Washington's Useful Safe Life: Snipping Off the Long Tail of Product Liability?

Bruce L. Schroeder
WASHINGTON’S USEFUL SAFE LIFE: SNIPPING OFF THE LONG TAIL OF PRODUCT LIABILITY?

In 1981, the Washington Legislature passed the Tort and Product Liability Reform Act, the most extensive legislative intervention in Washington’s tort law this century. The purpose of this comprehensive reform was to create a more equitable distribution of liability among parties at fault. Under the existing law the legislature perceived a “product liability crisis” involving uncertain liability to manufacturers and sharply rising product liability insurance premiums; these in turn led to higher prices for consumer and industrial goods and discouraged the development of new products.

One important change the legislature made in product liability law was to include in section 7 of the Act a useful safe life defense. This defense allows a manufacturer to avoid liability by showing that the normal useful safe life of the product has passed. Section 7 creates a rebuttable presumption that a product’s useful safe life has expired after twelve years. In the same section of the Act the legislature made changes in the discovery-of-injury rule that applies to the three-year statute of limitations for product liability actions. Under the new rule the statute of limitations

1. Ch. 27, 1981 Wash. Laws 112 (codified at WASH. REV. CODE chs. 4.22, 7.72 (1981)).
2. Efforts to pass such reform extended over more than five years and were marked by bitter controversy. Talmadge, Washington’s Product Liability Act, 5 U. PUGET SOUND L. REV. 1, 1 (1981).
3. The preamble to the Act states: “The purpose of this amendatory act is to enact further reforms in the tort law to create a fairer and more equitable distribution of liability among parties at fault.” Ch. 27, 1981 Wash. Laws 112, 112.
6. Other changes include revertion to a negligence standard for product design and warning cases, limiting strict liability of retailers, curtailing the use of violations of legislative or administrative regulations as negligence per se, extending comparative fault to product liability claims, and adopting a right to contribution between joint tort-feasors. WASH. REV. CODE §§ 4.22.005-.060, 7.72.010-.050 (1981). See generally Talmadge, supra note 2 (discussing Act’s major changes).
7. Section 7 provides:

“Useful safe life” begins at the time of delivery of the product and extends for the time during which the product would normally be likely to perform or be stored in a safe manner.

(2) Presumption regarding useful safe life. If the harm was caused more than twelve years after the 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 a preponderance of the evidence.

8. Subject to the applicable provisions of chapter 4.16 R.C.W. pertaining to the tolling and extension of any statute of limitation, no claim under this chapter may be brought more than
begins to run when the plaintiff discovers or should have discovered the harm and its cause. The legislature’s goal in passing section 7 was to return certainty to the tort litigation system.

This Comment reviews the general law applicable to product liability claims. Next it analyzes the changes made by section 7. The Comment argues that it is doubtful whether section 7 will be able to achieve the legislature’s desired goal of added certainty in product liability actions. The limited number of older claims, the limited spread of the law, and the use of a preponderance of the evidence test to overcome the twelve-year presumption stand as obstacles to achieving this end. Furthermore, this Comment argues that even if section 7 is successful in achieving its goal, the goal itself may be undesirable. The new provision is unfair to product liability claimants and counterproductive to the social goal of encouraging safe products.

I. HISTORICAL BACKGROUND OF STATUTES OF LIMITATIONS IN PRODUCT LIABILITY ACTIONS

Though the earliest use of the statute of limitations concept dates back to Roman times,9 the modern law of limiting the time in which personal actions may be brought dates from the English Limitations Act of 1623,10 which established different periods for various types of actions.11 Today, most statutes of limitations focus on the plaintiff’s conduct with the intention of protecting defendants and courts from stale and tenuous claims.12 Proponents of statutes of limitations claim that if a plaintiff is allowed an unlimited amount of time to bring a cause of action the evidence necessary to determine liability will fade from memory.13 Another important concern is that defendants will face protracted fears of litigation if a plaintiff is allowed unlimited time.14

Contract actions differ from tort actions as to when the statute of limitations is tolled. In a contract suit, the cause of action accrues and the statute begins to run when the agreement is breached.15 Under a contract the-

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10. 21 Jac. 1. ch. 16, reprinted in J. Angell, LIMITATIONS OF ACTIONS AT LAW 505 app. (1876).
11. Id. § 3, reprinted in J. Angell, supra note 10, at 506–07 app.
14. See id. at 664–65, 453 P.2d at 634.
ory, then, the date of sale triggers the statute on a product liability claim because the warranties of quality, kind, or condition are broken by the seller when they are made at the time of sale.\(^{16}\) In a tort suit, the cause of action accrues when the person or product actually produces injury.\(^{17}\)

The development of the strict product liability doctrine, a hybrid of tort and contract actions, led to confusion over the correct statute of limitations to apply to product liability claims. Confusion arose because relief for injury to persons and property is available under three theories: (1) negligence; (2) breach of express or implied warranty; and (3) strict liability.\(^{18}\) Although most jurisdictions agree that negligence actions are governed by tort date-of-injury limitations,\(^{19}\) the appropriate statute for the remaining theories is not well-defined.

The reason for the difficulty in deciding which statute of limitations theory to apply is that the decision necessarily involves a policy choice between favoring manufacturers or consumers. A date-of-sale statute favors manufacturers by providing a definite cutoff to product liability after a set period of time. Such a statute harms consumers, however, by arbitrarily cutting off all possible claims without considering how products are being used. Conversely, a tort date-of-injury statute favors consumers by providing a right to sue measured from the date of the injury while subjecting manufacturers to an indefinite term of liability.

Initially, some courts opted for a policy favoring manufacturers and applied the contract date-of-sale limitations to breach of warranty and strict liability claims.\(^{20}\) The New York Court of Appeals stated the rationale behind this choice:

> We are willing to sacrifice the small percentage of meritorious claims that might arise after the statutory period has run in order to prevent the many unfounded suits that would be brought and sustained against manufacturers ad infinitum. Surely an injury resulting from a defective product many years after it has been manufactured, presumptively at least, is due to operation and maintenance. . . . [W]e must make that presumption conclusive.\(^{21}\)

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18. U.S. DEP'T OF COMMERCE, INTERAGENCY TASK FORCE ON PRODUCT LIABILITY, FINAL REPORT II–3 to II–4 (1977) [hereinafter cited as COMMERCE REPORT].
Thus, in warranty or strict liability suits plaintiffs could only bring claims during the years covered by the state's contract statute of limitations, which started the date the injuring product was sold.\textsuperscript{22}

As the strict product liability doctrine evolved and concern for consumer product safety increased, courts vigorously questioned the balance of policies involved in the choice of contract date-of-sale limitations:

Except in topsy-turvy land, you can't die before you are conceived, or be divorced before you ever marry, or harvest a crop never planted, or burn down a house never built, or miss a train running on a non-existent railroad. For substantially similar reasons, it has always heretofore been accepted, as a sort of legal "axiom," that a statute of limitations does not begin to run against a cause of action before that cause of action exists, \textit{i.e.}, before a judicial remedy is available to the plaintiff.\textsuperscript{23}

Courts thus gradually shifted to the tort date-of-injury limitations. Today the majority of jurisdictions\textsuperscript{24} hold that the statute of limitations for breach of warranty and strict-liability suits runs from the date of the plaintiff's injury.\textsuperscript{25}

Washington courts, before the new Act, followed the majority rule and applied the tort or personal injury statute of limitations to strict liability and breach of warranty product claims.\textsuperscript{26} In addition to using a date-of-injury statute of limitations, Washington courts applied a judicially-created "discovery" rule to product liability claims.\textsuperscript{27} Where a product causes injury or disease which does not manifest itself immediately after exposure to the product, the claim does not accrue and the statute of limitations does not begin to run until the plaintiff discovers or should have discovered all of the essential elements of the plaintiff's possible cause of

\textsuperscript{22} This period was usually from four to six years. \textit{See} Massery, \textit{supra} note 19, at 539.

\textsuperscript{23} Dincher v. Marlin Firearms Co., 198 F.2d 821, 823 (2d Cir. 1952) (Frank, J., dissenting) (footnotes omitted).


\textsuperscript{25} Product manufacturers often point to the unique disadvantages they face in defending liability claims involving older products due to the absence of evidence. The passage of time also affects the plaintiff because it is more difficult to prove that the defect existed at the time the product left the manufacturer's plant. Such proof is a prerequisite to recovery in strict liability. Thus, product manufacturers are not inequitably burdened by a unique evidentiary disadvantage. \textit{See} Victorson v. Bock Laundry Mach. Co., 37 N.Y.2d 395, 404, 335 N.E.2d 275, 279, 373 N.Y.S.2d 39, 44 (1975).


\textsuperscript{27} \textit{See}, \textit{e.g.}, Ohler v. Tacoma Gen. Hosp., 92 Wn. 2d 507, 513, 598 P.2d 1358, 1360 (1979).
action.\textsuperscript{28} Under a strict liability theory these elements include (1) a defect, (2) in existence at the time the product left the manufacturer, (3) unknown to the user, (4) which made the product unreasonably dangerous, and (5) which caused the plaintiff’s injury.\textsuperscript{29}

II. COMMON LAW CONSIDERATION OF TIME LAPSE

Under the common law, if a product liability claim was not barred by the statute of limitations, liability could nonetheless be avoided under either a negligence or strict liability theory by showing that the product failure was solely a result of natural deterioration.\textsuperscript{30} Nevertheless, mere evidence of prolonged safe use does not foreclose liability as a matter of law in the majority of courts:\textsuperscript{31} """[P]rolonged use of a manufactured article is but one factor, albeit an important one, in the determination of the factual issue whether the [defect or] manufacture proximately caused the harm.'""\textsuperscript{32}

The result has been to consider product age on a case-by-case basis. For example, in \textit{Pryor v. Lee C. Moore Corp.},\textsuperscript{33} the manufacturer of an oil derrick was held liable when the derrick collapsed because of a defective weld even though the derrick had been used safely for fifteen years.\textsuperscript{34} In contrast, in \textit{Bolander v. Northern Pacific Railway}\textsuperscript{35} the Washington Supreme Court refused to impose liability for injuries sustained in a derailment under a negligence theory against a manufacturer of train wheel bearings because some of those bearings had been manufactured thirteen years before the accident and had travelled over 136,000 miles in just the two years preceding the accident.\textsuperscript{36}

Thus, in Washington, as in most other jurisdictions, the age of a product was relevant but not conclusive on issues of negligence and defective-

\textsuperscript{28} \textit{Id.} Under a negligence theory this includes proof of duty, breach, causation and damages. \textit{Id.} at 511.


\textsuperscript{30} 1 L. \textsc{Frumer} & M. \textsc{Friedman}, \textit{Products Liability} § 11.03, at 238–39 (1981); 2 \textit{id.} § 16A(4)(e)(vi), at 3B–117.

\textsuperscript{31} 1 L. \textsc{Frumer} & M. \textsc{Friedman}, \textit{supra} note 30, § 11.03, at 239–41.


\textsuperscript{33} 262 F.2d 673 (10th Cir. 1958).

\textsuperscript{34} \textit{Id.} at 675.

\textsuperscript{35} 63 Wn. 2d 659, 388 P.2d 729 (1964).

\textsuperscript{36} \textit{Id.} at 663, 388 P.2d at 731.
This common law doctrine reflects a view that the passage of time does not affect all products equally. The conditions of use and amount of use vary so greatly that blanket time limitations on liability cannot be fixed.\(^{38}\)

### III. RECENT DEVELOPMENTS

#### A. State Statutes

Product sellers maintain that they are unable to assess accurately the probabilities of future liability because no time limitation is placed on liability under the case-by-case approach. They claim this uncertainty is one of the major causes of increases in product liability insurance premiums and cutoffs in insurance coverage.\(^{39}\) Several states have adopted product liability legislation aimed at meeting the seller's complaints. Most of the resulting legislation has altered both the statutes of limitations for product liability and the common law consideration of product age, but the changes have not been uniform among the states.\(^{40}\) The new statutes of limitations fall into three basic categories:\(^{41}\) (1) statutes that run from the date of manufacture of sale;\(^{42}\) (2) statutes that run from the date of injury, death, or property damage;\(^{43}\) and (3) statutes that contain two periods of limitations, one running from the date of death, injury, or property damage, and a second running from the date of manufacture or sale.\(^{44}\)

\(^{37}\) See Ulmer v. Ford Motor Co., 75 Wn. 2d 522, 533, 452 P.2d 729, 735 (1969) (holding that it cannot be said as a matter of law that mileage and years of use are factors affecting the likelihood of a defect). But see Bock v. Truck & Trailer, Inc., 18 Wn. 2d 458, 476. 139 P.2d 706, 714 (1943) (stating that it is possible for the period of possession to be so protracted and its use so extensive that a court could say as a matter of law that proximate causation had not been established).

\(^{38}\) See COMMERCE REPORT, supra note 18, at VII-28.

\(^{39}\) Id. at VII-20.

\(^{40}\) See Twerski, Rebuilding the Citadel: The Legislative Assault on the Common Law, TRIAL 55 (1979); see also 2A L. FRUMER & M. FRIEDMAN, supra note 30, § 16C(2) (discussing different variations enacted).

\(^{41}\) 2A L. FRUMER & M. FRIEDMAN, supra note 30, § 16C. In addition to the impact of three different forms of statutes, the unique terms and exceptions of each state's statute further exacerbate the lack of uniformity.

\(^{42}\) E.g., GA. CODE ANN. §§ 105–106(b)(2) (Supp. 1979) (10 years); KY. REV. STAT. ANN. § 411.310 (Baldwin 1979) (5-8 year rebuttable presumption); N.C. GEN. STAT. § 1–50(6) (Supp. 1979) (6 years); N.D. CENT. CODE § 28–.01.1–02 (1974) (10-11 years); R. I. GEN. LAWS § 9–1–13 (Supp. 1979) (10 years); S.D. COMP. LAWS ANN. § 15–2–12.1 (Supp. 1979) (6 years); UTAH CODE ANN. §§ 78–15–3 (Supp. 1979) (6-10 years).

\(^{43}\) E.g., MINN. STAT. ANN. § 541.05 (West Supp. 1980) (4 years).

\(^{44}\) E.g., ALA. CODE § 6–5–502 (Supp. 1979) (1 year and 10 years); ARiz. REV. STAT. ANN. §§ 12–542 to –551 (1978) (2 years and 12 years); COLO. REV. STAT. §§ 13–2–403(3) and 13–80–127.5–1 (Supp. 1978) (3 years and 10 year rebuttable presumption); CONN. GEN. STAT. ANN. § 52–5779 (West Supp. 1980) (3 years and 10 years); IDAHO CODE § 6–1303 (1979) (2 years and 10
The first variation incorporates a statute of repose. A statute of repose sets an outside limitation period beyond which no product liability claim may be brought, usually measured from the date of manufacture or sale.\footnote{In this respect it is similar to a contract statute of limitations. There is a difference, however, between statutes of repose and statutes of limitations. The former applies both to accrued and unaccrued claims, whereas the latter runs from the time a claim accrues and does not have any effect on unaccrued claims. For example, when an automobile becomes 12 years old the statute of repose presumptively cuts off any future product liability claims involving the car. The statute of limitations, on the other hand, would cut off any claim that was not brought within three years of the injury even if the injury caused by the car came in the first year after purchase.} Under this variation, all claims are extinguished after \( x \) years from manufacture or sale, whether the claims are then in existence or not. As a result, the cause of action may be barred before it has ever accrued.

Under the second variation, the general tort date-of-injury limit applies but is shortened. No “outside” statute of repose is coupled with this variation so there is no possibility of cutoff prior to the existence of the cause of action.

Under the third variation, a product liability claim is barred if it is (1) not brought within the standard tort statute of limitations, or (2) brought more than \( y \) years from date of manufacture or sale, even if brought within the tort statute of limitations. This establishes both an “inside” limitation period (the regular statute of limitations) and an “outside” period (statute of repose) beyond which no claim can be brought.\footnote{See note 45 supra (discussing difference between statute of repose and statute of limitations).} Most states adopting product liability legislation have chosen this third alternative.\footnote{2A L. FRUMER & M. FRIEDMAN, supra note 30, § 16C(2)(i), at 3D–4.}

B. Washington Product Liability Act

The clamor about the impending product liability crisis led the Washington Legislature to join the trend towards ameliorative legislation by enacting the Tort and Product Liability Reform Act.\footnote{Ch. 27, 1981 Wash. Laws 112 (codified at Wash. Rev. Code chs. 4.22 (contribution among tort-feasors), 7.72 (products liability) (1981).} The Washington Legislature included a provision, section 7, to control the “open-ended” liability problem. Section 7 basically followed\footnote{See SENATE REPORT, supra note 4, at 41, reprinted in 1981 WASH. S. JOUR. at 632.} the format set forth in the Model Uniform Product Liability Act promulgated by the United

\begin{itemize}
\item ILL. ANN. STAT. ch. 83, §§ 21.2(b), (d) (Smith-Hurd Supp. 1980) (2 years and 10–12 years);
\item IND. CODE ANN. § 34–4–20A–5 (Burns Supp. 1979) (2 years and 10 years);
\item MICH. COMP. LAWS ANN. § 27A.5805(9) (Supp. 1980) (3 years and 10 years);
\item NEB. REV. STAT. § 25–224(1979) (4 years and 10 years);
\item N.H. REV. STAT. ANN. § 507–D:2 (Supp. 1979) (3 years and 12 years);
\item OR. REV. STAT. § 30.905 (1979) (2 years and 8 years);
\item TENN. CODE ANN. § 29–28–103 (Supp. 1979) (1 year and 6–10 years).
\end{itemize}
States Department of Commerce.\textsuperscript{50} Section 7 contains three basic parts: (1) a "useful safe life" defense; (2) a twelve-year rebuttable presumption statute of repose; and (3) a three-year statute of limitations with an express discovery rule.\textsuperscript{51}

The useful safe life defense is similar to other affirmative defenses such as contributory negligence. A manufacturer can avoid liability by showing that the useful safe life of the product had passed before the injury occurred. The implication of the defense is that injuries at that point are caused by natural deterioration of the product, not attributable to the manufacturer, instead of a defect in the product. The defense is waived, however, if not raised by the defendant. Under section 7, the useful safe life begins at the time of delivery of the product to its first purchaser or lessee who is not engaged in the business of either selling the product or using it as a component part of another product to be sold.\textsuperscript{52} The useful safe life extends for the time during which the product would normally be likely to perform or would normally be stored in a safe manner. This time is to be decided on a case-by-case basis. Though the statute does not list the factors that are to be considered in arriving at a useful safe life, the factors included in the Model Act should provide a guide.\textsuperscript{53} Thus the statute rejects alternatives that would allow the manufacturer or some independent body to fix useful safe lives for all products.\textsuperscript{54}

There are three general situations where the new defense does not apply: (1) when the product seller furnished warranties of safety beyond the useful safe life; (2) when intentional misrepresentations or concealment of facts about a product proximately cause the claimant's harm; or (3)

\textsuperscript{50} Model Uniform Product Liability Act (U.S. Dept. of Commerce 1979) [hereinafter cited as Model Act], reprinted in 44 Fed. Reg. 62,714 (1979). The Model Act was promulgated in response to the Final Report of the Federal Interagency Task Force on Product Liability. The Task Force undertook an extensive examination of the tort litigation system, the insurance industry, and product manufacturers in an attempt to discover if a product liability crisis existed and, if so, the cause. The Task Force substantiated some insurance problems cited by manufacturers but found something less than a crisis. See Commerce Report, supra note 18, at VI-52 to -56. It identified three major causes of these problems: (1) insurance rate-making procedures; (2) uncertainties in tort law; and (3) unsafe manufacturing processes. Id. at 1-21 to -31. The Model Act, although not greeted by thunderous acclaim, has served as the basis for legislation adopted in Connecticut, Conn. Gen. Stat. Ann. §§ 52-572m, -572n, -577a (West Supp. 1981); Idaho, Idaho Code § 6-1401-09 (1980); and has been introduced in the U.S. House of Representatives. H.R. 7921, 96th Cong., 2d Sess. (1980).


\textsuperscript{52} Id. § 7.72.060(1)(a).

\textsuperscript{53} See Model Act, supra note 50, §§ 110(A)(1)(a)-(e) (naming as factors: (1) wear and tear; (2) deterioration; (3) normal use and repair; (4) representations by the product seller about use, care and expected life; and (5) modifications and alterations of the product).

\textsuperscript{54} See Senate Report, supra note 4, at 19, 1981 Wash. S. Jour. at 625-26.
Useful Safe Life Defense

when harm, not manifested until after the useful safe life had expired, occurred from exposure within the useful safe life.\textsuperscript{55}

During the twelve-year period following delivery of a product, the product seller bears the burden of proving that the useful safe life has expired.\textsuperscript{56} After the twelve-year period passes, section 7 erects a rebuttable presumption that any harm that occurs is after the product’s useful safe life has expired.\textsuperscript{57} This presumption “wall” erected in front of a product liability claim may only be scaled by a preponderance of the evidence.\textsuperscript{58}

\textsuperscript{55} WASH. REV. CODE §§ 7.72.060(1)(b)(i)–(iii) (1981). The Model Act provides an additional exception for contribution and indemnity actions. Model Act, supra note 50, § 110(B)(2)(c). The reason the Washington Legislature omitted this exception is unclear. Even with the omission, though, contribution and indemnity claims will probably not be governed by § 7. Arguably, if a claimant is forced to overcome the presumption that useful safe life has expired, so should a defendant claiming contribution. Section 7, however, specifies that its limits apply only to claims arising under §§ 2–7, thus sparing the contribution claims that are authorized in §§ 12–14 of the Act. WASH. REV. CODE § 7.22.060(1)(a) (1981). Additionally, § 13 provides one year beyond the initial judgment to bring contribution actions. Id. § 4.22.050(3).

\textsuperscript{56} WASH. REV. CODE § 7.72.060(1)(a).

\textsuperscript{57} Id. Use of a rebuttable presumption probably disposes of any possible constitutional problems. See generally Note, Date-of-Sale Statutes of Limitation: An Effective Means of Implementing Change in Products Liability Law?, 30 CASE W. RES. 123, 149–50 (1979) (discussing constitutional issues). The absolute cutoffs adopted in other states, see notes 42–44 supra, face possible challenges on equal protection or special class legislation grounds. The basis of these challenges would be that the statutes of repose grant special immunities from tort liability to product manufacturers that are not granted to other parties and that impose special burdens on plaintiffs injured by older products.

Even if the Washington Legislature had included a conclusive cutoff after twelve years, decisions of the Washington courts upholding the similar six-year architect’s and builder’s statute of repose, WASH. REV. CODE §§ 4.16.300–310 (1981), indicate the cutoff would have been constitutional. See Yakima Fruit & Cold Storage Co. v. Central Heating & Plumbing Co., 81 Wn. 2d 528, 532, 503 P.2d 108, 111 (1972); Rodriguez v. Niemeyer, 23 Wn. App. 398, 401, 595 P.2d 952, 954 (1979). The Rodriguez court emphasized the legislative power “to enact a clear line of demarcation to fix a precise time beyond which no remedy will be available.” Id.


Another possible ground for a constitutional attack is that the Act embraces more than one subject in violation of Washington’s constitutional requirement that “[n]o bill shall embrace more than one subject, and that shall be express in the title.” WASH. CONST. art. II, § 19. Matters embraced in a statute, however, need only have congruity, be naturally connected with each other, or be cognant and germane to each other to be considered one subject. State v. Hall, 24 Wash. 255, 64 P. 153, 154 (1901); Tri-M Erectors, Inc. v. Donald M. Drake Co., 25 Wn. App. 264, 268–69, 606 P.2d 709, 711–12 (1980). Because product liability is a subdivision within the general tort field, reforms in product liability should be germane to general tort reforms. Therefore, the success of this attack is doubtful.

\textsuperscript{58} Washington’s statute of repose differs in two significant respects from that found in the Model Act. First, the initial period before the presumption that the useful safe life has passed was extended from 10 to 12 years. Compare WASH. REV. CODE § 7.72.060(2) (1981) (12 years) with Model Act, supra note 50, § 110(B)(1) (10 years). Second, the standard of proof necessary to rebut
The final provision of section 7 is the continuation of the tort three-year statute of limitations but with a reformulation of the discovery-of-injury rule. Even if a claimant has been injured by a product within its useful life, the claimant must still bring the claim within three years from the time the claimant discovered, or "in the exercise of due diligence should have discovered," the harm and its cause. This provision thereby requires that plaintiffs process accrued claims within a reasonable time.

This relatively intricate three-part provision was designed to return certainty to a tort system perceived as uncertain, and to snip off the potential "long tail" of liability exposure which supposedly plagues product manufacturers. The legislature also wanted to protect the right of a consumer to recover for injuries caused by unsafe products. The ability of this provision to satisfy these twin goals is questionable. The ultimate question is whether section 7 of the Washington Act is supportable on policy grounds. Analysis of this provision indicates that the alleged benefits are primarily illusory and are outweighed by "actual" costs.

IV. ANALYSIS OF THE WASHINGTON TORT AND PRODUCT LIABILITY REFORM ACT

A. The Illusory Benefits: Greater Certainty

The major justification for the recent passage of the statute of repose in section 7 was the perceived existing "long tail" liability exposure, which allegedly makes it impossible for product liability insurers to fix insurance premiums with any degree of certainty. At first glance such a statute appears to return certainty by imposing a temporal limit to product
liability. Several factors, however, cast doubt on its ability to truly attain certainty.

1. Limited Number of Claims Involving Older Products

The first factor is the limited number of product liability claims involving older products. A major insurance industry survey revealed that ninety-seven percent of product-related incidents occur within six years of the date the product was purchased. Even in the capital goods area, the prime area for long-lived products, eighty-six percent of all bodily injuries occur within twelve years of the date of manufacture. Thus, in the product liability field as a whole, the statute of repose would reach less than three percent of all claims. Equating "certainty" in three percent of the cases with certainty in the product liability field is questionable.

Neverthelesss, manufacturers and insurers argue that such statutes will increase certainty and lower insurance rates. First, insurers and manufacturers claim that the number of incidents does not reflect the cost of liability claims involving older products. Although this is true, total claims paid on older products still represent a small segment of the product liability field and provide an insufficient base to return certainty to the overall field. Furthermore, administrative and legal fixed expenses of insurers are untouched by the new statute of repose, which further reduces the

65. See COMMERCE REPORT, supra note 18, at VII–22. Capital goods consist primarily of machinery for manufacturing. The Interagency Task Force stated that such machinery typically lasts from 10–30 years.
66. See CLOSED CLAIM SURVEY, supra note 64, at 82. The Interagency Task Force's legal study based on 198 appellate cases found that only 13% of the cases involved products over 20 years old. Only four percent involved products over 25 years old. COMMERCE REPORT, supra note 18, at VII–20 to –21. Other surveys have found a higher correlation between older products and product liability claims. See, e.g., IMPACT ON PRODUCT LIABILITY: HEARINGS BEFORE THE SELECT Senate Comm. ON SMALL BUSINESS, 94th Cong., 2d Sess. 478 (1977) (testimony of James H. Mack, Public Affairs Director, National Machine Tool Builders Association) (75% of cases involve machines over ten years old and four out of nine involve machines over 20 years old). Most of these other surveys, however, suffer from insufficient sample size or other statistical problems.
67. Insurers' administrative expenses further reduce the effect of the statute of repose on insurance premiums. More than half the product liability insurance premiums go to cover insurers' administrative and legal expenses. J. O'CONNELL, ENDING INSULT TO INJURY 21 (1975). These expenses are unaffected by any particular product liability doctrine. Thus, the statute of repose can have little if any impact on this significant portion of a manufacturer's product liability insurance premium.
68. CLOSED CLAIM SURVEY, supra note 64, at 81 (14.2% of payments flow to only 4.8% of claimants).
69. Id.
new law’s ability to translate greater certainty into reduced insurance premiums.\textsuperscript{70}

Second, manufacturers and insurers claim that since product liability insurance premiums are set subjectively,\textsuperscript{71} it is the insurer’s perception of uncertainty caused by “long tail” exposure that is important and not hard facts.\textsuperscript{72} Consequently, they argue that the perception of legislative relief will be translated into lower insurance premiums.\textsuperscript{73} This argument is unrealistic, however, because the insurance business’ concern with ultimate profitability requires it to keep close track of specific areas of liability.\textsuperscript{74} Even if insurance premiums are subjectively determined, the use of a statute of repose to alter that subjective view is a roundabout means of attacking the problem. Legislation addressed to ratemaking procedures would be more direct.\textsuperscript{75}

2. \textit{Limited Spread of Statutes of Repose}

A second factor casting doubt on the ability of repose statutes to increase certainty is the limited spread of such statutes. It is true that almost one half of the states now have some form of repose statute.\textsuperscript{76} Unfortunately, the scope of these statutes varies from state to state.\textsuperscript{77} Unlike other forms of insurance, product liability insurance rates are set on a nationwide basis.\textsuperscript{78} Thus the impact of nonuniform repose enactments among the states on product liability insurance premiums is questionable.\textsuperscript{79}

3. \textit{Washington’s Statute of Repose in Multistate Product Liability Actions}

A third factor casting doubt on the ability of section 7 to increase certainty is its application in multistate product liability actions. With the growth of national and international manufacturers and the development

\textsuperscript{70} See note 67 supra.
\textsuperscript{71} \textit{Commerce Report}, supra note 18, at VII–23.
\textsuperscript{73} \textit{See Commerce Report}, supra note 18, at VII–23.
\textsuperscript{74} The correlation between the incidence of auto accidents involving young people and differential insurance rates is a prime example of insurers’ monitoring actual claims results.
\textsuperscript{75} \textit{See Twerski}, supra note 40, at 56.
\textsuperscript{76} See notes 42–44 and accompanying text supra.
\textsuperscript{77} \textit{See note 41 and accompanying text supra.}
\textsuperscript{79} \textit{See Phillips, An Analysis of Proposed Reform of Products Liability Statutes of Limitations, 56 N.C.L. Rev. 663, 672 (1978).}
of national marketing channels, product liability actions increasingly involve more than one state. The choice of a forum in which to bring a product liability action and the choice of the appropriate law to apply becomes more complex in these multistate actions. This raises the issue whether courts outside Washington will apply the Washington statute of repose to bar claims that arose in Washington. To the extent they do not apply the Washington statute of repose, the statute’s impact on certainty is diminished. To illustrate, if \( P \), a citizen of Washington, was injured in Washington by a thirteen-year-old drill press manufactured in California by \( X \), a Delaware corporation with principal place of business in Washington, \( P \)'s suit in Washington might be barred by the twelve-year statute of repose. However, \( P \) might also be able to bring suit in California, Delaware, or any other state in which \( P \) could obtain jurisdiction over \( X \). In those suits the question whether section 7 will be applied emerges.

Since statutes of limitations have historically been viewed as procedural devices, \(^{80}\) courts generally apply the statute of limitations of the forum state. \(^{81}\) In contrast, many courts undertake an interests analysis to determine which state’s substantive law to apply. \(^{82}\) Thus, a cause of action may be maintained in a forum where the statute of limitations has not run with the court applying another state’s substantive law, even though the statute of limitations has run in the state where the cause of action arose. \(^{83}\) This result, if also applied to statutes of repose, would encourage plaintiffs to shop for forums without repose statutes and would reduce the impact of section 7 on the “long tail” liability problem. In the example above, then, \( P \) would sue in California or Delaware, none of which have statutes of repose.

The historical approach of considering statutes of limitations as procedural devices has come under attack, \(^{84}\) and at least one court has heeded the criticism and considers statutes of limitations to be substan-

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\(^{82}\) See, e.g., Tomlin v. Boeing Co., 650 F.2d 1065, 1067 (9th Cir. 1981); Henry v. Richardson-Merrill, Inc., 508 F.2d 28, 32 (3d Cir. 1975); R. Weintraub, supra note 80, at 62.

\(^{83}\) See Chevron Oil Co. v. Huson, 404 U.S. 97, 111 n.2; Clarke v. Pennsylvania R.R., 341 F.2d 430, 432 (2d Cir. 1965); Cummings v. Cowan, 390 F. Supp. 1251, 1255 (N.D. Miss. 1975); R. Leflar, supra note 80, at 252.

\(^{84}\) R. Leflar, supra note 80, at 122; R. Weintraub, supra note 80, at 62.
Even in jurisdictions following the traditional approach, an exception has developed that, where the statute of limitations extinguishes the plaintiff’s right of action and not just the plaintiff’s remedy, it is treated as substantive rather than procedural law. The prime example of this exception is wrongful death actions, which are wholly statutory and usually contain an express time within which the action must be brought. Thus, if a wrongful death action based on Washington’s wrongful death statute is brought in California, California courts consider themselves bound by Washington’s limitations period.

The impact of this exception on section 7 is unclear. Unlike wrongful death actions, product liability actions existed at common law and are not creatures of statute. The comprehensive nature of the Washington Act reveals, however, the legislative desire to supplant existing common law product liability doctrine with an inclusive definition of a “product liability claim.” The statute of repose arguably extinguishes the “new” right of action and not just the remedy, which indicates that the limit should be treated as substantive.

An additional factor supporting application of the exception is the nature of the section 7 limit. The Washington Court of Appeals considered a similar statute in *Sobo v. Sobo*. That case considered whether the Washington court should apply a Missouri statute which established a conclusive presumption that a judgment had been paid ten years after rendered. The *Sobo* court found that statute to be within the exception to the traditional rule and treated it as substantive law. The court, therefore, barred the judgment creditor’s Washington action to collect on the judgment. The similarly structured twelve-year presumption in section 7 should receive the same treatment under Washington law.

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87. See, e.g., Tomlin v. Boeing Co., 432 F.2d 592 (5th Cir. 1970); Park v. Beech Aircraft Corp., 50 Del. 413, 132 A.2d 54 (1957); R. WEINTRAUB, supra note 80, at 59–60.
89. The legislature defined “product liability claim” to include “any claim or action previously based on: Strict liability in tort; negligence; breach of express or implied warranty; [or] . . . or other claim or action previously based on any other substantive legal theory . . .” WASH. REV. CODE § 7.72.010(4) (1981).
91. Id. at 520, 626 P.2d at 521.
Even though Washington courts will probably treat the new statute of repose as substantive law, there is no guarantee that courts in other jurisdictions will follow suit. The absence of an express indication by the Washington Legislature that it intended section 7 to be substantive makes it easier for courts in other jurisdictions to treat section 7 as procedural law.\(^9\)

Even if the statute of repose is treated as substantive law in other states, there is still no guarantee it will be applied. States use different choice-of-laws tests, some of which would lead to rejection of the Washington law.\(^9\) Therefore, because of these numerous uncertainties, it appears doubtful that Washington’s statute of repose will substantially increase certainty when applied in a multistate context.

4. **Choice of Useful Safe Life and Rebuttable Presumption**

Two other characteristics of the Washington Act further reduce its ability to attain certainty. The first is the use of a useful safe life approach. This amorphous concept, which requires a case-by-case approach for development of guidelines, provides little guidance for an insurer to assess accurately the possibilities for liability of an insured. With so many factors to consider, it is unclear if the approach is preferable to the prior common law system. This concern is echoed in a report put out by the Interagency Task Force on Product Liability:

\(^92\) See COMMERCE REPORT, supra note 18, at VII–24.

\(^93\) One test is the “center of gravity” or “most significant relationship” test which attempts to quantify contacts between events and jurisdictions related to the cause of action. Kuhne, *Choice of Law in Products Liability*, 60 CALIF. L. REV. 1, 16 (1972). Because contacts are often split between many states in product liability actions, choice of law decisions are often arbitrarily made under this approach.

A second test used is the “governmental interests” approach. Under this approach the qualitative nature of each state’s social, economic, or administrative policy in relationship to the parties, the transaction, the subject matter, and the litigation fixes the applicable law. Currie, *Survival of Actions: Adjudications versus Automation in the Conflict of Laws*, 10 STAN. L. REV. 205, 238–39 (1958). The competing interests of consumer protection versus limitation of manufacturers’ liabilities, however, provide no assurance that the express desires of the Washington Legislature will be followed outside Washington.

A third and fourth approach, “principles of preference” and “better law,” may be analyzed together. See generally D. Cavers, *The Choice of Laws Process* 139, 146, 159, 166, 177 (2d ed. 1965) (discussing principles of “preference”); R. LeFlar, *supra* note 80, at 245 (discussing “better law”). In the product liability context, the “principles of preference” approach favors the law of the jurisdiction that provides greater compensation for a plaintiff or imposes a higher standard of care on the defendant. D. Cavers, *supra* at 139. The “better law” approach allows a court to deliberately choose the rule it regards as intrinsically better. With the prevailing strict liability policies, both approaches may reject limitations such as Washington’s statute of repose in favor of the more liberal traditional tort statutes of limitations available in other states. See Note, *Date-of-Sale Statutes of Limitation: An Effective Means of Implementing Change in Products Liability Law?*, 30 CASE W. RES. 123, 145 (1979).
[W]hile insurers agree that a "useful life" rule could be more flexible and potentially more equitable than a flat statute of limitations, many feel that the uncertainty associated with any administrative or judicial procedure for establishing useful lives would possibly reduce and certainly delay any rate impact as compared with a statute of limitations modification.94

A second characteristic of the Act that limits the chance of attaining certainty has to do with the presumption chosen. First, the length of the period, twelve years, means that the presumption only applies to a minority of products. No other state has adopted a statute of repose longer than Washington's.95 Second, the standard necessary to rebut the presumption is potentially lax. The legislature chose a "preponderance of the evidence" test in lieu of the stricter "clear and convincing" standard advocated by the drafters of the Model Act.96 Such a choice was made to help mitigate the harshness of the presumption. This may be fair but such gains in fairness come at the expense of the desired certainty which lay at the heart of the provision. In attempting to balance conflicting policies, the legislature may have frustrated both policies. Only application of the preponderance of the evidence standard in the courts will determine how much certainty will be gained.97 All of these potential problems in the Act make attainment of the certainty goal questionable.98

95. See notes 42–44 supra.
96. See note 58 supra.
98. As a corollary to the benefit of added certainty, proponents point to the benefit of reduced evidentiary problems because there will be fewer suits involving older products. Although the underlying assumption that product liability defendants suffer from unique evidentiary problems is questionable, the new Act does not eliminate such problems. Because of the nature of the useful safe life approach, every claim will potentially require consideration of factors establishing a useful safe life.
B. The Costs Inherent in the Act

1. Arbitrary Cutoff of Nonaccrued Claims

The primary objection to statutes of repose is the inequity of abolishing plaintiffs’ claims before injuries occur. Unlike a traditional statute of limitations where a plaintiff is punished for “sleeping on his claim,” the punishment under a statute of repose falls on a victim of a defective product who did absolutely nothing wrong. Proponents often point to the small number of claims involving older products to minimize this indictment. This argument is flawed in two respects, however. First, it ignores the magnitude of the rejected claims, a magnitude which takes on human dimensions when it is recalled that the victims must bear these costs on their own. Second, this argument represents an attempt by manufacturers and insurers to “have their cake and eat it too.” The number of older product claims is minimized by manufacturers and insurers when attempting to show statutes of repose are equitable, yet emphasized when they argue that the statutes promote lower insurance premiums.

It is true that coupling the useful safe life approach with a rebuttable presumption attempts to deal with this drawback. Though this attempted balance is admirable, it is unnecessarily complex. Common law impediments to plaintiffs’ recovery were already potentially overpowering. The common law tort system, which deals on a case-by-case basis, is preferable to this statute of repose approach. The common law approach may be more inefficient, but it does not shortchange the interests of the parties. As one court noted:

[A date-of-sale limiting period] does not meet the realities of life in today’s society where the consumer is dependent on a remote manufacturer for many of the products he uses. The “repose” of the manufacturer must give way to the welfare of the consuming public, and if this means liability in perpetuity, so be it. Products containing defects when manufactured, which remain undetected, are veritable time bombs ready to explode in the face of the hapless consumer at any time.

Many of these factors involve events at the time of manufacture. See note 53 and accompanying text supra. Thus, evidentiary problems will still be present.

99. See Massery, supra note 19, at 541.
100. See note 12 and accompanying text supra.
101. See text accompanying note 66 supra.
102. See note 68 and accompanying text supra.
103. In the insurance industry study, only 28% of the cases that went to trial resulted in awards for the plaintiffs. CLOSED CLAIM SURVEY, supra note 64, at 23.
104. See notes 32–37 and accompanying text supra.
2. Application of Tolling Exceptions

A second potential area of unfairness is the possible application of preexisting statutory exceptions to general statutes of limitations to the new statute of repose. The legislature previously provided tolling exceptions for infancy, incompetency, concealment or absence of the defendant from the jurisdiction, and commencement of judicial proceedings. Of prime concern is how these exceptions mesh with the new "outside" statute of repose limits. If the tolling exceptions apply, the twelve-year presumption will not begin to run until the incompetency is gone. Commentators have suggested that the policy arguments supporting the initial adoption of the tolling exceptions fully apply against the statutes of repose. At least one court has so held. Additional support for extending the tolling exceptions to Washington's statute of repose is the section-by-section analysis of the new Act provided by the State Senate Select Committee on Tort and Product Liability Reform. The Select Committee said:

A special provision is made so that the time periods of the section do not include the period under which a claimant is under a legal disability as defined by RCW 4.16.190. This would protect minors during the period of minority and persons under a guardianship, as well as others covered by that statute.

Whether the Select Committee was referring to both the statute of repose and statute of limitations is unclear. Arguably the comment extends to both.

The tolling exceptions should apply to the discovery rule and the statute of limitations in section 7(3) because the exceptions only apply to claims that have already accrued. The desirability of extending tolling exceptions to the statute of repose is doubtful. The existence of general tolling exceptions stems from the inability of an incompetent party to process a claim which has already accrued. The objective of the statute of repose of section 7 is to cut off claims that have not yet accrued, thereby

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107. See, e.g., Phillips, supra note 79, at 672.
108. Parlato v. Howe, 470 F. Supp. 996 (E.D. Tenn. 1979). This case involved Tennessee's three-year medical malpractice statute. The court found that even with the legislature's desire to limit the period in which physicians face potential liability, it was onerous to require very young children to bring causes of action. Id. at 999–1000.
110. Id.
111. Section 7(3) provides that the three-year statute of limitations is "[s]ubject to the applicable provisions of chapter 4.16 RCW pertaining to the tolling and extension of any statute of limitations . . . ." Wash. Rev. Code § 7.72.060(3) (1981).
Useful Safe Life Defense

shifting attention to the age of a product rather than to the length of time a claimant waits to bring a claim. Thus, the fact of disability is irrelevant when considering unaccrued claims.

The following example helps clarify the unfairness of extending the tolling exceptions to the statute of repose. Assume $X$, a twenty-five year old, and $Y$, a fifty year old, were both passengers on a Boeing 707 involved in a crash caused by a Boeing manufacturing defect. The airline purchased the plane from Boeing fifteen years before the accident. In a suit against Boeing, $X$ would not face the twelve-year presumption because the twelve-year period began to run only after he reached majority, age eighteen. $Y$, however, would face the presumption because the twelve-year period expired three years earlier. This anomaly emerges even though $X$ and $Y$ were both adults at the time of the crash, fully able to prosecute their actions. The plight of incompetents is the same as competents and does not deserve special treatment. Applying tolling exceptions to the statute of repose would be unfair to competent claimants, yet this result is possible in light of the Act’s imprecise legislative history.

3. Reduces Incentive to Make Safety Improvements

Section 7 also has the possible effect of reducing manufacturers’ incentive to make safety improvements in their products. One of the prime rationales for adopting strict liability was to provide an economic incentive for safety improvements. To the extent that section 7 is successful in limiting liability in claims involving older products, the incentive to make products longer-lived will be gone. Instead there will be incentive to make twelve-year “one-hoss shays”: products that disintegrate after the twelve-year product liability has passed. Although market competition provides counterincentives to provide longer-lived and safer products, the limitation of product liability loosens the grip on ensuring safe products.


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


115. A product seller might not last long in business if the firm develops the reputation of being a manufacturer of short-lived or dangerous products.
V. CONCLUSION

Washington has joined the parade of other states by adopting product liability reform that includes changes in the time in which a product liability suit may be brought. The full impact of the useful safe life defense, rebuttable presumption, and limited discovery rule awaits its reception by the Washington judiciary as well as the judiciary in other jurisdictions in multistate product liability actions.116

The fundamental goals behind the legislation are justifiable: namely to balance plaintiffs' rights to recover for injuries caused by defective products against product sellers' needs to have available, affordable product liability insurance. However, the mechanism chosen to balance these goals will probably succeed in attaining neither goal. The limited number of older product claims provides an insufficient basis to transmit certainty throughout the tort system. Likewise, the lack of specificity in the "useful safe life" concept will breed expensive litigation even before the merit of claims is examined. The resulting uncertainty of future liability will take its toll on product liability insurance premiums.

To the extent, though, that the Act does limit liability, policy considerations do not support the limitation. Limitations on liability are unfair to innocent claimants and inconsistent with safety incentive and cost allocation goals. Fortunately, the "useful safe life" approach chosen by Washington produces less of these harmful side effects than the more drastic alternatives adopted in other states.

Because section 7 will probably attain neither of its desired goals, this Comment proposes two alternative courses of action for the legislature. First, if the legislature is intent on increasing certainty in the product liability field it should either repeal the useful safe life and rebuttable presumption approach and adopt an absolute bar to recovery after a given number of years from date of sale, or else it should impose a clear and convincing evidence standard in order to rebut the presumption. Additionally, the legislature should expressly indicate that this absolute bar or modified useful safe life is considered substantive law and not procedural, thereby increasing the chance that the statute of repose will be applied in multistate product liability actions.

116. Section 7 will inevitably launch the plaintiff's bar on a voyage to find new theories, new parties, and new exceptions to allow detours around obstructions to recovery or erosion of the obstructions. For example, actions might be brought against the owners of products who use them beyond their useful safe life. The use beyond the twelve year period might be argued as presumed negligence. See Proposed Tort Legislation, WASHINGTON TRIAL LAWYER'S ASS'N TRIAL NEWS, Nov. 1980, at 1. See also McGovern, The Status of Statutes of Limitations and Statutes of Repose in Product Liability Actions: Present and Future, 16 FORUM 416, 434-35 (1981) (predicting emergence of new theories and defendants).
The second and preferred alternative is to repeal section 7 and return to the common law approach. This alternative might not increase certainty for insurers or manufacturers as much as the first alternative, but it is better in protecting the interests of consumers and society in general by fostering safer products.

In section 7, the Washington Legislature attempted to snip off the long "tail" of product liability which had grown on manufacturers. The section 7 "scissors," however, are not sharp enough to cut through this "tail." Either the legislature should sharpen the scissors by increasing the conclusiveness of the cutoff or else should accept that these "tails" reflect the true societal costs of products manufactured and are desirable. It is hoped that the latter course of action is chosen.

Bruce L. Schroeder