State Legislative Restrictions on Product Liability Actions

Product liability actions were developed by judicial interpretations of common law tort principles as a method of permitting injured consumers to recover for injuries caused by defective products.[1] Recently, manufacturers, distributors, and insurers have pointed to problems which they contend justify substantial changes in the present reparation system.[2] The efforts of these groups have caused scholars, legislatures, and governmental agencies to reevaluate principles governing product liability actions. This comment will explore the problems experienced by manufacturers and insurers and will outline numerous suggested solutions to the perceived problem with emphasis on the response of state legislatures to these proposals.

I. Overview

As the result of tentative conclusions set forth in a report entitled "Product Liability Insurance — Assessment of the Related Problems and Issues,"[3] the Ford Administration directed the Under Secretary of Commerce to chair an Interagency Task Force for the purpose of conducting a six month study of problems caused by product liability claims.[4] The Task Force confronted two major questions: (1) to what extent were American industries experiencing economic difficulties caused by product liability judgments, and (2) what changes in the law of product liability could lessen the problems experienced by manufacturers and insurers?

Because the overriding concern of those who seek reform of the present reparation system is the difficulty experienced by manufacturers and sellers in securing protection against large liability judgments and because costs of product liability insurance are constantly on the rise,[5] the Task Force studied these problems and made a number of findings. The Task Force concluded that between 1974 and 1976, product liability insurance premiums rose substantially, especially for industries associated with in-

1. *See e.g.*, Greenman v. Yuba Power Prods., Inc., 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1963); Escola v. Coca-Cola Bottling Co., 24 Cal. 2d 453, 150 P.2d 436 (1944); Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 161 A.2d 69 (1960).

2. *See* notes 5-7, *infra.*

3. U.S. Dep't of Commerce, Interagency Task Force on Product Liability, Briefing Report 1 (1977) [hereinafter cited as Briefing Report].

4. *Id.*

5. Briefing Report, *supra* note 3, at 6. *See also, Product Liability Meeting Told of Crisis Facing Insurers, Businesses, Consumers,* 5 Prod. Safety & Liab. Rep. (BNA) 226 (March 25, 1977); 122 Cong. Rec. S8381 (daily ed. June 3, 1976) (remarks of Sen. Taft).

dustrial machinery, industrial chemicals, and high risk consumer goods. Although the rate of increase in product liability claims seems to be less than the rate of increase in actual product-related injuries, the total dollar amount of pending claims rose substantially between 1970 and 1975. The problem of increased cost is more intense for smaller firms. The Task Force found that, at the present time, only a few companies are unable to obtain product liability insurance; consequently, the problem seems to be more one of affordability than availability. Even though the increase in most industries accounts for less than 1% of total sales, many companies are now going without any form of product liability insurance. There have been noticeable effects on the manufacturing process as well, according to the Task Force's *Briefing Report*. Concern over increased cost has caused some manufacturers to delay the introduction of new products, and it has also caused insurers and industries to spend more time and effort developing liability prevention techniques.[6]

Many reasons for the rise in the cost of product liability insurance have been noted. Among the more commonly cited are (1) a broadening of theories of liability by the courts; (2) an increase in the size of awards to claimants with a sanctioning of those awards by the courts; and (3) the general pressures of inflation.[7] The efforts of manufacturers and insurers to curtail these trends have not gone unopposed. Various consumer advocates, including Ralph Nader, contend that insurance companies have greatly exaggerated the rise in product liability litigation.[8] Other groups have pointed to the valuable role product liability litigation, in its present form, plays in forcing manufacturers to concentrate on the safety of products, thereby eliminating many needless injuries.[9] Still other groups recognize the existence of a problem, but they contend that the problem is not quite as pressing as manufacturers and insurers would have us believe.[10]

In spite of such views, consideration has been given to proposals that would make it easier for manufacturers to secure protection against large liability judgments. Basically these proposals center on one of two approaches: reformation of the insurance system or reformation of the tort

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6. BRIEFING REPORT, *supra* note 3, at 6-7.

7. Kircher, *Products Liability—The Defense Position*, 44 INS. COUN. J. 277 (1977). This article represents the position of four major organizations: The Defense Research Institute, International Association of Insurance Counsel, Federation of Insurance Counsel, and Association of Insurance Attorneys.

8. *Hearings on Product Liability Problems Affecting Small Business Before the Select Committee on Small Business*, 94th Cong., 2d Sess. 1584-1585 (1976) (statement of Ralph Nader). *See also, MAAC Conference Reveals Disunity on Solutions to Liability Problems*, 5 PROD. SAFETY & LIAB. REP. (BNA) 377, 378 (May 20, 1977).

9. *Hearings on Product Liability Problems Affecting Small Business Before the Select Committee on Small Business*, 94th Cong., 2nd Sess. 1609-1617 (statement of Thomas F. Lambert).

10. *See* BRIEFING REPORT, *supra* note 3, at 6. The Task Force found that even in those companies affected by a sharp premium increase, the cost rarely exceeds 1% of total sales.

reparation system.[11] Proposals to reform the tort reparation system have been numerous, and they have come from many different sources. A survey of proposals to alter the tort system in a manner that would limit liability may be obtained through analysis of the more prominent proposals by such groups as the Multi-Association Action Council, a group representing over 100 business associations; the American Mutual Insurance Alliance; the Defense Research Institute; the International Association of Insurance Counsel; the Federation of Insurance Counsel; and the Association of Insurance Attorneys.

A common proposal of these groups is the imposition of a statute of repose which would begin to run when the product is first placed in the stream of commerce.[12] Such a limitation could be imposed in one of several ways. One alternative is to allow the statute of repose to bar the strict liability claim, but not a cause of action based on negligence.[13] A second alternative, would permit the statute to bar *any* claim which alleges defective design or manufacture.[14] Because industry contends that the imposition of liability for products manufactured long ago can make preparation of a defense impossible,[15] a third alternative would create a conclusive legal presumption that a product used safely for a certain number of years was free from defect when it was first put into use.[16]

One recognized defense to product liability actions is considered by many to be in danger of deterioration at the hands of activist courts.[17] This defense, the state of the art defense, limits a manufacturer's responsibility to the state of the art or prevailing industry standards at the time the product was designed or manufactured.[18] To prevent possible deterioration by courts, reformers call for codification of this defense as well as codifica-

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11. Proposals to alter the insurance system have been varied. For an example of proposed re-insurance plans see S.527, 95th Cong., 1st Sess. (1977), introduced by Senator John C. Culver, *Small Business Support Reinsurance Bill, But Insurance Firms Express Reservations,* 5 PROD. SAFETY & LIAB. REP. (BNA) 178, 179 (March 11, 1977). For an example of self-insurance plans *see* S.1611, 95th Cong., 1st Sess. (1977), also introduced by Senator Culver, *More Measures are Introduced on Hill to Deal With Product Liability Problems,* 5 PROD. SAFETY & LIAB. REP. (BNA) 473 (June 24, 1977). For an example of captive insurance company plans see BRIEFING REPORT, *supra* note 3, at 23.

12. *See* notes 38, 46, 57, and 61, *infra,* and accompanying text. For an example of similar rules some courts have adopted see W. PROSSER, THE LAW OF TORTS §30, at 144 (4th ed. 1971).

13. Kircher, *supra* note 7, at 288.

14. *Id.* at 288. *See, infra* note 62.

15. *See* 122 CONG. REC. S8381 (daily ed. June 3, 1976) (remarks of Sen. Taft). *See also* U.S. DEP'T OF COMMERCE, INTERAGENCY TASK FORCE ON PRODUCT LIABILITY, 5 FINAL REPORT OF THE LEGAL STUDY 1 (1977) [hereinafter cited as LEGAL STUDY].

16. Kircher, *supra* note 7, at 289. *See infra* note 50 for a similar presumption which is merely rebuttable.

17. Kircher, *supra* note 7, at 295.

18. For a good treatment of the state of the art in product liability, see Phillips, *The Standard for Determining Defectiveness in Product Liability,* 46 CIN. L. REV. 101 (1977). *See also* Comment, 57 MARQ. L. REV. 649 (1974); *infra* note 49.

tion of new evidence provisions, such as statutes permitting a defendant to show the economic pragmatism of a design and statutes preventing a plaintiff from showing that the defendant subsequently modified his product.[19]

Remaining proposals that would create defenses to product liability actions include: (1) creation of a rebuttable presumption that a product is not defective if it complies with governmental standards;[20] (2) recognition of the plaintiff's conduct under a theory of contributory or comparative negligence;[21] (3) elimination of a product liability action if any alteration of the product occurred after it was placed into the stream of commerce;[22] (4) abolition of a manufacturer's or seller's duty to warn if the danger is open and obvious;[23] and elimination of strict liability in cases involving products which are unavoidably unsafe.[24] As noted, these proposals would serve to codify certain defenses which prevent *any* imposition of liability.

Aside from proposals designed to expand or codify defenses to a product liability action, critics of the present system have proposed other statutory measures which they feel would limit the amount of liability judgments. Such proposals include: (1) elimination of ad damnum, a prayer for a specific dollar amount, thereby limiting the prayer to a general request for damages within the jurisdictional limits of the court;[25] (2) elimination of punitive damages;[26] (3) abolition of the collateral sources rule, a rule which prevents a defendant from showing the amount a plaintiff has already recovered from other sources;[27] and (4) regulation of plaintiffs' attorneys' contingent fees.[28]

The Task Force developed six considerations that it felt should weigh heavily in any analysis of proposed remedies. These considerations include the need to ensure that plaintiffs injured by unsafe products can be reasonably compensated, to ensure availability of product liability insurance at affordable rates, to place the incentive for risk prevention on the parties most capable of accomplishing that goal, to expedite the reparation pro-

19. Kircher, *supra* note 7, at 295-297. *See also* 1 LEGAL STUDY, *supra* note 15, at 26.

20. Kircher, *supra* note 7, at 298. *See also infra* notes 44 & 47.

21. For an example of legislative response see PA. STAT. ANN. tit. 17, §2101 (Supp. 1976). This statute adopts comparative fault in all negligence cases and is one of general application. *See* 1 LEGAL STUDY, *supra* note 15, at 27.

22. Kircher, *supra* note 7, at 291. *See infra* notes 41 & 59.

23. Kircher, *supra* note 7, at 293.

24. *Id.* at 282.

25. *Id.* at 314-315. *See infra* note 40.

26. *Id.* at 301. For an example of a legislative response see Kansas S.852 (1976) which requires plaintiffs seeking punitive damages to prove beyond a reasonable doubt that defendant is guilty of wilful and wanton misconduct. *See* 1 LEGAL STUDY, *supra* note 15, at 27.

27. Kircher, *supra* note 7, at 312. For an example of legislative responses see Kansas S.852 (1976) which allows evidence of certain collateral resources to be introduced. 1 LEGAL STUDY, *supra* note 15, at 27.

28. Kircher, *supra* note 7, at 308-309.

cess, to minimize costs associated with product liability litigation, and to develop a specific and concrete remedy.[29] It is urged that legislatures carefully weigh the effect any change may have on the furtherance of these considerations.

A discussion of these proposals must include a discussion of the level at which they could be more effectively implemented. The Task Force takes the position that action at the federal level is more appropriate.[30] This position is based on recognition of the effect product liability law has on interstate commerce. The Task Force concludes that federal regulation would: "(a) avoid duplicate efforts by the states, (b) facilitate interstate commerce, (c) be more effective in reducing or stabilizing insurance costs."[31] The Defense Research Institute, the International Association of Insurance Counsel, the Federation of Insurance Counsel, and the Association of Insurance Attorneys, in a joint position paper, articulate the view that the matter is one exclusively for state concern.[32] This view is based on the contention that the problems of each state vary to an extent which would disable far-removed federal legislators in any effort to make effective evaluations. Since tort actions have traditionally been defined by the individual states it would seem that the first legislative responses would come from the state legislators.

II. State Legislative Enactments

Recent enactments in Utah, Colorado, and Oregon are state legislative responses to insurers' and manufacturers' complaints and represent the first state efforts to limit recovery in product liability actions.[33]

A. *Utah*

The first state measure restricting recovery in product liability cases is the Utah Product Liability Act.[34] This Act, which was passed in large part due to the efforts of the Utah Manufacturers Association,[35] contains the following legislative findings:

> The number of suits and claims for damages and the amount of judgments and settlements arising from defective products has increased greatly in

29. Briefing Report, *supra* note 3, at 29.

30. Briefing Report, *supra* note 3, at 19-20.

31. *Id.*, at 20.

32. Kircher, *supra* note 7, at 278.

33. Several other states have considered legislation which would restrict recoveries in product liability actions including bills introduced in Kansas S.852, Massachusetts H.R. 4919 and Michigan H.R. 6422. *See* 5 Legal Study, *supra* note 15, at 1-17.

34. *Utah Code Ann.* §§78-15-1 through 78-15-7 (Supp. 1977).

35. F. Finlinson, Utah Product Liability Act, A Practical Resolution of a Crisis 2 (1977) (unpublished address available from Sen. Fred W. Finlinson of the Utah Legislature).

> recent years. Because of these increases, the insurance industry has substantially increased the cost of product liability insurance. The effect of increased insurance premiums and increased claims has increased product cost through manufacturers, wholesalers and retailers passing the cost of premiums to the consumer. Further, certain product manufacturers are discouraged from continuing to provide and manufacture such products because of the high cost and possible unavailability of product liability insurance.[36]

With the express intention of alleviating the adverse effects upon the manufacturing industry of these suits and increased insurance costs, the legislature enacted the Utah Product Liability Act "to encourage private insurance companies to continue to provide liability insurance."[37]

The Utah Act restricts recovery on product liability claims in the following ways. First, the Act provides for a statute of repose on product liability actions six years from the date of initial purchase or ten years from the date of manufacture.[38] These limitations are applicable to causes of action accruing after May 9, 1979.[39] Second, the Act provides that "[n]o dollar amount shall be specified in the prayer of a complaint filed in a product liability action;" the complaint must merely ask for such damages as are reasonable.[40] Third, the Act restricts liability when a "substantial contributory cause" of the injury was an alteration or modification of the product which changed "the purpose, use, function, design or intended use or manner of use of the product from that which the product was originally designed, tested or intended."[41] Fourth, the legislation provides that in an action for damages for injury caused by a defect in a product "[n]o product shall be considered to have a defect . . . unless at the time the product was sold by the manufacturer or other initial seller, there was a defect or defective condition in the product which made the product unreasonably dangerous to the user or consumer."[42] "Unreasonably dangerous" is defined to "mean that the product was dangerous to an extent beyond which would be contemplated by the ordinary and prudent buyer, consumer, or

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36. UTAH CODE ANN., §78-15-2 (Supp. 1977).

37. *Id.*

38. UTAH CODE ANN., §78-15-3(1) (Supp. 1977) provides: "(1) No action shall be brought for the recovery of damages for personal injury, death or damage to property more than six years after the date of intitial purchase for use or consumption, or ten years after the date of manufacture, of a product, where that action is based upon, or arises out of, any of the following: (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."

39. UTAH CODE ANN., §78-15-3(2) (Supp. 1977).

40. UTAH CODE ANN., §78-15-4 (Supp. 1977) provides: "No dollar amount shall be specified in the prayer of a complaint filed in a product liability action against a product manufacturer, wholesaler or retailer. The complaint shall merely pray for such damages as are reasonable in the premises."

41. UTAH CODE ANN., §78-15-5 (Supp. 1977).

42. UTAH CODE ANN., §78-15-6(1) (Supp. 1977).

user of that product in that community considering the product's characteristics, propensities, risks, dangers and uses together with any actual knowledge, training, or experience possessed by that particular buyer, user or consumer."[43] Finally, the Utah legislature created a "rebuttable presumption" that a product is free from any defect or defective condition when the development and manufacture of the product was in conformity with government safety standards for that industry existing at the time the product was manufactured.[44]

B. Colorado

The Colorado enactment[45] is similar to the Utah Product Liability Act in several ways. First, the Act provides for a statute of limitations on product liability actions, but in contrast to the Utah law, this statute of limitations is three years for all actions brought against a manufacturer or seller of a product for injuries except those actions brought under breach of warranty theory.[46] Second, the Act creates a rebuttable presumption that the product causing the harm was not defective if the product conformed to government standards.[47]

The Colorado approach to rising insurance costs and product liability suits and claims differs sharply from the Utah approach in several important respects. The Colorado statute bars the use of evidence of any "scientific advancements" when such advancements were discovered subsequent to the time the product was sold by the manufacturer, for any purpose other than showing a duty to warn.[48] Aside from providing a rebuttable presumption that the product which caused the injury was not defective if it complied with government standards, the Colorado law pro-

43. UTAH CODE ANN., §78-15-6(2) (Supp. 1977).

44. UTAH CODE ANN., §78-15-6(3) (Supp. 1977).

45. COLO. REV. STAT., §§13-80-127.5, 13-21-401 through 13-21-405 (Supp. 1978).

46. COLO. REV. STAT., §13-80-127.5 (Supp. 1978) provides: "(1) Notwithstanding any other statutory provisions to the contrary, all actions except those governed by section 4-2-725, C.R.S. 1973 [statutes of limitations in contracts of sale], brought against a manufacturer or seller of a product, regardless of the substantive legal theory or theories upon which the action is brought, for or on account of personal injury, death, or property damage caused by or resulting from the manufacture, construction, design, formula, installation, preparation, assembly, testing, packaging, labeling, or sale of any product, or the failure to warn or protect against a danger or hazard in the use, misuse, or unintended use of any product, or the failure to provide proper instructions for the use of any product shall be brought within three years after the claim for relief arises and not thereafter."

47. COLO. REV. STAT., §13-21-403(1) (Supp. 1978) provides: "In any product liability action, it shall be rebuttably presumed that the product which caused the injury, death, or property damage was not defective and that the manufacturer or seller thereof was not negligent if the product: . . . (b) Complied with, at the time of sale by the manufacturer, any applicable code, standard, or regulation adopted or promulgated by the United States or by this state, or by any agency of the United States or of this state."

48. COLO. REV. STAT., §13-21-404 (Supp. 1978).

vides a "state of the art" defense to manufacturers who can show that prior to the sale the product conformed to the state of the art in existence at the time of sale.[49] An additional rebuttable presumption is codified which states that a product is presumed not defective, that the seller or manufacturer was not negligent, and that all warnings and instructions were proper and adequate ten years after a product is first sold.[50]

Perhaps the most unique section of the Colorado law is a section which does not allow a product liability action based on the doctrine of strict liability in tort to lie against any "seller" of an allegedly defective product unless the seller is also the "manufacturer"[51] of the product.[52] Furthermore, the Colorado law provides that if jurisdiction cannot be obtained over the manufacturer of a product, then the manufacturer's principal distributor shall be the manufacturer of the product for the purposes of this statute.[53] The Colorado legislature defines "manufacturer" more broadly than its common meaning by including in the definition any seller "who has actual knowledge of a defect in the product or a seller of a product who creates or furnishes a manufacturer with specification relevant to the alleged defect."[54] Additionally, the term "manufacturer" includes "any seller of a

49. COLO. REV. STAT., §13-21-403(1) (Supp. 1978) provides: "In any product liability action, it shall be rebuttably presumed that the product which caused the injury, death, or property damage was not defective and that the manufacturer or seller thereof was not negligent if the product: (a) Prior to sale by the manufacturer, conformed to the state of the art, as distinguished from industry standards, applicable to such product in existence at the time of sale."

50. COLO. REV. STAT., §13-21-403(3) (Supp. 1978).

51. COLO. REV. STAT., §13-21-401(1) (Supp. 1978) defines "manufacturer" as "a person or entity who designs, assembles, fabricates, produces, constructs or otherwise prepares a product or a component part of a product prior to the sale of the product to a user or consumer. The term includes any seller of a product . . . who creates and furnishes a manufacturer with specifications relevant to the alleged defect for producing the product or who otherwise exercises some significant control over all or a portion of the manufacturing process or who alters or modifies a product in any significant manner after the product comes into his possession and before it is sold to the ultimate user or consumer. The term also includes any seller of a product who is owned in whole or significant part by the manufacturer or who owns, in whole or significant part, the manufacturer. A seller not otherwise a manufacturer shall not be deemed to be a manufacturer merely because he places or has placed a private label on a product if he did not otherwise specify how the product shall be produced or controlled, in some significant manner, the manufacturing process of the product and the seller discloses who the actual manufacturer is."

52. COLO. REV. STAT., §13-21-402(1) (Supp. 1978) provides: "No product liability action based on the doctrine of strict liability in tort shall be commenced or maintained against any seller of a product which is alleged to contain or possess a defective condition unreasonably dangerous to the buyer, user, or consumer unless said seller is also the manufacturer of said product or the manufacturer of the part thereof claimed to be defective. Nothing in this part 4 shall be construed to limit any other action from being brought against any seller of a product." *Cf.* GA. CODE §105-106 (1977).

53. COLO. REV. STAT., §13-21-402(2) (Supp. 1978).

54. COLO. REV. STAT., §13-21-401(1) (Supp. 1978).

product who is owned in whole or significant part by the manufacturer or who owns, in whole or significant part, the manufacturer."[55]

C. *Oregon*

Oregon's product liability law has three principal parts. First, the statute bars a "product liability civil action"[56] brought more than two years after the date of injury or eight years after the date on which the product was first purchased for use or consumption.[57] Secondly, the law creates a "disputable presumption" in a product liability action that a product as manufactured and sold or leased is not unreasonably dangerous for its intended use.[58] Finally, the law creates a statutory defense to the product liability action if an alteration or modification of a product occurred under the following circumstances:

> (1) The alteration or modification was made without the consent of or was made not in accordance with the instructions or specifications of the manufacturer, distributor, seller or lessor;
> (2) The alteration or modification was a substantial contributing factor to the personal injury, death or property damage; and
> (3) If the alteration or modification was reasonably foreseeable, the manufacturer, distributor, seller or lessor gave adequate warning.[59]

III. Comparison of Legislative Approaches

One common feature of each state's product liability laws is a statute of limitations for suits against manufacturers and sellers for injuries caused by a product. The feeling of the respective legislatures was perhaps best stated by the sponsor of the Utah act who explained the statute of limitations provision as a way "to prevent lawsuits where products manufactured 15 to 30 years ago have come back to haunt manufacturers when, at the time of manufacture, technology and safety practices were either nonexistent or not applicable to the industry."[60]

The enactment of new statutes of limitations is caused by a shift from claims based in negligence to claims based in strict tort which have had the effect of enlarging the scope of a manufacturer's potential liability. No

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55. *Id.*

56. Or. Rev. Stat. §30.900 (1977) defines "product liability civil action" as "a civil action brought against a manufacturer, distributor, seller or lessor of a product for damages for personal injury, death or property damage arising out of: (1) Any design, inspection, testing, manufacturing or other defect in a product; (2) Any failure to warn regarding a product; or (3) Any failure to properly instruct in the use of a product."

57. Or. Rev. Stat. §30.905 (1977).

58. Or. Rev. Stat. §30.910 (1977).

59. Or. Rev. Stat. §30.915 (1977).

60. F. Finlinson, Utah Product Liability Act, A Practical Resolution of a Crisis 2 (1977) (unpublished address available from Sen. Fred W. Finlinson of the Utah Legislature).

longer must the difficulties involved in proving specific negligent acts serve to defeat a large number of claims as in the past. With the elimination of the privity requirement, a manufacturer can possibly be held liable for injuries resulting from its products during the entire lifetime of the product. Traditionally, the statute of limitations in tort cases does not begin to run until an injury has occurred.[61] Since strict liability actions are usually considered to be tort actions, manufacturers claim to experience little or no protection from liability from the "typical" statute of limitations.

A provision closely analogous to the typical statute of limitations is what might be called a "statute of repose." Utah and Oregon adopted such statutes.[62] A statute of repose differs from a typical statute of limitations in that it limits recovery from a fixed point of time, usually the point of sale. For example, if a defective tire was sold by ABC Corp. in 1977 and caused injury in 1985, and a suit was brought in 1986, an eight year limit on bringing suit from the "time of sale" would bar the suit while a two year bar from the "time the claim for relief arises" would not bar a suit brought by the injured party. Under the statute of repose, the time for bringing the claim would have expired before the injury occurred.[63] Under the statute of limitations the claim did not arise until the injury occurred, therefore the injured party brought the action in a timely manner.

Enacting a statute of repose to run from a specified date, as has been done in Oregon and Utah, will undoubtedly relieve the manufacturers' fear of suits on products manufactured in the distant past. The problem is that certain claims which are indisputably meritorious would be barred before the injury occurred or even before the user purchased the product.[64]

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61. W. PROSSER, HANDBOOK OF THE LAW OF TORTS (4th ed. 1971). It is quite common for a "statute of repose" to be confused with a statute of limitation. While the former bars an action after a period from some fixed date *(e.g.* the manufacture of the product) a statute of limitation merely bars a suit from the time the action arises *(e.g.* from the time injury occurred). See F. Finlinson, Utah Product Liability Act, A Practical Resolution of a Crisis (1977) (unpublished address available from Sen. Fred W. Finlinson of the Utah Legislature), for an example of the confusion between statutes of repose and statute of limitation.

62. OR. REV. STAT. §30-905 (1977); UTAH CODE ANN., §78-15-3 (Supp. 1977).

63. The statute of repose is clearly analogous to §2-725 of the Uniform Commercial Code, which provides that an action for breach of contract must be commenced within four years of delivery of the product.

64. The problem with statutes of repose can best be understood when applied to cases where the injury does not occur until long after the product was manufactured. Many suits against drug companies might be barred because the side-effects of use of a prescribed drug may not appear long after the drug was ingested. Injuries caused by contraceptives might not appear until long after the tolling of a statute of repose. *Cf.* Roginsky v. Richardson-Merrill, Inc., 378 F.2d 832 (2nd Cir. 1967); Sterling Drug, Inc. v. Cornish, 370 F.2d 82 (8th Cir. 1966); Tinnerholm v. Parke-Davis & Co., 285 F. Supp. 432 (S.D.N.Y. 1968); Toole v. Richardson-Merrill, Inc., 251 Cal. App. 2d 689, 60 Cal. Rptr. 398 (1967) (contraceptive cases that might be barred by statute of repose). The same problem could occur with cases seeking recovery for injuries caused by heavy industrial machinery whose normal lifespan may be in excess of the statute of repose.

It would seem that the Utah and Oregon legislatures have decided that the value of reduced insurance cost to the manufacturers and ultimately to the consumer justify placing the full weight of some product related injuries upon the injured parties.[65] Constitutional challenges to such statutes can be predicted,[66] and one must wonder whether less severe remedies can be found which would accomplish the goal of limiting claims in a more equitable manner.[67] Such a solution seems utterly incompatible with the goals of the tort system, namely to ensure that a person injured by an unsafe product received reasonable compensation for his or her injuries.

A feature common to the Utah and Oregon legislative attempts to control product liability actions is the establishment of a statutory "misuse defense." Under the Oregon statute, the defense is applicable when an alteration or modification (1) was made without the consent of the manufacturer or made in a manner inconsistent with instructions; (2) was a substantial contributing cause of the injury; and (3) was made in the face of an adequate warning by the manufacturer, distributor or seller, provided the modification was not reasonably foreseeable.[68] The Utah statute couches the defense in terms of an alteration or modification which is a "substantial contributing cause of the injury . . . and which change the purpose, use, function, design or intended use or manner of use of the product" as originally designed.[69]

The misuse defense, as codified by the Oregon legislature, is little more

65. *See* UTAH CODE ANN., §78-15-1 (Supp. 1977).

66. The proposed statutes of repose in the product liability sphere are analogous to similar legislation limiting the liability of architects and contractors. Such legislation has been overturned on constitutional grounds in five states. Bagby Elevator & Elec. Co. v. McBride, 292 Ala. 191, 291 So. 2d 306 (1974); Skinner v. Anderson, 38 Ill. 2d 455, 231 N.E.2d 588 (1967); Fujioka v. Kam, 55 Haw. 7, 514 P.2d 568 (1973); Saylor v. Hall, 497 S.W.2d 218 (Ky. 1973); Kallas Millwork Corp. v. Square D Co., 66 Wis. 2d 382, 225 N.W.2d 454 (1975). Eleven states have found these statutes of repose to be constitutional. Grissom v. North American Aviation, Inc., 326 F. Supp. 465 (M.D. Fla. 1971); Reeves v. Ille Elec. Co., 551 P.2d 647 (Mont. 1976); O'Connor v. Altus, 67 N.J. 106, 335 A.2d 545 (1975); Yakima Fruit & Cold Storage Co. v. Central Heat & Plumbing Co., 81 Wash. 2d 528, 503 P.2d 108 (1972); Rosenburg v. Town of North Bergen, 61 N.J. 190, 293 A.2d 662 (1972); Smith v. Allen-Bradley Co., 371 F. Supp. 698 (W.D. Va. 1974); Carter v. Hartenstein, 247 Ark. 1172, 455 S.W.2d 918 (1970); Carr v. Mississippi Valley Elec. Co., 285 So. 2d 301 (La. App. 1973); Nevada Lakeshore Co. v. Diamond Elec., Inc., 89 Nev. 293, 511 P.2d 113 (1973); Good v. Christensen, 527 P.2d 223 (Utah 1974); Josephs v. Burns, 260 Or. 493, 491 P.2d 203 (1971); Freezer Storage, Inc. v. Armstrong Cork Co., 234 Pa. Super. 441, 341 A.2d 184 (1975). *Cf.* Silver v. Silver, 280 U.S. 117 (1929); New York Cent. R.R. v. White, 243 U.S. 188 (1917), which recognized that legislatures possess the power to modify or abolish common law rights of action. *See* 5 LEGAL STUDY, *supra* note 15, at 1-17.

67. One such remedy might be a "useful life" limitation. Such an enactment would limit a manufacturer's liability for product-related injuries to a certain number of years after the product was sold. For an analysis and assessment of this approach toward limiting a manufacturer's liability *see* 4 LEGAL STUDY, *supra* note 15, at 19-33.

68. OR. REV. STAT. §30-915 (1977).

69. UTAH CODE ANN., §78-15-5 (Supp. 1977).

than a refinement of existing tort principles. Under present law in most states, a plaintiff's misuse of a product can be asserted as a defense in a product liability action if the misuse was not foreseeable at the time of the product's manufacture.[70] To recover in a strict tort action, the plaintiff must prove that the product was defective and that the defect caused the injury. If a manufacturer or seller can demonstrate that the plaintiff misused the product in a manner not foreseeable, then this misuse may prove that the product was not defective or that the defective product did not cause the plaintiff's injury.

A misuse defense can involve one of several approaches. For example, a statute could codify the defense in terms of a user's failure to heed a manufacturer's warning. The Utah and Oregon statutes take a different approach by concentrating on alteration or modification of the product. A very strong argument for such a defense can be articulated since an analysis of the policy considerations underlying adoption of strict tort recovery support the existence of this defense. One of major reasons for adoption of strict tort liability was to provide incentives for the manufacturer to produce safe products.[71] Recovery by a user who was injured after a product was modified or altered is no incentive for a manufacturer to make safer products. If the manufacturer cannot foresee the alteration or modification, the manufacturer cannot protect himself from liability by manufacturing a product which will not cause injury. The crucial concept is "foreseeability." The Oregon statute creates the defense in cases of foreseeable use only when the manufacturer has warned the user of the danger. Arguably, if a consumer is given a warning, the consumer should be responsible for any injuries caused by the consumer's failure to heed the warning.

The Utah statute is perhaps less defensible as a means of limiting product liability recoveries. The Utah enactment does not take into account the possibility that a product may be put to a use which was not intended, yet was foreseeable. Under the rationale for strict tort recovery, injuries caused by uses which are foreseeable can be prevented by a change in design by the manufacturer. If the rationale for recovery in strict tort is still valid, the Utah statute should have taken into account the possibility of foreseeable alterations or modifications.

A major complaint of manufacturers has been that, in judging whether a product is unreasonably dangerous, and thus defective, at the time the product was sold, the courts have viewed their products in light of current technology, knowledge, or safety standards. Several of the protections created by the state legislation would exonerate a manufacturer if his product conformed to either industry norms or governmental standards in existence at the time the product was sold.

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70. OR. REV. STAT. §30-915 (1977).

71. *See supra* note 1.

Both protections are present in the Colorado statute.[72] The statute creates a rebuttable presumption that the product which caused the injury was not defective and the manufacturer or seller was not negligent if the product:

> (a) Prior to sale by the manufacturer, conformed to the state of the art, as distinguished from industry standards, applicable to such product in existence at the time of sale; or
> (b) Complied with, at the time of sale by the manufacturer, any applicable code, standard, or regulation adopted or promulgated by the United States, or by this state, or by any agency of the United States or of this state.[73]

The Utah statute further creates the rebuttable presumption that the product was defective if it fails to comply with government standards,[74] and thus contains only the rebuttable presumption dealing with conformity to government standards and not industry standards.[75]

One serious difficulty with the Colorado statute is that the term "state of the art" is a confusing one for the courts.[76] In the past, courts have equated the term with common industry standards or customs,[77] while other courts have taken a broader view of the term.[78] The latter courts understand the term to include consideration of the feasibility or practicality of making changes in the product which will make it more safe. While the Colorado statute seems to demand the broader definition of "state of the art," the exact breadth of the term will be left largely to judicial interpretation.

A second problem with regard to the Colorado statute may be the possibility that the state of the art presumption will conflict with the government standards presumption. Clearly, a product could comply with the state of the art and not comply with government standards, or vice versa. If this were to happen, the courts are given no guidance. Conceivably, the courts could decide to ignore both presumptions, but it is just as probable that a court would choose to apply one or the other standard. The choice could turn on the governmental interest in upholding governmental standards; or the choice could turn on a judicial decision that the higher standard should apply.

Aside from these construction problems, a more fundamental question

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72. COLO. REV. STAT., §13-21-403(1) (Supp. 1978).
73. *Id.*
74. UTAH CODE ANN., §78-15-6(3) (Supp. 1977).
75. *See* 5 LEGAL STUDY, *supra* note 15, at 101-125.
76. *Id.* at 102.
77. *See, e.g.*, Lunt v. Brady Mfg. Corp., 13 Ariz. App. 305, 475 P.2d 964 (1970); Wagner v. Coronet Hotel, 10 Ariz. App. 296, 458 P.2d 390 (1969); Horn v. General Motors Corp., 17 Cal.3d 359, 551 P.2d 398, 131 Cal. Rptr. 78 (1976).
78. *See, e.g.*, Badorek v. General Motors Corp., 11 Cal. App. 3d 902, 90 Cal. Rptr. 305, 328 (1920); Sutkowski v. Universal Marion Corp., 5 Ill. App. 3d, 281 N.E.2d 749 (1972).

is whether there is a need for such presumptions. At the present time, all states, with the possible exception of Illinois,[79] appear to agree that the feasibility of alternative designs is an important factor in determining whether a product is defective.[80] Likewise, government safety standards may be introduced as evidence in support of the defendant's position that a product was not defective at the time it was marketed.[81] One must question what impact these presumptions will actually have on rising insurance costs and product liability claims.

The primary question remains whether the state of the art or government standards presumptions will reduce the current high costs of product liability insurance. Since courts have usually given consideration to government standards, industry customs, and the feasibility of making design changes in deciding whether a product was defective or a manufacturer or seller was negligent, the impact of such presumptions may be negligible. A second practical consideration with regard to the government standards presumption is the possibility that few safety standards will be promulgated at either the federal or state level.[82] Moreover, safety standards can never anticipate every circumstance in which a product might be dangerous in normal use. Safety standards can quickly become obsolete, and courts would have to be aware of this possibility. Despite these arguments, the idea of rebuttable presumptions in favor of manufacturers and sellers does not seem unreasonable. Such presumptions serve as no "more than a minimum or 'floor,' below which product-related dangers are intolerable."[83]

Each of the reviewed statutes contains a number of provisions which are unique to that particular state. One such provision is a clause in the Utah law which prohibits a plaintiff in a product liability action from claiming dollar damages of a specific amount,[84] although a plaintiff would not be prevented from arguing actual dollar amounts at trial. Sponsors of the Utah act felt that by prohibiting the plaintiff from alleging specific damages plaintiffs could be prevented from using large damages claims to coerce the manufacturer or insurer into a quick settlement.[85] Utah's elimination of the ad damnum clause seems to be an innocuous change in

79. *See, e.g.*, Cunningham v. MacNeal Memorial Hosp., 47 Ill. 2d 443, 266 N.E.2d 897 (1970); Gelsumino v. E.W. Bliss Co., 10 Ill. App. 3d 604, 295 N.E.2d 110 (1973); McKasson v. Zimmer Mfg. Co., 12 Ill. App. 3d 429, 299 N.E.2d 38 (1973); Stanfield v. Medalist Indus., Inc., 34 Ill. App. 635, 340 N.E.2d 276 (1975). *See also* 4 LEGAL STUDY *supra* note 15, at 104-107.

80. 4 LEGAL STUDY, *supra* note 15, at 107.

81. 4 LEGAL STUDY, *supra* note 15, at 127-153.

82. This has been generally true of the Consumer Product Safety Commission. *See, e.g.*, Jackson, *The Relaxed Regulator*, 12 TRIAL 12 (May 1976).

83. 4 LEGAL STUDY, *supra* note 15, at 131.

84. UTAH CODE ANN., §78-15-4 (Supp. 1977).

85. F. Finlinson, Utah Product Liability Act, A Practical Resolution of a Crisis 7 (1977) (unpublished address available from Sen. Fred W. Finlinson of the Utah Legislature).

product liability law since a damage claim should never be used to coerce the defendant. If the conclusion the Utah legislature reached is correct, the provision may eliminate some psychological advantage that would operate in favor of the plaintiff.

Another distinctive provision, peculiar to the Colorado statute, is the creation of a rebuttable presumption that a product was not defective and the manufacturer and seller were not negligent ten years after the product is first sold.[86] This presumption is closely analogous to the state of the art and government standards presumptions also codified in the Colorado act.[87] The same criticism of these other presumptions can be raised against the "ten years from sale" presumption. First, there is the question of whether such a presumption is needed since evidence of the product's age is generally admissible to show that a product has been in use and was not apparently defective from the time of purchase. Second, there could be a conflict between this presumption and either of the two presumptions above mentioned. In such event, the statute provides no guidance for the courts. Third, the ten year period seems somewhat arbitrary since many goods, such as industrial machinery, may have a useful life of ten or twenty years, and a defect may not show up until the ten year period has passed. At the same time, this presumption seems much more reasonable than the arbitrary statute of repose enacted in Utah. The Colorado presumption would set up a barrier to liability actions after ten years from the date the product was purchased new but would not absolutely bar a suit for damages when a defect was proved after the ten year period.

An unusual response to the conceived need to restrict recovery in strict tort actions is the Colorado provision which bars product liability actions, based on the doctrine of strict liability, against any "seller" of an allegedly defective product.[88] With the exception of the cases in which the seller is also the manufacturer of the product, the seller has actual knowledge of the defect, or the seller furnishes the manufacturer with specifications, the "seller" will not be liable in product liability actions brought in strict tort. Since this provision has no apparent effect on an injured party's claims based on negligence or warranty, its effectiveness is diluted.

IV. Conclusion

The three state enactments studied are the first state legislative efforts to ensure the availability of affordable product liability insurance. While state legislatures are aware that product liability claims are rising, the legislature can pinpoint no single cause of the rising dissatisfaction with the present system. As previously noted, solutions to the perceived prob-

86. Colo. Rev. Stat., §13-21-403(3) (Supp. 1978).
87. Colo. Rev. Stat., §13-21-403(1) (Supp. 1978).
88. Colo. Rev. Stat., §13-21-402 (Supp. 1978).

lem range from modifications of the insurance system to reformation of the tort system. The three recent enactments concentrate on the latter solutions.

The enactments of these legislatures manifest the common goal of restricting recovery by consumers and users in product liability actions, but the approaches are strikingly different. The Utah and Oregon enactments place the most severe restriction on such actions by barring all actions at some pre-established time after the product was first bought. The Colorado statute only creates a rebuttable presumption that a product was not defective ten years after the product was sold. The Colorado statute represents an attempt at reforming the tort system which does little more than redefine various evidentiary rules to the advantage of the manufacturer or insurer. On the other hand, the Utah statute, and to a degree the Oregon enactment, represent more far-ranging attempts to modify the tort system.

The short-term effect these statutes will have on rising insurance costs is probably negligible. As expressed by the Interagency Task Force, "even immediate changes in existing tort law would likely have little if any immediate impact on the availability or affordability of product liability insurance."[89] Insurers will still be concerned about claims filed before the effective date of the legislation and manufacturers are likely to take a "wait and see" attitude in order to learn how the reforms will actually work. Moreover, reformation undertaken in three relatively small states will have little or no impact on insurance rates until other states such as California or New York move to restrict recoveries in product liability actions.

While recognizing the limited effect these statutes will have, they represent important first efforts to restrict recoveries in product liability actions. These statutes evidence a concern that courts will expand strict liability doctrines even further to increase exposure of insureds and a growing resistance to expansion of these doctrines. While the effectiveness of these statutes will depend upon such factors as judicial interpretation and application of conflict of law principles, study of these enactments after they have been in effect for several years may point to other means of ensuring the availability of affordable product liability insurance while at the same time providing reasonable compensation to persons injured by unsafe products.

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89. 1 LEGAL STUDY, *supra* note 15, at 20.