OREGON

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I. STATUTES OF LIMITATION AND/OR STATUTES OF REPOSE WHICH PROVIDE DEFENSES TO PRODUCT LIABILITY ACTIONS

A. Statutes of Limitation

The action must be commenced within two years of discovery. ORS 30.905(2)(a). If a death claim is involved, a three year discovery rule applies. ORS 30.905(3); 30.020(1).

Actions involving asbestos or breast implants (including death cases) must be brought within two years of discovery. ORS 30.907(1); ORS 30.908.

B. Statute of Repose

The harm must have occurred within eight years after the product was first purchased for use or consumption. ORS 30.905(1). However, the discovery rule also applies to the statute of repose, meaning that the action must be brought within ten years from the product's original purchase for use or consumption. ORS 30.905(2). The statute of repose for death cases is identical. ORS 30.905(3)(b).

Asbestos claims and "civil actions against a manufacturer of pickup trucks for injury or damage resulting from a fire caused by rupture of a sidesaddle gas tank in a vehicle collision " have no statute of ultimate repose. See ORS 12.278(1); ORS 30.907.

II. BASIS FOR IMPOSITION OF LIABILITY AND DAMAGES

A. What is the law of your jurisdiction for assignment of fault/liability in negligence actions:

Contributory (comparative) negligence is not a bar to a plaintiff's recovery unless the fault attributable to the plaintiff is greater than the combined fault of all persons against whom the plaintiff's fault is compared. ORS 31.600. In other words, as long as the percentage of fault assigned to the plaintiff is 50% or less, recovery is not barred.

B. What is the law of your jurisdiction for allocation of damages:

Liability is several only in Oregon, meaning that each defendant is only liable for its percentage of fault multiplied by the plaintiff's total damages. ORS 31.610. However, if any portion of a judgment against multiple defendants is "uncollectible," the plaintiff may, upon motion up to one year after final judgment, seek to reallocate that portion of the judgment among the remaining parties under the following guidelines:

1. The plaintiff's percentage of fault (to which the percentage of fault of any settled party is added) is compared to the percentages of fault of the remaining defendants to determine each party's *pro rata* share of the uncollectible portion of the judgment. ORS 31.610(3).

2. A defendant is not subject to reallocation if "the percentage of fault of the clamant is equal to or greater than the percentage of fault of the [defendant]." ORS 31.610(4)(a).

3. A defendant that is 25% or less at fault is not subject to reallocation. ORS 31.610(4)(b). Note: any defendant's share that is exempt from reallocation under these two exceptions is also considered "uncollectible" for purposes of calculating the reallocation among non-exempt defendants.

C. Entities to whom liability can be assigned; what entities can be submitted on the jury verdict form?

Four classes of persons/entities may appear on the verdict form: (1) plaintiff, (2) defendants, (3) third-party defendants who are "liable in tort" to the plaintiff, and (4) any person with whom plaintiff has settled. ORS 31.600(2).

The plaintiff's fault is not compared with persons/entities who are: (1) immune from liability to the plaintiff, (2) not subject to the jurisdiction of the court, or (3) "not subject to action because the claim is barred by a statute of limitations or statute of ultimate repose." ORS 31.600(2)(a)-(c).

III. WHAT DEFENSES ARE AVAILABLE IN YOUR JURISDICTION IN PRODUCT LIABILITY ACTIONS?

A. Comparative Fault

As noted in Section II A, B above. However, in a strict liability case, the plaintiff's incidental carelessness or negligent failure to discover or guard against a product defect is not a defense and is excluded from consideration of comparative fault. *See e.g., Hernandez v. Barbo Machinery Co.*, 327 Or 99, 109, 957 P2d 147, 153 (1998) (citing Restatement (Second) of Torts, Section 402 A, Comment n).

B. Assumption of the Risk/Last Clear Chance

These doctrines were abolished by ORS 31.620.

C. Abnormal Use (Misuse)

Abnormal use of a product is a defense to strict liability. *Findlay v. Copeland Lumber Co.*, 265 Or 300, 304-05, 509 P2d 28, 30-31 (1973). The use or misuse "must be so unusual * * * that the average consumer could not reasonably expect that the product [was] designed and manufactured to withstand it." *Id*. at 306. The failure to follow plain, unambiguous instructions and warnings can constitute misuse. *See Wilson v. BF Goodrich*, 52 Or App 139, 151, 627 P2d 1280, 1287, *rev den* 291 Or 419 (1981).

D. Alteration of the Product

ORS 30.915 provides that alteration or modification of a product is a defense in the following circumstances:

> (1) The alteration or modification was made without the consent of or was made not in accordance with the instructions or specifications of the manufacturer, distributor, seller or lessor;
>
> (2) The alteration or modification was a substantial contributing factor to the personal injury, death or property damage; and
>
> (3) If the alteration or modification was reasonably foreseeable, the manufacturer, distributor, seller or lessor gave adequate warning.

E. Unavoidably Unsafe Products

The Oregon Legislature has adopted § 402A of the Restatement (Second) of Torts, Comment k. ORS 30.920(3). That comment provides that unavoidably unsafe products – "products which, in the present state of human knowledge, are quite incapable of being made safe for their intended and ordinary use" – are neither defective nor unreasonably dangerous if "properly prepared, and accompanied by proper directions and warning." Under those circumstances, a seller will not be strictly liable for unfortunate consequences attending the use of such products.

F. Hypersensitivity of the Consumer

In negligence, strict liability, and breach of warranty claims, a consumer's unique sensitivity to a product can bar recovery when the injury occurs as a result of the hypersensitivity. *See Cochran v. Brooke*, 243 Or 89, 409 P2d 904 (1966) (negligence); *Anderson v. Klix Chemical*, 256 Or 199, 211, 472 P2d 806 (1970) (strict liability). *Landers v. Safeway Stores*, Inc., 172 Or 116, 131-37, 139 P2d 788 (1943) (breach of warranty). However, in strict liability cases, if the manufacturer of the product is aware

of the consumer's sensitivity, whether the manufacturer has a duty to warn becomes a question of fact. *Anderson*, 256 Or at 214-15.

G. Negligence of a Third Person

If a defendant's negligence was a substantial factor in causing the plaintiff's injury, the defendant may not escape liability by showing a third-person also was negligent. However, the negligence of a third-person may be introduced to negate the casual connection between the defendant's own negligence and the injury. *Whisnant v. Holland*, 206 Or 3921, 398-99, 292 P2d 1087 (1956).

Under the "sealed container" doctrine, a manufacturer has the burden of proving that a defective product in a manufacturer-sealed container was caused by the negligence of a third-party. *Keller v. Coca Cola Bottling Co.*, 214 Or 654, 330 P2d 346 (1958).

H. Disclaimer/Release

Under Restatement (Second) of Torts §402A comment k (1965), a consumer's cause of action for products liability "is not affected by any disclaimer or other agreement."

With the use of proper language, a warranty may be disclaimed, excluded, or modified. *See* ORS 72.3160 (describing requirements for disclaiming and excluding warranties).

I. Criminal Conduct

"It is a complete defense in any civil action for personal injury or wrongful death that * * * [t]he person damaged was engaged in conduct at the time that would constitute aggravated murder, murder or a Class A or a Class B felony [and] * * * [t]he felonious conduct was a substantial factor contributing to the injury or death." ORS 31.180(1)(a).

J. Preemption

To the extent an Oregon statute or law is in conflict with a federal regulation, preemption may be a defense. *See e.g.*, *Medtronic, Inc. v. Lohr*, 518 US 470, 116 S Ct 2240, 135 L Ed 2d 700 (1996) (plurality opinion discusses preemption of state law claims in conflict with federal Food and Drug Administration requirements).

K. Lack of Notice

In a warranty-based claim, after accepting the goods, the buyer may not sue the seller unless he or she has given the seller notice of the breach within a reasonable time after the buyer discovers or should have discovered the breach. ORS 72.6070(3)(a).

IV. TORT REFORM

A. Have there been tort reform initiatives in your jurisdiction in the last 2 years?

No.

B. Summary of proposed and/or enacted tort reform legislation.

On January 1, 2006, HB 2591 was enacted to prohibit food consumption-based claims commonly referred to as McLawsuits. "A person may not maintain an action for a claim of injury or death caused by a "food related condition" against a person involved in the selling of food. A "food related condition" includes weight gain, obesity, and health conditions resulting from "long-term consumption of food," but does not include claims arising out of adulterated or misbranded food.