

1981

## Product Liability Reform and the Model Uniform Product Liability Act

Terry Morehead Dworkin  
*Indiana University*

Follow this and additional works at: <https://digitalcommons.unl.edu/nlr>

---

### Recommended Citation

Terry Morehead Dworkin, *Product Liability Reform and the Model Uniform Product Liability Act*, 60 Neb. L. Rev. (1981)  
Available at: <https://digitalcommons.unl.edu/nlr/vol60/iss1/4>

This Article is brought to you for free and open access by the Law, College of at DigitalCommons@University of Nebraska - Lincoln. It has been accepted for inclusion in Nebraska Law Review by an authorized administrator of DigitalCommons@University of Nebraska - Lincoln.

By Terry Morehead Dworkin\*

# Product Liability Reform and the Model Uniform Product Liability Act

## I. INTRODUCTION

On October 31, 1979, the Department of Commerce published the final draft of the Model Uniform Product Liability Act.<sup>1</sup> The Act is the culmination of a process begun by President Ford in 1976 to clarify and stabilize product liability law and, thereby, stabilize recoveries and insurance premiums.<sup>2</sup> During its formation testimony was received from major interest groups, each of which hoped the Act would provide a solution to its particular product liability problems. Consumers saw gains being eroded away by legislation in many states which limited a manufacturer's liability. Manufacturers saw themselves as becoming insurers of their products, yet increasingly being unable to afford and, in some instances, obtain liability insurance. Insurers claimed that their liability had become impossible to predict because of the open-ended nature of product liability claims, and the increase in the frequency of claims and amount of awards. Consequently, they claimed that there was no way to stop the spiraling premiums.<sup>3</sup>

---

\* Assistant Professor of Business Law, Indiana University, Bloomington, Indiana.

1. MODEL UNIFORM PRODUCT LIABILITY ACT [hereinafter cited as UPLA], *reprinted in* 44 Fed. Reg. 62,714 (1979).
2. A Federal Interagency Task Force on Product Liability was established in April, 1976, by the Economic Policy Board of the White House. On January 4, 1977, its report, THE FEDERAL INTERAGENCY TASK FORCE ON PRODUCT LIABILITY, BRIEFING REPORT (1977) was released [hereinafter cited as BRIEFING REPORT]. This was edited and published under the Carter administration as separate studies: UNITED STATES DEP'T OF COMMERCE, INTERAGENCY TASK FORCE ON PRODUCT LIABILITY, FINAL REPORT OF THE LEGAL STUDY (1977) [hereinafter cited as LEGAL STUDY]; UNITED STATES DEP'T OF COMMERCE, INTERAGENCY TASK FORCE ON PRODUCT LIABILITY, FINAL REPORT OF THE INDUSTRY STUDY (1977) [hereinafter cited as INDUSTRY STUDY]; UNITED STATES DEP'T OF COMMERCE, INTERAGENCY TASK FORCE ON PRODUCT LIABILITY, FINAL REPORT OF THE INSURANCE STUDY (1977) [hereinafter cited as INSURANCE STUDY].
3. See, e.g., S. 403, 95th Cong., 1st Sess. (1977), *reprinted in Product Liability*

Like all products of compromise, the Act is likely to disappoint each group. It introduces and strengthens defenses and increases claimant's burden of proof; it does away with many of the gains manufacturers had obtained through legislative change while potentially increasing manufacturer liability; and it is ineffectual in solving the open-endedness and spiraling awards problems. The Act changes common law little, and many of the changes it does make are so hedged with compromise that they are at best ineffectual. In addition, inconsistencies in the burdens of proof are likely to cause much confusion if the UPLA is adopted. Although the Act may prove useful as a standard of reference for courts and legislatures considering product liability change,<sup>4</sup> its adoption is unlikely to lead to the achievement of its stated goals of reducing confusion and stabilizing recoveries and insurance premiums.<sup>5</sup>

## II. THE PRODUCT LIABILITY CLAIM

The Act preempts the common law theories of action for product liability<sup>6</sup>—strict liability, negligence, breach of warranty, and misrepresentation—and replaces them with the single product liability claim.<sup>7</sup> While this move may eliminate some confusion<sup>8</sup> and certain procedural advantages engendered by a choice of theories,<sup>9</sup> it actually changes little because these common law theories are

---

*Insurance Hearings on S. 403 Before the Sub-Comm. for Consumers of the Senate Comm. on Commerce, Science and Transportation*, 95th Cong., 1st Sess. 3 (1977); BRIEFING REPORT, *supra* note 2; Note, *When the Product Ticks: Products Liability and Statutes of Limitation*, 11 IND. L. REV. 693, 695-99 (1978).

4. Birnbaum, *Weighing the Model Uniform Act's Proposed Evidentiary Changes*, NAT'L L.J., Mar. 24, 1980, at 25.

5. See UPLA Preamble, *reprinted in* 44 Fed. Reg. at 62,716.

6. The Act does not cover economic loss; therefore, it does not preempt the Uniform Commercial Code or other commercial law regarding claims for direct or consequential economic damages. UPLA § 103(A), *reprinted in* 44 Fed. Reg. at 62,720.

7. *Id.*

8. See *Jorae v. Clinton Crop Serv.*, 465 F. Supp. 952, 954-55 (1979). Jury instructions are a special problem when several theories are used. Wade, *On Product "Design Defects" and Their Actionability*, 33 VAND. L. REV. 551, 577 (1980).

9. Statutes of limitations are good examples. Some courts have held that the Uniform Commercial Code's four-year statute of limitations which runs from the date of delivery, U.C.C. § 2-725 (1976), applies to personal injuries cases based on warranty. *Berry v. G.D. Searle & Co.*, 56 Ill. 2d 548, 309 N.E.2d 550 (1974); *Colvin v. FMC Corp.*, 43 Or. App. 709, 604 P.2d 157 (1979). Other courts have held that the statutory limitation for personal injury actions based in tort is applicable. *Brown v. Merrow Mach. Co.*, 411 F. Supp. 1162 (D. Conn. 1976); *Becker v. Volkswagen of America, Inc.*, 52 Cal. App. 3d 794, 125 Cal. Rptr. 326 (1975). Similarly, some courts have held that a suit in warranty requires notification under U.C.C. § 2-607(3)(a) (1976). *Bennett v. United Auto Parts, Inc.*, 294 Ala. 300, 315 So. 2d 579 (1975); *San Antonio v. Warwick Club Ginger Ale Co.*, 104 R.I. 700, 248 A.2d 778 (1968). *Contra*, *Goldstein v. G.D.*

reintroduced into the Act under various sections. A manufacturer will be held strictly liable for mismanufactured products, but negligence is applied to defects in design and warnings.<sup>10</sup> Express warranties are specifically recognized, and exempted from pro-manufacturer sections of the Act, such as section 106 which denies liability for an unavoidably dangerous aspect of a product, and section 110 which creates the presumption that after ten years a product is being used beyond its useful safe life.<sup>11</sup> Intentional misrepresentations are similarly recognized and exempted.<sup>12</sup> Because a product "may be unreasonably unsafe in more than one way," many product liability claims will still be litigated under more than one theory.<sup>13</sup> Thus, the hoped for simplification may be lost as new litigation determines the implications of this legislative reshuffling.

The retention of these theories is illustrative of the Act's traditional approach to most product liability problems. The drafters, in adopting a tort compensation approach to product liability, chose to follow the state of product liability law in virtually every jurisdiction.<sup>14</sup> Fault, as manifested by an "unreasonably unsafe" defective product, not the mere act of manufacturing a product which injures, is the Act's basis for recovery.<sup>15</sup> However, a product which deviates from the manufacturer's self-established standards is by definition unreasonably unsafe.<sup>16</sup> Therefore, the manufacturer is strictly liable for mismanufactured products and products which do not meet its express warranty. However, because no single standard was considered appropriate for manufacturers'

---

Searle & Co., 62 Ill. App. 3d 344, 378 N.E.2d 1083 (1978); *Fericks v. General Motors Corp.*, 278 Md. 304, 363 A.2d 460 (1976).

10. UPLA § 104(A), (C), *reprinted in* 44 Fed. Reg. at 62721.

11. UPLA §§ 104(D), 105(B), 106(B) (3), 110(B) (2) (a), *reprinted in* 44 Fed. Reg. at 62,721, 62,726, 62,727, 62,733.

12. UPLA §§ 110(B) (2) (b), 120(B) (4), *reprinted in* 44 Fed. Reg. at 62,733, 62,748.

13. UPLA §§ 104, Analysis, 110(B) (2) (b), 120(B) (4), *reprinted in* 44 Fed. Reg. at 62,722, 62,733, 62,748. Since failure to adequately warn is often a fallback theory if defect is difficult to prove, the likelihood of a majority of suits including at least two theories is considerable. See Twerski & Weinstein, *A Critique of the Uniform Product Liability Law—A Rush to Judgment*, 28 *DRAKE L. REV.* 221, 234 (1979).

14. *But see* *Cline v. Prowler Indus. of Maryland*, 48 U.S.L.W. 2839 (Del. S. Ct. 1980), where the Delaware Supreme Court refused to adopt strict liability in sales cases.

15. UPLA § 104, *reprinted in* 44 Fed. Reg. at 62,721. With the possible exception of Pennsylvania, no state imposes traditional strict or absolute liability on a manufacturer. In *Azzarello v. Black Brothers Co.*, 480 Pa. 547, 391 A.2d 1020 (1978), the court stated that the manufacturer of a product is the guarantor of its safety. *Id.* at 559 n.12, 391 A.2d at 1027 n.12. However, the court also denied that it was imposing an insurer's liability. *Id.* at 553, 391 A.2d at 1024.

16. UPLA § 104(A), (D), *reprinted in* 44 Fed. Reg. at 62,721.

choices regarding designs and warnings, these are judged by a risk-benefit analysis.<sup>17</sup> This division of defects into strict liability and risk-benefit types again closely tracks the common law.

Following the lead of the *Restatement (Second) of Torts*, Section 402A<sup>18</sup> and *Greenman v. Yuba Power Products, Inc.*,<sup>19</sup> most states have been willing to impose strict liability for mismanufactured products. Mismanufactured products easily meet the *Greenman* and Section 402A requirement of being unreasonably dangerous and falling below consumer expectations. In producing a product, the manufacturer establishes a minimum standard for that product, and consumers, at a minimum, expect one product to perform as safely as others that came off the same assembly line. The standard by which to judge the mismanufactured product is readily available and easily determined.

The same is true of an express warranty. If a manufacturer makes claims about its product, the consumer justifiably expects the product to meet these claims. The standard by which the product is to be judged is easily determined by reference to those claims. The common law has traditionally held manufacturers strictly liable for products which deviate from express claims that shape consumer expectations, whether suit is brought under warranty or misrepresentation.<sup>20</sup>

However, courts have been reluctant to apply as strict a liability to design and warning cases because, unlike manufacturing defect cases, the central question is the standard by which to judge whether the product is defective. No absolute standard has been acceptable to the courts because they do not want to make manufacturers insurers of all their products. A finding of defect based on design or warning choices impugns the entire line, not just the deviating product. Almost any product can be made safer but most

---

17. *Id.* § 104(B), (C), reprinted in 44 Fed. Reg. at 62,721.

In order to determine that the product was unreasonably unsafe in design, the trier of fact must find that, at the time of manufacture, the likelihood that the product would cause the claimant's harm or similar harms, and the seriousness of those harms outweighed the burden on the manufacturer to design a product that would have prevented those harms, and the adverse effect that alternative design would have on the usefulness of the product.

*Id.* § 104(B)(1), reprinted in 44 Fed. Reg. at 62,721.

18. RESTATEMENT (SECOND) OF TORTS § 402A (1965).

19. 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1962) (held that a remote purchaser could sue in strict liability the manufacturer of a defective lathe which caused the purchaser personal injury).

20. See, e.g., *Hauter v. Zogarts*, 14 Cal. 3d 104, 534 P.2d 377, 120 Cal. Rptr. 681 (1975); *Baxter v. Ford Motor Co.*, 179 Wash. 123, 35 P.2d 1090 (1934); RESTATEMENT (SECOND) OF TORTS § 402B (1965). See W. PROSSER, HANDBOOK OF THE LAW OF TORTS 652 (4th ed. 1971).

courts have been unwilling to require manufacturers to do so if the resulting safer product would be inutile or unsalable, or would lead to financial ruin.<sup>21</sup> Therefore, a "safest possible" standard has been widely rejected, and most courts have required a claimant to prove something more than that a safer product was possible. This "something more" is usually phrased in terms of feasibility.<sup>22</sup>

An industry-established standard also has been rejected by most courts, but for the opposite reason—industry is too likely to choose a design that is not safe enough. Apparently, the fear is that, unlike professionals such as doctors and lawyers whose decisions are judged by group-established standards, manufacturers work for profit instead of the theoretical good of humanity; therefore, their decisions would not give safety its proper perspective.<sup>23</sup>

Having rejected these two relatively easily determined and straight forward standards, most courts have fallen back on the *Greenman* and *Restatement* formulas.<sup>24</sup> However, in their search

21. See, e.g., *Weakley v. Fischbach & Moore, Inc.*, 515 F.2d 1260, 1267-68 (5th Cir. 1975) ("The defendant is not obliged to design the safest possible product, or one as safe as others make or a safer product than the one he has designed, so long as the design he has adopted is reasonably safe."); *Dreisonstok v. Volkswagenwerk, A. G.*, 489 F.2d 1066 (4th Cir. 1974) (van couldn't be made more crashworthy and retain features that made it useful); *Thibault v. Sears, Roebuck & Co.*, 118 N.H. 802, 395 A.2d 843 (1978) (could risk be reduced without significant impact on product effectiveness and manufacturing costs); *Phillips v. Kimwood Mach. Co.*, 269 Or. 485, 525 P.2d 1033 (1974) (unnecessary to make safer if would be priced out of the market, or inutile).
22. See, e.g., *Wilson v. Piper Aircraft Corp.*, 282 Or. 61, 577 P.2d 1322, rehearing denied with opinion, 282 Or. 411, 569 P.2d 1287 (1978); *Henderson v. Ford Motor Co.*, 519 S.W.2d 87 (Tex. 1975); II LEGAL STUDY, *supra* note 2, at 36. The California Supreme Court in *Barker v. Lull Eng'r Co.*, 20 Cal. 3d 413, 430 n.10, 573 P.2d 443, 455 n.10, 143 Cal. Rptr. 225, 237 n.10 (1978), left open the possibility of strict liability for products for which no safer design is feasible.
23. Wade, *supra* note 8, at 568-69; O'Donnell, *Design Litigation and the State of the Art: Terminology, Practice and Reform*, 11 AKRON L. REV. 627, 631 (1978).
24. RESTATEMENT (SECOND) OF TORTS § 402A(1) (1965) provides:

One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if

- (a) the seller is engaged in the business of selling such a product, and
- (b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.

Comment i explains "unreasonably dangerous" to be dangerous "to the extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristic." *Id.*, Comment i.

The *Greenman* court stated that "[a] manufacturer is strictly liable in tort when an article he placed on the market, knowing that it is to be used without inspection for defects, proves to have a defect that causes injury to a human being." *Greenman v. Yuba Power Products, Inc.*, 59 Cal. 2d 57, 62, 377 P.2d 897,

for an appropriate standard, courts have differed in their interpretations of these basic formulas. Some courts have focused more heavily on the negligence heritage of strict liability and have applied a straightforward risk-benefit<sup>25</sup> or reasonably prudent manufacturer test.<sup>26</sup> The reasonably prudent manufacturer test is a risk-benefit analysis which uses the manufacturer as the point of reference. It asks whether a prudent manufacturer would have marketed the product, knowing of the risks involved in its use.<sup>27</sup> The factor which theoretically makes these strict liability and not negligence tests is that knowledge of the risk is imputed to the manufacturer.<sup>28</sup>

A recent decision by the Texas Supreme Court, *Turner v. General Motors Corp.*,<sup>29</sup> is a leading example of a straight forward risk-benefit approach. *Turner* was a crashworthiness case in which the defect that caused plaintiff's injuries did not cause the accident. The court determined that strict liability was an appropriate standard to apply to crashworthiness design decisions, and that defect was to be determined by balancing the utility of the product against the risk involved in its use. In using this risk-benefit approach the court rejected a reasonable manufacturer test or a consumer expectations test.<sup>30</sup> It rejected the consumer expectation test because it doubted that "jurors would know what ordinary consumers would expect in the consumption or use of a product, or that jurors would or could apply any standard or test outside their own experiences and expectations."<sup>31</sup> The "alternative" prudent manufacturer test was rejected because it provided no better standard.<sup>32</sup>

---

900, 27 Cal. Rptr. 697, 700 (1963). Defect is defined as "a defect in design and manufacture of which the plaintiff was not aware that made [the product] unsafe for its intended use." *Id.* at 64, 337 P.2d at 901, 27 Cal. Rptr. at 701.

25. *Byrns v. Riddell, Inc.*, 113 Ariz. 264, 550 P.2d 1065 (1976); *Moning v. Alfono*, 400 Mich. 425, 254 N.W.2d 759 (1977); *Thibault v. Sears, Roebuck & Co.*, 118 N.H. 802, 395 A.2d 843 (1978).

26. *See, e.g., Suter v. San Angelo Foundry & Mach. Co.*, 81 N.J. 150, 402 A.2d 140 (1979); *Newman v. Utility Trailer & Equip. Co.*, 278 Or. 395, 564 P.2d 674 (1977); *Phillips v. Kimwood Mach. Co.*, 269 Or. 581, 525 P.2d 1033 (1974).

27. "A dangerously defective article would be one which a reasonable person would not put into the stream of commerce *if he had knowledge of its harmful character*. The test, therefore, is whether the seller would be negligent if he sold the article *knowing of the risk involved*." *Phillips v. Kimwood Mach. Co.*, 269 Or. 485, 492, 525 P.2d 1033, 1036 (1974) (emphasis in the original).

28. *Newman v. Utility Trailer & Equip. Co.*, 278 Or. 395, 564 P.2d 674 (1977); *Wade, On the Nature of Strict Liability for Products*, 44 Miss. L.J. 825, 834 (1973).

29. 584 S.W.2d 844 (Tex. 1979).

30. *Id.* at 850-51.

31. *Id.* at 851 (citations omitted).

32. "The stated reason for the alternative test of the prudent manufacturer does not justify its continued use." *Id.*

The other main approach followed by the courts, the consumer expectations test, draws more heavily on the implied warranty background of strict liability. This test uses the consumer as the point of reference and asks whether the product is defective because it is more dangerous than the reasonable consumer would expect.<sup>33</sup> Little can be said with assurance about consumer expectations concerning design of a product except that most consumers assume that a manufacturer will put a reasonably safely designed product on the market.<sup>34</sup> Consequently, this test has been more difficult for the courts to define. There has been disagreement on whether the test should be objective<sup>35</sup> or subjective,<sup>36</sup> on whether patent dangers will excuse a manufacturer,<sup>37</sup> and on the amount of subjectivity tolerable in expectations regarding complicated prod-

- 
33. See, e.g., *Karjala v. Johns-Manville Prod. Corp.*, 523 F.2d 155 (8th Cir. 1975); *Young v. Tide Craft, Inc.*, 270 S.C. 453, 242 S.E.2d 671 (1978); *Lamon v. McDonnell Douglas Corp.*, 91 Wash. 2d 348, 588 P.2d 1346 (1979). The warranty background of the consumer expectations test has been widely recognized. *Barker v. Lull Eng'g Co.*, 20 Cal. 3d 413, 430-31, 573 P.2d 443, 454, 143 Cal. Rptr. 225, 236 (1978); Fischer, *Products Liability—The Meaning of Defect*, 39 Mo. L. REV. 339, 348 (1974); Schwartz, *Foreward: Understanding Products Liability*, 67 CALIF. L. REV. 435, 438-39 (1979). The wide acceptance of the consumer expectations test is partially due to its incorporation into the RESTATEMENT (SECOND) OF TORTS § 402A, Comment i (1965): "The article sold must be dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics."
  34. See, e.g., *Montgomery & Owen, Reflections on the Theory and Administration of Strict Liability for Defective Products*, 27 S.C. L. REV. 803, 832 (1976); *Green, Strict Liability Under Sections 402A and 402B: A Decade of Litigation*, 54 TEX. L. REV. 1185, 1205 (1976); Schwartz, *supra* note 33, at 478.
  35. See, e.g., *Allen v. Rodgers Mach. Mfg. Co.*, 268 N.W.2d 830 (Iowa 1978); *Vincer v. Esther Williams All-Aluminum Swimming Pool Co.*, 69 Wis. 2d 326, 230 N.W.2d 794 (1975); II LEGAL STUDY, *supra* note 2, at 30-31.
  36. See, e.g., *Williams v. Brasea, Inc.*, 497 F.2d 67 (5th Cir. 1974), *cert. denied*, 423 U.S. 906 (1975) (seaman have common knowledge that lines on shrimp boats frequently tangle); *Hunt v. Harley Davidson Motor Co.*, 147 Ga. App. 44, 248 S.E.2d 15 (1978) (motorcyclist with many years of experience was aware of danger of motorcycle without a crash bar); *Young v. Tide Craft, Inc.*, 270 S.C. 453, 242 S.E.2d 671 (1978) (because decedent was an experienced boater, he must have known of the risks resulting from manufacturer's failure to install a power kill switch).
  37. *Dreisonstok v. Volkswagenwerk, A.G.*, 489 F.2d 1066, 1071 (4th Cir. 1974) (a design is not unreasonably dangerous because the risk is one which anyone immediately would recognize and avoid); *Hunt v. Harley Davidson Motor Co.*, 147 Ga. App. 44, 248 S.E.2d 15 (1978) (there is no duty to warn of a product-connected danger which is obvious or generally known); *Stenberg v. Beatrice Foods Co.*, 176 Mont. 123, 576 P.2d 725 (1978) (patent danger should not, as a matter of policy, excuse manufacturer); *Micallef v. Miehle Co.*, 39 N.Y.2d 376, 384 N.E.2d 571, 384 N.Y.S.2d 115 (1976) (a manufacturer should not escape liability simply because the defect is obvious).



ucts.<sup>38</sup> Regardless of these differences, most courts have employed some balancing of factors, as has been the case in the reasonable manufacturer and risk-benefit approaches.<sup>39</sup>

Some courts, not happy with either approach, have combined the two.<sup>40</sup> In *Barker v. Lull Engineering Co.*,<sup>41</sup> the California Court fashioned a unique approach by using consumer expectations and a risk-utility analysis as a two-pronged test to determine liability. If the plaintiff fails to meet the threshold ordinary consumer expectations test, she can still prevail if the defendant manufacturer is unable to show that the benefits of the design outweigh the risks inherent in such design. This test was an attempt to eliminate negligence principles in strict liability analysis, with a shift of the burden of proof to the manufacturer supposedly erasing all vestiges of it.<sup>42</sup> While this test has caused much comment,<sup>43</sup> it has drawn few followers.<sup>44</sup>

As can be seen from the foregoing discussion, the UPLA's adoption of a risk-benefit approach is consistent with the standard being used by a large number of jurisdictions. The abandonment of the consumer as the point of reference<sup>45</sup> would be a nominal change for jurisdictions that use the consumer expectations test; however, many of these jurisdictions utilize a risk-benefit analysis anyway. For those that don't use a risk-benefit analysis, the adoption of the Act's approach would have the advantage of clearing up much of the confusion engendered by a consumer expectations test, especially in cases involving complicated products about

38. UPLA § 104(B), Analysis, reprinted in 44 Fed. Reg. at 62,724. Birnbaum, *Unmasking the Test for Design Defect: From Negligence [to Warranty] to Strict Liability to Negligence*, 33 VAND. L. REV. 593, 614 (1980).

39. See, e.g., *Casrell v. Altec Indus. Inc.*, 335 So. 2d 128 (Ala. 1976); *Seattle-First Nat'l Bank v. Talbert*, 86 Wash. 2d 145, 542 P.2d 774 (1975); II LEGAL STUDY, *supra* note 2, at 30.

40. See, e.g., *Welch v. Outboard Marine Corp.*, 481 F.2d 252 (5th Cir. 1973); *Suter v. San Angelo Foundry Mach. Co.*, 81 N.J. 150, 406 A.2d 140 (1979).

41. 20 Cal. 3d 413, 573 P.2d 443, 143 Cal. Rptr. 225 (1978).

42. *Id.* at 433, 573 P.2d at 456, 143 Cal. Rptr. at 238. Despite this shift in the burden of proof and the insistence by the court that the focus is on the product, this test still leaves the trier of fact balancing the options of the manufacturer to determine if the choices made were reasonable.

43. See, e.g., Birnbaum, *supra* note 38, at 602-10; Schwartz, *supra* note 33, *passim*; 28 DRAKE L. REV. 493 (1978-79).

44. Only Alaska has expressly adopted this test. See *Caterpillar Tractor Co. v. Beck*, 593 P.2d 871, 882, 885, (Alaska 1979). The Supreme Court of Oregon expressly declined to follow it. *Wilson v. Piper Aircraft Corp.*, 282 Or. 61, 66, 577 P.2d 1322, 1327, rehearing denied with opinion, 282 Or. 411, 579 P.2d 1287 (1978). In *Turner v. General Motors Corp.*, 584 S.W.2d 844, 851 (Tex. 1979), the Texas Supreme Court rejected a similar bifurcated test of ordinary consumer expectations and reasonably prudent manufacturer.

45. UPLA § 104, Analysis, reprinted in 44 Fed. Reg. at 62,724.

which the consumer can have few realistic expectations.<sup>46</sup> Perhaps one of the most useful things the Act will do is serve as a point of authority for jurisdictions which are casting about for a workable design defect standard.

However, the UPLA does not speak to the issue which most courts have emphasized in separating the risk-benefit negligence test from the strict liability test—the imputation of knowledge to the manufacturer.<sup>47</sup> The drafters do say that “[i]n light of the fact that the judgment is the equivalent of holding that the whole product line is defective, it is important that traditional tort law principles be followed and that the claimant retain the burden of proof.”<sup>48</sup> Since negligence is the standard, claimants will have to show that the reasonable manufacturer knew or should have known of the risks inherent in the design as well as the available alternatives. This change from product liability law in the many jurisdictions that impute knowledge to the manufacturer<sup>49</sup> unnecessarily penalizes the claimant in that the risk-benefit standard could have been utilized, and clarity achieved, without shifting the burden back to the claimant. Nevertheless, the practical effect of this shift may not be very great in most jurisdictions because even under a negligence standard the manufacturer is expected to be an expert in its field and be aware of current developments.<sup>50</sup> However, the Act’s shift in the burden of proof would work a major change in those states in which the manufacturer is held liable for risks and improvements unknowable at the time of manufacture.

The view that manufacturers should be liable for knowledge and improvements at the time of trial, not manufacture, has been urged by Dean Keeton and other legal scholars as the way to distinguish negligence from strict liability.<sup>51</sup> It has been adopted by a small but growing number of courts.<sup>52</sup> This growing adoption greatly concerned manufacturers, who responded by getting “state of the art” legislation adopted in several states.<sup>53</sup> Generally this

---

46. Montgomery & Owen, *supra* note 34, at 823; Wade, *supra* note 28, at 829.

47. See note 28 & accompanying text *supra*. But see Woodill v. Parke Davis & Co., 79 Ill. 2d 26, 402 N.E.2d 194 (1980) (plaintiff must show defendant knew or should have known of dangers in strict liability failure to warn suit).

48. UPLA § 104, Analysis, reprinted in 44 Fed. Reg. at 62,724.

49. See Birnbaum, *supra* note 38, at 647.

50. II LEGAL STUDY, *supra* note 2, at 27; Phillips, *A Synopsis of the Developing Law of Products Liability*, 28 DRAKE L. REV. 317, 346 (1978-79).

51. Keeton, *Product Liability and the Meaning of Defect*, 5 ST. MARY’S L.J. 30, 38 (1973).

52. See, e.g., Stanfield v. Medalist Indus., Inc., 34 Ill. App. 3d 635, 340 N.E.2d 276 (1975); Bailey v. Boatland of Houston, Inc., 585 S.W.2d 805 (Tex. Civ. App. 1979).

53. See, e.g., ARIZ. REV. STAT. ANN. § 12-681(6) (Supp. 1979); COLO. REV. STAT. § 13-21-403(1)(a) (Supp. 1978); IND. CODE ANN. § 34-4-20A-4(4) (Burns Supp.

legislation bars consideration of post-manufacture knowledge of improvements in assessing the defectiveness of the product. If the safety improvement which might have prevented the accident was not in the "state of the art" at the time the product was made, the manufacturer will not be liable.

The Act implicitly rejects the Keeton approach by adopting a traditional negligence standard;<sup>54</sup> it also specifically embraces the "state of the art" defense by barring evidence of post-manufacture changes including changes in technological feasibility.<sup>55</sup> Thus, the plaintiff must show that at the time of manufacture the probability and seriousness of injury outweighed the technical, functional and economic difficulties involved in making the product safer.

Failure to adequately warn or instruct is judged by the same negligence at time-of-manufacture standard under the UPLA.<sup>56</sup> In many ways, warning and instruction defects are simply a variation of the duty to design safely,<sup>57</sup> and the common law has treated them in a manner similar to its treatment of design defects.<sup>58</sup> However, because foreseeability plays a more important role in failure to warn cases,<sup>59</sup> the Act's abandonment of imputation of knowledge to the manufacturer will have a greater impact than it would in design cases.<sup>60</sup> On the other hand, the adoption of the time-of-manufacture standard will change little. Because foresee-

---

1980); KY. REV. STAT. ANN. § 41.310(2) (Supp. 1980); TENN. CODE ANN. § 23-3705 (Supp. 1979).

54. The reasonable manufacturer would not know of risks which were unknowable at the time of manufacture.

55. UPLA § 107(A), (D), *reprinted in* 44 Fed. Reg. at 62,728. Section 107(A) states:

Evidence of changes in (1) a product's design, (2) warnings or instructions concerning the product, (3) technological feasibility, (4) "state of the art", or (5) the custom of the product seller's industry or business, occurring after the product was manufactured, is not admissible for the purpose of proving that the product was defective in design under Subsection 104(B) or that a warning of instruction should have accompanied the product at the time of manufacture under Subsection 104(C).

*Id.* § 107(A), *reprinted in* 44 Fed. Reg. at 62,728. Subsection (D) defines "practical technological feasibility" as "the technological, mechanical, and scientific knowledge relating to product safety that was reasonably feasible for use, in light of economic practicality, at the time of manufacture . . . *Id.* § 107(D).

56. *Id.* §§ 104(C), 107(A), *reprinted in* 44 Fed. Reg. at 62,721, 62,728.

57. Twerski, Weinstein, Donaher & Pehler, *The Use and Abuse of Warnings in Products Liability—Design Defect Litigation Comes of Age*, 61 CORNELL L. REV. 495, 501-05 (1976) [hereinafter cited as Twerski]; II LEGAL STUDY, *supra* note 2, at 60.

58. *See, e.g.*, UPLA § 104, Analysis, *reprinted in* 44 Fed. Reg. at 62,723.

59. The utility of the product is not considered in warning cases; instead, the focus is on the seriousness of the danger and its foreseeability.

60. II LEGAL STUDY, *supra* note 2, at 67.

ability plays such an important role in warning cases, courts have been even more reluctant there than in design defect cases to hold manufacturers liable for risks which were unknowable at the time of manufacture.<sup>61</sup> Thus, the Act's bar of post-manufacture evidence concerning warnings is consistent with the common law as well as recent legislative changes.

This time-of-manufacture standard does not shield manufacturers who unreasonably fail to warn about dangers discovered after the product was manufactured. Warnings and instructions given at the time of manufacture are judged by knowledge existing at that time. However, knowledge about a product-connected danger acquired after production raises an obligation on the part of the manufacturer to make reasonable efforts to warn product owners of those dangers.<sup>62</sup> The common law has long recognized this duty.<sup>63</sup> Furthermore, several recent decisions have included very large punitive damage awards for failing to warn after acquiring knowledge of a danger. Most of these cases, however, have involved a manufacturer's efforts to hide information concerning known dangers and to continue to market the product.<sup>64</sup> Clearly such actions indicate much more culpability than a mere failure to warn.

Because courts consider warnings and instructions relatively easy and inexpensive to give,<sup>65</sup> and because plaintiffs increasingly use failure to warn as a back-up theory of liability,<sup>66</sup> warnings are potentially one of the most explosive issues in product liability law. This explosiveness could be enhanced by the Act's bar of the imputation of knowledge and its adoption of the time-of-manufacture standard. If plaintiff's case is weak regarding manufacturer knowledge or safety improvement feasibility in either design or warning situations, a back-up claim might be predicated on a post-manufacture failure to warn. For purposes of this claim, evidence of post-manufacture change would be probative and, assumedly,

---

61. *Id.* at 68-69.

62. UPLA § 104(C)(6), *reprinted in* 44 Fed. Reg. at 62,721.

63. *See, e.g.,* Schenebeck v. Sterling Drug, Inc., 423 F.2d 919 (8th Cir. 1970); Comstock v. General Motors Corp., 358 Mich. 163, 99 N.W.2d 627 (1959).

64. *See, e.g.,* Hoffman v. Sterling Drug, Inc., 485 F.2d 132 (3d Cir. 1973) (defendant promoted new use for chloroquine phosphate without warnings that prolonged use would cause retinopathy); Toole v. Richardson-Merrell, Inc., 251 Cal. App. 2d 689, 60 Cal. Rptr. 398 (1967) (defendant falsified and concealed test results indicating dangerousness of MER 29 while heavily promoting it and representing it as safe).

65. *See, e.g.,* West v. Broderick & Bascom Rope Co., 197 N.W.2d 202, 211-12 (Iowa 1972); Moran v. Faberge, Inc., 273 Md. 538, 543-44, 332 A.2d 11, 15 (1975); Hamilton v. Morton Coach Indus. Inc., 569 S.W.2d 571, 575 (Tex. Civ. App. 1978); Twerski, *supra* note 57, at 513.

66. Phillips, *supra* note 50, at 352.

admissible.<sup>67</sup> Thus, because it provides an alternative theory of recovery by which the state of the art evidence bar may be avoided, the post-manufacture duty to warn will be used increasingly in product liability suits.

### III. DEFENSES

Defenses under the UPLA are treated in a manner consistent with the balancing approach to liability adopted for design and warning defect decisions, and, with the exception of the useful safe life defense,<sup>68</sup> follow recent trends in tort law. Comparative fault is used to balance a claimant's conduct against the product's defect in determining responsibility for an injury.<sup>69</sup> In addition, partial defenses are created for the manufacturer by the use of rebuttable presumptions.<sup>70</sup>

Strict product liability has never been strict in the traditional sense in that defenses have long been recognized.<sup>71</sup> For example section 402A of the *Restatement (Second) of Torts* recognizes assumption of the risk as a defense to strict liability,<sup>72</sup> and most jurisdictions which look to the *Restatement* as the source of strict liability have accepted this defense. One of the main differences among jurisdictions concerning the assumption of the risk defense is whether actual knowledge of the risk is required or whether it can be inferred from facts like the obviousness of the danger.<sup>73</sup> Closely analogous to this is the recognition of the patent danger rule which has limited a manufacturer's liability in a majority of jurisdictions.<sup>74</sup> The patent danger rule is not an affirmative de-

---

67. "If the court finds that the probative value of such evidence substantially outweighs its prejudicial effect . . . [it] may be admitted for other relevant purposes . . ." UPLA § 107(A), *reprinted in* 44 Fed. Reg. at 62,728.

68. See notes 141-47 & accompanying text *infra*.

69. UPLA §§ 111, 112, *reprinted in* 44 Fed. Reg. at 62,734-36. See notes 87-98 & accompanying text *infra*.

70. UPLA §§ 108, 110 to 112, *reprinted in* 44 Fed. Reg. at 62,730, 62,732-36. See notes 109-11 & accompanying text *infra*.

71. II LEGAL STUDY, *supra* note 2, at 90.

72. RESTATEMENT (SECOND) OF TORTS § 402A, Comment n (1965).

73. Compare *Shamrock Fuel & Oil Sales Co. v. Tunks*, 416 S.W.2d 779 (Tex. 1976) (actual knowledge required) and *Hahn, Inc. v. Armco Steel Co.*, 601 P.2d 152 (Utah 1979) (actual knowledge required) with *Downey v. Moore's Time-Saving Equip., Inc.*, 432 F.2d 1088 (7th Cir. 1970) (defendant should have known of danger) and *Bereman v. Burdolski*, 204 Kan. 162, 460 P.2d 567 (1969) (defendant should have known of danger).

74. See, e.g., *Mather v. Caterpillar Tractor Corp.*, 23 Ariz. 409, 533 P.2d 717 (1975); *Hensely v. Muskin Corp.*, 65 Mich. App. 662, 238 N.W.2d 362 (1976); *Kimble v. Waste Systems Int'l, Inc.*, 23 Wash. App. 331, 595 P.2d 569 (1979).

The UPLA adopts this position: "A manufacturer shall not be liable for its failure to warn or instruct about dangers that are obvious . . ." UPLA § 104(C)(4), *reprinted in* 44 Fed. Reg. at 62,721.

fense. Instead, it relieves the manufacturer of a duty to guard against or warn of dangers which are open and obvious. It has been most widely used by courts who employ a consumer expectations test. These courts have reasoned that a reasonable consumer will recognize and appreciate dangers which were open and obvious; therefore, the manufacturer should not have to take additional precautions.<sup>75</sup> However, an increasing number of courts are refusing to recognize patent danger as an absolute bar, and are instead considering it as just one of several factors to consider in determining liability.<sup>76</sup>

Misuse and product alteration, the proof of which are the other two most common ways a manufacturer can avoid strict liability, also are not generally considered to be affirmative defenses. The *Restatement* recognizes misuse as a way to prove that the product was not defective, but that it was the claimant's misuse of a nondefective product which caused the injuries.<sup>77</sup> Thus, it is used to rebut defect and causation.<sup>78</sup> Product alteration is treated in a similar manner. A defendant can avoid liability by showing that it was the alteration, not a defect in the product, which caused claimant's injuries.<sup>79</sup> However, misuse and alteration are not absolute bars to liability. If the misuse or alteration was foreseeable, most courts will hold that the manufacturer had a duty to take precautions.<sup>80</sup> Furthermore, some courts have allowed recovery where misuse of a defective product led to claimant's injuries.<sup>81</sup> Misuse and product modification have also been the focus of manufacturer sponsored reforms which have recently been statutorily adopted in several states.<sup>82</sup>

---

75. II LEGAL STUDY, *supra* note 2, at 32.

76. See, e.g., *Micallef v. Miehle Co.*, 39 N.Y.2d 376, 348 N.E.2d 571, 384 N.Y.S.2d 115 (1976); *Palmer v. Massey-Ferguson*, 3 Wash. App. 508, 476 P.2d 713 (1970).

77. RESTATEMENT (SECOND) OF TORTS § 402A, Comment h (1965).

78. *Rogers v. Toro Mfg. Co.*, 522 S.W.2d 632 (Mo. App. 1975); Noel, *Defective Products: Abnormal Use, Contributory Negligence, and Assumption of Risk*, 25 VAND. L. REV. 93, 96 (1972). *Contra*, *Walker v. Trico Mfg. Co.*, 487 F.2d 595 (7th Cir. 1973).

79. See, e.g., *Ericksen v. Sears, Roebuck & Co.*, 240 Cal. App. 2d 793, 50 Cal. Rptr. 143 (1966); *Robinson v. Reed-Prentice Div. of Package Mach. Co.*, 49 N.Y.2d 471, 403 N.E.2d 167, 426 N.Y.S.2d 717 (1980).

80. See, e.g., *Cepeda v. Cumberland Eng'r Co.*, 138 N.J. Super. 344, 351 A.2d 22 (App. Div. 1976); *Robinson v. Reed-Prentice Div. of Package Mach. Co.*, 49 N.Y.2d 471, 403 N.E.2d 167, 426 N.Y.S.2d 717 (1980); *Findley v. Copeland Lumber Co.*, 265 Or. 300, 509 P.2d 28 (1973).

81. See *Dorsey v. Yoder Co.*, 331 F. Supp. 753 (E.D. Pa. 1971), *aff'd*, 474 F.2d 1339 (3d Cir. 1973); *Cronin v. J.B.E. Olson Corp.*, 8 Cal. 3d 121, 501 P.2d 1153, 104 Cal. Rptr. 433 (1972). Cf. *Hahn, Inc. v. Armco Steel Co.*, 601 P.2d 152, 158 n.5 (Utah 1979) (misuse not an affirmative defense unless it exists with a product which is unreasonably dangerous).

82. See ARIZ. REV. STAT. § 12-683 (Supp. 1979); IND. CODE ANN. § 34-4-20A-4(b) (3)

Courts have had the most difficulty with the affirmative defense of contributory negligence in strict liability cases. Some courts have struggled with the theoretical inconsistencies of comparing fault in cases where a defect in the product, not fault, is supposed to be the basis of liability.<sup>83</sup> Theoretically, if the product is defective, a claimant's fault should be irrelevant. Arguably this is one reason contributory negligence was specifically not accepted as a defense under section 402A of the *Restatement*.<sup>84</sup> Nevertheless, several courts have accepted contributory negligence as an affirmative defense.<sup>85</sup> This acceptance is consistent with the use of other doctrines, like assumption of the risk, patently dangerous products, and misuse, which can be viewed as variations of contributory negligence.<sup>86</sup>

The same theoretical inconsistencies arise when notions of comparative fault are applied to strict liability. Nevertheless, an increasing number of courts have adopted it as a way to get around the all or nothing approach of the traditional defenses.<sup>87</sup> More than two-thirds of the states have adopted proportionate responsibility in one form or another, and its use in strict liability is growing with this trend, both through judicial and statutory adoption.<sup>88</sup>

The UPLA joins this trend, and incorporates misuse, alteration, assumption of the risk and contributory negligence<sup>89</sup> into its version of the Uniform Comparative Fault Act.<sup>90</sup> If a claimant unreasonably fails to discover a defect<sup>91</sup> or unreasonably uses a known

---

(Burns Supp. 1979); KY. REV. STAT. ANN. § 411.320 (Supp. 1979); OR. REV. STAT. § 30.915 (1977); R.I. GEN. LAWS § 9-1-32 (1978); TENN. CODE ANN. § 23-3708 (Supp. 1979); UTAH CODE ANN. § 78-15-5 (1977).

83. See, e.g., *Bachner v. Pearson*, 479 P.2d 319 (Alaska 1970); *Kirkland v. General Motors, Inc.*, 521 P.2d 1353 (Okla. 1974).

84. RESTATEMENT (SECOND) OF TORTS § 402A, Comment n (1965).

85. See, e.g., *Stephen v. Sears, Roebuck & Co.*, 110 N.H. 248, 266 A.2d 855 (1970); *Codling v. Paglia*, 32 N.Y.2d 330, 298 N.E.2d 622 (1973).

86. See *Preston v. Up-Right, Inc.*, 402 F.2d 943 (5th Cir. 1968); *Hagenbuck v. Snap-On Tools Corp.*, 399 F. Supp. 676 (D.N.H. 1972); *Dippel v. Sciano*, 37 Wis. 2d 443, 155 N.W.2d 55 (1967).

87. See, e.g., *Murray v. Fairbanks Morse, Beloit Power Sys., Inc.*, 610 F.2d 149 (3d Cir. 1979); *Daly v. General Motors Corp.*, 20 Cal. 3d 725, 575 P.2d 1162, 144 Cal. Rptr. 380 (1978); *Thibault v. Sears, Roebuck & Co.*, 118 N.H. 802, 395 A.2d 843 (1978).

88. Wade, *supra* note 8, at 578; see, e.g., *Murray v. Fairbanks Morse, Beloit Power Sys., Inc.*, 610 F.2d 149 (3d Cir. 1979); *General Motors Corp. v. Hopkins*, 548 S.W.2d 344 (Tex. 1977); ARK. STAT. ANN. §§ 27-1763 to -1765 (1979); ME. REV. STAT. ANN. tit. 14, § 156 (1980); MICH. COMP. LAWS ANN. § 600.2949 (Supp. 1979).

89. UPLA §§ 111, 112, *reprinted in* 44 Fed. Reg. at 62,734-37.

90. *Reprinted in* 12 U.L.A. 33 (Supp. 1979). "Section 111 borrows extensively from the UCFA and its accompanying commentary." UPLA § 111, Analysis, *reprinted in* 44 Fed. Reg. at 62,737.

91. UPLA § 122(A), *reprinted in* 44 Fed. Reg. at 62,737. The Act follows the *Restatement* in not requiring the claimant to inspect the product for a defective

defective product,<sup>92</sup> the claimant's recovery is reduced by the percentage of the claimant's responsibility for the injury. Proof of a claimant's misuse or alteration of a product can result in either a reduction of the plaintiff's recovery by the percentage of his or her fault, or a determination that the product was not defective.<sup>93</sup> It is unclear why the drafters decided to retain these traditional categories while adopting comparative fault. Indeed, many of the technicalities involved in the traditional use of these doctrines, which have led to unnecessary confusion, could have been eliminated by a comprehensive comparative fault category.<sup>94</sup> It is also unclear why the drafters of the UPLA included a misuse and alteration rebuttal of defect or causation in with the reduction of recovery for the claimant's fault. Although misuse and alteration are still bars to recovery, their inclusion in this section shifts the traditional burden of proof from plaintiff to defendant.<sup>95</sup> This shift deviates from common law and creates a confusing inconsistency. Section 104 of the Act requires the claimant to show "by a preponderance of the evidence that the harm was proximately caused because the product was defective,"<sup>96</sup> while section 112 requires the defendant to carry the same burden of proof.<sup>97</sup> Thus, inclusion here will lead to much confusion as courts try to interpret which party is to carry the burden of persuasion. Moreover, the inclusion of the misuse and alteration rebuttal here is likely to result in increases in the number of awards as juries avoid difficult decisions on defect and causation questions by recasting them on fault apportionment

---

condition. However, if the claimant uses a product with a defective condition that would have been apparent without inspection to an ordinary reasonably prudent person, the damages are subject to reduction. *Id.* For a telling criticism of this apparently inconsistent section, see Twerski & Weinstein, *supra* note 13, at 249-50.

92. UPLA § 112(B), *reprinted in* 44 Fed. Reg. at 62,736-37. In optional subsection (B)(2), unreasonable use or storage by a third party user which causes the claimant's harm can also subject the claimant's damages to apportionment. This section is made optional because of the possibility that the claimant might be left without anyone to sue. Thus, safety incentives take a back seat to claimant compensation. *See id.* § 112(B), Analysis, *reprinted in* 44 Fed. Reg. at 62,738.

93. *Id.* § 112(C), (D), *reprinted in* 44 Fed. Reg. at 62,737.

94. II LEGAL STUDY, *supra* note 2, at 88-123.

95. Since misuse and product alteration are not affirmative defenses under common law, the plaintiff has the burden of proving that it was the defect in the product, not the misuse or alteration, which caused the injury. W. PROSSER, *supra* note 20, § 102.

96. UPLA §§ 104, 112, *reprinted in* 44 Fed. Reg. at 62,721, 62,736.

97. *See* UPLA § 112(C), *reprinted in* 44 Fed. Reg. at 62,736. Section 112(C)(2) states: "When the product seller proves, by a preponderance of the evidence, that product misuse by a claimant . . . has caused the claimant's harm . . . the trier of fact may determine that the harm arose solely because of product misuse." *Id.*



grounds.<sup>98</sup> This categorization undermines the Act's goals of avoiding confusion and helping to stabilize recoveries, and is unnecessary to the adoption of comparative fault. Legislatures should consider an alternate approach to the Act's comparative fault provisions if they choose to adopt the Act.

The same confusion as to burden of proof arises as a result of the Act's treatment of the defense of custom. Section 107(C) of the Act states that custom can be considered by the trier of fact in judging design and warning defects.<sup>99</sup> Section 107(E) states that if "the product seller proves, by a preponderance of the evidence, that it was not within practical technological feasibility to make the product safer with respect to design and warnings or instructions," the product seller shall not be liable.<sup>100</sup> However, in section 104 the Act states that "the claimant has the burden of showing, in light of the formula, that the product was unreasonably unsafe in design."<sup>101</sup> Part of the formula includes the technological and practical feasibility of making the product safer.<sup>102</sup> The claimant has the same burden of proof regarding warnings.<sup>103</sup> Both parties, of course, cannot have the same burden of persuasion. A well drafted act would not contain such inconsistencies.

The Act's treatment of compliance with established industry standards for design and warning defects follows the law in most jurisdictions, which looks upon such compliance as just one of the factors to be considered in determining liability.<sup>104</sup> In following the common law, the UPLA rejects an innovative and useful change which was included in the draft of the Act.<sup>105</sup> Manufacturers have strongly argued that compliance with industry custom should be a defense; that industry custom is likely to incorporate all cost-justified safety features; and that products conforming to these customs are not defective.<sup>106</sup> Although manufacturers have

---

98. See Twerski & Weinstein, *supra* note 13, at 247-48.

99. UPLA § 107(C), *reprinted in* 44 Fed. Reg. at 62,728.

100. *Id.* § 107(E), *reprinted in* 44 Fed. Reg. at 62,728-29.

101. *Id.* § 104(B), Analysis, *reprinted in* 44 Fed. Reg. at 62,723. It is clear that the drafters did not mean the burden of producing evidence. Instead they were speaking of the burden of persuasion: "If the case is sent to the jury, the balancing formula should be placed in a jury instruction indicating that the claimant has the burden of showing, in light of the formula, that the product was unreasonably unsafe in design." *Id.*

102. *Id.* § 104(B)(2)(b), *reprinted in* 44 Fed. Reg. at 62,721.

103. *Id.* § 104(C)(2)(c), *reprinted in* 44 Fed. Reg. at 62,721.

104. *Id.* § 107(B), (C), *reprinted in* 44 Fed. Reg. at 62,728. See text accompanying note 23 *supra*.

105. See DRAFT UNIFORM PRODUCT LIABILITY LAW [hereinafter cited as DRAFT], *reprinted in* 44 Fed. Reg. 2996 (1979).

106. UPLA § 107, Analysis, *reprinted in* 44 Fed. Reg. 62,729.

been able to get a few legislatures to accept this argument,<sup>107</sup> courts have almost universally rejected industry custom as a defense.<sup>108</sup>

Initially, the drafters of the UPLA adopted a position between these points of view, and in the Draft of the Act proposed that compliance with a non-governmental safety standard could raise a rebuttable presumption of nondefectiveness. The seller could petition the court to determine whether the standard was strict enough according to enumerated factors, such as the extent of product testing and safety evaluation, and the extent consumer interests were considered.<sup>109</sup> If the court determined that it was, then the trier of fact would be instructed to presume nondefectiveness.<sup>110</sup>

The drafters eliminated the presumption because of the "variance in the nature and quality of privately developed safety standards."<sup>111</sup> However, since the court was to screen the standards according to carefully delineated guidelines, these variations could have been adequately curbed.<sup>112</sup> Furthermore, adoption of the presumption might have given manufacturing or other groups greater incentive to devise standards that set a high level of safety rather than to encourage individual development of standards at a

---

107. See, e.g., KY. REV. STAT. ANN. § 411.310 (Supp. 1980) (rebuttable presumption of nondefectiveness); TENN. CODE ANN. § 23.3705 (Supp. 1979). Several legal writers also have supported compliance with industry custom as a defense. See Wade, *supra* note 8, at 568 n.85.

108. II LEGAL STUDY, *supra* note 2, at 340. See note 23 & accompanying text *supra*. But see Owens v. Allis-Chalmers Corp., 83 Mich. App. 74, 286 N.W.2d 291 (1978).

109. UPLA § 104(e) states:

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.

UPLA § 104(e), reprinted in 44 Fed. Reg. at 62,721.

110. DRAFT § 106(e)(1)-(4), reprinted in 44 Fed. Reg. at 2999.

111. UPLA § 107(C), Analysis, reprinted in 44 Fed. Reg. at 62,730.

112. See DRAFT § 106(e)(1)-(4), reprinted in 44 Fed. Reg. at 2999.

greater cost and with more variation in the safety level. Also, litigation costs would be decreased because each standard would not have to be judged in every case,<sup>113</sup> and the battle of the experts would not retain as central an importance at trial.<sup>114</sup> Finally, its adoption could have helped stabilize insurance rates because insurers could assess the development and quality of these standards and make predictions with more assurance. Thus, the presumption appears to be consistent with the goals of safety, cost reduction and rate stabilization, and should be given further consideration.

Compliance with legislative or administrative standards was given similar treatment in the Draft,<sup>115</sup> but the rebuttable presumption was retained in the final version.<sup>116</sup> This is in line with the position of most courts, which view governmentally determined standards as minimum safety standards which must be met. However, compliance with such standards is treated as strong evidence of nondefectiveness.<sup>117</sup> This presumption is also supported by the *Restatement*<sup>118</sup> and by reform legislation in a few states.<sup>119</sup> Only compliance with mandatory government contract regulations affords an absolute defense.<sup>120</sup>

113. See IV LEGAL STUDY, *supra* note 2, at 130.

114. *Id.* at 154-56. The UPLA deals with the problem of biased or unqualified experts, and the inability of lay jurors to assess their information in section 117 which provides for appointment of expert witnesses by the court. This appointment can be made known to the jury. UPLA § 117(C), *reprinted in* 44 Fed. Reg. at 62,745.

115. DRAFT § 107, *reprinted in* 44 Fed. Reg. at 2999.

116. UPLA § 108(A), *reprinted in* 44 Fed. Reg. at 62,730. If the injury-causing aspect was not in compliance, a rebuttable presumption of defect is raised. *Id.* § 108(B), *reprinted in* 44 Fed. Reg. at 62,730.

117. See *Rucker v. Norfolk & W. Ry.*, 77 Ill. 2d 434, 396 N.E.2d 534 (1979); *Jones v. Hittle Serv., Inc.*, 219 Kan. 627, 549 P.2d 1383 (1976); *cf. Sindell v. Abbot Laboratories, Inc.*, 26 Cal. 3d 588, 607 P.2d 924, 63 Cal. Rptr. 132 (1980) (the court rejected holding the manufacturers liable under the theory they had acted in concert because of the government's pervasive role in formulating criteria for testing and marketing drugs). *But see Grye v. Dayton-Hudson Corp.*, 48 U.S.L.W. 2833 (Minn. Sup. Ct. 1980) (not only did compliance with Flammable Fabrics Act not insulate the manufacturer from liability, it also did not insulate it from a \$1,000,000 punitive damages award).

118. See RESTATEMENT (SECOND) OF TORTS § 288C, Comment a (1965).

119. See, e.g., COLO. REV. STAT. § 13-21-403(1)(b) (Supp. 1978); TENN. CODE ANN. § 23-3704 (Supp. 1979); UTAH CODE ANN. § 78-15-6(3) (1977).

120. UPLA § 108(C), *reprinted in* 44 Fed. Reg. at 62,731. Noncompliance with mandatory government contract specifications means the product was defective. *Id.* § 108(D), *reprinted in* 44 Fed. Reg. at 62,730. This section protects the manufacturer from a "Catch-22" situation. The government is the appropriate defendant in such situations, and the drafters admonish the legislature to make sure adequate compensation is provided for under state law. *Id.* § 108(C), Analysis, *reprinted in* 44 Fed. Reg. at 62,731.

The drafters adopted another rebuttable presumption of nondefectiveness—that a product over ten years old is beyond its useful safe life.<sup>121</sup> Despite the fact that liability claims for old products make up a very small percentage of product liability claims,<sup>122</sup> insurers cited them as one of the main factors underlying their inability to predict liability and hold down rates.<sup>123</sup> Manufacturers were equally upset by the thought of liability for a product which had passed from their control 20 or 30 years previously. Consequently, insurer and manufacturer lobbying efforts have resulted in the adoption of statutes of repose in over one-third of the states.<sup>124</sup> In most of these states the statute is an absolute bar to liability<sup>125</sup> for a product which has been in the hands of the consumer<sup>126</sup> for a stated period of time—usually ten years.<sup>127</sup>

Statutes of repose differ from the usual statutes of limitation because they are based on the product itself, not on the cause of action. They are passed to protect special interests, not to ensure the timely prosecution of rights.<sup>128</sup> Similar special legislation for architects and builders has been challenged on equal protection and due process grounds, as well as under state constitutional provisions, with mixed success.<sup>129</sup> Challenges to the product-related

---

121. *Id.* § 110(B), *reprinted in* 44 Fed. Reg. at 62,732.

122. The 1976 Products Liability Closed Claim Survey (Insurance Services Office, New York City (Dec. 1976)) reported that products over six years old made up only 2.7% of the litigated claims.

123. DRAFT § 106(e), *reprinted in* 44 Fed. Reg. at 3009; INSURANCE STUDY, *supra* note 2, at 4-92.

124. *See, e.g.*, ARIZ. REV. STAT. ANN. § 12-551 (Supp. 1979); COLO. REV. STAT. § 13-21-403(3) (Supp. 1978); CONN. GEN. STAT. ANN. § 52-577a (West Supp. 1978); FLA. STAT. ANN. § 95.831(2) (West Supp. 1977); GA. CODE ANN. § 105-106 (Supp. 1980); ILL. ANN. REV. STAT. ch.28, § 22.2 (Smith-Hurd Supp. 1979); IND. CODE ANN. § 34-4-20A-5 (Burns Supp. 1979); KY. REV. STAT. ANN. § 411.310 (Supp. 1980); NEB. REV. STAT. § 25-724 (Reissue 1979); OR. REV. STAT. § 30.905 (1977); R.I. GEN. LAWS § 9-1-13 (1978); S.D. CODIFIED LAWS ANN. § 15-2-12.1 (Supp. 1980); TENN. CODE ANN. § 23-3703 (Supp. 1979); UTAH CODE ANN. § 78-15-3(1) (1977). In addition, North Carolina's statute, N.C. GEN. STAT. § 99B (1979), could be interpreted as a statute of repose. *See* Note, *supra* note 3, at 707-08.

125. *But see* COLO. REV. STAT. § 13-21-403(3) (Supp. 1978); KY. REV. STAT. ANN. § 411.310 (Supp. 1980). These statutes raise rebuttable presumptions of nondefectiveness after the running of the statutory period.

126. Some states measure the repose period from the time of manufacture. *See, e.g.*, KY. REV. STAT. ANN. § 411.310 (Supp. 1980) (five years from date of sale to consumer or eight years from date of manufacture); R.I. GEN. LAWS § 9-1-13 (1978); UTAH CODE ANN. § 78-15-3(1) (1977) (six years from sale to consumer or ten years from date of manufacture).

127. The periods range from a low of five years (Kentucky) to a high of 12 years (Arizona and Florida). At least 8 states (Alabama, Colorado, Georgia, Indiana, Nebraska, Tennessee, Rhode Island and Utah) have adopted the 10-year state of repose.

128. V LEGAL STUDY, *supra* note 2, at 7.

129. Over half of the states have enacted repose statutes for architects and build-

statutes of repose are even less likely to be successful because, unlike architect and builder statutes, the product liability statutes of repose do not distinguish between classes of defendants.<sup>130</sup>

Despite the strong legislative support, statutes of repose were rejected by the drafters of the UPLA because "they *may* deprive a person . . . of the right to bring a claim based on a defective product before the injury has actually occurred."<sup>131</sup> Instead, they substituted a rebuttable presumption that after ten years a product is beyond its useful safe life, and increased the burden of proof necessary to overcome this presumption.<sup>132</sup>

Exceptions to the presumption's applicability severely weaken its effectiveness in dealing with older-product problems. The ten-year presumption does not apply if: (1) the harm was caused by prolonged exposure to a defective product; (2) the injury-causing aspect of the product was not reasonably discoverable until after ten years; or (3) the injury did not manifest itself until after ten years.<sup>133</sup> Furthermore, the presumption does not apply to warranty or intentional misrepresentation cases.<sup>134</sup> Since the few cases involving older products have almost all involved either capital goods, where the presumption would be fairly easy to rebut,<sup>135</sup>

---

ers. See V LEGAL STUDY, *supra* note 2, at 10-11. Only five jurisdictions have overturned repose statutes on constitutional grounds. Alabama and Kentucky overturned their statutes on state constitutional grounds. *Bagby Elevator & Elec. Co. v. McBride*, 292 Ala. 191, 291 So.2d 306 (1974); *Saylor v. Hall*, 497 S.W.2d 218 (Ky. 1973). Hawaii, Illinois and Wisconsin overturned them on equal protection grounds. *Fujioka v. Kam*, 55 Hawaii 7, 514 P.2d 568 (1973); *Skinner v. Anderson*, 38 Ill. 2d 455, 231 N.E.2d 588 (1967); *Millwork Corp. v. Square D Co.*, 66 Wis. 2d 382, 225 N.W.2d 454 (1975).

130. *Cf. Skinner v. Anderson*, 38 Ill. 2d 455, 231 N.E.2d 588 (1967) (statute invalidated on grounds that, under state constitution, legislature cannot grant special privilege, immunity or franchise to any person, corporation or association); see V LEGAL STUDY, *supra* note 2, at 10. But see *Massery, Date-of-Sale Statutes of Limitations—a New Immunity for Product Suppliers*, 1977 Ins. L.J. 535, 545.

131. UPLA § 110, Analysis, reprinted in 44 Fed. Reg. at 62,733.

132. *Id.* § 110(B)(1), reprinted in 44 Fed. Reg. at 62,732. "In claims that involve harm caused more than ten (10) years after time of delivery, a presumption arises that the harm was caused after the useful safe life had expired. This presumption may only be rebutted by clear and convincing evidence." *Id.*

133. *Id.* § 110(B)(2)(d), reprinted in 44 Fed. Reg. at 62,732.

134. *Id.* § 110(B)(2), reprinted in 44 Fed. Reg. at 62,732.

135. See, e.g., *Pryor v. Lee C. Moore Corp.*, 262 F.2d 673 (10th Cir. 1959) (liability for the collapse of a 15-year-old crane where the evidence showed that a properly fused weld would have lasted more than 15 years); *Miller v. Bock Laundry Mach. Co.*, 568 S.W.2d 648 (Tex. 1977) (liability for failure of an 18-year-old laundry machine seal where the evidence was that the normal life expectancy was 30 to 40 years); *Kozlowski v. John E. Smith's Sons Co.*, 87 Wis. 2d 882, 275 N.W.2d 915 (1979) (19-year-old sausage-stuffing machine). See V LEGAL STUDY, *supra* note 2, at 4-5.

or the types of injuries or actions which are excluded from the presumption's protection,<sup>136</sup> this presumption is likely to be of little practical value.

Moreover, the costs associated with the use of this presumption make it even less appealing. The manufacturer would be required to prove the product has met the ten-year requirement in order to take advantage of the presumption. The ten-year period begins to run at the time of delivery to the first purchaser or lessee not engaged in selling the product or in using it as a component part.<sup>137</sup> In the case of goods delivered close to the ten-year period, it would be virtually impossible to show the date of delivery unless the retailer or manufacturer keeps relatively detailed sales and inventory records. Yet the expense and bother of keeping such records for ten years will probably outweigh their utility for these close cases; consequently, they will not be kept. Thus, manufacturers will not find the presumption very useful except in cases where the product was clearly delivered more than ten years prior to the injury. Essentially, adoption of this presumption would remove the special statutory protection accorded manufacturers in many states,<sup>138</sup> but it would not materially increase a plaintiff's current burden of overcoming a jury's natural skepticism about a product being defective when it has been in continuous use without incident for over 10 years.

In those cases in which the presumption does not apply, because ten years have not elapsed, the ten-year lapse cannot be proved, or because one of the exceptions applies, a useful safe life defense is still available to the manufacturer. However, in these cases the manufacturer has the burden of proving the product was being used beyond its useful safe life.<sup>139</sup> Factors considered especially probative in determining the useful safe life are the amount of wear and tear, the storage conditions, and the use of the product compared to normal use by others.<sup>140</sup> These, of course, are nothing more than the factors upon which any good defense counsel usually would rely to show that the product was not defective or that it was misused. A final consideration, manufacturer representations, instructions or warnings regarding useful safe life may

136. *Michie v. Great Lakes Steel Div., Nat'l Steel Corp.*, 495 F.2d 213 (6th Cir. 1974) (pollution); *Abel v. Eli Lilly & Co.* 94 Mich. App. 59, 289 N.W.2d 20 (1979) (diethylstilbestrol); *Mickle v. Blackmon*, 252 S.C. 202, 166 S.E.2d 173 (1969) (plastic on gearshift lever deteriorated after 12 months of sunlight exposure but accident causing impalement due to shattering of plastic occurred 13 years after manufacture).

137. UPLA § 110(A)(1), *reprinted in* 44 Fed. Reg. at 62,733.

138. *See* note 125 & accompanying text *supra*.

139. UPLA § 110(A)(1), *reprinted in* 44 Fed. Reg. at 62,732.

140. *Id.* § 110(A)(1)(a), *reprinted in* 44 Fed. Reg. at 62,732.

be used to support a useful safe life defense; however, these factors are considered probative only if not too self-serving.<sup>141</sup>

Although the drafters considered manufacturer abuse of safe life warnings and instructions, they failed to consider its opposite—consumer manipulation of safe life into a new theory of liability. Thus, the useful safe life defense may be a double-edged sword for the manufacturer. If manufacturers have sufficient information to show that a product is being used beyond its useful safe life, does this information then raise a duty on the part of the manufacturer to warn all users as to the useful safe life period? Such a duty would be consistent with both the Act and case law.

The Act makes a failure to warn or properly instruct about a product's use a cause of action.<sup>142</sup> This cause of action specifically includes a failure to warn based on post-production knowledge.<sup>143</sup> Increasingly, manufacturers have been held liable for failures to warn even where the likelihood of harm is extremely small.<sup>144</sup> The manufacturer is the body most likely to have and be able to gather information about useful safe life, both through actual damage reports, and through engineering and design projections.<sup>145</sup> Therefore, when a duty of common sense use by consumers is balanced against a duty to warn on the part of the manufacturer, the manufacturer's superior knowledge would probably weigh heavily in favor of placing the duty on the manufacturer. Such a duty would also be consistent with the current pro-consumer bias in product liability law, and with the safety goals underlying strict liability.

Once such a duty is generally recognized, its limitations are hard to imagine. If the useful safe life seems short in a regard to some expectations, warnings, recall or even redesign might be required. Furthermore, punitive damages may be available for a failure to act on accumulated safe life information.<sup>146</sup> Liability for

---

141. *Id.* § 110(A)(1)(d), Analysis, reprinted in 44 Fed. Reg. at 62,733-34. The product seller cannot use the safe life warnings or instructions to set unreasonably short periods of time or unreasonable instructions regarding care to limit its liability. *Id. Contra*, *Valez v. Craine & Clark Lumber Corp.*, 33 N.Y.2d 117, 305 N.E.2d 750, 350 N.Y.S.2d 617 (1973).

142. UPLA § 104(C), reprinted in 44 Fed. Reg. at 62,721.

143. *Id.* § 104(C)(6), reprinted in 44 Fed. Reg. at 62,721.

144. See, e.g., *Harrison v. Flota Mercante Grancolombiana, S.A.*, 577 F.2d 968 (5th Cir. 1978); *Graham v. Joseph T. Ryerson & Sons*, 8 P.S.L.R. 415 (Del. Super. Ct. 1980); *Kozlowski v. John E. Smith's Sons Co.*, 87 Wis. 2d 882, 275 N.W.2d 915 (1979); *Moran v. Fabergé, Inc.*, 273 Md. 538, 332 A.2d 11 (1975).

145. Cf. *Graham v. Joseph T. Ryerson & Sons*, 8 P.S.L.R. 415 (Del. Super. Ct. 1980) (20 reports to manufacturer of injury put duty on manufacturer to warn expert). See UPLA § 104(C)(6), Analysis, reprinted in 44 Fed. Reg. at 62,725.

146. The duty to warn regarding the expected life of products has been mentioned by commentators, e.g., Wade, *supra* note 28, at 848; Phillips, *supra* note 50, at 358, but has generally not been accepted by the courts. But see *Cronin v.*

selling replacement parts or for encouraging a resale market is also possible if such activities would contribute to a product being used beyond its useful safe life.<sup>147</sup> Conceivably, the dating of all products, accompanied by warnings as to their useful safe life, may be required. Needless to say, the economic impact of such a requirement would be tremendous. Since suits for old product injuries are relatively rare, and since the effectiveness of the useful life presumption is questionable, this useful life section should be eliminated.

The primary motivation for use of a safe life defense and the useful life presumption was to stabilize insurance rates by placating manufacturers and insurers who claimed that "open-ended" liability for products was the main cause of the instability.<sup>148</sup> Workplace injuries are a major source of old-product suits and the stabilization of insurance rates would be better served by the provisions dealing with workplace accidents than by the useful safe life provisions. While the drafters of the UPLA did not feel it was within their province to change worker's compensation or the tort compensation system, they did devise a plan which more equitably distributes the cost of workplace accidents within the present framework.<sup>149</sup> Following a plan proposed by the American Insurance Association,<sup>150</sup> the UPLA reduces the liability of the manufac-

---

J.B.E. Olson Corp., 8 Cal. 3d 121, 501 P.2d 1153, 104 Cal. Rptr. 433 (1972) (duty to warn regarding the length of time a bread truck could be safely used); *Hamilton v. Motor Coach Indus., Inc.*, 569 S.W.2d 571 (Tex. Civ. App. 1978) (duty to warn of a nondefective product which may change (rust) with the passage of time). A discussion of using disclaimers to solve the problem of older products, something which can be done without legislative change, is included in V LEGAL STUDY, *supra* note 2, at 25-29. The Act's useful safe life section is likely to make expected life warning generally required.

147. See Phillips, *supra* note 50, at 358.

148. Perhaps more significant than any other single factor alleged to be the cause of the nationwide product liability insurance problem are the rules governing the responsibility of product sellers for older products . . . . In the case of sellers of durable goods . . . , an "open-ended" liability situation is created. Section 110 attempts to provide insurers and product sellers with some security against stale claims, while preserving the claimant's right to obtain damages for injuries caused by defective products.

UPLA § 110, Analysis, *reprinted in* 44 Fed. Reg. at 62,733.

149. *Id.* § 114, Analysis, *reprinted in* 44 Fed. Reg. at 62,740. In many states, manufacturers of workplace products must pay for all out-of-pocket expenses and all the pain and suffering awards of the claimant because of manufacturer has no claim for contribution against a negligent employer. *E.g.*, *Seaboard Coast Line R.R. v. Smith*, 359 So. 2d 427 (Fla. 1978). *Contra*, *Skinner v. Reed-Prentice Div. of Package Mach. Co.*, 70 Ill. 2d 1, 374 N.E.2d 437 (1977); *Dole v. Dow Chem. Co.*, 30 N.Y.2d 143, 282 N.E.2d 288, 311 N.Y.S.2d 382 (1972).

150. AMERICAN INSURANCE ASS'N, PRODUCT LIABILITY LEGISLATIVE PACKAGE 75-76 (1977).



turer by the amount of worker compensation benefits received or to be received by the claimant.<sup>151</sup> Moreover, employer misuse or improper alteration of the product reduces the claimant-employee's award, which in turn reduces the manufacturer's liability.<sup>152</sup> These sections make it unlikely that a manufacturer will pay more than is apportionable to its fault in workplace injuries, including injuries caused by old products. Since workplace injuries are a major source of old-product suits,<sup>153</sup> these provisions make the rebuttable presumption of a ten year safe life even less necessary.

#### IV. LIMITATIONS ON DAMAGES AND TRIALS

The Act's proposals to help curb awards are its most novel and least effectual. The limitation on non-pecuniary damages is a good example. An optional subsection suggests that the state should limit non-pecuniary damages to \$25,000 or twice the pecuniary damages, whichever is less.<sup>154</sup> Such a limitation faces serious constitutional challenges similar to those raised by the statutes of repose.<sup>155</sup> They may violate due process or equal protection clauses, or prohibitions on damage limitations in some state constitutions. Similar provisions in automobile no-fault and medical malpractice legislation have encountered difficulties.<sup>156</sup>

However, even if the limitation survives these challenges it will be of little help in closing the "openendedness" of pain and suffering awards<sup>157</sup> because the limitation does not apply to non-pecuni-

---

151. UPLA § 114(A), *reprinted in* 44 Fed. Reg. at 62,740. Transaction costs are reduced under this plan by barring employer subrogation, contribution or indemnity against the product seller. *Id.* Also, the employer's worker compensation insurance carrier has no right of subrogation. *Id.* § 114(B), *reprinted in* Fed. Reg. at 62,741.

152. *Id.* § 112(C), (D), *reprinted in* Fed. Reg. at 62,737. This plan gives the employer stronger incentive to maintain products and provide a safe workplace than is provided under the current laws. *See* III LEGAL STUDY, *supra* note 2, at 121.

153. A large number of old product suits involve capital goods which are being used in a workplace situation. *See* Note, *supra* note 3, at 702; note 135 & accompanying text *supra*.

154. UPLA § 118(C), *reprinted in* 44 Fed. Reg. at 62,747. Section 118 defines non-pecuniary damages as "those which have no market value and do not represent a monetary loss to claimant." *Id.* § 118(A), *reprinted in* 44 Fed. Reg. at 62,747. The rest of Section 118 merely states that the court shall review damage awards for excessiveness. *Id.* § 118(B), *reprinted in* 44 Fed. Reg. at 62,747.

155. *See* note 129 & accompanying text *supra*.

156. *See* UPLA § 118, Analysis, *reprinted in* 44 Fed. Reg. at 62,747 (listing cases and statutes); V LEGAL STUDY, *supra* note 2, at 109.

157. "A most important reason for the difficulty in setting product liability rates is the 'openendedness' of damages for pain and suffering." UPLA § 118, Analy-

ary damages in cases where the claimant has suffered "permanent or prolonged (1) disfigurement, (2) impair[ment] of bodily function, (3) pain and discomfort, or (4) mental illness."<sup>158</sup> Limiting non-pecuniary damages in those cases in which they are likely to be small, but leaving them unchecked in cases where they are likely to be largest, and where juries' sympathies are most easily aroused will do little to cure the "openendedness" problem. Moreover, it will increase litigation costs because it will be necessary to determine whether a harm is serious, permanent or prolonged.

The UPLA's proposed modification of the collateral source rule would probably have even less effect than the damage limitation provision in curbing awards, since it applies only to claimants whose compensation has been paid by general tax revenues such as Medicaid or Medicare. The provision reduces a claimant's recovery by the amount received for the injuries from a fund which gets more than half of its revenue from general taxes.<sup>159</sup> The ethical concerns about limiting the collateral source rule only to the disadvantage of the poor are obvious. Thus, because the amount deductible from an award would be so inconsequential (20% of the amount awarded in 6% of the claims),<sup>160</sup> and because the rule only works to the detriment of the disadvantaged, the framers should have done nothing if they could not take a more comprehensive approach to the problem.

The most useful UPLA section regarding damages is the one dealing with punitive damages. Punitive damages, like old-product claims, have received more publicity and business concern than are justified by the actual cases.<sup>161</sup> Nevertheless, the potential for abuse exists, and the Act's treatment of punitive damages may help to curb these excesses.

The Act continues the policy of having the jury determine whether punitive damages should be awarded; however, plaintiff's burden of proof is increased. The claimant must show by clear and convincing evidence that defendant had a reckless disregard for

---

sis, *reprinted in* 44 Fed. Reg. at 62,746. According to one study, 70% of claims closed with payment include non-pecuniary damages, and the greater the pecuniary damages, the greater the average amount of non-pecuniary payments. *Id.*

158. *Id.* § 118(C)(1)-(4), *reprinted in* 44 Fed. Reg. at 62,746.

159. *Id.* § 119, *reprinted in* 44 Fed. Reg. at 62,747. "[T]he claimant's recovery, or that of any party who may be subrogated . . . shall be reduced by any compensation from a public source which the claimant has . . . or will receive for the same damages. '[P]ublic source' means a fund more than half of which is derived from general tax revenues." *Id.*

160. *Id.* § 119, Analysis, *reprinted in* 44 Fed. Reg. at 62,748.

161. Fulton, *Punitive Damages in Product Liability Cases*, FORUM, Fall 1979, at 117; see Annot., 29 A.L.R.3d 1021 (1968).

safety.<sup>162</sup> This standard is closer to the criminal standard of beyond a reasonable doubt, and it is consistent with the semi-criminal nature of this type of damages.<sup>163</sup> Once the jury decides punitive damages are merited, the decision-making shifts to the judge to determine the amount.<sup>164</sup> Since the judge is assumedly less subject to emotional appeals, and is instructed to follow specific considerations in making the determination,<sup>165</sup> extreme awards should be eliminated.

These considerations generally follow suggested reforms of legal writers<sup>166</sup> and are based on Minnesota legislation<sup>167</sup> passed after thorough consideration of the topic.<sup>168</sup>

Some of these considerations are the same factors which the jury is to balance when judging the reasonableness of the manufacturer's design or warning decisions.<sup>169</sup> Thus, records of design or warning choices which do not show a clear preference for safety could form the basis of punitive damage awards.<sup>170</sup> Although the

162. UPLA, § 120(A), *reprinted in* 44 Fed. Reg. at 62,748.

163. *But see* Long, *Punitive Damages: An Unsettled Doctrine*, 25 DRAKE L. REV. 870, 885 (1976).

164. UPLA § 120(B), *reprinted in* 44 Fed. Reg. at 62,748.

165. *Id.* § 120(B), Analysis, *reprinted in* 44 Fed. Reg. at 62,749.

166. *See, e.g.,* Mallor & Roberts, *Punitive Damages: Toward a Principled Approach*, 31 HASTINGS L.J. 639 (1980); Owen, *Punitive Damages in Products Liability Litigation*, 74 MICH. L. REV. 1257 (1976); Note, *Exemplary Damages in the Law of Torts*, 70 HARV. L. REV. 517 (1957).

167. *See* MINN. STAT. §§ 549.20, 549.21 (Supp. 1980).

168. The UPLA requires the judge to consider:

(1) the likelihood at the relevant time that serious harm would arise from the product seller's misconduct; (2) the degree of the product seller's awareness of that likelihood; (3) the profitability of the misconduct to the product seller; (4) the duration of the misconduct; (5) whether the product seller attempted to conceal the misconduct; (6) the product seller's response to the discovery of the misconduct; (7) whether the product seller has terminated the misconduct; (8) the product seller's financial condition; (9) the total effect of other punishment imposed or likely to be imposed on the product seller as a result of the misconduct; and (10) whether the harm suffered by the claimant was also the result of the claimant's own reckless disregard for personal safety.

UPLA § 120(B), *reprinted in* 44 Fed. Reg. at 62,748.

169. These considerations include: "(1) the likelihood at the relevant time that serious harm would arise from the product seller's misconduct; (2) the degree of the product seller's awareness of that likelihood; [and] . . . (5) the attitude and conduct of the product seller upon discovery of the misconduct and whether the conduct has been terminated." *Id.*

170. *Cf. Strobil & Tybor, Pinto Papers Hold Key to Ford Trial*, Nat'l L.J., Jan. 7, 1980, at 1, col. 4 (discussing importance of internal Ford memos, crash tests, reports and financial studies to Indiana's prosecution of Ford for criminal recklessness in *State v. Ford Motor Co.*, No. 5324 (Pulaski County Ct. 1980)); *Buehler v. Whalen*, 70 Ill. 2d 51, 374 N.E.2d 460 (1978) (in failure to comply with discovery request for testing results, the trial court would have been

Act would increase punitive damage awards in approximately one-fifth of the states, where they are prohibited or severely limited,<sup>171</sup> the Act's scheme could serve as a useful check on juries in states in which they are currently allowed.<sup>172</sup>

Attempts by the UPLA to filter out frivolous claims and unnecessary parties are primarily embodied in provisions dealing with the assignment of costs and attorneys' fees, arbitration, and non-manufacturing sellers. These provisions are also likely to meet with mixed success in achieving their goals.

Manufacturers and insurers have blamed part of the increase in the number of liability claims and in the cost of insurance on the bringing of frivolous claims which allegedly are partially fostered by contingency fees.<sup>173</sup> The Act's response, although cosmetically appealing, is ineffectual. Attorneys' fees and other costs determined by the judge to be the result of pursuing a frivolous claim or defense can be assessed against the party pursuing the claim, or the attorney, or both.<sup>174</sup> The determination is to be made after final judgment has been entered, and is to be based on a standard of clear and convincing evidence. "[T]he court must conclude that the claim was without *any* reasonable legal or factual basis."<sup>175</sup> However, because virtually anything more than a fraudulent claim will have *some* legal merit when judged by this stiffer burden of proof, especially any claims which survive beyond the pleadings stage, the frivolous claims provision will cover few, if any, cases. Furthermore, this provision adds little to the current law, in light of the remedies that already exist for misuse of the legal process.<sup>176</sup>

---

justified in striking defendant's answer and only submitting to the jury the question of damages).

171. Louisiana, Massachusetts, Nebraska, and Washington, as well as Puerto Rico, do not allow punitive damages. Indiana does not allow them if the defendant's conduct is punishable as a crime. Connecticut, Michigan and New Hampshire limit them to compensation for actual damages. Mallor & Roberts, *supra* note 166, at 641 n.8, 643 n.28.

172. *See, e.g.*, *Sturm Ruger & Co., Inc. v. Day*, 594 P.2d 38 (Alaska 1979) (award of \$2,895,000 punitive damages was remanded as excessive in case where claimant was injured when he grabbed for a gun he had dropped and shot himself in the leg despite warnings and obviousness of the danger); *Grye v. Dayton-Hudson Corp.*, 48 U.S.L.W. 2833 (Minn. Sup. Ct. 1980) (\$1,000,000 in punitive damages awarded against a manufacturer despite the fact that it had complied with the Federal Flammable Fabrics Act of 1953).

173. V LEGAL STUDY, *supra* note 2, at 79-81; UPLA § 115, Analysis, *reprinted in* 44 Fed. Reg. at 62,741.

174. UPLA § 115(c), *reprinted in* 44 Fed. Reg. at 62,741.

175. *Id.* § 115, Analysis, *reprinted in* 44 Fed. Reg. at 62,742.

176. *See, e.g.*, FED. R. CRV. P. 11 (disciplinary action can be taken against an attorney who knowingly signs a false pleading or one with "scandalous or indecent" matter, or who interposes one for delay); FED. R. APP. P. 38 ("If a court

Another effort to filter out frivolous claims and reduce transaction costs is made through the arbitration section.<sup>177</sup> The section provides for non-binding arbitration on the motion of either party before trial if the dispute is for less than \$50,000. The arbitration is to be done by a three-member panel which files the arbitration decision and award with the court.<sup>178</sup> Within twenty days after filing either party can demand a trial. However, at trial, evidence that there was arbitration and the nature and amount of the award are given to the trier of fact. Also, the party asking for the trial is to be assessed the cost of the arbitration plus interest on the arbitration award if the trial results in an award that is less than that party received or more than it had to pay under arbitration.<sup>179</sup>

Transaction costs will only be reduced if few arbitrations go on to trial. The admissibility of arbitration evidence at trial, combined with the assessment of costs, should help keep the number of requests for trial low. The \$50,000 ceiling should allow a large number of claims to be submitted to the arbitration process.<sup>180</sup> However, it may also bring about an increase in the amount of damages claimed as parties try to avoid arbitration. Nevertheless, this section has the potential for speeding up decisions, and for having them made on a less emotional basis and at less expense than through litigation.

Litigation expenses should also be reduced by the UPLA's exclusion of non-manufacturers from liability unless their actions directly led to a claimant's injury. Wholesalers, retailers and distributors are routinely included in the product liability suit,

---

of appeals shall determine that an appeal is frivolous, it may award just damages and single or double costs to the appellee."'). In addition, a wronged party could bring suit for abuse of process. W. PROSSER, *supra* note 20, § 121.

177. UPLA § 116, *reprinted in* 44 Fed. Reg. at 62,742.

178. UPLA § 116(A), (C), (H), *reprinted in* 44 Fed. Reg. at 62,742. Unless the parties agree otherwise, the arbitration is to be conducted by an active state bar member or a retired judge of a state court of record, a person with expertise in the field in dispute, and a layperson. *Id.*

Compulsory, non-binding arbitration in medical malpractice disputes has met with mixed success when challenged, as have the medico-legal review panels. See VI LEGAL STUDY, *supra* note 2, at 154-63. Recently, in *Aldana v. Holub*, 381 So. 2d 231 (Fla. 1980), the Florida medical malpractice statute was held unconstitutional because its absolute jurisdictional time periods deprived the physicians in the case of due process. Section 116 should be unaffected by the *Aldana* decision since the UPLA provides for arbitration within 30 days after the claim is referred unless the court extends the period for good cause shown.

179. UPLA § 116(H) (1), (3)-(4), *reprinted in* 44 Fed. Reg. at 62,742.

180. Insurance data indicates that the average payment in bodily injury cases, trended for severity, is \$26,004, and that more than two-thirds of product liability payments are under \$1,000. *Id.* § 116(A), Analysis, *reprinted in* 44 Fed. Reg. at 62,743.

thereby increasing both defense costs and insurance premiums; yet these defendants account for a very small percentage of claims paid.<sup>181</sup> Under the Act, causes of action against non-manufacturers will not be submitted to the jury unless the claimant has produced sufficient evidence to support a finding that the non-manufacturer's own negligence led to the claimant's injuries, or that the non-manufacturer breached an express warranty.<sup>182</sup> This provision is consistent with the Act's general fault approach to liability; the use of non-manufacturer sellers as back-up insurers for manufacturer's is not. Nevertheless, the Act subjects a product seller to liability, regardless of its fault, if the manufacturer is not subject to service of process, is insolvent, or is likely to be judgment proof.<sup>183</sup> This extension of strict liability to non-manufacturers, while consistent with common law, exhibits an extreme preference for consumer compensation uncharacteristic of the rest of the UPLA. No cogent reason is given why the consumer should be preferred over wholesalers, retailers and distributors once strict liability as a comprehensive approach to product liability has been abandoned. Arguably, non-manufacturers should be judged by the same fault standards as manufacturers and consumers.

## V. CONCLUSION

The Model Uniform Product Liability Act was proposed to ensure the availability of product liability insurance, to reduce litigation costs, and to eliminate confusion while ensuring reasonable compensation for injured claimants and fostering safety. The Act will meet with mixed success in accomplishing these goals.

The retention of a strict liability approach for manufacturing defects and a negligence approach for design and warning defects should help foster these goals. This approach ensures compensation to consumers for injuries resulting from accidentally mismanufactured products in cases in which negligence would be virtually impossible to prove. Furthermore, it does so without encouraging soaring insurance premiums, because the incidence of mismanufactured products is relatively predictable and, therefore, can be more readily insured. Since there is no confusion as to the standard by which to judge the product, judges and juries will continue to find it workable.

A risk-benefit approach to design and warning defects should help clear up confusion regarding an appropriate standard, and is

---

181. Distributors, wholesalers, and retailers accounted for 4.6% of total product liability payments according to a 1977 Insurance Service Office Closed Claims Survey. UPLA § 105, Analysis, *reprinted in* 44 Fed. Reg. at 62,727.

182. *Id.* § 105(A)-(B), *reprinted in* 44 Fed. Reg. at 62,726.

183. *Id.* § 105(C), *reprinted in* 44 Fed. Reg. at 62,726.

more workable than the consumer expectations test. Juries can more readily balance the factors involved in making a design or adequacy of a warning choice with less difficulty than that involved in discerning what the average person would know about or expect from a complicated product. Furthermore, a risk-benefit approach should promote the primary goal of product liability safety. Manufacturers should use greater care in considering design and warning alternatives when careful, well documented decisions can make a difference as to their liability. At the same time, insurers should be able to assess the quality of these decisions and more realistically predict the potential liability flowing from them. Premiums could be lowered for the careful manufacturer, who would no longer have to pay for the careless. Furthermore, as a result of the potential incentives of reduced premiums and reduced liability, manufacturers should give safety more consideration in their decision-making. Greater economy and safety would be promoted by the use of a rebuttable presumption of nondefectiveness for compliance with carefully drawn industry standards in which safety was duly featured. Although not contained in the UPLA, such a presumption should be given further consideration.

Although the burden of proving manufacturer knowledge is returned to the plaintiff under the Act's negligence approach, this provision is not essential to the adoption of a risk-benefit standard, and could be ignored by courts and legislatures desiring to continue the evidentiary preference for the consumer. Nevertheless, the impact of the UPLA's shift in the burden should be minimized by today's negligence standard which considers the manufacturer to be an expert in its field. The Act's judgment of knowledge and feasibility at the time of manufacture is the appropriate standard if manufacturers are not to be insurers of their products.

The adoption of comparative fault in the UPLA may aid in achieving most of the Act's goals if some changes are made in the Act's provisions. Comparative fault is theoretically consistent with the primary goal of safety because making users responsible for their misuse or abuse of a product should make them more careful. While product users' decisions are probably less affected by the legal consequences than are manufacturers', there may be some increase in safety consciousness which strict liability does not seem to have promoted. The abandonment of the all-or-nothing approach, characteristic of negligence and contributory negligence law, redounds to the benefit of both consumers and manufacturers through a fairer allocation of responsibility and payments, and the reduction of insurance premiums and product prices which should result. However, the old negligence defense categories should be

abandoned to eliminate unnecessary confusion and reduce litigation costs.

Similarly, the UPLA's useful safe life defense and rebuttable presumption should be eliminated. Statutes of repose are the most effective way to solve the openendedness problem related to old products. If such a statute is not retained, the Act's compromise safe life solution should not be adopted. It raises the spectre of increased costs, confusion and liability which is antithetical to the Act's goals. Abandonment of the Act's compromise safe life proposals would be adequately compensated for by the setting off of worker-compensation payments and third-party liability for misuse and alteration. Furthermore, comparative fault provides some protection for a manufacturer since the older the product is, the harder it would be for a claimant to show reasonable use or defect. At a minimum, the burden of proof inconsistencies raised by the Act's treatment of defenses needs to be resolved.

As analysis of the safe life compromise solution indicates, the Act's attempts at solving the openendedness problems are the least effective part of the Act because the proposals are so hedged with compromises. The non-pecuniary damage limitation, modification of the collateral source rule and the assessment of costs are more likely to increase litigation costs and cause additional confusion than they are to have a positive effect, and should not be adopted. The arbitration and punitive damages sections, however, deserve careful consideration.

The Act's attempt to solve the perceived crisis in product liability law should be carefully considered by the courts and legislatures. Not all of its solutions should be adopted, nor should attempts at solving the problems through the adjudicative process be abandoned without serious thought. Nevertheless, the Act should serve as a valuable resource tool to those searching for solutions.