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The Useful Life Defense: Embracing the Idea That All Products Eventually Grow Old and Die

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I. INTRODUCTION

The *Restatement (Third) of Torts*[1] is expected to continue the consumer-oriented trend that began with the recognition of strict products liability under section 402A.[2] Prior to the adoption of the *Restatement (Second)* in 1965,[3] the law required an injured plaintiff either to focus on the defendant's failure to conform to the standard of

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1. *See* RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 8 (1997).
2. *See* RESTATEMENT (SECOND) OF TORTS § 402A (1965) (allowing a plaintiff to recover by showing that a product was defective and unreasonably dangerous when it left the manufacturer); RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2(a) (Tentative Draft No. 2, 1995) (providing that "a product contains a manufacturing defect when the product departs from its intended design even though all possible care was exercised in the preparation and marketing of the product"); Matthew R. Johnson, Note, *Rolling the "Barrel" a Little Further: Allowing Res Ipsa Loquitor to Assist in Proving Strict Liability in Tort Manufacturing Defects*, 38 WM. & MARY L. REV. 1197, 1237-38 (1997) (recognizing that proposed revisions to the *Restatement (Second) of Torts* result in a producer or distributor of a product being held liable for defects regardless of the degree of care used).
3. *See* Kevin M. Warsh, *Corporate Spinoffs and Mass Tort Liability*, 1995 COLUM. BUS. L. REV. 675, 688 (referring to the 1965 adoption of the *Restatement (Second) of Torts* as "giving rise to a 'second wave' of lawsuits in the 1980s").

care as required by the law of negligence[4] or to comply with the Uniform Commercial Code's complicated law of warranty.[5]

In establishing a cause of action under the negligence standard, the doctrine of privity presented early problems.[6] Another obstacle to a plaintiff's recovery was establishing a defendant's responsibility for the alleged defect.[7] Additional concerns involved measures that would have detected the problem prior to placing a product into the stream of commerce.[8]

Similarly, the law of warranty did not facilitate a plaintiff's burden.[9] While both express and implied warranties were created at the time of sale,[10] a plaintiff's recovery could be limited, and in some cases denied completely.[11] These hurdles, combined with the costly expense

4. *See* Geoffrey C. Hazard, Jr., *Tribute in Memory of Herbert Wechsler*, 100 COLUM. L. REV. 1362, 1364 (2000) (imparting that the *Restatement (Second)* clarified the concept of negligence).

5. *See* Charles E. Cantu, *Twenty-Five Years of Strict Products Liability Law: The Transformation and Present Meaning of Section 402A*, 25 ST. MARY'S L.J. 327, 328 (1993) (explaining that under section 402A courts were no longer required to focus on the actions of the defendant or the principles of the law of warranty); Robert A. Van Kirk, Note, *The Evolution of Useful Life Statutes in the Products Liability Reform Effort*, 1989 DUKE L.J. 1689, 1693 (observing that "courts began to stretch warranty and negligence principles" in order to protect injured individuals); *see also* William L. Prosser, *The Assault Upon the Citadel (Strict Liability to the Consumer)*, 69 YALE L.J. 1099, 1114 (1960) (discussing the elements of negligence); Roger J. Traynor, *The Ways and Meanings of Defective Products and Strict Liability*, 32 TENN. L. REV. 363, 364-65 (1965) (suggesting that breach of warranty principles are less than ideally suited to products liability actions).

6. *See* Van Kirk, *supra* note 5, at 1693 (observing that the privity doctrine allowed only the original purchaser to recover).

7. *See id.* (imparting that plaintiffs had similar difficulty proving that appropriate safety measures would have uncovered the problem prior to sale); *see also* Henningson v. Bloomfield Motors, Inc., 161 A.2d 69, 76-77 (N.J. 1960) (explaining that the importance of strict liability is that the plaintiff does not need to show the defendant's responsibility).

8. *See* Warren E. Platt, *Post Sale Duty to Warn*, 379 PRAC. L. INST. 265, 279 (1989) (recognizing that a defective product may appear safe when sold); Van Kirk, *supra* note 5, at 1693 (reviewing the limitations of an injured plaintiff's recourse).

9. *See* Greenman v. Yuba Power Prods., Inc., 377 P.2d 897, 901 (Cal. 1963) (stating that plaintiff must prove violation of an express warranty by demonstrating he "read and relied on the representations . . . in the manufacturer's brochure"); William L. Prosser, *The Fall of the Citadel*, 50 MINN. L. REV. 791, 801 (1966) (discussing a manufacturer's opportunity to show that the plaintiff did not rely on the representations); Van Kirk, *supra* note 5, at 1693 (explaining that manufacturers could defeat a warranty cause of action by demonstrating that the plaintiff had not relied on the representations concerning the product's quality).

10. *See* David S. Morritt & Sonia L. Bjorkquist, *Product Liability in Canada: Principles and Practice North of the Border*, 27 WM. MITCHELL L. REV. 177, 182 (2000) (referring to legislative establishment of "implied conditions and warranties independent of any express contractual warranties").

11. *See* Johnson, *supra* note 2, at 1239 (discussing the theory that strict liability is an outgrowth of the implied warranty of merchantability); Van Kirk, *supra* note 5, at

of litigation,[12] often resulted in situations wherein an injured plaintiff was left with little or no recourse.[13]

Section 402A of the *Restatement (Second) of Torts* brought these inequities to an end.[14] The law of strict products liability as set forth by the American Law Institute produced a simple and straightforward approach that eliminated obstacles and eradicated many of the legal fictions previously invoked.[15] For the first time, an injured consumer could prevail simply by establishing that the product in question was defective.[16]

Once enacted, section 402A quickly became an integral part of American Jurisprudence.[17] It is credited with increasing the number of lawsuits in the area of consumer protection,[18] and many maintain that now the pendulum has swung to the opposite extreme.[19] Manufacturers are now held responsible not only for defective products causing injury, as contemplated by the *Restatement*,[20] but also goods that would not ordinarily be perceived as "products."[21] Some main-

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1694 (describing the courts' application of warranties that ran with the goods to tort law as forced); *see also* U.C.C. § 2-314 (1978) (requiring a good to be "fit for the ordinary purposes for which such goods are used").

12. *See* John Hill, *Introduction, Consumer Protection Symposium*, 8 ST. MARY'S L.J. 609, 609 (1977) (observing that, prior to the adoption of section 402, "losses were simply too small to justify the costs of litigation").
13. *See id.* at 610 (referring to the common law remedies as "ineffective").
14. See Potter v. Chi. Pneumatic Tool Co., 694 A.2d 1319, 1330 (Conn. 1997) (citing Garthwait v. Burgio, 216 A.2d 189 (Conn. 1965), as one of the first cases to adopt the rule provided for in section 402A).
15. *See* Platt, *supra* note 8, at 307-08 (suggesting that a post-sale duty to warn might arise under strict liability); Van Kirk, *supra* note 5, at 1694-97 (1989) (describing the wide acceptance of section 402A).
16. *See* Van Kirk, *supra* note 5, at 169 (opining that strict liability is an avenue through which the trier of fact can infer negligence on the part of the manufacturer); *see also* Montez v. Ford Motor Co., 161 Cal. Rptr. 578, 580 (Ct. App. 1980) (referring to a showing of a defect as a shortcut to a showing of negligence); *cf.* Terry Morehead Dworkin, *Product Liability of the 1980s: "Repose Is Not the Destiny" of Manufacturers*, 61 N.C. L. REV. 33, 42 (1982) (presuming the defendant's responsibility in order to protect innocent injured plaintiffs).
17. *See Potter*, 694 A.2d at 1329 (noting that "courts have widely accepted the concept of strict tort liability").
18. *See* Cantu, *supra* note 5, at 328 (stating that "[s]ection 402[A] marked the beginning of a growing revolution in the field of plaintiff-oriented litigation").
19. *See* Terry Morehead Dworkin, *Federal Reform of Product Liability Law*, 57 TUL. L. REV. 602, 604 (1983) (stating that two-thirds of the states have adopted some measure of tort reform); Van Kirk, *supra* note 5, at 1701 (explaining that product liability awards increased from 143,000 in the 1960s to nearly 377,000 in the years between 1975-1979).
20. *See Potter*, 694 A.2d at 1329 (observing that "[s]ection 402A imposes liability only for those defective products that are 'unreasonably dangerous'").
21. *See* RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY (1998); David W. Lannetti, *Toward a Revised Definition of "Product" Under the* Restatement (Third) of Torts: Products Liability, 55 BUS. LAW. 799, 801 (2000); Marshall S. Shapo, *In Search of the Law of Products Liability: The ALI Restatement Project*, 48 VAND. L.

tain that products liability should now extend to injuries inflicted during the dismantling, destruction, and general recycling of products.[22] One might even argue that in thirty years the legal system has gone from strict products liability to unlimited liability.[23]

This phenomenon has resulted in cries of insurance crises as well as the need for tort reform.[24] The outburst has been so strident that, after almost four decades of developing products liability law, perhaps we should take a new look at these issues. The purpose of this article is to consider an idea that has previously received little attention: the premise that a manufacturer should not be held responsible for injuries once the useful life of its product has come to an end. We should explore the prospect that, like all things tangible, products eventually grow old and die,[25] and that once this process has taken place, a manufacturer should not be held responsible for resulting injuries.

II. BACKGROUND

From its inception, strict products liability law has looked to the manufacturer when allocating the cost of fault.[26] When so-called space age technology was first recognized as a boon to mankind and by-products of each new wave of advancement made life in the home and workplace easier, healthier, and more convenient, the law im-

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REV. 631, 642 (1995) (describing products liability as a "vigorously evolving branch of the law").

22. *See, e.g.*, Charles E. Cantu, *The Recycling, Dismantling, and Destruction of Goods as a Foreseeable Use Under Section 402A of the* Restatement (Second) of Torts, 46 ALA. L. REV. 81, 97-98 (1994) (opining that every product must be recycled, dismantled, or destroyed at the end of its useful life); Michael B. Gerrard, *Fear and Loathing in the Siting of Hazardous and Radioactive Waste Facilities: A Comprehensive Approach to a Misperceived Crisis*, 68 TUL. L. REV. 1047, 1175 (1994) (explaining that recycling actually results in the production of new goods).

23. *See* Geraint G. Howells & Mark Mildred, *Is European Products Liability More Protective Than the* Restatement (Third) of Torts: Products Liability?, 65 TENN. L. REV. 985, 1019 (1998) (discussing the change that may come as a result of the adoption of the third *Restatement*).

24. *See* Keith Moheban, Comment, Hodder v. Goodyear*: End of the Road for the Useful Life Defense?*, 73 MINN. L. REV. 1081, 1087 (1989) (restating the argument that the "avalanche" of products liability claims made a manufacturer's potential liability uncertain); Van Kirk, *supra* note 5, at 1689-90 (observing the claim of insurance companies that the rise in products liability actions resulted in premium increases).

25. *See* Cantu, *supra* note 22, at 98-99 (noting that "a manufacturer will not be held liable for injuries caused by a product which should no longer be in use and in fact should have been discarded").

26. *See* Francis E. McGovern, *The Variety, Policy and Constitutionality of Product Liability Statutes of Repose*, 30 AM. U. L. REV. 579, 599-600 (1981) (arguing that in a free enterprise system manufacturers are best able to bear the burden); Van Kirk, *surpa* note 5, at 1699-1700 (acknowledging that manufacturers often have the ability to forecast potential liability and can price their products accordingly).

posed any resulting risk upon the manufacturer.[27] While these developments benefited society as a whole, those who introduced new products into the stream of commerce were responsible for the corresponding increase in the number of injuries and fatalities occurring on a daily basis.[28]

This allocation of risk was by no means unanimous.[29] One conflicting idea was that the injured plaintiff should bear part of the burden, and that safety, like charity, should begin in the home.[30] This approach reflected the prevalent belief that a family was responsible for the safety of its individual members, and that one had a duty to make one's abode and workplace safer.[31] However, a manufacturer's options in selecting what should have been the best materials, safest designs, and the most efficient means of assembly were presented in opposition to imposing responsibility upon an injured plaintiff.[32] Additional persuasive factors included a manufacturer's ability to issue

27. *See* Dana K. Astrachan, Note, Anderson v. Owens-Corning Fiberglass Corp.: *Asbestos Manufacturers and Strict Liability: Just How Strict Is It?*, 23 PAC. L.J. 1807, 1814 (1992) (imparting the purpose of admitting state-of-the-art evidence is to introduce evidence of the unknowability of a product's risks); Moheban, *supra* note 24, at 1083.

28. *See* C. Boyden Gray, *Regulation and Federalism*, 1 YALE J. ON REG. 93, 97 (1983) (suggesting that "[b]ecause manufacturers cannot predict the standards by which their products will be judged, they may be reluctant to introduce new designs or innovative products"); Marcus L. Plant, *Strict Liability of Manufacturers for Injuries Caused by Defects in Products—An Opposing View*, 24 TENN. L. REV. 938, 950 (1957) (implying that the adoption of strict liability might result in impeding the development of new products).

29. *See* Lucinda M. Finley, *Guarding the Gate to the Courthouse: How Trial Judges are Using Their Evidentiary Screening Role to Remake Tort Causation Rules*, 49 DEPAUL L. REV. 335, 335-36 (1999) (referring to judgments in products liability cases as "normative"); Page Keeton, *Products Liability—Some Observations About Allocation of Risks*, 64 MICH. L. REV. 1329, 1333 (1966) (noting that "[t]he assumption is that the manufacturer can shift the loss to the consumers by charging higher prices for the products").

30. *See* Mary J. Davis, *Individual and Institutional Responsibility: A Vision for Comparative Fault in Products Liability*, 39 VILL. L. REV. 281, 285-86 (1994) (distinguishing a manufacturer's responsibility for the product from responsibility for the injuring incident); James A. Henderson, Jr., *Coping With the Time Dimension in Products Liability*, 69 CAL. L. REV. 919, 931-39 (1981) (outlining the policy reasons behind the imposition of strict products liability).

31. *See* Uniroyal Goodrich Tire Co. v. Martinez, 977 S.W.2d 328, 348 (Tex. 1998) (Hecht, J., dissenting) (quoting RESTATEMENT (THIRD): PRODUCTS LIABILITY § 2 cmt. a (1998), that "requiring individual users and consumers to bear appropriate responsibility for proper product use prevents careless users and consumers from being subsidized by more careful users and consumers"); Jonathan Bridges, Note, *Suing for Peanuts*, 75 NOTRE DAME L. REV. 1269, 1289 (2000) (acknowledging that individuals with allergies must accept responsibility for their own safety because they are "in the best position to reduce the risk of exposure").

32. *See* John F. Vargo, *The Emperor's New Clothes: The American Law Institute Adorns a "New Cloth" for Section 402A Products Liability Design Defects—A Survey of the States Reveals a Different Weave*, 26 U. MEM. L. REV. 493, 724 (1996)

adequate warnings and instructions,[33] secure insurance against loss,[34] and ultimately pass the cost of liability to all consumers.[35] While others in the stream of distribution were ultimately liable,[36] there was never any question that they could seek indemnification from the entity upon which responsibility should be placed—the manufacturer.[37]

III. DEFENSES IN GENERAL

Even in this climate of manufacturer liability there were defenses.[38] From the beginning, manufacturers could claim contribut-

(imputing the knowledge of the risk to the manufacturer); *see also* Prentis v. Yale Mfg. Co., 365 N.W.2d 176, 185 (Mich. 1984).

33. *See* Gen. Motors Corp. v. Turner, 567 S.W.2d 812, 815-18 (Tex. App. 1978), *rev'd*, 584 S.W.2d 844 (Tex. 1979) (balancing various factors, including the manifacturer's ability to eliminate the defect and the existence of suitable warnings or instructions); *see also* Dean Keeton, *Manufacturer's Liability: The Meaning of "Defect" in the Manufacture and Design of Products*, 20 SYRACUSE L. REV. 559, 565 (1969) (indicating that misinformation about "the dangers involved in the use of the product" should form a basis for recovery); John W. Wade, *Strict Tort Liability of Manufacturers*, 19 SW. L.J. 5, 17 (1965) (listing the "effect of instructions or warnings" as one of the factors of consideration).

34. *See* David W. Lannetti, *Toward a Revised Definition of "Product" Under the* Restatement (Third) of Torts: Products Liability, 35 TORT & INS. L.J. 845, 872 (2000) (observing that "[s]trict liability therefore prevents the unsuspecting consumer from bearing the costs of injury"); Gary T. Walker, *The Expanding Applicability of Strict Liability Principles: How Is a "Product" Defined?*, 22 TORT & INS. L.J. 1, 3 (1986).

35. *See* Lisa L. Locke, *Products Liability and Home-Exercise Equipment: A Failure to Warn and Instruct May be Hazardous to Your Health*, 22 SUFFOLK U. L. REV. 779, 781 (1988) (opining that "[u]ntil manufacturers design and market safe, effective products, with adequate warnings and instructions, consumers injured by home-exercise equipment will look increasingly to the failure to warn action in seeking recovery from manufacturers"); *cf.* Harless v. Boyle-Midway Div., Am. Home Prods., 594 F.2d 1051, 1054 (5th Cir. 1979) (listing characteristics of adequate warnings); Dougherty v. Hooker Chem. Corp., 540 F.2d 174, 179 (3d Cir. 1976) (enumerating the factors for the adequacy of warnings).

36. *See* Amy Edwards, *Mail-Order Gun Kits and Fingerprint-Resistant Pistols: Why Washington Courts Should Impose a Duty on Gun Manufacturers to Market Firearms Responsibly*, 75 WASH. L. REV. 941, 954 (2000) (imparting cases wherein plaintiffs have claimed that manufacturers should be liable for distribution practices); Dragan M. Cetkovic, *Loss Shifting: Upstream Common Law Indemnity in Products Liability*, 61 DEF. COUNS. J. 75, 75-76 (1994) (discussing apportionment of liability in terms of a distributional chain).

37. Thomas A. Matthews, *Products Liability in Alaska—A Practitioner's Overview*, 10 ALASKA L. REV. 1, 29 (explaining that a retailer can obtain indemnity from a manufacturer if it did not contribute to the defect); *see also* Fairbanks N. Star Borough v. Kandik Constr., Inc., 823 P.2d 632, 638 (Alaska 1991) (holding the indemnitor jointly liable with the indemnitee only if the indemnitee was not jointly at fault).

38. *See, e.g.*, Tonya Smits Rodriguez, Comment, *Extending the Fraud on the Market Theory: The Second Circuit's Connection Test for SEC Rule 10B-5*, 25 J. CORP. L.

ing fault on the part of the plaintiff in the forms of contributory negligence or assumed risk,[39] misuse or abuse of the product,[40] or that the injured party had in some way encountered an obvious risk.[41] Based upon principles of equity and sound public policy, the plaintiff's conduct was always a factor to consider in determining whether and how much he should recover.[42] The idea of a defense with respect to the mere passage of time, however, was not always so apparent.[43]

The issue in cases dealing with the deterioration of products is of dual proportions. The first part inquires as to whether the product has endured the rigors of normal wear and tear.[44] If a product has endured normal use, its manufacturer is absolved of responsibility.[45]

423, 439 (2000) (providing three defenses for a drug manufacturer); William Tetley, Q.C., *A Canadian Looks at American Conflict of Law Theory and Practice, Especially in the Light of the American Legal and Social Systems (Corrective vs. Distributive Justice)*, 38 COLUM. J. TRANSNAT'L L. 299, 354 (explaining how the state of Virginia applied negligence defenses in products liability cases).

39. *See* William J. McNichols, *The Relevance of the Plaintiff's Misconduct in Strict Tort Products Liability, the Advent of Comparative Responsibility, and the Proposed* Restatement (Third) of Torts, 47 OKLA. L. REV. 201, 207 (1994) (explaining the relationship between plaintiff's conduct issues and an issue on which the plaintiff bears the burden of proof).

40. *See* Kirkland v. Gen. Motors Corp., 521 P.2d 1353, 1366-67 (Okla. 1974) (referring to the affirmative defense of misuse or abnormal use in adopting Oklahoma's strict tort products liability doctrine of manufacturers' products liability); McNichols, *supra* note 39, at 207 (explaining the relationship between plaintiff's conduct issues and an issue on which the plaintiff bears the burden of proof).

41. *See* John Michael Robinson, Jr., *Self-Service Slip and Falls: Is the Storekeeper's Burden Too Great?*, 48 LA. L. REV. 1443, 1463 (1988) (explaining that the application of the doctrine of assumption of risk serves as a complete bar to plaintiff's recovery); *see also* Murray v. Ramada Inns, Inc., 521 So. 2d 1123, 1135-36 (La. 1988) (suggesting that a defendant's duty might not extend to open and obvious risks).

42. *See* W. PAGE KEETON ET AL., PROSSER AND KEETON ON TORTS § 17, at 478 (5th ed. 1984); HENRY WOODS, COMPARATIVE FAULT § 7.1, at 363-74 (2d ed. 1987); Gail D. Hollister, *Using Comparative Fault to Replace the All-or-Nothing Lottery Imposed in Intentional Torts Suits in Which Both Plaintiff and Defendant are at Fault*, 46 VAND L. REV. 121, 128 (1993) (concluding that most courts consider comparative fault in strict liability cases).

43. *See* Thomas A. Eaton & Susette M. Talarico, *Testing Two Assumptions About Federalism and Tort Reform*, 14 YALE J. ON REG. 371, 381 (1996) (imparting that several states have enacted statutes under which the passage of time affects products liability substantively as opposed to procedurally); James A. Henderson, Jr., *Product Liability and the Passage of Time: The Imprisonment of Corporate Rationality*, 58 N.Y.U. L. REV. 765 (1983).

44. *See* LEWIS BASS, PRODUCTS LIABILITY § 4.03, at 52 (1986); Douglas R. Richmond, *Expanding Products Liability: Manufacturers' Post-Sale Duties to Warn, Retrofit and Recall*, 36 IDAHO L. REV. 7, 16 (1999) (distinguishing between a defect caused by a manufacturing problem and a defect resulting from normal wear and tear).

45. *See* Gary C. Robb, *Practical Approach to Use of State of the Art Evidence in Strict Products Liability Cases*, 77 N.W. U. L. REV. 1, 20 (1982) (stating that if the manufacturer knows of no risks associated with the normal use of the product, the product is not defective). Some courts have refused to formulate a test for "defec-

The second part explores the possibility that the manufacturer has introduced a product into the stream of commerce that is so fragile that he should have foreseen a risk of injury.[46] In these cases, courts have readily imposed liability based on the concept of a defective product.[47]

A third result has evolved in scenarios involving the disposal and destruction of a product once its useful life has come to an end.[48] In these cases, the courts have universally held, despite vigorous and logical arguments to the contrary, that when a product is dismantled or recycled, it is not being used in the manner intended.[49] This unintended use is therefore unforeseeable, and any resulting injury is not the responsibility of the manufacturer.[50]

The concept of "state of the art,"[51] however, is still evolving. This has real significance because of the difficulty in holding a manufac-

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tive condition," allowing a plaintiff to recover for an injury suffered in the course of the normal use of a product. *See* Matthews v. Stewart Warner Corp., 314 N.E.2d 683, 691-92 (Ill. App. Ct. 1974).

46. *See* JOHN L. DIAMOND ET AL., UNDERSTANDING TORTS § 17.04, at 330 (1996); Robert C. DeDona, *Simply "Too Tenuous"* McCoy v. American Susuki Motor Corporation: *The Application of the Rescue Doctrine to a Products Liability Claim*, 20 PACE L. REV. 497, 510-11 (2000) (suggesting that the "purpose of imposing strict liability upon a manufacturer arises from [his] ability to foresee injuries and to protect against them").

47. *See* Greenman v. Yuba Power Prods., Inc., 377 P.2d 897, 900 (Cal. 1963) (extending the strict liability doctrine to a variety of products); David S. Goldberg, *Manufacturers' Post-Sale Duties in Texas—Do They or Should They Exist?*, 17 ST. MARY'S L.J. 965, 969 (1986) (explaining that the basis for liability is that the manufacturer did not further inspect the product for defects).

48. *See* Ronald L. Green, *Torts*, 86 KY. L.J. 907, 924-25 (1998) (imparting the facts of a case wherein plaintiffs were injured when transformers which had exceeded their useful lives were salvaged); *cf.* Janice M. Hogan & Thomas E. Colonna, Ph.D., *Products Liability Implications of Reprocessing and Reuse of Single-Use Medical Devices*, 53 FOOD & DRUG L.J. 385, 385 (1998) (discussing products liability exposure resulting from inappropriate or inadequate reprocessing techniques).

49. *See* Cantu, *supra* note 22, at 85 (providing that individuals involved in dismantling or recycling products are not "users" under the *Restatement*'s definition); *see, e.g.*, Boscarino v. Convenience Marine Prods., Inc., 817 F. Supp. 116, 117 (S.D. Fla. 1993) (agreeing that dismantling a product is not an intended use which gives rise to a strict liability claim); High v. Westinghouse Elec. Corp., 559 So. 2d 227, 229 (Fla. Dist. Ct. App. 1989) (holding as a matter of law that salvaging junk components of a product was not foreseeable product use).

50. *See* M. Stuart Madden, *Modern Post-Sale Warnings and Related Obligations*, 27 WM. MITCHELL L. REV. 33, 52-53 (2000) (imparting the New York Court of Appeals rule that "a manufacturer has 'a duty to warn of the danger of unintended uses of a product provided these uses are reasonably foreseeable'"); Edward Steinbrecher, *When Playing Goes Wrong*, 36 TRIAL 76, 78 (2000) (explaining that liability may be imposed if the unintended use is foreseeable).

51. *See* Robb, *supra* note 45, at 2 (explaining that some jurisdictions have created a statutory "state of the art" defense); *see generally* Day v. Barber-Colman Co., 135 N.E.2d 231 (Ill. App. Ct. 1956).

turer to a standard that is unknown or in some cases impossible to meet.[52] Still, some courts have imposed liability in this situation,[53] reasoning that strict products liability is not concerned with what the manufacturer knew or ought to have known, but with the condition of the product.[54] This dichotomy is further blurred by jurisdictional views which provide that state of the art is not a defensive issue, but a burden that a plaintiff must meet in order to establish that the manufacturer had feasible alternatives or reasonable expectations concerning defects.[55]

Intergenerational harms, on the other hand, present an interesting and totally unrelated problem.[56] There is no question that the medical arena has made tremendous technological advances.[57] Today a medical expert can convince a jury that certain substances are toxic,

52. *See* Gary T. Schwartz, *New Products, Old Products, Evolving Law, Retroactive Law*, 58 N.Y.U. L. REV. 796, 848 (1983) (opining that statutes invoking the useful life approach "seem incoherent both theoretically and operationally"); *see also* Hodder v. Goodyear Tire & Rubber Co., 426 N.W.2d 826, 832 (Minn. 1988) (referring to the limits of liability for aging products as "perplexing").

53. *See* Caterpillar Tractor Co. v. Beck, 593 P.2d 871, 882-83 (Alaska 1979) (articulating that "unreasonably dangerous" narrows the scope of recovery and unduly increases the plaintiff's burden); Cronin v. J.B.E. Olsen Corp., 501 P.2d 1153, 1162 (Cal. 1972) (opining that "a requirement that a plaintiff also prove that the defect made the product 'unreasonably dangerous' places upon him a significantly increased burden and represents a step backward").

54. *See* Owens-Corning Fiberglas Corp. v. Martin, 942 S.W.2d 712, 717-18 (Tex. App. 1997) (allowing consolidation in the face of a state of the art defense); John C. Peck & Wyatt A. Hock, *Engineer's Liability: State of the Art Considerations in Defining Standard of Care*, 23 TRIAL 47 (Feb. 1987). *But see* Vassallo v. Baxter Healthcare Corp., 696 N.E.2d 909, 924 (Mass. 1998) (assessing duty to warn in terms of foreseeable risks known or knowable in light of the state of the art).

55. *See, e.g.*, Bloyed v. Gen. Motors Corp., 881 S.W.2d 422, 429 (Tex. App. 1994), *aff'd*, 916 S.W.2d 949 (Tex. 1996) (holding that because the alternative designs had not been tested, there was no indication that a design change would not do more harm than good); Caterpillar Tractor Co. v. Boyett, 674 S.W.2d 782, 790 (Tex. App. 1984) (opining that the existence of safer alternatives is relevant in illustrating the available scientific knowledge and practicalities).

56. *See* Paul A. Le Bel & Richard C. Ausness, *Toward Justice in Tobacco Policymaking: A Critique of Hanson and Logue and an Alternative Approach to the Costs of Cigarettes*, 33 GA. L. REV. 693, 694 (1999) (opining that suggestions for dealing with the risks associated with tobacco must be sensitive to inconsistent demands); Jack W. Snyder, *Silicone Breast Implants: Can Emerging Medical, Legal, and Scientific Concepts be Reconciled?*, 18 LEGAL MED. 133, 187-93 (1997) (including intergenerational injuries in the list of the causes of action available to plaintiffs in silicone breast implant litigation).

57. *See* James P. Daniel, *Of Mice and 'Manimal': The Patent & Trademark Office's Latest Stance Against Patent Protection for Human-Based Inventions*, 7 J. INTELL. PROP. L. 99, 99 (1999) (imparting the challenge technological advances pose to judges and legislators); Amy Shelf, *A Need to Know Basis: Record Keeping, Information Access, and the Uniform Status of Children of Assisted Conception Act*, 51 HASTINGS L.J. 1047, 1047 (2000) (noting the precision with which doctors are able to manipulate human fertility).

carcinogenic, and in some cases produce chromosomal changes that are manifested in generations not yet born.[58] When members of unborn generations come into existence bearing the effects of these harmful pharmaceuticals, the issue becomes whether to impose liability upon the manufacturer.[59]

Again, the jurisdictions are divided.[60] Some hold, as in situations involving proximate cause, that public policy limits the extent of a manufacturer's responsibility.[61] Some courts hold that liability should be extended only to those who ingested or were exposed to the harmful substance *in utero*,[62] while others, at the opposite extreme, impose liability more readily.[63] The reasoning of the latter is that strict products liability litigation focuses on the condition of the product, and if it is defective liability will necessarily follow.[64]

58. *See, e.g.*, Douglas v. Town of Hartford, 542 F. Supp. 1267 (D. Conn. 1982) (recognizing a child's causes of action based on injuries sustained *in utero*); Curlender v. Bio-Science Labs., 106 Cal. App. 3d 811 (1980) (deciding a case in which an infant born with Tay-Sachs disease sued a medical testing laboratory for incorrectly conducting genetic tests on parents when testing error led to conclusion of no danger of transmitting the disease to the infant); *see also* Frank Gulino, Comment, *Legal Duty to the Unborn Plaintiff: Is There a Limit?*, 6 FORDHAM URB. L.J. 217, 230-31 (1978) (discussing the impact of medical knowledge upon the law).

59. *See* Lindsay v. Ortho Pharm. Corp., 637 F.2d 87, 90 (2d Cir. 1980) (holding that a drug manufacturer, "like any other manufacturer, can be held liable for a defective product under the theory of strict products liability"); Daniel E. Troy, *In Defense of Retroactive Laws*, 78 TEX. L. REV. 235, 252 (1999) (discussing liability of DES manufacturers).

60. *Compare Lindsay*, 637 F.2d at 90 (holding that a drug manufacturer, "like any other manufacturer, can be held liable for a defective product under the theory of strict products liability"), *with* ARIZ. REV. STAT. ANN. § 2-701 (West 1992) (insulating drug manufacturers from liability for punitive damages if the drug was approved by and labeled in accordance with the FDA requirements).

61. *See* Int'l Union, UAW v. Johnson Controls, Inc., 499 U.S. 187 (1991) (curtailing employers' ability to protect employees' unborn children); Carole Stern & Cathleen M. Gillen Tienery, *Inheriting Workplace Risks: The Effect of Workers' Compensation "Exclusive Remedy" Clauses on the Preconception Tort After* Johnson Controls, 28 TORT & INS. L.J. 800, 801 (1993) (addressing the issue of preconception toxic torts).

62. *See* Enright v. Eli Lilly & Co., 570 N.E.2d 198, 199 (N.Y. 1991), (finding that "in these circumstances no cause of action accrues in favor of the infant plaintiff against the drug manufacturers").

63. *Compare* Bonbrest v. Kotz, 65 F. Supp. 138 (D.D.C. 1946) (permitting the parents of a child, born alive, to maintain an action for injuries sustained *in utero*), *and* Merrell Dow Pharms., Inc. v. Havner, 953 S.W.2d 706, 715 (Tex. 1997) (allowing the issue of whether an unborn child suffered an injury as a result of exposure to a dangerous substance up to the jury as finder of fact), *with* Wolfe v. Isbell, 280 So. 2d 758, 763 (Ala. 1973), *and* Simon v. Mullin, 380 A.2d 1353, 1357 (Conn. Super. Ct. 1977).

64. *See* W. PROSSER ET AL., PROSSER & KEETON ON TORTS, § 55, at 370-71 (5th ed. 1984); Margaret M. Hershiser, *Preconception Tort Liability—The Duty to Third Generations*: Enright v. Eli Lilly & Co., 24 CREIGHTON. L. REV. 1479, 1490-91 (1991) (imparting the difficulties with recognizing an unborn fetus's cause of ac-

Finally, statutory repose should be mentioned. Similar to the idea of a statute of limitations, this defense limits the time within which an injured plaintiff may bring his or her cause of action.[65] However, they differ on one important point: a statute of limitations runs from the time of injury, or in some cases when the injured party discovers or should have discovered the harm,[66] while a statute of repose begins to run when the product is manufactured or introduced into the stream of commerce.[67] The theory behind each is to ensure timely litigation.[68] More importantly, both of these defenses limit the time period during which manufacturers should be held accountable for the condition of their products.[69] In this respect, each is the perfect defense; if the time period has elapsed, regardless of the presence of a defect, there is no liability.

IV. USEFUL LIFE DEFENSE

The useful life defense is an idea closely related to the statutes of limitations and repose,[70] as well as the defense of deterioration.[71]

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tion); Ozer M.N. Teitelbaum, *Pregnant Women in the Computer Era: Are Video Display Terminals the Next Mass Exposure Products Liability Scenario?*, 5 SOFTWARE L.J. 493, 506 (1992) (suggesting that a products liability action might be available for injuries to an unborn fetus).

65. *See* McGovern, *supra* note 26, at 584-87 (describing several definitions of "statute of repose"); Moheban, *supra* note 24, at 1088 (explaining that these statutes reflect the principle that a claim involving an older product has less merit).
66. *See* Departments, *What's New?*, 12 S.C. LAW., Sept.-Oct. 2000, at 42, 57 (reviewing the facts of a case wherein the statute of limitations was tolled by the discovery rule).
67. *See* Moheban, *supra* note 24, at 1090 (describing this time as the duration in which the product is safely available for use); *see, e.g.*, MINN. STAT. § 604.03 (1988) (defining useful life as the period during which with reasonable safety the product should be useful to the user).
68. *See* W. PAGE KEETON ET AL., PRODUCTS LIABILITY AND SAFETY 406 (2d ed. 1989); Tami J. Johnson, Note, *Limiting Manufacturers' Liability for Aging Products*, 39 DRAKE L. REV. 713, 720 (1990) (expressing that "[l]egislatures initially enacted statutes of limitation to remedy the common law's open-ended liability potential for manufacturers").
69. *See* Frank E. Kulbaski III, *Statutes of Repose and the Post-Sale Duty to Warn: Time for a New Interpretation*, 32 CONN. L. REV. 1027, 1032 (2000) (noting that the period of time allowed under statutes of repose tends to be longer than that for statutes of limitations).
70. *See* COLO. REV. STAT. § 13-21-403(3) (2000) (stating that "[t]en years after a product is first sold for use or consumption, it shall be rebuttably presumed that the product was not defective and that the manufacturer or seller thereof was not negligent and that all warnings and instructions were proper and adequate").
71. *See* Van Kirk, *supra* note 5, at 1718 (considering whether a defect or natural deterioration caused the injury); Paul J. Wilkinson, Comment, *An Ind. Run Around the U.C.C.: The Use (Or Abuse?) of Indemnity*, 20 PEPP. L. REV. 1407, 1413 (1993) (suggesting that "if the condition at time of sale is such that the product is subject to deterioration, change, or use making the product dangerous, liability may be found on that basis").

The premise supporting this concept is that each product has a definite life span, and that once this span has lapsed, the manufacturer should not be held responsible for injuries resulting from the use of these products.[72] To paraphrase Dean Prosser, we must accept the idea that all products eventually grow old and die.[73] All tangible goods enjoy respective periods of time during which they are best suited to serve their respective purposes.[74] If we continue indefinitely to hold a manufacturer liable for injuries arising from the use of a product, we are unreasonably extending the precepts that originally supported section 402A of the *Restatement (Second) of Torts*.[75]

To date, no jurisdiction has adopted the useful life defense as part of its common law. Instead, the few jurisdictions that have incorporated the defense have done so legislatively by enacting provisions that limit a manufacturer's liability based on time.[76] However, unlike statutes of repose or limitations, these laws do not operate as affirmative defenses.[77] Instead, the useful life of a product is considered as one factor in determining the contributory fault of a user or consumer.[78] In such a case, the jury is instructed to consider the fault of a plaintiff in exposing himself to a foreseeable risk by using a product

72. *See* Glass v. Allis-Chalmers Corp., 618 F. Supp. 314, 316 (E.D. Mo. 1985); Kuisis v. Baldwin-Lima-Hamilton Corp., 319 A.2d 914, 922 (Pa. 1974); Mickle v. Blackmon, 166 S.E.2d 173, 189 (S.C. 1969); *see also* Johnson, *supra* note 68, at 717-19 (tracing the development of the policy reasons behind the concept of a product's useful life).

73. *See* W. PAGE KEETON ET AL., PROSSER & KEETON ON THE LAW OF TORTS § 102, at 711-12 (5th ed. 1984 & Supp. 1998).

74. *See* George N. Meros, Jr. & Chanta G. Hundley, *Florida's Tort Reform Act: Keeping Faith with the Promise of* Hoffman v. Jones, 27 FLA. ST. U. L. REV. 461, 470-71 (2000) (noting that manufacturers have been subjected to perpetual liability despite the fact that "[n]othing is made to last forever").

75. *See id.*; *see also* Richard C. Ausness, *Replacing Strict Liability with a Contract-Based Products Liability Regime*, 71 TEMP. L. REV. 171, 174 (1998) (proposing that the UCC might be preferable to the tort-based system of products liability).

76. *See, e.g.*, MODEL UNIF. PRODS. LIAB. ACT § 110 (1979); CONN. GEN. STAT. ANN. § 52-577a (West 1991); KAN. STAT. ANN. § 60-3303 (1994); MINN. STAT. § 604.03 (2000); *see also* Hodder v. Goodyear Tire & Rubber Co., 426 N.W.2d 826, 830-32 (Minn. 1988) (concluding that the statute is ambiguous regarding its function as a defense); Johnson, *supra* note 68, at 720-21 (1989) (describing the impact of the discovery rule).

77. *See* Julie A. Schultz, Note, *Disregarding Precedent in Minnesota Choice of Law:* Nesladek v. Ford Motor Co., 29 CREIGHTON L. REV. 1237, 1241 (1996) (explaining a holding that a useful life statute differs from a statute of limitations because the former is based on product age, while the latter is based on promptness of filing a suit).

78. *See Hodder*, 426 N.W.2d at 832; *see also* Johnson, *supra* note 68, at 737 (imparting that Minnesota appears to be the only state that refers to the useful life concept as a defense).

beyond the finite period of its useful life.[79] The issue in these jurisdictions is the plaintiff's behavior, not the death of the product.[80]

Perhaps the time has come to reconsider this position and accept the logical consequences of such a defensive concept. At some point, natural deterioration, rather than a defect in design, manufacturing, or marketing, is the cause of a plaintiff's injury.[81] Acceptance of this premise would provide an equitable and rational limit to a manufacturer's exposure to liability.

This idea is currently in use in the areas of medicine and food products.[82] We have all encountered the admonitions of "best if used before" and "sell by." Clearly, these are overt recognitions of a product's useful life. It is therefore puzzling as to why we have not extended this concept to non-perishable, more durable goods, and perhaps even to all products.

Related to the extension of the useful life defense is the issue of its application.[83] The defense must be treated as a question of fact for the jury because it is an issue wherein reasonable minds will differ.[84] The useful life defense must be applied to the individual facts of each case because some products will naturally have longer lives than

79. *See* Moheban, *supra* note 24, at 1100 (citing a Minnesota statute which allows evidence of a product's useful life in order to show a user's contributory negligence).

80. *See id.*; *see also* Kerr v. Corning Glass Works, 169 N.W.2d 587, 589 (Minn. 1969) (recognizing an inference that fault more likely lies with the user in accidents involving older products).

81. *See* Korando v. Uniroyal Goodrich Tire Co., 637 N.E.2d 1020 (Ill. 1994) (holding that defendant was not liable for tire that had been manufactured in 1980 and had been subjected to three punctures); Hampton v. Sears Roebuck & Co., 625 N.E.2d 192 (Ill. App. Ct. 1993) (affirming verdict for defendant because swingset clamp had been put to significant use and would not last forever).

82. *See* Angela C. Rushton, Comment, *Design Defects Under the* Restatement (Third) of Torts*: A Reassessment of Strict Liability and the Goals of a Functional Approach*, 45 EMORY L.J. 389, 434 (1996) (discussing a possible separate standard for prescription drugs under the new *Restatement*).

83. *See* Gregory P. Wells, *General Aviation Accident Liability Standards: Why the Fuss?*, 56 J. AIR L. & COM. 895, 924 (1991) (noting that some states create a rebuttable presumption that a product's useful life has ended when the statute of repose expires, while other statutes of repose are specifically excluded from application).

84. *See* Martin Rispens & Son v. Hall Farms, Inc., 621 N.E.2d 1078, 1091 (Ind. 1993) (Dickson, J., dissenting in part and concurring in part) (arguing that "the determination of whether damage is 'sudden' will necessarily depend on the unique facts of each controversy, and will ordinarily be resolved by the trier of fact"); *cf.* M. Stuart Madden, *Modern Post-Sale Warnings and Related Obligations*, 27 WM. MITCHELL L. REV. 33, 75 (2000) (noting that the remedy of rejection must be exercised by the buyer within a reasonable period of time, and that what constitutes a reasonable time is a question of fact).

others.[85] For example, a piece of heavy earth moving machinery would, in most cases, be expected to last longer than a fragile, delicate, or lightweight item. Identical goods of the same chronological age could be expected to have differing durations of life because of differences in wear and tear, abuse, over-use, or exposure to the elements.[86]

To establish the useful life of a product, we can borrow from what has long been an established principle in other areas of products liability law: the reasonable expectations theory.[87] This was one of the earliest tests utilized to determine whether a product was defective.[88] The reasonable expectations test has been used to determine defective design, and most recently it has been applied to defective manufacture.[89] Today, whether a product has been defectively manufactured is determined by whether the goods in question meet the reasonable expectations of the user or consumer.[90] The test is easily applied to the useful life defense. When attempting to establish the lifespan of a product, we can and should look to factors such as the appearance of the product, claims made in the product's advertising, and the image of the product that in so many cases is carefully crafted to promote sales. As opposed to those jurisdictions considering the useful life concept in relation to contributory fault, the evidence should be considered as an affirmative defense, resulting in a bar to recovery, or at the very least, a diminished one.

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85. *See* Johnson, *supra* note 68, at 741 (opining that having triers of fact determine the useful life of a product is preferable to giving the responsibility to legislatures).

86. *See, e.g.*, MINN. STAT. § 604.03(1) (2000) (providing that specific climate conditions should be considered when determining the useful life of a product); Moheban, *supra* note 24, at 1106 (1989) (advocating a departure from considering the individual user's habits with respect to product use).

87. *See, e.g.*, Jeffrey W. Stempel, *Unmet Expectations: Undue Restriction of the Reasonable Expectations Approach and the Misleading Mythology of Judicial Role*, 5 CONN. INS. L.J. 181, 184-86 (1998) (discussing reasonable expectations theory in the context of construing language in insurance policies); Robert E. Keeton, *Insurance Law Rights at Variance with Policy Provisions: Part I*, 83 HARV. L. REV. 961, 967 (1970) (positing additional principles creating policy-holder rights beyond those terms included within the text of an insurance policy).

88. *See* Henderson, *supra* note 30, at 935-36 (discussing a consumer's reasonable expectations as a traditional justification for strict products liability).

89. *See* Stempel, *supra* note 87, at 189 (referring to the reasonable expectations doctrine as "being employed in varying situations and with varying justifications") (quoting Kenneth S. Abraham, *Judge-Made Law and Judge-Made Insurance: Honoring the Reasonable Expectations of the Insured*, 67 VA. L. REV. 1151, 1153 (1981)).

90. *See* BARRY R. OSTRAGER & THOMAS R. NEWMAN, HANDBOOK ON INSURANCE COVERAGE DISPUTES § 103[b], at 22-27 (9th ed. 1998) (citing cases in which courts have adopted the reasonable expectations doctrine); Stempel, *supra* note 87, at 191 (explaining that thirty-eight states have adopted some form of the reasonable expectations doctrine).

V. JUSTIFICATION

The useful life defense is practical as well as logical. As mentioned previously, it is currently employed in the areas of medicine and food, and could easily be extended in its application to all products. The concept that all products eventually outlive their usefulness is obvious, and is now accepted in the common law of products liability litigation under the defense of deterioration.[91] The concept is simply an extension of existing law.

The useful life defense tempered with the reasonable expectations doctrine is equitable. Nothing could be fairer from the manufacturer's perspective than a premise that limits liability to a period of time during which a product is viable, useful, and fit for its intended purpose.

Additionally, the useful life defense would ultimately save money. In the past, section 402A has been justified on the basis that it is the manufacturer who should bear the cost of liability.[92] The manufacturer is in the best position to insure against such loss and spread the cost of liability through the pricing of products.[93] Whether foreseen or intended, section 402A and its rationale of cost distribution have resulted in higher costs to the consumer.[94] Limiting the manufacturer's liability would save money for the manufacturer, which in turn would be passed on in the form of lower prices to the public at large.[95]

Finally, from a philosophical point of view, this defense is one that would mitigate what has previously appeared to be a steady march towards unlimited manufacturer liability.[96] Whether couched in terms of insurance crises or the need for tort reform, the useful life

91. *See supra* note 72 and accompanying text.

92. *See* Cantu, *supra* note 5, at 330 (justifying section 402A as a means of attributing responsibility to a manufacturer as a cost of doing business); Van Kirk, *supra* note 5, at 1695 (explaining that "manufacturers were perceived as the least cost risk avoider since they are in the best position to detect and remedy various hazards"); *see also* Greenman v. Yuba Power Prods., 377 P.2d 897, 901 (Cal. 1963) (holding that the purpose of strict liability is to ensure costs of injuries are born by manufacturers rather than innocent plaintiffs).

93. *See* Lannetti, *supra* note 34, at 872 (describing the manufacturer's unique position of being able to "allocate the burden among all who derive benfit from its products").

94. *See* Van Kirk, *supra* note 5, at 1724 (arguing that a useful life statute allows cost spreading among those at risk); McGovern, *supra* note 26, at 590 (explaining that manufacturers are in the best position to take measures to reduce the risk of a defect and to pass the costs onto consumers generally).

95. *See* Richard C. Ausness, *An Insurance-Based Compensation System for Product-Related Injuries*, 58 U. PITT. L. REV. 669, 670 (1997) (explaining critic's view that consumers pay for manufacturers' insurance coverage in the form of higher products prices); *but see* Tom Baker, *On the Genealogy of Moral Hazard*, 75 TEX. L. REV. 237, 279 (1996) (imparting that the "economics of moral hazard do not support a reduction in manufacturers' liability").

96. *See* David J. Moffitt, *The Implications of Tort Reform for General Aviation*, AIR & SPACE LAW., Summer 1995, at 8 (suggesting that states have limited damages

defense has received much attention.[97] A formal recognition of this concept would both embrace its current application and extend it logically, practically, and beneficially.

VI. CONCLUSION

Section 402A has provided a cause of action for injured plaintiffs that is arguably inequitable to defendant manufacturers. While defendants have invoked various defenses in tempering strict liability as provided by the *Restatement*, arbitrary and conflicting decisions concerning the application of those defenses have brought about the need for a logical and equitable standard.[98] The useful life defense is just such a doctrine for use in allocating fault in strict product liability cases.

While the concept of the useful life defense has received attention and consideration in the past, this article proposes coupling it with the reasonable expectations theory in order to form one, efficiently functioning doctrine. This combination of legal doctrines removes the unattractive burden of uniformly determining when a given product is legally dead. The reasonable expectations doctrine places the responsibility of determining the useful life of a product where it belongs—in the hands of the trier of fact.

Perhaps now we can move beyond what has arguably been a manufacturer's blanket liability for a product he or she has produced. The time has come for consumers and manufacturers alike to acknowledge, if not embrace, the idea that all products eventually lose their usefulness and become dead as bases for liability.

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after recognizing the fact that there has been virtually unlimited liability on manufacturers).

97. *See, e.g.*, Johnson, *supra* note 2, at 1252 (noting that several states have outlined statute of limitations defenses similar to the useful life defense); Christopher C. McNatt, Jr. & Steven L. England, *The Push for Statutes of Repose in General Aviation*, 23 TRANSP. L.J. 323, 337 (1995) (discussing the useful life defense in the context of determining comparative liability in Minnesota).

98. *See, e.g.*, Thomas V. Van Flein, *Prospective Application of the* Restatement (Third) of Torts: Products Liability *in Alaska*, 17 ALASKA L. REV. 1, 41 (2000) (noting the conflict between the *Third Restatement's* position on the learned intermediary defense and an Alaska Supreme Court decision); Steven P. Zabel & Jeffrey A. Eyres, *Conflict-of-Law Issues in Multistate Product Liability Class Actions*, 19 HAMLINE L. REV. 429, 441-42 (1996) (noting the responses of several jurisdictions to use of "state of the art" as an affirmative defense).