez.

They look at the hole and not the doughnut.

It is true that the certified question in that case and the others the Court reviewed include a prefatory statement that the

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[7] See Lamb v. Volkswagenwerk Aktiengesellschaft, 631 F. Supp. 1144 (S.D. Fla. 1986) aff'd sub nom, Eddings v. Volkswagenwerk A.G., 835 F.2d 1369 (11th Cir.) cert. denied sub nom, Eddings Volkswagenwerk, 488 U.S. 822 (1988).

particular cause of action had accrued before the repeal,[8] Melendez, 515 So.2d at 735. Apparently, as a matter of craftsmanship, the courts took care to outline the general scenario carefully, But when the Court examines the decision and the various District Court opinions which preceded it (id. at 737), it will find that the fact the action arose before the amendment did not play any role in the analysis.

And if, technically, the accident's happening after repeal is enough to distinguish the holding in Melendez from the present case, the Court's fundamental reasoning is still directly on point.

D. The "plain" meaning argument begs the question.

The District Court asserts, later, that the "plain meaning" of the statutory text compels a ruling that the trial should go forward in this case.

In fact, the plain words of the statute say nothing about that question.

The draftsmen of Chapter 272 deleted words which had referred to product liability cases--they did not make affirmative statements.

The deletion of those clauses left silence and the silence is ambiguous. At most, it might raise a question as to what the Legislature wanted to accomplish.

But the mere existence of that question must mean that Plaintiffs had not satisfied the requirement of Melendez that the

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[8] That phrase appears in each of the published opinions which certified the question to the Court, see, e.g., Pait v. Ford Motor Co., 515 So.2d 1278 (Fla. 1987), but the date of "accrual" played no part in the analysis in the District Court's opinions.

legislative intent to create a retroactive statute be strong and unmistakable.

The federal court's related assertion ("C" at 3) that the Legislature could not have meant that product liability cases should be ''exempt" from the amendment/repeal for an "indefinite and conceivably endless time period" also is skillful rhetoric rather than analysis. Judge Korvick never said product liability actions could be ''exempt" from the amendment and the suggestion is surrealistic. The amendment consisted of nothing but the deletion of the reference to product liability actions. If there were such an "exception" there would be no amendment.

The strategy is to transform the trial judge's traditional "prospective only" application of the 1986 amendment into something new and strange.

In reality, however, if the amendment is to have only "prospective" effect--as Melendez says--it necessarily follows that the legal rights and duties which existed before that repeal must remain as they were. Thus the Judge had to give effect to the statute insofar as it had established the legal consequences of past events. That the statute later was repealed could not change that fact.

Even mare to the point, there is nothing strange or unusual in the idea that a closed claim must stay closed absent the most extraordinary circumstances. The values of finality and stability are traditional and important. Hochman, The Supreme Court and the Constitutionality of Retroactive Leqislation, 73 Harv. L. Rev. 692, 727 (1958).

E. The clause in Chapter 272 which specifies the date of effect does not offer any meaninsful answer to the questions before the Court either.

Chapter 272 establishes that the amendment takes effect on July 1, 1986. But it does not deal with the issues now before the Court--(a) when the "break" with past policy is to take effect; (b) how the trial courts are to deal with the awkward reality that some parts of the controversy occurred before the amendment and some after; and (c)whether the Plaintiff should be allowed to bring the particular lawsuit.

To escape that difficulty, the federal opinion says that Melendez "merely" provided a definite date "to break cleanly with past policy regarding repose in product liability actions." ("C" at 2).

The formulation is elegant, at first glance, but it also is meaningless.[9]

In a sense, every statutory change in the law represents a "break" with past policy. Otherwise, there would be no reason for the change. But every change in every statute would have retroactive effect if that were all that is necessary. As the Court well knows, the law is just the opposite.[10]

In any event, to rule in the Plaintiff's favor, the Court would have to go back to a time before the effective date of the

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[9]The statute itself recites the date on which it was to take effect--July 1, 1986. The opinion, obviously, does not change that and it must have a different purpose.

[10]A statute is presumed not to have retrospective effect. Foley V. Morriss, 339 So.2d 215 (Fla. 1976).

statute and change the critical legal facts. Whatever else that might be, it could not be a "clean break" with the past.

Beyond that, it is misleading to speak of the Supreme Court making a decision to "break with past policy." The essence of Melendez lay in the Court's recognition that such choices are the responsibility of the legislative branch rather than the judiciary. The Court's role was only to examine the text to discern intent in the light of the legislative history and traditional principles of interpretation.

F. The passage of the twelve years without lawsuit created more than a "mere expectancy."

The quotation from Lamb to the effect that a vested right "must be more than a mere expectation based on an anticipation of the continuation of existing law," 631 F. Supp. at 1149, also does not support the federal judge's conclusions. The present situation is far different from that which Judge Marcus discussed. In Lamb, the product had been sold, the Statute of Repose had been declared unconstitutional and the plaintiff merely had hoped that there would be no further change before he obtained a final judgment. But in Acosta twelve years did go by without a lawsuit being filed before the Legislature amended 95.031(2). Therefore, all the necessary conditions had been met and the defendant had a right enforceable at law or equity to have any such claim dismissed. That, by definition, is a vested right. See infra at n.15.

IV. JUDGE KORVICK'S OPINION GIVES PRECEDENT FAIRNESS AND CONSTITUTIONAL DUE PROCESS THE WEIGHT THEY DESERVE.

Our efforts to rebut the attacks on Judge Korvick's ruling necessarily have been cast in negative terms. To keep matters in perspective, however, it is important that we point to the positive characteristics of that ruling--in terms of obedience to precedent, fairness and practicality.

A. The trial judge made the best of a difficult situation.

The Third District and the federal court make much of the fact that the accident did not happen until after the Statute of Repose had been repealed. They point to the unusual nature of the situation and then suggest that it somehow would be intolerable that rights which accrued under the Statute of Repose should be given effect later, when the statute had been repealed.

We suggest, instead, that the seeming strangeness of the situation reflects the dislocation which any repeal must produce; and the fact that a lawsuit has been brought against an old psoduct--not any flaw in the reasoning of Melendez or Judge Korvick's application of that precedent.

The trial court, after all, faced a difficult choice. She must either enforce the Statute of Repose even though it later had been repealed or allow a lawsuit to go forward even though the Statute of Repose had barred the claim years before.

Under either approach, the situation is confusing and even disorienting.

There is a logical way out of these "conceptual" dilemmas, however. That is to consider which events were the most important in the statutory scheme and, then, to interpret the amendment in such a way as **not** to change the legal consequences of those critical events if they occurred before July 1, 1986. That approach would respect the logic of Melendez by ensuring that the amendment have only "prospective" effect.

The Court might ask what were the "critical events?" The Legislature answered that question, as we have seen (I A. at 5).

B. Judge Korvick's interpretation gives an important function to each part of the legislative language.

The Third D.C.A. opinion charges that Judge Korvick's approach would "nullify" the 1986 amendment. That criticism, too, does not seem justified.

Her reading--unlike Judge Ryskamp's approach--recognizes that there had been a Statute of Repose for a number of years and that it had legal consequences. Equally important, it leaves both the 1986 amendment and Melendez with important roles. Specifically, the amendment means that the Statute of Repose bars a lawsuit in those instances where the product was sold at an early enough date and no lawsuit had been filed **before** twelve years had gone by following that first sale.[11] On the other hand, the Statute of Repose would not bar a lawsuit against a product which **was** sold after July 1, 1986. More important for present purposes, the statute would not bar a lawsuit if the product had been sold even

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[11]By our calculations sometime in 1964 or even before.

one day less than twelve years before the amendment took effect on July 1, 1986.

V. THE COURT COULD AND SHOULD AVOID THE CONSTITUTIONAL QUESTIONS WHICH WOULD ARISE FROM AN ORDER OVERRIDING THE SELLER'S RIGHTS UNDER THE STATUTE OF REPOSE.

A. Case Law Supports the Manufacturer's Due Process Rights Under These Circumstances.

There is abundant authority that the right to freedom from a lawsuit after the statute of limitations or repose has run is protected by the law and, thus, "property" for this purpose at least. See, e.g., La Floridienne v. Seaboard Airline Railway, 59 Fla. 196, 52 So. 298 (1910) (passage of period set in Statute of Repose covering railroad rate charges forever extinguished claims even though later legislation purported to authorize suits for forfeitures based on transactions during the period); Bahl v. Fernandioa Contractors, Inc., 423 So.2d 964 (Fla. 1st DCA 1982) (passage of three-year winding-up period for dissolved corporations barred plaintiff's personal injury action against the dissolved corporation). See also CBS, Inc. v. Garrod, 622 F. Supp. 532 (M.D. Fla. 1985) (repeal of a statute does not deprive one of a right or defense which arose under it).[12]

[12]In addition, we refer the Court to Foley v. Morriss, 339 So.2d 215 (Fla. 1976); In Re: Will of Martell, 457 So.2d 1067 (Fla. 2d DCA 1984); and McRae v. Cessna Aircraft Co., 454 So.2d 1093 (Fla. 1st DCA 1984) (savings clause showed legislative did not intend to abolish action, merely to shorten time in which to bring action), each of which suggests that the settled principle that courts may not interfere with vested rights has its basis in constitutional doctrine.

The majority view among the states is the same. See, e.g., Roller v. Basis Constr. Co., 384 S.E.2d 323, 327 (Va. 1989) (Statute of Repose extinguishing causes of action within "x" years after they arose, created substantive rights of repose which later legislation could not abridge); and Waller v. Pittsburuh Corning Corp., 742 F. Supp. 581, 583 (D. Kan. 1990) (collecting cases): In re Kaplan, 178 N.J. Super. 487, 429 A.2d 590 (1981) (statute that set increased penalties for and designated specifically as retroactive violated due process.[13]

B. The few cases which the federal court cites for the proposition that the Statute of Repose does not create a vested right actually say the opposite.

The federal court states (A-4) that it has located no Florida cases which involve the extension of a statute of limitations after the statutory period expired. It then cites Corbett v. General Eng'g & Mach. Co., 160 Fla. 879, 37 So.2d 161 (1948), and Mazda Motors of America v. S.E. Henderson & Sons, Inc., 364 So.2d 107 (Fla. 1st DCA 1978), each of which indicate that where the statutory limitations period had not expired, the defendant had no vested right against an extension of that statute. Judge Ryskamp, however, did not deal with the obvious corollary of those rulings If the statutory period had expired, there would be a vested right. Each court, in fact, made just that point in its opinion. See Corbett, 37 So.2d at 162 and Mazda Motors, 364 So.2d at 108.

[13]See also Colony Hill Condo Rm. #1 Ass'n v. Colony Co., 320 S.E.2d 273 (N.C. App. 1984); Rosenberq v. Town of North Berqen, 61 N.J. 190, 293 A.2d 662 (1972).

To be frank, there is another side to the question. The circumstances under which the state and federal due process clauses limit retrospective or retroactive legislation is a matter of debate among scholars. See McGovern, The Variety, Policy and Constitutionality of Product Liability Statutes of Repose, 30 Am. U.L. Rev. 579, 590 (1981).

Rather than take up the Court's time with the intricacy of that question, however, we suggest a simpler, alternative solution.

c. Few principles **are better established than a Court's duty to avoid an unnecessary constitutional ruling.**

The Court itself has recognized its duty not to reach unnecessary constitutional issues. In the process, refused to give a statute retroactive effect. In Trustees of Tufts College v. Triple R Ranch, Inc., 275 So.2d 521 (Fla. 1973), the controversy involved a statute which limited the duration of an easement or right of entry over mineral and oil deposits to twenty years. The Court held that a statute should not be given retrospective effect. Justice Roberts explained that conclusion in these terms:

> The rule that statutes are not to be construed retrospectively unless such construction was plainly intended by the Legislature applies with peculiar force to those statutes the retrospective operation of which would impair or destroy vested rights . . .

Id. at 525.

In this context, that means the Court should favor any reasonable interpretation of the amendment of 95.031(2) which would not involve the constitutional question.

One such reasonable interpretation would call for nothing more than the application of Melendez.

VI. PRACTICAL CONSIDERATIONS MEAN THAT IT WOULD BE UNWISE AS A MATTER OF PUBLIC POLICY TO INTERPRET THE AMENDMENT OF 95.031(2) TO PERMIT A SUIT WHERE THE STATUTORY PERIOD HAD EXPIRED.

Throughout the controversies over the Statute of Repose, the Florida Supreme Court has emphasized two themes.

The first is respect for the right of the Legislature to make the critical judgments as to how long the product should be the subject of potential liability.

The second is the need for fairness.

The Third District's ruling in this case thwarts each of those concerns.[14]

Fairness: The Supreme Court showed its traditional concern for fairness in Frazier v. Baker Material Handling Corp., 559 So.2d 1091 (Fla. 1990), where it held that a plaintiff who had been misled by Battilla into letting the Statute of Repose run out was entitled to go forward with a case.

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[14]Lest there be any confusion, PLAC contends that the choice is far the Legislature not the Court, and that Pullum and Melendez establish that point of constitutional practice by the scrupulous care the Court took to be governed by legislative intent, See also Hess v. Snyder Hunt Corp., 392 S.E.2d 817, 819 (Va. 1990) ("Statutes of repose evince a legislative policy decision that after the expiration of a specific time a defendant should no longer be subjected to liability").

Here the situation would be the opposite. The common sense reading of the Statute of Repose is that once claims are barred they are barred for all time--otherwise the measure could not accomplish its objectives. Thus manufacturers were given misleading assurances that the passage of the Statute of Repose meant there could be no lawsuit. They would take that assurance into account in deciding how long to retain records and documents. In the future, plaintiffs might well attack them, charging bad faith in the destruction of documents-because the Courts had changed Florida law.

Equally important, a ruling which "nullified" the past effects of the Statute of Repose as the plaintiffs demand would permit the filing of lawsuits concerning accidents which might occur after July 1, 1986 and involve any product which was manufactured and first sold in Florida between 1963 and 1975 if not many others.[15] The number of those products is infinite and so is the number of potential cases.

Product liability law assumes, moreover, that rational manufacturers will set their prices by taking into account their experience with accidents and lawsuits concerning the product. Prosser & Keeton, Prosser & Keeton on Torts § 98 at 692-93 (5th Ed. 1984). Yet if statutes of repose can be set aside, the manufacturer could not protect themselves that way. What seemed an old accident which could not lead to a lawsuit would be, in

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[15] "There are other possibilities which complicate the question of the years covered by the statute. Since they are not involved in this case, however, we will not take up the Court's time with them.

fact, the basis for a huge liability that an unknown person might assert at any time.

For that matter, insurance companies themselves would rely upon the Statute of Repose when they set their rates. Their assumptions, too, would be distorted and turned against them.

Past choices between "occurrence" and "claims made" insurance policies would be distorted long after the event and a whole new field of potential liability would emerge.

To survive, they would have to increase their rates.

A. The Third DCA's view would place burdens on the trial courts.

We add that the courts would not encounter any difficulty in administering the rule of Melendez in this context--a situation marginally different from that in the case but fundamentally the same. The trial judge only need determine when the first sale occurred. If twelve years had run before the lawsuit was brought, the legislation would require dismissal, Q.E.D.

In contrast, the Plaintiffs' rule would embroil this and other courts in logical difficulties.[18] And perhaps more important, it would require trial courts to deal with a host of uniquely difficult cases.

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[18] "Consider a hypothetical instance in which a manufacturer produced a bicycle of a particular design in 1965. A major reason for the bar against a lawsuit after that date is the fact that the evidence would be stale. Carr v. Broward County, 541 So.2d 92, 95 (Fla. 1988). Were the Third District correct, if the bicycle were involved in an accident **before** 1986 amendment, there could be no lawsuit even if the plaintiff claimed that the design had been the cause of the event. Yet if the same bicycle were involved in an accident in 1991, five years later, there could be a lawsuit. Even though the evidence necessarily would be far more stale.

The rule the Third District adopted would mean a vast and unmeasured burden for the trial bench and, ultimately, the appellate courts.

A major reason for the Statute of Repose is that cases against old products are unusually susceptible to unfairness and distortion. See qenerally Schwartz, New Products, Old Products Evolving Law, Retroactive Law, *58* N.Y.U. Law Rev. 796 (1983).

The trial of a lawsuit ten--or twenty--or thirty--years after a product was sold requires that the parties reconstruct the events of the accident and the state of the art which had prevailed years before.[17] The jurors must follow that testimony and resist the temptation to judge the product by standards which prevail at the time of the trial rather than when the designer did the work.

Moreover, the difficulties of these tasks compound one another.

Scholars have found that claims against older products tend to be relatively large and that they are concentrated in capital

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[17]The abnormally long period of time between the manufacturer's involvement with the product and the trial of a product liability lawsuit creates unique conceptual and practical problems, particularly for the defense, These problems include the admissibility of evidence, the concept of defect, the proof of defect, the availability of defenses, the proof of defenses and damages. In addition, a jury's natural tendency to employ hindsight makes it virtually impossible to ensure that a 1950 product is judged by 1950 standards. Evidence gathered after the sale of a product, even if admitted with a limiting charge, forces a jury to make judgment based upon retroactive and "unrealistic" standards. Further, a manufacturer might refrain from making a product safer and more efficient out of fear that any design changes might be used against him at trial. The unfairness to a defendant's manufacturer, in a trial occurring long after its involvement with product, bolsters the argument for statutes of repose. McGovern, Am. U.L. Rev. at 590.

goods--long-lasting articles such as trucks, construction equipment or the like. These items are relatively high in cost and small in number. As a result, manufacturers find it difficult to pass the increased costs of litigation on through the pricing system--even though "spreading the loss" is one of the central premises of those opinions which have expanded the product liability law.

The practical result is that manufacturers must try cases hard or resign themselves to large payments; and the complexity of the substantive issues makes the discovery disputes and evidentiary battles even more difficult.

If the Legislature had considered burdens of this sort and if it had concluded that the judiciary **must** bear them, the Court might have no choice but to obey. But, as we have seen, the staff studies and the legislative debate compel a **far** different conclusion.

B. <u>The Third DCA's ruling would create uncertainty far beyond the technical question</u>.

Judge Ryskamp **and** the district court of appeal each referred to the tumultuous history of the Statute of Repose. They then assert that no manufacturer or business reasonably "would have relied" upon 95.031(2).

PLAC disagrees with the specific argument.

There could not be a more unfair use of hindsight than to say that manufacturers should have foreseen--ten and twenty years ago--that the Legislature and the courts would engage in a seesaw battle in future decades, still less that they should have decided

that a duly enacted Florida statute was not to be taken seriously.[18]

The judicial observation, however, does highlight an important reality.

Yet another change of course concerning the Statute of Repose would tend to undermine the institutional credibility of Florida law.

The lesson to insurers and manufacturers would be that Melendez did not end the long struggle after all and, worse, that the Florida Supreme Court believes itself free to change statutory law retroactively and that it will do so in important product liability matters even in the absence of a clear cut legislative intention.

Furthermore, if the Statute of Repose could be nullified in that fashion, the same would be true of the statute of limitations and any other legislative safeguards.

Both insurers and manufacturers would have to increase their prices and create a still greater margin of safety if they hope to survive and to protect their stockholders and employees.

The result would be a needless burden on the public which must pay those prices.

CONCLUSION

Amicus PLAC urges that the decision of the Third DCA be reversed and that the Court reaffirm the trial judge's holding that

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[18]The inference must be that a manufacturer has no right to take a Florida statute seriously because the state may soon change its mind. Yet we doubt that the Court would have patience with an argument by a manufacturer/defendant to the effect that it did not obey a state regulation because it was confident that the law would soon change.

the Statute of Repose applies whenever the product was sold and twelve years had expired without suit.

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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing Brief of Amicus Curiae, Product Liability Advisory Council, Inc., was mailed this 11th day of September, 1991 to: Norman Klein, Esq., Attorney for Plaintiff, Klein & Tannen, P.A., 633 N.E. 167 St., North Miami Beach, FL 33162, Bruce Schwartz, Esq., Schwartz, Weinstein & Mopsick, 2750 N.E. 187 St., North Miami Beach, FL 33180, Clifford B. Selwood, Jr., P.A., Attorneys for The Kelsey-Hayes Company, P.O. Box 14128, Ft. Lauderdale, FL 33302, Nancy Little Hoffman, Esq., Co-Counsel for The Kelsey-Hayes Company, 4419 W. Tradewinds Avenue, #100, Fort Lauderdale, Florida 33309; Steven P. Befera, Esq., Attorney for Okeechobee Tires, Wicker, Smith, et al., 5th Floor Grove Plaza Building, 2900 Middle Street, Miami, FL 33133, and to G. William Bissett, Attorney for Firestone, Preddy, Kutner, Hardy, Rubinoff, Brown & Thompson, 501 N.E. First Ave., Miami, FL 33132-1998.

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