

When the Product Ticks: Products Liability and Statutes of Limitations

I. INTRODUCTION

*Have you heard of the wonderful one-hoss shay,
That was built in such a logical way
It ran a hundred years to a day,
And then, of a sudden, it _____.¹*

In this delightful poem, "The Deacon's Masterpiece," by the senior Oliver Wendell Holmes, the deacon, preparing to build a type of carriage known as a chaise, observed that long-lived products such as carriages tend to break down long before they ultimately wear out. He determined to avoid the inconvenience and danger of unexpected component failures by first ascertaining the chaise's most vulnerable part, designing that part to last almost indefinitely, and then fashioning every other component and assembly to last as long as it. Built to these simple but logical guidelines, the "one-hoss shay" functioned without breaking down for exactly one hundred years, whereupon each part of each assembly wore out—simultaneously—and the carriage self-destructed into sawdust.

Unfortunately, the amazing skill of Holmes' deacon, like that of Senor Stradivari, is now lost to us. Today's products, if they survive the tyranny of current fashion and economic obsolescence, eventually require ever more frequent repairs until they are declared "worn out" in a somewhat arbitrary decision. Even a product designer cannot accurately predict any specific unit's ultimate moment of uselessness. However, until the product is scrapped, in almost all jurisdictions, the manufacturer remains liable to users, perhaps even to bystanders, for injuries to person or property which result from unreasonably dangerous defects in the design or manufacture of the product or in the warning and instruction system of the product or its package. The product may have been altered, processed, or misused, but if a defect existed at the time of sale and the defective condition was either the sole or a substantial concurring cause of the injury, the manufacturer may nevertheless be held liable.²

¹O.W. HOLMES, *The Deacon's Masterpiece: or, The Wonderful "One-Hoss Shay"*, in COMPLETE POETICAL WORKS OF OLIVER WENDELL HOLMES 158 (Cambridge Ed. 1914) (written by the father of the renowned Supreme Court Chief Justice in 1858).

²The great majority of American jurisdictions apply the doctrine of strict tort liability, as defined by RESTATEMENT (SECOND) OF TORTS, § 402A (1965), to cases in which plaintiff or his property is injured by a defective product. This Note will not attempt to discuss the wide variation of existing judicial interpretation of this section as it is applied to definitions of the essential elements of defect and causation, parties covered by the doctrine, or extent of plaintiff's contributory conduct necessary to raise an effective defense.

Thus, in the case of long-lived products, such as machine tools, the manufacturer's exposure to liability may theoretically continue indefinitely after the introduction of the product into the stream of commerce. This potentially long time gap from manufacturer's (defendant's) act to user's (plaintiff's) injury creates a unique situation in tort law, since the usual tort case finds plaintiff injured as the direct and *immediate* result of defendant's action.

Problems posed by manufacturers' open-ended exposure to liability from long-lived defective products have led to proposals limiting that liability. Various legislation has been enacted or proposed in more than one-half the state legislatures³ and in the United States Congress⁴ to relieve product manufacturers of liability after a certain period of time, commencing when the product is either manufactured, first sold, or first used for its intended purpose. Statutes which run from the time of the defendant's act have been characterized as repose statutes, to be distinguished from statutes of limitations in general.⁵ The unique feature of these legislative schemes is that they purport to cut off liability without regard to when plaintiff's cause of action accrues. Under such statutes, a product user, such as a machine operator in a factory, may find himself time-barred before he is injured—perhaps even before working on the defective machine for the first time.

Laws which would bar an action before the cause of action accrues are justifiable only in response to an urgent social need. Proponents of such legislation vigorously claim that such a problem exists and that, indeed, it has become a "crisis." This Note will examine the evidence supporting that view, consider the doctrinal questions raised by the legislative proposals, attempt to project the effects which can be anticipated if the legislation is generally adopted, and investigate alternative solutions to the problem.

II. IS THERE A "CRISIS"? IS THERE A PROBLEM?

Manufacturers, wholesalers, and liability insurers claim that the

³"At this writing, 73 product liability bills have been either prepared or introduced by the legislatures of 28 states." Irving, *Our National Product Liability Crisis and Why You are Part of it*, IRON AGE, August 1, 1977, at 113. Since a number of these bills have been drafted or adopted by interested national organizations, such as the American Mutual Insurance Alliance, it can be assumed that these proposed statutes have been widely lobbied for in state legislatures.

⁴See, e.g., S. 403, 95th Cong., 1st Sess. (1977), reprinted in *Product Liability Insurance: Hearings on S. 403 Before the Sub-Comm. for Consumers of the Senate Comm. on Commerce, Science and Transportation, 95th Cong., 1st Sess.* 3 (1977) [hereinafter cited as *S. 403 Hearings*]; S. 1706, 95th Cong., 1st Sess., 123 CONG. REC. S10029 (daily ed. June 16, 1977). See discussion of these two bills in text accompanying notes 105-114 *infra*.

⁵See text accompanying note 139 *infra*.

rapid increase in numbers of products liability suits, as well as the size of awards and settlements, justify the fact that products liability insurance premiums have skyrocketed and that such insurance is virtually unavailable to a significant number of product sellers. They also predict that these problems will continue to worsen, leading to inadequately covered sellers, insufficiently protected users, business failures, and higher product prices.⁶

No one disputes the mere fact that claims and premiums are increasing,⁷ but controversies exist as to the rate of increase, the validity of trend projection, the causes of the increased litigation, and the implications for the economy. A number of companies in certain industries have been severely affected by the explosion in insurance premium rates and scarcity of insurance coverage. In response, the President's Economic Policy Board has established an Interagency Task Force under the Department of Commerce to study "the impact of product liability claims on the economy."⁸ The Interagency Task Force subsequently reported that between 1974 and 1976, product liability insurance premiums rose "substantially in most target industries" but affected certain industries and small business firms more seriously, and that insurance coverage remained generally available, although perhaps unaffordable. The Task Force also reported that a number of companies have decided to go "bare" (uninsured), although some companies may have insufficient resources to meet substantial products liability judgments.⁹ The In-

⁶Representatives of seller and liability-insurer groups have testified vigorously in support of this proposition before legislative committees on federal and state levels. For an extensive collection of such testimony with considerable statistical documentation, see *S. 403 Hearings*, *supra* note 4. Note in particular the statements of Charles W. Steward (president, Machinery & Allied Products Institute), *id.* at 138; Peter, A.R. Findlay (executive vice president, American Die Casting Institute, Inc.), *id.* at 129; James D. McKeivitt (counsel, National Federation of Independent Business), *id.* at 100; Paul Benke (vice president, AMF Marine Products Group), *id.* at 94; William C. McCamant (executive vice president, National Association of Wholesaler-Distributors), *id.* at 120; Stan Haransky (vice president, Truck Body & Equipment Association, Inc.), *id.* at 422; National Machine Tool Builder's Association, *id.* at 445. For similar testimony on a state level, see Minutes of the Select Joint Committee on Products Liability, 1977 Indiana Legislature (July 25, 1977; August 24, 1977) [hereinafter cited as *Joint Committee*] (minutes available from the Indiana Legislative Council). See also Machinery and Allied Products Institute, Products Liability: A MAPI Survey (Aug. 1976) [hereinafter cited as *MAPI Survey*] (available from MAPI, 1200 Eighteenth Street N.W., Washington, D.C. 20036).

⁷U.S. DEPT OF COMMERCE, INTERAGENCY TASK FORCE ON PRODUCT LIABILITY BRIEFING REPORT ii (1977) [hereinafter cited as *BRIEFING REPORT*].

⁸*Id.* at i. This Note will not examine the statistical data presented by this study, beyond testing the proposition that a serious and widespread economic problem exists or is likely to develop soon as a result of increased products liability costs.

⁹*Id.* at ii.

teragency Task Force Briefing Report noted that this increased exposure to liability has resulted in fewer manufacturers' decisions in favor of marketing new products¹⁰ and greater manufacturers' allocation of resources to product safety systems.¹¹

The Task Force found that "[t]he rate of increase in product liability claims appears to have been rising in excess of the rate of increase in actual product injuries."¹² This finding could have been predicted from a 1970 study by the National Commission on Product Safety in which researchers sought to determine "the extent to which injured consumers resort to legal remedies."¹³ In this study of 276 respondents injured by household products, only 4% contacted an attorney, and an additional 10.3% took the matter up with an insurance company. Those who decided against seeking relief typically reported that they thought they had no case because they (or someone they would not sue, such as a close relative) in some way contributed to the accident.¹⁴ It seems reasonable to conclude that a substantial portion of the 85.7% who failed to seek damages had valid claims against product manufacturers. Although the doctrine of strict liability has been accepted by the courts so rapidly that public awareness of plaintiffs' rights has lagged behind their creation, it was reasonably predictable that increasing numbers of injured persons would eventually discover those rights. Emerging public discovery of the right to relief because of injury from a defective product, despite contributory negligence on the part of the plaintiff, has resulted in a "transitional period" characterized by a "psychology of entitlement."¹⁵ The eventual maturation of this discovery process should result in an equilibrium between frequency of claims and frequency of accidents.

The growth rate in products liability claims and in the amount of award or settlement are vigorously debated statistics, because

¹⁰*Id.* See text accompanying note 118 *infra*.

¹¹BRIEFING REPORT, *supra* note 7, at ii.

¹²*Id.*

¹³NATIONAL COMMISSION ON PRODUCT SAFETY, PRODUCT SAFETY LAW AND ADMINISTRATION: FEDERAL, STATE, LOCAL AND COMMON LAW, SUPPLEMENTAL STUDIES, *Claims and Recovery for Product Injury Under the Common Law* 237 (1970).

¹⁴*Id.* at 242.

¹⁵Boe, *Ills of Society Seen as Rooted in Society in Transition Period*, reprinted in part in NATIONAL UNDERWRITER, May 7, 1976, at 1 (talk before the New York chapter of the Chartered Property Casualty Underwriters). Archie R. Boe, chairman of Allstate Insurance Company, suggests that the rapid creation of wasteful and duplicative compensation systems is a judicial response to soaring consumer expectations. He anticipates that a resolution of these expectations with economic realities will require a fifteen-year transitional period in which new values underpinning the liability insurance system will have to be developed. Mr. Boe appears to favor a reaffirmation of, and return to, fault principles.

available data are fragmentary.¹⁶ The Insurance Information Institute, an organization which assembles data for the insurance industry, noted in 1976 that a recent Department of Commerce report cited an "estimate" which showed average losses per claim to have increased 686% from 1965 to 1973, while the general price index rose 41% during the same period.¹⁷ The Institute reported that a study of insurance policies written exclusively for *products* liability showed that between 1969 and 1973, the number of claims increased 26% and the loss per claim rose 202%.¹⁸ The Institute also noted that the judgment docket of Cook County, Illinois, showed a 30.9% increase of product claims in the 1975-76 term over the preceding term, with an increase in average verdict from \$109,502 to \$175,947—a 61% increase.¹⁹

On the other hand, Robert G. Begam, president of the Association of Trial Lawyers of America, compared awards in twenty-two product-related death cases from 1973 with nineteen such cases in 1975 and found that average damages of about \$300,000 per case were awarded in both groups. All plaintiffs in this study were wage earners.²⁰ Begam submitted this highly limited study to refute the claim of "explosion" in the size of jury verdicts, declaring that the burden of proving a crisis rests with the insurance industry.²¹

Many of the assertions regarding claim experience, whether made by supporters of legislative change or by those who advocate maintenance of the status quo, have rested on very limited data. The Interagency Task Force Briefing Report noted that generalizations based on surveys financed or organized by its contractors, such as telephone surveys and trade association surveys, may be of limited validity because of their narrow scope, spotty response, and inadequate sampling techniques.²² The Briefing Report noted the

¹⁶As noted, no consensus exists as to the rate of increase in frequency of claims or size of awards, and sufficient data is not available at this time to make an authoritative determination. This Note accepts the qualified findings of the Interagency Task Force on Product Liability that the *claims* increase rate exceeds the *accident* increase rate and that total dollars of pending claims have increased substantially in the target industries. BRIEFING REPORT, *supra* note 7, at 7. It is further assumed that the increase in insurance premiums can, in good part, be justified by this increased claim experience. See note 28 *infra*.

¹⁷Insurance Information Institute, Product Liability, The Gathering Storm 9 (December 1976) [hereinafter cited as Gathering Storm] (background memorandum obtainable from the Insurance Information Institute, 110 William Street, New York, New York 10038).

¹⁸*Id.* at 10.

¹⁹*Id.*

²⁰Begam, *One More Insurance 'Crisis,'* TRIAL MAGAZINE, November 1976, at 46, 49.

²¹*Id.* at 49.

²²BRIEFING REPORT, *supra* note 7, at 5-6.

need for a broad closed-claim survey²³ and a scientifically conducted survey of manufacturers.²⁴ Until data can be developed which authoritatively quantify the rate of increase in the frequency and severity of products liability costs over the economy as a whole, the dimensions of the products liability problem will remain undelineated.

One cannot deny, however, that products liability insurance premiums have risen dramatically in recent years.²⁵ Since premiums are based not only on past experience but also on future estimates, insurance underwriters can produce short-run percentage changes which may not appear to be directly linked to current or past experience.²⁶ Recent testimony by Indiana manufacturers before a joint legislative study committee included numerous instances where premiums escalated several thousand percent, but were apparently unjustified by past losses on the part of the insured companies.²⁷ For the most part, this testimony was from small- to

²³A broad closed-claim survey such as is now available from the Insurance Services Office (ISO), see note 153 *infra*, will provide information as to the nature of judgments but "will not show liability judgment trends." BRIEFING REPORT, *supra* note 7, at 6.

²⁴A broad survey of manufacturers as to claim frequency and judgment experience—a most formidable project—has not yet been produced. For future analyses, a mechanism which would report judgments from both lower and appellate court records might be more practical, although such records would omit considerable settlement data. The Interagency Task Force did rely on such records from Connecticut, "the only state that has kept track of that information," BRIEFING REPORT, *supra* note 7, at 5.

A limited manufacturers' survey of claim experience is attempted as part of the MAPI Survey, *supra* note 6, at 7-12. The findings are highly qualified but they do tend to support a conclusion of an increase in the judgment per claim rate in the machinery industry.

²⁵See note 6 *supra* and accompanying text.

²⁶Representatives of the plaintiff's bar have suggested that liability insurance premium increases may be due in good part to investment losses by insurance companies. See, e.g., *S. 403 Hearings*, *supra* note 4, at 73 (statement of Craig Spangenberg, chairman, National Affairs Committee, The Association of Trial Lawyers of America).

For an excellent technical summary of the liability rate-making process and the effect of the recent adverse claim experience on that process, see *S. 403 Hearings*, *supra* note 4, at 202 (statement of Mavis A. Walters, vice president, Government and Industry Relations, Insurance Services Office). Note that neither investment income nor loss plays a part in the actuarial computations. In testimony before the Select Joint Committee on Products Liability of the Indiana Legislature, Ms. Walters is reported to have said that "ISO does not monitor adherence to its recommendations." *Joint Committee*, *supra* note 6, at 1 (September 19, 1977). But Ms. Walters does suggest that the recent substantial premium increases could be justified by the generally adverse claim experience of the early 1970's. *Id.* at 13 (statement by Ms. Walters).

²⁷*Joint Committee*, *supra* note 6, (October 14, 1977) (statement by Brian J. Krenzke, Indiana Manufacturers Association). This IMA report surveys the claim and premium experience from 176 Indiana manufacturers. Although untabulated, the raw

medium-sized firms in what could be characterized as medium-risk industries, such as manufacturers of special-purpose machine tools, pressure tanks, and electronic components. The testimony indicated that many other similarly situated manufacturers, as well as businesses in the chain of product distribution, were experiencing similar rapid and substantial premium increases.²⁸

Nevertheless, an increase of tenfold or more over a period of a few years is not the majority experience, even within these relatively "risky" industries. The Machinery and Allied Products Institute (MAPI) Products Liability Survey showed that 30% of its respondents incurred less than a doubling of premium cost over the preceding five-year period, and another 58% reported increases of less than tenfold (1000%).²⁹ Perhaps more significantly, 86% of respondents in the MAPI Survey reported that their 1976 products liability insurance premiums represented less than 1% of sales.³⁰

Unquestionably, many of these premium increases have been very steep and have become intolerable for certain businesses. Costs that leap substantially ahead of the rate of inflation may properly be considered a serious problem. However, the situation will be something less than an immediate general crisis, if the cost explosion proves to be temporary, if it is essentially confined to a minority of business units of modest business volume, and if total premium costs for the industries most affected remain in the neighborhood of 1% of sales.

The Interagency Task Force Briefing Report concluded:

Nevertheless, our study does suggest that the so-called product liability "crisis" is not a crisis in the sense that a large sector of industry cannot obtain product liability insurance or that the increased cost of such insurance has made a substantial impact on the price of many products. On the other hand it does seem clear that a number of smaller businesses are facing a difficult choice. . . .³¹

Recognizing that "government action need not always spring from crisis,"³² the Briefing Report then considered a spectrum of options which are directed toward *averting* a crisis.

data appear to support the proposition that product liability insurance *premium increase* in Indiana is greatly in excess of product liability *claim loss* for those manufacturers reporting.

²⁸Joint Committee, *supra* note 6, (July 25 & Aug. 24, 1977).

²⁹MAPI Survey, *supra* note 6, at 24.

³⁰*Id.* at 23.

³¹BRIEFING REPORT, *supra* note 7, at 40.

³²*Id.*

III. DEALING WITH THE PRODUCTS LIABILITY PROBLEM—IN GENERAL

Three primary lines of attack have been suggested to deal with the costs, burdens, and inequities allegedly incurred by sellers with regard to products liability exposure. The first approach is simply to seek ways in which to manufacture and sell safer products while concurrently training, instructing, and supervising product users more effectively. The second is to study the insurance delivery system in order to determine whether it can be modified or supplemented to spread risks more equitably. The third approach is to enact legislation modifying the tort litigation system in order to correct the alleged imbalance which now purportedly gives the plaintiff an unfair advantage.

Legislative proposals to change tort law³³ by limiting or inhibiting the claims or recoveries of certain injured product users include statutory recognition of a misuse defense³⁴ and the barring of a plaintiff's recovery whenever the product is substantially modified after sale and the modification is a substantial factor in causing the accident.³⁵ These proposals generally make no provision for finding liability when the defendant might have foreseen the misuse or the later modification but nevertheless failed to guard or warn.

Other proposals would bar recovery when the safety device which might have prevented the injury was not in the "state of the art," either at time of sale or at the time the design was prepared,³⁶ and would bar evidence of post design or post manufacture modification or advance in safety technology.³⁷ It has also been proposed that the collateral source rule be abolished so that a plaintiff

³³Many of the proposed tort "reform" statutes drafted or adopted by national organizations have been collected in a memorandum prepared by the Independent Insurance Agents of America, Inc. (IIAA). This memorandum is reprinted in *Product Liability Insurance: Hearings on S. 403 Before the Sub-Comm. for Consumers of the Senate Comm. on Commerce, Science and Transportation, 95th Cong., 1st Sess. 457-99* (1977). This Note will cite to the reprinted memorandum for examples of proposed tort modification as, e.g., Kansas Bill 852, reprinted in part in *S. 403 Hearings, IIAA Memorandum, supra* note 33, at 478 [hereinafter cited as Kansas Bill 852].

³⁴See, e.g., the product liability statute proposed by the Independent Insurance Agents of Massachusetts (IIAM), reprinted in part in *S. 403 Hearings, IIAA Memorandum, supra* note 33, at 478 [hereinafter cited as IIAM Statute]. See also *Gathering Storm, supra* note 17, at 17.

³⁵See, e.g., Kansas Bill 852, *supra* note 33, at 478; Defense Research Institute, Sample Statute, reprinted in part in *S. 403 Hearings, IIAA Memorandum, supra* note 33, at 477 [hereinafter cited as DRI Statute].

³⁶See, e.g., IIAM Statute, *supra* note 34, at 475 ("at the time the manufacturer . . . parted with possession and control or sold it, whichever occurred last"); Kansas Bill 852, *supra* note 33, at 476 ("at the time such plan or design was prepared").

³⁷See, e.g., DRI Statute, *supra* note 35; Kansas Bill 852, *supra* note 33, at 476.

who initially recovers from his own insurance carrier will not be allowed to collect a second time from defendant, although this proposal has been criticized because defendant would thereby benefit from the plaintiff's prudence in insuring himself.³⁸

It has also been suggested that size of awards be limited;³⁹ non-economic awards, such as damages for pain and suffering, be limited or eliminated;⁴⁰ punitive damages be barred;⁴¹ and contingency fees more strictly regulated.⁴² Provisions have also been advanced calling for installment payment of damages,⁴³ payment of defendants' costs of litigation by unsuccessful plaintiffs,⁴⁴ and the elimination of the *ad damnum* clause from the complaint.⁴⁵ Other proposed legislation would restrict the remedy for workplace accidents to worker's compensation,⁴⁶ apply comparative fault principles to damage awards in product cases,⁴⁷ substitute arbitration for tort litigation,⁴⁸ and provide that compliance with government standards shall be a defense.⁴⁹ Finally, virtually all proposed products liability tort reform bills include a statute of limitation or repose which would run from the date on which the product is introduced into the stream of commerce.⁵⁰

³⁸See, e.g., DRI Statute, *supra* note 35, at 488; Kansas Bill 852, *supra* note 33, at 488.

³⁹See Indiana Medical Malpractice Act, § 2(a), IND. CODE § 16-9.5-2-2 (1976).

⁴⁰See, e.g., American Mutual Insurance Alliance Proposed Statute, *reprinted in part in S. 403 Hearings*, IIAA Memorandum, *supra* note 33, at 469 [hereinafter cited as AMIA Statute] (would limit pain and suffering to two times special damages); Kansas Bill 852, *supra* note 33, at 469 (would place this limit at 30% of special damages).

⁴¹See, e.g., AMIA Statute, *supra* note 40, at 466; DRI Statute, *supra* note 35, at 481.

⁴²See, e.g., American Insurance Association Proposed Statute, *reprinted in part in S. 403 Hearings*, IIAA Memorandum, *supra* note 33, at 487 [hereinafter cited as AIA Statute].

⁴³See, e.g., Kansas Bill 852, *supra* note 33, at 488.

⁴⁴See, e.g., Gathering Storm, *supra* note 17, at 17.

⁴⁵See, e.g., DRI Statute, *supra* note 35, at 489; AMIA Statute, *supra* note 39, at 488.

⁴⁶See, e.g., AMIA Statute, *supra* note 40, at 483; O'Connell, First Party No-Fault Coverages as a Sole Remedy to Solve Many Tort Liability Problems (1977) (statement printed and distributed by Marsh & McLennan, Inc., 200 Clarendon Street, Boston, Mass. 02116) [hereinafter cited as Sole Remedy].

⁴⁷See, e.g., DRI Statute, *supra* note 35, at 489.

⁴⁸See, e.g., S. 403, 95th Cong., 1st Sess. §§ 401-405, 501-510 (1977), *reprinted in S. 403 Hearings*, *supra* note 4, at 3. See also Gathering Storm, *supra* note 17, at 17.

⁴⁹See, e.g., Kansas Bill 852, *supra* note 33, at 485; AMIA Statute, *supra* note 40, at 485.

⁵⁰Proposed legislation has variously defined the date on which a product is introduced into the stream of commerce. See, e.g., AMIA Statute, *supra* note 40, at 472 ("No action . . . may be commenced more than [x] years after the product was first sold . . ."); DRI Statute, *supra* note 35, at 473 (Sample Statute II(2)) ("within a period of [x]

Each of these proposals suggest substantial modifications of existing doctrine and practice in most jurisdictions, although enactment of any one proposal would reduce the need for others. For example, limiting the size of awards would greatly affect attorneys' contingency fees, perhaps eliminating any necessity to consider interfering with the freedom of contract between lawyer and client.⁵¹ Similarly, adopting a form of the English rule whereby the losing party pays the winner's litigation costs might prove to be sufficiently inhibiting so as to make other proposals less pressing. Thus, when considering the potential impact of any one proposal in this group, attention must be given to the overlap of impact if more than one of the proposed modifications were to be enacted at the same time. Although each proposal can be studied independently, the combined impact on claims and awards must be considered.

The following discussion will focus on one of the more radical proposals, a statute of limitations or repose which would run from date of defendant's final act—the introduction of the product into the stream of commerce—rather than from date of plaintiff's injury. Such a statute would certainly reduce products liability claims significantly.⁵² If, however, certain defenses, such as "misuse," "later modification," or "state of the art,"—defenses which are less at odds with long-established legal doctrines—were codified, many of these same claims might be eliminated, thereby reducing the need to advocate the more radical repose doctrine.

IV. STATUTES OF LIMITATION—IN GENERAL

"A statute of limitations is an act limiting the time within which an action shall be brought."⁵³ Although such a limitation did not exist at common law, the earliest statutes date back to Roman times.⁵⁴ The earliest English statute, dating from 1236, prohibited real property actions based on seisin occurring prior to a given date, such as

years after it was put in use"); *id.* (Sample Statute III(1)) ("within [x] years after the date of the delivery of the completed product to its first purchaser"); AIA Statute, *supra* note 35, sec. 2, at 472, ("eight (8) years after the manufacturer of the final product parted with its possession and control, or sold it, whichever occurred last, except, where the defendant is a lessor, bailor or licensor of a product, . . . the action must be commenced no later than eight (8) years after the time at which the defendant ceases to have the use, possession or control of the product or ceases to be under the legal duty to inspect, maintain, repair, modify or improve it").

⁵¹See Indiana Medical Malpractice Act, § 2(a), IND. CODE § 16-9.5-2-2 (1976), which provides for \$500,000 maximum recovery. Because this liability ceiling has been accompanied by other restrictive provisions, it is difficult to trace the recent lack of plaintiffs' success in malpractice suits to the liability ceiling alone. See note 64 *infra*.

⁵²See text accompanying note 152 *infra*.

⁵³53 C.J.S. *Limitations of Actions* § 1, at 900 (1948).

⁵⁴See R. SOHM, *THE INSTITUTES: A TEXTBOOK OF THE HISTORY AND SYSTEM OF*

the coronation of a king.⁵⁶ As the given date receded, the limitation naturally affected fewer actions, making the statute less effective. In 1540, the statute of 32 Henry 8 was enacted, establishing fixed-time periods.⁵⁶

The modern law of limitations on personal actions dates from the Limitation Act of 1623, which established different periods for various types of actions.⁵⁷ In the United States, statutes in each state provide different time limits for recovery of land, oral and written contracts, injuries to person or property, and all other actions. There are also special statutes designed to deal with special situations, sometimes departing from traditional form, such as the Marketable Title Acts in which unrecorded property interests are shut off after a given number of years from the time of the conveyance in question.⁵⁸

The purpose of statutes of limitation is to protect defendants and courts from stale and tenuous claims.⁵⁹

Statutes of this character have sometimes been said to be founded in part at least on the general experience of mankind that claims which are valid are not usually allowed to remain neglected, and that the lapse of years without any attempt to enforce a demand creates a presumption against its original validity or that it has ceased to exist, the negligence or laches of plaintiff being also advanced as an additional ground by some of the authorities.⁶⁰

It would seem that defendant's right to raise a statute of limitations defense derives directly from plaintiff's failure to pursue his cause of action within a reasonable time after its accrual. This purpose of limitation statutes—the protection of court and defendant from stale claims⁶¹—comes into play only when plaintiff has failed to bring his suit in a timely manner.

ROMAN PRIVATE LAW 318-22 (3d ed. Ledlie's trans. 1907), cited in *Developments in the Law—Statutes of Limitations*, 63 HARV. L. REV. 1177, 1177 n.2 (1950).

⁵⁶See 2 F. POLLOCK & F. MAITLAND, THE HISTORY OF ENGLISH LAW 81 (2d ed. 1898), cited in *Developments*, supra note 54, at 1177 n.3.

⁵⁷See 32 Hen. 8, c. 2 (1540) (30-60 years from last seisin of claimant or ancestor), cited in *Developments*, supra note 54, at 1177 n.4.

⁵⁸See Limitation Act, 1623, 21 Jac. 1, c. 16, cited in *Developments*, supra note 54, at 1177 n.5.

⁵⁹*Developments*, supra note 54, at 1179.

⁶⁰*Id.* at 1185.

⁶¹53 C.J.S. *Limitations of Actions* § 1, at 902 (1948).

⁶²In states in which the purpose of limitations is held to be the exclusion of stale claims from state trial court forums, the statutes may be considered procedural for choice-of-law purposes. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 142 (1971). When,

"A cause or right of action accrues, so as to start the statute of limitations running, when the right to institute and maintain a suit arises, and not before."⁶² Courts may rule that plaintiff had a cause of action before he discovered it and that the statute started running before plaintiff knew he was injured. This result can also be achieved by legislation, such as the Indiana Medical Malpractice Act, which runs the statute from the date of the medical procedure that allegedly resulted in harm to plaintiff,⁶³ although the plaintiff may not and perhaps could not have discovered the harm until much later.⁶⁴ Less harsh provisions would run the statute from date of discovery of harm or from the date when plaintiff *should* have reasonably discovered the harm.⁶⁵

Limitations on breach-of-warranty actions may run from date of sale, on the contract theory that plaintiff is able, under the Uniform Commercial Code, to maintain an action for at least nominal damages upon tender of defective goods.⁶⁶ In most jurisdictions, a buyer or user⁶⁷ may include in his warranty action claims for personal injury or property damage. These latter claims are governed by the tort limitation which runs from date of injury,⁶⁸ because restricting plaintiff to a contract limitation could lead to the harsh result of barring plaintiff before his tort action accrued.⁶⁹ Actions

for example, the accident occurs in state *A* after *A*'s limitation has run, the injured party might nevertheless be able to sue the manufacturer in an open forum state that would not honor *A*'s procedural statute, but would instead apply its own limitations statute and allow the action to be maintained. See *Horvath v. Davidson*, 148 Ind. App. 203, 264 N.E.2d 328 (1970). The Interagency Task Force recommends that in order to preserve the full effectiveness of a limitation statute, the legislation should be clearly labeled as "part of the substantive law of torts." 7 U.S. DEPARTMENT OF COMMERCE, INTERAGENCY TASK FORCE ON PRODUCT LIABILITY, FINAL REPORT VII-24 (1977).

⁶²54 C.J.S. *Limitations of Actions* § 109, at 11 (1948).

⁶³IND. CODE § 16-9.5-3-1 (1976).

⁶⁴Reporting on the Indiana Medical Malpractice Act, IND. CODE §§ 16-9.5-1-1 to 9-10 (1976), *The Wall Street Journal* reported that an attorney who served on the commission which drafted the law, now "calls [the Act] 'the cruelest and most regressive piece of legislation' he has ever seen." The article observed that since the Act was passed in 1975, no patient has won a malpractice suit in Indiana. *Easing the Pain, Problems of Insuring Medical Malpractice Show Signs of Abating*, Wall St. J., Apr. 19, 1977, at 1, col. 1.

⁶⁵See, e.g., Kan. Stat. Ann. § 60-513(7)(b) (1976), and discussion in text accompanying notes 89-91 *infra*.

⁶⁶U.C.C. § 2-725(1), (2) (1972 version).

⁶⁷See *id.* § 2-318, alternatives A, B, & C, which extend a right of action for warranty breach to product users other than the purchaser.

⁶⁸1 U.S. DEPARTMENT OF COMMERCE, INTERAGENCY TASK FORCE ON PRODUCT LIABILITY, PRODUCT LIABILITY: LEGAL STUDY, at 245 (1977) [hereinafter cited as LEGAL STUDY].

⁶⁹See *Mendel v. Pittsburgh Plate Glass Co.*, 25 N.Y.2d 340, 253 N.E.2d 207, 305 N.Y.S.2d 490 (1969), *overruled*, *Victorson v. Bock Laundry Machine Co.*, 37 N.Y.2d 395, 335 N.E.2d 275, 373 N.Y.S.2d 39 (1975).

which rely on tort theory alone are generally governed by the state's tort limitation.⁷⁰ These limitations are rules of law and should be distinguished from presumptions, which are rules of evidence subject to rebuttal.⁷¹

V. STATUTES OF LIMITATIONS GOVERNING ACTIONS FOR INJURY FROM PRODUCTS

Relief for injury to person or property from products may be sought under four theories: negligence, breach of express or implied warranty sounding in contract, breach of express or implied warranty sounding in tort, and strict liability in tort. Except for the contractual warranty claims, these actions are normally governed by tort statutes of limitations covering injuries to person or property. However, if the plaintiff joins the contractual warranty theory to his tort-based complaint he may, in many jurisdictions, have the benefit of the tort limitation running from date of injury, as well as the contract limitation running from date of sale.

In 1969, the New York Court of Appeals held that extending such an option to plaintiffs was unfair to defendants. In *Mendel v. Pittsburgh Plate Glass Co.*⁷² the court ruled that when plaintiff was not in privity with defendant, breach of implied warranty and strict liability in tort were in fact the same cause of action⁷³ and were governed by New York's six-year contract limitation which ran from the date of sale and governed Uniform Commercial Code (UCC) warranty actions. The court chose the contract limitation after concluding that it was precluded from applying the personal injury statute of limitations by the New York legislature's adoption of the UCC, which the court held to control "injury to person or property proximately resulting from any breach of warranty."⁷⁴ The court concluded that even if not so precluded, the court would be

willing to sacrifice the small percentage of meritorious claims that might arise after the statutory period has run in

⁷⁰LEGAL STUDY, *supra* note 68, at 45. *But see* text accompanying notes 72-119 *infra* (strict tort action by plaintiff not in privity with manufacturer held by *Mendel* court to be congruent with contractual warranty breach and governed by a contractual statute of limitation).

⁷¹53 C.J.S. *Limitations of Actions* § 1, at 904 (1948). The application of rebuttable statutory or common-law presumptions to limiting products liability after a specified amount of time will be discussed in text accompanying notes 159-166. In this context, however, a so-called conclusive presumption closely resembles a limitation.

⁷²25 N.Y.2d 340, 253 N.E.2d 207, 305 N.Y.S.2d 490 (1969).

⁷³In *Anderson v. Fairchild Hiller Corp.*, 358 F. Supp. 976 (D. Alas. 1973), the court found no such congruence under Alaskan law between breach of implied warranty and strict liability theories. Plaintiff, who was time-barred under the Alaskan tort limitation, was denied recovery under a warranty theory statute of limitations (four years from date of sale) because he lacked privity with the manufacturer.

⁷⁴U.C.C. § 2-715(2)(b) (1972 version).

order to prevent the many unfounded suits that would be brought and sustained against manufacturers ad infinitum. Surely an injury resulting from a defective product many years after it has been manufactured, presumptively at least, is due to operation and maintenance [W]e must make that presumption conclusive⁷⁵

With this dicta, the *Mendel* court squarely faced the distinctive policy question found in many product cases: Is it preferable to arbitrarily and prematurely cut off the right of some plaintiffs to sue, or is it better to expose defendants to an indefinite term of liability?⁷⁶

In 1975, the New York Court of Appeals overruled *Mendel* in *Victorson v. Bock Laundry Machine Co.*⁷⁷ by allowing plaintiffs to amend a contract action complaint to include a strict liability theory of recovery, thereby permitting the use of the tort statute of limitations running from date of injury rather than the contract limitation running from date of sale. The *Victorson* court adopted the majority view that a tort nexus exists in product-injury cases, whether brought under a strict liability or breach of warranty theory. Defendant's argument that open-ended liability is unfair was rejected. Noting that defendant had derived sufficient benefit from the increase with time of the difficulty of plaintiff's burden of proof, the court concluded that variation in case-to-case considerations made inappropriate a general limitation running from date of sale. Although the court held that the Uniform Commercial Code was not intended to pre-empt the tort limitation rule, the court pointedly did not exclude the use of the Code's contract statute of limitations as an alternative available to the plaintiff.⁷⁸

A result differing from that in *Mendel* was also reached in *Land v. Neill Pontiac, Inc.*,⁷⁹ in which a North Carolina court stated, "The North Carolina Supreme Court has consistently held that the cause

⁷⁵25 N.Y.2d at 346, 253 N.E.2d at 210, 305 N.Y.S.2d at 495. Note that the conclusive presumption called for in *Mendel* is equivalent to an absolute limitation defense.

⁷⁶The *Mendel* holding purported only to govern strict liability actions by "strangers to the contract." *Id.* at 344, 253 N.E.2d at 209, 305 N.Y.S.2d at 493. Parties in privity with manufacturers were already limited to contract warranty or negligence actions. *Blessington v. McCrory Stores Corp.*, 305 N.Y. 140, 111 N.E.2d 421, 122 N.Y.S.2d 147 (1953).

⁷⁷37 N.Y.2d 395, 335 N.E.2d 275, 373 N.Y.S.2d 39 (1975).

⁷⁸The *Victorson* holding was partially based on the fact that plaintiffs were strangers to the contract. The Defense Research Institute (DRI) suggests that the status of those in privity with manufacturers was not resolved in *Victorson*. *Strict Liability Given Tort Nexus*, 16 FOR THE DEFENSE 101, 109 (1975).

⁷⁹6 N.C. App. 197, 169 S.E.2d 537 (1969).

of action accrues at the time of the invasion of the right and that nominal damages, at least, naturally flow from such invasion."⁸⁰ Thus, the court found that the rights of a plaintiff who was injured by a negligently installed gas tank were invaded when he purchased his car, not when he was injured three months later. The *Land* court stated further, "The cause of the action accrues at the time of the commission of the negligent act or omission complained of, not at the time of infliction of injuries resulting therefrom."⁸¹

In *Williams v. General Motors Corp.*,⁸² a district court, interpreting North Carolina Supreme Court rulings, pointed out that a plaintiff's action would not accrue in all cases at the time of defendant's negligent act so as to start the limitation running. "[T]he statute starts to run when the first injury, however slight, occurs even if the injury is not discoverable"⁸³ If plaintiff were a later purchaser, for example, he clearly would have no cause of action at the time of the first sale. Moreover, the *Williams* court held that the statute had not begun to run on the date of the *later* sale to plaintiff because there was no contractual relationship between plaintiff and manufacturer.⁸⁴ The court apparently reasoned that a plaintiff lacking privity with the manufacturer would have no cause of action at the time of the resale to him because the only harm he experienced at that time was economic damage from the defective product. In North Carolina, as in the majority of jurisdictions, the bringing of an action for economic damages still requires privity.⁸⁵

The requirement of slight, although perhaps undiscoverable, injury distinguishes the North Carolina law from a limitation statute which would be independent of plaintiff's cause of action. Yet it seems clear that a pure repose policy has at times supported the judicial interpretation of the North Carolina statute. The *Williams* court noted a number of North Carolina decisions in which the slight injury requirement was ignored, thereby relieving defendants of liability before plaintiffs could maintain an action.⁸⁶ The district court concluded, however, that if the North Carolina Supreme Court

⁸⁰*Id.* at 199, 169 S.E.2d at 538.

⁸¹*Id.*, 169 S.E.2d at 538-39.

⁸²393 F. Supp. 387 (M.D.N.C. 1975), *aff'd*, 538 F.2d 327 (4th Cir. 1976).

⁸³*Id.* at 391.

⁸⁴*Id.* at 392.

⁸⁵For an excellent discussion in an opinion which reaches a similar result, see *Trans World Airlines, Inc. v. Curtiss-Wright Corp.*, 1 Misc. 2d 477, 148 N.Y.S.2d 284 (Sup. Ct. 1955), *aff'd*, 2 App. Div. 2d 666, 153 N.Y.S.2d 546, § 550 (1956). *But see* *Santor v. A. & M. Karagheusian, Inc.*, 44 N.J. 52, 207 A.2d 305 (1965), in which the court held a remote consumer could recover from the manufacturer for the diminished value of a defective product.

⁸⁶393 F. Supp. at 392.

were to rule on *Williams*, it would follow its early decision in *Hocutt v. Wilmington & W.R. Co.*,⁸⁷ which required the showing of some injury to start the statute running.

North Carolina courts reached a position consistent with a nearly pure repose doctrine through a rather strained interpretation of the state's limitation statute, until these harsh results were ameliorated by statute in 1971.⁸⁸ In recent years, courts have moved in the opposite direction by *extending* the period wherein plaintiffs can bring their actions, paralleling the New York judicial policy shift from *Mendel to Victorson*.

The Kansas Supreme Court reached this liberal result by means of judicial construction and interpretation. In 1973, Kansas enacted a law which appeared to fix a period from time of defendant's act within which an action for injury had to be brought. The relevant section read:

[T]he cause of action in this section shall not be deemed to have accrued until the act giving rise to the cause of action first causes substantial injury, or, if the fact of injury is not reasonably ascertainable until some time after the initial act, then the period of limitation shall not commence until the fact of injury becomes reasonably ascertainable . . . but in no event shall the period be extended more than ten (10) years beyond the time of the act giving rise to the cause of action.⁸⁹

A trial court subsequently construed this language to bar plaintiff ten years after defendant had acted by installing gas pipes in the plaintiff's house. In *Ruthrauff v. Kensinger*,⁹⁰ the Kansas Supreme Court reversed, holding that the ten-year period referred to the time in which plaintiff may reasonably discover her injury. The

⁸⁷124 N.C. 214, 219, 32 S.E. 681, 683 (1899).

⁸⁸In 1971, the North Carolina General Assembly enacted N.C. GEN. STAT. § 1-15(b) (Supp. 1977) which provides for a limitation in the case of bodily injury or property damage but *excludes wrongful death*, and which runs from the date plaintiff ought to reasonably have discovered the injury or defect. This section also provides "that in such cases the period shall not exceed 10 years from the last act of the defendant giving rise to the claim for relief." The *Williams* court noted that excluding wrongful death actions would lead to product manufacturers being held liable for an indefinite period when the injury results in death. 393 F. Supp. at 391. However, this result would obtain only where the deceased was *not* in privity with the manufacturer. If deceased had purchased a defective product directly from the manufacturer, the limitation would run from the sale date, since the deceased would have had an action at that time under North Carolina case law.

⁸⁹KAN. STAT. ANN. § 60-513(b) (Supp. 1973) (currently codified at KAN. STAT. ANN. § 60-513(7)(b) (1976)).

⁹⁰214 Kan. 185, 519 P.2d 661 (1974).

court noted that the defendant's argument sought to establish "an absolute bar which destroys the right of action before it accrues."⁹¹ It held that such a result would be clearly contrary to legislative intent, since established doctrine in the state required that the limitation begin not only after the action accrued, but also after the plaintiff's discovery of the harm.

These earlier developments of limitation doctrine took place before the recent rapid increases in the frequency and severity of product cases and the accompanying explosion of liability insurance premiums. The current environment has led to products liability legislation on both the state and national levels, including statutes of limitations which run from defendant's act and supplement pre-existing statutes running from time of plaintiff's harm. Although plaintiffs in many jurisdictions enjoy two times at bat, once under a tort limitation and once under contract,⁹² it is now proposed that defendants be given two opportunities to bar plaintiffs' action—*x* years after injury or *y* years after sale of the product.

Connecticut has fixed limitations periods in product cases at three years from injury, but in no case more than eight years from date of sale.⁹³ Florida allows four years from injury, but in no case more than twelve years from delivery to original buyer.⁹⁴ Utah now bars actions commenced more than

six years after the date of initial purchase for use or consumption, or ten years after the date of manufacture, of a product, where that action is based upon, . . .

- (a) Breach of any implied warranties;
- (b) Defects in design, inspection, testing or manufacture;
- (c) Failure to warn;
- (d) Failure to properly instruct in the use of a product; or
- (e) Any other alleged defect or failure of whatsoever kind or nature in relation to a product.⁹⁵

Note that the Utah act does not appear to limit actions from date of defendant's act on account of defendant's negligence. This act also provides that a manufacturer who cannot prove when he first *sold*

⁹¹214 Kan. at 187, 519 P.2d at 664.

⁹²See *Strict Liability Given Tort Nexus*, 16 FOR THE DEFENSE 101, 109, 116 (1975) for a collection of cases which hold that only one statute of limitations, the personal injury/property damage statute, is applicable to strict liability and negligence actions, while the U.C.C. limitations period is applicable to actions for breach of implied warranty. The article reports that jurisdictions are evenly divided on this question.

⁹³CONN. GEN. STAT. ANN., § 52-577a (West Supp. 1978).

⁹⁴FLA. STAT. ANN. §§ 95.031(2), 95.11(3) (Supp. 1977).

⁹⁵UTAH CODE ANN. §§ 78-15-1 to 6 (repl. vol. 9A 1977).

the product or who sold the product more than four years after it was made can still be relieved of liability ten years after *manufacture*.

In 1977, the Colorado legislature, apparently unwilling to absolutely bar a plaintiff-user of a long-lived product, enacted legislation which creates the following rebuttable presumptions ten years after a product is first sold: That the product was not defective, that the manufacturer was not negligent, and that all warnings and instructions were proper and adequate.⁹⁶ How this statute will be construed remains to be seen.

On March 10, 1978, Governor Otis Bowen of Indiana signed into law House Enrolled Act No. 1396, the final bill considered by the Second Regular Session of the 100th General Assembly. Although primarily concerned with courts and court officers, the Act also includes a new chapter on products liability.⁹⁷ This latter chapter, entitled Statute of Limitations,⁹⁸ requires products liability actions to be commenced within

ten (10) years after the delivery of the product to the initial user or consumer; except that, if the cause of action accrues more than eight (8) years but not more than ten (10) years after the initial delivery, the action may be commenced at any time within two (2) years after the cause of action accrues.⁹⁹

This provision "applies to all persons regardless of minority or legal disability,"¹⁰⁰ and allows a plaintiff two full years to bring an action, so long as the injury occurs within the ten-year limitation.

Other products liability bills are being studied and debated in a substantial number of state legislatures.¹⁰¹ Common to most of these bills is a statute of limitations or statutory presumption running from date of defendant's act. This proposed legislation is in response to demands from manufacturers, sellers, and insurers, but the relief available to these groups from state legislation is limited, because manufacturers' products will continue to be subject to the laws of the other states in which it is marketed, and insurance rates for

⁹⁶COLO. REV. STAT. § 13-21-403(3) (Supp. 1977).

⁹⁷Pub. L. No. 141, sec. 28 (Mar. 10, 1978) (to be codified at IND. CODE §§ 33-1-1.5-1 to 8). This new products liability law, covering causes of action accruing after June 1, 1978, will be discussed in detail in the forthcoming annual Survey Issue of the *INDIANA LAW REVIEW*.

⁹⁸*Id.* (to be codified at IND. CODE § 33-1-1.5-5).

⁹⁹*Id.*

¹⁰⁰*Id.*

¹⁰¹See note 3 *supra*. These bills contain various clusters of the liability-limiting proposals discussed in the text accompanying notes 33-50.

interstate sellers are based on national experience.¹⁰² Although wholesalers and retailers might benefit significantly from isolated state legislation, manufacturers must either hope for widespread state adoption of products liability legislation or they must look to the federal government for relief.

Congress has shown recent concern for this situation, beginning with extensive hearings in 1976 before the Senate Select Committee on Small Business headed by Senator Jacob Javitz.¹⁰³ Following a preliminary study conducted by the Bureau of Domestic Commerce, an extensive study of products liability problems was launched in April 1976, by the President's Economic Policy Board, which created an Interagency Task Force.¹⁰⁴ As resource material, these hearings and studies, along with extensive input from legislators' constituencies, have stimulated the introduction of a number of federal products liability bills.

Senate Bill 403, introduced by Senator James Pierson,¹⁰⁵ features an arbitration mechanism which would be instituted in every federal judicial district.¹⁰⁶ In addition, states would be encouraged to create their own arbitration panels.¹⁰⁷ In jurisdictions with such panels, all product litigation would be subject to a preliminary review by the panel in order to determine whether an action should be barred because "injury or damages were sustained after the time period which a reasonable person would expect to be the ordinary useful life of such product."¹⁰⁸ Product injury cases in which the product was more than ten years old, and which survived this preliminary review, would be subject to compulsory binding arbitration.¹⁰⁹ The avowed purpose of substituting arbitration for tort litigation is to "expedite the resolution of cases and controversies"¹¹⁰ and to bring to bear the knowledge of a panel experienced in law and medicine.¹¹¹

¹⁰²See *Joint Committee*, *supra* note 6, at 1 (September 19, 1977) (testimony of Mavis Walters, vice president, Insurance Services Office).

¹⁰³*Impact on Product Liability, Product Liability Problems Affecting Small Business, Hearings before the Select Committee on Small Business*, U. S. Senate, 94th Cong., 2d Sess. (1976).

¹⁰⁴BRIEFING REPORT, *supra* note 6, at i.

¹⁰⁵S. 403, 95th Cong. 1st Sess. (1977), *reprinted in S. 403 Hearings*, *supra* note 4, at 3.

¹⁰⁶*Id.* §§ 401-405.

¹⁰⁷*Id.* §§ 501-510.

¹⁰⁸*Id.* § 604(b).

¹⁰⁹*Id.* § 604(a).

¹¹⁰*Id.* § 102(b).

¹¹¹*Id.* § 403. See also *S. 403 Hearings*, *supra* note 4, at 275 (remark by Sen. Wendell H. Ford to the effect that he would expect arbitration to result in lower attorney fees).

Senate Bill 1706, introduced by Senator Richard Lugar,¹¹² provides for a two-year limitation from date of injury combined with a seven-year limitation from date of first purchase or when "otherwise acquired for use or consumption."¹¹³ This provision does not apply to breach-of-warranty actions on long-lived products, such as machine tools, which Senator Lugar suggests will be governed by "express warranties of durations agreed to by commercial parties."¹¹⁴ His bill specifically cuts off negligence as well as strict liability actions commenced more than seven years from sale of the product.¹¹⁵

Also under consideration is proposed federal legislation which would permit self-insurers to deduct contributions to reserves for product liability risks¹¹⁶ or provide for re-insurance mechanisms.¹¹⁷ If these non-tort approaches provide sufficient relief to beleaguered sellers, there may be less need for major tinkering with the tort litigation system. Establishment of safety standards for products through legislation, such as the Consumer Product Safety Act¹¹⁸ and the Occupational Safety and Health Act of 1970¹¹⁹ can more clearly

¹¹²S. 1706, 95th Cong. 1st Sess. (1977), 123 CONG. REC. S10030 (daily ed. June 16, 1977).

¹¹³*Id.* § 201(a).

¹¹⁴123 CONG. REC. S10029 (daily ed. June 16, 1977) (remarks of Sen. Richard Lugar).

¹¹⁵S. 1706, § 201(a), 95th Cong. 1st Sess. (1977), 123 CONG. REC. S10030 (daily ed. June 16, 1977).

¹¹⁶The Internal Revenue Code permits ordinary business expense deductions for products liability insurance premiums under I.R.C. § 162(a). There is, at present, no provision in the Code which would permit a self-insurer to deduct contributions to a reserve fund designed to satisfy product liability claims. However, there are at least three bills before Congress which would authorize limited contributions to such reserves or trusts. S. 1611, 95th Cong., 1st Sess., 123 CONG. REC. S8763 (daily ed. May 26, 1977), would allow corporations to deduct up to three percent of gross sales for contributions to a products liability reserve trust. H.R. 8064, 95th Cong., 1st Sess., 123 CONG. REC. H6647 (daily ed. June 28, 1977), would place the basic limitation at two percent of gross sales. H.R. 7711, 95th Cong., 1st Sess., 123 CONG. REC. H5685 (daily ed. June 9, 1977) (corrected by telephone interview with Mark Rosenberg, assistant to Rep. Charles W. Whalen, on June 29, 1978, in Washington, D.C.), would limit a deduction to the extent which those trust contributions do not exceed the reasonable expense for comparable products liability insurance.

Another approach is suggested in *Doctors and Hospitals Start Insurance Concerns in Caribbean to Beat Malpractice Premium Rises*, Wall St. J., July 6, 1977, at 30, col. 1, which describes the formation of Caribbean-based insurance companies by physician groups in order to provide malpractice insurance under less regulation than would be required of domestic companies. Premiums paid to both American and foreign insurance companies are deductible business expenses.

¹¹⁷See, e.g., S. 403, §§ 301-309, 95th Cong., 1st Sess. (1977), reprinted in S. 403 Hearings, *supra* note 4, at 114-23; S. 527, 95th Cong., 1st Sess. (1977), 123 CONG. REC. S1735 (daily ed. Jan. 31, 1977).

¹¹⁸15 U.S.C. § 2051 (1976).

¹¹⁹29 U.S.C. § 651 (1970 & Supp. V 1975).

define product defects and thereby reduce some of the uncertainty that generates unnecessary litigation.

VI. STATUTES OF LIMITATION AND THE PRODUCT SELLERS' CONDUCT

*"The fence at the top of the cliff is better than an ambulance in the valley below."*¹²⁰

This maxim was quoted by two witnesses, a former president of the American Society of Safety Engineers,¹²¹ and the editor-in-chief of the publication of The Association of Trial Lawyers of America,¹²² during testimony before a United States Senate subcommittee which was holding hearings on S. 403. Both witnesses made it clear that the "fence" they referred to included not only actual safety devices and precautions to prevent accidents, but also the tort doctrines which impose liability and assess damages against manufacturers of defective products. To weaken these doctrines by limiting liability in any significant way, they argued, would weaken the "fence" and materially increase the frequency and severity of injury. Mr. MacCollum, the safety engineer, stated that "really it is the court that has been making safety work."¹²³ He stressed the need for continued pressure on the manufacturer because of the continuing trend to larger and therefore more dangerous equipment.

MacCollum's remarks are particularly relevant with regard to the class of products found in the workplace. A distinction between industrial and consumer products is significant for several reasons. First, industrial equipment generally produces more severe injuries.¹²⁴ Second, industrial products are generally longer lived than consumer products. Third, industrial equipment is subject to direct statutory safety regulation. Fourth, the purchaser of an industrial machine is rarely the user; the employer purchases the product but the employee, under varying degrees of economic coercion, is the one who uses it and the one who is subjected to the risk of injury. Fifth, for injury to employees from industrial equipment, a separate comprehensive statutory program, the workers' compensation system, already provides compensation on a no-fault basis. Under workers' compensation, the injured employee recovers his medical costs and a substantial part of his lost wages from his employer's compensation carrier. However, he may also sue the

¹²⁰S. 403 Hearings, *supra* note 4, at 268 & 332 (statements of David V. MacCollum & Thomas F. Lambert, Jr.).

¹²¹*Id.* at 268 (statement of David V. MacCollum).

¹²²*Id.* at 332 (statement of Thomas F. Lambert, Jr.).

¹²³*Id.* at 268 (statement of David V. MacCollum).

¹²⁴*Id.* at 268.

manufacturer of the defective product which injured him. Sixth, industrial products, which are capital goods, are usually not mass-produced. A capital goods design decision is not likely to affect as many users as would a consumer product, but this characteristic is counter-balanced by the greater damage potential of a machine-product.

Because of these distinctions, manufacturers of industrial products are subject to a substantially different set of considerations than are manufacturers of consumer products. Therefore, predictions of seller's conduct upon enactment of products liability legislation should be made separately for these two classes of manufacturer-sellers. For example, a statute of limitations running from the date of introduction of the product into the stream of commerce will affect only those products still likely to be in use when the statute has run. Clearly, the impact of such legislation will be felt more acutely by the manufacturers of the longer-lived industrial products. But if, in fact, the safety conduct of the manufacturer of industrial goods is already effectively circumscribed by various other deterrents, enactment of limitation legislation will have little or no effect on conduct—although, of course, it would result in fewer claims. Such deterrents on manufacturers of industrial goods already include laws mandating that the manufacturer install safety devices, laws requiring the employer-purchaser to only operate the products when equipped with safety devices, and market forces penalizing manufacturers of equipment known to be unsafe.

It can also be argued that even if a manufacturer has attempted to cheapen his product in order to take advantage of a new favorable statute of limitations, there would be no practical way he could do so. Under a seven-year-from-date-of-first-sale statute, the manufacturer who seeks to design his product to hold together for seven years will probably find that he would have to manufacture the same safety configurations required for a product designed to last far longer. This proposition suggests that there is no way to design and build a less-than-wonderful "one hoss shay" embodying a safety system which will last precisely seven years.

However, manufacturers do indeed make decisions regarding design and manufacture specifications based on product and component life. When liability is open-ended as to time, some of these decisions are undoubtedly resolved in favor of increased component longevity. But when liability is cut off after a fixed period, this decision may easily go the other way, especially when the longer-lived solution is significantly more expensive.¹²⁵ To what extent manufac-

¹²⁵It might be argued that capital goods manufacturers are less sensitive than consumer manufacturers to cost considerations governing material and component life.

turers may be motivated to skimp on safety as a result of a statute of limitations running from date of first introduction of a product into the stream of commerce is not known, but perhaps a preliminary prediction can be derived by noting that when products liability insurance premiums began to rise dramatically in the mid-1970's, manufacturers, especially large ones, substantially increased their safety system budgets.¹²⁶ The Interagency Task Force Briefing Report noted:

While our data base is not extensive, it suggests that [the] tort-litigation system and the use of product liability insurance premiums have been an effective spur toward inducing manufacturers to produce safe products.

Thus, in considering any modifications in the tort-litigation system, one must be careful not to diminish pressure on manufacturers toward employing sound product liability prevention technique programs.¹²⁷

It should be emphasized, however, that unlimited allocation of resources to "fool-proof" safety technology may not be an entirely positive development. Some rates of expenditure cannot be justified by reduced risk.¹²⁸ There may also be a point where it does not pay to shift a risk to a seller from a user who may be the better risk-avoider.¹²⁹

Increases in the cost of accidents may stimulate manufacturers not only to alter their safety programs but also to review their plans to develop and market new products. The introduction of a new product produces uncertainties for the manufacturer that frequently extend far into the future. The Interagency Task Force Briefing Report noted some adverse effects on new product develop-

Selecting a stainless steel part rather than an iron casting is not a significant cost decision when measured against, say, a \$100,000 selling price for the product. But for capital goods manufacturers it is not at this decision point that the safety costs are incurred; it is the safety *design* procedure that is expensive. *Determining* that specifying the stainless part would make a difference in the number and severity of injuries some years down the road is the manufacturer's costly process, a process which might be cut back if the manufacturer's liability were limited by statute.

¹²⁶BRIEFING REPORT, *supra* note 7, at 10.

¹²⁷*Id.* at 10.

¹²⁸"At some point the emphasis can be so great that it is not economically justified. If one spends \$10 million to make a Dixie cup safer, that is wasteful." S. 403 *Hearings*, *supra* note 4, at 47 (testimony by Professor Victor Schwartz).

¹²⁹"There is a school of economic thought that suggests . . . it is economically wasteful to force manufacturers to employ more product liability prevention techniques or devices than may be necessary in light of the fact that the user or consumer is sometimes the most 'efficient accident cost avoider.'" BRIEFING REPORT, *supra* note 7 at 10.

ment, particularly in the pharmaceutical industry.¹³⁰ This development may be due in part to the difficulty of reliably predicting judicial standards for liability and the fact that both plaintiff and defendant may incur substantial litigation costs, even when no action properly lies. The natural response of manufacturers to these risks is a conservative product development policy. The Interagency Task Force found this result to not be totally adverse, since it may prevent development and sale of unreasonably unsafe products.¹³¹

Opponents of state statutes of limitation which run from the date of first introduction into the stream of commerce point out that enactment will create geographical areas where old products may be sold with immunity from liability. Sellers will then be motivated to "dump" these aged and presumably dangerous products in the immune states.¹³² Whether such laws will in fact provide sufficient inducement to significantly distort the marketing patterns of these products is at present undetermined, but recent passage of state statutes in Utah, Connecticut, Florida, and Indiana may soon provide evidence on the issue.

VII. PROPOSED APPROACHES TO BALANCE THE EQUITIES

This Note has described the tension between the plaintiff's right to sue within a reasonable time after he is injured and the defendant's right to be free of the threat of litigation after a reasonable time has elapsed following a possibly injurious act. When the injurious effect of a defendant's act may be delayed for an extended period, these rights and interests of the plaintiff vis-a-vis the defendant cannot be resolved absolutely and must therefore be

¹³⁰In *Gottsdanker v. Cutter Laboratories*, 182 Cal. App. 2d 602, 611, 6 Cal. Rptr. 320, 326 (1960), the court recognized but rejected defendant's argument "that public policy will best be served by denying recovery in warranty for 'new' drugs. The argument is that development of medicines will be retarded if manufacturers are held to strict liability for their defects."

In 1977, the Interagency Task Force noted that although manufacturers of "unavoidably" unsafe pharmaceuticals may be insulated from liability, the threat of a lawsuit in which it will be *determined* whether the product is to be ruled "unavoidably unsafe" may be sufficient to inhibit product development. BRIEFING REPORT, *supra* note 7, at 9-10.

¹³¹*Id.* at 10, 16.

¹³²See Indiana Trial Lawyers Association, Urgent Legislative Bulletin (March 25, 1977) (available from ITLA Legislative Committee, 6201 Carrollton Avenue, Indianapolis, Indiana 46220). "Such legislation [SB 70] will make Indiana a dumping ground for every poorly-designed and poorly-made product imaginable. How would you like to ride an elevator on the basis of such a limitation of manufacturer responsibility . . . or an aircraft?"

balanced. Manufacturers,¹³³ middlemen,¹³⁴ liability insurance carriers,¹³⁵ and the defendants' bar¹³⁶ argue that the rapid acceptance of the strict liability doctrine by the courts, together with a growth in "consumerism," have created a heavy imbalance favoring the plaintiff. This imbalance, they assert, has led to the products liability "crisis" discussed earlier.¹³⁷ The widely varying proposals for limitation legislation reflect the efforts of legislatures and interested groups to redress this perceived imbalance.

A threshold issue presented with considerable clarity by the Defense Research Institute (DRI)¹³⁸ is whether statutes of repose are appropriate or constitutional in the area of products liability. The DRI distinguished between statutes of limitation, which run when a plaintiff's claim accrues, and statutes of repose, which begin to run at the time of defendant's act, such as the introduction of the product into the stream of commerce.¹³⁹ Sellers' groups propose that such repose statutes should replace or supplement limitation statutes.¹⁴⁰

A DRI Position Paper noted that statutes of repose have been successfully challenged in some courts on the ground that they violate the federal constitutional guarantee of equal protection, because some plaintiffs may be barred before their claims arise.¹⁴¹ The Wisconsin Supreme Court found such a statute to be barred by a provision in its state constitution which guaranteed a legal remedy for all injuries.¹⁴² Other courts have upheld such statutes in non-product cases when the statutory language required the action to be brought within a given number of years "of the act or commission complained of."¹⁴³ The DRI reports that only one products liability

¹³³See, e.g., *S. 403 Hearings*, *supra* note 4, at 91 (statement by Paul Benke, vice president, AMF Marine Product Group).

¹³⁴See, e.g., *id.* at 121 (statement by William C. McCamant, executive vice president, National Association of Wholesaler-Distributors).

¹³⁵See, e.g., *id.* at 281 (statement by Andre Maisonpierre, vice president, American Mutual Insurance Alliance).

¹³⁶See, e.g., *id.* at 62 (statement of Louis A. Lehr, Jr., attorney with Arnstein, Gluck, Weitzenfeld & Minow).

¹³⁷See text accompanying notes 6-32 *supra*.

¹³⁸The DRI is a nonprofit corporation organized "To Increase the Professional Skill and Enlarge the Knowledge of Defense Lawyers." DRI, PRODUCTS LIABILITY POSITION PAPER No. 9, (1976) [hereinafter cited as POSITION PAPER].

¹³⁹*Id.* at 20.

¹⁴⁰See Maisonpierre, *supra* note 135, at 289; Lehr, *supra* note 131.

¹⁴¹POSITION PAPER, *supra* note 138, at 21.

¹⁴²*Kallas Millwork Corp. v. Square D Co.*, 66 Wis. 2d 382, 225 N.W.2d 454 (citing WIS. CONST. art. 1, § 9).

¹⁴³POSITION PAPER, *supra* note 138, at 21.

statute has been construed (in dicta) to uphold a ten-year-from-date-of-sale repose statute where a plaintiff is injured but not killed.¹⁴⁴

The DRI, recognizing the constitutional problem, proposes that plaintiff should be allowed to retain his right to bring a negligence action, subject only to a limitation running from date of injury or plaintiff's discovery of the injury.¹⁴⁵ Thus, a repose statute would bar only strict liability actions"—years after the product was first sold."¹⁴⁶

A commentator for the Independent Insurance Agents of America, Inc. (IIAA) has suggested that permitting plaintiff to retain his right to bring product actions under a negligence theory after a repose statute for strict liability has run would not in practice restore the balance in favor of defendant. He predicts that the courts would then liberalize the negligence rule to allow what are in reality strict liability cases to be litigated under the doctrine of *res ipsa loquitur*.¹⁴⁷ A similar view has been expressed by the vice president of a large insurance brokerage firm, who suggests that "results of cases decided under the traditional cause of action [negligence] would probably not have been materially different given the current environment of increased consumer expectation."¹⁴⁸

Assuming that the constitutionality of a repose doctrine is upheld, the task of balancing the equities becomes the choosing of the proper time period in which liability should attach. For example, capping liability five years from date of first sale would obviously affect far more products, industries, and claims than would a ten-year repose provision.

Existing and proposed legislation provides for liability caps ranging typically from five¹⁴⁹ to twelve¹⁵⁰ years. Until recently, however, there was no substantial data to aid the drafters of limitation legislation who sought to gauge the probable impact of specific statutory liability periods on claims. In 1977, however, the

¹⁴⁴*Raferly v. Wm. C. Vick Const. Co.*, 29 N.C. App. 495, 224 S.E.2d 706 (1976) (discussing N.C. Gen. Stat. § 1-16(G) (Supp. 1975)), *aff'd*, 291 N.C. 180, 230 S.E.2d 405 (1976). See discussion in note 88 *supra*.

¹⁴⁵POSITION PAPER, *supra* note 138, at 21.

¹⁴⁶*Id.* at 22.

¹⁴⁷*S. 403 Hearings*, IIAA Memorandum, *supra* note 33, at 462 (statement of Jeffrey M. Yates, assistant general counsel, IIAA).

¹⁴⁸O'Sullivan, *Product Liability and Tort Reform* (1977) (article published and distributed by Marsh & McLennan, Inc., 200 Clarendon Street, Boston, Mass. 02116).

¹⁴⁹Ind. H.B. 1587 (1977) provided in part that "action for the recovery of damages for personal injury, death, or damage to real or personal property . . . shall be brought within five (5) years of the date the product was first purchased for use or consumption"

¹⁵⁰See discussion of proposed liability cap by Jeffrey Yates, *S. 403 Hearings*, IIAA Memorandum, *supra* note 33, at 461.

American Mutual Insurance Alliance (AMIA) published a survey of large-loss product liability claims.¹⁵¹ The data provided by eight of the Alliance's member insurance companies on claims in 1975 involving combined losses and expenses in excess of \$100,000 led to the conclusion that a six-year repose statute would have cut off 12.6% of payments to claimants.¹⁵²

A far more comprehensive Product Liability Closed Claim Survey prepared by the Insurance Services Office (ISO) was released in late 1977.¹⁵³ This report analyzed the results of 24,452 survey forms submitted by twenty-three insurance companies and encompassed claims closed between July 1, 1976, and March 15, 1977.¹⁵⁴ The report disclosed that 14.2% of payments to claimants were for injuries sustained more than six years after the product was manufactured.¹⁵⁵ The fact that 14.2% of the total amount was paid out to only 4.8% of the claimants¹⁵⁶ supports the proposition that longer-lived products cause more severe accidents. The ISO survey noted that twelve years after manufacture 5.7% of the amount of payments for bodily injury was still to be made.¹⁵⁷ These statistics, if assumed reasonably valid for future projections, can provide the tool whereby drafters of legislation can determine the consequences of specifying a particular liability cap.

The IIAA commentator proposes a twelve-year liability cap for manufacturers, since the ISO survey suggests that relatively few claims would be affected by such a limitation. He further proposes that strict liability should be applied against resellers, modifiers, and repairers of products for an additional twelve-year period running from the date of such acts.¹⁵⁸ This generous liability period and expansion of the seller-defendant class appears to be a trade-off for the application of a repose statute to negligence as well as strict liability actions. As can be seen, the absolute defense of a repose statute is capable of wide variety: Vary the liability cap, the applicable theories, or the class of defendant—and the equitable balance is shifted significantly.

But if the validity of a repose statute absolute defense is rejected on equitable, constitutional, or public policy grounds, other

¹⁵¹AMIA, Survey of Large-Loss Products Liability Claims (1976) (available from American Mutual Insurance Alliance, 20 North Wacker Drive, Chicago, Ill. 60606).

¹⁵²*Id.* at 4.

¹⁵³INSURANCE SERVICES OFFICE, PRODUCT LIABILITY CLOSED CLAIM SURVEY (1977) [hereinafter cited as ISO Survey].

¹⁵⁴*Id.* at 7.

¹⁵⁵*Id.* at 81.

¹⁵⁶*Id.*

¹⁵⁷*Id.*

¹⁵⁸S. 403 Hearings, IIAA Memorandum, *supra* note 33, at 461.

approaches can be considered to restore weight to the defendant's position. One such approach is to increase the plaintiff's burden of proof by requiring him to overcome a statutory presumption that the long-lived product that injured him was not defective at the time of sale, since it had served for many years without causing injury.¹⁵⁹ The intended result of such a statutory presumption would be to discourage litigation of all but the clearly meritorious claims. Whether such a law would in fact provide such a benign filter would depend heavily on judicial interpretation of the standard necessary to rebut the presumption. For example, evidence that the product had been very lightly used during the statutory period would tend to rebut the presumption that the defect causing the injury arose only after a product life of normal wear and tear.

But should the courts be required to determine standards of normal product usage? The Indiana Supreme Court in *J.I. Case Co. v. Sandefur*¹⁶⁰ stated the following:

This brings us to the question of the age of the machine and the lapse of time since its manufacture. We judicially know that no machine can be made perfect, nor can one last forever. It degenerates with age. There comes a time when some part wears out or breaks. It does not, as the proverbial "One-Hoss Shay," totally disintegrate and fall apart all at one time.

No evidence was offered as to the useful life of the combine in question. Evidence was offered to show that the machine, although 5 years old, was but slightly used the first four years Its life and its physical condition is a question of fact to be determined in the trial.¹⁶¹

Clearly courts do rule, even without benefit of statutory guidelines, that a product was or was not defective at time of first sale based on a determination that the product has or has not outlived a period of normal service. But the imposition of statutory guidelines should generate greater uniformity and predictability, thereby reducing doubtful litigation without arbitrarily barring a significant number of meritorious cases. As the court in *Victorson v. Bock Laundry Machine Co.*,¹⁶² concluded after overruling the New York repose doctrine established in *Mendel v. Pittsburgh Plate Glass Co.*,¹⁶³ there is

¹⁵⁹See COLO. REV. STAT. § 13-21-403(3) (Supp. 1977) and discussion in text accompanying note 96.

¹⁶⁰245 Ind. 213, 197 N.E.2d 519 (1964).

¹⁶¹*Id.* at 222, 197 N.E.2d at 523.

¹⁶²37 N.Y.2d 395, 335 N.E.2d 275 (1975).

¹⁶³25 N.Y.2d 340, 253 N.E.2d 207 (1969).

too much variation in facts from case to case to permit a general rule of repose.

A statutory presumption of normal product life can be established as a fixed period for all products, as provided in the Colorado statute,¹⁶⁴ or it can be based on a determination of the "useful life" of the product. This determination can be made by governmental agencies or arbitration panels, or it can be established by manufacturers through disclaimers. The latter proposal, although easy to administer, "would give rise to litigable issues surrounding their adequacy and effectiveness."¹⁶⁵ Senate Bill 403 uses a combination of approaches, calling for an arbitration panel to determine useful life for products less than ten years old, coupled with a provision that ten-year-old products are presumed to have originally been nondefective. A plaintiff who wishes to rebut that presumption *must* submit the issue to arbitration.¹⁶⁶

As noted, the balance of equities between the parties can be affected by changes outside the tort law area. Laws directed toward the improvement of the delivery of insurance, greater rationalization of the rate-making procedure, or overhaul of the tax laws inhibiting self-insurance reserves might make so-called tort reform unnecessary.

If tort law modification is found to be necessary, certain proposals designed to balance the equities may be preferable to others. For example, one proposal that might obviate the need for repose statutes is a suggestion developed by Professor Jeffrey O'Connell, the well-known proponent of applying no-fault principles to accident cases. Professor O'Connell begins with two observations. First, tort litigation is shockingly slow, uncertain and inefficient. Product cases typically take years to adjudicate, and the likelihood of plaintiff's recovery is usually in doubt until the very end.¹⁶⁷ Ultimately, net plaintiffs' recoveries are less than one-half of the total costs incurred by products liability insurers.¹⁶⁸ Second, O'Connell notes, citing

¹⁶⁴COLO. REV. STAT. § 13-21-403(3) (Supp. 1977).

¹⁶⁵LEGAL STUDY, *supra* note 68, at 48.

¹⁶⁶S. 403 § 604(a), (b), 95th Cong. 1st Sess. (1977), *reprinted in S. 403 Hearings*, *supra* note 4, at 33-34.

¹⁶⁷"This, then is the present tort insurance system: not a system for paying accident victims from accident insurance (as sensible as that simple idea would seem to be), but a system for *fighting* accident victims about paying them from accident insurance; a system so cumbersome and tricky that the typical accident victim 'even after consulting a lawyer . . .' cannot know *what* he will be paid, *when* he will be paid, or *if* he will be paid; a system hugely wasteful . . . ; a dilatory system . . . , with the outcome more dependent on luck and emotion than on need and reason." O'CONNELL, *ENDING INSULT TO INJURY; NO-FAULT INSURANCE FOR PRODUCTS AND SERVICES*, 54 (1975).

¹⁶⁸The ISO Survey, *supra* note 153, at 11, notes that for every dollar of claim payment in personal injury cases, there are an additional thirty-five cents of defense costs

the ISO Survey, that "about one-half of the total of product liability payments for personal injury goes to employees injured on the job and therefore presumably already covered by workers' compensation."¹⁶⁹ Because the workers' compensation system is not fault based, it is fast, certain and efficient, returning about seventy percent of the insurance dollar to the injured party,¹⁷⁰ beginning as early as one week after the accident is reported. O'Connell proposes that the sole remedy to employees for workplace accidents should be a claim for workers' compensation.¹⁷¹

The industrial products which injure employees tend to be far longer lived than consumer products. Since injuries by industrial products result in forty-two percent of total recoveries in product cases,¹⁷² presumably a substantial percentage of these claims would be barred by statutes of repose. Although the ISO survey does not provide this precise statistic, the available figures appear to warrant the assumption that barring employee claims against industrial product manufacturers would sharply reduce the potential number of "old" product claims. Therefore, adoption of such a proposal could sufficiently reduce the exposure of the most seriously affected industries, rendering the absolute defense of statutes of repose no longer so urgent.

Yet, reduction of this exposure provides one of two major criticisms of the O'Connell proposal, since modification of liability could adversely affect seller's conduct by reducing the seller's incentive to seek improved safety systems.¹⁷³ O'Connell answers this problem by suggesting that the employer-purchaser retain the right to maintain a third-party action against the product manufacturer, but under comparative negligence principles. The employer or his compensation carrier could, for example, only recover sixty percent of his compensation payment to the injured worker from the machinery manufacturer if the manufacturer could show that the employer's negligence constituted forty percent of the cause of the accident.¹⁷⁴ Although this restoration of the employer's right to sue the

or twenty-six percent of total costs. Plaintiff's attorney fees, expenses and expert witnesses are probably somewhat higher than defendant's defense costs, thereby leaving plaintiff with a net recovery of less than one-half of the defendant insurer's loss.

¹⁶⁹Sole Remedy, *supra* note 46, at 1.

¹⁷⁰See A. CONARD, J. MORGAN, R. PRATT, C. VOLTZ & R. BOMBAUGH, AUTOMOBILE ACCIDENT COSTS AND PAYMENTS 59, 61 (1964). In contrast, the authors found that only 44% was paid out as net benefits under the tort liability system.

¹⁷¹Sole Remedy, *supra* note 46, at 1.

¹⁷²ISO Survey, *supra* note 153, at 62. Note that 42% of the payments go to 10.6% of the parties. *Id.*

¹⁷³See text accompanying notes 125-127 *supra*.

¹⁷⁴Sole Remedy, *supra* note 46, at 1-2.

manufacturer under products liability theories would reduce the relief promised by making workers' compensation a sole remedy, the stakes would be substantially lower, since workers' compensation provides payment for economic loss only. Pain and suffering awards are removed from the system, and contingency fees are lower and strictly regulated.¹⁷⁵ Also, workers' compensation is generally on a pay-as-you-go basis, with temporary total disability awards ceasing if the injured employee should recover his health sooner than expected. Finally, since the remaining product litigation under this proposal would be between business entities who are or have been dealing with each other, nuisance suits and doubtful claims would be reduced, and settlement potential would be enhanced, particularly in view of the fact that the dollar amounts in issue would be reduced. Also, allowing the partial defense of the employer's negligence should sharply reduce third-party claims against product manufacturers.

A second, and probably more serious, objection to shifting liability from product manufacturer to employer through the "sole remedy" proposal is that the injured worker would lose a significant right of action available to other classes of injured plaintiffs. This loss is emphasized by the general inadequacy of workers' compensation payments. Noting this inadequacy suggests the solution. O'Connell believes that increasing the worker's compensation payment schedules under national guidelines would provide a trade-off which would be acceptable to both labor and business interests.¹⁷⁶ Such a quid pro quo should eliminate constitutional objections and provide efficient *uniform* protection to workers, regardless of whether they are injured by old or new products, or by nonproduct workplace conditions.

Another effect of shifting much of the product defect risk from manufacturer to employer would be to spread the risk over many more business enterprises. Employer-purchasers of industrial products certainly outnumber manufacturer-sellers. But if this proposal is more efficient at loss-spreading than the present system, what effect will it have on the rate of accidents?

Perhaps the most efficient loss-spreading mechanism would be externalization of accident costs through socialization, as practiced in New Zealand.¹⁷⁷ American policy, however, remains committed to

¹⁷⁵O'Connell suggests, however, that the employer should succeed to the employee's entire tort claim, including pain and suffering, when the employee is injured by a third party who is not a workers' compensation employer, *e.g.*, where the worker is injured on the job by a non-commercial vehicle. *Id.* at 3.

¹⁷⁶*Id.* at 1.

¹⁷⁷See Palmer & Lemons, *Toward the Disappearance of Tort Law—New Zealand's New Compensation Plan*, U. ILL. L. F. 693 (1972). As originally conceived, the New

assigning liability to the enterprises best able to take the corrective action designed to reduce future similar accidents. In the workplace context, the employer-purchaser is more likely to be the designated enterprise than the manufacturer-seller. Moreover, among the employer, employee, and product manufacturer, it is the employer who can make the greatest contribution to the safety system. The employer selects the equipment; hires, trains, and supervises the employees; sensitizes the workplace environment to safety considerations; maintains and replaces the equipment; modifies the components for new tasks; and provides first aid and other post-accident mechanisms. As the product ages, the employer's share of this control increases. Thus, a proposal which makes the employer the primary obligor for all compensation to injured workers could appear just.

Shifting the risk to the employer is not as onerous as it may first appear. The employer would retain the right to sue the manufacturer of a defective machine, and he would benefit significantly from the reduction in the purchase price of the industrial product, such price reduction resulting from the reduced burden of products liability insurance on the manufacturer.

Arguably, although adoption of workers' compensation as a sole remedy for injured workers might reduce the nation's overall products liability insurance costs, it would supply this relief unevenly and inequitably, because manufacturers of consumer products would continue to be subject to open-ended liability.¹⁷⁸ Although uneven, this proposal is, nevertheless, consistent with recent public policy directed toward special protection for consumers.¹⁷⁹

VIII. CONCLUSION

Numerous proposals have been advanced to deal with the increasing frequency and severity of product-related accidents and a

Zealand plan provided for a compulsory program which would provide compensation for accidents occurring in the workplace, highway, and home. As implemented, the act covers motor accidents and accidents to earners in the workplace and, to a lesser extent, outside the workplace. The enacted plan does provide some general deterrence by assessing penalties against industries, employees, or individuals that experience greater than "normal" accident rates, but there is no requirement that fault, defect, or causation be proven in order to recover from the system.

¹⁷⁸Professor O'Connell suggests that litigation could be more easily replaced by less costly arbitration when the parties are business entities. He suggests further that third-party actions could be eliminated by contract at the time of sale, the employer giving up his third-party right of action in exchange for a lower price for the product. Sole Remedy, *supra* note 46, at 2.

¹⁷⁹*See, e.g.*, Flammable Fabrics Act, 15 U.S.C. § 1191 (1976); 15 U.S.C. § 1211 (1976) (household refrigerators); Poison Prevention Packaging Act of 1970, 15 U.S.C. § 1471 (1976); Consumer Product Safety Act, 15 U.S.C. § 2051 (1976).

concomitant explosion of insurance premiums. One set of proposals suggest modification to tort laws, including a statute of limitations, or more properly a statute of repose, to run from the date of manufacture or from the date seller first introduces the product into the stream of commerce. Such a statute, however, may have the unconstitutional and inequitable effect of barring plaintiffs before their claims accrue.

This Note has dealt with the tension inherent in the proposals designed to balance the equities between sellers and users without encouraging the seller to cut back on safety mechanisms so as to increase the risk of accident. The efficiency and predictability of the present compensation delivery systems have been considered, and the analysis suggests that changes may be needed. Our present tort litigation system is wasteful and uncertain, but introduction of an absolute defense which would arbitrarily bar meritorious claims through no fault of the plaintiff is clearly inequitable, perhaps unconstitutional, and probably unnecessary. The quest for a solution should focus first on mechanical problems, such as insurance delivery and tax law distortion. Only then should consideration be given to modifying established legal doctrines, examining first those principles that are least fundamental to the legal fabric.

The evidence indicates that a satisfactory rebalance of interest and equities in the direction of defendant-sellers may be achievable without introduction of repose statutes. Exhaustive analysis should be given a plan to apply no-fault principles to the products problem through the vehicle of workers' compensation, as well as the proposal allowing the use of rebuttable statutory presumptions. Enactment of "misuse," "state of the art," and "later modification" defenses may be preferable to passage of repose statutes and would cut off most of the same claims. However, if a repose doctrine is accepted, its effect may be tempered by applying it to strict liability cases only or by providing generous liability caps. If tort law modifications are to be adopted they should be directed against the slowness and inefficiency of the tort system and should foster conduct designed to reduce accidents.

Product liability is like a box that's ticking.

*We don't know what's inside, a clock or a time-bomb.*¹⁸⁰

JORDAN H. LEIBMAN

¹⁸⁰Headline from a full-page advertisement placed by Travelers Indemnity Company in several national magazines, e.g., TIME, April 25, 1977, at 35. The purpose of the advertisement was to inform readers that the products liability problem is about to "blow up." Similar ads have been placed by other insurance companies. See, e.g., Aetna Life & Casualty's "Too bad judges can't read this to a jury . . .," showing the

judge holding a jury instruction which points out that judgments must be indirectly paid by uninvolved parties through insurance premiums, *TIME*, Feb. 20, 1978, at 65; "And now, the big winners in today's lawsuits . . .," which points up the "lottery" aspects of the tort litigation system with examples of seemingly outrageous awards, *id.* at 88-89.

Plaintiffs' lawyers have begun to complain about these advertisements to the F.T.C., and in February 1978, a lawsuit was filed in Connecticut charging insurance companies "with what amounts to jury tampering." *Ford's \$128.5 Million Headache*, *id.* at 65.

Although the Travelers' ad may underline the explosiveness of the products liability issue, it can also serve to forcefully remind us that many of the products we purchase, use, or merely come near are themselves "ticking."