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Date-of-Sale Statutes of Limitation: An Effective Means of Implementing Change in Products Liability Law?

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Notes

DATE-OF-SALE STATUTES OF LIMITATION: AN EFFECTIVE MEANS OF IMPLEMENTING CHANGE IN PRODUCTS LIABILITY LAW?

In the face of a growing inability of manufacturers to procure products liability insurance at less than exorbitant rates, several states have passed date-of-sale statutes of limitation which specify that, upon expiration of a designated time period measured from the date of original purchase, an injured party can no longer bring a products liability suit. Within the context of available choice of laws analyses, this Note traces the limited impact of the date-of-sale statutes in a multistate products liability suit. The Note also anticipates the due process and equal protection challenges that may be raised by potential plaintiffs barred from recovery by virtue of this historically procedural device. The Note concludes that even assuming the date-of-sale statutes can withstand constitutional challenges, to the extent that their use in a multistate suit can be avoided through selection of a choice of laws approach, the new statutes can hardly be expected to stay the soaring costs of products liability insurance.

INTRODUCTION

IN THE PAST FEW YEARS, products liability suits have become rather common events,[1] accompanied by a rise both in the size and frequency of damage awards.[2] Consequently, the cost of products liability insurance, which is the primary means of indemnifying defendant manufacturers in products liability actions, has soared.[3]

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1. The number of products liability suits being filed in district courts, for example, grew from 1,579 in 1974 to 3,696 in 1976—an increase of 134%. U.S. DEP'T OF COMMERCE, INTERAGENCY TASK FORCE ON PRODUCT LIABILITY, FINAL REPORT, II-44 (1977) [hereinafter cited as FINAL REPORT]. Connecticut, the only state to record docket lists of products liability cases, reported a 58% increase in the number of such cases brought between 1974 and 1976. *Id.* at II-45.

The advertising media, consumer research organizations such as the Consumer Product Safety Commission, testing laboratories, and doctors are helping to educate the public with respect to its legal rights in the field of products liability. *Id.* at I-29. The response has been enthusiastic: that public "which has been persuaded to buy with enthusiasm is just as eager to impose liability if the product does cause harm." 1 L. FRUMER & M. FRIEDMAN, PRODUCTS LIABILITY §§ 1-5 (1978).

2. In a sample survey of state products liability suits, the Interagency Task Force found a trend toward recovery of greater monetary damages by injured parties. While the average damage award in the period 1965-70 was $104,202, the average award in the 1971-76 period increased to $221,514. FINAL REPORT, *supra* note 1, at II-56.

3. Manufacturers view the increase in insurance costs as the result of more frequent litigation and higher plaintiff awards, which in turn are due to the judicial tendency to

The manufacturing industry has been waging a vigorous campaign to convince state governments, the public, and the legal community that its inability to obtain insurance at reasonable rates has reached crisis proportions.[4] Consumers have alleged, however, that business, in close alliance with its insurers, is creating a panic situation[5] based on unsupported assertions that products liability insurance has become either unaffordable or totally unavailable.[6]

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favor compensation, especially in doubtful cases. Phillips, *An Analysis of Proposed Reform of Products Liability Statutes of Limitations*, 56 N.C.L. REV. 663 (1978).

4. As far back as 1971, G.L. Maatman, president of the National Loss Control Service Corp., in an address to the Second Annual Conference on Product Liability Prevention, commented:

> The products liability insurance crunch has yet to reach its peak. More and more manufacturers are going to find it increasingly difficult to obtain primary insurance coverage at any price . . . . The solution may very well be ultimately dependent on the willingness of legislative and judicial branches of government to grant legal relief to manufacturers and sellers of products.

Is "No-Fault" Products Liability Coming?, IRON AGE, September 9, 1971, at 29. Thus, the manufacturers argue that in view of the crippling costs of insurance needed to compensate plaintiffs, the law of products liability should be reformulated. The objective of their resultant lobbying has been the passage of new statutes of limitation for products liability actions. *See, e.g.*, BUSINESS WEEK, January 17, 1977, at 62; FORBES, June 15, 1976, at 52 (advertisement); NATION'S BUSINESS, June, 1977, at 24.

5. Insurance companies explain this "panic situation" by asserting that products liability insurance rates were too low from 1971 to 1974. With stock market declines in 1973–74, the industry sustained heavy losses, which reduced its policyholder surplus and thereby diminished its underwriting capacity. The substantial increase in products liability insurance premiums which followed was a direct response to these losses. FINAL REPORT, *supra* note 1, at I-23.

6. The consumers' position was summarized by Ralph Nader in his testimony before the Senate Select Committee on Small Business on December 8, 1976. Responding to insurers' claims of a financial crisis, Nader asserted:

> The usual techniques of the insurance industry, when it wishes to stampede the policymakers into precipitious decision, is to dramatically hike the premiums for a number of clients, who then in turn rush to their legislators with their real grievances . . . . The cost of insurance is not in itself a reason to limit consumer rights in the courts, but when this so-called insurance financial crisis is not even documented, one can be even more skeptical of what the industry is asking for.

Product Liability Problems Affecting Small Business: Hearings Before the Senate Select Comm. on Small Business, 94th Cong., 2d Sess. 1584–85, 1591 (1976) (statement of Ralph Nader).

The issue of whether a problem of crisis proportions actually exists in products liability remains unanswered. However, the Interagency Task Force Report on Products Liability, the most comprehensive analysis on the topic to date, provides some insight into the current status of the alleged products liability cases. In its 1977 Final Report, the Task Force reported that the dearth of data both on products liability insurance and the insurance industry precluded any finding of a crisis with respect to manufacturers' inability to purchase products liability policies. FINAL REPORT, *supra* note 1, at XXXV. The Task Force did, however, discover substantial increases in the cost of products liability insurance to manufacturers since 1974. *Id.* at XXXVI. Nevertheless, neither the increased premiums nor the proliferation of products liability litigation could be characterized as a problem of

Although the exact cause of rising products liability insurance rates remains an enigma, the costs associated with insurance coverage and products liability litigation have risen substantially in recent years.[7] Therefore, it is not surprising that the manufacturing industry has been taking steps to remedy the problem of products liability insurance costs. The most visible result of the manufacturers' lobbying efforts has been the enactment by a number of states of statutes of limitation pertaining specifically to products liability actions.[8] The newly enacted statutes of limita-

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crisis proportions within the insurance industry, despite that industry's claimed inability to meet the costs and risks of providing comprehensive products liability insurance to all manufacturers. *Id.* at XXXVII.

7. *Id.* at II–44, II–56.

8. Since 1977, 18 states have considered legislative reforms in products liability, with respect to new statutes of limitation. Bivins, *The Products Liability Crisis: Modest Proposals for Legislative Reform*, 11 AKRON L. REV. 595, 611 (1978); Comment, *Statutes of Repose in Products Liability: The Assault Upon the Citadel of Strict Liability*, 23 S.D.L. REV. 149 (1978).

The following jurisdictions have enacted date-of-sale statutes of limitation:

(1) *Colorado*:

> [T]en years after a product is first sold for use or consumption, it shall be rebuttably presumed that the product was not defective and that the manufacturer or seller thereof was not negligent and that all warnings and instructions were proper and adequate.

COLO. REV. STAT. § 13–21–403(3) (1977).

(2) *Connecticut*:

> No action to recover damages for injury to the person or to real or personal property caused by any product in a defective condition shall be brought against one who manufactures [or] sells . . . any such product but within three years from the date when the injury is first sustained, discovered or in the exercise of reasonable care should have been discovered except that no such action may be brought later than eight years from the date-of-sale, . . . of such product.

CONN. GEN. STAT. ANN. § 52–577a (West Supp. 1978).

(3) *Florida*:

> Actions for products liability . . . must be begun within the period prescribed in this chapter, with the period running from the time the facts giving rise to the cause of action were discovered or should have been discovered . . . but in any event within 12 years after the date of delivery of the completed product to its original purchaser . . . .

FLA. STAT. ANN. § 95.031(2) (West Supp. 1978).

(4) *Indiana*:

> [A]ny product liability action must be commenced within two (2) years after the cause of action accrues or within ten (10) years after the delivery of the product to the initial user or consumer . . . .

IND. CODE ANN. § 33–1–1.5–5 (Burns 1978).

(5) *Kentucky*:

> In any product liability action, it shall be presumed, until rebutted by a preponderance of the evidence to the contrary, that the subject product was not defective if the injury, death or property damage occurred either more than five (5) years after the date of sale to the first consumer or more than eight (8) years after the date of manufacture.

KY. REV. STAT. ANN. § 411.310 (Baldwin 1978).

(6) *Nebraska*:

tion begin to run upon delivery of a product to its original purchaser.[9] Upon expiration of the statutory time period, measured from the date of original purchase, a products liability action can no longer be maintained by an injured party.[10]

Manufacturers contend that by designating a specific time period during which suit must be brought, date-of-sale statutes of limitation provide them, at last, with a reasonable standard for predicting their potential liability, especially with respect to older

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(1) All product liability actions shall be commenced within four years next after the date on which the death, injury, or damage complained of occurs. (2) Notwithstanding subsection (1) . . . any product liability action, except one governed by section 2-725, Uniform Commercial Code, shall be commenced within ten years after the date when the product which allegedly caused the personal injury, death, or damage was first sold or leased for use or consumption.

NEB. REV. STAT. § 25-224(1)-(2) (1978).

(7) *Oregon*:

[A] product liability civil action shall be commenced not later than eight years after the date on which the product was first purchased for use or consumption.

OR. REV. STAT. § 30.905(1) (1977).

(8) *Tennessee*:

Tennessee law provides that products actions be brought within either ten years from date of first sale or within one year after expiration of anticipated life of the product, whichever is shorter. Tennessee Products Liability Act of 1978, 1978 Tenn. Pub. Acts ch. 703.

(9) *Utah*:

"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 initial purchase for use or consumption, or ten years after the date of manufacture, of a product . . . ."

UTAH CODE ANN. § 78-15-3 (1977).

9. The statutes of limitation traditionally employed in tort actions do not begin running until the injury itself is sustained. Note, *Developments in the Law: Statutes of Limitations*, 63 HARV. L. REV. 1178, 1185 (1949).

10. Among the date-of-sale statutes of limitation enacted by nine jurisdictions, several distinctions are noteworthy. First, the time period during which an action may be brought ranges from five to twelve years after the initial sale of the product. *See* note 8 *supra*. Second, the statutes are structured differently. Several states have formulated limits based on the date of manufacture. *E.g.*, Utah, UTAH CODE ANN. § 78-15-3 (1977). Other states have imposed limits which reflect the anticipated life of the particular product. *E.g.*, Tennessee, Tennessee Products Liability Act of 1978, 1978 Tenn. Pub. Acts ch. 703. A number of jurisdictions have chosen to supplement their traditional date-of-injury limitations by tacking on a date-of-sale limitation as an additional restriction upon the ability to maintain a products liability action. *E.g.*, Connecticut, CONN. GEN. STAT. ANN. § 52-577a (West Supp. 1978); Florida, FLA. STAT. ANN. § 95.031(2) (West Supp. 1978); Indiana, IND. CODE ANN. § 33-1-1.5-5 (West Supp. 1978); Nebraska, NEB. REV. STAT. § 25-224(1)-(2) (1978). Still other states have formulated their date-of-sale statutes of limitation in the form of rebuttable presumptions. Under these statutes, upon expiration of a statutory period commencing with the date of sale, a product is presumed to be nondefective; to maintain a products liability action a plaintiff must rebut the presumption by a preponderance of the evidence. *E.g.*, Colorado, COLO. REV. STAT. § 13-21-403(3) (1977); Kentucky, KY. REV. STAT. ANN. § 411.310 (Baldwin 1978).

products.[11] Conversely, consumer groups view the manufacturers' campaign to secure date-of-sale limitations as nothing short of a "corporate assault . . . a major, fundamental, determined drive to codify in a strangulatory manner the frontiers of common law in products liability."[12]

Irrespective of the impetus behind their passage, date-of-sale statutes represent a rethinking of the policy considerations which underlie the strict liability principles presently applied in products liability cases. Under the strict liability approach to product-related injuries, the economic burden is placed upon the manufacturers under the theory that it will be treated "as a cost of production against which liability insurance can be obtained."[13] It is no longer clear, however, that manufacturers are able to obtain insurance at rates which can be internalized as a cost of production and still remain competitive.[14] Under the date-of-sale concept, manufacturers continue to absorb the cost of insuring against the risk of product-related injuries but the duration of such risk is expressly limited to the statutory period. The manufacturers hope that this reduction in risk will lead to a commensurate reduction in the cost of insurance, which they can effectively pass on to consumers as a cost of production.[15]

Because date-of-sale statutes represent a radical change in products liability law, they are likely to be a source of lively controversy between disgruntled consumers and relieved manufacturers. With a number of these new statutes taking effect in the past year,[16] conflicts arising from their application to products liability actions are bound to move into the courts for ultimate resolution.

The broad purpose of this Note is to assess the viability of the

11. Proponents of date-of-sale limitations argue that this mechanism "would merely restore a balance of benefits and burdens in the marketplace, that there have been an inordinate number of suits involving older products, and that manufacturers should no longer be required to bear an unreasonable share of the risk involved in the use of their products." Massery, *Date-of-Sale Statutes of Limitations—A New Immunity for Product Suppliers*, 1977 INS. L.J. 535, 542 (1977).

12. Nader, *The Corporate Assault on Products Liability: A Call To Action*, TRIAL, October, 1977, at 38. Nader characterizes the attack on products liability as an attempt by insurers to save money, a dislike for the decentralized decisionmaking of the courts, and a concern on the part of insurers that heretofore secret information will be made public. *Id.* at 39.

13. RESTATEMENT (SECOND) OF TORTS § 402A, Comment c (1962).

14. Comment, *supra* note 8, at 165.

15. FINAL REPORT, *supra* note 1, at XXXVI.

16. *E.g.*, CONN. GEN. STAT. ANN. § 52–577a (West Supp. 1978); FLA. STAT. ANN. § 95.031(2) (West Supp. 1978); IND. CODE ANN. § 33–1–1.5–5 (West Supp. 1978).

date-of-sale statutes of limitation and their ability to withstand impending judicial scrutiny. First, this Note investigates the usefulness of the date-of-sale limitations in the multistate products liability suit.[17] With increasing nationwide distribution and regional manufacture of products, the involvement of more than one jurisdiction in a single products liability action has become common. The multistate context raises important conflicts of law considerations which this Note addresses.

Second, this Note assesses the ability of the date-of-sale statutes to withstand scrutiny under the federal and state constitutions.[18] Due process and equal protection challenges are likely in view of the durational limit which the date-of-sale concept imposes on the consumers' ability to maintain a products liability action.[19]

The Note concludes that even assuming that the date-of-sale statutes are able to withstand constitutional scrutiny, the lack of uniformity with respect to their use in a multistate products liability suit renders them devices of limited utility—not only as a means to protect the manufacturers of a product but also as a means to stay the soaring costs of products liability insurance.[20]

I. THE DEVELOPMENT OF STATUTES OF LIMITATION IN PRODUCTS LIABILITY LAW

A. *Early Attempts to Identify the Proper Cause of Action: Tort or Contract?*

The law of products liability, which presently imposes strict liability upon the manufacturer of a defective product,[21] evolved

17. *See* notes 60–111 *infra* and accompanying text. For a comprehensive discussion of the conflicts of laws issue, see Phillips, *An Analysis of Proposed Reform of Products Liability Statutes of Limitation*, 56 N.C.L. REV. 663, 672 (1978) and Note, *State Legislative Restrictions on Product Liability Actions*, 29 MERCER L. REV. 619, 634 (1978).

18. *See* notes 112–41 *infra* and accompanying text.

19. For additional discussions of possible constitutional obstacles, see Massery, *supra* note 11, at 545–49; Phillips, *supra* note 17, at 673; Student Symposium, *Products Liability: 1978 Survey of Recent Developments in Indiana Law*, 12 IND. L. REV. 227, 251–53 (1978); Comment, *supra* note 8, at 174–76.

20. *See* notes 142–52 *infra* and accompanying text.

21. *E.g.*, Greenman v. Yuba Power Prods. Inc., 59 Cal. 2d 27, 377 P.2d 897, 27 Cal. Rptr. 697 (1963). *See generally* Carmichael, *Strict Liability in Tort—An Explosion in Products Liability Law*, 20 DRAKE L. REV. 528 (1971); Noel, *Manufacturers of Products—The Drift Toward Strict Liability*, 24 TENN. L. REV. 963 (1957); Plant, *Strict Liability of Manufacturers for Injuries Caused by Defects in Products: An Opposing View*, 24 TENN. L. REV. 938 (1957); Prosser, *The Fall of the Citadel: Strict Liability to the Consumer*, 50 MINN. L. REV. 791 (1966); Traynor, *The Ways and Means of Defective Products and Strict Liability*,

from two causes of action, one sounding in negligence[22] and the other based on breach of an implied warranty.[23] Until 1963,[24] the major controversy with respect to statutes of limitation centered upon whether, in products-related suits, a tort or contract statute should apply. This question was resolved according to the injured plaintiff's theory of recovery. For instance, in suits brought under a negligence theory of recovery, the prevailing view was that a tort type of limitation should control. Thus, the statute of limitation would begin to run on the date of the personal injury or property damage.[25]

Tort statutes of limitation were applied with relative ease in suits brought on a theory of negligence. By contrast, courts apparently were in a state of flux about what kind of statute of limitation should prevail in suits premised on a breach of warranty theory.[26] One reason suggested for the uncertainty over the use of the warranty theory was the hybrid character of the remedy;[27] essentially, the remedy originated in tort but was developed as an action in contract. In such cases, some courts took the position that a breach of warranty action originated in the manufacturer's

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32 TENN. L. REV. 363 (1965); Wade, *On the Nature of Strict Tort Liability for Products*, 44 MISS. L.J. 825 (1973).

22. Under this approach, liability attached to anyone who manufactured or sold any product reasonably capable of inflicting substantial harm if defectively made. *E.g.*, Smith v. S.S. Kresge Co., 79 F.2d 361 (8th Cir. 1935); Simmons Co. v. Hardin, 75 Ga. App. 420, 43 S.E.2d 553 (1947).

23. Traditionally, a cause of action brought for breach of an implied warranty required the presence of privity of contract between seller and purchaser. *See, e.g.*, Huset v. J.I. Case Threshing Mach. Co., 120 F. 865 (8th Cir. 1903), which followed the rule that a contractor or manufacturer shall not be held liable to third parties with whom it does not have a contractual relation for negligence in the construction, manufacture, or handling of his products. The court expressed the policy behind the privity requirement as follows:

> [T]here must be a fixed and definite limitation to the liability of manufacturers and vendors for negligence in the construction and sale of complicated machines and structures which are to be operated or used by the intelligent and the ignorant that cannot be known to the manufacturers or vendors, and who use the articles all over the country hundreds of miles distant from the place of their manufacture or original sale . . . .

Id. at 867.

24. In 1963, one court expressly recognized that responsibility for defective products was to be governed not by contract warranties but by the law of strict liability in tort. Greenman v. Yuba Power Co., 59 Cal. 2d 27, 377 P.2d 897, 27 Cal. Rpt. 697 (1963). Other courts eventually adopted the approach. *See* notes 34–38, 60–61, and 73 *infra* and accompanying text.

25. *See generally*, Comment, *Choice of Law: Statutes of Limitations in the Multi-State Products Liability Case*, 48 TUL. L. REV. 1130 (1974); Note, *Statutes of Limitation: Their Selection and Application in Products Liability Cases*, 23 VAND. L. REV. 775 (1970).

26. Note, *supra* note 25, at 782.

27. *Id.*

breach of contract, thus requiring that a contract limitation, running from the date of sale of the injurious product, be used.[28] Other courts chose to emphasize the nature of the plaintiff's injury and applied a tort statute of limitation.[29]

The early controversy over the use of tort or contract statutes of limitation was indicative of two competing policy considerations in the products liability setting. The use of a contract limitation, running from the date of a product's sale, set an explicit time limit upon an injured party's ability to sustain a products liability claim. As such, it functioned as a device to eliminate stale claims. In contrast, the use of a tort statute, which would not begin to run until an injury was sustained, reflected less of an attitude toward protecting potential defendants from possible stale claims and more of an effort to preserve the injured plaintiff's right of redress, regardless of how long after manufacture the injury occurred.

The dispute over the proper statute of limitation for products liability claims thus reflected an inability to solve the more basic issue of substantive liability—whether a products liability cause of action should be viewed as an action in tort, for which the right to compensation should be stressed, or as an action for breach of contract, for which specific rights and liabilities should be delineated.[30]

B. *Strict Liability: A Solution to the Tort Versus Contract Dispute over Statutes of Limitation*

The creation of the strict liability in tort doctrine in 1963 was perceived as the solution to the prior controversy over statutes of limitation. With the adoption of a single products liability cause of action in all jurisdictions, it was assumed that "the confusion in

28. *Id. See, e.g.*, Mendel v. Pittsburgh Plate Glass Co., 25 N.Y.2d 340, 253 N.E.2d 207, 305 N.Y.S.2d 490 (1969), in which a six-year statute of limitation for contract actions was held to govern an action arising from an injury caused by the alleged faulty installation of a glass door. According to the court, the theory of recovery was based upon a breach of an implied warranty made by the defendant manufacturer that the goods were fit for their designed purpose. This theory of recovery justified application of a contract-type limitation commencing at the time of sale. *Id.* at 308, 253 N.E.2d at 210, 305 N.Y.S. 2d at 495.

29. *See, e.g.*, Chavez v. Kitsch, 70 N.M. 439, 374 P.2d 497 (1962), in which a personal injury statute of limitation was applied in an action for breach of express or implied warranty against a manufacturer of heating equipment. The court reasoned as follows: "When an action in its effect is one for the recovery of damages for personal injury, the statute of limitation for injuries to the person applies, even though the cause of action stated is *ex contractu* in its nature." *Id.* at 444, 374 P.2d at 500.

30. Note, *supra* note 25, at 791.

selecting and applying statutes of limitations in products liability cases [would] be largely eliminated."[31] Under the strict liability theory, the use of contract law statutes of limitation was to be abandoned; existing tort statutes of limitation applied in personal injury and property damage actions were to prevail in all products liability cases.[32] Furthermore, the strict tort doctrine provided, for the first time, some definite indication of the appropriate policies for the future development of products liability law. As stated in the *Restatement (Second) of Torts*:

> [T]he justification for the strict liability has been said to be that the seller, by marketing his product for use and consumption, has undertaken and assumed a special responsibility toward any member of the consuming public who may be injured by it; that the public has the right to and does expect, in the case of a product which it needs and for which it is forced to rely upon the seller, that reputable sellers will stand behind their goods; that the public policy demands that the burden of accidental injuries caused by products intended for consumption be placed upon those who market them, and be treated as a cost of production against which liability insurance can be obtained; and that the consumer of such products is entitled to the maximum of protection at the hands of someone, and the proper persons to afford it are those who market the products.[33]

Despite the tremendous potential of the strict tort concept for resolving the dispute over the proper statute of limitation and ending the underlying policy struggles, the doctrine was not readily accepted in all jurisdictions. As of 1970, only about one-half of the states were applying strict liability to injuries caused by all types of products.[34] The rest of the states, with the exception of Idaho and Louisiana, had indicated only partial support for the doctrine by adopting a variety of statutes which abrogated the privity requirement in certain products liability suits.[35]

Because of the failure of the strict liability doctrine to be universally adopted, the statute of limitation dilemma continued into the early 1970's. Some jurisdictions applied strict tort liability to

31. *Id.* at 788.

32. Dean Prosser emphasized that strict liability in tort is a theory of recovery unto itself, finding "no need to borrow a concept from the contract law of sales . . . . Why talk of it? If there is to be strict liability in tort, let there be strict liability in tort, declared outright, without any illusory contract mask." Prosser, *The Assault Upon the Citadel*, 69 YALE L.J. 1099, 1134 (1960).

33. RESTATEMENT (SECOND) OF TORTS § 402A, Comment c (1962).

34. W. SCHWARTZ, A PRODUCTS LIABILITY PRIMER 5 (1970).

35. *Id.* Under the privity requirement, recovery is limited to the product's original purchaser. W. PROSSER, HANDBOOK OF THE LAW OF TORTS 641 (4th ed. 1971).

all product-related cases,[36] others applied it only in certain situations,[37] and still others continued to rely on familiar contract principles in adjudicating such claims.[38] The problem intensified with increasing nationwide manufacture and distribution of products. The national character of industrial production meant that a number of different states could become involved in a single products liability suit when the situs of manufacture, distribution, sale, and injury were different.[39] The multistate products suit, with disparate statutes of limitation potentially available, created serious choice of law issues[40] which have influenced the development of products liability law in the 1970's.

C. *Multistate Products Liability Actions: The Continuing Statute of Limitation Dilemma*

The plethora of multistate products liability actions which arose in the early 1970's[41] again and again raised the question whether—in the context of a choice of law problem—a tort or contract statute of limitation was applicable in such actions. For example, a multistate suit might involve both a jurisdiction which had accepted strict liability in tort and a jurisdiction which applied a breach of warranty theory to cases involving defective products. This presented the problem of selecting the appropriate statute of limitation.[42] Conducting the necessary choice of laws analysis, courts were faced with the additional task of deciding which factors—place of injury, of manufacture, of sale, or of discovery of the defect—connecting the cause of action to a particular state, were to be decisive of the statute of limitation issue.[43] It has even been suggested that the choice of laws dilemma is incapable of resolution; neither traditional nor modern choice of law

36. As of mid-1973, these jurisdictions were: Alaska, Arizona, California, Connecticut, District of Columbia, Hawaii, Illinois, Indiana, Iowa, Kentucky, Louisiana, Minnesota, Mississippi, Missouri, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, Oregon, Pennsylvania, Rhode Island, South Dakota, Tennessee, Texas, Washington, and Wisconsin. 1 R. HURSH & H. BAILEY, AMERICAN LAW OF PRODUCTS LIABILITY § 4.41 (2d ed. 1974).

37. *Id.* Those states restricting the application of strict liability included Arkansas, Maryland, North Carolina, and South Carolina.

38. *Id.* Strict liability in tort was rejected in Delaware, Florida, Georgia, and North Dakota.

39. Comment, *supra* note 25, at 1142.

40. For a comprehensive analysis of the choice of law issue, see *id.*

41. *See* note 1 *supra.*

42. Comment, *supra* note 25, at 1142.

43. *Id.*

techniques yield a predictable means of determining which state's statute of limitation should govern in a given suit.[44]

Under a traditional conflict of laws analysis, the question of which jurisdiction's substantive law is to apply is resolved according to the conflicts rule of the forum state, the *lex fori*.[45] The conflicts statutes of most states call for application of the substantive law of the state where the action arose—the *lex loci delicti*—in products cases, the law of tort or contract.[46] The problem is complicated by the traditional characterization of a statute of limitation as a procedural matter,[47] thus governed according to the dictates of the *lex fori*. Therefore, in resolving the issues before it, a court is confronted with the contradiction between the substantive rule of law from one jurisdiction and the procedural rule of another jurisdiction,[48] with the additional complication that, in a products liability context, inconsistent results may occur.

For example, if a products liability suit were brought in State *A*, which has a tort statute of limitation, the tort limitation would be used. If in the same suit, however, the substantive law of State *B*, the state in which the cause of action arose, were to apply, and State *B* adhered to a warranty cause of action for products liability claims, State *A*'s tort limitation period could conceivably be measured from the date-of-sale of the injurious product,[49] rather than from the date of injury. The result of this interplay of traditional choice of law rules is a hybrid statute of limitation without allegiance to either tort or contract principles.[50]

The modern approaches to conflict of laws analysis, which are not restricted to the use of the standard *lex fori* and *lex loci delicti*

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44. *Id.*

45. Note, *supra* note 9, at 1260.

> This forum rule rests on the theory that general statutes of limitation, operating only to limit the time within which an action may be brought rather than to extinguish the underlying right, are rules of procedure . . . and reflect the forum's determination of the time after which its courts can no longer operate fairly and effectively.

Id.

46. *See, e.g.*, Alabama Great S. R.R. v. Allied Chem. Corp., 467 F.2d 679 (5th Cir. 1972) (forum state from which venue was changed applies law of the state where the cause of action arose, which provided that an action accrues at the time the defect becomes known).

47. Note, *supra* note 9, at 1187.

48. Alabama Great S. R.R. v. Allied Chem. Corp., 467 F.2d 679, 681 (5th Cir. 1972).

49. Comment, *supra* note 25, at 1142.

50. *Id.* at 1147. In such a situation, "the problem of characterization may result in a cause of action being barred before it has arisen." *Id.* (citing the result in Alabama Great S.R.R. Co. v. Allied Chem. Corp., 467 F.2d 679 (5th Cir. 1972)).

rules, do not fare much better when used to determine the proper statute of limitation to be applied in multistate products liability actions. For example, under the "contact" approaches,[51] the statute of limitation of the jurisdiction having the greatest number of contacts with the cause of action is used. However, there may be no one state with a greater number of contacts than the others,[52] a problem which this quantitative approach to choice of law decisionmaking is unequipped to solve.

Similarly, under modern approaches which defer to a forum state's "government interest" in a particular products liability action,[53] identifying which interest should prevail poses difficulties.[54] For example, the government's interest in protecting its consumers would require application of the law of the state in which the injury took place; however, an equally legitimate interest in product safety would favor application of the law of the state in which the injurious product was manufactured. In the early 1970's, this conflict between competing state interests became a serious obstacle to usefulness of the "government interest" approach[55] in products-related suits.

Finally, applying the "law most favorable to the plaintiff"[56] was suggested as an appropriate conflict of laws analysis. Its advocates asserted that, in the products liability context, the use of the statute of limitation most favorable to the injured party would

51. For the purposes of this Note, the "contact" approaches include the "center of gravity test", discussed in text accompanying notes 81-83 *infra*, and the "significant relationship test", discussed in text accompaning note 84 *infra*.

52. In such a case, with an equal number of contacts allotted to each state, the choice of law arbitrarily forces a cause of action into one jurisdiction rather than the other. Kühne, *Choice of Law in Products Liability*, 60 CALIF. L. REV. 1, 16 (1972). *See also* Comment, *supra* note 25, at 1143.

53. According to one theorist, the "government interest" theory dictates that if a forum state's connection with a cause of action gives it a "legitimate interest" in having its law applied, the law of the forum state generally should be applied. Currie, *The Constitution and the Choice of Law: Governmental Interests and the Judicial Function*, 26 U. CHI. L. REV. 9-10 (1958). For an example of an attempt to identify the social, political, or economic interests of a state in a particular cause of action, see Watson v. Employers Liab. Assurance Corp., 348 U.S. 66 (1954).

54. *See* Comment, *supra* note 25, at 1144. Both product safety and consumerism underlie products liability law. In this context it is difficult to identify the predominant interest.

55. *Id.*

56. *See generally* D. CAVERS, THE CHOICE OF LAW PROCESS 139 (1965); Ehrenzweig, *Products Liability in the Conflict of Laws—Toward a Theory of Enterprise Liability Under "Foreseeable and Insurable Laws": II*, 69 YALE L.J. 794, 800 (1960); Leflar, *Choice Influencing Considerations in Conflicts of Law*, 41 N.Y.U. L. REV. 267, 282 (1966); Leflar, *Conflicts Law: More on Choice-Influencing Considerations*, 54 CAL. L. REV. 1584 (1966).

harmonize with the developing trend toward consumer protection and compensation.[57] On the other hand, this explicit policy judgment reveals a desire to further the legal rights of injured parties, a course which may exceed the proper role of a neutral, procedural statute of limitation.[58]

In summary, the early 1970's seemed to offer few solutions to the statutes of limitation controversy; the issue had, in fact, become more clouded with the proliferation of multistate products liability suits. As one commentator described the situation: "Manufacturers, consumers and courts will be compelled to make choices and decisions based on confusion rather than on orderly, predictable, and equitable standards until strict liability in tort is adopted, the Uniform Commercial Code is deemed appropriate, or statutes are enacted specifying the proper limitation."[59]

II. THE CURRENT CONTROVERSY BETWEEN TORT VERSUS DATE-OF-SALE STATUTES OF LIMITATION IN PRODUCT LIABILITY SUITS

Since the early 1970's, the strict liability in tort doctrine has enjoyed continuous judicial acceptance. At present, it is applied in nearly every jurisdiction in all products liability actions.[60] The nearly uniform adoption of the doctrine has eliminated the conflict over whether to apply a strict tort or a contract limitation in multistate actions since, under strict liability, a tort type of limitation is universally applied.[61]

Recent developments in the law have, however, introduced new complications within the doctrine of strict liability in tort. The passage of new date-of-sale statutes of limitation by some nine jurisdictions raises the issue of whether date-of-sale or tort statutes of limitation are more appropriate in the products liability setting.[62] From a practical standpoint, a tort statute would impose

57. Comment, *supra* note 25, at 1145.

58. *Id.* at 1146.

59. Note, *supra* note 25, at 791. *See also* Shanker, *A Case of Judicial Chutzpah (The Judicial Adoption of Strict Tort Products Liability Theory)*, 11 AKRON L. REV. 697 (1978), which argues that the Uniform Commercial Code comprehensively covers product liability actions.

60. For a discussion of the current status of strict liability in different jurisdictions, see [1977] 1 PROD. LIAB. REP. (CCH) ¶ 4070.

61. According to Dean Prosser, strict liability in tort was designed to abolish all drawbacks associated with the warranty cause of action, including the contract statute of limitation which accompanied it. W. PROSSER, *supra* note 35, at 658.

62. For the text of the date-of-sale statutes of limitation enacted thus far, see note 8 *supra*.

strict liability on the manufacturer beginning at the date of the products-related injury; a date-of-sale statute would impose strict liability for any products-related injury occurring during a prescribed period measured from the date of sale.[63] On an even broader scale, the enactment of date-of-sale limitations calls into question the continuing prudence of the strict liability doctrine in light of rising insurance and litigation costs.[64]

Moreover, in the multistate products liability context, the present situation simply shifts the focus of choice of law questions: the choice is now between tort and the new date-of-sale statutes rather than between tort and traditional contract limitations. Thus, a conflict of laws analysis according to both traditional and modern approaches is necessary to assess the present efficacy of the date-of-sale limitations and their relevance to the future development of products liability law.

A. *The Traditional Approach to Choice of Law Analysis*

Statutes of limitation have historically been viewed as procedural devices which, after passage of a prescribed time period, prevent a party from seeking legal redress for an otherwise valid claim.[65] Traditionally, statutes of limitation have been applied in multistate actions according to the conflicts rule of the forum state, the *lex fori*, with the following results:

> [I]n the absence of a statute to the contrary in most jurisdictions, when the claim is based upon foreign facts, even though the foreign period of limitation has not run, the plaintiff may not recover if the time allowed for suit at the forum has expired. Conversely, if the foreign period has expired, suit may nevertheless be brought at the forum if the time specified there has not run.[66]

Application of the *lex fori* rule to the conflict between tort and date-of-sale limitations is likely to result in complete rejection of the new, stricter date-of-sale statutes. Injured plaintiffs will surely file suit against manufacturers in states applying tort limitations whenever the latter are amenable to jurisdiction in such a forum. They will steer clear of date-of-sale jurisdictions where the limitation period has elapsed, thus barring suit, in favor of tort jurisdictions, where the limitation period does not commence until an

63. *See* notes 9–15 *supra* and accompanying text.

64. *See* notes 1–8 *supra* and accompanying text.

65. *See* note 9 *supra*.

66. G. STUMBERG, PRINCIPLES OF CONFLICT OF LAWS 146-47 (3d ed. 1963).

injury has occurred. The increasing amenability of manufacturers to suit in a variety of jurisdictions as a result of nationwide production and distribution, coupled with the fact that only nine states have enacted date-of-sale limits to date, makes it highly probable that injured parties will be successful in their attempts to shop for the forum most favorable to their claims.[67]

The rigidity of the *lex fori* rule led the courts to develop several exceptions to it. First, if a statutory cause of action, in abrogation of the common law, includes its own statute of limitation, the limit is generally viewed as substantive.[68] Second, a statute of limitation is deemed substantive if it specifically qualifies a substantive right created by statute.[69]

Applying these judicially-created exceptions to the current products liability situation, an argument can be made that the new date-of-sale limitations are substantive in nature. Although the law of products liability has generally developed through common law theories of negligence, warranty, and most recently, strict liability, a statutory basis for products liability does exist in some states.[70] A number of jurisdictions have enacted statutes which eliminate privity requirements or follow the standards prescribed in the *Restatement (Second) of Torts*, section 402A.[71] Because the passage of new date-of-sale statutes in those jurisdictions specifically relates to the right to maintain a products liability suit, it can be argued that such statutes affect the substantive rights created by the strict liability statutes.[72] In jurisdictions where strict liability

67. Forum-shopping by injured plaintiffs could occur when, for example, the court in which suit was brought could not obtain jurisdiction over the defendant manufacturer, possibly because the manufacturer was not "doing business" in the state to the extent necessary to establish the minimum contacts required by International Shoe Co. v. Washington, 326 U.S. 310 (1945).

68. *See, e.g.*, Gatti Paper Stock Corp. v. Erie R.R., 247 A.D. 45, 286 N.Y.S. 669, *aff'd*, 272 N.Y. 535, 4 N.E.2d 724 (1936) (dismissal of action on the ground that it was not commenced within the limitation period provided by the statute creating the cause of action).

69. R. LEFLAR, AMERICAN CONFLICTS LAW 303–07 (1968). *See* Davis v. Mills, 194 U.S. 451 (1904) (holding that a statute of limitation was substantive since "it was directed to the newly created liability so specifically as to warrant saying that it qualified the right." *Id.* at 454); The Harrisburg, 119 U.S. 199 (1886) (holding that when a liability and a remedy are created by the same statute, limitations on the remedy are to be treated as limitations on the right itself).

70. For example, Arkansas, Georgia, Maine, Maryland, Massachusetts, New Hampshire, Rhode Island, South Carolina, Virginia, and West Virginia have enacted statutes which provide for strict liability in tort or, at the very least, abandon the privity requirement. [1977] 1 PROD. LIAB. REP. (CCH) ¶ 4110.

71. *Id.*

72. Under this rationale, the date-of-sale statutes arguably meet the requirement of specificity discussed in text accompanying note 69 *supra*.

in tort originated in judicial decisions[73] rather than by statute, this exception to the *lex fori* rule would not apply. Thus, in only a limited class of cases—those brought in statutory strict liability jurisdictions—can date-of-sale limitations be viewed as substantive within the exceptions to the traditional *lex fori* rule in choice of law analysis.

The *lex loci delicti* approach to a conflict of laws, whereby the substantive law of the state in which the cause of action arose is applied,[74] raises difficulties as well. According to this concept, the substantive character of the cause of action determines when the limitation period commences. Therefore, in all but the nine date-of-sale jurisdictions, the *lex loci delicti* would dictate that the statute of limitations in products liability actions commence at the date of injury. If, for example, suit were brought in State *A*, a date-of-sale jurisdiction, rather than in State *B*, a strict tort jurisdiction, the substantive law of State B, strict liability, would apply. The result would be a contradiction in terms: a date-of-sale limitation period measured from the date of injury.[75] Thus, the application of traditional methods of choice of law analysis to the current statute of limitation controversy offers little hope for effective utilization of the date-of-sale concept in products liability suits. Until a change in the basic law of products liability occurs, perhaps through resurrection of a warranty cause of action[76] which is compatible with the date-of-sale concept, it is unlikely that this new type of statute of limitation will consistently provide manufacturers with the durational limit they have sought.

B. *Modern Approaches to Choice of Law Analysis*

The last few decades have seen a great deal of criticism of the mechanical *lex fori* and *lex loci delicti* rules as the proper method for resolving choice of law questions.[77] Historically, statutes of

73. The highest courts of most states have adopted the doctrine of strict liability in tort [1977] 1 PROD. LIAB. REP. (CCH) ¶ 4040.

74. *See* notes 46–48 *supra* and accompanying text.

75. This result is analogous to that produced by a tort and date-of-sale hybrid statute. *See* notes 49–50 *supra* and accompanying text.

76. *See* Shanker, *supra* note 59, at 697, arguing that the Uniform Commercial Code should govern all product liability actions and that strict liability in tort has brought few substantive changes while producing much uncertainty and confusion.

77. *See, e.g.*, Heavner v. Uniroyal, Inc., 63 N.J. 130, 305 A.2d 412 (1973), in which the court stated that:

> the rule fitted very neatly into basic principles of early conflicts law which rather arbitrarily compartmentalized the incidents found in a foreign cause of action into fixed characteristics and mechanical rules in the supposed interests of uni-

limitation have been viewed as procedural mechanisms that only restrict, after a given period of time, the forum state's substantive remedy.[78] In contrast, because the choice of which state's substantive cause of action should prevail is determinative of the plaintiff's rights, it is considered a substantive matter and demands application of the *lex loci delicti* rule.[79] However, as Professor Leflar has aptly pointed out,

> A right for which the legal remedy is barred is not much of a right. It would have made better logic if the limitations rule of the state whose substantive law is chosen to govern the right were deemed substantive also, so that both the original and the terminal existence of the right would be related to the same body of law. That, however, was not the way the law developed . . . . The result [under the traditional distinctions] is that plaintiffs whose claims are barred by the governing substantive law are allowed to shop around for a jurisdiction in which the statute is longer, in the hope of getting service there on the obligor.[80]

Applied to the multistate products suit, Professor Leflar's comments are particularly telling. Application of the historical methodology conceivably permits an injured party to avoid the new date-of-sale statutes completely. Professor Leflar's proposal, that statutes of limitation be considered substantive devices, thereby keyed to the forum state's substantive cause of action, seems to have the potential to reduce forum shopping in multistate actions.

Suppose, for example, that an injured party brought suit in a state with a tort statute of limitation in order to avoid a date-of-sale limitation that would bar the action. If the substantive law of a date-of-sale jurisdiction governed, that state's date-of-sale limitation would also apply, thus defeating the incentive for forum-shopping, and, more importantly, the ability to pursue a products liability claim that has outlasted the limitation period. Therefore, as long as the cause of action arose in a date-of-sale jurisdiction, a date-of-sale limitation would be applied, regardless of the plaintiff's ability to bring suit in a jurisdiction having a tort statute of limitation. Characterizing statutes of limitation as substantive would thus permit consistency in the application of a state's products liability laws and its date-of-sale limitations.

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formity and certainty, almost regardless of the justice or good sense of the particular situation. . . ."

Id. at 136, 305 A.2d at 415.

78. Note, *supra* note 9, at 1186.

79. *Id.* at 1260.

80. R. LEFLAR, *supra* note 69, at 304.

Some of the modern choice of law approaches disregard the traditional substantive-procedural distinction altogether. They concentrate instead upon the various ingredients of a cause of action or upon the interests of the state or parties in a particular suit.

1. *The "Contact" Approaches*

Within the contacts approach to choice of law, several specific tests have developed. Under the "center of gravity" or "grouping of contacts" method initiated by the New York Court of Appeals,[81] courts simply tally the various contacts of each jurisdiction with particular events relating to the cause of action—the place of injury, of sale, and of manufacture. The jurisdiction where the contacts are most heavily grouped is deemed the center of gravity and its statute of limitation is applied in the multistate case.

Using the center of gravity method to choose between a jurisdiction with a tort limitation and one with a date-of-sale statute leads to a variety of results. First, as long as the number of contacts with a tort jurisdiction is greater than the number of contacts with a date-of-sale jurisdiction, states having date-of-sale limitations can be avoided.[82] Second, it may be impossible to find one state having truly dominant contacts. Products liability cases are quite susceptible to this problem because they

> present many situations in which the place of manufacture (harmful conduct) and the place of sale (and resultant injury) are in different jurisdictions. Both elements being indispensable and interrelated requirements of liability, the determination of a center of gravity in most cases would imply an arbitrary and often tortured process of nationalization.[83]

Similar criticism can be levelled at the "most significant relationship" method advocated by the *Restatement (Second) of Conflict of Laws*.[84] This approach examines the quantitative ties of each state involved in a particular action. It may, however, be impossible to find a jurisdiction with a quantitatively more significant relation to the cause of action than the other jurisdictions

81. *See, e.g.*, Bowles v. Zimmer Mfg. Co., 277 F.2d 868 (7th Cir. 1960); Auten v. Auten, 308 N.Y. 155, 124 N.E.2d 99 (1954).

82. The same results would obtain under the "significant relationship" test of conflicts of law analysis, discussed in text accompanying note 84 *infra*.

83. Kühne, *supra* note 52, at 16.

84. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 145 (1969). The "most significant relationship" test has not been advocated explicitly for use in products liability actions; however, the factors which it considers—the place of injury, place of harmful conduct, and place of business of the parties—would seem to apply to such actions.

involved. For example, the place of injury, of manufacture, and of other contacts may each arise in different states. If so, the "most significant relationship" approach fails to provide a predictable standard by which to determine whether the existing tort limitation or the new date-of-sale limitation should prevail in multistate products liability cases.

2. *The "Interest" Approaches*

In contrast to the quantitative approach of the contacts methods in conflicts of law analysis, the interest approaches are concerned with the qualitative nature of each state's involvement in a particular cause of action. In the late 1950's, Professor Currie presented the concept of "government-interest analysis,"[85] whereby the interests of the various states in applying their own substantive laws predominated in the choice of law decision. Within the framework of government interest, Currie included the social, economic, or administrative policy expressed by a state in relationship to the parties, the transaction, the subject matter, and the litigation. These factors determined the extent of a state's legitimate interest in having its own policy prevail.[86]

With respect to the decision among statutes of limitation in multistate products liability cases, the government interest approach would present courts with difficulties in ascertaining state policy.[87] On one hand, it can be argued that the pervasive social, judicial, and, in some states, legislative policies, which were affirmed by nearly uniform adoption of the strict liability doctrine,[88] demand that tort statutes of limitation be applied in all multistate products liability actions. On the other hand, the recent enactment of date-of-sale limitations by nine states[89] may also be viewed as policy decisions premised upon a "government interest" in limiting the impact of strict liability on manufacturers, especially in light of rising insurance costs.[90]

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85. *See* Currie, *Married Women's Contracts: A Study in Conflicts of Laws Methods*, 25 U. CHI. L. REV. 227 (1958); Currie, *Survival of Actions: Adjudication Versus Automation in the Conflict of Laws*, 10 STAN. L. REV. 205 (1958).

86. B. CURRIE, SELECTED ESSAYS ON THE CONFLICT OF LAWS 189 (1963).

87. *See, e.g.*, Heavner v. Uniroyal, Inc., 63 N.J. 130, 305 A.2d 412 (1973), and note 77 *supra*.

88. *See* notes 70 and 73 *supra*.

89. For specific jurisdictions and the text of their statutes, see note 8 *supra*.

90. *See* notes 1-8 *supra* and accompanying text. In the case of individualized insurance plans, a cost increase may result from imposition of strict liability. *See* McCreight, *The Actuarial Impact of Products Liability Insurance Upon Choice of Law Analysis*, 1972 INS. L.J. 335 (1972).

Given these diverse policy considerations, courts would face the difficult task of deciding which government interests should prevail. One possible solution is to view a state's enactment of date-of-sale limitations as a shift in its products liability policy which overrides earlier judicial or legislative decisions favoring the traditional tort statutes of limitation.[91] Thus, date-of-sale limitations would apply uniformly in all jurisdictions which had enacted them. A second, more moderate solution is to enforce date-of-sale limitations in cases where the substantive law of states which have enacted them applies in a multistate suit.[92] Under this arrangement, substantive products liability law would accurately reflect legislative attempts to redefine that law through enactment of date-of-sale statutes of limitation. In addition, products liability law in jurisdictions with conventional tort statutes of limitation would remain intact.

Although the government interest approach appears to be generally useful in effectuating the policies which support date-of-sale limitations, there may be problems in its application to products liability actions. As one commentator has noted, even assuming that the general policies underlying products liability could be ascertained by a court, the common law development of products liability has varied so much from state to state that determination of the relevant government interests would be so difficult that a court would probably adopt the forum state's policies, with which it is most familiar.[93] This confusion can only be remedied if the date-of-sale limitations are viewed in the context of the alleged crisis in products liability. Such a perspective may well lead to the conclusion that the date-of-sale statutes reflect a legislative policy decision to override otherwise competing policy considerations under a traditional government interest analysis.

3. *The Principles of Preference Approach*

A conflict of laws approach with an entirely different focus from the foregoing modes of analysis has been suggested by Professor Cavers in his proposal that "principles of preference" be

91. This solution accords with an accepted rule of statutory construction—that when two statutes conflict, the later in time prevails. *See, e.g.*, United States Steel Co. v. County of Allegheny, 369 Pa. 423, 86 A.2d 838 (1952); Kimminan v. Common School Dist., 170 Kan. 124, 223 P.2d 689 (1950).

92. *See* note 69 *supra* and accompanying text.

93. Kühne, *supra* note 52, at 17.

applied in certain multistate situations.[94] The premise of Cavers' approach is the proposition that:

> [I]n a closely-knit federation of states in which a common legal tradition coexists with innumerable common economic, social, and political needs, goals, and values, the courts [should] come increasingly to strive to accommodate the conflicting laws of the several states in ways that will optimize the working of the federation.[95]

In attempting to create an accommodating approach to choice of law analysis, Cavers sets forth a number of policy preferences. The first of these applies to a situation in which a conflict of laws exists between the state in which the injury occurred and the state in which the defendant's wrongful conduct, defective manufacturing, took place.[96] In such a case, if the state where the injury occurred provides for greater compensation for the plaintiff or imposes a higher standard of care on the defendant, Cavers contends that its law should prevail over that of the state in which the defendant's action took place.[97] Conversely, if the state in which the defendant acted imposes special controls upon such wrongful conduct, policies of preference require that the plaintiff be accorded the benefits of the controls though they are not available in the state in which the injury occurred.[98] Such an approach is premised upon the assumption that all states recognize the need to protect their citizens against injurious conduct, and that a preference for plaintiffs well serves this universal concern.[99]

Applied to the controversy over the proper statute of limitation in multistate products liability cases, this rationale would uniformly reject the new date-of-sale statutes. Tort statutes of limitation, which do not begin to run until the plaintiff sustains an injury, are clearly more favorable to plaintiffs than are the date-of-sale statutes which commence when the product is initially placed on the market. This result, although praised for the uniformity it provides,[100] ignores the position of the manufacturers, and, in light of the soaring costs of products liability insurance, a choice of laws analysis which protects the consumer without even

94. D. CAVERS, THE CHOICE OF LAW PROCESS 139, 146, 159, 166, 177 (2d ed. 1965).
95. *Id.* at 119.
96. *Id.* at 139, 159.
97. *Id.* at 139.
98. *Id.* at 159.
99. *Id.* at 140–41.
100. *See* RESTATEMENT (SECOND) OF TORTS § 402A, Comment c (1962).

addressing the interests of the manufacturer may well be too unresponsive to the latter's complaints.

Professor Cavers envisions another conflict of laws situation, however, in which date-of-sale statutes could conceivably be applied under a principles of preference analysis. If the defendant's conduct and the plaintiff's injury occur in the same state, and that state provides less protection of the plaintiff or imposes less stringent controls upon the defendant than does the state in which the plaintiff resides, the more lenient standards could prevail.[101] This result, Cavers argues, is as it should be: "the state's plan has been drawn, not merely for the benefit of the endangered public, but also with concern for the people whose activities may cause harm."[102] Thus, even if the plaintiff resides in a jurisdiction which espouses a traditional tort statute of limitation and chooses to bring the cause of action in that state, a date-of-sale statute conceivably could be used. Cavers' approach in this hypothetical, in which manufacture and injury both occur in one of the nine date-of-sale states, would protect manufacturers to a limited extent—but only if it can be assumed that there is a policy preference for protecting the defendants from the more stringent standards imposed by other jurisdictions.

4. *The "Better Law" Approach*

Professor Leflar has recommended an approach to conflict of laws which is based on several of what he terms "choice-influencing considerations."[103] These are: (1) predictability of results; (2) maintenance of interstate and international order; (3) simplification of the judicial task; (4) advancement of the forum state's governmental interest; and (5) the better law rule.[104] The first three considerations provide general guidelines and goals for choice of law analysis; the fourth, the government interest approach, has already been discussed.[105] The fifth and most widely known of Leflar's considerations is the "better law" rule, which recognizes that, given two rules of law from which to choose, a court deliberately chooses the rule which it regards as intrinsically better.[106]

101. D. CAVERS, *supra* note 94, at 146. This hypothetical obviously assumes that the state in which the plaintiff lives is not the state in which the injury occurs.

102. *Id.*

103. R. LEFLAR, *supra* note 69, at 245.

104. *Id.*

105. *See* notes 85–93 *supra* and accompanying text.

106. R. LEFLAR, *supra* note 69, at 254–55.

Given the prevailing policies underlying the strict liability in tort doctrine, the most significant of which is consumer protection, reliance on the better law approach in the multistate context would most likely result in adherence to a tort statute of limitation. This would resolve the choice of law issue in favor of the plaintiff since, as previously discussed, the tort limitation is more protective of consumers than is the date-of-sale limitation.

The criticisms levelled at Professor Cavers' principles of preference seem to apply here as well. At the very least, Leflar's approach entertains a clear bias in favor of the plaintiff, assuming that the better law as perceived by a court is that which affords maximum protection to the plaintiff. Further, the burden on the courts is great and the directive—to identify a "better policy"—is vague. A more equitable alternative would be to apply a date-of-sale limitation when the substantive law of a date-of-sale jurisdiction governed the cause of action.[107]

In conclusion, not one of the traditional or modern approaches to choice of law analysis ensures consistent application of the new date-of-sale statutes in multistate products liability cases. The *lex fori* rule invites injured plaintiffs to forum-shop to avoid the bar to suit imposed by date-of-sale limitations.[108] The contacts approaches[109] to the choice of law problem, which attempt to quantify the connections between events and jurisdictions related to the cause of action, produce unpredictable results when the "contacts" are distributed equally. The government interest approach[110] offers hope that the change in underlying policy represented by passage of date-of-sale limitations will have at least some influence on a choice of law analysis. However, the doctrine of strict liability may still outweigh the concern over the amorphous products liability insurance crisis, which has been the impetus behind the passage of date-of-sale limitations.

The plaintiff-oriented approaches espoused by Cavers and Leflar[111] offer little hope for application of date-of-sale limitations. Under both methods, the defendants' preferences, as a function of the underlying tort policies of products liability law, play no role in choice of law determinations. Characterizing statutes of limitation as substantive rules of law may offer the best opportunity for

107. *See* notes 68–74 and note 80 *supra* and accompanying text.
108. *See* notes 65–67 *supra* and accompanying text.
109. *See* notes 81–84 *supra* and accompanying text.
110. *See* notes 85–93 *supra* and accompanying text.
111. *See* notes 94–102 *supra* and accompanying text.

effectuating date-of-sale limitations on a limited basis. If a substantive approach were adopted, at least those states with date-of-sale reforms could be assured that their new statutes of limitation would be used in conjunction with their substantive law in multistate products liability actions. Moreover, such an approach lends consistency to choice of law analysis. Imposing a definite boundary upon a given defendant's potential liability for its defective product will undoubtedly help the insurance industry more accurately forecast the costs of litigation and thus provide effective insurance coverage.

III. DATE-OF-SALE LIMITATIONS: ARE THEY CONSTITUTIONALLY SOUND?

In addition to the serious conflict of laws problems that seem destined to plague the application of the new date-of-sale statutes of limitation, a number of constitutional issues also seem likely to arise. The fact that a plaintiff's products-related claim may be barred by the running of a date-of-sale limit before an injury even occurs may have state and federal due process implications.[112] Beyond due process concerns, by entitling a class of tort defendants to special limitations on potential liability, states which have enacted date-of-sale limitations may well be called to answer allegations that they deny equal protection to some products liability plaintiffs.

Before evaluating the relative merits of these constitutional challenges, it is helpful to examine the fate of date-of-sale limitations enacted in the 1960's in an effort to limit the liability of architects and builders engaged in improving real estate.[113] Date-of-sale limitations ranging from three to twenty years were passed by some thirty jurisdictions.[114] In response, injured parties raised both due process and equal protection challenges with respect to these statutes.[115] In eleven jurisdictions the date-of-sale limita-

112. More specifically, some of the new statutes may establish an irrebuttable presumption that after the limitation period elapses, products are not defective. Such statutes are subject to challenge under recent Supreme Court cases which have held that such a presumption, if not "necessarily or universally true in fact," denies due process of law. *See* Note, *The Irrebuttable Presumption Doctrine in the Supreme Court*, 87 HARV. L. REV. 1534 (1974), and notes 129-41 *infra* and accompanying text.

113. *E.g.*, ARK. STAT. ANN. § 37-237 (Supp. 1977); IND. CODE ANN. §§ 2-639 to 2-642 (Burns 1967). *See generally* Cotter, *Limitation of Action Statutes for Architects and Builders—Blueprints for Non-Action*, 18 CATH. L. REV. 361 (1969).

114. Massery, *supra* note 11.

115. *See* Cotter, *supra* note 113.

tions were upheld;[116] in five states they were found to violate state and federal equal protection guarantees.[117]

With respect to due process claims, these early date-of-sale limitations were challenged on the basis of state constitutional guarantees that "every man, for injury done to him in his person, property, or reputation, shall have remedy by due course of law."[118] The challengers claimed denial of due process because the date-of-sale limitations could bar a cause of action before it ever arose.[119] Courts faced with this argument generally looked to the function of the date-of-sale limitation. Many decisions that concluded that such a statute redefined plaintiffs' substantive rights deemed it a permissible exercise of state legislative power. As such, it did not violate due process.[120]

The due process issue with respect to date-of-sale statutes may well revolve around the extent to which such statutes directly affect a plaintiff's substantive rights or the remedy for violation of that right. As one commentator has pointed out:

[A]s to those claims . . . accruing before the statutory period

116. *E.g.*, Smith v. Allen-Bradley Co., 371 F. Supp. 698 (W.D. Va. 1974) (holding that enactment of a statute of limitation to bar plaintiff's suit before he was injured was within the power of the state legislature and not a violation of the due process clause of the 14th amendment or of state constitutional provisions); Josephs v. Burns, 260 Or. 493, 491 P.2d 203 (1971) (holding that a statute of limitation prohibiting any action for negligent injury after ten years from the date of injury was intended to set an upper limit on the time within which an action in tort could be brought and was not unconstitutional regardless of the date of discovery or the plaintiff's inability to bring an action before the discovery date).

117. *E.g.*, Skinner v. Anderson, 38 Ill. 2d 455, 231 N.E.2d 588 (1967) (holding that a statute which regulated the time within which an action must be brought against an architect or contractor violated a state constitutional provision which prohibited any corporation, association, or individual from receiving any special or exclusive privilege, immunity, or franchise); Saylor v. Hall, 497 S.W.2d 218 (Ky. 1973) (holding that a statute which limited the time within which an action for personal injuries caused by a homebuilder's negligence could be brought improperly destroyed the common law right of action which existed at the time the statute was enacted); Kallas Millwork Corp. v. Square D Co., 66 Wis. 2d 382, 225 N.W.2d 454 (1975) (holding that a statute limiting the time within which an action must be brought against those engaged in the construction business was unconstitutional in that it unreasonably afforded special protection to a certain group).

118. IND. CONST. art. 1, § 12. Every other state has a similar due process guarantee.

119. *E.g.*, Rosenberg v. Town of North Bergen, 61 N.J. 190, 293 A.2d 662 (1972) (holding that under a 10-year statute of limitation for actions against persons improving real property, a paving contractor who had paved the roadway 34 years before was not liable for injury sustained by a pedestrian on that same roadway).

120. *See, e.g.*, Reeves v. Ille Elec. Co., 170 Mont. 104, 551 P.2d 647 (1976). The *Reeves* court held that a 10-year statute of limitation with respect to actions brought against architects and builders did not violate a state constitutional provision requiring that each injury be afforded a speedy remedy. The court found that "the legislature is not constitutionally prohibited from eliminating common law rights which have not accrued or vested." *Id.* at 113, 551 P.2d at 652.

> has run, the statutes may act as statutes of limitations, and limit only the remedy. But as to claims accruing after the statutory period has run, the enactments are statutes of limitations in form only, while in essence they are substantive acts defining rights.[121]

This observation is equally true of the recently enacted date-of-sale limitations. They impose merely a durational limit when injury occurs before the limitation period elapses; they exclude the substantive right to bring suit when injury occurs after the period elapses. Since the various jurisdictions have the power to define and redefine their substantive laws, the curtailment by date-of-sale statutes of the right to maintain a products liability claim should withstand due process scrutiny.

The equal protection challenges to the architect and builder date-of-sale limitations were more successful than those waged on due process grounds. Following the "rational basis" standard of equal protection, courts inquired whether the classifications drawn by the date-of-sale statutes bore a rational relation to the legislative purpose in enacting the statutes.[122]

In some jurisdictions such statutes were deemed underinclusive if there existed a class of persons similarly situated in relation to real estate improvements but not expressly covered by the classifications contained in the statute.[123] Such a class of persons would be subject to liability for a greater period of time than those covered by the date-of-sale statutes.[124] In other jurisdictions, the classification was held to be reasonable in light of the legislative purpose of limiting liability.[125] The success of the equal protection claims seemed to depend in large part on the wording of the particular statute involved, since it determined the inclusiveness of its classification. Some statutes limited the liability of only architects and builders; others limited the liability of any person performing real estate improvements.[126]

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121. Cotter, *supra* note 113, at 372.

122. Under the rational basis standard, courts examine the reasonableness of the classifications drawn by such statutes in the context of legislative policies and state interests. *See, e.g.*, Carter v. Hartenstein, 248 Ark. 1172, 455 S.W.2d 918 (1970).

123. *Contra*, Reeves v. Ille Elec. Co., 170 Mont. 104, 551 P.2d 647 (1976) (holding that a date-of-sale statute of limitation does not violate equal protection principles merely because a certain class of persons—here, materialmen—could not avail themselves of its benefits).

124. Architects, for example, were sometimes given special immunities not afforded to owners or persons in control of improvements. Skinner v. Anderson, 38 Ill. 2d 455, 458, 231 N.E.2d 588, 590 (1967).

125. *E.g.*, Rosenberg v. Town of North Bergen, 61 N.J. 190, 293 A.2d 662 (1972).

126. Cotter, *supra* note 113, at 369–74.

It is improbable that the current date-of-sale limitations will suffer from the equal protection classification problems that plagued some of the builder and architect statutes. The various products liability limitations rely on broad language, referring to "all product liability type"[127] actions and frequently to "manufacturers" and "sellers" as the class whose liability is to be limited.[128] The classification created by these statutes appears to be congruent with the class of persons whose liability is supposed to be limited—all potential products liability defendants, including manufacturers, distributors, retailers, and component manufacturers. Therefore, under state and federal equal protection analysis, these sufficiently inclusive classifications are likely to be upheld as having a rational relation to the legislative purpose behind date-of-sale limitations. Specifically, placing limits on the duration of the liability of all potential products liability defendants appears rationally related to the legislative objective of giving relief to all who must pay crippling products liability insurance costs. Thus, under the rational basis standard, present date-of-sale statutes of limitation are likely to withstand an equal protection challenge.

A question remains, however, as to whether the new date-of-sale limitations can withstand the scrutiny demanded by the Supreme Court's "irrebuttable presumption doctrine." With its scope and constitutional underpinnings then as now undefined,[129] the doctrine emerged in a line of cases raising due process and equal protection questions.[130] At issue in those cases were statutes which

> contained rules denying a benefit or placing a burden on all individuals possessing a certain characteristic. In the irrebuttable presumption cases, the Court has treated such a classification as being employed only to effect a second classification, one more directly tied to the true statutory purpose. The characteristic is seen as the "basic fact", from which the "presumed

127. *See* note 8 *supra*.

128. *E.g.*, CONN. GEN. STAT. ANN. § 52-577a (West Supp. 1978).

129. The doctrine has been subjected to criticism by a number of commentators. *See* Simson, *The Conclusive Presumption Cases: The Search for a Newer Equal Protection Continues*, 24 CATH. U.L. REV. 217 (1975); Note, *The New Equal Protection—Substantive Due Process Resurrected Under a New Name?*, 3 FORDHAM URB. L.J. 311 (1975); Note, *supra* note 113; Note, *The Case of the Pregnant School Teachers: An Equal Protection Analysis*, 34 MD. L. REV. 287 (1974); Note, *The Conclusive Presumption Doctrine: Equal Process or Due Protection?*, 72 MICH. L. REV. 800 (1974); Note, *Irrebuttable Presumptions: An Illusory Analysis*, 27 STAN. L. REV. 449 (1975).

130. *See* Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632 (1974); United States Dep't of Agriculture v. Murry, 413 U.S. 508 (1973); Vlandis v. Kline, 412 U.S. 441 (1973); Stanley v. Illinois, 405 U.S. 645 (1972).

> fact"—possession of whatever quality is relevant to the postulated ultimate purpose—is inferred. The Supreme Court cases have held that if it is not "necessarily or universally true in fact" that the basic fact implies the presumed fact, then the statute's irrebuttable presumption denies due process of law.[131]

The irrebuttable presumption doctrine contains threads of both equal protection and procedural due process. In line with equal protection analysis, the doctrine focuses on the classification which a statute creates. Strict scrutiny is then applied to determine *inter alia* if some compelling state interest demands that the statute be enforced. The procedural due process component of the doctrine requires that the aggrieved party in irrebuttable presumption cases be given a hearing at which to present evidence rebutting the presumed fact associated with the classification.[132]

The Supreme Court's decision in *Cleveland Board of Education v. LaFleur*[133] illustrates the analysis involved in applying the irrebuttable presumption doctrine. The challenged provision was a school board rule which required that every pregnant school teacher take maternity leave beginning five months before the expected birth of her child.[134] The classification drawn by the rule comprised all pregnant teachers; the presumed fact, or conclusive presumption inferred from the basic fact, was that at the fifth or sixth month of pregnancy, all of these teachers were physically unable to continue their duties. The *LaFleur* Court inquired whether any compelling state interest required application of the leave of absence rule to all pregnant teachers, rather than to only those teachers who had actually become incompetent by reason of pregnancy. Upon finding that the school board's administrative needs did not compel such a rule, the aggrieved teachers were afforded the opportunity to present evidence of their physical capacity to teach.[135]

Date-of-sale statutes of limitation may be subject to the same sort of inquiry as that undertaken in *LaFleur*. It may be argued that some of the statutes effectively create irrebuttable presumptions that after the specified period has elapsed *all* products are nondefective for purposes of maintaining a products liability ac-

131. Note, *The Irrebuttable Presumption Doctrine in the Supreme Court*, *supra* note 129, at 1534.

132. *Id.* at 1535–36.

133. 414 U.S. 632 (1974).

134. *Id.*

135. *Id.*

tion.[136] The basic fact upon which the classification in these statutes is drawn is that the duration of liability for all products injuries should be equally limited; the presumed fact underlying this classification is that all products are equally nondefective as a matter of law after passage of the date-of-sale limitation period.

Several date-of-sale statutes, however, expressly reject this approach by creating *rebuttable* presumptions, which permit introduction of evidence that a product was indeed defective after passage of the limitation period.[137] These rebuttable presumption statutes seem to recognize that, with the variety of products on the market today, each having its own useful life, it is illogical to use a conclusive presumption based on a single statutory period for all products.

Assuming that the irrebuttable presumption analysis of *LaFleur* will apply to date-of-sale statutes which contain such presumptions, it is necessary to determine whether any compelling state interests require that the statutes be enforced. The interest of the legislatures in passing these reforms clearly was to reduce manufacturers' amenability to suit for their injurious products. Additionally, it may be argued that administrative convenience is a state interest; setting a single, predictable limitation period for all products injuries removes the burden on courts to decide what the length of the limitation period should be for each particular products injury. On the other hand, because the breadth of the single date-of-sale limitation period fails to account for such product characteristics as latent defects and varying shelf lives, the state interest in administrative convenience in adjudicating products liability actions may not be compelling.[138] Indeed, the result of such an analysis may be the same as that of *LaFleur*: that the right to present evidence rebutting the conclusive presumption prevails over notions of administrative convenience.

The preceding analysis suggests that current date-of-sale limitations can withstand constitutional challenges brought on traditional due process and equal protection grounds. Serious problems may arise, however, if courts resort to the irrebuttable

136. It appears that the effect of the following date-of-sale limitations may be to conclusively presume that all products are nondefective after the passage of the statutory period of limitation: CONN. GEN. STAT. ANN. § 52–577a (West Supp. 1978); FLA. STAT. ANN. § 95.031 (West Supp. 1978); IND. CODE ANN. § 33–1.5–5 (Burns 1978); NEB. REV. STAT. § 25–224(1)–(2) (1978); OR. REV. STAT. § 30.905(1) (1977); UTAH CODE ANN. §§ 78–15–3 (1977).

137. *E.g.*, COLO. REV. STAT. § 52–577(a) (West Supp. 1978).

138. *See* Cleveland Bd. of Educ. v. Lafleur, 414 U.S. 632 (1974).

presumption doctrine; given the possibility of latent defects and variation among useful lives of different products, the presumption that all products are nondefective after passage of the date-of-sale limitation period may not be "necessarily or universally true in fact."[139] The conclusive presumption that a product is nondefective cannot easily be justified by state interests in administrative convenience. Date-of-sale limitations may thus be invalidated, at least insofar as they deny an aggrieved party the opportunity to present rebuttal evidence of a product's defectiveness.

Several ways to avoid the problems posed by the irrebuttable presumption doctrine are available. In simplest terms, those statutes which create conclusive presumptions can be reformulated to create rebuttable presumptions to avoid the strict scrutiny required by the irrebuttable presumption doctrine. Alternatively, a single limitation period for all products could be discarded in favor of "useful life statutes of limitation," as recommended by the Interagency Task Force.[140] Under a useful life statute, the length of the limitation period would depend on the normal life expectancy of the particular product, as established by an amortization schedule.[141]

IV. CONCLUSION

This Note has attempted to show that there are both choice of law and constitutional problems posed by products liability date-of-sale limitations. A sweeping solution to such problems would be to discard date-of-sale limitations as inappropriate devices for achieving the goals sought by the various state legislatures. If manufacturers and legislatures agree that the underlying policies of products liability need to be reevaluated and redefined, they should follow a more direct route: modifying the substantive law of products liability itself. As one commentator has suggested, the change in substantive law need not be radical; in fact, the already existing Uniform Commercial Code, with its warranty statute of limitation, may provide the durational limit on liability that the manufacturers are seeking.[142] Nonetheless, reliance on the statute

139. *See* note 131 *supra* and accompanying text.

140. FINAL REPORT, *supra* note 1, at VII–26.

141. *Id.*

142. Shanker, *A Reexamination of Prosser's Products Liability Crossword Game: The Strict or Stricter Liability of Commercial Code Sales Warranties*, 29 CASE W. RES. L. REV. 550 (1979); Shanker, *supra* note 59. Professor Shanker argues that the U.C.C.'s express

of limitations, historically a procedural device,[143] to effect substantive change seems ill-advised, particularly in light of the choice of law problems in multistate cases[144] and their constitutional implications.[145]

A number of alternatives to the current reliance on statutes of limitation in products liability law have been suggested. One proposal is to permit recovery in strict liability for a designated period of years, after which a products liability plaintiff could only assert his or her claim in negligence, which in turn demands a more rigid standard of proof.[146] Under this proposal, in negligence actions involving older products, a manufacturer could assert affirmative defenses to its liability. According to its originator, conversion from strict liability to negligence has the virtue of simplicity and would avoid the constitutional problems which can plague special statutes of limitation.[147]

In contrast, another theory would create an elective, no-fault products liability system under which both consumers and manufacturers would jointly purchase no-fault insurance.[148] Thus, the question of which party is at fault would have no bearing on the amount of the premium.

Finally, the Department of Commerce has recently unveiled a Uniform Products Liability Law,[149] which utilizes a "useful safe-life" statutes of limitation.[150] The useful life of a particular product is determined by assessing factors such as its susceptibility to wear and tear and the replacement and repair practices of its consumers.[151] Accounting for characteristics peculiar to each product should forestall the complications raised by the irrebuttable presumption doctrine[152] since there will be no presumed fact as to a product's nondefectiveness after a given point in time.

In summary, the future of the date-of-sale statutes appears un-

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warranty and warranty of merchantability impose the same substantive liabilities as does strict liability in tort and contends that the existing U.C.C. provisions are to be preferred over the confusing strict tort statutes of limitation. *Id.*

143. Note, *supra* note 9, at 1177.

144. *See* notes 60–111 *supra* and accompanying text.

145. *See* notes 112–41 *supra* and accompanying text.

146. Kircher, *Products Liability—The Defense Position*, 1977 INS. COUNSEL J. 276, 288–89 (1977).

147. *Id.* at 288.

148. V. O'CONNELL, ENDING INSULT TO INJURY (1975).

149. 44 Fed. Reg. 2996 (1979).

150. *Id.* at 2999.

151. *Id.*

152. *See* notes 129–39 *supra* and accompanying text.

certain. Even if the statutes can withstand constitutional challenges, their availability in a multistate products liability suit will fluctuate with the choice of laws approach adopted in a given situation. Consequently, although date-of-sale statutes represent a valid legislative attempt to balance the interests of consumers and the needs of modern manufacturers, their impact is unpredictable. To the degree that they fail to provide uniformity in products liability actions, their effect on products liability insurance rate-making must be viewed with skepticism. If there is indeed a crisis with respect to the soaring costs of products liability insurance, it is doubtful, based on the foregoing analysis, that the date-of-sale statutes will be able to alleviate it to any significant degree.

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