Remedying the Confusion Between Statutes of Limitations and Statues of Repose in Wisconsin - A Conceptual Guide

Daniel J. La Fave

Follow this and additional works at: http://scholarship.law.marquette.edu/mulr

Part of the Law Commons

Repository Citation
Available at: http://scholarship.law.marquette.edu/mulr/vol88/iss5/2
REMEDIYING THE CONFUSION BETWEEN STATUTES OF LIMITATIONS AND STATUTES OF REPOSE IN WISCONSIN—A CONCEPTUAL GUIDE

DANIEL J. LA FAVE

I. INTRODUCTION

In its 2001 decision in *Landis v. Physicians Insurance Co. of Wisconsin*, the Wisconsin Supreme Court lamented that "the terms 'statute of repose' and 'statute of limitations' have long been two of the most confusing and interchangeably used terms in the law." The court went a long way towards remedying this confusion in *Wenke v. Gehl Co.*, a decision issued at the end of the 2003-04 term. There the court finally laid to rest any doubt over the intended meaning of the oft-quoted statement from its 1944 decision in *Maryland Casualty Co. v. Beleznay*, that "in Wisconsin, limitations are not treated as statutes of repose." As the court recognized in *Wenke*, by reading this phrase out of context, Wisconsin courts previously had attributed to *Maryland* a contemporary distinction between time limits that operate, or are triggered, in two fundamentally different ways, namely statutes of limitation (accrual or injury driven) and statutes of repose (keyed to a specified event). In reality, no such distinction was intended in *Maryland*. Rather, when understood in its proper historical context, *Maryland* serves to underscore a bedrock principle of Wisconsin law dating back to 1860; one that *Wenke* reaffirms: The effect of the running of any statutory time limit for commencing an action, however it might be denominated, is to create a vested right to immunity in the party

---

1. 2001 WI 86, ¶ 61 n.16, 245 Wis. 2d 1, 628 N.W.2d 893.
2. 2004 WI 103, 274 Wis. 2d 220, 682 N.W.2d 405.
3. 245 Wis. 390, 393, 14 N.W.2d 177, 179 (1944).
potentially subject to suit—a right that is constitutionally protected.\(^5\)

While the court's analysis in *Wenke* does much to cure what is arguably the single greatest source of confusion in this area of the law, namely debunking the *Maryland* myth, it does not fully develop and expose how the confusion arose. Nor does it offer any clear guidelines to ensure that one does not misread one of the many decisions that propagated the *Maryland* myth. Expanding upon *Wenke*, this Article presents a conceptual model that delineates the operative distinction between statutes of limitations and statutes of repose, clarifies how the two terms have been used over the years in Wisconsin case law, and provides practical guidelines to avoid future errors in this area.

II. THE CONTEMPORARY TERMINOLOGICAL DISTINCTION—WHAT TRIGGERS THE RUNNING OF THE TIME LIMIT?

A statute of limitations specifies a time period for commencing suit on a given claim that begins to run, or is triggered, when the cause of action accrues, which is when a claimant "discovers" an injury.\(^6\) By contrast, the time limit for bringing suit established by a statute of repose is triggered by a specified event, such as the substantial completion of an improvement to real property.\(^7\) The critical difference is that repose periods run and can expire regardless of whether an injury has occurred or has been discovered.\(^8\) Potential plaintiffs can be as diligent as possible in prosecuting their claims and still find them time barred by the running of a repose period. In effect, through a repose period, "the legislature has already determined when the claim 'accrues'—at the time of the defendant's action."\(^9\) By determining how a particular time limit is triggered (i.e., by injury, actual or discovered, or by a specified event) one can confidently and consistently distinguish between statutes of limitation and statutes of repose, as those terms currently are used. This conceptual difference, which *Wenke* characterizes as an "operational distinction,"\(^10\) will be referred to herein

---

5. *Id.* ¶ 57.
6. *Aicher ex rel. LaBarge v. Wis. Patients Comp. Fund, 2000 WI 98, ¶ 82, 237 Wis. 2d 99, 613 N.W.2d 849; see also *BLACK'S LAW DICTIONARY* 1422 (7th ed. 1999).
7. *Aicher, 2000 WI 98,* ¶ 26; *see also BLACK'S LAW DICTIONARY, supra* note 6, at 1423; Wis. Stat. § 893.89 (2003-04) (ten-year repose period on action for injury resulting from improvements to real property).
10. *2004 WI 103,* ¶ 50, 274 Wis. 2d 220, 682 N.W.2d 405.
as the "trigger distinction."

Understanding what triggers a given statutory time limit is a critical step in assessing the viability of any cause of action. Whether one is prosecuting or defending a claim, it is vital to know when the clock on the prescribed period began to run. Otherwise, one may devote substantial resources to litigating a dispute only to find that the action is untimely. A ready illustration of how things can go awry can be found in *Tomczak v. Bailey.*\(^{11}\) There, the Wisconsin Supreme Court dismissed a negligence action brought by landowners based upon an errant land survey as being barred by the six-year repose period prescribed for such actions.\(^{12}\) In doing so, the court held that repose periods are not subject to the common law discovery rule adopted in *Hansen v. A.H. Robins, Inc.* (i.e., tort claims accrue on the date the injury is discovered or with reasonable diligence should be discovered, whichever occurs first).\(^{13}\) The court explained that, consistent with *Hansen*, Wisconsin's legislature could specify limited discovery rules as part of a given limitations period or "choose to employ no discovery rule at all."\(^{14}\) All in all, as *Tomczak* illustrates, statutes of repose tend to be less forgiving than traditional statutes of limitation.

The first reported Wisconsin case in which the phrase "statute of repose" was used to convey the trigger distinction is the supreme court's 1989 decision in *Funk v. Wollin Silo & Equipment, Inc.*\(^{15}\) Yet even then, it was not a phrase that the court itself employed. Rather, it appears in an excerpt taken from the Alaska Supreme Court's discussion of the constitutionality of a time limit for claims based upon improvements to real property, which was at issue in *Funk.*\(^{16}\) However, the *Funk* court inexplicably failed to include the concise contemporary definitional distinction between statutes of limitations and statutes of repose found elsewhere in the Alaska case.\(^{17}\) Instead, the *Funk* court characterized the Wisconsin counterpart, section 893.89 of the Wisconsin Statutes, as

---

11. 218 Wis. 2d 245, 578 N.W.2d 166 (1998).
12. *Id.*
13. 113 Wis. 2d 550, 560, 335 N.W.2d 578, 583 (1983); *Tomczak*, 218 Wis. 2d at 259, 578 N.W.2d at 173 ("We hold that the judicially-created *Hansen* discovery rule cannot be applied to a statute of repose.").
14. *Tomczak*, 218 Wis. 2d at 258, 578 N.W.2d at 172.
15. 148 Wis. 2d 59, 435 N.W.2d 244 (1989); *see also Wenke*, 2004 WI 103, ¶41 n.22 ("In *Castellani v. Bailey* we stated that, if anything, a claim subject to a statute of repose limitation period 'accrues' on the date of the primary conduct triggering the limitation period occurs.").
17. *Turner*, 752 P.2d at 469 n.2.
an "immunity statute," even though it was "presented by the legislature as a statute of limitations." 18 The court remarked that while there was a "facade of ordinariness" about the statute:

Examination of [it] reveals that it is anything but ordinary. It limits actions in a manner unrelated to "accrual" of a cause of action or the sustaining of injury or damages. Under this statute, an action may be barred before the injury is ever sustained or before any right to bring suit arises. 19

Because of this "uniqueness," the court felt that this "unusual statute" required careful examination. 20 Ultimately, the court concluded that it was unconstitutional on equal protection grounds because the legislature failed to provide adequate justification for excluding property owners and certain others from the protected class of individuals. 21

Shortly after Funk, in Leverence v. United States Fidelity & Guaranty, 22 the court of appeals employed the modern definitions underlying the trigger distinction in finding that the phrase "period of limitation" as used in Wisconsin's borrowing statute, section 893.07, applies to only statutes of limitations and not statutes of repose. In doing so, the court of appeals borrowed wholesale the definitions given by the Seventh Circuit in its 1987 decision in Beard v. J.I. Case Co., 23 which also involved interpretation of the borrowing statute. 24 Notably, Beard provided no citation to Wisconsin authority (or any authority for that matter) for the terminological distinction.

Before proceeding, it bears emphasizing a point made in Funk, namely that the "special interest immunity statute," as the court labeled it, had been presented by the legislature as an ordinary "statute of limitations." 25 In Landis, the supreme court took pains to note that the legislature never has employed the phrase "statute of repose" or

18. Funk, 148 Wis. 2d at 71, 435 N.W.2d at 249 (emphasis added).
19. Id.
20. Id. at 71–72, 435 N.W.2d at 249–50.
21. Id. at 77, 435 N.W.2d at 252.
22. 158 Wis. 2d 64, 462 N.W.2d 218 (Ct. App. 1990).
23. 823 F.2d 1095 (7th Cir. 1987).
24. Leverence, 158 Wis. 2d at 92, 462 N.W.2d at 230 (quoting Beard, 823 F.2d at 1097 n.1).
25. Funk, 148 Wis. 2d at 71, 74, 435 N.W.2d at 249, 251.
“repose” in any statute. Instead, the legislature uses phrases such as “period of limitation,” “time limitation,” “statute of limitation,” and “law limiting the time for commencement of an action.” The Landis court explained that the term “statute of repose” is largely a judicial label for a particular type of limitation on actions, and “is not featured in legislative lingo.” Consequently, the court held that when, as part of the 1983–84 session, the legislature enacted section 655.44, a medical malpractice tolling statute, it intended the phrase “[a]ny applicable statute of repose” to include and toll “any applicable statute of repose.” That included the five-year repose period for medical malpractice actions that the legislature enacted during the 1979–80 session as part of section 893.55.

III. THE SOURCE OF CONFUSION—EARLIER DECISIONS USING “STATUTE OF REPOSE” TO CONVEY SOMETHING OTHER THAN THE TRIGGER DISTINCTION

The first time the phrase “statute of repose” appears in any reported Wisconsin decision is in the 1853 case of Pritchard v. Howell. However, at the outset of the opinion, the court stated, “[t]he only question in this case arises under the statute of limitations.” The case involved an action on a promissory note and was commenced more than six years after the note became due, which was the controlling limitations period. In upholding judgment for the defendant based upon the statutory bar, the court reasoned, “[s]ound policy, therefore, requires that this law should be so administered, as to make it what it was designed to be, ‘a statute of repose.’” How could this be, since Wisconsin did not formally recognize the trigger distinction until the court of appeals’ 1990 decision in Leverence? The answer is straightforward. The court was not attempting to distinguish between

26. 2001 WI 86, ¶ 61, 245 Wis. 2d 1, 628 N.W.2d 893.
27. Id. ¶ 61 & n.15.
28. Id. ¶ 5.
29. Id. ¶ 61; see also id. ¶ 60 n.13 (“While the concept of a statute of repose may have been part of the ‘legal lexicon’ for more than a century, it has never been part of the legislative lingo in this state.”).
30. Id. ¶ 5; see also id. ¶ 59 n.11 (noting that phrase originated in Wis. Stat. § 655.44(6) (1983–84)).
31. Id.; see also id. ¶ 47.
32. 1 Wis. 131 (1853).
33. Id. at 134 (emphasis added).
34. Id. at 138 (emphasis added).
two fundamentally different types of time limits. Rather, the court was describing one of the widely recognized purposes behind statutes of limitation, to give rest (or repose) to litigation.

As the supreme court subsequently observed in its 1879 decision in *Oconto Co. v. Jerrard*, "[i]t is therefore the policy of the law that some reasonable lapse of time should end all controversies.... This is the philosophy of statutes of limitation. They are therefore called 'statutes of repose.' They give possession rest from litigation." The use of the phrase "statute of repose" to convey the concept of giving rest to litigation after a specified period of time will be referred to as the "rest distinction." That distinction applies with equal force to any statute that establishes a time limit for bringing a claim, regardless of how it is denominated.

The supreme court did not use the phrase "statute of repose" to convey anything but the rest distinction until its 1921 decision in *In re Hoya's Will*. Among the issues presented there was whether an executor, upon his assuming to act in that capacity, could be charged with debts he owed his mother's estate for which the statute of limitations had run at the time of her death. The court recognized the general rule that such a person becomes chargeable with his existing obligations to the estate he undertakes to administer. However, there was a split in authority as to whether the same rule applied to obligations against which a statute of limitations had run during the testator's life. In relating this split in authority, the court stated the following:

The general line of authorities holding that the statute of limitations does not bar the application of such general rule is held in those jurisdictions wherein the statute of limitations is considered merely a statute of repose applying to the remedy only, while the contrary view is maintained where it is considered that the statute of limitations destroys the right of action itself and gives rise to a new property right in the debtor. This latter view as to the statute of limitations has been repeatedly asserted by this

---

35. 46 Wis. 317, 50 N.W. 591 (1879).
36. *Id.* at 326, 50 N.W. at 594.
37. See Aicher, 2000 WI 98, ¶ 27, 237 Wis. 2d 99, 613 N.W.2d 849 ("Statutes of limitation and statutes of repose represent legislative policy decisions that dictate when the courthouse doors close for particular litigants.").
38. 173 Wis. 196, 180 N.W. 940 (1921).
39. *Id.* at 198, 180 N.W. at 943.
court, although such view is deemed to be contrary to that of many of the sister states and of the United States Supreme Court.\textsuperscript{40}

Consistent with its longstanding adherence to the vested right approach, the \textit{Hoya} court held that an obligation that was time barred at the testator's death was not to be charged against the son when he assumed the duties as executor of his mother's estate.\textsuperscript{41}

The \textit{Hoya} court's distinction between those jurisdictions in which the effect of the running of a time limit was deemed to be solely a remedial bar and those, like Wisconsin, where it extinguished the claim and created a new property right in the potential defendant will be referred to herein as the "right/remedy distinction." The significance of this distinction is that under the vested rights approach, a legislature cannot constitutionally make a retroactive change in the time limit that governs a given claim once the period has run, whereas in remedy-only jurisdictions it can.\textsuperscript{42}

Although not discussed in \textit{Hoya}, the Wisconsin Supreme Court first adopted the vested right approach to the running of a limitations period in 1860 in \textit{Sprecher v. Wakeley}.\textsuperscript{43} As the preceding excerpt from \textit{Hoya} indicates, the competing remedial-bar-only school of thought was led by none other than the United States Supreme Court, whose leading case on the subject was its 1885 post-\textit{Sprecher} decision in \textit{Campbell v. Holt}.\textsuperscript{44}

In its 1889 decision in \textit{Eingartner v. Illinois Steel Co.},\textsuperscript{45} the Wisconsin Supreme Court made clear that, notwithstanding \textit{Campbell}, it was adhering to the vested rights approach. The court believed that the dissent in \textit{Campbell} had the better argument and remarked that it

\textsuperscript{40} \textit{Id.} at 198, 180 N.W. at 944 (emphasis added).
\textsuperscript{41} \textit{Id.}
\textsuperscript{42} See, \textit{e.g.}, \textit{State v. Haines}, 2003 WI 39, ¶13, 262 Wis. 2d 139, 661 N.W.2d 72 ("We have concluded that 'once a statute of limitations has run, the party relying on the statute has a vested property right in the statute-of-limitations defense, and new law which changes the period of limitations cannot be applied retroactively to extinguish that right.'") (quoting \textit{Borello v. U.S. Oil Co.}, 130 Wis. 2d 397, 416, 388 N.W.2d 140, 148 (1986)); see also \textit{Betthauser v. Med. Protective Co.}, 172 Wis. 2d 141, 147, 493 N.W.2d 40, 42 (1992) ("If... a statute is procedural or remedial, rather than substantive, the statute is generally given retroactive application unless retroactive application would impair contracts or disturb vested rights.").
\textsuperscript{43} 11 Wis. 432, 433 (1860) ("It is an error to suppose that a statute of limitations affects the remedy only... The statute of limitations is not only a bar to the remedy, but it takes away the legal right.").
\textsuperscript{44} 115 U.S. 620 (1885).
\textsuperscript{45} 103 Wis. 373, 79 N.W. 433 (1899).
"states the doctrine of this court on the subject with strict accuracy." Wisconsin has adhered to that doctrine, without interruption, up to the present. Indeed, the rule is codified in section 893.05.

The headwaters of the confusion in this area can be traced to the Wisconsin Supreme Court's 1944 decision in *Maryland Casualty Co. v. Beleznay*. There, the court was called upon to determine whether the defendant's liability on a surety bond had been discharged in bankruptcy. In answering the question affirmatively, the court rejected the argument that the exception to discharging liabilities under bankruptcy law for "willful and malicious injuries" applied. The court reasoned that no action could be maintained based upon such conduct (e.g., a claim for conversion) because it would have been time barred when the surety company commenced suit. In what has become a frequently quoted passage, the *Maryland* court declared that:

In Wisconsin the running of the statute of limitations absolutely extinguishes the cause of action for *in Wisconsin limitations are not treated as statutes of repose*. The limitation of actions is a right as well as a remedy, extinguishing the right on one side and creating a right on the other, which is as of high dignity as regards judicial remedies as any other right and it is a right which enjoys constitutional protection.

The mischievous error was to omit the word "merely" from the right/remedy distinction as the court had expressed it in *Hoya* (i.e., in Wisconsin, limitations are not treated merely as statutes of repose that simply give rise to a remedial bar).

Until *Landis* was decided in 2001, there was only one reported Wisconsin decision in which the court applied the right/remedy distinction in a way that hearkened back to the manner in which it had been expressed in *Hoya* (i.e., accurately). In its 1999 decision in *Strassman v. Muranyi*, the court of appeals held that the plaintiff could not rely on the timely commencement of a third-party action to toll the

---

46. *Id.* at 375, 79 N.W. at 435.
47. *See*, e.g., *Bethhauser*, 172 Wis. 2d at 147–48 & n.5, 493 N.W.2d at 42 & n.5 (pointing out its continued philosophical disagreement with the United States Supreme Court and other remedial bar only jurisdictions).
48. 245 Wis. 390, 14 N.W.2d 177 (1944).
49. *Id.* at 392–93, 14 N.W.2d at 178.
50. *Id.* at 393, 14 N.W.2d at 179 (emphasis added).
51. 225 Wis. 2d 784, 594 N.W.2d 398 (1999).
running of the three-year personal injury limitations period to assert her
own claim against the same third-party. In rejecting the plaintiff's
argument equating notice of litigation with tolling, the Muranyi
court reasoned, "[s]tatutes of limitations serve a much different purpose than
simply providing notice and repose." The court then quoted a prior
decision regarding "the effect [the running of a] statute of limitations ha[s] on a claim" that, in turn, recycled the notorious quote from
Maryland in its entirety.53

Maryland's subtle variation on the right/remedy distinction has
proliferated.54 It did not wreak havoc, though, until after 1989, when
courts began taking it (or cases that had recycled it) out of context to
address the trigger distinction.

IV. COMPOUNDING THE ERROR AND PROPAGATING
THE MARYLAND MYTH

Leverence constitutes the first instance in which a Wisconsin
appellate court fundamentally misapplied Maryland's right/remedy
distinction. The court of appeals concluded, based upon Maryland's
1944 statement, that "in Wisconsin limitations are not treated as statutes
of repose" read using Beard's 1987 trigger distinction definitions, that
the plain meaning of the borrowing statute excluded statutes of repose.55
Section 893.07 "refers to a period of limitation, not a period of repose."

Conceptually, by using right/remedy distinction authority to develop
a trigger distinction analysis, the court of appeals was mixing apples with
bananas. The only way that Maryland's right/remedy distinction might
conceivably provide support is if the effect of the running of a statute of
repose gave rise solely to a remedial bar. Yet that never has been the
case in Wisconsin.

On two occasions prior to the supreme court's decision in Wenke,

52. Id. at 792, 594 N.W.2d at 402 (emphasis added).
53. Id. at 792–93, 594 N.W.2d at 402–03 (quoting Kohnke v. St. Paul Fire & Marine Ins.
Co., 140 Wis. 2d 80, 85, 410 N.W.2d 585, 587 (Ct. App. 1987), aff'd, 144 Wis. 2d 352, 424
N.W.2d 191 (1988) (quoting Maryland, 245 Wis. at 383, 14 N.W.2d at 179)).
54. See, e.g., Pulchinski v. Strnad, 88 Wis. 2d 423, 428, 276 N.W.2d 781, 789 (1979) (citing
Haase v. Sawicki, 20 Wis. 2d 308, 311, 121 N.W.2d 876, 878 (1963) (quoting Maryland, 245
Wis. at 383, 14 N.W.2d at 179)).
55. See Leverence v. U.S. Fidelity & Guaranty, 158 Wis. 2d 64, 91–93, 462 N.W.2d 218,
230 (Ct. App. 1990). The operative portion of the borrowing statute reads, "If an action is
brought in this state on a foreign cause of action and the foreign period of limitation which
applies has expired, no action may be maintained in this state." WIS. STAT. § 893.07(1)
56. Leverence, 158 Wis. 2d at 93, 462 N.W.2d at 231.
Wisconsin appellate courts had observed that the running of a repose period "extinguishes the cause of action," just as the running of a statute of limitations does. In *Hartland-Richmond Town Insurance Co. v. Wudtke,*57 decided by the court of appeals two years before *Leverence*, the court found that once the six-year limitations period in the improvement to real property statute had run, "Hartland-Richmond's 'right' was extinguished."58 It should not be surprising that the court of appeals repeatedly referred to section 893.89 as a "limitations period" or a "statute of limitations" (although it is unquestionably a repose period) because neither the trigger distinction found in *Leverence* nor *Funk*'s "special interest immunity statute" judicial labels had yet been developed.59

The second pre-*Wenke* instance in which a Wisconsin appellate court commented on the effect of the running of a repose period was the supreme court's 2000 decision in *Aicher ex rel. LaBarge v. Wisconsin Patients Compensation Fund.*60 There, the court upheld the constitutionality of the repose periods that govern medical malpractice actions involving minors. The court found that when they ran, they "extinguish[ed] [the] cause of action."61 The court made clear that their running extinguished the remedies too.62

*Hartland-Richmond's* and *Aicher's* recognition that the running of a repose period extinguishes the right to bring an action (assuming it has not been prevented from vesting before an injury accrues) is in keeping with the approach in the majority of jurisdictions—a point highlighted by the court in *Wenke*.63 Indeed, even jurisdictions that follow the remedy-only approach embodied by *Campbell* for statutes of limitation treat the running of a repose period as "extinguish[ing] both the right and the remedy."64 In brief, the vested substantive right from

57. 145 Wis. 2d 682, 429 N.W.2d 496 (Ct. App. 1988), overruled on other grounds by *Funk*, 148 Wis. 2d 59.
58. *Id.* at 693, 429 N.W.2d at 500 (citing *Maryland*, 245 Wis. at 394, 14 N.W.2d at 170). The supreme court overruled *Hartland-Richmond* on other grounds when it found the statute to be unconstitutional the following year in *Funk*. *Funk*, 148 Wis. 2d at 68, 77.
59. See *Hartland-Richmond*, 145 Wis. 2d at 691, 693, 45 N.W.2d at 248, 252.
60. 2000 WI 98, 237 Wis. 2d 99, 613 N.W.2d 849.
61. *Id.* ¶ 83.
62. *Id.* ¶ 50 ("The effect of extinguishing a remedy in court is the same." (emphasis added)).
63. 2004 WI 103, ¶¶ 57–58, 274 Wis. 2d 220, 682 N.W.2d 405.
64. Via v. GE, 799 F. Supp. 837, 839 (W.D. Tenn. 1992); accord 51 AM. JUR. 2D Limitation of Actions § 32 (2000) ("While a statute of limitations generally is procedural and extinguishes the remedy rather than the right, a statute of repose is substantive and
Sprecher-Eingartner-Hoya-Maryland applies with equal force to the running both of a statute of limitations and a statute of repose, as those terms are now operationally differentiated under the trigger distinction.

V. DEBUNKING THE MARYLAND MYTH—THE DEMISE OF LEVERENCE

After Landis was decided in 2001, Wisconsin courts gradually began to debunk the Maryland myth. However, that process has been limited to one context: correcting Leverence's conceptual error in interpreting the borrowing statute.

The debunking process began in earnest in the Eastern District's decision in Merner v. Deere & Co.65 There, the court was called upon to determine whether Iowa's fifteen-year repose period for product liability actions applied under the borrowing statute to preclude two consolidated lawsuits brought by Iowa residents injured while refueling old John Deere lawn tractors. The centerpiece of the plaintiffs' argument in support of Leverence's interpretation of the borrowing statute was a set of notes provided by the Wisconsin Judicial Council Committee to sections 893.07 and 893.05, the latter of which, as mentioned earlier, is a codification of the right/remedy distinction. Notably, both of these statutes were enacted during the 1979–80 session in the same piece of legislation.66 The statutes, along with their notes, read as follows:

---

893.05. Relation of statute of limitations to right and remedy
When the period within which an action may be commenced on a Wisconsin cause of action has expired, the right is extinguished as well as the remedy.

JUDICIAL COUNCIL COMMITTEE NOTE—1979
This new section is a codification of Wisconsin case law. See Maryland Casualty Company v. Beleznavy, 245 Wis. 390, 14 N.W.2d 177 (1944), in which it is stated at page 393: “In Wisconsin the running of the statute of limitations absolutely extinguishes the cause of action for in Wisconsin limitations are not treated as statutes of repose.”

893.07. Application of foreign statutes of limitation.
(1) If an action is brought in this state on a foreign cause of action and the foreign period of limitation which applies has expired, no action may be maintained in this state.
(2) If an action is brought in this state on a foreign cause of action and the foreign period of limitation which applies to that action has not expired, but the applicable Wisconsin period of limitation has expired, no action may be maintained in this state.

JUDICIAL COUNCIL COMMITTEE NOTE—1979
Subsection (1) applies the provision of s. 893.05 that the running of a statute of limitations extinguishes the right as well as the remedy to a foreign cause of action on which an action is attempted to be brought in Wisconsin in a situation where the foreign period has expired. Subsection (1) changes the law of prior s. 893.205(1), which provided that a resident of Wisconsin could sue in this state on a foreign cause of action to recover damages for injury to the person even if the foreign period of limitation had expired.

Subsection (2) applies the Wisconsin statute of limitations to a foreign cause of action if the Wisconsin period is shorter than the foreign period and the Wisconsin period has run.67

67. WIS. STAT. §§ 893.05, 893.07 (2003-04) (emphasis added).
Based on these notes, the plaintiffs in *Merner* argued that the express purpose of section 893.07(1) was to apply Wisconsin's "'*longstanding judicial distinction between statutes of limitations and statutes of repose applicable to foreign causes of action.'*" In rejecting this argument, the court in *Merner* explained:

The judicial committee language only *seems* to suggest what plaintiffs conclude. The purpose of Section 893.07(1) was not to codify the "'*longstanding judicial distinction between statutes of limitation and statutes of repose applicable to foreign causes of action.'* *Maryland Casualty* is quoted in connection with § 893.05, which is titled "Relation of statute of limitations to right and remedy," and this section codifies the concept that when "'the period within which an action may be commenced on a Wisconsin cause of action has expired, the right is extinguished as well as the remedy.'" § 893.05. Accordingly, when the Court in *Maryland Casualty* held that "in Wisconsin limitations are not treated as statutes of repose," this was not in the context of addressing the distinction between a statute of limitations and a statute of repose, a distinction which the Court addresses today. Instead, it was cited as authority for the proposition that "'the limitation of actions is a right as well as a remedy, extinguishing the right on one side and creating a right on the other.'" *Maryland Casualty*, 14 N.W.2d at 179. Under Wisconsin law, "’statutes of limitation [are viewed as] substantive statutes because they create and destroy rights.'" *Betthauser v. Medical Protective Company*, 172 Wis. 2d 141, 493 N.W.2d 40, 43 (1992). The quote in *Maryland Casualty* is therefore taken out of context.

The *Merner* court reasoned that, given *Landis*, it would be "'incomprehensible that the Wisconsin Supreme Court would find that Wisconsin's legislature intended statutes of limitation to equal statutes of repose in 1979 for one statute [(i.e., Wis. Stat. § 893.55(1)(b), the medical malpractice statute of repose)], but not another [namely the borrowing statute].'" Accordingly, the *Merner* court predicted that the Wisconsin Supreme Court would not follow *Leverence*, but would instead find that a repose period constitutes a "'period of limitation"
under the borrowing statute.\textsuperscript{71}

The Wisconsin Court of Appeals continued the debunking of the Maryland myth in its decision in Wenke, which affirmed the dismissal of a lawsuit brought against Gehl Company arising out of a 1997 accident involving a Gehl round baler, which had been sold to the initial purchaser in 1981. In similarly finding that Iowa's fifteen-year repose period barred the action by virtue of the borrowing statute, the court of appeals adopted Merner's logic.\textsuperscript{72} In keeping with Merner's prediction, the court of appeals concluded that Landis had implicitly overruled Leverence.\textsuperscript{73}

In affirming the court of appeals' decision in Wenke, the supreme court conclusively completed the Maryland myth debunking process. The court recognized that there had been two competing definitions of the phrase “statute of repose” over the years. The “modern definition” captures the “operational distinction” between the two types of limitations periods (which has been referred to herein as the trigger distinction).\textsuperscript{74} The court found that before the modern definition came into vogue, the phrase “‘statute of repose’ was commonly used to refer to general limitations periods that simply provided peace, or ‘repose,’ to potential litigants, taking away the remedy for an otherwise valid claim.”\textsuperscript{75} As to the purportedly decisive Judicial Council Committee Notes, after tracing the historical uses of the phrase “statute of repose,” the court found that:

The language from Maryland Casualty was actually expressing that all Wisconsin limitations periods are more than merely statutes providing “repose,” because that kind of repose would not be substantive in effect.

We have extensively reviewed Wisconsin cases that have invoked the term “statute of repose” and conclude that its use at the time of Maryland Casualty, which is the proper context of the Committee Note to § 893.05, was merely to describe limitation periods that apply only to bar an available remedy, not affect substantive rights. . . . In all, the longstanding judicial distinction between statutes of limitation and statutes of repose alluded to in

\textsuperscript{71} Id. at 888–90.

\textsuperscript{72} 2003 WI App 189, ¶ 21, 267 Wis. 2d 221, 669 N.W.2d 789, aff’d, 2004 WI 103, 274 Wis. 2d 220, 682 N.W.2d 405.

\textsuperscript{73} Id. ¶ 24.

\textsuperscript{74} Wenke v. Gehl Co., 2004 WI 103, ¶ 50, 274 Wis. 2d 220, 682 N.W.2d 405.

\textsuperscript{75} Id. ¶ 54.
the Note to Wis. Stat. § 893.05 has nothing to do with how the two concepts are differentiated today. Rather, it relates solely to the effect of a limitation period—any limitation period—expiring.\textsuperscript{76}

For the dissent in Wenke, the Committee’s Note to section 893.05 was determinative.\textsuperscript{77} However, the dissent inexplicably failed to address two key points, which completely undermine its credibility. First, the Judicial Council itself referred to other limitations periods included in the 1979–80 legislation as statutes of limitation—even though the supreme court has since labeled them as statutes of repose under what the Wenke majority describes as the “modern definition” (i.e., the trigger distinction).\textsuperscript{78} One must remember that until Leverence in 1990, no Wisconsin appellate court had employed “statute of repose” to connote the trigger distinction. To the contrary, when the supreme court focused on the distinction in Funk in 1989, it recognized that the legislature still considered such laws to be statutes of limitation. It was an operational distinction that was present in Wisconsin law (e.g., the negligent improvement to real estate provision involved in Funk), but had not received a distinct definitional label—even though our courts may have been aware that certain statutory time limits operated in an “unusual” fashion when compared to the typical, accrual driven ones.\textsuperscript{79} Second, the dissent failed to justify the incongruity between its position in Wenke, and its 2001 concurrence in Landis. There, the same two justices agreed, in construing the medical malpractice tolling provision enacted during the 1983–84 session, that “the term ‘statute of repose’ is not part of the legislature’s lexicon, but rather is a judicially created label used to describe a particular type of limitation on actions.”\textsuperscript{80} For

\textsuperscript{76} Id. ¶ 56 (footnotes omitted).

\textsuperscript{77} See id. ¶ 85 (Bradley, J., dissenting) (“Although the majority attempts at length to explain away this note, there is no escaping its clear mandate: Wisconsin’s borrowing statute . . . was not intended by the legislature to apply to statutes of repose.”).

\textsuperscript{78} See Tomczak v. Bailey, 218 Wis. 2d 245, 255–66, 578 N.W.2d 166, 171 (1998) (“The 4-year statute of limitation time period . . . has been increased to 6 years.”) (emphasis added) (quoting Committee’s Note to Section 893.07).

\textsuperscript{79} See Funk v. Wollin Silo & Equip., Inc., 148 Wis. 2d 59, 435 N.W.2d 244 (1989); see also Kallas Millwork Corp. v. Square D Co., 66 Wis. 2d 382, 387–88, 225 N.W.2d 454, 457–58 (1975) (addressing, as in Funk, a constitutional challenge to the negligent improvement to real property time limit, after quoting from a recent prior decision that had pointed out that the statute could bar suit before the injury arises, the court commented, “[i]t seems, therefore, that there is little rational justification for this statute in the traditional terms by which statutes of limitations are judged” (emphasis added)).

\textsuperscript{80} Landis v. Physicians Ins. Co. of Wis., 2001 WI 86, ¶ 67, 245 Wis. 2d 1, 628 N.W.2d
these justices, the phrase was not part of the legislature’s lexicon in 1983–84; therefore, one is left wondering how it could have been present in the legislature’s mind during the 1979–80 session—several years earlier. The simple truth is this: the majority in *Landis* got it right. Neither Wisconsin courts nor its legislature used the modern definition, or trigger distinction, in discussing statutory time limits prior to 1990. Indeed, to this day, the legislature does not employ that terminology in crafting legislation.\(^8^1\)

VI. OTHER MANIFESTATIONS OF THE MARYLAND MYTH

While *Wenke* has once and for all brought an end to the *Maryland* myth, it does not establish ready guidelines for avoiding confusion in reading and applying earlier cases. Nor does it speak to the other settings in which Wisconsin appellate decisions have attributed a trigger distinction to *Maryland* and its progeny. One prominent example is in *Landis*. While the supreme court concluded that the legislature never had distinguished between statutes of limitation and statutes of repose, the court “acknowledge[d] that [its] opinions have long regarded statutes of limitation as different from statutes of repose.”\(^8^2\) That simply is not true. Each of the cases that *Landis* cited for this proposition addressed the right/remedy distinction, as expressed in *Maryland*, and nothing more. Yet as *Wenke* makes clear, that distinction does not speak to operational differences between two different types of time limits, but rather to Wisconsin’s long-established treatment of the effect of the running of any statutory time bar. Indeed, the most recent of the three cases cited by *Landis* for this proposition is a 1979 decision that pre-dates the formal judicial recognition in Wisconsin of the trigger distinction by a decade.\(^8^3\) All of the authority *Landis* cites for this errant proposition flows from the *Maryland* headspring.

The dissent in *Landis* similarly muddled things. In collecting authority to support its claim that the modern concept of statute of repose had been firmly imbedded in Wisconsin law for “over 100 years,”

---

81. During the 2003–04 legislative term, the senate considered enactment of what would have been a fifteen-year repose period for product liability actions. Yet the proposed legislation was titled simply as “TIME LIMIT.” 2003 Senate Bill 126 (proposed new section 895.047(5); period to run from product’s date of manufacture).

82. *Landis*, 2001 WI 86, ¶ 60 n.12 (citing *Pulchinski*, 88 Wis. 2d at 428, 276 N.W.2d at 783–84; *Haase*, 20 Wis. 2d at 311, 121 N.W.2d at 877; *Maryland*, 245 Wis. at 393, 14 N.W.2d at 179).

83. *Id.* (citing *Pulchinski*).
the dissent asserted that *Pritchard v. Howell* involved a statute of repose. However, as established earlier, that is in patent disregard of how the *Pritchard* court itself had characterized the law in question. At the outset of the opinion, the court expressly stated that it involved a "statute of limitations." The subsequent reference to "statute of repose" was to convey nothing more than the rest distinction. The dissent's reference to *McMillan v. Wehle* similarly fails to support the proposition of an earlier recognition of the trigger distinction. Throughout *McMillan*, the court referred to the adverse possession time limit involved as a "period of limitation." As in *Pritchard*, the court's one use of the phrase "statute of repose" was solely to convey the rest distinction.

A more recent example of the supreme court using the terms interchangeably and in a haphazard manner can be found in its 2003 decision in *Hamilton v. Hamilton*. There, the court was called upon to construe section 893.40, which sets a twenty-year limitations period for bringing actions on a judgment. In describing the law, which became effective July 1, 1980, the court stated that it "is different from its predecessor, § 893.16(1) (1977), in another way. The new statute is a statute of repose.... In this case, the 'act' that triggers the statute of repose is the entry of the judgment." Yet in the very next one-sentence paragraph the court states, "[i]n short, § 893.40 is plain and unambiguous in its declaration that the statute of limitations begins to run upon the entry of judgment."

---

84. *Id.* ¶ 81 & n.10 (Crooks, J., dissenting).
85. *See supra* note 33 and accompanying text.
86. 55 Wis. 685, 13 N.W. 694 (1882).
88. *See, e.g., McMillan*, 55 Wis. at 686, 13 N.W. at 696 ("The extent to which the period of limitation was so shortened depended upon the time when such possession was taken under it." (emphasis added)).
89. *See id.* at 687, 13 N.W. at 697 ("It is a statute of repose, giving perfect security to the possessor, and terminating all inquiry on the part of any who might otherwise question his title or disturb the possession.").
90. 2003 WI 50, 261 Wis. 2d 458, 661 N.W.2d 832.
91. *Id.* ¶ 29 (emphasis added).
92. *Id.* ¶ 30 (emphasis added).
VII. SOME PRACTICAL GUIDELINES TO AVOID PITFALLS

First, in analyzing statutes that bear upon the timeliness of an action, one must begin with Landis's recognition that Wisconsin's legislature has never employed the term "statute of repose." The senate's recent consideration of a fifteen-year post-manufacture limit for product liability actions suggests that the legislature continues to prefer other labels for such laws. To the extent that the legislature is presumed to be aware of published decisions, certainly at no point prior to Funk in 1989 could it have intended to codify the modern definition/trigger distinction—it had not yet been recognized in Wisconsin. Wisconsin's appellate courts were only beginning to focus on the "unusual" operational distinction of such laws and did not expressly adopt the contemporary definitions of statutes of repose and statutes of limitations until 1990 in Leverence. That is not to say that Wisconsin courts or attorneys should ignore the operational distinction that may indeed be present in laws pre-dating Funk and Leverence, just as the supreme court excepted the negligent surveying repose period from the judicially-created discovery rule in Hansen. However, nothing can turn on the legislature having intended to impart a terminological distinction. Indeed, based upon the senate's drafting efforts during the most recent legislative session, one can persuasively argue that this precept continues to hold true.

Second, any reference to a decision that pre-dates Leverence as supporting the trigger distinction is in error. Even in Landis, where the supreme court's attention was focused on the distinctions between statutes of limitation and statutes of repose, both the majority and dissenting opinions contain seeds of error on this point. Because of the pervasive misuse of Maryland, it would be wise to read with circumspection any pre-Wenke Wisconsin appellate decision that purports to address distinctions between statutes of limitations and statutes of repose.

Third, when dealing with a repose period, recognize that there are no common-law exceptions to it. If there is no statutory exception, such as the tolling provision in Landis, once the time limit has run the cause of action is extinguished (if an injury has already occurred), or will be prevented from accruing through the discovery of an injury. Once that

93. See supra note 81.
94. See Aicher ex rel. LaBarge v. Wis. Patients Comp. Fund, 2000 WI 98, ¶ 82, 237 Wis. 2d 99, 613 N.W.2d 849 ("If a statute of repose has run, no legally recognized cause of action
has happened, there is no way to revive the claim. Only a prospective defendant's waiver of its constitutionally protected vested right in the statutory defense would enable the claimant to pursue relief in court.

VIII. CONCLUSION

In today's legal climate, where the trigger distinction has become a critical feature in the law of timeliness of actions, it is vital that Wisconsin courts and counsel take pains to distinguish between how the terms statute of limitations and statute of repose have been used over the years. As the fallout from Maryland illustrates, even a subtle shift in phrasing can engender considerable confusion.

The preceding guidelines will help courts and advocates alike to avoid error imbedded in cases prior to Wenke. The time period in which a case was decided serves as a handy benchmark. If it pre-dates Leverence, one can be confident that any reference it makes to a "statute of repose" would not be to convey the trigger distinction, and should not be used to develop arguments that turn on it. However, it would be conceptually appropriate to use such cases to advance the policies embodied in both the rest and right/remedy distinctions, regardless of how a given time limit would be labeled today, because these concepts apply across the board to all such laws.

Having conclusively debunked the Maryland myth, Wenke has taken great strides in curing the confusion in this area of the law that the supreme court recognized in Landis. Armed with a better appreciation of the source of this confusion and how it has proliferated over the years, as well as having practical guidelines on how to diagnose errant decisions and avoid temporal miscues, as detailed above, one can hope to lay to rest any lingering confusion in Wisconsin over statutes of limitations and statutes of repose.

can accrue and, therefore, no right can vest." (quoting Susan C. Randall, Due Process Challenges to Statutes of Repose, 40 Sw. L.J. 997, 1007 (1986)).