OREGON

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I. Statutes of Limitation and/or Statues of Repose for Products Liability Actions

A. Statutes of Limitation and Limitations on Application of Statute

A products liability civil action must be commenced within two years of discovery. ORS 30.905(1). 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(1).

B. Statute of Repose and Limitations on Application of Statute

For injury and property damage cases, the harm must have occurred within ten years after the product was first purchased for use or consumption. ORS 30.905(2)(a). However, if the product was manufactured in another state or a foreign country, the statute of repose is the applicable statute of repose from the state or country of manufacture. ORS 30.905(2)(b).

The statute of repose for death cases is the shortest of any of the following: (1) three years from the date of decedent's death, (2) ten years from the date of first purchase of the product, or (3) the equivalent statute of repose from the state or country of manufacture of a product manufactured outside of Oregon. ORS 30.905(4)(a)-(c).

Asbestos and breast implant cases, as well as "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. ORS 12.278(1); ORS 30.907(2); ORS 30.908(2).

II. Basis for Imposition of Liability and Damages

A. Assignment of Liability/Comparative/Contributory Negligence

A "product liability civil action" means "a civil action brought against a manufacturer, distributor, seller or lessor of a product for damages for personal injury, death or property damage arising out of: (1) Any design, inspection, testing, manufacturing or other defect in a

product; (2) Any failure to warn regarding a product; or (3) Any failure to properly instruct in the use of a product." ORS 30.900. Most commonly, plaintiffs pursue strict liability products liability claims. *See* ORS 30.920 (setting forth elements of the strict liability claim). However, negligence and warranty-based theories also are available. *See* ORS 30.920(4) ("Nothing in this section shall be construed to limit the rights and liabilities of sellers and lessors under principles of common law negligence or under [Oregon's Uniform Commercial Code].").

Oregon's comparative fault statutes (ORS 31.600 *et seq.*) apply in strict liability products liability claims. *Sandford v. Chevrolet Division of General Motors*, 292 Or 590, 598, 642 P2d 624 (1982). "Fault" of the injured plaintiff includes "contributory negligence except for such unobservant, inattentive, ignorant, or awkward failure of the injured party to discover the defect or to guard against it[.]" *Id.*; *see also Hernandez v. Barbo Mach. Co.*, 327 Or 99, 108, 957 P2d 147 (1997) (further analyzing applicable test).

A plaintiff's comparative fault is not a bar to 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. Risk/Benefit Analysis v. Consumer Expectations Test

ORS 30.920(3) expressly states that Oregon's products liability statutory scheme shall be interpreted consistently with RESTATEMENT (SECOND) OF TORTS § 402A, §§ 1-2 and Comments a-m. This includes the so-called "consumer expectations test" under Comment i, which, as a practical matter, is often applied through performing a risk/utility analysis on the allegedly defective product:

> "When a jury is 'unequipped, either by general background or by facts supplied in the record, to decide whether [a product] failed to perform as safely as an ordinary consumer would have expected,' this court has recognized that additional evidence about the ordinary consumer's expectations is necessary. That additional evidence may consist of evidence that the magnitude of the product's risk outweighs its utility, which often is demonstrated by proving that a safer design alternative was both practicable and feasible."

McCathern v. Toyota Motor Corp., 332 Or 59, 75–76, 23 P3d 320 (2001) (internal citations omitted).

C. Allocation of Damages Between Multiple Defendants

Oregon courts have not addressed whether defendants that are liable solely because they are within the chain of distribution for a product are to have their conduct compared using a "fault" based rationale for purposes of allocating damages. In other words, it is an open question in Oregon whether a defendant manufacturer, distributor and retailer would be listed together on a single "slot" on the verdict form, or whether each entity receives its own "slot" and is thereby

allocated a individual share of "fault." On the one hand, ORS 30.610 applies to actions for strict products liability, and the statute requires the fact finder to compare the "fault" of the following parties: (1) the claimant, (2) all named defendants and third-party defendants who are liable in tort to the claimant, and (3) the fault of any person with whom the claimant has settled. ORS 31.610(2). On the other hand, ORS 31.605(4) states that "the court may order that two or more persons be considered a single person for the purpose of determining the degree of fault of the persons specified in ORS 31.600(2)." Whether to advocate for a particular result in a given case involves tactical considerations beyond the scope of this outline.

If two or more defendants are found strictly liable, there may be a right to common-law indemnity or statutory contribution among them. To obtain common-law indemnity under Oregon law, the indemnity plaintiff must establish: (1) it has discharged a legal obligation owed to a third party; (2) the indemnity defendant was also liable to the third party; and (3) as between the two parties, the obligation "ought to" be discharged by the manufacturer. *Fulton Ins. v. White Motor Corp.*, 261 Or 206, 210, 493 P2d 138 (1972), *overruled in part on other grounds by Waddill v. Anchor Hocking, Inc.*, 330 Or 376 (2000); *see also Scott v. Francis*, 314 Or 329, 333-34, 838 P2d 596 (1992) (holding that the third *Fulton* element turns on who was primarily responsible for the wrongful act). Generally speaking, as between a retailer who merely sells a defective product, and a manufacturer who created the defective product, the usual test for indemnity will be satisfied. *See Smith Radio Communications, Inc. v. Challenger Equipment, Ltd.*, 325-26, 527 P2d 711 (1974) (supporting conclusion). In the event a manufacturer is found liable and a non-manufacturing seller is not, indemnity for the seller's costs of defense may lie if the following test can be met:

> "[A] party seeking common law indemnity [for defense costs] must plead and prove that a third party made a claim, that the party reasonably incurred costs in defending or satisfying the claim and that, as between the party seeking indemnity and the indemnitor, the costs incurred ought to be borne by the latter."

Martin v. Cahill, 90 Or App 332, 336-37, 752 P2d 857 (1988).

In situations where a strictly liable defendant is not entitled to indemnity from another defendant (or another responsible party who was not sued by the injured party), a claim for contribution may still be available. In Oregon, claims for contribution are governed by statute. *See* ORS 30.800-820. The four elements of a claim for contribution are (1) joint liability in tort for the same injury (ORS 31.800(1)); (2) payment by the contribution plaintiff of more than a proportional share of the common liability (ORS 31.800(2)); (3) settlement extinguishing the contribution defendant's liability for the injury or wrongful death (ORS 31.800(3)); and (4) settlement that was not in excess of what was reasonable for the injury or wrongful death (ORS 31.800(3)). The proportional shares of liability are based upon each tortfeasor's relative degree of fault or responsibility. ORS 31.805(1). If equity requires, the collective liability of some as a group shall constitute a single share, and principles of equity generally applicable to contribution shall apply. ORS 31.805(2).

III. Available Defenses to Product Liability Actions

A. Modification/Intentional Misuse

Alteration or modification of a product is a defense if the following three-part test is met:

> "(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."

ORS 31.915.

Abnormal use of a product is also a defense. *Findlay v. Copeland Lumber Co.*, 265 Or 300, 304-05, 509 P2d 28, 30-31 (1973). However, the abnormal use "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. *See also Wilson v. BF Goodrich*, 52 Or App 139, 151, 627 P2d 1280, 1287, *rev den* 291 Or 419 (1981) (the failure to follow plain, unambiguous instructions and warnings can also constitute misuse).

B. Distributor Statute

Oregon does not have a distributor statute or other statutory right for a distributor or retailer to obtain indemnity from a product manufacturer. However, a distributor or retailer may have a right to common-law indemnity or statutory contribution against a manufacturer under ORS 31.800 *et seq*. *See* Section II.C., *supra*.

C. Others

1. Unavoidably Unsafe Products

Oregon 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.

2. Hypersensitivity of the Consumer

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.

3. 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." However, 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).

4. 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).

5. 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 discussing preemption of state law claims in conflict with federal Food and Drug Administration requirements).

6. 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).

7. 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 391, 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).

8. Assumption of the Risk/Last Clear Chance

These doctrines were abolished by ORS 31.620.

IV. Criteria for Admissibility of Plaintiff Expert Testimony (i.e. Daubert or other standard)

The leading case in Oregon governing the admissibility of expert testimony is *State v. O'Key*, 321 Or 285, 291, 899 P2d 663 (1995). In the trial court's role as the "gatekeeper" of expert testimony, it considers whether the expert's opinion or theory: (1) "can and has been tested," (2) "has been subjected to peer review and publication," (3) "has a known or potential rate of error," and (4) to what degree the opinion has gained "acceptance in the relevant scientific community." *O'Key*, 321 Or at 303-05. The focal point of the analysis is on whether the evidence is based on "scientifically valid principles." *Id.* at 301-02 and n 19.

Although *O'Key* adopted a decisional process analogous to *Daubert v. Merrell Dow Pharmaceuticals*, 509 US 579, 113 S Ct 2786, 125 L Ed 2d 469 (1993), as a practical matter, it is more difficult under Oregon law to exclude expert testimony. *See, e.g., Marcum v. Adventist System/West*, 345 Or 237, 244, 193 P.3d 1 (2008) (physician's expert opinion that patient's medical condition was caused by the gadolinium that was injected into her hand to perform MRI was admissible); *Kennedy v. Eden Advanced Pest Technologies*, 222 Or App 431, 193 P3d 1030 (2008) (allowing expert testimony that the plaintiff suffered from "multiple chemical sensitivity" syndrome under *O'Key*, notwithstanding multiple federal court decisions under *Daubert* excluding similar expert testimony).

V. Liability of Component Part Manufacturer in Relation to Whole Product Manufacturer and Plaintiff

A. Tort Claim

1. Generally

Strict liability claims extend to component-part manufacturers for the sale of defective components. *See , e.g., Smith v. J.C. Penney Co.*, 269 Or 643, 525 P2d 1299 (1974) (fabric manufacturer held liable because of flammable character of fabric, even though fabric was sold to coat manufacturer before reaching the consumer). However, Oregon also follows the "raw material supplier doctrine" that bars a strict liability claim if the product is not unreasonably dangerous in and of itself, but becomes unreasonably dangerous only when incorporated into certain uses. *See Hoyt v. Vitek, Inc.*, 134 Or App 271, 284- 86, 894 P2d 1225 (1995) (Du Pont Teflon was not unreasonably dangerous until it was used in a medical prosthetic

device, and Du Pont had warned the manufacturer of the prosthetic that the FDA had not approved Teflon for surgical use).

2. Economic loss rule as a defense

Generally speaking, economic loss alone is not recoverable in a strict liability claim. *Russell v. Deere & Co.*, 186 Or App 78, 84-85, 61 P3d 955 (2003) (*Deere & Co.*) ("[M]ere economic loss unaccompanied by physical injury to property will not suffice for a product liability claim but physical destruction of, or perhaps other significant physical injury to, the property will.").

(i) Privity requirements

Oregon's strict products liability statutory scheme is to interpreted consistently with RESTATEMENT (SECOND) OF TORTS §402A. Sub-section (2)(b) of §402A states that the fact "the user or consumer has not bought the product from or entered into any contractual relation with the seller" is immaterial. *See also* ORS 30.920 (allowing a "user or consumer" of a product to bring a strict liability products liability action). Thus, with respect to strict liability claims, there is no privity requirement under Oregon law.

Privity requirements in the context of implied warranty claims are discussed in sub-section V.B., *infra*.

(ii) Damage to the product itself

It is an open question in Oregon whether damage to only a product itself is actionable under a strict liability theory. *Compare Russell v. Ford Motor Company*, 281 Or 587, 595-96, 575 P2d 1383 (1978) (decided before Oregon codified strict products liability claims where the court said that damage to the product could be actionable) *with Deere & Co.*, 186 Or App at 82 (a case decided after the statutory codification of product liability claims where court stated in dictum that "[a] defective product is not unreasonably dangerous * * * if it poses a risk only to itself.").

B. Implied Warranty Claims

Oregon courts have not addressed how a component part manufacturer's liability is different, if at all, under an implied warranty theory. Thus, implied warranty claims made against component part manufacturers proceed as they would as against other manufacturers.

Privity requirements under Oregon law for implied warranty claims are unsettled, and can be different depending on: (1) the relationship of the claimant to the product manufacturer, (2) the type of good sold, (3) the type of warranty claim involved, and (4) the type of damages sought. As a result, a detailed discussion of these requirements is beyond the scope of this outline, but privity requirements should be noted an issue that should be carefully assessed on a case-by-case basis.

VI. Legacy Equipment Liability – What is the manufacturer's liability for older equipment in the field where there have been advancements in safety?

A. Does the manufacturer have a duty to recall and/or retrofit the machine in view of the safety advancement?

This question has not been squarely addressed in Oregon. Neither ORS 30.900-927 nor RESTATEMENT (SECOND) OF TORTS § 402A, Comments a-m, impose a direct duty on manufacturers to recall and retrofit products. Rather, the manufacturer's duty is to avoid selling products that are "unreasonably dangerous" at the time of sale. ORS 30.920(1)(b). *See also* Oregon Uniform Civil Jury Instruction No. 48.01 (the product has to be in a defective condition when it "left the defendant's hands"). However, the subsequent safety advancement could potentially be used in a design defect case as evidence that an alternative safer design was available and practicable at the time of the original sale. *See Wilson v. Piper Aircraft Corp.*, 282 Or 61, 67, 577 P2d 1322 (1978) (discussing the elements of a plaintiff's *prima facie* case in a design defect claim).

If the products liability claims is premised on negligence, the duty of a supplier of chattel (which would include the manufacturer) under Oregon law is governed by *Restatement (Second) of Torts* § 388. *Waddill v. Anchor Hocking, Inc.*, 149 Or App 464, 474-75, 944 P2d 957 (1997), *overruled on other grounds*, 330 Or 376 (2000). Section 388 provides that if the supplier knows or has reason to know that the chattel is likely to be dangerous for its intended purpose, the supplier has a duty to inform the consumer of the dangerous condition or the facts that might make it dangerous. *Id.* Thus, it would appear that a manufacturer would only have a duty to advise the consumer of the safety advancement if the product was likely to be dangerous for its intended purpose without the safety advancement. Of course, if that were the case, the manufacturer would be liable independent of any duty to recall and retrofit the product. Further, and as discussed above, a plaintiff could try to use the safety advancement as evidence that a safer alternative design was available when the product was originally sold (to argue that the manufacturer's failure to incorporate the safety improvement into the original product was negligent). *Wilson*, 282 Or at 67.

B. Does the manufacturer have a duty to notify the customer of the safety advancement?

See discussion above.

C. Does the manufacturer have a duty to keep track of its products after sale so as to alert customers of safety advancements?

See discussion above.