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# THE PROPOSED PRODUCT LIABILITY STATUTE IN OHIO—ITS PURPOSE AND PROBABLE RESULTS

## I. INTRODUCTION

**A**N INNOVATIVE PRODUCT LIABILITY STATUTE was recently passed by the Ohio Senate.<sup>1</sup> The legislation was introduced in response to a sharp increase in the amount and cost of product liability litigation. It is designed to make product liability insurance for companies more readily available and less expensive.<sup>2</sup> Should this bill be enacted, significant changes in Ohio product liability law will occur.

Reform is needed in this relatively new area of the law. Within the past twenty years there has been, in both Ohio and throughout the United States, a marked increase in the number of product liability lawsuits and the amount of damages awarded in court, or agreed upon in settlements out of court.<sup>3</sup> The reasons for these developments appear to include greater public awareness, which has significantly increased the number of claims filed, a greater interest in the cause of consumerism and the stricter standards of liability imposed by court decisions upon manufacturers and retailers of allegedly defective products.

The increased expense of such lawsuits, which has been borne by manufacturers and ultimately their insurers, has created calls for legis-

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<sup>1</sup> S.B. No. 67, 113th Gen. Assy., Reg. Sess. (1979-80) [hereinafter cited as S.B. No. 67]. See Appendix I for text of S.B. No. 67. At the time of this writing, the bill was pending before the Ohio House of Representatives.

<sup>2</sup> The introduction to S.B. No. 67 states that its legislative purpose is: [To] impose on product liability actions a statute of limitations related to the time of initial sale of the product, to make certain defenses available in all product liability cases, to establish rebuttable presumptions in the case of either compliance or noncompliance with manufacturing standards, to limit the liability of sellers of allegedly defective products, to require insurance companies writing product liability insurance policies to report annually certain information relative to such policies to the Superintendent of Insurance, and to require insurers to base their product liability insurance rates in this state on experience in this state.

<sup>3</sup> A typical example of the recent increase in the number of product liability claims borne by American businesses is that of the Newman Machine Company, which operates with the Baxter D. Whitney Company. Prior to 1967, neither Newman nor Whitney, with more than 150 years of combined business operation, had ever been sued. Since 1967, however, these firms have been subjected to thirty-eight claims. Statement of Dennis R. Connolly of the American Insurance Assoc. before the Subcomm. on Consumer Protection and Finance, Comm. on Interstate and Foreign Commerce, U.S. House of Representatives 3 (Sept. 27, 1979) (on file with the author) [hereinafter cited as Connolly]. Multi-million dollar awards and settlements in product liability cases are becoming more frequent. One commentator has cited seventeen awards in excess of one million dollars made by one jury in a fifteen month period. Hoenig, *Products Liability Problems and Proposed Reform*, 651 INS. L.J. 213, 229 (1977).

lative reform. Such reform is urged to reduce the excesses of product liability litigation and to make product liability insurance more available and affordable.<sup>4</sup>

Another goal of reform is to reduce the number of claims arising from excessively aged products.<sup>5</sup> Even though these claims represent a small percentage of the total number of product liability actions filed, they can result in sizeable judgments and settlements. Furthermore, with the tendency toward legal action to remedy an injury, the number of aged claims may substantially increase.

This note will deal with the effects of the proposed bill, Senate Bill No. 67, on product liability law as it is now practiced in Ohio, including: 1) The types of claims the proposed legislation would preclude due to a time lag between the date of purchase and the date of injury;<sup>6</sup> 2) the effects this proposed legislation would have upon lawsuits whose outcomes depend upon technical applications of the various statutes of limitations now in effect, which depend on whether the claim is based on written or oral contract, tort, implied or express warranty, or professional malpractice;<sup>7</sup> 3) the legislation's consideration of the appropriate status of sellers who did not manufacture the product, and the extent of their liability in a damage suit;<sup>8</sup> 4) the available defenses provided by Senate Bill No. 67 based upon claims that the product involved was modified, or has deteriorated due to neglect or abuse;<sup>9</sup> and 5) the rebut-

<sup>4</sup> See Connolly, *supra* note 3, at 1. "From 1962 until 1974, there were no increased rate filings for product liability insurance. In 1974, 1975, and 1976, there were substantial increased rate filings. In 1977, 1978, and 1979, rates and premiums tended to stabilize. The activity in 1974 was triggered by changes in the legal system." *Id.*

<sup>5</sup> INSURANCE SERVICES OFFICE, PRODUCT LIABILITY CLOSED CLAIM SURVEY: TECHNICAL ANALYSIS OF SURVEY RESULTS 83 (1977) [hereinafter cited as I.S.O. SURVEY]. This national study indicated that 2.6% of the products involved in product liability actions were purchased more than six years prior to the time of the injury from which the lawsuit arose.

<sup>6</sup> The current statutory rule merely restricts bodily injury or personal damage claims to those which have been brought within two years after the injury occurred. OHIO REV. CODE ANN. § 2305.10 (Page 1979). To this limitation will be added the restriction that the action not be brought more than ten years after first being sold or leased other than when the requirements for any of the exceptions have been met. S.B. No. 67, *supra* note 1.

<sup>7</sup> OHIO REV. CODE ANN. §§ 2305.06 (contract in writing), 2305.07 (contract not in writing), 2305.09 (certain torts), and 2305.11 (time limitations for bringing certain actions) (Page Supp. 1979). See also notes 19-22 *infra* and accompanying text.

<sup>8</sup> S.B. No. 67, *supra* note 1, § 2305.32 incorporates a number of provisions narrowly defining the situations in which actions in tort may be brought against sellers of products.

<sup>9</sup> See *id.* § 2305.33. The proposed legislation is similar on this point to the common law rule of Ohio as stated in *Temple v. Wean United, Inc.*, 50 Ohio St. 2d 317, 364 N.E.2d 267 (1977), and apparently completes Ohio's transition from contributory negligence—where any conduct of plaintiff which helped bring about his injury would defeat his claim—to the law of strict liability, which would re-

table presumptions which the proposed legislation establishes in cases involving products made or not made in accordance with "state of the art" or governmental safety regulations applicable at the time of manufacture.<sup>10</sup>

## II. BACKGROUND

A motivating factor behind this legislation is concern over the cost and availability of product liability insurance to both manufacturers and insurers. The concept that the cost of paying for a plaintiff's injuries sustained from a product should be absorbed by the manufacturer as a cost of doing business is a major factor behind the doctrine of strict liability.<sup>11</sup> The manufacturer's assumption of this increased risk is reflected in additional expenses allocated to the product due to higher products liability insurance premiums. As to insurers, the cost of doing business is also increased. With the advent of large damage awards, it is foreseeable that payments to injured parties may exceed premium revenues. Thus, the burden of paying large damage awards falls upon the insurers, and not solely on the manufacturers who put the product on the market.

As a result, there is a substantial risk that the product liability line may become so unprofitable for insurers that rates may have to be substantially increased and the availability of products liability insurance curtailed. Therefore, those businesses which can least afford insurance — the small manufacturers — will be placed in the difficult position where they must either pay the increased premiums, or forego insurance and assume the risk of having to pay substantial damage awards. The portent for small businesses is apparent: without affordable products liability insurance, many will operate with either severely impaired capital due to high insurance rates, or be under the shadow of bankruptcy should they need to satisfy a large judgment award.

A primary goal of the pending legislation is to make insurance available at reasonable cost.<sup>12</sup> To assure that the cost and availability of this

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quire plaintiff to knowingly confront the danger before recovery of damages would be precluded. *Temple* literally adopted RESTATEMENT (SECOND) OF TORTS § 402A (1965) which abolishes contractual privity and negligence requirements in order to establish the strict liability doctrine.

<sup>10</sup> "State of the art" has been included as a part of S.B. No. 67 § 2305.33 which also includes the defenses of modification, deterioration, abuse, and plaintiff's assumption of risk. The rebuttable presumptions of the product's safety, if made in accordance with governmental safety standards, and of the product's defectiveness, if not made within those standards, are organized into a separate section. See S.B. No. 67 *supra* note 1, § 2305.34.

<sup>11</sup> The first advancement of the "spreading of the cost" theory was made by Justice Traynor in *Escola v. Coca Cola Bottling Co.*, 24 Cal. 2d 453, 150 P.2d 436 (1944). Justice Traynor reasoned that the manufacturer could insure against the risk of injury and distribute the economic burden among the public as a cost of doing business. *Id.* at 458, 150 P.2d at 441.

<sup>12</sup> See note 2 *supra*.

insurance are based on reliable, verifiable data, a substantial portion of the proposed product liability legislation includes requirements that insurance companies report the data upon which their Ohio premium rates are based. The bill also mandates that insurance rates in Ohio be based upon the insurer's actual business experience in Ohio.<sup>13</sup>

The Ohio proposal is but one approach in the large reform movement in product liability law taking place throughout the country. This approach can be compared to other proposals, such as the Product Liability Legislative Package offered by the American Insurance Association<sup>14</sup> and selected provisions of the Draft Uniform Product Liability Law.<sup>15</sup>

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<sup>13</sup> S.B. No. 67 *supra* note 1, § 3929.301 embodies several reporting requirements which provide the state with reliable data to verify the bases upon which insurance companies determine their premium schedules. Section 3937.021, besides requiring that Ohio rates be based upon the companies' experiences in the state, also creates the *Ohio Products Liability Study Commission* whose purpose will be to study the effects of this legislation on product liability law in general, with the goal of making recommendations to the legislature about possible revisions in Ohio product liability law. See Appendix I.

<sup>14</sup> AMERICAN INSURANCE ASSOCIATION, PRODUCT LIABILITY LEGISLATIVE PACKAGE: STATUTES DESIGNED TO IMPROVE THE FAIRNESS AND ADMINISTRATION OF PRODUCT LIABILITY LAW (revised March, 1977). This package deals with seven proposals (the first five will be considered in this note): 1) Statute of Limitations; 2) Product Modification and Alteration; 3) State of the Art Defenses; 4) Subsequent Repairs and Improvements; 5) Duty to Warn; 6) Punitive Damages; and 7) Workers' Compensation. According to the package's overview,

[T]hese reforms do not purport to make any major breaks with the common law tradition of torts litigation. They do not envision the introduction of an alternative scheme of accident compensation, such as workmen's compensation or automobile no-fault insurance, but instead assume that individual cases will be tried before juries in the usual common law way. Likewise the package is by no means comprehensive, as there are several major problem areas in product liability law which these . . . statutes do not directly address.

The Association further acknowledges that:

[t]he statutes here will create unfortunate results in individual cases; yet there is reason to believe that the emerging case law is also productive of greater injustices. Ideally, a more sensitive judicial [sic] approach could provide the best solution, but failing that, the errors created by these statutes seem to be of a lesser magnitude than the errors that are eliminated.

A comparison will be made between these statutory proposals and S.B. No. 67.

<sup>15</sup> 44 Fed. Reg. 2,996 (1979) [hereinafter cited as Draft Uniform Product Liability Law]. The Draft Uniform Product Liability Law was written for the Department of Commerce. After public comments are obtained and revisions are made, it will be published as a model law for use by the states. The findings upon which the law was written include:

[S]harply rising product liability insurance premiums have created serious problems in interstate commerce resulting in: 1) Increased prices of consumer and industrial products; 2) Disincentives to develop high-risk but potentially beneficial products; 3) Businesses going without product liability insurance coverage, thus jeopardizing the availability of

Legislatures in many states face the problem of suits brought because of injuries sustained from products manufactured in a world of changing technological principles and safety standards. One result of this reform movement has been to exacerbate a condition which has existed for many years; the wide disparity in legal principles which govern the outcome of product liability lawsuits depending upon the jurisdiction in which they are brought. Recently enacted product liability legislation has widened already existing differences among state laws.<sup>16</sup> Particularly in product liability law, where the injury sustained may be permanently disabling, it seems incongruous that the outcome of a suit should depend upon where it is brought.

The similarities and differences between the Ohio product liability legislation and applicable provisions of the Draft Uniform Product Liability Law will be discussed in an attempt to determine whether the Ohio legislation shares the spirit of uniformity behind the Department of Commerce's proposal. Many other states have reformed their laws on product liability or are in the process of doing so. The laws of some of these states will also be compared with the proposed Ohio legislation, particularly as they relate to the statute of limitations, perhaps one of the most important features of Senate Bill No. 67.<sup>17</sup>

There is a great deal of controversy because of inherent conflicts between the goals and interests of the insurance industry, manufacturers, and plaintiffs. A comparison of the present Ohio product law with the experience of other "reform" states and with the proposed Ohio legislation will be attempted. This evaluation can then provide insight into the possible effects the legislation could have on product liability actions.

### III. THE STATUTE OF LIMITATIONS

#### A. Generally

There are presently six sections of the Ohio Revised Code defining the applicable statutes of limitation. There are sections for actions

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compensation to injured persons; and 4) Panic "reform" efforts that would unreasonably curtail the rights of product users.

*Id.* at 2,997. Selected portions of the Draft Uniform Product Liability Law can be found in Appendix II.

<sup>16</sup> See *id.* at 2,997 § 101(f). Section 101(f) notes these disparities and suggests the model law as the remedy to be adopted by the states.

<sup>17</sup> The statutes of limitations of Connecticut, Florida, Oregon and Utah will be highlighted for comparison purposes.

<sup>18</sup> S.B. No. 67 § 2305.101 provides:

(A) An action for bodily injury, death, or injury to personal or real property caused by a defective product shall be brought within two years after the cause thereof arose, but in no event more than ten years from the date the product was first sold or leased for use or consumption if the cause of action is based upon strict tort liability or implied warranty except as otherwise provided in this section. If the manufacturer

sounding in contract, whether written<sup>19</sup> or oral,<sup>20</sup> a section governing actions for injury to body or personal property<sup>21</sup> and a section providing time limitations for bringing certain actions based on other grounds such as libel, slander, assault or malpractice.<sup>22</sup>

The interplay of these various statutes of limitations can result in a great deal of confusion when the product liability claim is based upon more than one cause of action.<sup>23</sup> Frequently the courts must evaluate and define the nature of the lawsuit before deciding which statute of limitations applies.

The results of this procedure often appear to be incongruous.<sup>24</sup> Accordingly, one goal of the proposed legislation is to de-emphasize the

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of a defective product, at the time such defective product was manufactured, had actual knowledge of the defect and that such defect is likely to cause harm in the ordinary course of the use of the product, then the ten-year limitation set forth in this section shall not apply to an action for bodily injury, death, or injury to personal or real property resulting from such defect. Neither shall the ten-year limitation apply to any such action or cause resulting from exposure to toxic substances.

(B) Nothing contained in this section affects the right of any person found liable to seek and obtain indemnity from any other person.

S.B. No. 67, *supra* note 1, § 2305.101.

<sup>19</sup> OHIO REV. CODE ANN. § 2305.06 (Page Supp. 1979) (sets a period of fifteen years within which such an action may be brought).

<sup>20</sup> *Id.* § 2305.07 (Page Supp. 1979) (permits six years in which to bring an action based upon a contract not in writing).

<sup>21</sup> *Id.* § 2305.10 (Page 1979). This section, expected to be the section most affected by S.B. No. 67, states that "[a]n action for bodily injury or injuring personal property shall be brought within two years after the cause thereof arose."

<sup>22</sup> *Id.* § 2305.11 (Page Supp. 1979) (sets a limit of either one or two years, depending upon the nature of the action brought). *Id.* § 2305.131 sets a limitation of ten years, after which suits against architects and engineers for injuries sustained from defects in design to improvements upon real property will be barred.

<sup>23</sup> In *Adcor Realty Corp. v. Mellon-Stuart Co.*, 450 F. Supp. 769,770 (N.D. Ohio 1978), the court listed three possible causes of action in product liability claims: 1) an action in tort grounded upon negligence; 2) a cause of action based upon contract; 3) an action in tort based upon breach of duty assumed by the manufacturer-seller of a product. The listing above is by no means exhaustive. For example, the doctrine of strict liability was not even mentioned. The case, however, provides a good example of the complexities which federal and state courts in Ohio face when deciding statute of limitation issues.

<sup>24</sup> See *Farbach Chemical Co. v. Commercial Chemical Co.*, 101 Ohio App. 209, 136 N.E.2d 363 (1956). In *Farbach*, the court stated that OHIO REV. CODE ANN. § 2305.10 (Page 1979) "providing that an action for injury to personal property shall be brought within two years after the cause of action thereof arose, governs all actions the real purpose of which is to recover damages for injury to personal property and losses incident thereto, and it makes no difference whether such action is for a breach of contract or strictly in tort." *Farbach Chemical Co. v. Commercial Chemical Co.*, 101 Ohio App. at 211 (quoting *Andrianos v. Community Traction Co.*, 155 Ohio St. 47, 47, 97 N.E.2d 549, 549 (1951)). *But see* OHIO REV. CODE ANN. § 2305.10 (Page 1979); *id.* §§ 2305.06, .07, .11, .131 (Page Supp. 1979) (setting out statutes of limitation for various actions); note 19-22 *supra* and accompanying text.

sharp distinctions among the different statutes of limitation under which a product liability claim can be brought. Most of these suits would be subject to the bill's provisions, thus permitting the merits of each action to be reached or barred without resort to subtle theoretical distinctions.

The length of time imposed by the statute of limitations has become the most controversial facet of this legislation. Whereas the present Ohio Revised Code section 2305.10 merely requires an action be brought within two years after the cause arose,<sup>25</sup> proposed section 2305.101 adds the additional requirement that if the action is based on strict liability or implied warranty, it must be brought within ten years from the date the product was first sold or leased for use or consumption.<sup>26</sup> Thus, in order to avoid this date of sale provision, the plaintiff must prove the defendant's "actual knowledge of the defect" and knowledge that "such defect is likely to cause harm in the ordinary course of the use of the product."<sup>27</sup> Even construing the date of sale as to the date the product was sold by the merchant to the consumer rather than the sale by the manufacturer to the merchant, thereby protracting the "outside limitation period,"<sup>28</sup> this still results in a stringent requirement.

Much has been written about statutes of limitation which run from the date of sale of the product. The insurance industry strongly supports such a proposal.<sup>29</sup> Furthermore, manufacturers might argue that

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<sup>25</sup> OHIO REV. CODE ANN. § 2305.10 (Page 1979). Section 2305.10 refers to what is known as the "inside limitation period." This permits an action to be brought if it is within two years of the injury sustained, no matter when the product which caused the injury was made or sold.

<sup>26</sup> Compare S.B. No. 67 *supra* note 1, § 2305.101 with OHIO REV. CODE ANN. § 2305.06 (Page Supp. 1979). This proposal is known as the "outside limitation period," which is at the core of the controversy surrounding S.B. No. 67. It means that ten years after the date of initial sale or lease for use or consumption of the product, no action based upon strict liability or implied warranty will be heard absent a showing of scienter on the part of the manufacturer.

<sup>27</sup> S.B. No. 67 *supra* note 1, § 2305.101.

<sup>28</sup> See note 26 *supra*.

<sup>29</sup> AMERICAN INSURANCE ASSOCIATION, PRODUCT LIABILITY LEGISLATIVE PACKAGE: STATUTES DESIGNED TO IMPROVE THE FAIRNESS: AND ADMINISTRATION OF PRODUCT LIABILITY LAW 6-8 (revised March, 1977). The package lists four reasons in support of a statute of limitations to bar aged product liability claims. First, the statute will function mainly in those cases in which the defendant is apt to have a good defense to the plaintiff's cause of action on the merits, such as intervening alteration of modification. Additionally, it will apply most often to cases involving capital goods or industrial equipment and only rarely to consumer or household goods. Second, the proposed statute of limitations would not block the deserving plaintiff from some other remedy via tort law or workmen's compensation. Third, barring remote causes of action eliminates the need to evaluate evidence that has grown stale and unreliable over time. Finally, the statute protects the ability of defendants to rely upon standards of liability applicable when the products were first placed on the market instead of subjecting them to suit on the strength of legal doctrines emerging only a long time thereafter. See also



there is a need for products that have a long useful life in order to avoid the frequent purchase of replacement machinery at skyrocketing prices despite continual improvements in technology and safety features. Many businesses simply could not function without older, durable products. It is feared that permitting product liability lawsuits alleging defects in design of machinery made years ago can have the counterproductive effect of discouraging the production of high-quality machinery with a lengthy productive life, in favor of less durable goods which will need relatively rapid replacement.<sup>30</sup>

The feared occurrence of product liability suits based on aged products has become a reality throughout the country.<sup>31</sup> Although the extremes observed in other states have rarely occurred in Ohio, there have been actions maintained for injuries sustained from allegedly defective products which would have been barred had the proposed statute of limitations been in effect.<sup>32</sup>

The filing of suits for injuries sustained from products long after their manufacture or initial sale has other potentially prejudicial effects. For tactical reasons, plaintiff's attorneys often delay the filing of suits until just before the statute of limitations has expired. Particularly in urban areas where the court docket is crowded and calendar delays are frequent and lengthy, a trial could eventually be held on a claim filed alleging a defect in a product manufactured possibly before some of the factfinders were born.

These tactics frequently result in unjust burdens being placed upon the defendant. Not only does a significant lapse in time tend to create gaps in evidence, but there is also the problem of trying product liability cases on "hindsight"; *i.e.*, using technological and safety standards which were developed after the product in question was made.

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Griggs v. Firestone Tire & Rubber Co., 513 F.2d 851 (8th Cir. 1975) (product warnings issued in 1957 were judged by aggressive application of the RESTATEMENT (SECOND) OF TORTS § 388 standards on duty to warn published in 1965).

<sup>30</sup> See Hoenig, *A Statute of Repose?*, 179 N.Y.L.J. 1 (1978), at 1, col. 1.

<sup>31</sup> See, *e.g.*, Gates v. Ford Motor Co., 494 F.2d 458 (10th Cir. 1974) (twenty-four year old tractor was alleged to be defective because it was designed without roll bar or seat belts); Green v. Volkswagen of America, Inc., 485 F.2d 430 (6th Cir. 1973) (claim that a seventeen year old van was defectively designed because an eleven year old non-user severed her finger in the vent of the parked vehicle); Wittkamp v. United States, 343 F. Supp. 1075 (E.D. Mich. 1972) (injury sustained from fifty year old rifle); Mondshour v. General Motors Corp., 298 F. Supp. 111 (D. Md. 1969) (claim that seventeen year old bus was defective because it had no rear-view mirror on right side); Victorson v. Bock Laundry Machine Co., 37 N.Y.2d 395, 335 N.E.2d 275, 373 N.Y.S.2d 30 (1975) (centrifuge laundry extractor sold in 1948 and causing the injury in 1969).

<sup>32</sup> See Burns v. Pennsylvania Rubber & Supply Co., 117 Ohio App. 12, 189 N.E.2d 645 (1961) (twelve years of use between the date of sale and the date of explosion, without accident, did not require the trial court to direct a verdict for the retailer and thereby decide the question of proximate cause).

Theoretically jury instructions could correct this problem, but practically it would be difficult, if not impossible, to prevent the jurors from using their own personal experience to evaluate the validity of the issue before them. For example, how would the average juror evaluate the defectiveness of a lawnmower made in 1950 when the only lawnmower he has owned was made after 1975 and thereby subject to present developments in technology and safety standards? No matter what instructions the judge provides the juror will tend to evaluate the thirty-year old machine against his five-year old product. As stated by a noted commentator:

This would especially penalize the manufacturers and sellers of durable products whose quality permits them to remain desirable and useful for long periods of time. When the product is already ten or fifteen years old at the time of injury, the jury will later determine the design or manufacturing propriety of an ancient product in terms of the pace of modern space-age technology. Because jurors today are used to newer and safer products which are often subject to governmental safety standards, they may easily be receptive to claims that the older design was defective, particularly when a financially responsible or "target" defendant is sued and a severe injury evokes sympathy.<sup>33</sup>

Without reform, the end result may be a tendency to make products less durable so they will not last long enough to become the focus of a product liability claim filed many years after the product's manufacture. The proposed legislation would provide this "outside limitation period" to decrease the number of product liability claims based on aged products.<sup>34</sup> Without this provision the number of product based claims will continue to accelerate. This in turn will cause an increase in insurance premiums to retailers and manufacturers, thus making such insurance even more difficult to obtain and with the potential for driving small businesses from the marketplace. Also, the burden on the consumer to pay ever-increasing prices for products which may not be designed to last as long as they could is similarly unjustified. Strong public policies, it seems, support a restrictive statute of limitations.<sup>35</sup>

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<sup>33</sup> Hoenig, *supra* note 30, at 3, cols. 1-2.

<sup>34</sup> See note 26 *supra* and accompanying text.

<sup>35</sup> See, e.g., *Johnson v. Star Machinery Co.*, 270 Or. 694, 530 P.2d 53 (1974). The court recognized the policy arguments behind such a statute of limitations: In general, there are usually two reasons which are advanced as justification for the imposition of such statutes. The first concerns the lack of reliability and availability of evidence after a lapse of long periods of time. . . .

The second rationale concerns the public policy of allowing people, after the lapse of a reasonable time, to plan their affairs with a degree of certainty, free from the disruptive burden of protracted and unknown potential liability.

### B. *The Exceptions*

The proposed statute of limitations has two exceptions which would prevent its application to specific product liability claims. The first occurs when the manufacturer of a defective product *at the time of its manufacture* had actual knowledge of the defect and that such defect would be likely to cause harm in the ordinary course of the product's use.<sup>36</sup> The other occurs when the action arose due to an injury resulting from exposure to toxic substances.<sup>37</sup>

The first exception, often considered as an issue of fraudulent concealment, is a recognized tolling provision which is commonly built into such laws.<sup>38</sup> It is a reasonable exception; it is fundamentally unfair to enable an individual to escape liability by fraudulently concealing his knowledge of the defect.

The second exception in the proposed statute was apparently included because of difficulties presented in cases involving injuries resulting from exposure to poisons. The problem was to set a "date of injury" from which the statute of limitations could run. There appears to be significant common law precedent for the proposition that:

[W]here it was shown that the plaintiff lacked knowledge of the product's defect or of its unforeseen effect because the results of using the product were gradual and unaccompanied by actual or perceptible trauma which would lead to recognition of the causal connection between the product and the injury suffered, the statute of limitations would not begin to run on the action until the plaintiff knew or should have known of the connection.<sup>39</sup>

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These rationales are obviously applicable without regard to whether or not undetected damage had occurred at the time of the original negligence. . . .

*Id.* at 697, 530 P.2d at 56.

<sup>36</sup> S.B. No. 67, *supra* note 1, § 2305.101(A).

<sup>37</sup> *Id.*

<sup>38</sup> See Annot., 91 A.L.R.3d 991, 1001 (1979):

[W]here it was shown that the plaintiff lacked knowledge of the product's defect or unforeseen effect because of justifiable reliance on the manufacturer's false representation of the product's safety and fitness, or because of the manufacturer's fraudulent concealment of the product's defect, the statute of limitations would not begin to run on the action until the plaintiff discovered, or should have discovered, the misrepresentation or the fraudulent concealment.

See also *Baker v. Beech Aircraft Corp.*, 39 Cal. App. 3d 315, 114 Cal. Rptr. 171 (1974) (defects in airplane's fuel system fraudulently concealed by manufacturer); *Warrington v. Charles Pfizer & Co.*, 274 Cal. App. 2d 564, 80 Cal. Rptr. 130 (1969) (ingestion of drug caused bodily ailments during pregnancy and plaintiff relied on company's express representation of safety).

<sup>39</sup> Annot., 91 A.L.R. 3d 991, 999 (1979). This type of "tolling" of the statute of limitations applies to injuries involving cumulative exposure to toxic substances. See, e.g., *Raymond v. Eli Lilly & Co.*, 412 F. Supp. 1392 (D.N.H. 1976), *aff'd*, 556

The increasing complexity and sophistication of the chemicals industry provides adequate reason for this exception to be built into Senate Bill No. 67. The problems inherent in ascertaining a date of injury upon which to base a products liability claim were illustrated in a case involving a plaintiff's use of a chloroquine derivative.<sup>40</sup> Plaintiff began using the derivative in 1953 to treat a skin disorder. Plaintiff first noticed an eye problem in 1956. When she visited an ophthalmologist in 1962, she was found to be losing her eyesight from side effects of the chloroquine derivatives. By 1969, the plaintiff was almost totally blind.

There are many products whose continuous use results in an accumulation of insults to the body with resultant disease. Exposure to asbestos and fiberglass have resulted in such illnesses as asbestosis and berylliosis which do not appear until many years after the initial contamination.<sup>41</sup> Thus, there is ample justification for the exceptions to the statute for injuries involving toxic substances.<sup>42</sup>

F.2d 628 (1st Cir. 1977) (cause of action did not accrue for plaintiff's blindness until she learned of blindness caused to another person through use of the same drug and concluded that there might be a causal connection between her blindness and the defendant's drug); *Newcomer v. Searle & Co.*, 378 F. Supp. 1154 (E.D. Pa. 1974) (explaining that the rule in personal injury actions was that the statute did not begin to run until discovery of the cause of the harm or the time when the cause of the harm should have been discovered); *Wigginton v. Reichold Chemicals, Inc.*, 133 Ill. App. 2d 776, 274 N.E.2d 118 (1971) (plaintiff's cause of action accrued at the time he discovered that his illness resulted from exposure to chemical products even though discovery occurred three years after his last exposure to them).

<sup>40</sup> *Basco v. Sterling Drug, Inc.*, 416 F.2d 417 (2d Cir. 1969). Chloroquine had resulted in many similar injuries. See, e.g., *Sterling Drug, Inc. v. Yarrow*, 408 F.2d 978 (8th Cir. 1969); *Bine v. Sterling Drug, Inc.*, 422 S.W.2d 623 (Mo. 1968); *Krug v. Sterling Drug, Inc.*, 416 S.W.2d 143 (Mo. 1967).

<sup>41</sup> See, e.g., *Borel v. Fiberboard Paper Products Corp.*, 493 F.2d 1076 (5th Cir. 1973), cert. denied, 419 U.S. 869 (1974) (exposure to asbestos); *Arnstein v. Manufacturing Chemists Ass'n, Inc.*, 414 F. Supp. 12 (E.D. Pa. 1976) (exposure to vinyl chloride). Diagnoses of such illnesses after exposure to these and other chemicals can be extremely difficult. Symptoms may not appear until many years after exposure with no intervening illnesses to suggest the cause of an ultimately, debilitating disease. It is not uncommon for signs of asbestosis and other similar illnesses to develop twenty years or more after exposure.

<sup>42</sup> A number of other possible exceptions were not included in the legislation. The concept that a manufacturer has a continuing duty to either correct the defective condition or warn the purchaser of the defect has been recognized as a basis to toll a statute of limitations when evidence of the continuing duty is introduced. See, e.g., *Prokolkin v. General Motors Corp.*, 170 Conn. 289, 365 A.2d 1180 (1976) (suit based on continuing duty to warn may not be brought in strict liability under statute of limitations). There are also tolling exceptions such as infancy, mental or physical disability, and absence of a defendant from the jurisdiction. By excluding these tolling provisions from the proposed legislation, common law development of these exceptions could be precluded and prejudice rendered upon those plaintiffs least able to bear them. See generally, *Developments in the Law — Statutes of Limitations*, 63 HARV. L. REV. 1177, 1220-32 (1950) for a complete discussion of tolling provisions includable in statutes of limitations.

### C. *Right to Seek Indemnity*

Section 2305.101(B) of Senate Bill No. 67 apparently will not effect the present relationship between the defendant ultimately found liable, and the insurer who must pay the claim.<sup>43</sup> No additional defenses are made available to the insurer beyond those he already has against indemnifying the manufacturer for injuries sustained from defective products. The legislation also would not have an effect on the manufacturer's right to bring an action against one who was responsible in part for the injury-causing defect, such as the supplier who made the defective part for the manufacturer's product.

### D. *Senate Bill No. 67 v. Draft Uniform Product Liability Law § 109*

There are interesting contrasts to be noted between the proposed legislation and section 109 of the Draft Uniform Product Liability Law.<sup>44</sup> For the most part, Ohio's proposed product liability legislation is based upon an entirely different concept than that which forms the foundation of the Draft Uniform Product Liability Law. Whereas both section 109 of the model law and Senate Bill No. 67 seeks to provide the manufacturer (who is termed the "seller" in section 109) with some protection from "stale" claims, section 109 also seeks to provide the plaintiff with the right to seek damages for injuries sustained from defective products in situations in which Ohio's legislation would leave the plaintiff substantially without a remedy against the manufacturer.

Section 109 accomplishes this in two distinct ways. First, it utilizes the concept of "useful safe life," *i.e.*, the principle that "[the] age of an allegedly defective product must be considered in light of its expected useful life and the stress to which it has been subjected."<sup>45</sup> Through this concept, a seller may be held liable only for harms caused during the "useful safe life" of the product. It does not attempt to apply fixed useful life standards for all products. This may result in a less clear standard than that set by the fixed statute of limitations proposed in Ohio, but the section 109 standard is far less arbitrary. Second, the ten-year statute of repose is divided into workplace injuries and non-workplace injuries. No such distinction is made in Senate Bill No. 67 with the possible result that an employee injured on the job by defective machinery designed to last many years could be barred from obtaining legal re-

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<sup>43</sup> See S.B. No. 67 *supra* note 1, § 2305.101(B).

<sup>44</sup> Draft Uniform Product Liability Law § 109, 44 Fed. Reg. 2,996, 2,999 (1979). The text of section 109 is reprinted in Appendix II along with other selected portions of the model law.

<sup>45</sup> *Kuisis v. Baldwin-Lima-Hamilton Corp.*, 457 Pa. 321, 330, 319 A.2d 914, 923 (1974) (brake-locking mechanism on a crane failed after more than twenty years of use).

dress. Section 109 permits the plaintiff to bring an action against the employer outside the ten-year statute of repose if the worker can prove the danger of the product. For non-workplace injuries section 109 does not contain an absolute cut-off, but instead creates the rebuttable presumption that the product has been used beyond its normal life.<sup>46</sup>

The exceptions to section 109 are similar to those of Senate Bill No. 67. Both statutes provide for an exception where the manufacturer expressly warrants that his product will function beyond the ten-year period.<sup>47</sup> They also provide for exceptions where the seller (manufacturer) has intentionally misrepresented his product.<sup>48</sup> In addition, neither statute affects contribution and indemnity claims,<sup>49</sup> and each excepts products from which injuries may arise only after continual exposure.<sup>50</sup> The "inside limitation period" of section 109(C) is considerably more liberal with three years being permitted after the injury before an action may be filed, rather than the time requirement of two years specified in the Ohio proposal.<sup>51</sup>

It is apparent that despite the similarities in these proposals, there are substantial differences. These differences are grounded in fundamental philosophical bases which cannot be totally reconciled. Section 109 is a model statute for all the states and is thus more complex than section 2305.101 and probably more difficult to administer. The model statute makes a greater attempt to allow for the different circumstances in which a plaintiff may find himself and which would color a particular product liability case. For this reason the model statute is less prone to criticism upon the grounds of arbitrariness and lack of a rational basis.

Ohio is not the only state concerned with altering statute of limita-

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<sup>46</sup> Colorado law utilizes this rebuttable presumption concept rather than the absolute cutoff. *See* COLO. REV. STAT. § 13-21-403(3) (Supp. 1978). The proposed Ohio legislation and most other state product liability statutes use the cutoff approach. This raises questions of undue arbitrariness. *See* notes 57-67 *infra* and accompanying text for a discussion of possible constitutional challenges.

<sup>47</sup> *Compare* Draft Uniform Product Liability Law § 109(B)(3)(a), 44 Fed. Reg. 2,996, 3,000 (1979) *with* S.B. No. 67, *supra* note 1, § 2305.101(A). *See* appendices I and II.

<sup>48</sup> *Compare* Draft Uniform Product Liability Law § 109(B)(3)(b), 44 Fed. Reg. 2,996, 3,000 (1979) *with* S.B. No. 67, *supra* note 1, § 2305.101(A). *See* appendices I and II.

<sup>49</sup> *Compare* Draft Uniform Product Liability Law § 109(B)(3)(c), 44 Fed. Reg. 2,996, 3,000 (1979) *with* S.B. No. 67, *supra* note 1, § 2305.101(B). *See* appendices I and II.

<sup>50</sup> *Compare* Draft Uniform Product Liability Law § 109(B)(3)(d), 44 Fed. Reg. 2,996, 3,000 (1979) *with* S.B. No. 67, *supra* note 1, § 2305.101(A). *See* appendices I and II.

<sup>51</sup> *Compare* Draft Uniform Product Liability Law § 109(C), 44 Fed. Reg. 2,996, 3,000 *with* S.B. No. 67, *supra* note 1, § 2305.101(A). *See* appendices I and II.

tions legislation. Many states have already enacted similar statutes.<sup>52</sup> These statutes represent a broad range of approaches. Other than the use of a rebuttable presumption (as written into Colorado law<sup>53</sup> and the Draft Uniform Product Liability Law)<sup>54</sup> several states use an "outside limitation period" either alone or in conjunction with an inside limitation period. The movement toward reform utilizes the "outside limitation period" as a pivotal part of the legislation. Present law in Ohio and other states which have not amended their laws in this area apply only the inside limitation period, *i.e.*, as long as the injury complained of occurs within a certain period of time (usually two or three years) before the action is filed, the claim will be actionable, irrespective of the age of the product which caused the injury. The outside limitation used by the reform states usually varies from six to twelve years, and the point from which the statute of limitations begins to run can be from the date of sale, lease, bailment, or delivery of the product.<sup>55</sup> In comparison with the general tenor of the reform statutes adopted by other states,<sup>56</sup> Senate Bill No. 67 is reasonably typical in its outlook and application.

#### E. *Effect of Senate Bill No. 67 on Ohio Law*

While a complete prognosis as to what effect this legislation will have an Ohio product liability law is not possible, some general trends can be suggested.

First, it is unlikely that a significant proportion of product liability lawsuits in Ohio would be barred by the proposed statute of limitations. A recent survey conducted by the Insurance Services Office resulted in the finding that only 2.6 per cent of the products involved in product liability actions were purchased more than six years prior to the injury-

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<sup>52</sup> Variations among the state statutes of limitation are as great as the number of states which have enacted them. Connecticut adopted a three year inside limitation period and allows eight years within which an action may be brought from "the date of sale, lease or bailment" of an injury-causing defective product. CONN. GEN. STAT. ANN. § 52-577(a) (West Supp. 1979). Florida's statute allows a twelve year period "after the date of delivery of the completed product to its original purchaser . . ." within which such an action must be commenced. FLA. STAT. ANN. § 95.031(2) (West Supp. 1978). Oregon shares Connecticut's outside limitation period of eight years but bars commencement of an action "later than two years after the date on which the death, injury or damage complained of occurs." OR. REV. STAT. § 30.905(1) (1977). Utah distinguishes between the date of initial purchase and the date of manufacture permitting no action to be brought more than six years after the sale or ten years after the product was made. UTAH CODE ANN. § 78-15-3(1) (1977).

<sup>53</sup> COLO. REV. STAT. § 13-21-403(3) (Supp. 1978). See note 46 *supra* and accompanying text.

<sup>54</sup> Draft Uniform Product Liability Law 44 Fed. Reg. 2996 (1979).

<sup>55</sup> See note 52 *supra*.

<sup>56</sup> See notes 52 and 53 *supra*.

causing event.<sup>57</sup> Although there has been a few actions involving older products in Ohio,<sup>58</sup> and there are many products made today—such as ammunition, nails and aircraft—which are likely to have a useful life span or shelf life of greater than ten years,<sup>59</sup> many actions involving older products could be brought against defendants under whose control the product was used, such as the plaintiff's employer who owned the aged drill press, or the airline which owned the aged aircraft. Such actions against non-manufacturing defendants would further reduce the number of deserving plaintiffs barred from recovery.

Second, the proposed legislation may affect the availability and cost of product liability insurance. The underwriters' concern about potential losses associated with older products is an important factor in determining whether such coverage will be available and at what price. Since insurance companies must set their present rates based upon possible future losses, what may be of greatest import is not what is happening today in product liability actions, but what the insurance industry perceives as a portent for tomorrow.<sup>60</sup> Based upon present law in Ohio, and most other states, the theoretical multi-million dollar claim for injuries sustained from an electric drill or heating pad manufactured decades ago is still possible. While it cannot be positively stated that insurance rates will moderate and coverage will become more widely available if the proposed statute of limitations is enacted, it can be implied that this will be so.

#### F. Constitutional Considerations

There may be constitutional difficulties in setting some arbitrary time, such as ten years, after which a plaintiff would be prevented from suing the manufacturer of a defective product. Under present Ohio law, a suit must be filed within two years after the *injury-causing event*. The

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<sup>57</sup> I.S.O. SURVEY, *supra* note 5, at 83.

<sup>58</sup> See, e.g., *Burns v. Pennsylvania Rubber & Supply Co.*, 117 Ohio App. 12, 189 N.E.2d 645 (1961) (hydraulic lift caused injury twelve years after purchase).

<sup>59</sup> The average age of a Boeing 707, for example, is ten years. CENSUS OF U.S. CIVIL AIRCRAFT-1974, U.S. Government Printing Office, No. 050-007-00303-0.

<sup>60</sup> See Connolly, *supra* note 3, at 5-6:

To an insurance company, the evolutionary process of the liability system presents extreme difficulties. It must calculate its premium upon the anticipation of what will occur in the future. It receives its payment today and pays its losses tomorrow. In the area of product liability, there is no option by which the insurer may recover losses which have exceeded the premiums collected in past years.

The purpose of underwriting is to select risks which in the aggregate will hopefully produce a reasonable underwriting profit for the insurance company. This profit is a must if insurance companies are to continue to provide and finance the needed capacity to insure product liability risks.



present statute is not constitutionally infirm because it first requires an injury before the time begins to run. The potential difficulty with Senate Bill No. 67 is that *no injury is required* for the statute of limitations to run; once a product reaches ten years of age, the right to sue the manufacturer for injuries sustained from the product, is in most instances terminated. *The proposed legislation may extinguish a right before the injury giving rise to a violation of that right occurs.*

Several provisions of the Constitution of Ohio and the United States Constitution may be invoked in attacking the validity of such statutes of limitations, particularly the due process and equal protection provisions.<sup>61</sup> In order to uphold such statutes, the existence of legitimate legislative purposes may need to be shown. Even assuming that the legislative purposes behind this legislation—to discourage stale product liability claims and make product liability insurance more available and affordable—are valid, there may be an unconstitutional distinction made in the statute between two classes of plaintiffs based upon the ten-year cutoff point. The situation may arise in which two plaintiffs are injured by two similarly defective products; the first plaintiff is injured 9 years and 11 months after the product was sold, and the second is injured 10 years after the product was sold. Under Senate Bill No. 67, the first plaintiff could recover for damages, whereas the second could not. This distinction would not be made according to when the injury occurred but when the product was made. The second plaintiff would have his cause of action extinguished before the right to enforce it accrued, due to an arbitrary cutoff point.

Under the doctrine of equal protection, such a classification would be constitutional only if it was based “upon some ground of difference having a fair and substantial relation to the object of the legislation. . . .”<sup>62</sup> Although this “substantial relation” standard is relatively new, there is no indication that the courts would necessarily resort to it. Instead the statute of limitations could be evaluated using the more traditional minimum rationality standard; that standard only requires a finding that there be a rational connection between the classification and the state interest to be protected.<sup>63</sup> Using this standard, a court could readily conclude that the statute of limitations would operate to prevent stale claims and reduce the burden on product liability insurers and thereby uphold the constitutionality of the statute.

In assessing which equal protection analysis would be used to determine the validity of the statute of limitation provisions, it is noteworthy

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<sup>61</sup> See U.S. CONST. amend. XIV, § 1; OHIO CONST. art. I, § 16. Section 16 of the Ohio Constitution states: “All courts shall be open, and every person, for an injury done him in his land, goods, person, or reputation, shall have remedy by due course of law, and shall have justice administered without denial or delay.”

<sup>62</sup> *Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920).

<sup>63</sup> See, e.g., *McGowan v. Maryland*, 366 U.S. 420 (1961).

that the "substantial relation" standard was used by the Supreme Court of Idaho in *Jones v. State Board of Medicine*<sup>64</sup> to determine the validity of the limiting provisions of a medical malpractice statute. This statute operated similarly to the limiting provisions of the proposed statute of limitations for product liability actions. In determining that the "substantial relation" test applied, the court stated that "where the discriminatory character of a challenged statutory classification is apparent on its face and where there is also a patent indication of a lack of relationship between the classification and the declared purpose of the statute, then a more stringent judicial inquiry is required beyond that mandated by [the minimum rationality test] . . ." <sup>65</sup> If the "substantial relation" test were to be used, it is apparent that the proponents of the limitation period would have to substantiate their arguments. Data would have to be presented proving that the increased costs of maintaining a product liability line is due to large damage awards in suits brought for injuries sustained from aged products. Alternatively, proof that such suits are likely to increase in the near future to the point where providing product liability insurance may cease to be profitable could be presented. Proponents would also need to establish that such a statute of limitation would serve to stem the rising costs of product liability insurance at the relatively minor cost of preventing a few plaintiffs from obtaining judicial relief. Whether such a showing could be made to justify upholding the statute of limitations under the "substantial relation" doctrine is still open to conjecture.<sup>66</sup>

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<sup>64</sup> 97 Idaho 859, 555 P.2d 399 (1976), *cert. denied*, 431 U.S. 914 (1977). This case caused the Idaho Supreme Court to examine a statute which limited the maximum amount of damages permissible in a medical malpractice case to \$150,000. The court held that denying full recovery to plaintiff injured in excess of \$150,000 violated equal protection unless on remand it could be shown that: 1) a medical malpractice crisis existed; and 2) limiting recovery of \$150,000 per claim bore a fair and substantial relation to averting that crisis. *Id.* at 876, 555 P.2d at 416. Similarly, an Ohio court could uphold the constitutionality of the proposed legislation upon a showing that: 1) a product liability crisis exists which threatens the cost and availability of product liability insurance; and 2) by enacting a statute of limitations, including an outside limitation period of ten years, stale claims would be prevented, thereby making insurance more available and less costly for the indemnification of current claims.

<sup>65</sup> *Id.* at 871, 555 P.2d at 411.

<sup>66</sup> See generally Massery, *Date-of-Sale Statutes of Limitation—A New Immunity for Product Suppliers*, 656 INS. L.J. 535 (1977):

In testing the constitutionality of the Model Bill [Draft Uniform Product Liability Law, 44 Fed. Reg. 2996 (1979)], it is helpful to note that statutes of limitations similar to the Model Bill have been enacted to benefit architects and engineers engaged in designing or building structures on real property [as in OHIO REV. CODE ANN. § 2305.131 (Page 1979)]. The design statutes of limitations run from the time of substantial completion of the project and have limitations ranging from three to twenty years.

Of course, the structures designed by architects are, almost without ex-

A possible source of evidence lies in examining how product liability lawsuits have changed in those states which have enacted new statutes of limitation periods; however in most states there has not been sufficient opportunity to test it.<sup>67</sup> As a result, a complete picture cannot be obtained regarding the judicial interpretation being given these acts.

Only two cases have been decided to date which directly involved questions regarding the validity of such statutes. Both cases were decided in Florida under a twelve-year statute of limitations based on the original date of delivery of the completed product to its original purchaser.<sup>68</sup> In *Bauld v. J. A. Jones Construction Co.*,<sup>69</sup> the Supreme Court of Florida upheld the statute as within the legislative authority to devise. The court noted "[there] is no vested right in a litigant to the benefit of the statute of limitations in effect when his cause of action accrues,"<sup>70</sup> and that the one year grace period before the statute would take full effect was sufficient protection in adopting an outside date of delivery statute of limitations. In another Florida case, *Diamond v. E. R. Squibb and Sons, Inc.*,<sup>71</sup> the court again upheld the new statute of limitations. The court found that where an action was not brought within twelve years after the last date of delivery of the drug, the action was barred by the statute of limitations regardless of when the defect in the drug should have been discovered.<sup>72</sup>

The "substantial relation" requirement was used by the Idaho Supreme Court in *Jones* apparently because the statute involved set a maximum

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ception, of a more lasting nature than manufactured goods. Yet, even though a limiting period running from the date of completion of real estate might seem more appropriate in design professional cases, five courts have held these statutes of immunity for design professionals unconstitutional as violative of the equal protection and due process clauses of the United States and State Constitutions. *Plant v. R.L. Reid, Inc.*, 313 So. 2d 518 (Ala. 1975); *Fujioka v. Kam*, 514 P.2d 568 (Hawaii 1973); *Skinner v. Anderson*, 231 N.E.2d 588 (Ill. 1967); *Saylor v. Hall*, 497 S.W.2d 218 (Ky. 1973); *Kallas Millwork v. Square D. Co.*, 225 N.W.2d 454 (Wis. 1975).

On the other hand, there have been a number of courts that have held that design immunity statutes are constitutional. See, for example, *Rosenberg v. Town of North Bergen*, 293 A.2d 662 (N.J. 1972); and *Smith v. Allen Bradley Co.*, 371 F. Supp. 698 (W.D. Va. 1974).

*Id.* at 546. The better view at present appears to be that the legislature is entitled to make such policy judgments without the risk of having the legislation declared to be unconstitutional.

<sup>67</sup> See note 52 *supra*. For example, Connecticut's law did not become effective until June 4, 1976; Florida's outside limitation statute became effective on May 23, 1977; Oregon's statute took effect on January 1, 1978; and the statute of limitations in Utah became effective on May 10, 1977.

<sup>68</sup> See FLA. STAT. ANN. § 95.031(2) (West Supp. 1978).

<sup>69</sup> 357 So. 2d 401 (Fla. 1978).

<sup>70</sup> *Id.* at 403.

<sup>71</sup> 366 So. 2d 1221 (Fla. Dist. Ct. App. 1979).

<sup>72</sup> *Id.* at 1222.

damages amount. The case, therefore is distinguishable and does not provide solid precedent striking down an outside date-of-sale statute of limitations.

While sufficient litigation has not yet developed to indicate how the courts will treat these statutes, the Florida cases suggest that such legislation would be upheld.

#### IV. LIMITATION OF ACTIONS MAINTAINED AGAINST A SELLER WHO IS NOT A MANUFACTURER

Section 2305.32 of Senate Bill No. 67 makes a number of changes in the present law of Ohio regarding the liability of a non-manufacturing seller. Cases in Ohio and other states generally hold manufacturing and non-manufacturing sellers liable for injuries sustained from defective products (particularly foodstuffs and medicines).

"Sellers" has been defined to include suppliers, lessors, donors, bailors and lenders.<sup>75</sup> A possible rationale behind extending liability to non-manufacturing sellers is that they would be encouraged to pressure manufacturers to produce safer and better-designed products. In addition the cost of a damage award for injuries sustained from a defective product could be more easily borne if retailers and manufacturers would share the expenses involved.

There are countervailing considerations. For example, it is difficult to imagine that a small independent retailer could have a substantial influence on a national manufacturer. Also, it seems unfair that the retailer should share the expense of litigation because he sold a product which may have been sealed in a package and thereby was denied a reasonable opportunity to inspect. The proposed Ohio legislation seems to accept this viewpoint.

There are significant differences between the proposed legislation in Ohio and the Draft Uniform Product Liability Law regarding the potential liability of non-manufacturing sellers.<sup>76</sup> The statute proposed in the

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<sup>75</sup> See S.B. No. 67, *supra* note 1, § 2305.32.

<sup>74</sup> See, e.g., *Allison Steel Mfg. Co. v. Superior Court of Maricopa County*, 20 Ariz. App. 185, 511 P.2d 198 (1973), *aff'd*, 112 Ariz. 403, 542 P.2d 1102 (1975) (doctrine of strict product liability applies to all of those in chain of placing a product in stream of commerce; from retailer, to wholesaler, to manufacturer of product); *Midgley v. S.S. Kresge Co.*, 55 Cal. App. 3d 67, 127 Cal. Rptr. 217 (1976) (retailer's liability for injuries caused by defects in product it sells is coextensive with that of manufacturer of product).

<sup>75</sup> See generally *Lockett v. General Electric Co.*, 376 F. Supp. 1201 (E.D. Pa. 1974); *aff'd sub nom.*, *General Electric Co. v. Sun Shipbuilding & Drydock Co.*, 511 F.2d 1393 (3d Cir. 1975); *Wolfe v. Great Atlantic & Pacific Tea Co.*, 143 Ohio St. 643, 56 N.E.2d 230 (1944); *Kniess v. Armour & Co.*, 134 Ohio St. 432, 17 N.E.2d 734 (1938); *Dow Drug Co. v. Nieman*, 57 Ohio App. 190, 13 N.E.2d 130 (1936).

<sup>76</sup> Compare Draft Uniform Product Liability Law, § 114.44 Fed. Reg. 2,996, 3,001 (1979) with S.B. No. 67, *supra* note 1 § 2305.32. See appendices I and II.

Draft Uniform Product Liability Law is simpler and less comprehensive. It also would shield the non-manufacturing seller to a greater degree than would the proposed legislation in Ohio. The Draft would permit imposition of liability only when the seller makes an express warranty to the contrary, or in the event of seller's negligence. For example when a reasonable opportunity to inspect the product is not properly utilized. On the other hand, the Ohio legislation specifically permits actions to be maintained against the seller for negligence and for violation of express warranty. Section 2305.32 also permits the seller to be sued if the seller and manufacturer are substantially the same, or if there is common ownership between seller and manufacturer, or if the seller utilizes his own label, trademark, or product design, or if he knew or should have known of the defect, or modifies the product thereby rendering it defective.<sup>77</sup> The proposed statute also includes, for what appears to be purely policy reasons, an obligation that sellers must timely divulge names and addresses of manufacturers of the products they sell, or risk liability as a manufacturer.<sup>78</sup> This is a seemingly unprecedented requirement.

Section 2305.32(H) of Senate Bill No. 67 more closely comports with the provision of section 114(b) of the uniform statutory proposal.<sup>79</sup> A justification for inclusion of these sections on seller liability was expressed in *Vandermark v. Ford Motor Co.*,<sup>80</sup> "[i]n some cases the retailer may be the only member of that enterprise reasonably available to the injured plaintiff. In other cases the retailer himself may play a substantial part in insuring that the product is safe or may be in a position to exert pressure on the manufacturer to that end."<sup>81</sup> It is apparent that the Ohio legislation would expose the non-manufacturing seller to greater liability than would the Draft Uniform Product Liability Law. However, where the plaintiff would not be able to obtain sufficient redress from the manufacturer, both statutory proposals would treat the seller similarly.

The experience of other states regarding liability of a non-manufacturing seller has been varied. Although generally the retailer and distributor have a relatively small role as product liability defendants, when compared to the product manufacturer, they are frequently in-

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<sup>77</sup> S.B. No. 67, *supra* note 1 § 2305.32(A)-(E).

<sup>78</sup> *Id.* § 2305.32(G).

<sup>79</sup> Compare *id.* § 2305.32(H) with Draft Uniform Product Liability Law, § 114.44 Fed. Reg. 2,996, 3,001 (1979). See appendices I and II.

<sup>80</sup> 61 Cal. 2d 256, 391 P.2d 168, 37 Cal. Rptr. 896 (1964). Additionally, the Draft Uniform Product Liability Law provides, "[i]f the manufacturer is not subject to service of process or has been judicially declared insolvent, or where a court determines that the claimant would have appreciable difficulty in enforcing a judgment against the product manufacturer, the retailer or distributor has the same strict liability obligation as a manufacturer." 44 Fed. Reg. at 3,014.

<sup>81</sup> 61 Cal. 2d at 258, 391 P.2d at 170, 37 Cal. Rptr. at 899.

cluded as defendants.<sup>82</sup> As a result, retailers and distributors are subject to substantial product liability costs both in terms of insurance premiums and legal defense costs incurred beyond the scope of insurance coverage *e.g.*, employee time, records production and loss prevention techniques. The proposed Ohio legislation regarding liability of the retailer will undoubtedly have a mitigating effect upon the costs sellers must bear.

#### V. LIMITATION OF ACTIONS FOR SITUATIONS INVOLVING MODIFICATION, DETERIORATION, OR ABUSE OF THE PRODUCT<sup>83</sup>

Section 2305.33(A) of the proposed bill follows Ohio common law in exempting the manufacturer from liability where modification, deterioration or abuse of the product creates the defect outside of his control. Section 2305.33(A)(1) and (2) are similar to each other in that both involve a change in the product between the time it left the factory of the manufacturer and the time it caused the plaintiff's injury. The major difference between these sections is that in paragraph (1), the change in the product was brought about by assertive action by someone other than the manufacturer; and in paragraph (2) the change in the product was the result of a *lack* of action to maintain the product properly by someone other than the manufacturer. In either case the manufacturer is not liable.

This statutory prescription closely comports with Ohio law in this area of product liability. As illustrated in *Temple v. Wean United, Inc.*,<sup>84</sup> where there has been a "substantial change" from the condition in which the product was originally sold, manufacturers cannot be successfully sued for the injuries sustained.<sup>85</sup>

The rationale behind this rule is that the manufacturer should only be held liable for the injuries caused by the defects which existed in the product when it left his factory and not for injuries caused by defects which resulted from changes made to the product after it was beyond the manufacturer's control. The only variation added by section 2305.33(A) is that such modifications cannot be "made by, at the direction of, or with the express consent of, the party against whom recovery is sought."<sup>86</sup> Thus, unless the manufacturer was involved with the modifications, he will be absolved of liability therefrom.

<sup>82</sup> See, *e.g.*, *Vergott v. Deseret Pharmaceutical Co., Inc.*, 463 F.2d 12 (5th Cir. 1972); *Duckworth v. Ford Motor Co.*, 320 F.2d 130 (3d Cir. 1963); *Tuscon Indus., Inc. v. Schwartz*, 108 Ariz. 464, 501 P.2d 936 (1972).

<sup>83</sup> See S.B. No. 67, *supra* note 1, § 2305.33(A).

<sup>84</sup> 50 Ohio St. 2d 317, 364 N.E.2d 267 (1977).

<sup>85</sup> *Id.* at 269. The product involved was a power press machine. The activating buttons were relocated from shoulder height at the time of manufacture in 1954, to waist height and in an upward position before the injury in 1972.

<sup>86</sup> S.B. No. 67, *supra* note 1, § 2305.32(A)(1).

Section 2305.33(A)(3) and (4) set out further actions by the plaintiff which constitute defenses to the manufacturer's or seller's liability: use of the product, with knowledge that is defective, contrary to reasonable warnings or for other than the intended purposes;<sup>87</sup> and separately, assumption of the risk by the plaintiff.<sup>88</sup> The relationship between these defenses and sections 110 and 111 of the Draft Uniform Product Liability Law is noteworthy. Section 110 follows section 2305.33(A)(3) rather closely, except that the Draft Law (section 110(A)(3)) charges the manufacturer with anticipation of modification of the product by a third party, but only if the manufacturer has reasonable expectation that the modification will take place. Section 111, however, differs from sections 2305.33(A)(3) and (4) in that the former assumes a comparative negligence standard, whereby the amount of damages paid to plaintiff is reduced based upon an allocation of fault between plaintiff and defendant causing plaintiff's injuries. The comparative negligence standard has just recently been adopted in Ohio,<sup>89</sup> and Senate Bill No. 67 may very well be amended further to reflect this change in Ohio negligence law.

## VI. STATE OF THE ART<sup>90</sup> AND GOVERNMENT STANDARDS<sup>91</sup>

Section 2305.33(B) represents a codification of the premise that a product will be evaluated according to the technology in existence at the time of its manufacture. The production techniques of one generation are not to be judged in the light of subsequent technology.

Ohio cases have generally viewed the state of the art defense as viable when a product conforms to the date-of-production standards, while refusing to consider a product defective *per se* merely because it does not.<sup>92</sup> However, the common law in other states does not permit it as a defense in strict liability cases. Under Illinois law, for example, the term "state of the art" has been held to have no relevance to defense of an action for strict products liability.<sup>93</sup> In Texas, conformance to industry

<sup>87</sup> See *id.* § 2305.33(A)(3).

<sup>88</sup> See *id.* § 2305.33(A)(4).

<sup>89</sup> See OHIO REV. CODE ANN. § 2315.19 (Page Supp. 1980)(effective June 20, 1980).

<sup>90</sup> S.B. No. 67, *supra* note 1, § 2305.33(B) deals with the state of the art defense.

<sup>91</sup> S.B. No. 67, *supra* note 1, § 2305.34 deals with the government standards defense.

<sup>92</sup> See, e.g., *LaMonica v. Outboard Marine Corp.*, 48 Ohio App.2d 43, 355 N.E.2d 533 (1976)(subsequent changes in state of the art are not admissible to show that the item is defective in action based on strict liability); *Burkhard v. Short*, 28 Ohio App.2d 141, 275 N.E.2d 632 (1971)(unpadded dashboard not unreasonably dangerous when not shown to be unique or unusual in design from all other automobile manufacturers).

<sup>93</sup> *Waler v. Trico Mfg. Co., Inc.*, 487 F.2d 595 (7th Cir. 1973), *cert. denied*, 415 U.S. 978 (1974).

custom is admissible on the question of negligence of the manufacturer, but the custom itself may be shown to be negligent.<sup>94</sup>

Permitting an action to be maintained for injuries sustained from a product whose design is evaluated by standards which evolved after that particular product's manufacture places upon the defendant an almost insuperable burden. This section of Senate Bill No. 67 attempts to evenly allocate the burden between plaintiff and defendant.

The codification of the state of the art defense will curb some abuses in the product liability field. It provides some defense against strict liability standards concerning product risks that are unknown at the time particular products are placed into commerce. Even with the proposed statute of limitations, the spectacular growth of technology could result in significant technological differences in manufacturing standards after only a few years.

Furthermore, the state of the art defense does not preclude a defendant from relying upon any other defense, such as assumption of a risk. Including this defense may serve to encourage manufacturers to be more innovative in the design and production of their goods in order to reduce the number of product related injuries and subsequent actions.

The proposed state of the art defense, however, is not absolute. It creates only the *rebuttable presumption* that the product was not defective, and still affords the plaintiff an opportunity to overcome "the burden of going forward with evidence to rebut or meet the presumption."<sup>95</sup> This has the effect of requiring plaintiff to prove that the product was defective, a very difficult task in strict liability suits particularly when the product was made in accordance with technological standards that are now obsolete.

Thus the result of this rebuttable presumption is to require plaintiff to prove his case rather than resting it on the mere premise that an injury occurred from an allegedly defective product.<sup>96</sup> This concept is also reflected in the Draft Uniform Liability Law.<sup>97</sup>

The defense of compliance with government standards, which is also treated as a rebuttable presumption in the statutory proposal, would place the same evidentiary burdens on the plaintiff as would the rebut-

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<sup>94</sup> Turner v. General Motors Corp., 514 S.W.2d 497 (Tex. Civ. App. 1974).

<sup>95</sup> FED. R. EVID. 301.

<sup>96</sup> Additionally, claims based on *res ipsa loquitor*—the mere fact that the injury occurred from a product which when made was under defendant's control establishes defendant's liability—would also seem to be affected by the state of the art defense. When the defect complained of was due to a method of design or manufacture typical at the time the product was made, the plaintiff would still have to meet evidence to rebut the presumption that the product was not defective. Thus, the plaintiff would not be able to rest his case on *res ipsa loquitor* alone.

<sup>97</sup> See Draft Uniform Product Liability Law, § 106, 44 Fed. Reg. 2,996, 2,998 (1979).



table presumption of manufacture in accordance with the state of the art. There is ample justification for such a defense. There are many government agencies which are establishing safety standards.<sup>98</sup> It is logical to conclude that compliance with standards set by government experts should be a defense to an action based on strict liability. This would still leave the plaintiff with an action based on negligence as evidenced by failure to comply with the government standards (as it would if defendant failed to establish compliance with state of the art standards). But if the product met these standards, the strict liability issue may not reach the jury, unless evidence was introduced that the standards were defective.<sup>99</sup>

Many courts accept the idea that compliance with government standards, while usually precluding strict liability, would still permit an action based on negligence.<sup>100</sup> This view is also reflected by the Restatement (Second) of Torts which provides that "[c]ompliance with a legislative enactment or an administrative regulation does not prevent a finding of negligence where a reasonable man would take additional precautions."<sup>101</sup>

The status to be given the defense of compliance with government standards raises an additional point of contention. For example, in *Temple* the Ohio Supreme Court considered the defense of compliance with government standards to negate negligence as a matter of law.<sup>102</sup> One noted commentator interpreted this opinion to reasonably infer that "use of the industrial standard to negate negligence as a matter of law will carry over to the determination of the existence of a defect in a product for strict liability standards."<sup>103</sup> However, it was also noted that

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<sup>98</sup> *E.g.*, consumer products are regulated under the Consumer Product Safety Act, 15 U.S.C. §§ 2051-81 (1972); motor vehicles and related equipment are regulated under the Traffic and Motor Vehicle Safety Act, 15 U.S.C. §§ 1381-431 (1966); drugs are regulated under the Federal Food, Drug, and Cosmetic Act, 21 U.S.C. §§ 301-92 (1938).

<sup>99</sup> *See, e.g.*, Hoening, *Compliance with Government Standards*, 178 N.Y.L.J. 2 (1977), at 2, cols. 1-2. It is emphasized that merely introducing *some* evidence that the government standards were defective is insufficient; the plaintiff should be required to show that the standards were based on inaccurate, incomplete, misleading or fraudulent information.

<sup>100</sup> *See, e.g.*, *McDaniel v. McNeil Laboratories, Inc.*, 196 Neb. 190, 241 N.W.2d 822 (1976) (acceptance of Food and Drug Administration standards as persuasive evidence that product is not unreasonably dangerous in the absence of proof of inaccurate information furnished by manufacturer in meeting such standards); *Gilbride v. James Leffel & Co.*, 37 Ohio L. Abs. 457, 47 N.E.2d 1015 (2d Dist. 1942) (state inspection of boiler does not relieve manufacturer of boiler from liability for negligent construction thereof, as the negligent construction may have been overlooked by the state inspector).

<sup>101</sup> RESTATEMENT (SECOND) OF TORTS, § 288C (1965).

<sup>102</sup> 50 Ohio St. 2d 317, 327, 364 N.E.2d 267, 273 (1977).

<sup>103</sup> *Werber, Strict Liability Comes of Age in Ohio: Almost*, 11 AKRON L. REV. 679, 688 (1978).

some government standard legislation includes the provision "that it is not intended to be in derogation of the common law, as is the case with the National Traffic and Motor Vehicle Safety Act of 1966."<sup>104</sup> Additionally many courts view government standards not to be a defense as a matter of law, but only as an example of minimum requirements which would *not* serve as a legal defense but only as *some evidence* of due care. A finding of negligence is still permissible in spite of compliance with such standards.<sup>105</sup> Senate Bill No. 67, by establishing the rebuttable presumption that the product was not defective if made in compliance with government standards, appears to represent a middle ground between treating the defense as absolute and regarding it as insignificant.

It is apparent that the defenses of compliance with government standards and state of the art are treated similarly in Ohio's proposed product liability reform legislation. Furthermore, the government standards provision of section 2305.34 is similar in the treatment accorded the rebuttable presumption of the product's safety to that in section 107 of the Draft Uniform Product Liability Law, although the latter sets stricter guidelines in defining a "government standard" than does the Ohio legislation.<sup>106</sup>

The relationship *between* these two statutory defenses deserves a brief comment. While a product will be presumed to be free from defect if made in accordance with government standards and defective if not so made; and a product will be presumed to be safe if made according to the state of the art at the time of its manufacture, there is no alternative provision that the product would be considered defective if *not* made according to the state of the art at the time of its manufacture.<sup>107</sup> In other words, the plaintiff would theoretically be able to use the government standards provision to shift the burden to the defendant of going forward with evidence to rebut the presumption that the product was defective if it is shown that it did not meet applicable government standards when it was made. However, showing that the product did not meet the state of the art when it was made will not create a statutory presumption which will operate in the plaintiff's favor. Apparently, the reason for this different treatment is that it is assumed that government standards will always be either equal to or less than the state of the art standards, but never greater; and that it would be possible for a

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<sup>104</sup> *Id.* at 688. "15 U.S.C. §§ 1381-1410 (1970). Section 108(c) of the Act, 15 U.S.C. § 1397(c), expressly negatives any intention of Congress to preempt this field and leaves common law development intact." *Id.* at 688, n.38.

<sup>105</sup> See, e.g., *Burch v. Amsterdam Corp.*, 366 A.2d 1079 (D.C. 1976); *Pickering v. State*, 57 Hawaii 405, 557 P.2d 125 (1976); *Jones v. Hittle Service, Inc.*, 219 Kan. 627, 549 P.2d 1383 (1976).

<sup>106</sup> See Draft Uniform Product Liability Law, § 107, 44 Fed. Reg. 2,996, 2,999 (1979). See appendix I.

<sup>107</sup> See notes 90 and 91 *supra*.

product to meet government safety requirements and yet fail to meet the state of the art at the time of the product's manufacture. In this situation the Ohio Senate apparently wanted to avoid the incongruous result of a product being presumed defective because it met government safety requirements at the time of its manufacture.

#### VII. CONSIDERATION OF INSURANCE COSTS FOR PRODUCT LIABILITY COVERAGE<sup>108</sup>

Insurance companies generally support Senate Bill No. 67 because one of its primary purposes is to make liability insurance coverage more available. Additionally, the shared concern over the cost of insurance is manifest in the proposed legislation.

Beginning January 1, 1981, the bill would require every insurance company to "base its product liability insurance rates in this state on past and prospective loss experience in the state to the extent that the insured's exposure is in the state."<sup>109</sup> The term "exposure" is not defined in the bill, but it appears to reflect the idea that insurance companies should not have nationally uniform rates and that Ohio should reap the benefits of its legislation meant to curb these rates.

Current law requires insurance companies doing business in Ohio to file annual reports with the Superintendent of Insurance.<sup>110</sup> The bill would require any company that issues product liability insurance policies in Ohio to file an additional annual report with the superintendent, in order that more detailed information may be obtained on the product liability lines offered by these companies.<sup>111</sup> This will in turn enable the legislature to ascertain the effects of the new product liability law on the insurance rates it was intended to reduce. The proposed legislation also defines product liability insurance.<sup>112</sup> Furthermore, the Ohio Products Liability Study Commission would be created to evaluate the effects of Senate Bill No. 67 on product liability law and insurance and to report its findings to the legislature.<sup>113</sup> These sections will give the burgeoning field of products liability far more attention than it has been accorded in the past and afford Ohio the opportunity to evaluate the performance of its product liability reform legislation.

#### VIII. CONCLUSION

Senate Bill No. 67 is a comprehensive proposal which, if enacted, will have a substantial impact on Ohio product liability law. Whereas its

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<sup>108</sup> See S.B. No. 67, *supra* note 1, §§ 3929.301, 3929.32 and 3937.021.

<sup>109</sup> *Id.* § 3937.021.

<sup>110</sup> OHIO REV. CODE ANN. § 3929.30 (Page 1971).

<sup>111</sup> S.B. No. 67, *supra* note 1, § 3937.021(H).

<sup>112</sup> *Id.* § 3929.301(C).

<sup>113</sup> *Id.* § 3929.021 (Section 4).

most controversial aspect is the outside "date-of-sale" statute of limitations, its codification of certain defenses for manufacturers and sellers, including those of state of the art and compliance with government standards, as well as provisions for study of the legislation's effects on subsequent lawsuits and changes in insurance rates, promises to affect product liability law and insurance in Ohio for a long time to come.

Although the statute of limitations will not affect many Ohio product liability actions because most are filed within ten years from the product's initial date of sale, it may nevertheless influence product liability insurance rates based upon what the insurance industry *perceives* as being portentous in product liability claims. If constitutionally challenged, the outside date-of-sales statute of limitations will likely be upheld.

The codification of various defenses is basically in accordance with the present common law of Ohio. Some possible exceptions are sections 2305.33(A)(3) and (4) which appear to provide the final step in Ohio's evolution from the defense of contributory negligence to strict liability requiring more culpable conduct on the part of a plaintiff to prevent recovery.

The proposed legislation monitors the effects it will have on the insurance industry and provides a vehicle—the Ohio Products Liability Study Commission—through which further reform of product liability law in Ohio may be effectuated. Senate Bill No. 67 is not the final word in Ohio product liability law, but it is a significant first step. It reflects the first response to a recognized need for reform called by attorneys, manufacturers, legal commentators, and the insurance industry. While not flawless, it will help balance the burdens of plaintiff and defendant. The proposed legislation may provide a net societal benefit by more realistically regulating the conduct of product liability actions and by making product liability insurance coverage more readily available at reasonable rates.

GEORGE D. ROSCOE

## APPENDIX I

S.B. No. 67, 113th Gen. Assy., Reg. Sess. (1979-80)  
as passed by the Ohio Senate.

## A BILL

To amend section 3929.32 and to enact sections 2305.101, 2305.32, 2305.33, 2305.34, 3929.301, and 3937.021 of the Revised Code to impose on product liability actions a statute of limitations related to the time of initial sale of the product, to make certain defenses available in all product liability cases, to establish rebuttable presumptions in the case of either compliance or noncompliance with manufacturing standards, to limit the liability of sellers of allegedly defective products, to require insurance companies writing product liability insurance policies to report annually certain information relative to such policies to the Superintendent of Insurance, and to require insurers to base their product liability insurance rates in this state on experience in this state.

Be it enacted by the General Assembly of the State of Ohio:

Section 1. That section 3929.32 be amended and sections 2305.101, 2305.32, 2305.33, 2305.34, 3929.301, and 3937.021 of the Revised Code be enacted to read as follows:

Sec. 2305.101. (A) An action for bodily injury, death, or injury to personal or real property caused by a defective product shall be brought within two years after the cause thereof arose, but in no event more than ten years from the date the product was first sold or leased for use or consumption if the cause of action is based upon strict tort liability or implied warranty except as otherwise provided in this section. If the manufacturer of a defective product, at the time such defective product was manufactured, had actual knowledge of the defect and that such defect is likely to cause harm in the ordinary course of the use of the product, then the ten-year limitation set forth in this section shall not apply to an action for bodily injury, death, or injury to personal or real property resulting from such defect. Neither shall the ten-year limitation apply to any such action or cause resulting from exposure to toxic substances.

(B) Nothing contained in this section affects the right of any person found liable to seek and obtain indemnity from any other person.

Sec. 2305.32. No action in tort for bodily injury, death, or injury to real or personal property shall be maintained against any seller of a product that is alleged to have contained or possessed a defective condition unreasonably dangerous to the buyer, user, or consumer unless any of the following apply:

(A) The seller is the manufacturer of the product or of the part thereof claimed to be defective;

(B) The seller is owned in whole or in significant part by the manu-

manufacturer of the product, or owns in whole or in significant part the manufacturer of the product;

(C) The seller markets the product under its private label or trademark;

(D) The seller has actual knowledge of the alleged defect or, based on facts available to him, should have had knowledge of the defect prior to sale;

(E) The seller creates or furnishes a manufacturer with a design for producing the product in which such design is the proximate cause of the defect;

(F) The seller alters, modifies, or fails to maintain a product after the product comes into his possession and before it leaves his possession, and the alteration, modification, or failure to maintain the product renders the product defective;

(G) The seller, upon receipt of a written request, fails to provide in writing to any person within twenty days of receipt, the name and address of the manufacturer of the alleged defective product which has been or is currently being offered for sale by the seller and which is the basis for the injury.

(H) The manufacturer or importer of the alleged defective product has no agent within the United States subject to service of process, or has insufficient property within the United States subject to judicial process. However, nothing contained in this division shall prevent a plaintiff who has obtained a final judgment against a foreign manufacturer or importer from later refiling a suit against the seller to collect the balance of the judgment if the foreign manufacturer or importer has insufficient property or insurance in the United States to satisfy that judgment.

Nothing contained in this section is applicable to any action for bodily injury, death, or injury to real or personal property based upon negligence, express warranty, or contract.

Sec. 2305.33. (A) The manufacturer or seller of a defective product shall not be held liable for the cause of any bodily injury, death, or injury to real or personal property produced by the following, which constitute defenses:

(1) An alteration, modification, or change in the product that was not made by, at the direction of, or with the express consent of, the party against whom recovery is sought;

(2) Deterioration of the product by reason of the failure of a product owner or user properly and reasonably to maintain, service, or repair the product in accordance with the manufacturer's written warnings;

(3) Abuse of the product by the plaintiff:

(a) With knowledge that it is defective;

(b) In a manner contrary to reasonable warnings delivered to the plaintiff;

(c) For other than the purposes for which it is designed, or intended, or foreseeably used.

(4) The assumption of the risk by the plaintiff.

(B) It shall be rebuttably presumed that a product was not defective as manufactured if the design of the product or the method of its manufacture or testing or inspection which is alleged to have caused the bodily injury, death, or injury to personal or real property conformed with the state of the art existing at the time the product was designed, manufactured, tested, or inspected. For purposes of this division, "state of the art" means the technical, mechanical, scientific, and safety knowledge in existence and reasonably feasible for use at the time the product was designed, manufactured, tested, or inspected.

Sec. 2305.34. (A) In any action for bodily injury, death or injury to real or personal property caused by a product, evidence that such product, at the time of its manufacture, complied with applicable statutes, standards, and rules of the federal government and of this state regarding product design, manufacture, or testing creates a rebuttable presumption that the product, in any respect that is relevant to the action and as to which there was compliance with such applicable statutes, standards, and rules, was not defective.

(B) In any action for bodily injury, death or injury to real or personal property caused by a product, evidence that the product, at the time of its manufacture, did not comply with applicable statutes, standards, and rules of the federal government or of this state regarding product design, manufacture, or testing creates a rebuttable presumption that the product, in any respect that is relevant to the action and as to which there was not compliance with such applicable statutes, standards, and rules, was defective.

Sec. 3929.301. (A) The president or the vice-president and the secretary, of each insurance company doing business in this state that issues product liability insurance policies, shall, in addition to the report required by section 3929.30 of the Revised Code, prepare under oath, a statement of the following facts and items, as of the preceding thirty-first day of December, in the following form:

- (1) The name of the insurance company;
- (2) The name of all other companies associated with the company submitting the report, either as a holding company, parent, subsidiary, division, or through interlocking directorates;
- (3) The states in which the company is doing the business of product liability insurance;
- (4) The total premium dollar amount collected for all lines of insurance in this state and in all states in each of the three years preceding the initial report and in the years preceding the filing of each annual report thereafter;
- (5) The dollar amount collected in product liability insurance premiums in this state and in all states beginning with calendar year 1978;
- (6) The amount in dollars of product liability insurance premiums

- collected for primary coverage and for excess coverage in this state and in all states;
- (7) Whether the company sets reserves for product liability claims for losses that have been incurred but not reported;
  - (8) All reserves established in connection with the company's product liability line;
  - (9) The treatment of dollars reserved under each of the categories listed in division (A) (7) and (8) of this section, for federal income tax purposes;
  - (10) The number of claims or actions in this state for damages because of injury, death, or property damage claimed to have been caused by or to have resulted from the use of a product designed, manufactured, distributed, or sold by an insured of the company that were filed against such insured in the previous ten-year period, for the initial report, and for the year preceding the filing of each annual report thereafter, with each claim to be identified by:
    - (a) The name and address of the insured;
    - (b) The type of product involved in the claim and the date the product was first purchased for use or consumption;
    - (c) The rating classification code of product liability coverage, if any;
    - (d) The policy number of the insured;
    - (e) The date the claim arose and the state or other jurisdiction in which the claim was adjudicated, settled, or otherwise disposed of . . . ;
    - (f) The date the claim or action was filed, the court in which it was filed and the docket or case number assigned, if the claim was filed in a court action;
    - (g) A summary of the occurrence out of which the claim or action arose;
    - (h) The status of the claim or action, and the amount of payment made on the claim or action.

(B) The report required under division (A) of this section shall be deposited on the first day of January of each year or within sixty days thereafter, in the office of the superintendent of insurance.

(C) As used in this section, "product liability insurance" includes any insurance, provided pursuant to policy or contract, that insures a person against loss or damage resulting from accident to, or injury or death suffered by, a person, or injury to real or personal property, that was caused by or resulted from the use of a product designed, manufactured, distributed, or sold by the insured.

Sec. 3929. No company organized under a law of this state shall fail to make and deposit any statement required by sections 3929.30 and 3929.31, or section 3929.301 of the Revised Code, or to reply to an inquiry of the superintendent of insurance with respect to the statement.



Whoever violates this section shall be subject to a forfeiture of five hundred dollars, and an additional five hundred dollars for every month it thereafter continues to transact any business of insurance, to be recovered by action in the name of the state, and, on collection, paid into the state treasury.

Sec. 3937.021. Beginning on January 1, 1981, every insurer shall base its product liability insurance rates in this state on past and prospective loss experience in this state to the extent that the insured's exposure is in this state.

Section 2. That existing section 3929.32 of the Revised Code is hereby repealed.

Section 3. Section 2305.101 of the Revised Code as enacted by this act shall take effect at the earliest time permitted by law, except that any cause of action that has arisen through the occurrence of an injury before the effective date of this act shall not be affected by the amendment of that section.

Section 4. (A) There is hereby created for a period ending two years after the effective date of this act, the Ohio Products Liability Study Commission consisting of six members, three of whom shall be appointed from the membership of the Senate by the President of the Senate, not more than two of which shall be of the same political party, and three of whom shall be appointed from the membership of the House of Representatives by the Speaker of the House of Representatives, not more than two of which shall be of the same political party.

(B) The Commission shall:

- (1) Study the effects of this act;
- (2) Investigate the problems posed by products liability and the issues surrounding it;
- (3) Collect data and statistics to assist in its study;
- (4) Transmit a report of its findings, with any recommendations, to the members of the General Assembly not later than two years after the effective date of this act.

(C) Any vacancy in the membership of the Commission shall be filled in the same manner in which the original appointment was made.

(D) The members of the Commission shall by majority vote elect a chairman from among themselves.

(E) Each member of the Commission shall be reimbursed for expenses actually and necessarily incurred in the performance of his duties.

(F) The Commission is authorized to reimburse consultants it may engage for their expenses actually and necessarily incurred.

(G) The Legislative Service Commission shall provide such technical, professional, and clerical employees as are necessary for the Commission to carry out its duties.

(H) During the existence of the Ohio Product Liability Study Commission a copy of each report required by section 3929.301 of the Revised Code shall be filed with the Commission.

## APPENDIX II

Selected portions of the Draft Uniform Product Liability Law, 44 Fed. Reg. 2,996 (1979) are produced below for the convenience of the reader.

**Section 106. Relevance of the "State of the Art" and Industry Custom**

(a) For the purposes of this section, "state of the art" means the safety, technical, mechanical, and scientific knowledge in existence and reasonably feasible for use at the time of manufacture.

(b) Evidence of changes in a product design, in the "state of the art," or in the custom of the product seller's industry occurring after the product was manufactured is not admissible for the purpose of proving that the product was defective in design under Section 104(B), or that a warning or instruction should have accompanied the product at the time of manufacture under Section 104(C). The evidence may be admitted for other purposes if its probative value outweighs its prejudicial effect.

(c) Evidence of custom in the product seller's industry is generally admissible. The product seller's compliance or non-compliance with custom may be considered by the trier of fact in determining whether a product was defective in design under Section 104(C), or whether there was a failure to warn or instruct adequately under Section 104(C).

(d) Evidence that a product conformed to the "state of the art" at the time of manufacture, raises a presumption that the product was not defective within the meaning of Sections 104(B) and (C). This presumption may be rebutted by clear and convincing evidence that in light of the factors set forth in Sections 104(B) and (C), the product was defective.

(e) A product seller may by a motion request the court to determine whether the injury-causing aspect of the product conformed to a non-governmental safety standard having the following characteristics:

- (1) It was developed through careful, thorough product testing and a formal product safety evaluation;
- (2) Consumer as well as manufacturer interests were considered in formulating the standard;
- (3) It was considered more than a minimum safety standard at the time of its development; and
- (4) The standard was up-to-date in light of the technological and scientific knowledge reasonably available at the time the product was manufactured.

If the court makes such a determination in the affirmative, it shall instruct the trier of fact to presume that the product was not defective. This presumption may be rebutted by clear and convincing evidence that in light of the factors set forth in Sections 104(B) and (C), the product was defective.

**Section 107. Relevance of Compliance with Legislative or Administrative Standards.**

(a) A product seller may by a motion request the court to determine whether the injury-causing aspect of the product conformed to an administrative or legislative standard having the following characteristics:

- (1) It was developed as a result of careful, thorough product testing and a formal product safety evaluation;
- (2) Consumer as well as manufacturer interests were considered in formulating the standard;
- (3) The agency responsible for enforcement of the standard considered it to be more than a minimum safety standard at the time of its promulgation; and
- (4) The standard was up-to-date in light of the technological and scientific knowledge reasonably available at the time the product was manufactured.

(b) If the court makes such a determination in the affirmative, it shall instruct the trier of fact to presume that the product was not defective. This presumption may be rebutted by clear and convincing evidence that in light of the factors set forth in Section 104(B) and (C), the product was defective.

Section 109. Length of Time Product Sellers are Subject to Liability for Harm Caused by Their Products.

(A) Useful Safe Life.

(1) A product seller may be liable to a claimant for harm caused by the seller's product during the useful safe life of that product. "Useful safe life" refers to the time during which the product reasonably can be expected to perform in a safe manner. In determining whether a product's useful safe life has expired, the trier of fact may consider:

- (a) The effect on the product of wear and tear or deterioration from natural causes;
- (b) The effect of climactic and other local conditions in which the product was used;
- (c) The policy of the user and similar users as to repairs, renewals and replacements;
- (d) Representations, instructions and warnings made by the product seller about the product's useful safe life; and
- (e) Any modification or alteration of the product by a user or third party.

(2) A product seller shall not be liable for injuries or damage caused by a product beyond its useful safe life unless the seller has so expressly warranted.

(B) Statutes of Repose.

(1) Workplace Injuries.

- (a) A claimant entitled to compensation under a state worker compensation statute may bring a product liability claim under this Act for harm that occurs within ten (10) years after delivery of the completed product to its first purchaser

or lessee who was not engaged in the business of selling products of that type.

- (b) Where this Act precludes a worker from bringing a claim because of subdivision (1)(a), but the worker can prove, by the preponderance of evidence, that the product causing the injury was unsafe, the worker may bring a claim against the workplace employer. If possible, the claim should be brought in a worker compensation proceeding, and shall include all loss of wages that otherwise would not be compensated under the applicable worker compensation statute.
- (c) Where this Act precludes a worker's beneficiaries under an applicable wrongful death statute from bringing a wrongful death claim because of subdivision (1)(a), but they can prove, by a preponderance of evidence, that the product that caused the worker's death was unsafe, they may bring a claim against the workplace employer. If possible, the claim must be brought in a Worker Compensation proceeding, and shall include pecuniary losses that would not have otherwise been compensated under the applicable worker compensation statute.
- (d) An employer who is subject to liability under either subsection (1)(b) or (c) shall have the right to seek contribution from the product seller in an arbitration proceeding under Section 116 of this Act. Contribution shall be limited to the extent that the product seller is responsible for the harm incurred under the principles of Section 104 of this Act. The final judgment in that proceeding shall not be subject to trial *de novo*, but shall be treated as a final judgment of a trial court.

(2) Non-Workplace Injuries.

For product liability claims not included in subdivision (B) that involve harms occurring more than ten (10) years after delivery of the completed product to its first purchaser or lessee who was not engaged in the business of selling products of that type, the presumption is that the product has been utilized beyond its useful safe life as established by subdivision (A). This presumption may be rebutted by clear and convincing evidence.

(3) Limitations on Statutes of Repose.

- (a) Where a product seller expressly warrants or promises that the seller's product can be utilized safely for a period longer than ten (10) years, the period of repose shall be extended according to these warranties or promises.
- (b) The ten (10) year period of repose established in Section 109(B) does not apply if the product seller intentionally misrepresents a product, or fraudulently conceals information about it, where that conduct was a substantial cause of the claimant's harm.

- (c) Nothing contained in Section 109(B) shall affect the right of any person found liable under this Act to seek and obtain contribution or indemnity from any other person who is responsible for harm under this Act.
- (d) The ten (10) year period of repose established in Section 109(B) does not apply if the harm was caused by prolonged exposure to a defective product, or if an injury-causing aspect of the product existing at the time it was sold did not manifest itself until ten years after the time of its first use.

(C) Statute of Limitations.

All claims under this Act shall be brought within three years of the time the claimant discovered, or in the exercise of due diligence should have discovered, the facts giving rise to the claim.

Section 110. Relevance of Third-Party Alteration or Modification of a Product.

(a) A product seller shall not be liable for harm that would not have occurred but for the fact that his product was altered or modified by a third party unless:

- (1) The alteration or modification was in accordance with the product seller's instructions or specifications;
- (2) The alteration or modification was made with the express consent of the product seller; or
- (3) The alteration or modification was the result of conduct that reasonably should have been anticipated by the product seller.

(b) For the purposes of this section, alteration or modification includes changes in the design, formula, function, or use of the product from that originally designed, tested or intended by the product seller. It includes failure to observe routine care and maintenance, but does not include ordinary wear and tear.

Section 111. Relevance of Conduct on the Part of Product Liability Claimants.

(a) General Rule.

In any claim under this Act, the comparative responsibility of, or attributed to, the claimant, shall not bar recovery but shall diminish the award of compensatory damages proportionately, according to the measure of responsibility attributed to the claimant.

(b) Apportionment of Damages.

In any claim involving comparative responsibility, the court, unless otherwise requested by all parties, shall instruct the jury to give answers to special interrogatories, or the court shall make its own findings if there is no jury, indicating—

- (1) The amount of damages each claimant would have received if comparative responsibility were disregarded, and

- (2) The percentage of responsibility allocated to each party, including the claimant, as compared with the combined responsibility of all parties to the action. For the purpose, the court may decide that it is appropriate to treat two or more persons as a single party.
  - (3) In determining the percentage of responsibility, the trier of fact shall consider, on a comparative basis, both the nature and quality of the conduct of the party.
  - (4) The court shall determine the award for each claimant according to these findings and shall enter judgment against parties liable on the basis of the common law joint and several liability of joint tortfeasors. The judgment shall also specify the proportionate amount of damages allocated against each party liable, according to the percentage of responsibility established for that party.
  - (5) Upon a motion made not later than one year after judgment is entered, the court shall determine whether all or part of a party's share of the obligation is uncollectible from that party and shall reallocate any uncollectible amount among the other parties, including a claimant at fault, according to their respective percentages of fault. A party whose liability is reallocated is still to be subject to contribution and to any continuing liability to the claimant on the judgment.
- (c) **Conduct Affecting Claimant's Responsibility.**
- (1) **Failure to Discover a Defective Condition.**
    - (i) A claimant is not required to have inspected the product for defective condition. Failure to have done so does not render the claimant responsible for the harm caused.
    - (ii) Where a claimant using a product is injured by a defective condition that would have been apparent to an ordinary prudent person, the claimant's damages are subject to reduction according to the principles of subsections (a) and (b).
  - (2) **Using a Product with a Known Defective Condition.**
    - (i) A claimant who knew about a product's defective condition, but who voluntarily and unreasonably used the product, shall be held solely responsible for injuries caused by that defective condition.
    - (ii) In circumstances where a claimant knew about a product's defective condition and voluntarily used the product, but where the reasonableness of doing so was uncertain, claimant's damages shall be subject to reduction according to the principles of subsections (a) and (b).
  - (3) **Misuse of a Product.**
    - (i) Where a claimant has misused a product by using it in a manner that the product seller could not have reason-

ably anticipated, the claimant's damages shall be reduced according to the principles of subsections (a) and (b).

- (ii) Where the injury would not have occurred but for the misuse defined in subsection (3)(i), the product is not defective for purposes of liability under this Act.

...

**Section 114. The Individual Responsibility of Product Sellers other than Manufacturers as Compared to other Product Sellers.**

(a) Manufacturers shall be responsible for defective conditions in their products according to the provisions of this Act. In the absence of express warranties [sic] to the contrary, other product sellers shall not be subject to liability in circumstances where they do not have a reasonable opportunity to inspect the product in a manner which would or should, in the exercise of reasonable care, reveal the existence of the defective condition.

- (b) The duty limitation of subsection (a) shall not apply, however, if:
  - (1) The manufacturer is not subject to service of process in the claimant's own state;
  - (2) The manufacturer has been judicially declared insolvent;
  - (3) The court determines that the claimant would have appreciable difficulty enforcing a judgment against the product manufacturer.